

Enquiries

Received

Types	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
FOI	2,062	1,931	2,881	2,297	1,824	916
% changed compared prior year		-6%	49%	-20%	-21%	21%
Privacy & Other	16,793	19,407	17,445	14,842	11,647	5367
% changed compared prior year		16%	-10%	-15%	-22%	5%
Total	18,855	21,338	20,326	17,139	13,471	6283

- Enquiries received data includes all matters incoming to OAIC by telephone, written and in person channel.
- YTD FY2021/22 the data includes figures as at 31 December.
- The FY2021/22 percentage measures variance between FY2020/21 (From 1 July to 31 December).

FOI written enquiries closed within 10 days – Target 90%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% Enquiries closed in less than 10 days	88%	88%	94%	85%	76%	84%
Number enquiries closed in less than 10 days	509	517	776	654	559	354
% Enquiries closed in more than 10 days	12%	12%	6%	15%	24%	16%
Number enquiries closed in more than 10 days	90	67	49	124	175	69
Total	100%	100%	100%	100%	100%	100%

Privacy & other written enquiries closed within 10 days – Target 90%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% Enquiries closed in less than 10 days	78%	74%	92%	76%	63%	85%
Number enquiries closed in less than 10 days	2,712	3,294	3,703	2,841	3,207	1665
% Enquiries closed in more than 10 days	22%	26%	8%	24%	37%	15%
Number enquiries closed in more than 10 days	766	1,158	341	917	1,885	284
Total	100%	100%	100%	100%	100%	100%

Top 10 issues - Enquiries

Fiscal Year	2021-2022	
Issue Level 1	Total	% of Total
APP 3 - Collection	906	21%
Privacy Generally	582	14%
APP 6 - Use or Disclosure	486	11%
APP 12 - Access to Personal Information	472	11%
Exemptions	393	9%
APP 11 - Security of Personal Information	337	8%
APP 5 - Notification of Collection	235	6%
general advice	126	3%
making an FOI application	99	2%
Sec 94H mentioned but does not apply	96	2%

Privacy complaints

Types	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	917	1,082	1,465	785	1,101	1345
Average Handling Time Months	4.7	3.7	4.4	5.1	4.4	5.7
Received	2,494	2,947	3,306	2,673	2,474	1,404
% changed compared to last year Received	17%	18%	12%	-19%	-7%	10%
Closed	2,485	2,766	2,920	3,366	2,151	1,159
% changed compared to last year Closed	22%	11%	6%	15%	-36%	9%

- YTD FY2021/22 the data includes figures as at 31 December.
- Data includes figures as at 30 June for FY2017-18 to FY2020/21.
- The FY2021/22 percentage measures variance between FY2020/21 (From 1 July to 31 December)

Privacy complaints closed within 12 months Target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% closed in less than 365 days	95%	97%	95%	87%	94%	91%
Number of cases closed in less than 365	2,361	2,683	2,774	2,928	2,015	1,053
% closed in more than 365 days	5%	3%	5%	13%	6%	9%
Number of cases closed in more than 365 days	124	83	146	438	136	106
Total	100%	100%	100%	100%	100%	100%

Privacy complaints on hand	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	678	63%	718	49%	500	64%	532	48%	641	48%
Between 4 months and 6 months	150	14%	198	14%	72	9%	195	18%	202	15%
Between 6 and 9 months	121	11%	229	16%	39	5%	185	17%	248	18%
Between 9 and 12 months	63	6%	157	10%	38	5%	55	5%	135	10%
Over 12 months	70	6%	163	11%	136	17%	137	12%	119	9%
Total	1,082	100%	1,465	100%	785	100%	1,101	100%	1,345	100%

- Data includes figures as at 30 June for FY2017-18 to FY2020/21.
- YTD FY2021/22 the data includes figures as at 31 December.

