Attachment B

APSC submission to the Australian Information Commissioner

Disclosure of public servants' names and contact details under the FOI Act

Overview

1. Section 41 of the *Public Service Act 1999* (PS Act) sets out the Australian Public Service Commissioner's (the Commissioner's) functions. These functions include to uphold high standards of integrity and conduct in the Australian Public Service (APS) and to provide advice and assistance to Agencies on public service matters.

2. The Australian Public Service Commission (the Commission) is committed to positioning the APS workforce for the future and promotes regular review of policy matters that affect the APS for contemporary relevance. The Commission welcomes the opportunity to make a contribution to the discussion about disclosure of public servants' personal information in the freedom of information (FOI) context.

3. Section 47F of the *Freedom of Information Act 1982* (FOI Act) provides that:

   General rule

   (1) *A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

   (2) *In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*

   (a) *the extent to which the information is well known;*

   (b) *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*

   (c) *the availability of the information from publicly accessible sources;*

   (d) *any other matters that the agency or Minister considers relevant.*

4. There is no distinction in section 47F between public servants' personal information and personal information generally.

5. Paragraph 6.153 of the Australian Information Commissioner's FOI Guidelines currently states:

   > *Where public servants' personal information is included in a document because of their usual duties or responsibilities**, it would not be unreasonable to disclose unless special circumstances existed**. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website* (emphasis added).

6. The FOI Guidelines distinguish public servants' personal information from the personal information of persons generally. The Guidelines create a default assumption that disclosure of public servants' personal information is not unreasonable on the grounds that the information would reveal 'only' that the public servant was performing their public duties.

7. The reference to personal information in these submissions refers to the names, role or function and contact details of employees.

8. The Commission notes that the above extract from the Guidelines adopt the approach in FOI Memoranda 94 which was produced in 1994. The Commission is of the view that it is timely for this default assumption to be revised to take into account the information technology changes that have occurred over the last 25 years, current community concerns about privacy protection and the changed FOI landscape.

9. The Commission is of the view that where APS employees' personal information is captured within the scope of a valid FOI request, section 47F of the FOI Act should be available to refuse access where disclosure would be unreasonable, having regard to the mandatory factors set out at paragraphs 47F(2)(a)-(d) of the FOI Act.

10. That is, where the personal information is well known, is known to be or have been associated with the matters dealt with in the document, or is available from publicly accessible sources, the Commission is of the view that disclosure would not be unreasonable.

11. However, if that personal information is not publicly available or well known, the Commission submits that the test of unreasonableness would generally be made out, and that the relevant Agency should not be required to show that 'special circumstances' exist. The 'special circumstances' requirement in the FOI Guidelines appears to place an additional test over and above those mandatory considerations for determining unreasonableness set out in section 47F of the FOI Act.

12. The Commission further notes that it does not consider that '[public servants' personal information] may often also be publicly available, such as on an agency website'. Most Agencies have established structures and conventions for contacting public servants, reflecting the level of responsibility, transparency and accountability of public servants both legally and practically. Agencies ought to be able to maintain these established communication methods for contact with the public. The Commission submits that it would be unreasonable in appropriate cases for disclosure of contact details of public servants if that would result in members of the public subverting those established processes.

The disclosure of APS employees' personal information

13. The default policy position that disclosure of public servants' personal information is not unreasonable set out at paragraph 6.153 of the FOI Guidelines is not in conformity with the obligations agencies have under the Australian Privacy Principles (APPs) which provide that disclosure of personal information should only occur in prescribed circumstances.

14. In all other circumstances, Australian Government agencies have processes in place to ensure compliance with the APPs when it concerns the personal information of individuals, including their own APS employees.

15. The Commission's view is that this default approach in the FOI Guidelines does little to further the Objects of the FOI Act, noting that the language in the Objects of the FOI Act which focus on information held by and actions taken *by Government*, not individuals serving the Government of the day.

16. The transparency and accountability of the conduct of APS employees are met by other avenues for complaint handling and review of decisions.

17. All APS employees are bound by the APS Values and Code of Conduct and are accountable to their Agency Heads for performance of their duties under the PS Act. Any individual can write to an Agency Head to pursue a complaint or seek review of a decision. A complainant does not necessarily require individuals' specific details to enable appropriate action to be taken.

18. Like many APS agencies, the Commission deals with numerous complaints each year from members of the public or from other APS employees. Most Commission employees who are involved in handling

complaints do not have a formal decision-making role. For example, some employees receive complaints on public-facing telephone services or email addresses. These employees may be involved in communicating directly with complainants and providing advice to other employees within the Commission, including decision makers.

19. It is commonplace for FOI applicants to seek information in connection with complaints and grievances. The Commission submits that the specific personal information of employees who merely have a processing or advisory role would generally have little relevance to the FOI applicant. In other words, in relation to the public interest test associated with a conditional exemption such as s 47F, in many cases no public purpose would be achieved by disclosure of public servants' personal information. The public interest in knowing information about how a decision was made could be satisfied, for example, by disclosure of the role title without disclosing the name of the individual. The public interest in being able to communicate with agencies could be satisfied by disclosure of general contact details that are publicly available rather the direct contact details of individuals.

20. It is accepted that disclosure of the identity of an employee with a formal decision making role would generally not be unreasonable and the public interest generally would weigh in favour of disclosure. The FOI Act itself reflects this generally recognised distinction between decision makers and other employees. Sections 26, 29 and 24AB of the FOI Act each make it mandatory to provide certain personal information about decision makers or consultation contacts.

21. In *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner reconsidered a number of earlier cases dealing with the disclosure of certain 'vocational assessment information'. Before 'BA', the general position was essentially that it was not unreasonable to disclose the written job applications of successful applicants for positions in the APS.

22. In 'BA', the Information Commissioner decided that the default position "*should be reassessed in light of changes in privacy law, information technology and community concern about privacy protection*" (paragraph 2).

23. At paragraphs 81 and 82, the Information Commissioner made a number of observations about the dissemination of information on the internet (emphases added):

> 81. A second change that in my view influences the weight to be attached to the earlier cases is that the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. **It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information.** The view taken in earlier cases – that a successful applicant's claims should be opened to public scrutiny and their claim to privacy should be deemed as abandoned – **takes on a different hue when the publication and scrutiny can occur on the web or through email interchange. Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.**
>
> 82. **There is also a growing and understandable concern that personal information that is made available on the web can be misused or used differently by others, for example, for identity profiling or theft or unwanted contact.** Here I note that the documents in this case include the applicant's five page curriculum vitae, which lists her qualifications, employment history, award recognition, personal attributes and skills, hobbies and interests, and referees. Even deleting her date of birth and contact details, as the MPC proposed to do, may not impede someone else from building a larger profile of the applicant or even finding her date of birth and contact details from other sources.

24. The Commission submits that the statements in 'BA' can also apply to names and contact details of APS employees in appropriate circumstances. The statements about the impact of technology and current attitudes to privacy, in particular, are relevant to employees' personal information, regardless of whether they are public or private sector employees.

25. In addition to the statements made by the Information Commissioner in 'BA', the Commission submits that disclosure of the identity of APS employees now has much greater privacy impacts than in the past. Before the broad community use of social media, the disclosure of an APS employee's name on a document might have permitted an FOI applicant to determine an individual's telephone number or address. Today, an individual's identity may be connected effortlessly with a vast range of personal information available through social networks, such as: photographs; friends' and family members' identities and photographs; employment histories; social activities and interests; personal opinions, including political opinions, and so on.

26. In the five years since 'BA' was decided, community concerns about the handling of personal information in electronic form have increased markedly. Since 'BA' was decided there have been several well-known data breach incidents involving social media companies, such as the Cambridge Analytica scandal[5]. As recently as 25 July 2019, Facebook has been fined $5 billion[6] for privacy breaches and subjected to greater oversight by the United States Federal Trade Commission. In relation to public servants, broader community sentiment represented by media reporting appear to support the withholding of personal information of scientists in matters of dispute between Government and third parties[7]. In that case, concerns were raised by public servants of their personal information being researched online.

27. It is also clear that the Office of the Australian Information Commissioner acknowledges as part of this discussion paper that agencies are generally concerned about these issues:

> *The Office of the Australian Information Commissioner (OAIC) is aware of agency concerns about the disclosure of public servants' names and contact details in the context of FOI requests, both in response to FOI requests and when requests are being processed.*

28. The Commission is aware of a number of cases where FOI applicants have used the personal information of APS employees obtained through documents disclosed under the FOI Act to telephone, email, and physically approach public servants inappropriately. We do not propose to outline these specific circumstances here noting that other agencies may provide this information as part of their submissions.

29. In the Commission's own experience the ability of FOI applicants to anonymously request access to documents through the Right to Know (RtK) website has significantly changed the nature of FOI.

30. A number of requests made to the Commission through the RtK website have involved applicants making unsubstantiated allegations about Commission employees and specifically requesting the personal information of APS employees. It is common for an anonymous FOI applicant to make repeated and further unsubstantiated comments each time he or she corresponds with the Commission as part of the processing of the request. For example, statements in the nature of 'the APSC has acted illegally and improperly', '[Ms X, public servant has] engaged in obfuscation … breached her legal obligations' and 'Such documents are likely to include further evidence to support an allegation that Ms X has acted illegally'[8]. On this basis, applicants assert that employees' names must be disclosed.

[5] https://arstechnica.com/series/cambridge-analytica-facebook/

[6] https://arstechnica.com/tech-policy/2019/07/ftc-fines-facebook-5-billion-imposes-new-privacy-oversight/

[7] http://theconversation.com/adani-has-set-a-dangerous-precedent-in-requesting-scientists-names-120487

[8] https://www.righttoknow.org.au/body/apsc

31. In at least one such case, the Commission has found that disclosure of personal information would be unreasonable because it would permanently and publicly connect individuals to defamatory information. It may be difficult to establish special circumstances exist where an applicant has not yet posted defamatory information. However, this does not change the possibility of defamatory information and/or unsubstantiated allegations being made publicly *after* disclosure of an individual APS employees' personal details.

32. The Commission further notes that personal information of APS employees can also be used in creative ways. For example, the release of public servants names in access to documents under the FOI Act has resulted in those names (or the names of relatives of those persons – presumably obtained through online research) being used as pseudonyms for subsequent FOI applications. The Commission considers this bullying and trolling-type behaviour of anonymous FOI applicants concerning.

33. The Commission submits that in the current FOI and information technology environment, even the potential for an APS employees' personal information to be used in this way can have a negative impact on the health and wellbeing of APS employees who are simply performing their duties. The possible consequences of this on an APS workforce are hard to quantify but as an example, some agencies have reported difficulty recruiting to FOI positions in this environment, others have reported individual APS employees expressing concern should their personal information be released.

The distinction between the Senior Executive Service and APS employees

34. Paragraph 6.153 of the FOI Guidelines currently states:

> *Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.*

35. The statement in paragraph 6.153 that personal information "*may often also be publicly available*" is somewhat misleading. In fact, most public servants' contact details are <u>not</u> publicly available – see further at paragraph 43 below.

36. Paragraph 6.154 of the FOI Guidelines provides:

> *…there is no basis under the FOI Act for agencies to start from the position that the classification level of a department officer determines whether his or her name would be unreasonable to disclose.*

37. Paragraph 6.155 of the FOI Guidelines includes:

> *… the Information Commissioner said that there is no apparent logical basis for distinguishing between the disclosure of SES officers and other officers' names.*

38. The Commission submits there are relevant distinctions between senior public servants – nearly always being members of the Senior Executive Service (SES) – and APS employees generally that are directly relevant to the question whether disclosure of an individuals' personal information would be unreasonable.

39. SES employees are distinguished from non-SES employees in a legal sense. They are also treated differently in practical, governance and cultural senses within the APS.

40. Legally, the SES is a distinct cohort of APS employees. Section 35 of the PS Act sets out the constitution and role of the SES. Subsection 35(2) of the PS Act provides:

The function of the SES is to provide APS wide strategic leadership of the highest quality that contributes to an effective and cohesive APS.

41. Subsection 35(3) of the PS Act provides:

For the purpose of carrying out the function of the SES, each SES employee:
(a) provides one or more of the following at a high level:
(i) professional or specialist expertise;
(ii) policy advice;
(iii) program or service delivery;
(iv) regulatory administration; and
(b) promotes cooperation within and between Agencies, including to deliver outcomes across Agency and portfolio boundaries; and
(c) by personal example and other appropriate means, promotes the APS Values, the APS Employment Principles and compliance with the Code of Conduct.

42. The employment arrangements for SES employees are substantially different to APS employees. SES employees are normally not covered by agencies' enterprise agreements and they generally negotiate their individual terms and conditions of employment directly with the relevant Agency Head. SES employees' remuneration reflects the additional roles and responsibilities of SES employees compared with APS employees generally.

43. It is widely understood in the APS that SES employees are subject to higher degrees of transparency and accountability than APS employees generally. For example, SES employees are routinely required to attend and provide evidence publicly at Senate Estimates hearings. SES employees' details are usually published in agency structure charts on agency websites and in the Australian Government directory at www.directory.gov.au. Non-SES APS employees' details are not generally published in this manner.

44. For the reasons provided above, the Commission submits that senior public servants – in nearly all cases employees at the SES classification – are to be distinguished from non-SES employees.

45. The approach to distinguish personal information of APS employees at the SES classification is also consistent with paragraphs 47F(2)(a) and (c) of the FOI Act which emphasise the extent to which information is well known or available from publicly accessible sources.

46. The Commission is of the view that disclosure of SES employees' personal information that is available from publicly accessible sources would not be unreasonable under the FOI Act. This broadly reflects the current approach taken by agencies.

47. Having considered the nature and role of APS employees at differing levels, from a legal and practical perspective, the Commission considers it reasonable to distinguish SES employees (as representative in almost all cases as the senior public servants accountable for APS decision making) from other APS employees.

48. Taking all of the above into account, the Commission supports a policy position that acknowledges that disclosure of non-SES employees under the FOI Act could be unreasonable where the factors in subsection 47F(2) are satisfied without the additional requirement for agencies to show 'special circumstances' exist.

Attachment C

Public servants' names and contact details - Position Paper

Executive summary

The key principles underlying the development of ideas outlined in the position paper are:

1. Transparency and accountability are fundamental to Australian democracy and to the Australian public service. Public servants should be accountable for their decisions, their advice and their actions in the service of the Commonwealth.
2. Public servants also have a right to be safe at work and safe from harm as a result of their work.
3. The evolution of the digital environment – including its ubiquity, accessibility and longevity – gives rise to new risks for public servants, as well as for citizens. These risks include the traceability and trackability of public servants' personal lives and the risk of physical or online harassment.
4. Previously existing risks have been compounded by the normalisation of digital communications and publication. Risk may be increased when contact details are published to a wider audience, for a longer period of time, and at no cost, on a digital platform.
5. This paper recognises changes resulting from the development of the online environment when balancing the accountability and safety of public servants within the context of disclosures required by the FOI Act.
6. The following principles will inform updates to Parts 3 and 6 of the FOI Guidelines:

- The FOI Act plays an important role in promoting transparency and accountability in government.
- Public servants are accountable for their decisions, their advice and their actions. Agencies and ministers must ensure staff understand this and that this is made clear in staff induction programs and ongoing training.
- Agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act.
- Agencies and ministers who have not identified work health and safety risks associated with disclosure of staff names and contact details should generally continue to provide full access to this information on request.
- Agencies and ministers who have identified work health and safety risks associated with disclosure of staff names and contact details may consider whether the only way to mitigate these risks is by removing this information from documents before release, either because it is outside the scope of the request or because it is exempt from disclosure under the FOI Act.
- Agencies and ministers who have identified work health and safety risks associated with disclosing staff names and contact details can consider asking the FOI applicant whether they seek access to this information, where it is not apparent that this information falls outside the scope of the request.
- If an FOI applicant indicates that they seek access to the names and contact details of staff, agencies and ministers must make a decision about access based on the particular circumstances and context of the FOI request.
- In general it will only be appropriate to delete public servants' names and contact details as irrelevant under section 22 of the FOI Act if the FOI applicant states, clearly and explicitly, that they do not require this information. Agencies may ask this question of applicants in an access request form.
- It is not generally appropriate to treat non-response to advice that, unless told otherwise the agency or minister will treat this information as being irrelevant to the FOI request, as agreement to this revision of scope (unless the exclusion of names and contact details is apparent on the face of the request).

- If agencies and ministers adopt a practice of asking applicants whether they wish to exclude this kind of information from the scope of FOI requests, this should be published on the agency's website so there is transparency about their practices.
- Redacting the names and contact details of public servants can increase the time it takes to process an FOI request. This is a factor to be considered when deciding whether to impose a charge; noting that the decision to impose a charge is discretionary.
- In certain circumstances, the management of staff and the discharge of the Australian Government's legal responsibility to ensure the health and safety of its workforce may be substantially and adversely affected if public servants' names and contact details are routinely disclosed in response to FOI requests.
- Whether, because of the nature of the work it performs or because of the nature of its client base, disclosure of names and contact information poses a risk to the health and safety of their staff, agencies and ministers may consider whether the conditional exemption in section 47E(c) applies.
- However the circumstances in which disclosure of the names and contact details of public servants may be exempt under section 47E(c) are not unlimited and need to be considered on a case-by-case basis, based on an objective assessment of all available evidence.

Next steps: The OAIC will update Parts 3 and 6 of the FOI Guidelines consistent with the views expressed in this paper. Agencies and members of the public will have the opportunity to provide comment on draft versions of these parts before they are finalised and issued under section 93A of the FOI Act.

Background

In July 2019, the Office of the Australian Information Commissioner (OAIC) published a discussion paper on the disclosure of public servants' personal information in response to freedom of information (FOI) requests and sought submissions from interested parties.

The OAIC has considered the submissions received and monitored the issues arising in applications for Information Commissioner reviews (IC reviews) since that time.

The OAIC received 51 submissions in response to the discussion paper — 34 from Australian Government agencies, nine from individuals, six from other Information Commissioners/Ombudsmen and two from organisations (the OpenAustralia Foundation and the Community and Public Sector Union).

The submissions made by most Australian Government agencies expressed concern about the disclosure of personal information relating to their staff (principally their names and how they can be contacted). In many cases this is because of the potential that disclosure has to expose them to harm. Examples of the consequences of disclosing such information included:

- staff being approached and harassed, abused, physically assaulted and stalked
- staff being subject to online abuse and harassment
- social media being used to identify and pursue staff outside of their place of work, and also their families
- individuals circumventing established channels for contacting the agency which creates additional work for staff who are not trained or authorised to respond to that contact, which may result in unlogged enquiries not being actioned
- the undermining of agency policies that provide staff with the option of not identifying themselves in their dealings with the public, including policies embedded in Enterprise Agreements
- security risks to operational law enforcement and intelligence agencies and employees of law enforcement and intelligence agencies more generally.

The evidence indicates that, in an increasingly digital world, documents released in response to FOI requests can be published without effort and quickly disseminated globally. Further, documents can easily be accessed using standard search engines and effectively made permanently available to the world at large. This increases the risk of harm, not only at the time documents are released, but into the future.

Many of the specific risks outlined above, and the circumstances that give rise to them, are of relatively recent origin and post-date the introduction of the *Freedom of Information Act 1982* (FOI Act). Although the world wide web first became available to the general public in 1991, the increase in the use of digital technology, particularly smart phones, has accelerated the possibility of negative impacts of disclosure since the FOI Act reforms of 2010. In this context it is therefore appropriate to reconsider how best to balance the objects of the FOI Act, which include making government-held information available to the Australian community and increasing scrutiny, discussion, comment and review of Government's activities, with the duty of care the Australian Government has to ensure, as far as is reasonably practicable, the health and safety of its workers. It is also important to keep in mind that these issues are not specific to the release of documents under the FOI Act.

This paper outlines the Information Commissioner's consideration of how best to balance these interests in the context of processing FOI requests for government held information.

The Information Commissioner notes that there are explicit statutory requirements under the FOI Act for the provision of public servants' personal information for the purpose of processing or deciding an FOI request. These are set out in the Attachment. This paper does not otherwise refer to those provisions, but rather focuses on the personal information in the form of name and contact details that is included in documents sought by applicants through the FOI Act.

Disclosure of public servants' names and contact details

A public servant's name, and information about where they work and how they can be contacted, is personal information. It is information about an identified individual, or an individual who is reasonably identifiable (see section 6 of the Privacy Act 1988).

The Information Commissioner remains of the view that generally it will not be unreasonable to disclose the names and contact details of public servants because this information only reveals that they were performing their public duties. The Information Commissioner considers there are public interest factors, including transparency and accountability of public servants, which favour disclosure of this kind of information.9

However, the submissions made in response to the discussion paper and the evidence provided to support those submissions indicate there are circumstances that may lead to real risks to the health, safety and wellbeing of some staff resulting from disclosure of this information.

Section 19 of the Work Health and Safety Act 2011 requires employers to ensure, as far as is reasonably practicable, the health and safety of their workers. This means employers must eliminate risks to health and safety so far as it is reasonably practicable to do, or minimise the risks if it is not reasonably practicable to eliminate them (section 17).

Therefore, as an employer, the Australian Government has a statutory obligation to do what it can to eliminate or minimise known risks to the health and safety of its staff.

Balancing competing interests

Australian Government agencies must therefore balance the pro-disclosure objects of the FOI Act, which include increasing public participation in Government processes with a view to promoting better-informed decision-making and increasing scrutiny, discussion, comment and review of Government's activities, against the potentially serious risks posed to some public servants and the management of personnel, by the disclosure of their identity and contact information. This includes the impact of disclosing the identity of certain staff in law enforcement agencies in relation to particular functions, and the ability to manage insider risk.

Section 11 of the FOI Act provides a right of access to documents, except if they are exempt. Accountability for the work public servants do is part of achieving the objects of the FOI Act to increase scrutiny, discussion, comment and review of the Government's activities. Public servants should expect to be subject to scrutiny on their advice, recommendations and decisions, whether through complaints and appeal mechanisms, internal and external review, investigation by the Commonwealth Ombudsman, the actions of regulators, or through oversight and review by their supervisor or manager. Members of the public may disagree with decisions which affect their rights and entitlements and they have the right to challenge them and to seek more information about how decisions are made and the evidence on which they are based. Members of the public may also seek information about the basis upon which policy positions are taken, programs are implemented, and public revenue expended by government agencies and Ministers. The FOI Act provides an avenue to seek such documents.

Public servants should therefore come to work with a clear understanding that their actions will be subject to scrutiny, and an understanding of the important role that the FOI Act plays in promoting transparency and accountability in government. Agencies play a critical role in ensuring their staff understand these concepts, through their induction program and ongoing training.

However, and as noted above, the context in which public servants perform their work has changed. There are now risks that have been realised in a small number of cases.

The potential risks of disclosure have increased the possibility of:

- stalking, harassment and intimidation – including outside the workplace
- slander and defamation

9 Where the personal information does not relate to a public servant's usual duties and responsibilities, but relates to their disposition or private characteristics, the general rule about disclosure does not apply (see Part 6.157 of the FOI Guidelines).

- online abuse, insults and trolling.

Potential solutions

Some agencies will not have experienced the negative consequences identified above that may be associated with the disclosure of the names and contact details of staff. For these agencies, managing their work health and safety obligations will not impact on their statutory obligation to provide access to documents in response to FOI requests made under the FOI Act. These agencies can continue as they do now – providing full access to the names and contact details of their staff.

However for other agencies, because of the nature of their work or their client base, there may be risks they cannot mitigate other than by excluding the names and contact details of their staff before releasing documents in response to an FOI request – either because they fall outside the scope of the FOI request, or because they are exempt from disclosure under the FOI Act.

Relevance of public servants' names and contact details

Section 22 of the FOI Act provides that information that would reasonably be regarded as irrelevant to an FOI request can be deleted from documents before they are released to the FOI applicant.

In many cases, the names and contact details of individual public servants will fall outside the scope of the FOI request and this will be apparent on the face of the request. In these cases, deleting public servants' names and contact details under section 22 of the FOI Act before the documents are released will be appropriate.

However where it is not apparent that names and contact details fall outside the scope of the FOI request, agencies that identify general work health and safety risks associated with disclosure of the names and contact details of their staff can consider asking the FOI applicant whether they seek this information as part of their FOI request. This can be done in the letter acknowledging receipt of the request (under section 15(5)(a)) or by including a check box in an FOI request form giving the option to exclude this information. If the FOI applicant indicates clearly and explicitly that they do not require this information to be provided, it is appropriate to delete it as irrelevant under section 22 of the FOI Act. If the FOI applicant indicates that they do seek this information, the agency must make its decision on release of the information in light of the particular context and circumstances of the request.

In addition, it is the view of the Information Commissioner that there are risks to treating non-response to advice that, unless told otherwise, the agency will treat this information as being irrelevant to the FOI request. The circumstances in which an agency or Minister may delete irrelevant matter include where it decides that giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access (see section 22(1)(a)(ii)), and it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy (see section 22(1)(d)).

Accordingly, unless the exclusion of names and contact details is apparent on the face of the FOI request, in order to reasonably regard information as being irrelevant, positive confirmation should be sought from the applicant.

If agencies adopt a practice where they seek confirmation from applicants as to whether they wish to exclude this kind of information from the scope of FOI requests, this should be published on the agency's website so there is transparency about their practices in this regard.

Redacting the names and contact details of public servants can increase the time it takes to process an FOI request. Where an agency gives applicants the option to exclude the names and contact details of staff from the scope of their FOI request, processing of the request should not be delayed because of this. Further, the removal of this information to protect staff from potential harm may be a factor to consider when deciding whether to impose a charge; noting that the decision to impose a charge is discretionary.

Subsection 47E(c) — Substantial adverse effect on the management of personnel by the Commonwealth or an agency

Specific concerns about the health, safety and wellbeing of staff are most appropriately addressed under the conditional exemption in section 47E(c) of the FOI Act, which is subject to the public interest test. The inclusion of a public interest test under section 47E(c) ensures that the public interest in disclosure remains at the forefront of

decision making involving this provision. This is generally more appropriate than section 47F (personal privacy) for specific concerns about the health, safety and wellbeing of staff for the reasons discussed above. The personal privacy exemption may continue to be more appropriately considered where documents are sought that relate to an individual's disposition or private character, such as reasons for taking personal leave, information about performance management, or whether the person was unsuccessful during a recruitment process.

Section 47E(c) provides:

> A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:
> …
> (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
> …
> Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

The conditional exemption in section 47E(c) of the FOI Act is applicable when disclosure of a document[10] would have a substantial adverse effect on the management of staff. For a document to be exempt from disclosure under this provision, it must also be contrary to the public interest to disclose it.

In certain circumstances, the management of staff and the discharge of the Australian Government's legal responsibility to ensure the health and safety of its staff may be substantially and adversely affected if public servants' names and contact details are routinely disclosed in response to FOI requests. Agencies must take all reasonable steps to minimise the risk of harm to staff to be compliant with their statutory obligations under section 19 of the Work Health and Safety Act 2011. As discussed, these known risks have evolved over time as a result of the changing digital environment.

If an agency has identified that, because of the nature of the work it performs or because of the nature of its client base, disclosure of names and contact information may pose a risk to the health and safety of its staff, consideration may be given to whether the conditional exemption in section 47E(c) applies.

However the circumstances where disclosure of the names and contact details of public servants may be exempt under section 47E(c) are not unlimited and need to be considered on a case-by-case basis, based on an objective assessment of all available evidence. A finding that a document is conditionally exempt from disclosure under section 47E(c) cannot be based solely on the subjective wishes of individual public servants.

In assessing whether disclosure will have a substantial adverse effect on the health and safety of their staff, the following factors are relevant:

- the nature of the functions discharged by the agency – for example law enforcement functions
- the nature of any restrictions imposed by the agency to limit the dissemination of identifying details of staff, such as limitations on the ability of staff to disclose publicly where they work
- the type of work undertaken by the particular public servant
- the relationship between the individual public servant and the exercise of powers and functions discharged by the agency (i.e., are they a decision maker or do they provide advice/make recommendations in relation to decisions)
- whether the FOI applicant has a history of online abuse, trolling or insults
- whether the FOI applicant has a history of harassing or abusing staff
- the personal circumstances of the particular public servant, such that they may be vulnerable to, or at greater risk of harm, if their name and contact details are disclosed – for example, circumstances of family violence, mental health issues or other factors

[10] Section 4 of the FOI Act defines 'document' to include 'any of, or any part of' a document. This means that part of a document may be exempt from disclosure without requiring access to the whole document to be refused when requested under the FOI Act.

- whether the name and contact details of the public servant are already publicly available, including Senior Executive Service details available on the Government Online Directory.

If an agency decides, based on an objective assessment of all relevant factors based on the available evidence, that the name and/or contact details of a public servant are exempt from disclosure under section 47E(c), the notice of decision issued under section 26 of the FOI Act should clearly explain how the decision was reached and refer to the evidence on which the decision is based. On review, the Information Commissioner will require the decision to be justified and supported by evidence, with the public interest factors for and against disclosure clearly articulated.

Section 47E(d) — Certain operations of agencies

The OAIC has considered submissions made by some agencies that disclosure of public servants' contact details can have a substantial adverse effect on their operations by allowing members of the public to circumvent established methods and dedicated points of contact, including general enquiry email addresses and telephone numbers.

The OAIC has not received evidence that would support a position, as a general proposition, that the impact to an agency of disclosing this information in response to an FOI request is likely to have both a 'substantial' and an 'adverse' effect on an agency's operations. In most cases the impact can better be described as an inconvenience or distraction for an individual officer, rather than something that impacts substantially on the operations of the agency. Should an agency have evidence that provision of such information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the agency's operations, a case may be more likely to be made.

Further, for future conduct to amount to a risk that requires mitigation by exempting contact details from disclosure in response to an FOI request, that conduct must be reasonably expected to occur.

Attachment: Circumstances in which public servants' names are required to be disclosed under the *Freedom of Information Act 1982*

The FOI Act requires that a name be included in a document created by an agency for the purpose of processing or deciding an FOI request in specific circumstances. These circumstances include:

- the requirement to state the name and designation of the decision maker in FOI decisions (section 26(1)(b) of the FOI Act),
- the name and designation of the person rejecting a contention that a charge should be reduced or not imposed (section 29(9) of the FOI Act), and
- the name of a contact person (and details of how the applicant may contact the contact person) in notices initiating a request consultation process under section 24AB of the FOI Act.

Request consultation notice

The purpose of section 24AB is to give an applicant a meaningful opportunity to understand the access refusal reason so they have the opportunity to address it. To do that, the applicant requires access to the contact person.

What is required to satisfy section 24AB(2)(c), and to ensure the validity of the notice, is sufficient detail of the contact person's name to allow the applicant to contact the contact person so the applicant can be given the assistance required to be provided under section 24AB.

The full name of the contact person and their direct telephone number or email address (section 24AB(2)(d)) certainly satisfies this requirement. The minimum identifying information that must be included to comply with section 24AB is the first name of the contact person. In addition, details of how the applicant may contact the contact person should include at least a generic FOI contact email address, depending on how the email inbox is managed and whether the person named can be readily identified. See for example, Jack Waterford and Department of Human Services (Freedom of information) [2019] AICmr 21 (5 June 2019) and Justin Warren and Department of Human Services (Freedom of information) [2019] AICmr 22 (5 June 2019).

Decisions under sections 26 and 29 of the FOI Act

The same principles apply to the requirement to state the name of the decision maker in notices issued under sections 26 and 29 of the FOI Act. Notices that do not contain this information will not be valid.

In so far as it relates to documents or notices issued by agencies and ministers under the FOI Act, there are no further requirements in the FOI Act to include a person's name or contact details. Nevertheless, consistent with the objects of the FOI Act, agencies should start from the position of including full names in documents to increase transparency and accountability. Where there are circumstances particular to the risk profile of the agency, and sound public policy reasons for diverting from that practice, some agencies may decide to develop their own protocols about the inclusion of names and contact details in certain documents created by staff of the agency. If an agency develops a protocol about the inclusion of names and contact details, the protocol should be published on the agency's website to ensure transparency in relation to its processes. However, in such circumstances, it is important that there is a process in place to ensure the ability of the agency to identify the person mentioned in a document, for accountability purposes.

Commissioner brief: OAIC FOI requests

Key messages

- There has been a significant increase in the number of access requests made under the *Freedom of Information Act 1982* (Cth) (**FOI requests**) to the OAIC since 2016/17.
- In particular, in 2018/19, the OAIC received 244 FOI requests, compared to 93 FOI requests in 2017/18 (171%).
- However, the number of FOI access requests declined slightly from the peak in 2018/19 in both 2019/20 and the first quarter of 2020/21
    - In the first quarter of 2020/21, the OAIC has received 64 requests. This is an 11% decrease compared with the same quarter in 2019/20 (72).
    - In 2019/20, the OAIC received 232 FOI requests. This is a decrease from 2018/19 where 244 FOI requests were received (5%).
- The reasons for the significant increase in FOI access requests is not fully apparent, although an increase can be partly attributed to the commencement of the Notifiable Data Breach (**NDB**) scheme on 22 February 2018, and the public and media interest in the scheme. 9 requests were received in 2019/20.
- There are currently 7 FTE staff that process FOI requests. These staff members are located in the Legal Services section. Processing FOI requests is undertaken together with other duties.

Critical facts

- The number of FOI requests received by the OAIC since 2016/17 has increased significantly.[1] A table providing an overview of the number of FOI requests made to the OAIC over the last four years is at Attachment A.
- The OAIC processed all FOI requests received in 2019/20 within the statutory timeframe, with the OAIC using s 15AA extension of time agreements within that period. A table providing an overview of the

[1] In 2016-17 there were 76 requests made, in 2017-18 there were 93 requests made and in 2018-19 there were 252 requests. In 2019/20, the OAIC received 232 FOI requests and in 2018/19 the OAIC received 244 FOI requests.

number of FOI requests processed within the statutory timeframes is also at Attachment A.

- FOI requests for the NDB scheme information may be complex. Factors contributing to their complexity include the number of notifications falling within the scope of the request, the number of third-party consultations undertaken in accordance with sections 26A, 27 and/or 27A of the FOI Act and the number of access grant decisions that may have to be made.
- There has also been a significant increase in internal reviews sought. Internal review requests peaked in 2018/2019 when 20 requests were received. This was a 900% increase over the number of internal reviews sought in the 2017/2018 period (2).2
    - In 2019/20, the number sought declined from the 2018/19 peak, to 13. 33% of the internal reviews sought in 2018/19 were made by third parties seeking review of an access grant decision.
    - In the first quarter of 2020/21, five internal reviews were sought.
- Approximately 61% of FOI requests made in 2018/19 were FOI requests for personal information held by the OAIC.[3] In 2019/20 approximately 61% of FOI requests have been requests for personal information.[4]

Possible questions

Why doesn't the OAIC publish NDB on the website to reduce the number of requests made to the OAIC for NDB?

The NDB scheme does not provide the OAIC with the power to publish notifications. The OAIC's view is that the non-disclosure provisions in the *Australian Information Commissioner Act 2010* (Cth) and the *Privacy Act 1988* (Cth) prohibit proactive publication of data breach notifications received under the NDB scheme.

The OAIC is publishing regular statistical information about the NDB notifications to assist entities and the public in understanding the operation of the scheme, to illustrate the patterns observed from the notifications being reported to the OAIC, and to highlight the learnings that the NDB scheme has to offer.

[2] In 2017-18 there were 2 internal reviews sought, in 2018-19 20 internal reviews were sought.
[3] In 2018-19 150 requests related to personal information and 244 requests were received in total.
[4] In 2019-20, 142 requests related to personal information and 232 requests were received in total.

However, as a document held by the OAIC, data breach notifications can be sought under the FOI Act. Each request is considered on a case by case basis by the relevant decision maker.

The OAIC received 21 requests for NDB information in 2018/19. Of the 21, a decision on access to documents was made in relation to 15 of the requests.[5] Eight requests were granted in part, four requests were granted in full and access refused to three. These documents were subsequently published on the OAIC's disclosure log after third party review rights had expired.

Who processes FOI requests made to the OAIC?

FOI requests are processed within the Legal Services team. There are currently 7 FTE staff who work on processing requests. There are three senior lawyers and the principal lawyer available to conduct internal reviews when an application for internal review is made.

Key dates

- Commencement of NDB scheme on 22 February 2018.

[5] Four requests were withdrawn, two were refused as there were no documents held.

Document history

Updated by	Reason	Approved by	Date
Megan McKenna	Update	Caren Whip	5/02/20
Caren Whip	Clearance		6/02/20
Emma Liddle and Rachel Ranjan	Update – please note that source of data for full years is OAIC annual report and FOI processing statistics published on data.gov (external reporting). Source of data for first quarter 2020/21 is IMPS data (internal reporting).		12/10/20

Attachment A

Total number of FOI requests

	2016-17			2017-18			2018-19			2019-20			First quarter 2020-21
	Personal	Other	Total	Personal	Other	Total	Personal	Other	Total	Personal	Other	Total	Total
Total number of FOI requests	32	32	64	39	54	93	150	94	244	142	90	232	59
Total number of internal reviews	4	5	9	0	2	2	10	10	20	7	6	13	5

FOI requests determined within the statutory time period[6]

	2016-17			2017-18			2018-19			2019-20		
	Personal	Other	Total	Personal	Other	Total	Personal	Other	Total	Personal	Other	Total
Number of FOI requests processed within the statutory time period	29	27	56	28	35	63	68	65	133	52	49	101
Percentage of FOI requests processed within the statutory time period	100%	100%	100%	100%	97%	98%	100%	100%	100%	100%	100%	100%

[6] There is a discrepancy between the total number of requests received and determined as some requests are transferred to other agencies or withdrawn by FOI applicants.

Commissioner brief: FOI Bill report D2020/017896

Key messages

- On 22 August 2018, Senator Rex Patrick introduced the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* to the Senate.
- The Bill proposed a number of amendments to the FOI Act, including requiring the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner to be filled, allowing applicants to bypass the OAIC and go to the AAT if their review would take more than 120 days to finalise, preventing agencies from changing exemptions during IC review and requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter.
- The Bill was referred to a Senate Committee. The OAIC made a written submission to the Committee (**Attachment 2**) and I appeared at a hearing before the Committee to provide further evidence.
- On 30 November 2018, the Committee published its report recommending that the Senate not pass the Bill.
- On 31 August 2020, there was a 70-minute, second reading debate of the Bill, during which both Liberal and Labor Senators did not support the Bill being passed by the Senate. As at 20 September 2020, the Bill's status remains as 'Before Senate'.

TRIM link for reference: Executive Brief on FOI Bill - D2018/015033
See also Com brief - FOI - IC review: D2019/000843

Critical facts

- On 22 August 2018, Senator Rex Patrick introduced the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* to the Senate. The Bill seeks to improve the effectiveness of FOI laws 'to address the considerable dysfunction that has development in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.'[1]
- The Bill proposes changes to the FOI Act, AIC Act and the Archives Act including:
  - requiring the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner to be filled.
  - preventing the IC from making FOI decisions if s/he does not hold legal qualifications.
  - preventing agencies publishing documents on their disclosure log until at least 10 days after the documents are released to the FOI applicant.
  - allowing applicants to bypass the OAIC and go to the AAT, or if the IC review will take more than 120 days, allowing the applicant to go to the AAT without paying the AAT application fee.

[1] Explanatory Memorandum: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1142.

- preventing agencies from changing exemptions during IC review.
- requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter.

- On 23 August 2018, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry. The Committee received nine submissions, including one from the OAIC.
- At a public hearing on 16 November 2018, the Committee heard from the Law Institute of Victoria, Accountability Round Table, Transparency International, AGD, the OAIC, academics, and journalists from the ABC, The Saturday Paper and Buzzfeed Australia. The evidence (in submissions and at hearing) referred to lengthy delays in IC reviews.
- On 30 November 2018, the Committee published its report recommending that the Senate not pass the Bill. Senator Patrick and the Australian Greens presented dissenting reports.
- There has been criticism of the OAIC since the Bill's introduction, including in an article in The Australian on 7 January 2019 (**Attachment 1**), which notes comments made by Senator Patrick and information about unallocated reviews and timeframes for finalising IC reviews, including that 'about 500 matters for review had not been allocated a case officer'. The article incorrectly refers to these reviews as 'sit[ting] idle'.
- The OAIC employs an early resolution model which explores alternative resolutions with applicants and agencies. During the early resolution process, the OAIC also requests copies of exempt documents and submissions. It is only if these early attempts to resolve reviews are not successful that cases are allocated to a case officer. (For statistics, see **Attachment 4**, FOI Statistics from FOI Bill Submission).
- On 31 August 2020, there was a 70-minute, second reading debate of the Bill, during which both Liberal and Labor Senators did not support the Bill being passed by the Senate.
- Liberal Senator Amanda Stoker said 'the objectives of transparency, accountability and freedom of information are objectives that are highly valued and shared by this government, the measures contained in this bill simply don't achieve those otherwise noble objectives.'
- Labor Senator Murray Watt noted that the Bill 'seeks to address some of the failings of the FOI system as it has been operating for the past seven years under the Abbott-Turnbull-Morrison government', and claimed that 'the government … starve[s] the Information Commissioner of resources—so that it takes the commissioner so long to review a rejected freedom-of-information request that the applicant just gives up'. But he accepted the Committee's recommendation against passing the bill.
- Greens Senator Larissa Waters said that 'a full root-and-branch review' of national FOI laws were required, but the Greens supported the bill as 'as step in that direction.' She noted that '[s]ome applicants are having to wait more than 12 months and pay exorbitant fees only to receive heavily redacted documents.' She said that the OAIC have 'now got fewer than half their previous staff, yet they have a 72 per cent increase

in complaints. So, of course, the Office of the Australian Information Commissioner has been unable to properly discharge their functions. They are under resourced and overworked.'

- Senator Waters noted that 'delay of up to 12 months to even allocate an application for review to a particular officer is absolutely outrageous and unjustifiable. Without additional support to both internal FOI officers and the Office of the Australian Information Commissioner, agencies have no real incentive to proactively share information with the Australian people—which I'm sure suits the government down to the ground'.
- The Bill's status remains as 'Before Senate' on the Australian Parliament House website.

Possible questions

- ***Many of the witnesses at the Senate Committee hearing spoke of a poor FOI culture among Australian Government agencies. Does the OAIC agree there is a poor culture and, if so, what is the OAIC doing to address this?***

  The OAIC exercises its functions and powers to promote the objectives of the FOI Act and guides agencies in the discharge of their functions under the FOI Act by publishing agency resources, issuing FOI guidelines and making IC review decisions. The OAIC holds twice yearly Information Contact Officer Network information sessions at which we reinforce the value of providing access to government held information and the OAIC holds regular meetings with agencies. Through our enquiries line and at officer level the OAIC provides guidance to FOI staff in Australian Government agencies.

- ***What is your response to the proposal that the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner should be filled?***

  This is a decision for government.

- ***What is you view on the proposal to prevent the Information Commissioner from making FOI decisions if s/he does not hold legal qualifications?***

  This is a decision for government.

- ***Do you agree with the proposal that agencies should not be able to publish documents on their disclosure log until at least 10 days after the documents are released to the FOI applicant?***

  I am focussed on agencies publishing documents on their disclosure logs in accordance with the existing legislative requirements. The proposal to require agencies to publish documents within a four working day window may pose some challenges to agencies in terms of administration. I understand that this proposal will assist some users of the FOI system but that it will have minimal impact on larger group of FOI applicants.

- ***What do you think of the proposal to allow applicants to bypass the OAIC and go to the AAT, or if the IC review will take more than 120 days, allowing the applicant to go to the AAT without paying the AAT application fee.***

  Review by the AAT is more formal than review by my office. While there are some circumstances where this is appropriate, as a general principle I do not consider that this proposal accords with the objects of the FOI Act, in particular the object that functions and powers given by the FOI 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.

- ***Do you agree with the proposal to prevent agencies from changing exemptions during IC review?***

  I conduct merits review of FOI decisions made by Australian Government agencies. In doing so, I am charged with making the correct or preferable decision in each case. I consider that preventing agencies from changing exemptions during the IC review would hamper my ability to make the correct and preferable decision in relation to reviews, and is counter to administrative law and procedural fairness principles.

- ***Do you consider that requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter is a good step?***

  I support proposals to increase transparency and accountability in government.

  The Legal Services Direction requires agencies to report legal services expenditure within 60 days after the end of the financial year. This information is compiled into annual reports on Australian Government legal services expenditure. The annual reports provide an overview of legal services expenditure across the Australian Government and identify and report on trends, patterns and changes in Australian Government legal services expenditure.

  Further, s 93 of the FOI Act requires agencies to provide the Information Commissioner with information on 'freedom of information matters' for inclusion in the OAIC's annual report. This includes costs general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitors/ legal counsel) and litigation costs (this is the costs of specific litigation in relation to FOI matters).

  There may be a case for increased reporting of legal expenditure; it is not uncommon for FOI requests to be made for access to costs associated with agencies' legal expenditure. Further, increased reporting may be consistent with the FOI Act object of increasing scrutiny of government's activities.

  Further, any impact on the privacy of the individual whose application is subject to IC or AAT review would need to be considered.

Key dates

- **On 22 August 2018**, the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* was introduced into the Senate.
- **On 23 August 2018**, the Senate referred the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* to the Legal and Constitutional Affairs Legislation Committee for inquiry.
- **On 16 November 2018**, the Commissioner gave evidence to the Committee at a public hearing.
- The Committee published its report on **30 November 2018** recommending that the Senate not pass the Bill.
- **On 7 January 2019**, The Australian published an article '*Backlog of cases leaves senator livid at 'dysfunctional' OAIC'*, which notes comments by Senator Rex Patrick and data relating to unallocated matter and timeframes for finalisation of IC reviews. (**Attachment 1**)
- **On 31 August 2020**, there was a short second reading debate of the Bill.

Document history

Updated by	**Reason**	**Approved by**	**Date**
Nikki Edwards	October 2020 Senate Estimates	Raewyn Harlock	17.9.2020

MEDIA ARTICLE:
Backlog of cases leaves senator livid at ‘dysfunctional’ OAIC

Senator Rex Patrick said correspondence from the OIAC late last month revealed about 500 matters for review had not been allocated a case officer. Picture: Gary Ramage
Exclusive: Luke Griffiths Journalist @_LukeGriffiths 12:00AM January 7, 2019

Several hundred cases sit idle within the office tasked with adjudicating Freedom of Information disputes, raising the ire of a key crossbench senator who claims a lack of resources is stifling political debate.

Centre Alliance senator Rex Patrick said correspondence from the Office of the Australian Information Commissioner late last month revealed about 500 matters for review had not been allocated a case officer.

He said the lack of action was symptomatic of a dysfunctional system characterised by bureaucratic delays, obstruction and unacceptably long review processes.

The Coalition government has failed to appoint a FOI commissioner since 2014, when it moved to abolish the OAIC.

It has since cut the office’s funding by $1.6 million a year.
“Of what value is information if it is only made available well after the debate has passed,” Senator Patrick said. “Perhaps it suits the government to have a clogged FoI system for now, but that may not be the case after the election when they may find themselves in opposition.”