Privacy complaints on hand

Cumulative Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	678	63%	718	49%	500	64%	532	48%	641	48%
< 6 months	828	77%	916	63%	572	73%	727	66%	843	63%
< 9 months	949	88%	1,145	78%	611	78%	909	83%	1,091	81%
< 12 months	1,012	94%	1,302	89%	649	83%	964	88%	1,226	91%
Over 12 months	70	6%	163	11%	136	17%	137	12%	119	9%
Total	1,082	100%	1,465	100%	785	100%	1,101	100%	1,345	100%

Top 10 issues - Complaints

Fiscal Year	2021-2022	
	Total	% of Total
APP 11 - Security of Personal Information CP	347	29%
APP 6 - Use or Disclosure CP	293	24%
APP 3 - Collection CP	160	13%
APP 12 - Access to Personal Information	157	13%
APP 10 - Quality of Personal Information CP	117	10%
APP 13 - Correction CP	43	4%
APP 5 - Notification of Collection CP	36	3%
APP 7 - Direct Marketing CP	31	2%
APP 4 - Unsolicited Personal Information CP	3	0%
APP 2 - Anonymity and Pseudonymity CP	2	0%

Top 10 sectors - Privacy Complaints

Fiscal Year	2019-2020			2020-2021			2021-2022 July-Sep		
	Total	% of Total	Ranking	Total	% of Total	Ranking	Total	% of Total	Ranking
Health service providers	300	11%	3	301	12%	2	189	19%	1
Australian Government	319	12%	1	310	13%	3	151	16%	2
Finance (incl. superannuation)	305	11%	2	327	13%	1	144	15%	3
Retail	159	6%	4	177	7%	4	103	11%	4
Online services	132	5%	6	152	6%	5	86	9%	5
CRBs	108	4%	9	109	4%	6	75	8%	6
Travel & Hospitality industry	71	3%		71	3%	11	53	5%	7
Personal services (incl employment, child care, vets)	94	4%	10	97	4%	8	43	5%	8
Telecommunications	149	6%	5	93	4%	9	43	4%	9
Real estate agents	126	5%	7	95	4%	7	41	4%	10

Privacy Enquiries My Health Record

	2018-2019	2019-2020	2020-2021	2021-2022
Average Handling Time Days	271	9	1	5
Received	145	7	11	9
Percentage changed compared to last year Received	741%	-95%	60%	350%
Closed	143	5	2	9
Percentage changed compared to last year Closed	741%	-97%	-60%	350%

Privacy Complaints My Health Record

	2018-2019	2019-2020	2020-2021	2021-2022
Average Handling Time Days	4.85	9.22	6.63	310
Received	57	10	7	3
Percentage changed compared to last year Received	775%	-82%	-30%	-25%
Closed	41	28	7	6
Percentage changed compared to last year Closed	860%	-31%	-75%	200%

- YTD FY2021/22 the data includes figures as at 31 December.
- Data includes figures as at 30 June for FY2017-18 to FY2020/21.
- The FY2021/22 percentage measures variance between FY2020/21 (From 1 July to 31 December)

Notifiable Data Breaches

Privacy NDBs

	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	151	139	236	168	120
Average Handling Time Months	0.5	2.5	2.9	2.1	2.8
Received	305	950	1050	975	464
% changed compared to last year Received	n/a	211%	11%	-7%	-14%
Closed	200	911	973	987	518
% changed compared to last year Closed	n/a	356%	7%	1%	-8%

- Data includes figures as at 30 June for FY2016/17 to FY2020/21.
- YTD FY2021/22 the data includes figures as at 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020
- n/a has been attributed due to data capture for NDB, having commenced from FY 2017-18 prior data was not recorded.