Excluding the 500 unallocated matters, the OAIC, which upon request reviews decisions made by government departments under the Freedom of Information Act, finalised 610 of the 801 applications it received last financial year.

Of those completed, almost 100 took longer than 12 months.

On average, it took 6.7 months to complete a review, up from 6.2 months in the previous period.

An OAIC spokeswoman said some matters had not been allocated a case officer because alternative resolutions were first being explored. “Of those IC review matters needing further detailed consideration, 284 are currently awaiting allocation to a case officer,” she said.
OAIC boss Angelene Falk last year said managing an increasing workload with fewer resource was “challenging”.

Senator Patrick — dubbed “Inspector Rex” by Nick Xenophon because of his fondness for investigating issues via FoI — introduced a private member’s bill in August aimed at making government more transparent and accountable.

During a recent Senate inquiry, Andrew Walter from the Attorney-General’s Department conceded that there were “undoubtedly stresses” within the system.

“The OAIC has coped well with an increased workload,” he said. “However, of course, it’s not clear that that will be sustainable in the long run.”

Australian Government
Office of the Australian Information Commissioner

OAIC Submission

To the Senate Legal and Constitutional Affairs Legislation Committee – Inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

oaic.gov.au

Contents

Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to provide information to assist the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the Bill).

The Bill proposes a number of amendments to the *Archives Act 1983*, the *Australian Information Commissioner Act 2010* (AIC Act), and the *Freedom of Information Act 1982* (FOI Act).

The OAIC's role is to uphold the enforceable right of access to documents held by government agencies and ministers and the legislatively required proactive release of information by government agencies.

Through the development of resources, submissions, instruments, regulatory activities, education and engagement the OAIC supports the management of information held by the Government as a national resource. This objective is pursued through the exercise of the legislated functions in relation to FOI, privacy and information policy.

The OAIC's 2018-2019 Corporate Plan sets out how we promote and uphold information access rights under the FOI Act through promoting awareness and understanding in the community, developing the FOI capabilities of Australian Government agencies and ministers, promoting best practice, conducting Information Commissioner (IC) reviews, investigating FOI complaints and conducting Commissioner initiated FOI investigations.

This submission provides general information, to assist the Committee, in relation to the OAIC's regulatory role and functions, particularly in the context of its merits review function (IC reviews).

Further information about the way the OAIC discharges its regulatory functions under the FOI Act can be found in the OAIC's Freedom of Information Regulatory Action Policy[1], in the Guidelines issued by the Australian Information Commissioner under s 93A[2] (the FOI Guidelines), in particular Parts 10 (Review by the Information Commissioner)[3] and 11 (Complaints and investigations)[4] and in its Annual Reports.[5]

[1] https://www.oaic.gov.au/about-us/our-regulatory-approach/freedom-of-information-regulatory-action-policy/

[2] All legislative references in this submission are to the FOI Act unless otherwise stated,

[3] https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner.

[4] https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-11-complaints-and-investigations.

[5] https://www.oaic.gov.au/about-us/corporate-information/annual-reports/all/

The OAIC's regulatory role

The OAIC is an independent statutory agency established under the AIC Act.

The OAIC has three functions:

- freedom of information functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the FOI Act
- privacy functions, conferred by the *Privacy Act 1988* (Privacy Act) and other laws
- government information policy functions, conferred under the AIC Act.

The Australian Information Commissioner (Commissioner) has the power to perform all FOI regulatory functions.[6] Under section 10 of the AIC Act, the Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

The FOI regulatory functions include to:[7]

- review FOI decisions of agencies and ministers (IC review) (Part VII)
- investigate complaints about agency actions relating to the handling of FOI matters (Part VIIB)
- issue guidelines under s 93A
- decide on extension of time applications by an agency or minister in relation to decisions on FOI requests
- decide on whether to make a vexatious applicant declaration to restrict a person's rights to make an FOI request or application following an application from an agency or minister or on the Commissioner's own motion
- determine that the requirement to publish information in a disclosure log does not apply to specified information
- oversee the Information publication scheme (IPS)
- raise awareness of FOI and educate Australians and agencies about their rights and obligations
- monitor agencies' compliance with the FOI Act
- compile FOI data and assess trends,
- report and recommend to the Minister proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the FOI Act.

The OAIC has published a 'Freedom of information regulatory action policy'. This policy provides the Australian community and agencies and ministers with guidance on the approach of the OAIC to the exercise of FOI regulatory powers.

Agencies and ministers must also have regard to the Guidelines issued under s 93A (FOI Guidelines) in performing a function or exercising a power under the FOI Act.

In relation to the IC review function, agencies must comply with the 'Direction as to certain procedures to be followed in IC reviews', issued under s 55(2)(e)(i) (Procedure Direction).

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[6] The AIC Act confers power on each of the three statutory positions, the Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner to do all things necessary or convenient to perform the freedom of information (FOI) functions defined in the AIC Act, ss 8 , 10(2), 11(3) and 12(3)).

[7] See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

All IC review decisions made under s 55K are published. These are available through the OAIC website (as part of the Australian Information Commissioner (AICmr) series on the AustLII website).

The OAIC has published a range of other guidance materials to assist agencies and ministers in exercising their functions under the FOI Act. The OAIC has also published resources and other general information to assist members of the public to understand and promote their right to access information under the FOI Act. These documents are all available on the OAIC's website and include fact sheets that provide a general overview about particular topics of relevance to members of the public, and animated videos about access rights under the FOI Act.

The IC review function

A number of the proposed amendments in the Bill relate to the IC review function of the OAIC. The following information is intended to provide the Committee with information about this function, including statistical information.

IC reviewable decisions

A person (including a natural person, body politic or corporation) who disagrees with an agency or minister's decision received on a request for access to a document or for amendment or annotation of personal records may apply to the Commissioner for review of that decision under Part VII of the FOI Act. A person does not have to apply for internal review with the agency before seeking IC review. However, the Commissioner considers that it is usually better for a person to seek internal review of an agency decision before applying for IC review.[8]

The Commissioner can review the following decisions by an agency or minister:

- 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))
- a decision that is deemed to have been made by an agency or minister where the statutory timeframe was not met.[9]

Principles of the IC review process

Review by the Commissioner of decisions about access to government documents is designed around four key principles:[10]

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.

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[8] FOI Guidelines [10.2].

[9] FOI Guidelines [10.3]-[10.4].

[10] FOI Guidelines [10.15].

Merit review

Review by the Commissioner is a merit review process. The Commissioner does not simply review the reasons given by the agency or minister, but determines the correct or preferable decision in the circumstances. The Commissioner can access all relevant material, including material that the agency or minister claims is exempt.

The Commissioner can also consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. For example, for the purpose of deciding whether a document requested by an applicant is conditionally exempt, the Commissioner can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest.[11]

If the Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the Commissioner may decide that a document is not an exempt document under the FOI Act or that an access charge was not correctly applied.[12]

An informal process

IC reviews are intended to be a simple, practical and cost-efficient method of external merit review. This is consistent with the objects of the FOI Act, which provides that functions and powers 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 (s 3(4) of the FOI Act). [13]

Consistent with the object of prompt and cost-effective access to information, most matters will be reviewed on the papers rather than through formal hearings. The Commissioner has formal information gathering powers (see Division 8 of Part VII), however documents are usually requested from agencies without the need to invoke those provisions. Where required, the OAIC can use powers to compel agencies that do not cooperate with requests by the OAIC.[14]

Non-adversarial

Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Commissioner to make the correct or preferable decision in relation to access to information held by the Government. The OAIC also encourages all parties to minimise their use of legal representation in IC review proceedings, to reduce formality and costs.[15]

Timely

The IC review process is intended to be efficient and lead to resolution as quickly as possible.

In order to facilitate the efficient and timely resolution of IC reviews, a case officer may provide the parties with a preliminary view on the merits of the application after review of the documents at issue and conduct conferences between the parties.[16]

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[11] FOI Guidelines [10.16].

[12] FOI Guidelines [10.17].

[13] FOI Guidelines [10.18].

[14] FOI Guidelines [10.20].

[15] FOI Guidelines [10.21]-[10.22].

[16] FOI Guidelines [10.21]-[10.23].

The Commissioner may also decide to expedite the conduct of an IC review application in response to a request from the IC review applicant or as a result of identifying individual applications that involve factors that warrant expedition.[17]

Onus

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

In an IC review of an access grant decision, the affected third party has the onus of establishing that a decision refusing the request is justified or that the Commissioner should give a decision adverse to the person who made the request (s 55D(2)).[18]

How the Commissioner may finalise an IC review

The Commissioner may finalise an IC review by:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake a IC review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).

Reviewing an IC reviewable decision

IC review officers manage the application for review, including undertaking the preliminary assessment of the merits of the decision after reviewing the documents in dispute.

At any stage during an IC review, an agency or minister may revoke or vary an access refusal decision to favour the applicant.[19] Where an agency or minister no longer contends that material is exempt or has identified further material within the scope of a request during an IC review, a revised decision under s 55G facilitates the prompt release of further material to the applicant.[20] A revised decision does not automatically conclude the IC review and the revised decision will be the decision under review. The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.[21]

At any stage during an IC review, the Commissioner (or delegate) may also resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Before making the decision, the Commissioner (or delegate) must be satisfied that the terms of the written agreement would be within the powers of the Commissioner and that all parties have agreed to the terms.[22]

If the parties do not reach agreement, and unless the IC review applicant withdraws their application under s 54R, the Commissioner must make a decision after conducting a merit review

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[17] FOI Guidelines [10.24].

[18] FOI Guidelines [10.13]-[10.14].

[19] FOI Guidelines [10.67].

[20] FOI Guidelines [10.68].

[21] FOI Guidelines [10.70]

[22] FOI Guidelines [10.123].

of the matter under s 55K. The Commissioner has the power to affirm vary or set aside the decision of the agency or minister.[23] The final decision on a review under s 55K is non delegable.[24]

An agency or minister must comply with an IC review decision (s 55N). If an agency or minister fails to comply, the Commissioner or the review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)).[25]

Deciding not to review an IC reviewable decision

The Commissioner (or delegate) has the discretion not to undertake an IC review, or not to continue an IC review if:

- the applicant fails to comply with a direction by the Commissioner (s 54W(c)), or
- the Commissioner is satisfied that: a) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; (b) the review applicant has failed to cooperate in progressing the application or review without reasonable excuse; or (c) the Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a)).
- the Commissioner is satisfied the decision should be considered by the AAT (s 54W(b).

Under s 54W(b), the Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application.

Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.

The OAIC consults the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.[26]

Statistics

The OAIC has experienced an increase in the numbers of IC review applications received from 2015-16.

The OAIC has met its key performance indicator of finalising 80% of IC reviews within 12 months of receipt since 2015-16.[27] This is in part due to the implementation of early resolution processes which seek to resolve IC review applications or narrow the issues in contention at an early stage of

[23] FOI Guidelines [10.124].

[24] FOI Guidelines [10.83].

[25] FOI Guidelines [10.132].

[26] FOI Guidelines [10.88].

[27] The target timeframe for completion of IC reviews changed from 80% completed within 6 months to 80% completed within 12 months in 2013–14.

the case management process. The tables below indicate how and in what timeframes IC reviews have been finalised since 2011-12.

In 2018-19 the OAIC will continue to develop and implement refinements to its early resolution and case management processes, to meet the objectives of providing an informal, non-adversarial and timely review process.[28] The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently.

The following tables provide a statistical overview of IC review applications received, finalised and the outcome of applications for 2011-17.

Table 1: Overview of IC review applications received and finalised

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
IC reviews received	456	507	524	373	510	632
IC reviews finalised	253	419	646	482	454	515
IC reviews where s 55K decision made by IC	25	89	98	128	80	104
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%)

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
within 120 days	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)
within 6 months	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)
within 9 months	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)
within 12 months	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)
over 12 months	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)
Total	253	419	646	482	454	515

[28] See the OAIC's 2018-19 Corporate Plan page 30. Available at www.oaic.gov.au

Table 3: Overview of IC review outcomes

IC Review Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34
s 54R – withdrawn	108	95	111	59	81	115
s 54R – withdrawn / conciliated	-	13	71	51	78	93
s 54W(a) – deemed acceptance of PV / appraisal	-	2	27	26	7	0
s 54W(a)(i) – lacking in substance, misconceived etc	42	86	170	87	94	66
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57
s 54W(a)(iii) – lost contact	9	9	0	5	5	3
s 54W(b) – refer AAT	22	17	41	61	32	15
s 54(c) – failure to comply	-	2	0	0	0	0
s 55F – set aside by agreement	-	0	1	0	2	7
s 55F – varied by agreement	2	0	1	2	7	5
s 55F – affirmed by agreement	-	0	1	2	1	1
s 55G – substituted	-	7	6	5	16	15
s 55K – affirmed by IC	17	58	32	48	28	48
s 55K – affirmed by IC following revised decision	-	-	8	5	11	17
s 55K – set aside by IC	8	28	53	52	22	23
s 55K – varied by IC	0	3	5	23	19	16
Total	253	419	646	482	454	515

The proposed amendments

Below is information to assist the Committee in relation to particular aspects of the Bill's proposed amendments to the AIC Act and the FOI Act. The items are found in Schedule 1 of the Bill.

Items 2 and 3: Qualification of Commissioners

In relation to Schedule 1; Items 2 and 3 of the Bill, the AIC Act provides that the Information Commissioner and the Privacy Commissioner, as well as the Freedom of Information Commissioner, have the freedom of information functions which are set out in section 8 of the AIC Act and include reviewing decisions under Part VII of the FOI Act. However certain functions and powers of the FOI Commissioner may only be undertaken with the approval of the Information Commissioner, such as the issuing, variation or revocation of the FOI Guidelines.[29]

Under the AIC Act there is no requirement for the Information Commissioner or Privacy Commissioner to have legal qualifications. Since 2010 the Information Commissioner and the Privacy Commissioner have exercised the FOI functions including making IC review decisions.

Item 4: Appointment of Commissioners

Schedule 1; Item 4 of the Bill provides that all three statutory Commissioner roles are filled separately.

Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Australian Information Commissioner and Privacy Commissioner for a three year term.

Under section 10 of the AIC Act, the Information Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

As the Australian Information Commissioner Ms Falk performs the freedom of information functions.

Item 8: Preventing agencies from publishing information released under FOI for at least 10 days

In relation to Schedule 1; Item 8 of the Bill, under the FOI Act agencies and ministers must publish information that has been released in response to each FOI access request, subject to certain exceptions (s 11C). This publication is known as a 'disclosure log'.[30]

The FOI Act requires agencies and ministers publish this information within ten working days of giving the FOI applicant access to the information (s 11C(6)).[31]

Item 8 of the Bill would require information to be published on a disclosure log to occur within the window of 10-14 working days from the date access is provided to the FOI applicant. This is a narrower period of time in which to comply.

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[29] See section 11(4) AIC Act

[30] FOI Guidelines [14.1].

[31] FOI Guidelines [14.6].

The issue of the timing of publication of documents on a disclosure log was considered by the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke Report).[32] The Hawke Report recommended that there should be a period of five working days before documents released to an applicant are published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.

The FOI Guidelines provide guidance which seeks to appropriately achieve the balance between the pro-disclosure and equal public access objects of the FOI Act and individual circumstances.[33]

Item 10: Entitling Senators and Members access to documents without charge unless the charge exceeds $1000

In relation to Schedule 1; Item 10 of the Bill, information about the FOI Charges framework is set out in s 29 of the FOI Act and in the Freedom of Information (Charges) Regulations 1982 (Charges Regulations).[34]

The OAIC considers that the proposal risks a fragmented approach to the application of charges, absent a fuller consideration. In 2011 the inaugural Australian Information Commissioner, Professor John McMillan, undertook a substantial review of the charges under the FOI Act and a report was published in February 2012.[35]

The OAIC's guidance on the exercise of the discretion to impose a charge is set out in Part 4 of the FOI Guidelines and summarised below. The FOI Guidelines also contains guidance on matters to be taken into account in determining whether or not to reduce or waive a charge, including whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.[36]

Guiding principles from the FOI guidelines:

An agency or minister's decision to impose or not impose a charge, or to impose a charge that is lower than the applicable charge is discretionary. The FOI Guidelines advise agencies and ministers that in exercising that discretion, the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects of the FOI Act (s 3(4)).[37]

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. In assessing the costs of calculating and collecting a charge, agencies should also take into account the likely

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[32] The Hawke Report published in July 2013 is available at: https://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspxhttps://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx

[33] FOI Guidelines [14.27]

[34] FOI Guidelines [4.1].

[35] Review of charges under the Freedom of Information Act 1982: Report to the Attorney-General February 2012 available at https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982

[36] Section 29(5)(b) FOI Act and FOI Guidelines [4.79-4.87]

[37] FOI Guidelines [4.3].

costs that may be incurred by the agency, as well as other review bodies, if the applicant decides to seek further review.[38]

The objects of the FOI Act guide the following principles relevant to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.
- Charges should fairly reflect the work involved in providing access to documents on request.
- Charges are discretionary and should be justified on a case by case basis.
- Agencies should encourage administrative access at no charge, where appropriate.
- Agencies should assist applicants to frame FOI requests.
- Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information (s 3A(2)(b)).
- A decision to impose a charge should be transparent.[39]

Item 11: Preventing agencies from making additional exemption claims during the course of IC reviews

Schedule 1; Item 11 of the Bill would prevent further exemptions being raised during the course of an IC review. The Commissioner undertakes merits review of agency FOI decisions. During the review process, agencies may make submissions about any relevant exemption claimed over particular material subject to the FOI request, including any exemption not originally put forward in the initial decision.[40] The Commissioner will take the submissions of both parties into account and afford both parties procedural fairness when making a decision, which must be the correct or preferable decision at the time of the Commissioner's decision.

In an IC review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.

When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted.

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[38] FOI Guidelines [4.4].

[39] FOI Guidelines [4.5].

[40] The IC review process is a full merits review process and the Commissioner may affirm, vary or set aside and substitute a decision (s 55K(1) however the Commissioner cannot decide to provide access to a document that it is established in the IC review proceeding is exempt (s 55L)).

Item 12: Allowing applicants to seek AAT review during the course of an IC review

Schedule 1; Item 12 of the Bill provides for matters to be transferred from the OAIC to the AAT where the OAIC notifies the review applicant that it will take longer than 120 days to decide the matter or more than 120 days has passed since the application was made.

In general IC review applications are finalised 'on the papers', without the need for a formal hearing. The Commissioner has broad powers to finalise IC review applications in a number of ways. These include by agreement with the applicant (s 55F) in addition to an IC review decision under s 55K. Agencies also have the discretion to make a revised decision that is more favourable to the applicant during the IC review process (s 55G).

The number of IC reviews finalised within 120 days by the OAIC as a percentage of all IC reviews finalised was 39% in 2011-2012 (100 IC reviews), and 38% in 2016-17 (198 IC reviews). As set out above, the OAIC has met its key performance indicator of finalising 80% of IC review applications within 12 months since 2015-16. The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently. The OAIC considers that s 54W(b) of the FOI Act provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 13: Allowing applicants to appeal directly to the AAT

Schedule 1; Item 13 of the Bill provides that applicants can elect to have their matter bypass the Commissioner to go directly to the Administrative Appeals Tribunal (AAT).

Under the FOI Act an application can be made to the AAT for 2nd tier merit review if the Commissioner makes a decision under s 55K or if a decision is made under s 54W(b) to enable the applicant to go direct to the AAT (ie, if it is in the interests of the administration of the FOI Act).

Table 3 sets out the number of referrals made to the AAT under s 54W(b) by the OAIC. The OAIC considers that this provision provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 16: Publication of external legal expenses for FOI reviews

In relation to Schedule 1; Item 16 of the Bill, section 93 of the FOI Act requires agencies to provide the Commissioner with information on 'freedom of information matters' for inclusion in the OAIC's annual report.

Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed.

Summary details of these costs are published in the OAIC annual reports.

The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: www.data.gov.au.

The Senate

Legal and Constitutional Affairs Legislation Committee

Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

November 2018

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Recommendations

Recommendation 1

2.91 The committee recommends that the Senate not pass the bill.

Chapter 1

Introduction

1.1 On 23 August 2018, the Senate referred the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 30 November 2018.[1]

Purpose of the bill

1.2 The bill was introduced in the Senate by Senator Rex Patrick, who explained that the primary purpose of the bill 'is to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law.'[2] Senator Patrick outlined the issues within the Freedom of Information (FOI) system, which the bill aims to resolve:

> These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.[3]

1.3 Additionally, Senator Patrick notes that the bill 'seeks to restore the Office of the Australian Information Commissioner (OAIC) with the appointment of three independent Commissioners as was the intention of the Parliament.'[4]

Office of the Australian Information Commissioner

1.4 The OAIC is an independent statutory agency established under the *Australian Information Commissioner Act 2010 (*AIC Act). It is headed by the Australian Information Commissioner (Information Commissioner) and is supported by the Privacy Commissioner and FOI Commissioner.

Functions

1.5 The OAIC has three functions:

- FOI functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the *Freedom of Information Act 1982* (FOI Act);
- Privacy functions, conferred by the *Privacy Act 1988* to ensure the proper handling of personal information in accordance with the Privacy Act and other legislation; and

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1 *Journals of the Senate*, No. 113, 23 August 2018, p. 3606.

2 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

3 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

4 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

- Information Commissioner functions, conferred under the AIC Act relating to information policy and practice in the Australian Government.[5]

Background of the Office of the Australian Information Commissioner

1.6 The OAIC commenced operations on 1 November 2010.[6] At the same time, the former Office of the Privacy Commissioner was integrated into the OAIC.[7]

1.7 While the AIC Act allows for the appointment of three statutory office holders for each of its functions, it also allows for the Privacy Commissioner to perform the functions of the FOI Commissioner, and vice versa.[8] Additionally, the Information Commissioner can also perform the functions of the FOI Commissioner and the Privacy Commissioner.

1.8 When the OAIC first commenced operations, separate Commissioners were appointed for each of its functions.[9]

1.9 On 13 May 2014, the government announced that it would disband the OAIC by 1 January 2015.[10] The Freedom of Information Amendment (New Arrangements) Bill 2014, was introduced in the House of Representatives on 2 October 2014, which sought to:

- repeal the AIC Act, including abolition of the OAIC; and
- amend the FOI Act and Privacy Act and related laws. [11]

1.10 The 2014 bill was not passed by the Senate, and subsequently lapsed at prorogation of the 44th Parliament, on 17 April 2016.[12] However, in anticipation of the abolition of OAIC, its funding was reduced. According to the Accountability Round Table, 'the OAIC's FOI function was halved.'[13]

1.11 Following the Government's announcement to disband the OAIC, the former FOI Commissioner, Dr James Popple, resigned in December 2014, followed by the resignation of the former Information Commissioner, Professor John McMillan, in

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5 Office of the Australian Information Commissioner, *Annual Report 2010–11,* p. 5.

6 Office of the Australian Information Commissioner, *Annual Report 2010–11,* p. v.

7 Office of the Australian Information Commissioner, *Annual Report 2010–11,* p. v.

8 Office of the Australian Information Commissioner, *Submission 6*, pp. 3-4.

9 Office of the Australian Information Commissioner, *Annual Report 2010–11,* p. 5

10 www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic#australian-governments-budget-decision-to-disband-oaic (accessed 12 November 2018).

11 www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350 (accessed 12 November 2018).

12 www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350 (accessed 12 November 2018).

13 Accountability Round Table, *Submission 2,* p. 2.

June 2015.[14] The former Privacy Commissioner, Mr Timothy Pilgrim, was subsequently appointed to the role of Information Commissioner. He continued in his roles as Information Commissioner and Privacy Commissioner, while also performing the function of FOI Commissioner, until his retirement in March 2018.[15]

1.12 Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Information Commissioner and Privacy Commissioner for a three year term. Currently, the functions of the FOI Commissioner are being performed by Ms Falk as the Information Commissioner and the Privacy Commissioner.

Reviewing FOI decisions

1.13 Applicants who disagree with an agency or minister's decision relating to an FOI request for information, may apply to the Information Commissioner for review of that decision under Part VII of the FOI Act.[16] The OAIC noted that while an FOI applicant does not have to apply for an internal review before applying for a review by the Information Commissioner, it considers it best practice for an applicant to to so.[17]

1.14 The OAIC explained that Information Commissioner reviews are based on four key principles:

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.[18]

1.15 The OAIC outlined the ways in which an Information Commissioner review may be finalised:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake an [Information Commissioner] review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).[19]

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14 Mr Richard Mulligan, The slow death of the Office of the Australian Information Commissioner, Sydney Morning Herald, 26 August 2015, https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html (accessed 12 November 2018).

15 Attorney-General's Department, *Submission 3*, p. 2.

16 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

17 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

18 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

19 Office of the Australian Information Commissioner, *Submission 6*, p. 6.

1.16 Additionally, the Information Commissioner, or their delegate, may exercise discretion to not undertake an Information Commissioner reivew pursuant to one of the grounds outlined in section 54W of the FOI Act.[20] One of the discretionary grounds is where the Information Commissioner is satisfied that the decision should be considered by the Administrative Appeals Tribunal (AAT).[21]

Key provisions of the bill

1.17 As outlined in the Explanatory Memorandum, the provisions of the bill would amend the AIC Act, the FOI Act, and the *Archives Act 1983* (Archives Act). The key provisions of the bill are summarised below.

Australian Information Commissioner Act 2010

Legal qualifications

1.18 New subsections 10(3) and 12(2) would prohibit the Information Commissioner and Privacy Commissioner, respectively, from reviewing decisions under Part VII of the FOI Act, unless they hold legal qualifications.

Appointment of three separate Commissioners

1.19 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the AIC Act, while item 6 of the bill clarifies that 'the same person must not simultaneously hold more than one appointment (including an acting appointment).' Additionally new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

Freedom of Information Act 1982

Requirement to publishing information between 10 to 14 days

1.20 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 and 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public.

Charges

1.21 Charges related to FOI requests are covered in changes to paragraph 29(1)(d) and a new subsection 29(5A). Of particular note, new subsection 29(5A) would exempt Senators and Members of the House of Representatives from charges unless the work generated totals more than $1000. The proposed exemption for Senators and Members is designed to support greater parliamentary scrutiny of public administration.

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20 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

21 Subsection 54W(b) of the FOI Act, Office of the Australian Information Commissioner, *Submission 6*, p. 8.

Consistent application of exemptions

1.22 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commisioner review.

Referral to the AAT

1.23 Item 12 of the bill deals with referrals to the AAT where an Information Commissioner review has taken, or is likely to take, 120 days or longer to finalise. New sections 55JA require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to tranfer their review to the AAT at no charge to the applicant.

1.24 Separately, item 13 of the bill would allow an applicant to apply to the AAT for review of any Information Commissioner review, without first having the matter reviewed by the Information Commissioner. The Explanatory Memorandum states that 'an applicant taking this option would pay the usual fee for an application to the AAT.'[22]

Reporting of external legal expenses

1.25 New section 93AA covers the reporting of legal fees in agencies' annual reports, including listing each request made under section 15 of the FOI Act.

Transitional rules

1.26 Subitem 17(1) would allow the Attorney-General to make disallowable legislative instruments (transitional rules) for current applications. Subitem 17(2) confirms that certain significant matters (such as the creation of an offence or civil penalty) may not be included in the transitional rules.[23]

Archives Act 1983

1.27 The bill proposes to amend the *Archives Act* to require the reporting of external legal expenses incurred by the National Archives of Australia. Under new section 55B, expenses published must include external legal expenses incurred:

- in making an initial decision in relation to an application for access to a record;
- as part of an internal reconsideration of a decision under section 42 of the Archives Act;
- as part of a review by the AAT of a decision by the Archives; and

22 Explanatory Memorandum, p. 6.

23 Explanatory Memorandum, p. 7.

- as part of an appeal to the Federal Court of Australia from a decision of the AAT.[24]

Consideration by other Parliamentary committees

1.28 The Senate Standing Committee for the Scrutiny of Bills provided no comment on the bill.[25]

1.29 The Parliamentary Joint Committee on Human Rights stated that the bill does not raise human rights concerns.[26]

Conduct of this inquiry

1.30 In accordance with usual practice, the committee advertised the inquiry on its webpage and also wrote to various organisation and individuals inviting written submissions by 24 September 2018.[27] The committee received nine submissions, as listed at Appendix 1, and which are available on the committee's webpage.

1.31 The committee held a public hearing in Canberra on 16 November 2018. Details of the public hearing are provided at Appendix 2. Questions on notice and other material received by the committee are listed at Appendix 1.

Structure of this report

1.32 This report consists of two chapters:

- This chapter provides an overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters and witnesses, as well as providing the committee's views and recommendation.

Acknowledgements

1.33 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

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24 Explanatory Memorandum, pp. 2–3.

25 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 10.

26 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 9 of 2018*, 11 September 2018, p. 22.

27 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

Chapter 2

Key issues

2.1 A number of key issues were raised by submitters and witnesses concerning the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill). These issues included:

- *Australian Information Commissioner Act 2010* (AIC Act)
  - the resourcing of the Office of the Australian Information Commissioner (OAIC)
  - the requirement to appoint three separate Commissioners
  - the requirement that Commissioners have legal qualifications
- *Freedom of Information Act 1982* (FOI Act)
  - encouraging a pro-disclosure culture
  - the requirement that information be published within 10 to 14 working days
  - preventing agencies from relying on additional exemption grounds during the course of Information Commissioner reviews
  - allowing for referrals to the Administrative Appeals Tribunal (AAT)
  - exempting Senators and Members from charges under $1000, and
- the reporting of external legal expenses under the FOI Act and the *Archives Act 1983* (Archives Act).

2.2 This chapter will outline the above issues and provide the committee's views and recommendation on the bill.

Australian Information Commissioner Act 2010

Resourcing of the OAIC

2.3 A number of submitters suggested that the reduction of funding to OAIC in 2014–15, in anticipation of its closure, was an area of concern.[1] Witnesses echoed this concern at the hearing, and concluded that the reduced funding had resulted in delays in the FOI system. For example, the Law Institute of Victoria stated:

> The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage. The

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1 Accountability Round Table, *Submission 2,* pp. 2–4; Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 4-6, Mr Peter Timmins, *Submission 7,* p. 2, Transparency International Australia, *Submission 8,* p. 3.

> Law Institute of Victoria is also concerned that the government sought to abolish the Office of the Australian Information Commissioner in 2014, and, since that time, has failed to restore the funding levels to the previous levels experienced.[2]

2.4 While the Attorney-General's Department (the department), acknowledged that funding to the OAIC was reduced, it also explained that the OAIC's funding has since been largely restored:

> As part of the 2014–15 Budget measure there were expected to be savings of $3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of $2m per year was returned to the OAIC budget from those $3.6m of savings. The $1.6m which was not returned reflected streamlined arrangements that had been put in place by the OAIC to manage its workload, particularly in the area of FOI.[3]

2.5 However, the department recognised that the OAIC experiences 'ongoing stresses' due to an increase in the number of applications made to the OAIC.[4]

2.6 The Information Commissioner and Privacy Commissioner, Ms Angelene Falk, tabled the following statistics:

Table 1: Overview of IC review applications received and finalised

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews received	456	507	524	373	510	632	801
IC reviews finalised	253	419	646	482	454	515	610
IC reviews where s 55K decision made	25	89	98	128	80	104	123
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%)

2.7 Ms Falk confirmed that in 2017–18, the OAIC received 801 applications for Information Commissioner reviews, which is a 27 per cent increase from the previous financial year.[5] Furthermore, the OAIC had experienced similar increases of requests

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2 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 1.

3 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

4 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 29.

5 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34

for Information Commissioner reviews in the last three years.[6] These figures appear to support the department's view that the OAIC experiences 'ongoing stresses' due to the number of applications it receives.

2.8 However, Ms Falk also noted that the number of Information Commissioner reviews finalised in 2017–18, also increased by 18 per cent.[7] Additionally, the table shows that the total number of Information Commissioner reviews finalised in 2017-18 was the second highest, and that only in 2013–14 were more reviews finalised.

2.9 When asked whether there needed to be more resources at both the early resolution stage, as well as at a later stage, to enable more Information Commissioner reviews to be finalised earlier, Ms Falk stated:

> 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 offices 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.[8]

2.10 Ms Falk went on to say:

> …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.[9]

Requiring the appointment of three separate Commissioners

2.11 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the Act, while new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

2.12 The Explanatory Memorandum provides a rationale for the proposed change:

> While on its face section 14 of the AIC Act makes it clear that there should be three separate commissioners, the functions of the Freedom of Information Commissioner are currently being performed by the Australian Information Commissioner and Privacy Commissioner. Subsection 14(5) removes any doubt and clarifies that there is to be a

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6 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

7 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

8 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 40.

9 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 40.

separate Australian Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner.[10]

2.13 A number of witnesses agreed that the AIC Act already requires three separate appointments as this was the intention of the Parliament of the day.[11] However, according to the department, 'there is no legal impediment to the appointment of a single person' to the three Commissioner roles.[12] The department went on to explain:

> …the department's view is that it is open to the government to appoint only one commissioner. We think that the organisation can't effectively function without an information commissioner, so that one has to be in place. However, we think it would be perfectly open on the construction of the legislation to not have those other two positions filled. The government has decided to fill the privacy commissioner role. I might just contrast that with some other legislative schemes. I mentioned in my opening statement, for example, the Administrative Review Council. Once it falls below a certain number of appointments, it can no longer function. The parliament clearly didn't contemplate that. It contemplated a scheme where it could function with only one, even if it did provide for the establishment of the three.[13]

2.14 A number of submitters were supportive of the proposed amendment, suggesting that the appointment of three separate Commissioners had worked successfully in the past, and noting that a similar model is adopted in state governments as well as overseas jurisdictions.[14] Transparency International Australia stated that it supported this measure, provided the three Commissioners 'are also individually adequately resourced so that they can effectively perform their separate functions.'[15]

2.15 Dr David Solomon AM, Director of the Accountability Round Table, argued that having one person perform three roles was placing too much burden on that individual:

> The functions that each of the three have are different. They are complex. The Information Commissioner has additional functions outside or on top of FOI in terms of general information policy and so on, and particularly additional functions under the national action plan and so on. There is more than enough work to have three people separately perform these functions,

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10 Explanatory Memorandum, p. 3.

11 Ms Lara Freidin, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria, *Committee Hansard (Proof),* 16 November 2018, p. 6.

12 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof),* 16 November 2018, p. 28.

13 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof),* 16 November 2018, p. 31.

14 Accountability Round Table, *Submission 2,* p. 6 and Transparency International Australia, *Submission 8,* p. 3.

15 Transparency International Australia, *Submission 8,* p. 4.

> and requiring one person to do all three is putting a burden on them which really is absolutely unrealistic.[16]

2.16 In contrast, the OAIC and the department did not consider this amendment necessary, noting that 'the OAIC has been operating efficiently with a single person … since July 2015.'[17] Ms Falk reiterated this view at the hearing:

> 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.[18]

2.17 In support of her view that one individual could effectively perform the functions of three Commissioners, are the figures provided at table 1, and particularly, row 3 of the table (the full table is available above).

Row 3 of table 1: Overview of IC review applications received and finalised

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews where s 55K decision made	25	89	98	128	80	104	123

2.18 Ms Falk explained that a 's 55K' decision is a final decision that is made if the alternative dispute resolution or other mechanisms has not resolved the review.[19] Section 55K decisions are decisions that are made by the Information Commissioner and are non-delegable, and therefore must be made by Ms Falk.[20]

2.19 As noted in chapter 1, Dr James Popple resigned as FOI Commissioner in December 2014 and Professor John McMillan resigned as Information Commissioner in June 2015. Since this time, the OAIC has operated with one individual performing the functions of all three Commissioners. According to the table, the three periods which recorded the highest number of section 55K decisions being completed, were in 2014–15 (128 decisions), 2017–18 (123 decisions) and 2016–17 (104 decisions).

2.20 The committee notes that during all three periods, the OAIC was operating with less than three Commissioners. Based on the figures provided at row 3 of table 1, it is difficult to conclude that the effective operation of OAIC has suffered, due to having one individual performing the roles of three Commissioners.

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16 Dr David Solomon AM, Director, Accountability Round Table, *Committee Hansard (Proof),* 16 November 2018, p. 5.

17 Attorney-General's Department, *Submission 3,* p. 3. See also Office of the Australian Information Commissioner, *Submission 6,* p. 11.

18 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof),* 16 November 2018, p. 34.

19 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof),* 16 November 2018, p. 35.

20 Office of the Australian Information Commissioner, *Submission 6,* p. 13.

Legal qualifications

2.21 Most submissions were supportive of the requirement for the Privacy Commissioner and Information Commissioner to hold appropriate legal qualifications when reviewing FOI decisions, and raised concerns that the previous Information Commissioner did not hold such qualifications.[21] For example, the Law Institute of Victoria stated:

> The [Law Institute of Victoria] believes that the FOI Commissioner should always have the appropriate legal qualifications to engage in the complex legal decision-making required to perform the functions of the FOI Commissioner. The functions of the FOI Commissioner should not be performed by another statutory officer in order to avoid the requirement that the FOI Commissioner must have appropriate legal qualifications.
>
> The [Law Institute of Victoria] is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications.[22]

2.22 Ms McLeod provided some background as to why it was considered necessary for the FOI Commissioner to hold legal qualifications:

> I understand the intention in introducing those qualification requirements was to assist in the review process for claims of exemption, so that there was a person with understanding, or the qualifications to understand, the law and its application. So let's just take an area where there are frequent claims of exemptions, like national security, or perhaps public interest immunity, legal professional privilege: they're things that require the person viewing the exemptions to understand how the law works, what the law is and how the law is applied in practice, and to be abreast of developments and authority on those matters. It would appear logical that, even with a very experienced public servant acting in the role, you would need to have that capacity and that ability.[23]

2.23 However, the department did not support this view noting that '[t]here is no evidence that a lack of legal qualifications hindered Mr Pilgrim's effectiveness in making these decisions.'[24] The department explained why it considered the need for the FOI Commissioner to hold legal qualifications unnecessary:

> [Information Commissioner] reviews are intended to be a 'simple, practical and cost efficient method of external merit review'. This is consistent with the objects of the FOI Act which is to facilitate public access to information promptly and at the lowest reasonable cost. Requiring the reviewer to have legal qualifications does not align with the informality intended in the

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21 Law Institute of Victoria, *Submission 1,* p. 2; Accountability Round Table, *Submission 2,* p. 6 and Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 9.

22 Law Institute of Victoria, *Submission 1,* p. 2.

23 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof),* 16 November 2018, p. 6.

24 Attorney-General's Department, *Submission 3,* p. 2.

> review process. Furthermore, the effective operation of the OAIC should not be dependent on a statutory officer holding legal qualifications, as that capability should be resident within the staff of that office as it is with every other agency.[25]

2.24 At the hearing, the department expanded on this point, noting that it is common practice for statutory office holders to draw on the expertise of its staff:

> We have statutory office holders all around the Commonwealth who aren't lawyers making decisions that have legal impacts. They do so on the basis that they get advice from their own staff or, if necessary, they get legal advice to support those decisions. In general, that doesn't pose any particular problems. Naturally, we put lawyers in charge of courts because they're making final determinations of the legal rights as between various parties, and that's entirely appropriate. But, in terms of general administration of government, it's rare that you absolutely need a lawyer to make a decision. You just need somebody who is capable of taking into account all the relevant factors, which may include legal factors.[26]

Freedom of Information Act 1982

Encouraging a culture of pro-disclosure

2.25 At the hearing, witnesses expressed concern that the current culture within agencies and government does not encourage the disclosure of information, which was the intention of the FOI Act.

2.26 The Explanatory Memorandum outlines the purpose of the bill:

> These amendments are designed to significantly improve the effectiveness of Australia's freedom of information (FOI) laws. Freedom of information provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.
>
> These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.[27]

2.27 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan commented that the purpose of the FOI legislation is to 'encourage transparency and accountability in government' through the right of citizens to access government documents.[28] Ms Karen Middleton, Reporter for the Saturday Paper explained:

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25 Attorney-General's Department, *Submission 3,* p. 2.

26 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof),* 16 November 2018, p. 31.

27 Explanatory Memorandum, p. 1

28 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 2.

> The FOI system is one commitment to the public's right to know. It is a concern if the system gives the veneer of transparency and the veneer of accessibility but the process itself is used as a means to block access.[29]

2.28 In relation to the need for a change in culture, Dr Maria O'Sullivan stated:

> I feel that, although this has been done in the legislation, there hasn't been sufficient change in the culture of decision-making, particularly in certain agencies… [T]here really needs to be more of an emphasis on open government, and disclosure of information absolutely has to be the starting point of any FOI decision.[30]

2.29 Mr Michael McKinnon, Journalist and FOI Editor for the Australian Broadcasting Corporation stated:

> I can't remember the act working as badly as it does at the moment. Delays, wilful and wrongful exemption claims and a flawed appeals process mean that it's very difficult for journalists to do our job, which is to inform the Australian public accurately and fairly on what governments are doing.[31]

2.30 Mr McKinnon explained the importance of FOI for journalism and accurate reporting:

> In the era of so-called fake news, FOI allows us to report accurately and fairly on the government's own documents. Whereby politics can often be a debate between 'he said, she said', it's about where the ultimate truth lies. We can publish documents that are the government's. … FOI is crucial to what journalists do, because, rather than appealing to the bias or slant on any given issue because of any take or how the reporting occurs, we can simply report accurately and fairly on what the government's own documents say, and the public are in the delightful position of seeing the truth.[32]

2.31 Ms McLeod argued for the need for a 'push scheme' that is 'weighted in favour of disclosure and not endlessly chasing departments to disclose information'.[33]

2.32 Ms Falk explained the action that the OAIC is taking to promote a 'push scheme' model:

> 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,

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29 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

30 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 18.

31 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 9.

32 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 10.

33 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 5.

> 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.[34]

Publishing information within 10 to 14 days

2.33 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 to 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public:

> This provision addresses the frequent practice of agencies discouraging journalists from using freedom of information by denying any measure of exclusivity to information that may have been only released after long delays and payment of substantial fees. This subsection will give applicants the opportunity to examine released information before it is released to the public in general.[35]

2.34 At the hearing, the committee heard from journalists, who expressed their support for this provision. Mr McKinnon explained the importance of this provision, particularly to journalists:

> The reason we need 10 days is we get large lumps of information that are released only because they're in the public interest. You've won the public interest battle as soon as those documents have been released, because that's why they're released. What we would like to do, as journalists, is then research the documents appropriately, contact experts in the field, look for other documentation, even talk to politicians about it, and then produce a well-researched, concise, accurate and fair publication. We don't get that opportunity, because there are agencies that will release on the same day. I have had FOI documents coming back to me, and they have been given to other journalists by politicians in order to discourage us from doing FOIs.[36]

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34 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

35 Explanatory Memorandum, p. 4.

36 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 12.

2.35 Ms Middleton agreed, suggesting that 'the 10 days should be a minimum.... It disadvantages anyone doing longer term investigative work to have a short time frame.'[37]

2.36 However, the department confirmed that the FOI Guidelines[38] issued by the Information Commissioner already acknowledges how same day publication may adversely affect journalists.[39] Relevantly, the FOI Guidelines state:

> A contested issue in the operation of the FOI Act is that of 'same day publication (that is, publication of information on the disclosure log within 24 hours of when it is provided to the FOI applicant). With an eye to lessening dispute about this issue, an agency or minister may consider the following issues when choosing the date of publication in an individual case:
>
> …
>
> - A practice of same day publication, if widely adopted or practised across government, may discourage journalists from using the FOI Act. This may work against the objects of the FOI Act by discouraging FOI requests from a particular section of the community who are experienced in accessing government information and making it available to the community.[40]

2.37 The department explained why it was preferable that this issue be dealt with in the Guidelines rather than through legislation:

> The department considers that dealing with these matters through the FOI Guidelines provides the appropriate degree of flexibility to ensure agencies and Ministers can consider disclosure log publication timing on a case-by-case basis. This will ensure that disclosure log publication timing decisions strike the right balance between the objectives of the FOI Act in promoting access to Government information with the particular interests of journalists or others in receiving exclusive access to documents.[41]

2.38 The OAIC noted that the issue of the timing of the publication of documents was considered by the Hawke Report.[42] The Hawke Report recommended that 'there should be a period of five working days before documents released to an applicant are

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37 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 13.

38 Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, May 2018.

39 Attorney-General's Department, *Submission 3*, p. 4.

40 Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, May 2018, para 14.27.

41 Attorney-General's Department, *Submission 3*, p. 4.

42 Dr Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 2013.

published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.'[43]

2.39 More broadly, the department noted that the proposed provision, as currently drafted, would apply to all applicants and not merely journalists. Consequently, the department argued that the provision could 'frustrate the policy objective of the FOI Act's disclosure log provisions of facilitating broader release of information released to FOI applicants,' as it could result in the slower release of information.[44]

Consistent application of exemptions

2.40 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews, by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review. The Explantory Memorandum explains the basis for the proposed amendment:

> This section seeks to prevent agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision making, so that they can't change the basis for exemptions half way through a review. In effect, this frequent practice allows agencies and ministers to remake decisions half way through a review, something not normally permitted in merits review processes run in superior jurisdictions and never intended under the FOI Act.[45]

2.41 Most submissions opposed the bill's proposed requirement of requiring a consistent application of exemptions during Information Commissioner reviews. The OAIC explained that the current review process conducted by the Information Commissioner supports its merits review function:

> In an [Information Commissioner] review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.
>
> When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or

43 Office of the Australian Information Commissioner, *Submission 6*, p. 12.

44 Attorney-General's Department, *Submission 3*, p. 3.

45 Explanatory Memorandum, p. 5.

> preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted.[46]

2.42 Similarily, the department, Transparency International Australia and the Law Institute of Victoria agreed that the ability to raise additional exemptions ensures the FOI system remains, as the Law Institute of Victoria states, a 'pure form of merits review'.[47] Additionally, Ms Elisa Hesling, representative of the Law Institute of Victoria, raised the following issue with the proposed provision:

> There is the potential for locking someone into claiming an exemption—that then may require an organisation, an agency, to only consider that particular point and therefore not look further outside the field, which would be disadvantageous to justice in any event.[48]

2.43 The Department of Home Affairs also raised concerns that to limit agencies' use of exemptions during an Information Commissioner review would 'diminish the quality of the review process and limit the development of case law.'[49]

2.44 In expressing its opposition to the proposed provision, the Law Institute of Victoria provided the following explanation:

- Not permitting agencies to raise additional exemptions may be contrary to their statutory and ethical duty to properly and fully assist the Information Commissioner during IC reviews.
- If additional exemptions are raised by agencies, that does not mean that the Information Commissioner necessarily needs to agree that they apply; it just means that they ought to properly be considered if they have been appropriately raised.
- If additional exemptions were properly available and agencies were precluded from raising them at IC review just because they were not originally raised by the decision-making agency at first instance, that may have the unintended consequences of more agencies seeking review of Information Commissioner decisions from the AAT – a pure merits review body.
- The effectiveness of the FOI process is enhanced by promoting good communication between agencies and applicants, and formality and technicality in clarifying the documents sought in the FOI request and other aspects of the FOI process. Proposed section 55EA may result in a heightened risk that agencies would take a more rigid approach to drafting statements of reasons by looking for any conceivable exemption claim and including it at the outset, giving the perception that agencies may be seeking to obstruct access to information.