KPI cases close within 2 months - Target 80%

Time taken to close (Days)	2017-18	2018-19	2019-20	2020-21	2021-22
% closed in less than 60 days	97%	79%	62%	80%	76%
Number of cases closed in less than 60 days	194	720	603	790	394
% closed in more than 60 days	3%	21%	38%	20%	24%
Number of cases closed in more than 60 days	6	191	370	197	124
Total	100%	100%	100%	100%	100%

Cases Open - Privacy NDB

Age	2018-19		2019-20		2020-21		2021-22	
	# Cases	%						
< 4 months	126	91%	121	51%	80	48%	100	83%
Between 4 months and 6 months	6	4%	18	8%	17	10%	4	3%
Between 6 and 9 months	5	4%	51	22%	18	11%	5	4%
Between 9 and 12 months	2	1%	29	12%	16	10%	3	3%
Over 12 months	-	0%	17	7%	37	22%	8	7%
Total	139	100%	236	100%	168	100%	120	100%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Cases Open - Privacy NDB

Cumulative	2018-19		2019-20		2020-21		2021-22	
	# Cases	%						
< 4 months	126	91%	121	51%	80	48%	100	83%
< 6 months	132	95%	139	59%	97	58%	104	87%
< 9 months	137	99%	190	81%	115	68%	109	91%
< 12 months	139	100%	219	93%	131	78%	112	93%
Over 12 months	-	0%	17	7%	37	22%	8	7%
Total	139	100%	236	100%	168	100%	120	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

S 47E(d)

NDB My Health Record

	2017-18	2018-19	2019-20	2020-21	2021-22
Average Handling Time Months	1.2	1.2	1.8	2.3	0
Received	28	35	1	3	1
Percentage changed compared to last year Received	-20%	25%	-97%	200%	0%
Closed	29	33	7	2	0
Percentage changed compared to last year Closed	-17%	14%	-79%	-71%	-100%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020

NDB MHR - KPI cases closed within 2 months - target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% MHR NDBs closed in less than 60 days	49%	100%	77%	57%	50%	0%
Number MHR NDB cases closed <= 60	17	29	25	4	1	0
% MHR NDB closed in more than 60 days	52%	0%	23%	43%	50%	0%
Number of MHR NDB cases closed in more than 60 days	18	-	8	3	1	0
Total	100%	100%	100%	100%	100%	100%

Voluntary notifications of breaches**Privacy DBN Voluntary**

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	3	22	32	42	69	27
Average Handling Time Months	1.0	0.8	2.0	3.4	4.6	4.5
Received	114	174	175	125	178	125
% changed compared to last year Received	7%	53%	5%	-29%	42%	30%
Closed	119	158	168	129	177	170
% changed compared to last year Closed	9%	33%	6%	-23%	37%	183%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020

KPI cases close within 2 months - Target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% Closed in less than 60 days	92%	97%	66%	47%	51%	56%
Number cases closed in less than 60 days	109	153	111	61	91	95
% Closed in more than 60 days	9%	3%	34%	53%	49%	44%
Number of cases closed in more than 60 days	10	5	57	68	86	75
Total	100%	100%	100%	100%	100%	100%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.

Cases Open - Privacy Voluntary

Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%								
< 4 months	22	100%	24	75%	17	40%	24	35%	21	78%
Between 4 months and 6 months	-	0%	-	0%	11	26%	9	13%	1	7%
Between 6 and 9 months	-	0%	5	16%	7	17%	13	19%	1	4%
Between 9 and 12 months	-	0%	2	6%	5	12%	9	13%	1	4%
Over 12 months	-	0%	1	3%	2	5%	14	20%	3	11%
Total	22	100%	32	100%	42	100%	59	100%	27	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Cases Open - Privacy Voluntary

Cumulative Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%								
< 4 months	22	100%	24	75%	17	40%	24	35%	21	78%
< 6 months	22	100%	24	75%	28	67%	33	48%	22	81%
< 9 months	22	100%	29	91%	35	83%	46	67%	23	85%
< 12 months	22	100%	31	97%	40	95%	55	80%	24	89%
Over 12 months	-	0%	1	3%	2	5%	14	20%	3	11%
Total	22	100%	32	100%	42	100%	59	100%	27	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Privacy CII