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46 Office of the Australian Information Commissioner, *Submission 6*, p. 13.

47 Law Institute of Victoria, *Submission 1*, p. 3. See also Attorney-General's Department, *Submission 3*, pp. 4–5 and Transparency International Australia, *Submission 8*, p. 4.

48 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 3.

49 Department of Home Affairs, *Submission 5*, p. 3.

- If additional exemptions continue to be permitted to be raised by agencies, and if the 120 day time limit for IC reviews is put in place as proposed, the Information Commissioner may be more likely to make an assessment that consideration of the matter, including the additional exemptions, will take the matter beyond 120 days. This will increase the ability of FOI applicants to request that the matter be transferred to the AAT free of charge.[50]

2.45 At the hearing, the Law Institute of Victoria elaborated that by allowing agencies to reconsider exemptions, there may be situations where 'a government body decides that, no, the exemptions don't apply at all and decides to disclose the documents.'[51]

2.46 As an alternative to the proposed amendment, Ms McLeod and Mr Peter Timmins provided the following drafting alternative, with suggested timeframes:

> Where an application for review is lodged:
>
> a) the OAIC is required to notify the agency or minister within (10) days;
>
> b) the agency is required to respond in writing to provide the OAIC within (14) days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant; and
>
> c) the OAIC review function is to affirm, vary or set aside the decision based on material provided to the applicant in the notice of decision and to the OAIC within 14 days of lodgement of the application.[52]

Referral to the Administrative Appeals Tribunal

Referral where review will take more than 120 days to finalise

2.47 New sections 55JA would require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to tranfer their Information Commissioner review to the Administrative Appeals Tribunal (AAT), at no charge to the applicant.

2.48 The OAIC explained that the current process provides sufficient flexibility to allow matters to proceed to the AAT prior to an Information Commissioner review decision being made.[53] Under section 54W(b) of the FOI Act, the Information Commissioner can decline to undertake a review if they believe that the AAT is better placed to consider the review.[54] The OAIC provided the following

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50 Law Institute of Victoria, *Submission 1*, p. 3.

51 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof),* 16 November 2018, p. 3.

52 Ms Fiona McLeod, answers to questions on notice, 16 November 2018 (received 22 November 2018).

53 Office of the Australian Information Commissioner, *Submission 6*, p. 14.

54 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

examples of when the Information Commissioner may determine that it is desirable for the AAT to consider a matter instead of the Information Commissioner:

- the [Information Commissioner] review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier [Information Commissioner] review decisions and AAT decisions
- [Information Commissioner] review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the [Information Commissioner] review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.[55]

2.49 Regarding the application of section 54W(b) of the FOI Act, Mr McKinnon raised concerns that he has sought to have his matter heard by the AAT under section 54 of the FOI Act, but was not able to:

> I've attempted to go to the AAT any number of times, via the Information Commissioner, because I argue, quite simply, that it would be so much quicker, and I'm not allowed to go to the AAT via the Information Commissioner, under section 54. I don't know what the reasons are for not allowing me to go, but I want access to a fair means of appeal on FOI.[56]

2.50 Submitters and witnesses were generally supportive of this provision. The Law Institute of Victoria expressed its support for 'measures which will contribute to addressing substantial delays in the [Information Commissioner] review process for FOI decisions.'[57]

2.51 The Accountability Round Table agreed that applicants' should be informed if their Information Commissioner reivew would take in excess of 120 days for a decision. However, it also noted that applicants 'would be wise to determine whether the [AAT] is likely to hear an application for documentary access more quickly.'[58]

2.52 OpenAustralia Foundation stated that it did not support the provision as it considered the timeframe too long:

> The applicant has probably gone through a 30 day initial, 30 day internal review, maybe some consultation, even where the authority is straightforward in their dealings. It's possible for the request to be outstanding for 60+ days when the matter gets to the Information Commissioner (IC)—The IC should be sufficiently funded to be able to

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55 Office of the Australian Information Commissioner, *Submission 6,* p. 8.

56 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof),* 16 November 2018, p. 12.

57 Law Institute of Victoria, *Submission 1*, p. 2.

58 Accountability Round Table, *Submission 2,* p. 7.

> make decisions in the normal course of events within 30 days and allow them to be referred to the AAT.[59]

2.53 A number of witnesses were asked what timeframe they considered reasonable to complete an Information Commissioner review. Generally, those witnesses expressed the view that 120 days 'seems a more than adequate time' to complete an Information Commissioner review.[60] As a comparison, Ms Hesling noted that the Victorian legislation requires the Victorian Information Commissioner to make a decision on an FOI review within 30 days of receiving the application.[61] Ms Hesling explained:

> That time can be extended by agreement between the FOI applicant and the commissioner as long as that extension is sought within the initial 30 days of the review. At the end of that time, the commissioner is taken to have made a decision whether or not a decision has actually been made, and that then gives the right to refuse to the Victorian Civil and Administrative Tribunal.[62]

2.54 In answers to questions on notice, Dr Solomon provided the following figures in relation to FOI reviews conducted by the Queensland Information Commissioner:[63]

Table 2: Time taken for Queensland Information Commissioner to finalise an FOI review:

Year	Median days to finalise review	Number of reviews finalised
2015–16	98	407
2016–17	86	413
2017–8	102	595

2.55 In contrast, Ms Falk tabled the following statistics in relation to the time taken for Information Commissioner reviews to be finalised:

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59 OpenAustralian Foundation, *Submission 9,* p. 6.

60 Dr David Solomon AM, Director, Accountability Round Table, *Committee Hansard (Proof),* 16 November 2018, p. 7. See also Dr Maria O'Sullivan, *Committee Hansard (Proof),* 16 November 2018, p. 18.

61 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof),* 16 November 2018, p. 8.

62 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof),* 16 November 2018, p. 8.

63 Dr David Solomon AM, Accountability Round Table, answers to questions on notice, 16 February 2018, (received 16 November 2018).

Table 3: Overview of IC review finalisation times

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
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%)
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%)
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%)
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%)
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%)
TOTAL Finalised	253	419	646	482	454	515	610

2.56 As indicated in table 1, the OAIC received 801 Information Commissioner review applications in 2017–18. The above table shows that, during this period, the OAIC finalised 235 reviews within 120 days. Under the proposed amendment the reviews not finalised by the OAIC within 120 days would be transferred to the AAT (566 reviews).

2.57 The AAT's 2017–18 Annual Report shows that it received 47 lodgements in its FOI division during this period.[64] Based on the 2017–18 figures, if item 12 of the bill was enacted, the AAT's workload within its FOI division would increase from 47 lodgements to 566 lodgements—a 12-fold increase.

2.58 Ms Falk noted her concerns that the provision would 'transfer the issue from one jurisdiction to the other.'[65] On this point, Ms McLeod stated:

> The AAT is another body that is also facing a burgeoning workload and would probably need additional resources to be allocated to take on that extra jurisdiction.[66]

64 Administrative Appeals Tribunal, *Annual Report 2017–18,* p. 28.

65 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof),* 16 November 2018, p. 36.

2.59 In answers to questions on notice, the OAIC explained that '[t]he time to progress each IC review and the time it is formally allocated to a case officer varies from case to case depending on the complexity of the matters involved and the outcome sought by the IC review applicant.'[67] Prior to an application for a review being allocated to a case officer, the OAIC will generally conduct preliminary inquiries with an agency or minister, issue a notice to the agency or minister that an IC review has been commenced and request submissions and key documents.[68] The OAIC confirmed that:

> At 31 October 2018, the time from receipt to formal allocation for those matters not resolved in the early stages is approximately eight and a half months, noting, as set out above, there are many case management activities undertaken prior to formal allocation and the timeframe between the last case management event to allocation to case officer varies.[69]

Automatic referral to the AAT

2.60 The bill would also allow the applicant (at the normal cost), to by-pass a review by the Information Commissioner and apply to the AAT to review an FOI decision. Witnesses generally did not support this provision, noting that it would 'significantly increase the workload of the AAT.'[70]

2.61 The department made the following observation:

> Any significant workload increase for the AAT resulting from the proposed amendments would adversely affect the AAT's ability to finalise matters. This in turn is likely to lead to longer finalisation timeframes and increased backlogs.[71]

2.62 The department also commented that by-passing the Information Commissioner is 'a very big system change' and that it would want to understand the flow-on effects:

> We'd want to think through what that looks like in terms of the AAT load, what it means in terms of potentially decreasing the OAIC's load and what flow-on effects that has in terms of that kind of informal merits-based decision-making.[72]

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66 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof),* 16 November 2018, p. 5.

67 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

68 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

69 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

70 Mr Russell Wilson, Non-Executive Director, Transparency International Australia, *Committee Hansard (Proof),* 16 November 2018, p. 24.

71 Attorney-General's Department, *Submission 3,* p.5.

72 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof),* 16 November 2018, p. 32.

2.63 Additionally, Ms Falk noted that in 2017–18, the AAT's FOI division finalised 65 per cent of matters within 12 months.[73] The committee notes that if the purpose of the provision is to provide the applicant with early resolution of their matter, it is questionable whether the proposed amendment would achieve this objective, particularly if the AAT received a significant increase in the number of lodgements in its FOI division.

Exempting Senators and Members from charges

2.64 Submitters expressed mixed views with respect to the proposal to not impose a charge on Senators and Members where the work generated was under $1000.

2.65 As background, the department explained that agencies and ministers should interpret the 'lowest reasonable cost' objective broadly, in imposing any charges under the FOI Act.[74] Additionally, the department observed that the FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest.[75]

2.66 The OAIC explained that the following principles apply to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act
- Charges should fairly reflect the work involved in providing access to documents on request
- Charges are discretionary and should be justified on a case by case basis
- Agencies should encourage administrative access at no charge, where appropriate
- Agencies should assist applicants to frame FOI requests
- Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information
- A decision to impose a charge should be transparent.[76]

2.67 Regarding the specific provision that Senators and Members be exempt from charges where the work generated totals less than $1000, Ms Middleton made the following observation:

> …senators and members also have other mechanisms to use to access information, like orders of the Senate, asking for questions on notice and

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73 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 36.

74 Office of the Australian Information Commissioner, *Submission 6*, p. 12.

75 Attorney-General's Department, *Submission 3*, p. 4.

76 Office of the Australian Information Commissioner, *Submission 6*, p. 13.

> compelling witnesses to public inquiries. Journalists have fewer avenues, so I would say that, if there's going to be an exemption for members and senators, maybe think about an exemption for media as well because we're, in the end, representing the public.[77]

2.68 Dr O'Sullivan noted that exempting certain people from charges could be 'a slippery slope':[78]

> I was listening to the previous sessions where there was discussion about giving exemptions about payments to journalists, and then of course you run into the problem of: what about individual citizens, and what about civil society? I haven't really turned my mind extensively to this, but I think you need to bear in mind that if you make it free for certain people then you'll have to expand that circle of people. So I would give a note of caution about doing that.[79]

2.69 Mr Wilson made the following observation:

> So the issue to us is more one of looking at the principle of the cost of allowing access to government information and tackling that issue rather than necessarily simply giving this exemption, as it were, for senators and members.[80]

External legal expenses

2.70 The bill proposes to amend the FOI Act to require external legal fees to be reported in agencies' annual reports. Additionally, the bill also proposes to amend the Archives Act to require the National Archives of Australia to include in its annual report the number of applications made to it for access to records in which external legal expenses have been incurred, and provide the particulars of those expenses.

2.71 The OAIC explained that agencies already report their external legal expenses related to FOI, and this data is available online:

> Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed.
>
> Summary details of these costs are published in the OAIC annual reports.

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77 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof),* 16 November 2018, p. 14.

78 Dr Maria O'Sullivan, *Committee Hansard (Proof),* 16 November 2018, p. 20.

79 Dr Maria O'Sullivan, *Committee Hansard (Proof),* 16 November 2018, p. 20.

80 Mr Russell Wilson, Non-Executive Director, Transparency International Australia, *Committee Hansard (Proof),* 16 November 2018, p. 23.

> The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: www.data.gov.au.[81]

2.72 Similarly, the department argued that the provision 'would unnecessary duplicate existing practices around FOI reporting', while also adding an additional regulatory burden on agencies and ministers.[82]

> The department considers that these arrangements, along with additional reporting obligations under the [Legal Services Directions], already achieve the transparency in relation to government activities intended to be achieved through this provision. This proposal would simply create additional regulatory burdens on agencies and Ministers to achieve ends which are already achieved through current reporting arrangements.[83]

2.73 In relation to the proposed amendments to the Archives Act, the department explained that the National Archives of Australia's external legal expenditure is already reported publicly on the Archives' website in an aggregated form.[84] Furthermore, the department raised concerns 'about imposing a new reporting obligation applying specifically to the Archives that is inconsistent with whole-of-government arrangements that apply under the [Legal Services Directions].'[85]

Committee view

2.74 The committee is supportive of the broad intent of the bill. That is, 'to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law'[86] and 'to significantly improve the effectiveness of Australia's [FOI] laws.'[87]

2.75 However, underpinning the proposed amendments in the bill, is the contention that the FOI system is experiencing 'chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.'[88] The committee does not agree with this underlying contention.

2.76 Similarly, the committee is of the view that the provisions in the bill do not achieve their stated objectives. The committee's views on the bill's key provisions are set out below.

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81 Office of the Australian Information Commissioner, *Submission 6,* p. 14.

82 Attorney-General's Department, *Submission 3,* p. 6.

83 Attorney-General's Department, *Submission 3,* p. 6.

84 Attorney-General's Department, *Submission 3*, p. 1.

85 Attorney-General's Department, *Submission 3*, p. 2.

86 Explanatory Memorandum, p. 1.

87 Explanatory Memorandum, p. 1.

88 Explanatory Memorandum, p. 1.

Resourcing of the OAIC

2.77 A central claim made during this inquiry was that the OAIC has been under-resourced and consequently overburdened since the government's decision in 2014 to disband the OAIC. The underlying assumption was that this resulted in considerable delays in finalising Information Commissioner reviews.

2.78 The committee acknowledges that funding to the OAIC was reduced in 2014. However, the committee received evidence that the OAIC's funding was largely restored in 2016, with a portion of funding not returned to reflect the streamlined arrangements that had been put in place by the OAIC.[89] Furthermore, the committee notes that when the Information Commissioner and Privacy Commissioner, Ms Angelene Falk, was specifically asked whether additional resourcing would help expedite Information Commissioner reviews, she responded that the OAIC was working effectively, but 'should that change, then that would be something that [she] would bring to the attention of government.'[90]

2.79 The committee notes that the number of Information Commissioner review applications received has increased in the last three financial years. However, the number of Information Commissioner reviews finalised has also increased in this period. According to table 1, in 2017–18, the OAIC finalised 610 Information Commissioner reviews—the second highest number of reviews finalised in a financial year since the OAIC commenced operations. Based on the evidence provided, the committee considers it difficult to conclude that the OAIC is under-resourced.

Requiring the appointment of three separate Commissioners

2.80 In relation to the requirement that three separate Commissioners be appointed, the committee is satisfied that the one-commissioner model is functioning effectively. Additionally, the committee is persuaded by the evidence tabled by Ms Falk, which shows that the three periods which recorded the highest number of section 55K decisions[91] being completed, were during periods when the OAIC was operating with less than three Commissioners. Accordingly, the committee does not consider this provision necessary.

Requiring that Commissioners have legal qualifications

2.81 The committee does not agree that it should be a requirement that Commissioners who review decisions under Part VII of the FOI Act have legal qualifications. The committee shares the view of the department, that it is often not essential for people in senior positions who make decisions that have legal impact to hold legal qualifications, and instead it is common practise for senior officials to draw on the expertise of their staff.

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89 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

90 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof),* 16 November 2018, p. 40.

91 Section 55K are non-delegable decisions made by the Information Commissioner.

Publication of information within 10 to 14 working days

2.82 The committee notes that the current drafting of this provision would apply to all FOI applicants and not merely journalists. Therefore, the committee is mindful that this provision would result in information being released at a slower rate, which would appear to frustrate the objective of the FOI Act and the disclosure log.

2.83 A number of journalists submitted that the government's publication of information released under FOI sooner than 10 days after its release may be detrimental to public interest journalism. The committee acknowledges these concerns. The committee notes that the issue of early release of information provided to a journalist is considered in the FOI Guidelines, which the Hawke review considered to be the preferable way to deal with this issue. The committee agrees that this issue is best dealt with in FOI Guidelines. Nevertheless, the committee is of the view that there may be an opportunity to consider whether the guidance provided could be clarified and strengthened so that the general release of information does not unduly affect journalists who have received information pursuant to the FOI Act.

Consistent application of exemptions

2.84 Most submitters did not support the proposed amendment to prevent agencies from making additional exemption claims during the course of Information Commissioner reviews. The committee is persuaded by the evidence provided by submitters and witnesses that to do so would diminish the quality of the review process, would not align with a pure form of merits review, and would prevent an agency or minister from making a fresh decision that could otherwise be in favour of releasing of information to the applicant. Consequently, the committee does not support this provision.

Referrals to the AAT

2.85 The committee is sympathetic to the intent of this provision—that is, to provide a mechanism for a review of an FOI decision to be finalised in a shorter timeframe. Based on the figures provided by the OAIC, in 2017–18, it received 801 Information Commissioner review applications, finalised 235 reviews (39 per cent) within 120 days, which would result in at least 566 reviews to be transferred to the AAT, pursuant to item 12 of the bill. Noting that the AAT's FOI division received 47 lodgements in 2017–18, the committee shares the concerns of submitters and witnesses that item 12 of the bill may be transferring an issue to a different jurisdiction.

2.86 The committee is concerned that item 13 of the bill, which would allow applicants to by-pass an Information Commissioner review and apply to have their matter heard in the AAT, would only exacerbate the issue of managing a significant increase in workload. In light of the AAT's recent finalisation rates of 65 per cent of FOI matters finalised within 12 months, and particularly given the likely increase of FOI matters to be considered by the AAT, it appears questionable whether items 12 and 13 of the bill would result in matters being resolved at a faster rate than is currently the case.

Exempting Senators and Members from charges

2.87 The committee agrees with the views expressed by witnesses, that to exempt Senators and Members of charges where the work generated is under $1000, is a 'slippery slope'[92] whereby other groups may equally claim a public interest to also be exempt from these charges. The FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest. The committee considers that the FOI Act and FOI Guidelines adequately and appropriately deal with charges, including advice that, where appropriate, agencies should encourage access to information at no charge. Consequently, the committee does not support this provision of the bill.

Reporting of external legal expenses

2.88 Having regard to the additional administrative burden placed on agencies, and the evidence that much of the requirement would duplicate existing reporting mechanisms, the committee does not support item 16 of the bill.

2.89 Similarly, the committee considers that item 1 of the bill largely duplicates existing reporting arrangements with respect to legal expenses incurred by the National Archives of Australia, while also creating a reporting obligation that would be inconsistent with whole of government arrangements that apply under the Legal Services Directions.

2.90 For the reasons outlined above, the committee recommends that the Senate not pass the bill.

Recommendation 1

2.91 The committee recommends that the Senate not pass the bill.

Senator the Hon Ian Macdonald

Chair

92 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 20.

Dissenting Report by Senator Rex Patrick

Freedom of information, but only after the Information Commissioner finally gets around to making a review decision

The work of the Committee and its conclusions

1.1 I thank the committee for its efforts in relation to this very important Bill to improve Freedom of Information (FOI) in the federal sphere. I also thank the secretariat for their behind the scenes efforts.

1.2 I dissent from the majority report of Government senators which not only opposes all the reforms proposed in the legislation, but makes absolutely no alternative suggestions as to how Australia's freedom of information laws might be improved.

1.3 The negative approach taken by Government Senators is disappointing but unsurprising. They express support for the 'broad intent' of the Bill while categorically rejecting all reforms. Their stance clearly demonstrates the extent to which the Coalition Government remains opposed to any reform designed to improve public, media and parliamentary scrutiny of public administration.

1.4 Since its early effort to abolish the Office of the Australian Information Commissioner (OAIC), the Government has demonstrated no enthusiasm and indeed outright hostility to scrutiny through FOI.

1.5 It may be that the attitude of these Government senators on the Committee, and indeed their colleagues, will change in the event that following the forthcoming Federal Election they find themselves in Opposition and again wish to apply a measure of scrutiny to executive government. It may be the case that they will then become interested in increased openness and transparency.

Freedom of information

1.6 FOI provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.

1.7 Knowledge will always govern ignorance. FOI is a crucial tool in ensuring those that are governed are indeed properly armed.

> A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly time information, is the currency of power.[1]

1.8 How can there be debate on important public issues without information? Of what value is information if is it only made available well after debate has passed?

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1 Ralph Nadar, Freedom of Information: the Act and the Agencies.

A system in crisis

1.9 The Federal FOI regime is in crisis.

1.10 As a member of this Parliament who has made the frequent recourse to FOI applications in efforts to obtain valuable information about government administration—from exposing deficiencies in major defence contracting involving expenditure of billions of dollars of taxpayers' funds to revealing the flawed nature of the site selection process for Australia's national radioactive waste repository—I have experienced first-hand the chronic bureaucratic delay and obstruction that now characterises Australia's FOI system.

1.11 The witnesses who appeared at the hearing shared my view.

1.12 Ms Hesling of the Law Institute of Victoria and someone with experience and expertise in FOI law said:

> The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage.[2]

1.13 Mr McKinnon of the ABC was blunter in his consideration:

> At the ABC, I'm responsible for not only lodging my own FOIs but also coordinating and advising all journalists at the ABC on FOIs. We're talking about hundreds of applications a year. My experience is that the act is getting progressively worse, and it is substantially worse than in 2010, when, with great hope and glee—not glee, but great hope and optimism—the reforms occurred. But one of the major problems was agencies quickly worked out that the Office of the Australian Information Commissioner was very slow on appeals, and, in fact, does not operate a fair process. It's as simple as that. I had gone to the AAT numerous times prior to 2010. I'm appearing in the tribunal in New South Wales next week. I've done over a hundred appeals to courts and tribunals. The great thing about that is that you get a fair hearing; you can cross-examine witnesses that are making claims in relation to documents. This does not occur with the Office of the Australian Information Commissioner. So you have a toothless tiger trying to control agencies whose view is that the government's political interests are the same as theirs. They will not release documents—the more damning a document is of a government policy, the more embarrassing, the harder they will fight to have a document not released, because they see their job as being synonymous with the government's political interests. It's very sad to say that, but that's the case. So FOI has got progressively worse … I'm at the coalface probably more than most—I suspect more than any other

2 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof),* 16 November 2018, p. 1.

journalist in Australia—and I can see at the coalface how badly FOI is working.[3]

1.14 Karen Middleton of the Saturday Paper succinctly observed that:

It is a concern the system gives the veneer of transparency and the veneer of accessibility, but the process is used as a means to block access.[4]

1.15 The statistics back up the witnesses' experiences. Table 2 (time taken for Queensland Information Commissioner to finalise an FOI review) of the Committee report and Table 3 (Overview of IC review finalisation) show a stark contrast in performance between the Queensland and federal jurisdictions.

1.16 Since 2012 there has been an average of more than 110 reviews that took more than 365 days to complete. No doubt these FOI's were complex to a degree, but likely pretty important from a public debate perspective. In my own experience of FOI, the more embarrassing the information sought, the greater resistance offered by Government to its access.