Privacy CII

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	13	14	23	24	8	9
Average Handling Time Months	4.3	5.5	4.0	10.0	23.4	18.9
Received	29	21	15	19	4	1
Percentage changed compared to last year Received	71%	-28%	-29%	25%	-79%	-50%
Closed	26	18	7	21	10	4
Percentage changed compared to last year Closed	100%	-31%	-61%	200%	-52%	33%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020

KPI cases close within 8 months - Target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% Closed in less than 8 months	88%	72%	86%	38%	20%	25%
Number cases closed in less than 8 months	23	13	6	8	2	1
% Closed in more than 8 months	12%	28%	14%	62%	80%	75%
Number of cases closed in more than 8 months	3	5	1	13	8	3
Total	100%	100%	100%	100%	100%	100%

Cases Open - Privacy CII

Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	8	57%	3	13%	5	21%	1	12%	0	0%
Between 4 months and 6 months	1	7%	3	13%	3	13%	1	12%	1	11%
Between 6 and 9 months	3	21%	1	4%	1	4%	0	0%	5	56%
Between 9 and 12 months	1	7%	3	13%	3	13%	1	12%	2	22%
Over 12 months	1	7%	13	57%	12	50%	5	64%	1	11%
Total	14	100%	23	100%	24	100%	8	100%	9	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Cases Open - Privacy CII

Cumulative	2017-18		2018-19		2019-20		2020-21		2021-22	
Age	#	%								
	Cases		Cases		Cases		Cases		Cases	
< 4 months	8	57%	3	13%	5	21%	1	12%	0	0%
< 6 months	9	64%	6	26%	8	33%	2	12%	1	11%
< 9 months	12	86%	7	30%	9	38%	2	12%	6	67%
< 12 months	13	93%	10	43%	12	50%	3	12%	8	89%
Over 12 months	1	7%	13	57%	12	50%	5	64%	1	11%
Total	14	100%	23	100%	24	100%	13	100%	9	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Freedom of Information

IC Reviews

FOI IC Reviews

	2016-17	2017-18	2018-19	2019-20	2020-21	
On Hand	390	581	850	1,088	1,295	1,485
Average Handling Time Months	3.4	6.7	7.8	8.1	8.3	7.1
Received	632	801	928	1066	1,224	882
% changed compared to last year Received	24%	27%	16%	15%	15%	38%
Closed	515	610	659	829	1018	694
% changed compared to last year Closed	13%	18%	8%	26%	23%	37%

- Data includes figures to 30 June for FY2016-17 to FY2020/21.
- YTD FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020

FOI IC reviews closed within 12 months - target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% IC reviews closed less than 365 days	86%	84%	73%	72%	73%	81%
Number of IC reviews closed in less than 365 days	445	513	481	597	740	563
% IC reviews closed in more than 365 days	14%	16%	27%	28%	27%	19%
Number of IC reviews closed in more than 365 days	70	97	178	232	278	131
Total	100%	100%	100%	100%	100%	100%

Cases Open - FOI IC Reviews

Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	228	39%	190	22%	270	25%	264	20%	346	23%
Between 4 months and 6 months	94	16%	106	12%	108	10%	85	7%	102	7%
Between 6 and 9 months	122	21%	147	17%	142	13%	144	11%	128	9%
Between 9 and 12 months	56	10%	157	18%	108	10%	135	10%	130	9%
Between 12 and 18 months	59	10%	166	20%	168	15%	226	17%	207	14%
Between 18 and 24 months	17	3%	68	8%	175	16%	180	14%	210	14%
Over 24 months	5	1%	16	2%	117	11%	261	20%	362	24%
Over 12 months	81	14%	250	30%	460	42%	667	52%	779	52%
Total	581	96%	850	100%	1,088	100%	1,291	100%	1,485	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Cases Open - FOI IC Reviews

Cumulative Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	228	39%	190	22%	270	25%	264	20%	346	23%
< 6 months	322	55%	296	35%	378	35%	349	29%	448	30%
< 9 months	444	76%	443	52%	520	48%	493	40%	576	39%
< 12 months	500	86%	600	71%	628	58%	628	50%	706	48%
<18 months	559	96%	766	90%	796	73%	854	68%	913	61%
<24 months	576	99%	834	98%	971	89%	1,034	80%	1,123	76%
Over 24 months	5	1%	16	2%	117	11%	261	20%	362	24%
Total	581	100%	850	100%	1,088	100%	1,295	100%	1,485	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

IC Reviews open by category

Category Filter	# Cases	% Open
[Cat1]	149	10%
[Cat2]	316	21%
[Cat3]	268	18%
[Cat4]	50	3%
[Cat5.1]	18	1%
[Cat5.2]	127	9%
[Cat5.3]	223	15%
[Cat5.4]	27	2%
No Cat	307	21%
Total	1,485	100%

IC Reviews closed by outcome

Outcome of closed cases	FY 2021-22 YTD
Declined to review	134
Finalised by agreement	3
IC Decision	55
Invalid/no jurisdiction	150
Withdrawn IC reviews	352
Total	694

IC Reviews closed by age
1st of July 2021 to 31st December 2021

Category Filter	# Cases	% total
within 120 days	483	70%
Within 6 months	22	3%
Within 9 months	22	3%
Within 12 months	34	5%
Over 12 months	133	19%
Total	694	100%

IC Reviews closed by outcome
1st of July 2021 to 31st December 2021

Decision	Closed
s54N - out of jurisdiction	150
s54R – withdrawn	341
s54R - withdrawn/conciliated	11
s54W(a)(i) - frivolous, vexatious, misconcieved, lacking in substance, not in good faith	34
s54W(a)(ii) - failure to cooperate	53
s54W(a)(iii) - lost contact	5
s54W(b) - refer AAT	42
s55F - varied by agreement	3
s55K - affirmed by IC	30
s55K - set aside by IC	19
s55K - varied by IC	6
Total	693

IC Reviews closed by outcome

Category Filter	# Cases	%
With 55k	55	8%
Without 55k	639	92%
Total	694	100%

FOI Complaints

FOI Complaints

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	19	52	91	129	108	110
Average Handling Time Months	3.0	5.8	7.2	11.2	6.8	14.1
Received	36	62	61	109	151	99
% changed compared to last year Received	*n/a	72%	-2%	79%	39%	36%
Closed	18	29	22	71	174	97
% changed compared to last year Closed	*n/a	61%	-24%	223%	145%	17%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020
- *n/a has been attributed to comparative variance for FY 2016-17 - data for FY 2015-16 was not available due to OAIC FOI function being transferred to Commonwealth Ombudsman

KPI cases close within 12 months - target 80%

Time taken to close (Days)	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% Closed in less than 365 days	100%	83%	82%	52%	82%	60%
Number of closed in less than 365 days	18	24	18	37	142	58
% Closed in more than 365 days	0%	17%	18%	48%	18%	40%
Number of closed in more than 365 days	-	5	4	34	32	39
Total	100%	100%	100%	100%	100%	100%

Cases Open - FOI Complaints

Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	25	48%	12	13%	16	12%	26	24%	43	39%
Between 4 months and 6 months	13	25%	8	9%	18	14%	4	4%	16	15%
Between 6 and 9 months	6	12%	17	19%	26	20%	5	5%	8	7%
Between 9 and 12 months	4	8%	18	20%	17	13%	4	4%	5	5%
Over 12 months	4	8%	36	40%	52	40%	69	64%	38	35%
Total	52	100%	91	100%	129	100%	108	100%	110	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

Cases Open - FOI Complaints

Cumulative Age	2017-18		2018-19		2019-20		2020-21 YTD		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	25	48%	12	13%	16	12%	26	24%	43	39%
< 6 months	38	73%	20	22%	34	26%	30	28%	59	54%
< 9 months	44	85%	37	41%	60	47%	35	32%	67	61%
< 12 months	48	92%	55	60%	77	60%	39	36%	72	65%
Over 12 months	4	8%	36	40%	52	40%	69	64%	38	35%
Total	52	100%	91	100%	129	100%	119	100%	110	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December.