1.17 It is further noted that there appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.

1.18 Sunlight is said to be the best disinfectant, but the poor FOI culture mentioned at 2.25 of the Committee's report acts as a superbug.

Purpose of the bill

1.19 The purpose of the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 is to introduce measures that address current problems in the regime to make government more transparent and accountable, and assist citizens and the media to access information under the law.

1.20 Reforms proposed in the Bill include:

(a) Requiring the government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.

(b) Allowing FOI review applicants to elect to have their matter bypass the Information Commissioner, who can take more than a year to make a decision on controversial issues, to the Administrative Appeals Tribunal.

(c) Granting an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.

(d) Preventing agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision

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3 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

4 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

making, so that they can't switch exemptions half way through a review as often happens now. This would prevent a current practice that, in effect, allows an agency to remake decision half way through a review; something not normally permitted in merits reviews being run in superior jurisdictions.

(e) Preventing the Information Commissioner from making FOI decisions if he or she does not hold the legal qualifications required of the FOI Commissioner (as happens now).

(f) Preventing agencies from publishing information released under FOI until at least 10 days after the applicant has received his or her copy of the information.

(g) Requiring an agency to publish its external legal expenses for each Information Commission or AAT FOI matter that has concluded. This would apply in relation to agency FOI legal expenses and to expenses incurred by the National Archives in respect of applications made for access to information under the Archives Act 1983.

1.21 This comprehensive array of reforms reflects the practical experience of constituents, journalists, researchers and members of Parliament seeking information under FOI.

Improvements drawn from the committee process

1.22 The benefits of the proposed changes to the law in the Bill are spelt out in my second reading speech. The submissions and testimony from FOI observers and customers give support to most of the changes.

1.23 There were exception to the above statements and I address these now.

Improvements – consistent applications of exemptions by decision maker

1.24 There was almost unanimous opposition to the new Section 55EA that required, in law, the agency or Minister must not seek to rely on any exemptions in a review that were not relied upon in making the IC reviewable decision. On the arguments presented, it is accepted that this provision is not consistent with general principles of review in administrative law, that a merit review is *de novo*.

1.25 Most agreed that a new exemption advanced late in a review is not helpful.

Recommendation 1

1.26 Section 55EA should be removed from the bill.

1.27 Most, however, agreed that a new exemption advanced late in a review is not helpful. Ms McLeod and Mr Peter Timmins of the Accountability Round Table provided, by way of a response to a question on notice, an alternate remedy to the problem. This alternate approach should be adopted with a slight variation in time to afford a Minister or Agency fairness.

Recommendation 2

1.28 The Information Commissioner should incorporate in a practice direction the following:

- **Where an application for review is lodged:**
  - **The Information Commissioner is required to notify the agency or minister within ten days;**
  - **The agency is required to respond in writing to provide the OAIC within 21 days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant.**

Improvements – Exempting Senators and Members from Charges

1.29 The Committee is correct in stating that there were mixed views in relation to the proposal not to charge Senators and Members where work generated was under $1000.

1.30 This provision was based on Regulation 6 the South Australian Freedom of Information (Fees and Charges) Regulations 2003 which allows for a Member of Parliament to apply for access without charge if the fees and charges for the work generated are less than $1000.

1.31 This provision will support greater transparency of public administration through parliamentary scrutiny of agencies and provide the public with information that is published following the release of information to Senators and MPs.

1.32 However, I was drawn to the comments of Mr McKinnon on this matter when he said at hearing:

> It seems to me that any document being released under the act is being released because it's in the public interest to release it. It also says, then, that the government, by keeping it secret up until it is released, has failed in its duty to inform the public. Why any applicant should then have to pay because the government hasn't discharged its duty to inform the public is beyond me. But, certainly, I think politicians have other avenues. In this era of journalism, where budgets are very tight and where there is incredible pressure, because of the internet, on traditional forms of media—which, to my mind, still do the bulk of investigative journalism—there is a very good argument that if we get documents released to us, then there should be no fees or charges. That's because we've actually done a job for the Australian public by taking the time to lodge, find and reveal information that's in the public interest and that would inform the voters of Australia. I come back to the same thing. I think our job is to inform the public so that, when they go

> to the ballot box, they can cast an informed vote about which political party and/or politicians can best serve their interests as Australians.[5]

1.33 Noting Mr McKinnon's role and 'FOI stature' within the ABC, great weight must be given to his remarks.

1.34 I further note that on 30 July 2018 the Hon. Kelly O'Dwyer, the then Minister for Revenue and Financial Services, and Senator Cormann, the Minister for Finance, issued a joint media release announcing a fee exemption for journalists associated with ASIC search fees.[6] Minster O'Dwyer and Minister Cormann stated that 'expanding the group of journalists that will benefit from the exemption from fees will aid public discussion.'[7]

1.35 Exempting journalists, whose role in informing public debate is integral, makes sense in light of the exemption that the Government announced for ASIC search fees. While there were some concerns that this may lead to a 'slippery slope', it is clear that a policy to exempt a class of professionals with a clear justification, as the Government did with ASIC search fees, will not lead to a slippery slope and should be encouraged.

Recommendation 3

1.36 Section 29(5A) should be amended so that journalists are entitled to access to the documents without charge unless the work generated by the application involves charges totalling more than $1,000.

Additional OAIC resourcing

1.37 Whilst not within the scope of the Bill under review, it was clear from the submissions and oral evidence taken that the OAIC is underfunded and that this was having an adverse effect on the ability of Information Commissioner to assist in achieving the objectives of the FOI act, particularly in reference to facilitating and promoting prompt public access to information.

1.38 The Attorney General's Department offered the following explanation:

> As part of the 2014–15 Budget measure there were expected to be savings of $3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of $2m per year was returned to the OAIC budget from those $3.6m of savings. The $1.6m which was not returned reflected streamlined arrangements that had been

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5 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof),* 16 November 2018, pp. 16–17.

6 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, http://kmo.ministers.treasury.gov.au/media-release/091-2018/ (Accessed 30 November 2018).

7 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, http://kmo.ministers.treasury.gov.au/media-release/091-2018/ (Accessed 30 November 2018).

put in place by the OAIC to manage its workload, particularly in the area of FOI.[8] [Emphasis added]

1.39 Sir Humphrey Appleby would be proud.

Recommendation 4

1.40 That the OAIC Commission funding be increased substantially.

The Customer is Always Right

1.41 It is clear that there is dissatisfaction amongst users of the federal FOI scheme. The providers of the service seem to disagree. Unfortunately for the providers of the FOI product, and the Government that acts as the board, the customer is always right.

Recommendation 5

1.42 The bill as amended by recommendations 1 and 3 should be passed by the Senate.

Senator Rex Patrick
Senator for South Australia

8 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

Australian Greens dissenting report

1.1 The Greens acknowledge the extensive work of the Committee in this inquiry, and thanks everyone who made a public submission, or gave evidence at a public hearing.

1.2 Peter Timmins, Interim Convener of the Australian Open Government Partnership Network, noted in his submission to the inquiry (in a private capacity) that there has been no comprehensive review of the *Freedom of Information Act 1982* (FOI Act) since the Australian Law Reform Commission and Administrative Review Council joint reference review in 1994, which tabled its report in ALRC Report 77, in January 1996.[1]

1.3 This is despite hopes that comprehensive review and reform would result from the Government's commitment to the National Action Plan for Open Government, adopted in December 2016, and again in its second National Action Plan for 2018-20.

1.4 Mr Timmins also further noted these failures to review and reform came:

> …despite the fact that a comprehensive review, reform and a complete rewrite of the legislation in plain English, as recommended by Dr Alan Hawke in the 2012-2013 statutory review report, is long overdue and to be preferred to piecemeal changes. Dr Hawke said changes over the years had been "largely developed and inserted into the form and structure of the FOI Act as it was in 1982".[2]

1.5 Instead, amendments to the FOI Act have been ad-hoc over time, including a suite of reforms resulting from the Freedom of Information Amendment (Reform) Act 2010, legislated under Labor Governments, which included the establishment of the Office of the Australian Information Commissioner.

1.6 A subsequent Abbott Liberal Government announced the abolition of the OAIC in the 2014–15 Budget. However, the Freedom of Information Amendment (New Arrangements) Bill 2014 that would facilitate this abolition of the office failed to gain support of the Senate, and ultimately lapsed on prorogation on 17 April 2016. But regardless of the bill's failure, with reduced funding, operations were reduced, and the Canberra office was closed in December 2014.

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1 Mr Peter Timmins, *Submission 7*, p. 1.

2 Mr Peter Timmins, *Submission 7*, p. 1.

1.7 Since 2014, due to reductions in funding, the Accountability Roundtable noted in its submission to the inquiry that:

> …the OAIC has been unable to discharge most of its significant statutory functions and responsibilities – including the operation of the proactive information disclosure system.[3]

Recommendation 1

1.8 That Freedom of Information funding is restored to at least 2013–14 Budget levels plus CPI, along with the additional resources needed to enable the OAIC to discharge its obligations under National Action Plans 1 and 2 (NAP1 and NAP2).

1.9 As noted by the Accountability Roundtable, the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 makes recommendations for amendments to the *Archives Act 1983* (Archives Act) and FOI Act in five distinct areas:

- Overlaps in the functions undertaken by OAIC Commissioners;
- The qualifications required for appointment as Freedom of Information Commissioner;
- Fees and Charges;
- Delays in the completion of FOI reviews by the Information Commissioner;
- Matters having to do with the application of FOI fees and charges.[4]

1.10 Regarding overlaps in the functions undertaken by OAIC Commissioners, the bill would instil three separate Commissioners, as was the original intent of Parliament in 2010, which are:

1. Information Commissioner (lead commissioner)
2. Freedom of Information Commissioner
3. Privacy Commissioner

1.11 Transparency International Australia concluded in its submission to the inquiry that:

> TIA is broadly supportive of the measures in the Bill to the extent that they aim to improve the effectiveness of Australia's FOI laws and ensure open government, transparency and accountability. This support is premised on

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3 Accountability Round Table, *Submission 2,* p. 2.

4 Accountability Round Table, *Submission 2,* p. 5.

> the expectation that the OAIC three independent statutory offices are adequately resourced to undertake their full mandate and respective range of powers.[5]

1.12 In its submission to the inquiry, the Law Institute of Victoria, while raising concerns about possible negative unintended consequences resulting from the bills limiting agencies' ability to rely on exemptions in the Information Commissioner review (IC review) process that were not relied on in the decision, concluded that it is:

> …broadly supportive of measures which aim to improve the effectiveness of Australia's freedom of information (FOI) laws and ensure open government and transparency. The LIV supports the measures in the Bill that seek to ensure that there are three independent statutory officers with appropriate legal qualifications, and measures that seek to respond to delays in the IC review process.[6]

1.13 On the matter of appropriate legal qualifications, the Law Institute of Victoria submitted:

> The LIV is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications … [and that it] supports the proposed measures which require the Information Commissioner and the Privacy Commissioner to have appropriate legal qualifications when reviewing FOI decisions.[7]

1.14 Regarding Fees and Charges, the bill provides a schedule, and provides that Senators and Members Parliament should be free from fees and charges unless the cost of meeting an FOI request exceeds $1000. The Accountability Roundtable submitted:

> In the interests of governmental openness and transparency, and strengthening the capacity of MPs to obtain access to material relevant to their parliamentary work, the ART supports such a recommendation.[8]

1.15 The Bill also grants an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.

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5 Transparency International Australia, *Submission 8,* p. 5.

6 Law Institute of Australia, *Submission 1,* p. 1.

7 Law Institute of Australia, *Submission 1,* p. 2.

8 Accountability Round Table, *Submission 2,* p. 6.

1.16 On this matter of delays in Information Commissioner reviews, the Law Institute of Victoria submitted it:

> …supports measures which will contribute to addressing substantial delays in the IC [Information Commissioner] review process for FOI decisions.[9]

1.17 Echoing the conclusion of OpenAustralia Foundation, who submitted it 'broadly support[s] the intentions of these amendments, as laid out in the explanatory memorandum',[10] the Australian Greens share the views of this and other expert information stakeholders in broadly supporting this bill.

Recommendation 2

1.18 The Australian Greens recommend that the Senate pass this bill.

Senator Nick McKim

Senator for Tasmania

9 Law Institute of Australia, *Submission 1*, p. 2.

10 OpenAustralia Foundation, *Submission 9*, p. 1.

Appendix 1

Submissions

1 Law Institute of Victoria

2 Accountability Round Table

3 Attorney-General's Department

4 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan

5 Department of Home Affairs

6 Office of the Australian Information Commissioner

7 Mr Peter Timmins

8 Transparency International Australia

9 OpenAustralia Foundation

Answers to questions on notice

1 Accountability Round Table - answers to questions taken on notice at the public hearing on 16 November 2018 (received 16 November 2018).

2 Law Institute of Victoria - answers to questions taken on notice at the public hearing on 16 November 2018 (received 26 November 2018).

3 Office of the Australian Information Commissioner - answers to questions taken on notice at the public hearing on 16 November 2018 (received 29 November 2018).

4 Accountability Round Table – answers to questions taken on notice at the public hearing on 16 November 2018 (received 22 November 2018)

Additional information

1 Additional information provided by the Office of the Australian Information Commissioner at the Canberra hearing of 16 November 2018.

2 Additional information provided by the Attorney-General's Department correcting evidence in Hansard (received 26 November 2018).

Appendix 2

Public hearing and witnesses

Friday, 16 November 2018 - Canberra

FALK, Ms Angelene, Australian Information Commissioner and Privacy Commissioner, Office of the Australian Information Commissioner

FREIDIN, Ms Lara, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria

HESLING, Ms Elisa, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria

McKINNON, Mr Michael, Journalist and FOI Editor, Australian Broadcasting Corporation

McLEOD, Ms Fiona, SC, Chair, Accountability Round Table

MIDDLETON, Ms Karen, Reporter, The Saturday Paper

MINIHAN, Mr Colin, Director, Information Law Unit, Attorney-General's Department

NG, Dr Yee-Fui, Private capacity

O'SULLIVAN, Dr Maria, Private capacity

SOLOMON, Dr David, AM, Director, Accountability Round Table

TAYLOR, Mr Josh, Senior Reporter, Buzzfeed Australia

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WILSON, Mr Russell, Non-Executive Director, Transparency International Australia

FOI Statistics from FOI Bill submission – updated 2017-18

The following tables provide a statistical overview of IC review applications received, finalised and the outcome of applications for 2011-18.

Table 1: Overview of IC review applications received and finalised

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews received	456	507	524	373	510	632	801
IC reviews finalised	253	419	646	482	454	515	610
IC reviews where s 55K decision made	25	89	98	128	80	104	123
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%)

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
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%)
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%)
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%)
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%)
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%)
TOTAL Finalised	**253**	**419**	**646**	**482**	**454**	**515**	**610**

Table 3: Overview of IC review outcomes

IC Review Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34	81
s 54R – withdrawn	108	95	111	59	81	115	131
s 54R – withdrawn/conciliated	N/A	20	69	51	78	93	64
s 54W(a) – deemed acceptance of PV/appraisal	N/A	2	27	26	7	0	0
s 54W(a)(i) – misconceived, lacking in substance etc	42	86	170	87	94	66	79
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57	59
s 54W(a)(iii) – lost contact	9	9	0	5	5	3	10
s 54W(b) – refer AAT	22	17	41	61	32	15	16
s 54(c) – failure to comply	N/A	2	0	0	0	0	0
s 55F – set aside by agreement	N/A	0	1	0	2	7	15

s 55F – varied by agreement	2	0	1	2	7	5	27
s 55F – affirmed by agreement	N/A	0	1	2	1	1	0
s 55G – substituted	N/A	7	6	5	16	15	5
s 55K – affirmed by IC	17	58	40	53	39	48	68
s 55K – affirmed by IC following revised decision during IC review	N/A	N/A	8	5	11	17	9
s 55K – set aside by IC	8	28	53	52	22	23	45
s 55K – varied by IC	0	3	5	23	19	16	10
Total	253	419	646	482	454	515	610

Commissioner brief: FOI process review D2020/000765

Key messages

- Following significant year on year increases in the number of IC review applications received by the OAIC since 2014/15, an external consultant, Synergy, was engaged in April 2019 to further explore opportunities for efficiencies in the IC review process.
- Opportunities and improvements identified by Synergy generally fall within 2 categories:
    - utilisation of technological tools to reduce administrative processes
    - streamlining case management and clearance processes.
- Some of the opportunities and improvements identified were already in the process of implementation, while others have now been implemented.
- In the absence of supplementary FOI funding, the ability of the OAIC to keep pace with increases to the review caseload will continue to be challenged.

Critical facts

- There has been a year-on-year increase in the number of IC review applications received by the OAIC since 2014–15.[1] In 2019-20 there was an 15% increase the number of applications received when compared to the same period in 2018-19.
- Synergy conducted preliminary research and preparatory activities, including meetings with the OAIC Deputy Commissioner, Principal Director and FOI Team on 3 and 5 April 2019.
- On 8 April, Synergy facilitated a business planning workshop which sought to:
    - develop the FOI Team's priorities for the next three months;
    - examine the current IC Review business process to identify pressure points and opportunities for improvement; and
    - conduct a high-level assessment of the environmental factors that influence the efficiency and effectiveness of the FOI Team and the IC Review process.
- The three key objectives identified by the FOI team were:
    - (1) Improve IC Review timeliness,
    - (2) 50% of matters allocated as at 1 July 2019 that are 12 months or older, to be finalised within three months, and
    - (3) Work with the Information Commissioner to drive best practice FOI regulatory action across government and to support objectives (1) and (2).

[1] In 2018-19, there was a 16% increase in the number of applications received when compared to the same period in 2017–18. In 2015–16 there was a 37% increase on 2014–15, in 2016–17 a 24% increase and 2017–18 a 27% increase. Between 2014–15 and 2017–18 there was a 115% increase in IC reviews.

- In relation to objective (2), the FOI team achieved 50% of the target, which resulted in 25% of matters that were over 12 months old as at 1 July 2019 being either finalised or progressing to the Executive for clearance/consideration..
- These cases are complex and may not always be resolved informally.
- Opportunities and improvements identified by Synergy generally fall within 2 categories:
    - utilisation of technological tools to reduce administrative processes
    - streamlining case management and clearance processes.
- Opportunities and improvements identified have been or are being implemented.

Possible questions

- ***At the Estimates hearing on 9 April 2019, Deputy Commissioner Hampton noted that she expected the report "back on Friday" (12 April 2019). Has the OAIC received the report?***
  Yes, the OAIC has received a report.
- ***What did Synergy recommend?***
  Synergy's recommended a range of measures to increase the efficiency of the IC review process and to provide a greater focus on the legacy caseload. Some of the opportunities and improvements identified were already in the process of implementation, while others have been, or are now in the process of being, implemented.

- ***Are the OAIC's resources sufficient to undertake IC reviews?***
  We are continuing to increase the rate at which we finalise IC reviews, building on the greater efficiencies achieved in this area in 2017-18 when we finalised 610, 659 in 2018-19 and 829 in 2019-20. However, we acknowledge that this is not keeping pace with the continuing rise incoming work (in 2019-20 1,067 IC reviews were received and 829 were finalised). In the absence of supplementary FOI funding, the ability of the OAIC to keep pace with increases to the review caseload will continue to be challenged.
- ***What other steps has the OAIC taken to improve the efficiency in the IC review process?***

  In November 2019, a realignment of the structure of the FOI Group was implemented to further streamline the processing of IC reviews, enhancing the functions of the intake and early resolution area and focussing on the early identification of systemic issues. The new structure focuses on addressing the consistent and compounded increase in the numbers of IC reviews received without a corresponding increase in staffing levels.

  The realignment is designed to:

- increase the capacity of the Intake and Early Resolution team to resolve incoming IC review applications, to address the increasing allocations times and to allow for more senior capacity to work on finalising reviews early.
- increase the capacity of the Investigations/Compliance team to finalise FOI complaints and progress CIIs, which inform the affected agencies' process: in certain circumstances, this may also reduce the number of IC review applications received by the OAIC.
- allow flexibility in allocating resources across the extension of time, IC reviews – deemed access refusal matters and the FOI complaints functions based on priority and workload.
- allow closer monitoring of issues relating to agencies' compliance with the statutory processing timeframes, which assists current and potential FOI investigations.

As discussed at previous Estimates hearings, we engaged an external consultant, Synergy, to review of the IC review business process in April 2019. Following the Synergy review, the FOI Group identified key objectives to focus on from July to September 2019. The objectives included finalising 50% of allocated IC reviews that were 12 months or older within three months. At 1 July 2019, there were 125 IC reviews on hand that were over 12 months old since lodgement. The FOI Group finalised 48 IC review and progressed 14 IC reviews to Information Commissioner decision under s 55K during July to September 2019. This was 50% of the target of 125 IC reviews.

Please refer to Commissioner Brief: FOI Process Review **(**D2020/000765) for further information on the Synergy review.

In November 2019, the Group undertook further three-month planning in relation to the IC review case load. The FOI team focussed on particular cohorts or types of matters to improve timeliness and efficiency in the IC review process.

The Group is currently implementing other initiatives to improve the efficiency of the IC review process:

- a conferencing pilot for a particular cohort of matters and a particular agency, focused on engagement with parties in relation to a cohort of complex matters with a view to refining the scope of review
- a complex IC reviews pilot. This project encompasses 151 IC reviews from the unallocated reviews queue that involve complex issues and considerations. The project will involve review of each IC review with a view to:
    - engaging with applicants to confirm the scope of the review and where appropriate, providing a verbal preliminary view
    - engaging with respondents and where appropriate, providing a verbal preliminary review and inviting a revised decision under s 55G
    - identifying reviews that are ready to proceed to Commissioner decision under s 55K of the FOI Act.

Other process improvements include:

- Development and promotion of 'smartforms' for agencies to lodge extension of time applications (to support the existing IC review and FOI complaint application forms for applicants). Use of smart forms reduces the time needed to enter data on Resolve and reduces the need for case officers to contact agencies to ask for the information because the forms require certain information to be provided before the form can be lodged.
- Resolve review – we are currently working with developers to improve Resolve workflows. This will assist case officers to more efficiency progress IC reviews, FOI complaints and extension of time applications.
- Developing a procedure direction for applicants – this will clarify the OAIC's procedures for applicants and provide them with guidance about what the OAIC may require during an IC review.
- Batching of decisions – it is more efficient for case officers to focus on particular types of cases (for example, searches or practical refusals) or to focus on particular exemptions (in particular IC reviews involving single exemptions).
- Case categorisation – we have developed a system of categorising IC reviews to assist with identifying complexity and the appropriate review paths, as well as ensuring that cases are appropriately allocated to case officers.

Key dates

- 1 April 2019: Synergy engagement
- 3 and 5 April: Synergy conducted preliminary research and preparatory activities, including meetings with the OAIC Deputy Commissioner and the Principal Director, FOI Team.
- 8 April 2019: Business planning workshop and focus groups were delivered on-site at OAIC's premises at 175 Pitt Street, Sydney.

Document history

Updated by	Reason	Approved by	Date
Nikki Edwards	October 2020 Senate Estimates		

Commissioner brief: FOI Act Reforms D2020/000764

Key messages

- The review of charges under the FOI Act published in 2012, and the Hawke Report into the FOI Act in 2013, identified a number of areas in which changes could be made to the FOI Act which will increase its ability to delivery transparency and accountability for the Australian public.
- The FOI Act provides a sound basis for providing access to government held information to the Australian public through formal FOI requests, the disclosure log and the Information Publication Scheme. s 47E(d) [redacted]

s 47E(d) [redacted]

Critical facts

- **Charges review:** On 7 October 2011, the Minister for Privacy and Freedom of Information, the Hon Brendon O'Connor, issued terms of reference for a review of charges under the FOI Act. The Australian Information Commissioner issued a discussion paper on 31 October 2011, and received 23 submissions from agencies and applicants.