FOI Complaints closed by outcome

Issue Outcome	Total
Referred	0
s70 - not in jurisdiction	14
s73(b) - merits review	9
s73(e) - frivolous, vexatious, lacking in substance	13
S74 – referred Ombudsman	5
Withdrawn	18
withdrawn/conciliated	16
s86 – no recommendations made	4
s86 – recommendations made	29
Total	108

FOI Complaints Open by Agency

Agency	Open
DHS	9
DHA	15
AFP	4

FOI Complaints Received by Agency

Agency	DHS	DHA	AFP
01/07/21	1	10	2
01/08/21	1	3	
01/09/21	2	6	1
01/10/21	5	6	1
01/11/21			
01/12/21	2	6	
Total	11	31	4

FOI Vexatious

FOI Vexatious s89k & s89M

	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-22
On Hand	2	3	1	4	2	2
Received	7	11	16	4	2	3
Closed	11	10	18	1	4	2

- Data includes figures as of 30th June for FY 2016-17 to FY2019-20; FY 2020-21 (includes 1 July 2020 - 31 December 2021).

FOI Extension of time

FOI EOT

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
On Hand	14	44	49	490	56	84
Average Handling Time Months	0.03	0.07	0.12	0.15	0.3	0.12
Received	4412	3367	3784	4244	3,692	2,569
% changed compared to last year Received	-21%	-24%	12%	12%	-13%	27%
Closed	4420	3333	3779	3844	4,102	2,541
% changed compared to last year Closed	-21%	-25%	13%	2%	7%	6%

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020
- The FOI EOT data includes all EOTs

FOI EOT - Closed by outcome

Decision	# Cases	Average Handling Time
s15AB - complex or voluminous	425	7.48
s15AC – deemed refusal	323	5.90
s51DA-amendment - deemed refusal	1	6.00
s54D – deemed affirmation	57	5.51
Total	806	6.71

- The FOI EOT data includes only EOTs –s15AB, s15AC, s51DA, s54D

FOI EOT - Closed by outcome

Decision	2018-2019	2019-2020	2020-2021	2021-2022
s15AA - by agreement	2,959	2,393	3,029	1,648
		-19%	27%	-14%
s15AB - complex or voluminous	562	786	507	425

		40%	-35%	79%
s15AC – deemed refusal	178	492	405	323
		176%	-18%	78%
s51DA-amendment - deemed refusal	1	5	2	1
		400%	-60%	0%
s54B - internal review	1			
s54D – deemed affirmation	37	80	57	57
		116%	-29%	138%
s54T-to lodge an IC review	41	88	102	87
		115%	16%	61%
Grand Total	3,779	3,844	4,102	2,541

- Data includes figures to 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures to 31 December.
- The variance (percentage figure) for FY2021/22 is compared with FY2020/21 for the period 1 July 2020 - 31 December 2020

FOI EOT - Closed in 5 working days

Decision	<=7	>7	Grand Total
s15AB - complex or voluminous	55%	45%	100%
s15AC – deemed refusal	72%	28%	100%
s51DA-amendment - deemed refusal	100%		100%
s54D – deemed affirmation	72%	26%	100%
Total	63%	37%	100%

- The FOI EOT data includes only EOTs –s15AB, s15AC, s51DA, s54D

FOI EOT - Closed by outcome

Decision	Granted	Granted varied	Invalid	Not granted	Notified	Withdrawn	Grand Total
s15AB - complex or voluminous	304	57	4	24	1	35	425
s15AC – deemed refusal	267	16	9	20	2	9	323
s51DA-amendment - deemed refusal	1						1
s54D – deemed affirmation	50	5	2				57
Grand Total	622	78	15	44	3	44	806

- The FOI EOT data includes only EOTs –s15AB, s15AC, s51DA, s54D

FOI EOT – Received by month

Type	July	August	September	October	November	December	Grand Total
s15AA - by agreement	243	316	382	234	166	344	1685
s15AB - complex or voluminous	31	80	108	81	61	83	444
s15AC – deemed refusal	48	51	64	50	65	40	318
s51DA-amendment - deemed refusal			1				1

s54D – deemed affirmation	14	10	12	8	8	4	56
s54T-to lodge an IC review	6	15	4	20	9	11	65
Grand Total	342	472	571	393	309	482	2569

NDIS FOI EOT – Received by month

Type	July	August	September	October	November	December	Grand Total
s15AA - by agreement	22	10	4	11	7	31	85
s15AB - complex or voluminous	6	30	9	13	4	17	79
s15AC – deemed refusal	3	6	8	3	4	2	26
Grand Total	31	46	21	27	15	50	190

DFAT FOI EOT – Received by month

Type	July	August	September	October	November	December	Grand Total
s15AA - by agreement	6	6	18	13	9	10	62
s15AB - complex or voluminous	5	6	6	13	17	11	58
s15AC – deemed refusal		3	4	5	3		15
s54D – deemed affirmation	2		1	2			5
s54T-to lodge an IC review	3				1		4
Grand Total	16	15	29	33	30	21	144

DHS FOI EOT– Received by month

Type	July	August	September	October	November	December	Grand Total
s15AA - by agreement	72	138	56	4		29	299
s15AB - complex or voluminous	5	7	5	2	1	1	21
s15AC – deemed refusal	5	10	24	17	7	18	81
s54T-to lodge an IC review				1		1	2
Grand Total	82	155	85	24	8	49	403

DHA FOI EOT– Received by month

Type	July	August	September	October	November	December	Grand Total
s15AA - by agreement	22	26	10	9	29	41	137
s15AB - complex or voluminous						2	2
s15AC – deemed refusal	7	5	3	4		2	21
s54D – deemed affirmation	8	6	7	2	2	1	26
s54T-to lodge an IC review	2	10	3	17	6	9	47
Grand Total	39	47	23	32	37	55	233

Table 2: Top 5 exemptions (and percentages) 2020-21

Exemption	Percentage of FOI requests in which exemption applied
Personal privacy (s 47F)	38%
Certain operations of agencies (s 47E)	21%
Deliberative processes (s 47C)	10%
Documents affecting law enforcement (s 37)	8%
Secrecy provisions (s 38)	6%

The type of exemptions applied are generally consistent from year-to-year.

- The personal privacy conditional exemption (s 47F) of the FOI Act has been the most used exemption every year since 2011–12:
 - o In 2011–12, applied in **48%** of all FOI requests in which exemptions were applied
 - o In 2015–16, applied in **48%** of all FOI requests in which exemptions were applied
 - o In 2019–20, applied in **38%** of all FOI requests in which exemptions were applied
 - o In 2020–21, applied in **38%** of all FOI requests in which exemptions were applied.
- The use of the certain operations of agencies conditional exemption in s 47E has increased since 2011–12:
 - o In 2011–12, applied in **8%** of all FOI requests in which exemptions were applied (the 3rd most used exemption behind ss 47F and 37)
 - o In 2014–15, applied in **14%** of all FOI requests in which exemptions were applied (2nd most used)
 - o In 2019–20, applied in **21%** of all FOI requests in which exemptions were applied (2nd most used).
 - o In 2020–21, applied in **21%** of all FOI requests in which exemptions were applied (2nd most used).
- The documents affecting enforcement of law and protection of public safety exemption (s 37) has decreased, however it remains one of the most used exemptions:
 - o In 2011–12, applied in **12%** of all exemptions in which exemptions were applied (2nd most used)
 - o In 2014–15, applied in **12%** of all FOI requests in which exemptions were applied (3rd most used)
 - o In 2019–20, applied in **10%** of all FOI requests in which exemptions were applied (3rd)
 - o In 2020–21, applied in **8%** of all FOI requests in which exemptions were applied (4th).