  The review report was published in February 2012. The review made ten recommendations for a new charges framework. These recommendations include encouraging administrative access; introducing discretionary FOI application fees to encourage people to use an administrative access scheme before resorting to the FOI Act; no FOI processing charge for first five hours and a flat $50 fee for work between five and 10 hours; 40 hour ceiling on processing time (including for personal requests which are not subject to charges); specific access charges for activities such as supervising inspection; a reduction in charges for delayed processing; introduction of an IC review fee if the applicant does not first seek internal review, and indexation of all FOI fees and charges to the CPI.

The Executive Summary and Recommendations are at **Attachment A**. The OAIC's current position in relation to the recommendations made by the Information Commissioner in the Charges Review is at **Attachment B**.

- **Hawke review:** On 29 October 2012, the Attorney-General issued terms of reference for a review of the operation of the FOI and AIC Acts under s 93B of the FOI Act and s 33 of the AIC Act. On 1 July 2013, after considering 81 submissions, Dr Hawke finalised his 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*'.

  The Hawke Report concluded that the FOI reforms of 2010 were operating as intended and were generally well received, however many of the concerns raised in submissions were not directly addressed in the reform packages. The Hawke Report made 40 recommendations against seven broad themes; the FOI Act framework, the OAIC's structure and processes, the two-tier system of merits review, exemptions, FOI Act coverage, charges, regulatory and administrative burden. Dr Hawke also published a 'FOI Better Practice Guide' for Australian government agencies and practitioners.

  The Executive Summary, including the 40 recommendations, is at **Attachment C**. The OAIC's submissions to the Hawke Report are at **Attachment D**.

- **Belcher Red Tape Review:** The 'Independent Review of Whole-of-Government Internal Regulation' (the Belcher Red Tape Review) was published in August 2015. This recommended that entities examine their FOI practices to ensure they impose the least burdensome mechanisms for responding to FOI requests and consider more active publication of information to decrease FOI requests. It also recommended that AGD consider whether the IPS could be consolidated with other government initiatives for enhancing public accessibility of government information, such as the digital transformation agenda.

  To reduce the administrative burden on entities, AGD should reduce the frequency of reporting FOI matters from quarterly to annually and seek the Government's agreement to prioritise implementation of the Hawke report to reduce the regulatory burden and improve the operation of the FOI Act and consider issues raised about exemptions and the scope of access to information under the FOI Act to enhance its operation.

- **ANAO Review:** On 19 September 2017, the Australian National Audit Office published a report on *Administration of the Freedom of Information Act 1982*. This report reviewed the role of the OAIC and recommended that we develop an approach to verifying the quality of data input and develop and publish a statement of our regulatory approach. The audit also looked at how three entities (the Department of Veterans' Affairs, the Department of Social Services and the Attorney-General's Department) processed FOI requests. The report investigated the assistance provided to applicants, whether agencies conducted reasonable searches for documents, timeliness of decision making, the application of exemptions and whether internal reviews were conducted appropriately.

- **FOI Amendment Bill:** On 22 August 2018, Senator Rex Patrick introduced the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* into the Senate. It was referred to Committee, which held a public hearing in Canberra on 16 November 2018. Nine submissions were received. The Committee issued its report on 30 November 2018 which did not recommend that the Senate pass the Bill. The Bill proposed the following amendments to the FOI Act:
  - require government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.
  - add a new category of decision that may be appealed to the AAT and allow applicants to apply to the AAT for review of any IC reviewable decision without first going through the Information Commissioner review process. An applicant taking this option would pay the usual AAT application fee.
  - require the Information Commissioner to notify an IC review applicant if is likely that more than 120 days will elapse before a decision under s 55K will be made, or that 120 days has elapsed since the IC review application was made. The Information Commissioner's notice must state that an application to transfer the IC review application to the AAT may be made to the OAIC.
  - require the consistent application of exemptions by decision makers in the context during IC review.
  - require the Information Commissioner and Privacy Commissioner to hold legal qualifications if making IC review decisions.
  - require publication of documents on a disclosure log between 10 and 14 working days after access is given.
  - require publication of all external legal expenses incurred in relation to FOI matters.
  - Senators and Members of the House of Representatives are not subject to FOI charges unless the work generated by an access application involves charges totalling more than $1000.

  There was a brief second reading debate of the bill on 31 August 2020, during which both Liberal and Labour Senators spoke against it.

- **Thodey Review of the APS:** In May 2018 the government commissioned an independent panel to review the Australian Public Service. The committee received more than 700 submissions. On 19 March 2019, a draft report, 'APS Review: Priorities for change', was published. One key priority identified was 'an open APS, accountable for sharing information and engaging widely' which draws on Australia's Open Government National Action plan and refers to New Zealand's decision to proactively release some traditionally confidential material.

  On 13 December 2019, the *Independent Review of the Australian Public Service* was published. Relevantly, the review made the following recommendation:

  > Government to commission a review of privacy, FOI and record-keeping arrangements to ensure that they are fit for the digital age, by:

- supporting greater transparency and disclosure, simpler administration and faster decisions, while protecting personal data and other information, and
- exempting material prepared to inform deliberative processes of government from release under FOI.

The government did not agree to implement this recommendation. Government noted the recommendation, saying the government's principal focus is to ensure agencies effectively implement current requirements, addressing practical problems where required and that further reform would be considered separately to the Government's response to the APS Review.

- **Domestic and internal enforcement mechanisms:** A domestic and international comparison reveals the following legislative measures to address non-compliance by agencies following the exercise of enforcement powers by the regulator in reviewing FOI decisions:
  - reports to the Prime Minister/House of Representatives (New Zealand)
  - judicial review proceedings (New Zealand)
  - contempt of court proceedings (United Kingdom), and
  - summary offence proceedings with a maximum penalty of a $1,000 fine (Canada).

  A table setting out the relevant jurisdiction, legislation and enforcement mechanism is at **Attachment E**.

Possible questions

- ***Is the FOI Act working to achieve transparency and accountability in government?***

  The FOI Act provides a sound basis for providing access to government held information to the Australian public, through formal FOI requests, the disclosure log and the Information Publication Scheme. s 47E(d) [redacted]

- ***What are your suggestions for improvement to the FOI Act?***

s 47E(d) [redacted]

s 47E(d)

[redacted]

- ***The media has reported that the Australian government is becoming more secretive. What are you doing to improve transparency and accountability in government?***

  I continue to make IC review decisions which provide guidance to Australian Government agencies. We continue to update the FOI Guidelines. We are reviewing agency compliance with their disclosure log obligations. We completed a review of agency compliance with their IPS obligations in June 2019.

- ***What are your thoughts on the recommendation made by the Thodey review of the APS that material prepared to inform the deliberative processes of government should be exempt from release under the FOI Act?***

  The deliberative processes conditional exemption in s 47C of the FOI Act protects information which relates to the opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberations that have taken place for the deliberative processes of an agency or a minister or the government. It does not apply to 'purely factual material'. In my view this exemption, which is subject to a public interest test, adequately protects the ability of government officials to develop policy, debate issues, and to brief ministers and government where appropriate.

  The rights and interests of the Australian public would be significantly impacted if the deliberative processes of government are not subject to an overriding public interest test. It could undermine the objects of the FOI Act, which include that Australia's representative democracy is enhanced by increasing public participation in government processes with a view to promoting better informed decision making and increasing scrutiny, discussion, comment and review of the government's activities.

- ***Do you consider the FOI Act needs to be amended so that the FOI Act continues to apply when a Minister changes?***

  The FOI Act gives a right of access to an 'official document of a minister'. Unless documents are required to be retained as National Archives, General Records Authority No. 38 provides they can be destroyed when the exiting Minister ceases to hold a ministerial post. If the documents are retained as National Archives, they will not be able to be accessed for 20 years - until the open access period commences.

s 47E(d)

[redacted]

s 47E(d)

[redacted]

Key dates

- February 2012 – Australian Information Commissioner issues report into charges under the FOI Act.
- 22 May 2013 – Australia announces decision to join the Open Government Partnership.
- 1 July 2013 –Hawke Report into the operation of the FOI Act.
- August 2015 – Belcher red tape review published.
- 19 September 2017 – Australian National Audit Office publishes report '*Administration of the Freedom of Information Act 1982'*.
- 22 August 2018 – Senator Rex Patrick introduced *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* into the Senate.
- 13 December 2019 – Thodey review of Public Service and the government's response published.
- 31 August 2020 – Second reading debate of *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018*, during which both Liberal and Labour Senators spoke against it.

Document history

Updated by	Reason	Approved by	Date
Nikki Edwards	Senate Estimates October 2020	Raewyn Harlock	29.9.2020

Attachment A

Review of charges under the Freedom of Information Act 1982

Executive summary and recommendations

Background to this inquiry

The Freedom of Information Act 1982 (FOI Act), upon commencement in 1982, authorised agencies and ministers to impose charges for providing access to documents. The type and scale of charges were set out in the Freedom of Information (Charges) Regulations 1982 (Charges Regulations). In deciding on a charge an agency is to observe the stated objective of the FOI Act to facilitate public access to government information promptly and at the lowest reasonable cost (s 3(4)).

Changes have been made only four times to the charges provisions. The first change occurred in 1985 when an FOI application fee was introduced. Next, in 1986 a charge for decision making was introduced, and the current scale of charges was set. The third change was in 1991, when a cap was imposed on the charge that could be levied for a request for personal information. The most recent changes in 2010 were part of an extensive reform of the FOI Act, and were of two kinds: □application fees were removed from FOI access requests, applications for internal review, and requests to amend or annotate personal records □FOI charges were removed from access requests for personal information, for the first five hours of decision making time for other requests, and where an agency fails to notify a decision on a request within the prescribed processing period.

At the time of introducing these recent substantial reforms into the Parliament, the Government foreshadowed that it would ask the Australian Information Commissioner to review the charges regime within a year of the 2010 reforms commencing. This review commenced in October 2011, and involved publication of a discussion paper, consultation with the public and Australian Government agencies and advisory committees, and consideration of written submissions.

Main issues raised in inquiry

Issues that were highlighted by agencies in submissions and during consultations included:

- the suitability of the charges scale, which has not altered since 1986
- the need to simplify the charges framework
- the useful role that charges play in initiating a discussion with applicants about narrowing and refining the scope of broad requests, and the difficulties agencies face in using s 24AB of the FOI Act (the 'practical refusal' mechanism) to achieve the same effect
- the problem of large and complex applications from specific categories of applicants who use the FOI Act rather than rely upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)
- the need for further guidance from the OAIC regarding the application of the FOI Act provisions for waiving and reducing charges, particularly in assessing an applicant's claim of financial hardship or that disclosure would be in the public interest.

Applicants and members of the public, by contrast, emphasised the importance of:

- minimising cost barriers to the exercise of the democratic right of access conferred by the FOI Act
- ensuring that charges do not discriminate against economically disadvantaged applicants
- preventing the introduction of a full cost-recovery principle for FOI charging.

Various proposals for reform were made, including:

- simplifying the charges scale by combining some existing charges into a single hourly processing charge
- introducing a graduated charging scale under which the charge increases based on the time an agency spends in processing a request
- prescribing a ceiling on the amount of time an agency is required to spend on processing a request
- charging according to the amount of information released
- charging according to the category of applicant
- imposing an FOI application fee and abolishing all other processing charges.

Guiding principles to underpin a new charges framework

Fees and charges play an important role in the FOI scheme. It is appropriate that applicants can be required in some instances to contribute to the substantial cost to government of meeting individual document requests. Charges also play a role in balancing demand, by focusing attention on the scope of requests and regulating those that are complex or voluminous and burdensome to process.

On the other hand, full cost-recovery would be incompatible with the objects of the FOI Act and would strike unfairly against large sections of the community. This has been accepted during 30 years of the FOI Act, as the reported fees and charges collected by agencies represent only 2.08% of the estimated total cost of administering the FOI Act (1.68% in 2010–11). The FOI reform objective in 2010 was to further reduce the cost to the community of obtaining government information and to promote greater transparency in government.

A balance must be struck, but the current method in the FOI Act and Charges Regulations of striking that balance is inadequate. The charging framework is not easy to administer; charges decisions cause more disagreement between agencies and applicants than seems warranted; in some cases the cost of assessing or collecting a charge is higher than the charge itself; and the scale of charges is outdated and unrealistic.

This report proposes four principles to underpin a new charges framework:

- ***Support of a democratic right***: Freedom of information supports transparent, accountable and responsive government. A substantial part of the cost should be borne by government.
- ***Lowest reasonable cost***: No one should be deterred from requesting government information because of costs, particularly personal information that should be provided free of charge. The scale of charges should be directed more at moderating unmanageable requests.
- ***Uncomplicated administration***: The charges framework should be clear and easy for agencies to administer and applicants to understand. The options open to an applicant to reduce the charges payable should be readily apparent.
- ***Free informal access as a primary avenue***: The legal right of access to documents is important but should supplement other measures adopted by agencies to publish information and make it available upon request.

Recommendations for a new charges framework

Recommendations are made in Part 5 of this report to replace the current charges framework in the FOI Act and Charges Regulations with a new framework that can be summarised as follows:

1. ***Administrative access***: agencies are encouraged to establish administrative access schemes that enable people to request access to information or documents that are open to release under the FOI Act. A

scheme should be set out on an agency's website and explain that information will be provided free of charge (except for reasonable reproduction and postage costs).

2. ***FOI application fees***: to encourage people to use an administrative access scheme prior to using the FOI Act, an agency may in its discretion impose a $50 application fee if a person makes an FOI request without first applying under an administrative access scheme that has been notified on an agency's website. A person who applies under an administrative access scheme and is not satisfied with the outcome or who is not notified of the outcome within 30 days may make an FOI request without paying an application fee. The agency's exercise of the discretion to impose a $50 application fee would not be externally reviewable by the Information Commissioner (IC reviewable), nor subject to waiver on financial hardship or public benefit grounds.
3. ***FOI processing charges***: no FOI processing charge should be payable for the first five hours of processing time (which includes search, retrieval, decision making, redaction and electronic processing). The charge for processing time that exceeds five hours but is less than 10 hours should be a flat rate of $50. The charge for each hour of processing after the first 10 hours should be $30 per hour.
4. ***Ceiling on processing time***: an agency should not be required to process a request that is estimated to take more than 40 hours. The agency must consult with the applicant before making that decision. This ceiling will replace the practical refusal mechanism in ss 24, 24AA and 24AB. An agency decision to impose a 40-hour ceiling would not be IC reviewable, though the agency's 40-hour estimate would be reviewable.
5. ***FOI access charges***: specific access charges should apply for other activities, such as supervising document inspection ($30 per hour), providing information on electronic storage media (actual cost), postage (actual cost), printing ($0.20 per page) and transcription (actual cost).
6. ***Personal information***: there should be no processing charge for providing access to documents that contain an applicant's personal information, but personal information requests should be subject to the 40-hour ceiling applying to other requests.
7. ***Waiver***: the specified grounds on which an applicant can apply for reduction or waiver of an FOI processing or access charge should be financial hardship to the applicant, or that release of the documents would be of special benefit to the public. An agency may waive a charge in full or by 50% or decide not to waive. An agency would also have a discretion not to impose or collect an FOI application fee or processing or access charge; the exercise of that general discretion would not be an IC reviewable decision.
8. ***Reduction for delayed processing***: where an agency fails to notify a decision on a request within the prescribed statutory period, the FOI charge that is otherwise payable should be reduced by 25% if the delay is seven days or less, 50% if more than seven but up to and including 30 days, or 100% for a delay of more than 30 days.
9. ***Review application fees***: there should be no application fee for internal review. Nor should there be an application fee for IC review, if an applicant first applies for internal review and is not satisfied with the decision or is not notified of a decision within 30 days. If an applicant applies directly for IC review when internal review was available, a fee of $100 should be payable. The fee should not be subject to waiver.
10. ***Indexation***: all FOI fees and charges should be adjusted every two years to match any Consumer Price Index change over that period, by rounding the fee or charge to the nearest multiple of $5.

Explanation of the proposed changes

The proposed changes are explained fully in this report. The theme throughout is that applicants and agencies can equally benefit from a new charges framework that is clear, easy to administer and understand, encourages agencies to build an open and responsive culture, and provides a pathway for applicants to frame requests that can be administered promptly and attract little or no processing charge. There are three primary ways for bringing this change about.

The first is by encouraging agencies to develop, and applicants to use, administrative access schemes before resorting to the formal legal processes of the FOI Act. Administrative schemes can play a key role in meeting the objectives of the FOI Act. They can provide quick and informal information release in a way that can reduce the cost both to applicants and agencies. Importantly, they complement and do not detract from the legally enforceable right of access under the FOI Act. In fact, the discussion that occurs between applicants and agencies at the administrative access stage can assist the smooth operation of the FOI Act and bring about targeted and quicker document release if FOI processes are later used.

The second is by introducing a new scale of FOI charges that is clear and straightforward to administer. The new scale will markedly benefit applicants whose requests can be processed in less than 10 hours. Personal information requests will remain free of processing charges. A new ceiling of 40 hours on processing time would replace the 'practical refusal' mechanism in the FOI Act that makes it difficult to decide when a complex or voluminous request imposes an unreasonable administrative burden upon an agency. This will also provide a clear standard for deciding when consultation should occur between an agency and an applicant about revising and narrowing the scope of a request that appears unmanageably large.

The third is by reinforcing the important role that internal review can play in quickly and effectively resolving a disagreement between an applicant and an agency about a document request. Internal review is generally quicker than IC review and enables an agency to take a fresh look at its original decision. An applicant could still apply directly for IC review but would be required to pay an application fee of $100 (subject to some exceptions). This proposal builds on a changing mood within government since the 2010 reforms to attribute greater importance to internal review and to treat it as a valuable step in resolving access requests.

Attachment B

Review of charges under the Freedom of Information Act 1982: Report to the Attorney-General

In 2011 the former Australian Information Commissioner, Professor John McMillan undertook a review of the charges under the FOI Act. Terms of reference for the review were issued by the Minister for Privacy and Freedom of Information, the Hon Brendan O'Connor MP, on 7 October 2011.

In February 2012, the Australian Information Commissioner published a report with recommendations proposing that the current charges framework in the FOI Act and Charges Regulations is replaced with a new framework.

Considering the passage of time and current environment, many of the recommendations proposed in 2012 will need to be reviewed.

The Recommendations are as follows:

Recommendations	For consideration
Recommendation 1 – Administrative access schemes 1.1 Agencies are encouraged to establish administrative access schemes by which persons may request access to information or documents that are open to release under the FOI Act. 1.2 The details of an administrative access scheme should be set out on an agency's website, and explain: • how a person may make a request for information or documents that will be provided free of charge (except for reasonable reproduction and postage costs), and • the interaction of the administrative access scheme with the FOI Act. 1.3 If an agency establishes an administrative access scheme that is notified on its website, a person who makes an FOI request without first seeking the same information under the scheme may be required by the agency to pay an application fee of $50. 1.4 No FOI application fee shall be payable if a person has first applied under an appropriate administrative access scheme. The FOI request may be made either upon receipt of the agency's response to the administrative access request, or after 30 days if no agency response is received.	s 47E(d) [redacted]
Recommendation 2 – FOI processing charges 2.1 The FOI processing charges referred to in 2.3 and 2.4 should apply to all processing activities, including search, retrieval, decision making, redaction and electronic processing. 2.2 No processing charge should be payable for the first five hours of processing time. 2.3 The charge for processing time that exceeds five hours but is ten hours or less should be a flat rate charge of $50. 2.4 The charge for each hour of processing time after the first ten hours should be $30 per hour (or part thereof). 2.5 No processing charge should be payable for providing access to a document that contains the applicant's personal information.	
Recommendation 3 – FOI access charges 3.1 Supervision of an applicant inspecting documents (or hearing or viewing an audio or visual recording) should be charged at $30 per hour. 3.2 Providing information on electronic storage media (such as a disk or USB drive) should be charged at actual cost. 3.3 Postage costs should be charged at actual cost. 3.4 Printing (including photocopying and other printed copying) should be charged at $0.20 per page. 3.5 Transcription should be charged at actual cost.	

s 47E(d)

Recommendation 4 – FOI processing ceiling

4.1 An agency or minister should have a discretion to refuse to process a request for personal or non-personal information that is estimated to take more than 40 hours to process. While the estimate of time would be an IC reviewable decision, an agency decision not to process a request above the 40-hour ceiling would not be reviewable.

4.2 Before making a decision of that kind the agency or minister must advise the applicant of the estimated processing time and take reasonable steps to assist the applicant to revise the request so that it can be processed in 40 hours or less.

4.3 For the purposes of exercising this discretion, an agency or minister may treat two or more requests as a single request, as provided for in s 24(2) of the FOI Act.

4.4 The practical refusal mechanism in ss 24, 24AA and 24AB of the FOI Act should be repealed.

Recommendation 5: Reduction and waiver

5.1 The specified grounds on which an applicant can apply for reduction or waiver of an FOI processing or access charge (but not an FOI application fee) should be:

- that payment of all or part of the charge would cause financial hardship to the applicant, or
- that release of the documents requested by the applicant would be of special benefit to the public.

5.2 The options open to an agency should be to waive the charges in full, by 50% or not at all. The decision would be an IC reviewable decision.

5.3 An agency should also have a general discretion not to impose or collect an FOI application fee or processing or access charge, whether or not the applicant has requested it to do so. The exercise of that discretion should not be an IC reviewable decision.

Recommendation 6 – Reduction beyond statutory timeframe

6.1 Where an agency fails to notify a decision on a request within the statutory timeframe (including any authorised extension) the FOI charge that is otherwise payable by the applicant should be reduced:

- by 25%, if the delay is 7 days or less
- by 50%, if the delay is more than 7 days and up to and including 30 days
- by 100%, if the delay is longer than 30 days.

Recommendation 7 – Internal and IC review fees

7.1 No fee should be payable for an application for internal review.

7.2 No fee should be payable for an application for IC review of an internal review decision or a deemed affirmation on internal review.

7.3 An application fee of $100 should be payable for IC review if an applicant who can apply for internal review has not done so first. The fee of $100 should not be subject to reduction or waiver.

7.4 No fee should be payable for an application for IC review of a decision of a minister, the principal officer of an agency, or a deemed decision of an agency to refuse access to a document or to refuse to amend or annotate a personal record. No fee should also apply to an application for IC review by a third party of a decision to grant access to the FOI applicant.

Recommendation 8 – Indexation

8.1 All FOI fees and charges should be adjusted every two years to match any change over that period in the Consumer Price Index, by rounding the fee or charge to the nearest multiple of $5.00.

Recommendation 9 – Responding to an agency decision

9.1 An applicant should be required to respond within 30 days after receiving a notice under s 29(8), advising of a decision to reject wholly or partly the applicant's contention that a charge should not be reduced or not imposed. The applicant's response should agree to pay the charge, seek internal review of the agency's decision or withdraw the FOI request.

9.2 If an applicant fails to respond within 30 days (or such further period allowed by an agency) the FOI request should be deemed to be withdrawn.

Attachment C

Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010* (Hawke Report) (1 July 2013)

Executive Summary

This Review examined the *Freedom of Information Act 1982* (FOI Act) and *Australian Information Commissioner Act 2010* and the extent to which those Acts continue to provide an effective framework for access to government information. The Terms of Reference are at **Annex A**.

The FOI Act commenced on 1 December 1982. In 2009 and 2010, both the FOI Act and the processing and administrative framework were substantially amended by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009, Freedom of Information Amendment (Reform) Act 2010, Australian Information Commissioner Act 2010,* and *Freedom of Information (Fees and Charges) Regulations 2010* (No. 1).

Submissions from 81 individuals, agencies, and organisations were considered (including confidential submissions) and consultations held with key stakeholders, including government agencies, academics, and public interest groups as part of this Review. Relevant reports by the Australian Law Reform Commission, Australian National Audit Office, Commonwealth Ombudsman, Office of the Australian Information Commissioner (OAIC), and the Senate Standing Committee on Legal and Constitutional Affairs were also taken into account. A list of submissions is at **Annex B**.

Summary of Findings

The Review finds that the reforms have been operating as intended and have been generally well-received.

Many concerns in submissions raised issues not directly addressed by the 2009 and 2010 reform packages.

Administration of FOI represents a significant cost and resource commitment for the Australian Government and its agencies. A key challenge for agencies, and for the OAIC, is to adopt and maintain practices to process FOI requests effectively and efficiently within their resources.

Legislative and administrative changes to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies and the OAIC are recommended. The Review also recommends changes and adjustments to the operation of the exemptions, fees and charges, and coverage of specific agencies. In making these recommendations, the Review focussed on ensuring that the right of access to government information remains as comprehensive as possible.

There are exemptions for certain classes of documents and agencies. The Review believes that these are warranted despite their limiting effect on the release of government information. The most used exemption is the personal privacy exemption, being applied in 58% of cases where exemptions were used, or in 17.3% of FOI requests.

The deliberative processes exemption was applied in 1.5% of requests and the Cabinet documents exemption in 0.5% of requests. This suggests that the use of these two exemptions, contrary to some views, is at a very low level.

Guide to this Report

Chapter One provides background, including previous reviews and reports on Australia's federal FOI and the scope of this Review. It outlines the reforms to the framework as well as a brief description of the FOI process.

Chapter Two discusses the OAIC and examines its structure and processes, including the Advisory Committees. Resourcing and suggestions to alleviate particular issues faced by the OAIC are explored.

Chapter Three addresses the background to and effectiveness of the new two-tier system of merits review. Specific suggestions for improvements made by submissions are considered.

Chapter Four explores reformulation of the FOI Act exemptions. It examines both the principles and practical reasons for and effect of the existing exemptions and the impact of abolishing conclusive certificates.

Chapter Five looks at the specific agencies covered by the FOI Act and those that are exempt. It examines application of the FOI Act to the Parliamentary Departments as well as considering whether the range of documents covered by exemptions makes agency exemptions necessary.

Chapter Six examines the effectiveness of the FOI fees and charges framework and the OAIC's recommendations in its FOI Charges Review.

Chapter Seven considers the FOI regulatory and administrative burden, including discussion of best practice initiatives and recommendations to enhance administration of the FOI Act at an agency level, including time limits and practical refusal mechanisms.
Chapter Eight sets out some conclusions.

Recommendations

Chapter 1: Introduction
Recommendation 1 – Further Comprehensive Review
1(a) The Review recommends that a comprehensive review of the FOI Act be undertaken.
1(b) This review might also consider interaction of the FOI Act with the *Archives Act 1983, Privacy Act 1988* and other related legislation.

Chapter 2: Office of the Australian Information Commissioner (OAIC)
Recommendation 2 – Online Status of FOI Reviews and Complaints
The Review recommends the OAIC consider establishing an online system which enables agencies and applicants involved in a specific FOI review or FOI complaint investigation to monitor progress of the review or complaint.

Chapter 3: Effectiveness of the New Two-Tier System of Review
Recommendation 3 – Delegation of Functions and Powers
The Review recommends that section 25 of the *Australian Information Commissioner Act 2010* be amended to allow for the delegation of functions and powers in relation to review of decisions imposing charges under section 29 of the FOI Act.

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.

Recommendation 5 – Resolution of Applications by Agreement
The Review recommends the FOI Act be amended to make it clear that an agreed outcome finalises an Information Commissioner review and, in these circumstances, a written decision of the Information Commissioner is not required.

Recommendation 6 – Third Party Review Rights
The Review recommends the FOI Act be amended to provide that only the applicant and the respondent are automatically a party to an Information Commissioner review. Any other affected person would be able to apply to be made a party to the review.

Recommendation 7 – Extensions of Time
The Review recommends the FOI Act be amended to:

- 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.

Recommendation 8 – Agreement to Extension of Time Beyond 30 Days
The Review recommends that section 15AA of the FOI Act be amended to provide an agency or minister can extend the period of time beyond an additional 30 working days with the agreement of the applicant.

Recommendation 9 – Extension of Time for Consultation on Cabinet-related Material
9(a) The Review recommends the FOI Act be amended to allow an agency to extend the period of time for notifying a decision on an FOI request by up to 30 working days where consultation with the Department of the Prime Minister and Cabinet on any Cabinet-related material is required.
9(b) The Cabinet Handbook should be revised to accord with this recommendation.

Recommendation 10 – Two-Tier External Review
The Review recommends that the two-tier external review model be re-examined as part of the comprehensive review of the FOI Act.

Chapter 4: Reformulation of the FOI Act Exemptions
Recommendation 11 – Law Enforcement and Public Safety
The Review recommends the exemption for documents affecting the enforcement of law and protection of public safety in section 37 of the FOI Act be revised to include the conduct of surveillance, intelligence gathering and monitoring activities. This revision should also cover the use of FOI as an alternative to discovery in legal proceedings or investigations by regulatory agencies.

Recommendation 12 – Cabinet Documents
The Review recommends the exemption for Cabinet documents be clarified by including definitions of 'consideration' and 'draft of a document'.

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.

Recommendation 14 – Information as to Existence of Documents
The Review recommends that section 25 of the FOI Act be amended to cover the Cabinet exemption.

Chapter 5: Consideration of Specific Agencies Covered by the FOI Act
Recommendation 15 – Parliamentary Departments
The Review recommends the FOI Act be amended to make the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services subject to the FOI Act only in relation to documents of an administrative nature. The FOI Act should also be amended to provide an exclusion for the Parliamentary Librarian.
Recommendation 16 – Exclusion of Australian Crime Commission from the FOI Act
The Review recommends the Australian Crime Commission be excluded from the operation of the FOI Act. Section 7(2A) of the FOI Act should be amended to refer to an 'intelligence agency document' of the Australian Crime Commission.

Recommendation 17 – Review of Agencies Listed in Part I of Schedule 2 to the FOI Act

17(a) The Review recommends the intelligence agencies remain in Part I of Schedule 2 to the FOI Act. The parts of the Department of Defence listed in Division 2 of Part I of Schedule 2 should also remain.

17(b) All other agencies currently in Part I of Schedule 2 should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do this within 12 months, they should be removed.

17(c) The Attorney-General should also consider whether there is a need to include any other agencies in Schedule 2.

Recommendation 18 – Criteria for Assessment of Agencies Exempt in Respect of Particular Documents

The Review recommends the FOI Act contain criteria for assessment of agencies which are exempt from the FOI Act in respect of particular documents.

Recommendation 19 – Review of Agencies Listed in Part II of Schedule 2 to the FOI Act

19(a) The Review recommends Section 47 of the FOI Act be amended to make clear that it applies to documents that contain information about the competitive or commercial activities of agencies.

19(b) All agencies in Part II of Schedule 2 to the FOI Act should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do so, they should be removed from Part II of Schedule 2.

19(c) The Attorney-General should also consider whether there is a need to include any other agencies in Part II of Schedule 2.

Recommendation 20 – Review of Agencies Listed in Schedule 1 to the FOI Act

20(a) The Review recommends Schedule 1 to the FOI Act be amended to repeal the bodies listed, as they no longer exist.

20(b) The Attorney-General should also consider whether there is a need to include any tribunals, authorities or bodies in Schedule 1.

Chapter 6: Fees and Charges

Recommendation 21 – Administrative Access Schemes

21(a) The Review recommends the OAIC consider the development of appropriate guidance and assistance to encourage agencies to develop administrative access schemes.

21(b) While the Review acknowledges the desirability of encouraging the use of administrative access schemes, it does not believe it appropriate for this to be done by reintroduction of application fees for FOI requests.

Recommendation 22 – FOI Processing Charges

22(a) The Review recommends that a flat rate processing charge should apply to all processing activities, including search, retrieval, decision-making, redaction and electronic processing. No charge should be payable for the first five hours of processing time. Processing time that exceeds five hours but is ten hours or less should be charged at a flat rate of $50. The charge for each hour of processing time after the first ten hours should be $30 per hour.

22(b) The current provisions for no processing charges for access to an applicant's personal information and for waiver of charges should continue to apply.

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27(a) The Review recommends that an application fee of $400 apply for a review of an FOI decision for access to non-personal information. This fee would be reduced to $100 in cases of financial hardship.

27(b) If proceedings terminate in a matter favourable to the applicant, a $300 refund would apply. There would be no refund of the reduced fee.

27(c) No fee would apply for an Information Commissioner review of an access grant decision by an affected third party.

27(d) In all other cases, fees would be payable for Information Commissioner review of decisions for access to non-personal information.

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29(b) If an applicant fails to respond within 30 working days (or such further period allowed by an agency) the FOI request should be deemed to be withdrawn.

Chapter 7: Minimising Regulatory Burden on Agencies

Recommendation 30 – Practical Refusal Mechanism

The Review recommends section 24AA(1)(b) of the FOI Act be repealed to make it clear that the practical refusal mechanism can only be used after an applicant has provided information to identify the documents sought.

Recommendation 31 – Time Periods in the FOI Act to be Specified in *Working Days*

31(a) The Review recommends that where appropriate, the FOI Act be amended so that time periods are specified in terms of 'working days' rather than calendar days.

31(b) The timeframe for processing an FOI request (not taking into account any extensions of time) should be 30 working days. Provision should be made to exclude any period in which an agency is closed such as during the 'shut-down' period between Christmas and New Year.

Recommendation 32 – Repeat or Vexatious Requests

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The Review recommends that there should be a period of five working days before documents released to an applicant are published on the disclosure log. However, it considers that it would be better for this to be set out in guidelines rather than in the FOI Act itself and recommends the OAIC consider amending its guidelines accordingly.

Recommendation 38 – Copyright

The Review recommends the Government consider issues concerning the interaction of the FOI Act and the potential impact that publication of third-party material under the FOI Act may have on a copyright owner's revenue or market.

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The Review recommends the FOI Act be amended so that the processing of an FOI request is suspended where the applicant has commenced litigation or there is a specific ongoing law enforcement investigation in progress.

Recommendation 40 – Backup Tapes

The Review recommends the FOI Act be amended so that a search of a backup system is not required, unless the agency or minister searching for the document considers it appropriate to do so.

Recommendations	For consideration
Recommendation 1 – Further Comprehensive Review 1(a) The Review recommends that a comprehensive review of the FOI Act be undertaken. 1(b) This review might also consider interaction of the FOI Act with the *Archives Act 1983, Privacy Act 1988* and other related legislation.	s 47E(d)
Recommendation 2 – Online Status of FOI Reviews and Complaints The Review recommends the OAIC consider establishing an online system which enables agencies and applicants involved in a specific FOI review or FOI complaint investigation to monitor progress of the review or complaint.	
Recommendation 3 – Delegation of Functions and Powers The Review recommends that section 25 of the *Australian Information Commissioner Act 2010* be amended to allow for the delegation of functions and powers in relation to review of decisions imposing charges under section 29 of the FOI Act.	
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.	
Recommendation 5 – Resolution of Applications by Agreement The Review recommends the FOI Act be amended to make it clear that an agreed outcome finalises an Information Commissioner review and, in these circumstances, a written decision of the Information Commissioner is not required.	
Recommendation 6 – Third Party Review Rights The Review recommends the FOI Act be amended to provide that only the applicant and the respondent are automatically a party to an Information Commissioner review. Any other affected person would be able to apply to be made a party to the review.	
Recommendation 7 – Extensions of Time The Review recommends the FOI Act be amended to: • 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.	
Recommendation 8 – Agreement to Extension of Time Beyond 30 Days The Review recommends that section 15AA of the FOI Act be amended to provide an agency or minister can extend the period of time beyond an additional 30 working days with the agreement of the applicant.	
Recommendation 9 – Extension of Time for Consultation on Cabinet-related Material 9(a) The Review recommends the FOI Act be amended to allow an agency to extend the period of time for notifying a decision on an FOI request by up to 30 working days where consultation with the Department of the Prime Minister and Cabinet on any Cabinet-related material is required. 9(b) The Cabinet Handbook should be revised to accord with this recommendation.	
Recommendation 10 – Two-Tier External Review The Review recommends that the two-tier external review model be re-examined as part of the comprehensive review of the FOI Act.	
Recommendation 11 – Law Enforcement and Public Safety The Review recommends the exemption for documents affecting the enforcement of law and protection of public safety in section 37 of the FOI Act be revised to include the conduct of surveillance, intelligence gathering and monitoring activities. This revision should also cover the use of FOI as an alternative to discovery in legal proceedings or investigations by regulatory agencies.	
Recommendation 12 – Cabinet Documents The Review recommends the exemption for Cabinet documents be clarified by including definitions of 'consideration' and 'draft of a document'.	
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.	
Recommendation 14 – Information as to Existence of Documents The Review recommends that section 25 of the FOI Act be amended to cover the Cabinet exemption.	
Recommendation 15 – Parliamentary Departments The Review recommends the FOI Act be amended to make the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services subject to the FOI Act only in relation to documents of an administrative nature. The FOI Act should also be amended to provide an exclusion for the Parliamentary Librarian.	

s 47E(d)

Recommendation 16 – Exclusion of Australian Crime Commission from the FOI Act

The Review recommends the Australian Crime Commission be excluded from the operation of the FOI Act. Section 7(2A) of the FOI Act should be amended to refer to an 'intelligence agency document' of the Australian Crime Commission.

Recommendation 17 – Review of Agencies Listed in Part I of Schedule 2 to the FOI Act

17(a) The Review recommends the intelligence agencies remain in Part I of Schedule 2 to the FOI Act. The parts of the Department of Defence listed in Division 2 of Part I of Schedule 2 should also remain.

17(b) All other agencies currently in Part I of Schedule 2 should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do this within 12 months, they should be removed.

17(c) The Attorney-General should also consider whether there is a need to include any other agencies in Schedule 2.

Recommendation 18 – Criteria for Assessment of Agencies Exempt in Respect of Particular Documents

The Review recommends the FOI Act contain criteria for assessment of agencies which are exempt from the FOI Act in respect of particular documents.

Recommendation 19 – Review of Agencies Listed in Part II of Schedule 2 to the FOI Act

19(a) The Review recommends Section 47 of the FOI Act be amended to make clear that it applies to documents that contain information about the competitive or commercial activities of agencies.

19(b All agencies in Part II of Schedule 2 to the FOI Act should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do so, they should be removed from Part II of Schedule 2.

19(c) The Attorney-General should also consider whether there is a need to include any other agencies in Part II of Schedule 2.

Recommendation 20 – Review of Agencies Listed in Schedule 1 to the FOI Act

20(a) The Review recommends Schedule 1 to the FOI Act be amended to repeal the bodies listed, as they no longer exist.

20(b) The Attorney-General should also consider whether there is a need to include any tribunals, authorities or bodies in Schedule 1.

Recommendation 21 – Administrative Access Schemes

21(a) The Review recommends the OAIC consider the development of appropriate guidance and assistance to encourage agencies to develop administrative access schemes.

21(b) While the Review acknowledges the desirability of encouraging the use of administrative access schemes, it does not believe it appropriate for this to be done by reintroduction of application fees for FOI requests.

Recommendation 22 – FOI Processing Charges

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Attachment D

OAIC's submission to the Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (Hawke Report)

Please note that in light of the passage of time and current environment, the OAIC's current position may differ from the position in 2012. Similarly, the OAIC's consideration of recommendations proposed by the Hawke Review may need to be reviewed to reflect the current environment.

The OAIC's submissions to the Hawke Review of freedom of information legislation (December 2012) included the following suggestions for reform that would help improve efficiency of the IC review process/OAIC functioning.

- Remove Part V of the FOI Act so the Privacy Act provides the sole mechanism for amendment requests.
- Remove the prohibition in the AIC Act on delegation of the IC review decision-making power under s 55K of the FOI Act.
- Remove the barrier to delegation of Information Commissioner complaint handling powers.
- Authorise the Information Commissioner to remit a matter to an agency or minister for reconsideration.
- Broaden the grounds on which the Information Commissioner can decide not to undertake an IC review.
- Broaden the grounds on which the Information Commissioner can decide not to investigate a complaint.
- Provide a clearer mandate and powers for the Information Commissioner to resolve IC review applications by agreement between the parties to a review.
- Remove the requirement in s 15AA to notify the OAIC of extensions of time by agreement and otherwise limit the OAIC's role in approving extensions of time to situations where an FOI applicant has sought IC review or lodged a complaint about delay processing a request.
- Reduce the use of the FOI process for legal discovery by means such as introducing a 40-hour cap on processing time or by adopting the Queensland model where access may be refused if the document can be accessed under another Act or under arrangements made by an agency, whether or not access is subject to a fee or charge.
- Introduce a partial exemption under the FOI Act for the OAIC in respect of the OAIC's merits review and complaint functions.
- Amend the FOI Act so that an agency may refuse to process a request if, after having assisted the applicant to clarify the scope of the request, the processing time would exceed 40 hours.
- Consider whether action needs to be taken regarding the timing of disclosure log publication, in particular considering the issues potentially affecting the use of the FOI Act by applicants with a special interest in being granted access to documents prior to publication on an agency or ministerial disclosure log.

In 2013, the OAIC considered a range of recommendations made in the Hawke Report and either supported or did not oppose the following suggestions for change (selected because they may impact on the efficiency of the IC review/complaint handling processes).

- Limiting access when information is available free of charge, or when information that would substantially address the subject matter of the request is regularly made publicly available, in annual reports or otherwise, within a certain timeframe and revise the disclosure log requirements to expressly require publication of the terms of an FOI request (Neutral/could support but need more information).
- Streamline FOI processing and access charges, including indexation of fees and charges (Neutral/could support, more information needed).
- Provide that a search of backup tapes is not required unless the agency or minister considers it appropriate ((Neutral/could support, more information needed).

- Amend the FOI Act to provide for the delegation of the Information Commissioner's powers in charges decision (Support).
- Give the Information Commissioner power to remit matters to the original decision maker for further consideration (Support).
- Allow for the resolution of applications by agreement without requiring a formal IC decision (Support).
- Only the applicant and respondent are automatically parties to an IC review (other affected persons can apply to be made parties) (Support).
- Clarify the operation of the IC's discretion to decide not to undertake an IC review if the AAT is dealing with, or has dealt with, the matter (Support).
- Clarify s 54W(b) to include factors to take into account when considering whether it is in the interests of the administration of the FOI Act for the IC review to be considered by the AAT. Factors identified include if matter is complex or resource intensive; whether the decision was made by a minister or the principal officer of the agency; or whether the decision refusing access concerns national security or cabinet documents (Neutral/could support – question need for change).

Attachment E

Table setting out the relevant jurisdiction, legislation and enforcement mechanism

FOI jurisdiction	Agency and Legislation	Enforcement mechanisms during and after reviews of FOI decisions / complaints	Addressing non-compliance
Australia	OAIC Freedom of Information Act 1982	**IC reviews** - Power to issue a direction – s 55(2)(e) - Requirement for decision-maker to assist Information - Commissioner – s 55DA - Requirement to provide statement of reasons – s 55E - Obligation to comply with IC review decision – s 55N - Power to require production of information and documents – s 55R - Power to require further searches to be conducted – s 55V - Power to require a person to appear and answer questions – s 55W - Power to administer an oath or examine a person on oath or affirmation – s 55X **FOI Complaints** - Power to require production of information and documents – s 79 - Power to require persons to appear – s 82 - Power to administer an oath or examine a person on oath or affirmation – s 83 - Power to give implementation notice – s 89	**IC reviews** Non-compliance with s 55N, the IC can apply to the Federal Court for an order directing the agency to comply (s 55P) Non-compliance with s 55R, the penalty is imprisonment for 6 months. Non-compliance with s 55W, the penalty is imprisonment for 6 months. Non-compliance with s 55X, the penalty is imprisonment for 6 months. **FOI Complaints** Non-compliance with s 79, the penalty is imprisonment for 6 months. Non-compliance with s 82, the penalty is imprisonment for 6 months. Non-compliance with, the penalty is imprisonment for 6 months. Non-compliance with s 89, the Information Commissioner may give a written report to the responsible Minister and the FOI Minister (see s 89A). The FOI minister must cause the copy of the report to be laid before each House of Parliament.
Australia	Queensland Right to Information Act 2009	- Power to require information, documents and attendance (s 103) - Power to examine witnesses (s 104)	Non-compliance with s 103, 100 penalty units (s 173). Non-compliance with s 104, 100 penalty units (s 177).
Australia	Victoria	- Notice to produce or attend (s 61U)	Non-compliance with s 61U, 60 penalty units (s 61X). Non-compliance with s 61ZE, 60 penalty units (s 61ZE).

FOI jurisdiction	Agency and Legislation	Enforcement mechanisms during and after reviews of FOI decisions / complaints	Addressing non-compliance
		- Power to take evidence on oath or affirmation (s 61ZE)	
New Zealand	Ombudsman *Official Information Act 1982* *Local Government Official Information and Meetings Act 1987*	During the course of an investigation, agencies must comply with the Ombudsman's requests for information as soon as reasonably practicable and no later than 20 working days after the request is received, extensions of time can be applied for as prescribed (s 29A *Official Information Act,* s 29 *Local Government Official Information and Meetings Act*). The Ombudsman can make recommendations to agencies that become binding 21 working days after it is made and the agencies are under a 'public duty' to comply (s 32 *Official Information Act,* s 32 *Local Government Official Information and Meetings Act*).	Failures to comply with timeframes during the Ombudsman's investigation can be reported to the Prime Minister, and thereafter to the House of Representatives (s 29A *Official Information Act,* s 29 *Local Government Official Information and Meetings Act*). The Ombudsman has invited the Solicitor-General to enforce the public duty to comply with an Ombudsman's recommendation by initiating judicial review proceedings.
United Kingdom	Information Commissioner's Office *Freedom of Information Act 2000*	Information Commissioner can serve a notice requiring a public authority to provide information within a time specified in the notice (s 51 *Freedom of Information Act 2000*). Information Commissioner can serve an enforcement notice requiring a public authority to take steps to comply with the FOI Act if satisfied that there is non-compliance (s 52 *Freedom of Information Act 2000*). Information Commissioner can make a decision on whether a public authority has dealt with a request for information in accordance with Part I of the FOI Act (s 50 *Freedom of Information Act 2000*).	If there is non-compliance with a decision notice, information notice or enforcement notice, the Information Commissioner can certify in writing to the court that the public authority has failed to comply with the notice. The court can inquire into the matter and deal with the authority as if it had committed a contempt of court (s 54 *Freedom of Information Act 2000*).
Canada	Office of the Information Commissioner *Access to information Act 1985*	The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Part, power (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the	Persons who are found to have obstructed the Information Commissioner in the performance of duties and functions under the Act are guilty of an offence and liable on summary conviction to a fine not exceeding $1000 (s 67 *Access to Information Act*).

FOI jurisdiction	Agency and Legislation	Enforcement mechanisms during and after reviews of FOI decisions / complaints	Addressing non-compliance
		Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record; (b) to administer oaths; (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law; (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises; (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Part as the Commissioner sees fit; and (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation (s 36 *Access to Information Act*). The Information Commissioner may make an order if a complaint is found to be made out (s 36.1 *Access to Information Act*).	

s 47E(d)

s 47E(d)

s 47E(d)