- The documents to which secrecy provisions of enactments apply exemption (s 38) was applied:
 - o In 2011-12, applied in **6%** of all FOI requests in which exemptions were applied (the 4th most used)
 - o In 2014-15, applied in **5%** of all FOI requests in which exemptions were applied
 - o In 2018-19, applied in **7%** of all FOI requests in which exemptions were applied
 - o In 2019-20, applied in **7%** of all FOI requests in which exemptions were applied (5th most used)
 - o In 2020-21, applied in **6%** of all FOI requests in which exemptions were applied (5th most used).
- The deliberative processes conditional exemption (**s 47C**) was applied:
 - o In 2011-12, applied in **4%** of all FOI requests in which an exemption was applied (the 6th most used)
 - o In 2014-15, applied in **5%** of all FOI requests in which an exemption was applied (5th most used)
 - o In 2019-20, applied in **8%** of all FOI requests in which an exemption was applied (4th most used)
 - o In 2020-21, applied in **10%** of all FOI requests in which exemptions were applied (3rd most used).
- The documents affecting national security, defence or international relations exemption (s 33):
 - o In 2011-12, applied in **2%** of all FOI requests in which exemptions were applied (10th most used)
 - o In 2014-15, applied in **5%** of all FOI requests in which exemptions were applied (6th most used)
 - o In 2019-20, applied in **4%** of all FOI requests in which exemptions were applied (6th most used)
 - o In 2020-21, applied in **4%** of all FOI requests in which exemptions were applied (6th most used).
- The least used exemptions, consistent from year-to-year, are:
 - o ss 45A (Parliamentary budget office documents)
 - o 47A (electoral rolls)
 - o 47H (research)
 - o 47J (the economy)

Each of the above comprise less than 0.2% of all exemptions applied. Exemptions applied by agencies may change on review (data collected is for primary decisions on access).

Total number of FOI requests

	2018-19			2019-20			2020-21			2021-22		
	Personal	Other	Total									
Total number of FOI requests	150	94	244	142	90	232	122	71	193	79	83	162
Total number of internal reviews	10	10	20	7	6	13	12	5	17	10	4	14
Period total	264			245			210			176		

- Data includes figures to 30 June for FY2018-19 to FY2020/21.
- For FY2021/22 the data includes figures to 31 December.

COVID-19

COVIDSafe App enquiries and complaints statistics from 16 May 2020 to 10 January 2022

* The below figures are included in the total number of enquiries and privacy complaints received above. Below provides a breakdown of enquiries and complaints we have received about the pandemic specifically.

CovidSafe App & Part VIII A of the Privacy Act (types of Issues) cases Received	16 May 2020 to 10 January 2022
Enquiries	42
Complaints	0

CovidSafe App enquiries, complaints, and assessment data from 16 May 2020 to 31 December 2021

Covid Safe App	Number	Outcome	Context
Enquiries	42	42 closed	most from Individuals
Request to download or use COVIDSafe	15	15 Closed	12 individual, 1business
Request to download or use (Sec 94H applies)	1	1	
General enquiry or concern about COVIDSafe	26	26 Closed	16 individuals
Assessments	5	4 commenced. 2 completed, 2 remain open. 1 TBA	<ul style="list-style-type: none"> • Assessment 1: 30 June 2020 OAIC commenced assessment of the access controls applied to the National COVIDSafe Data Store by the Data Store Administrator. The targets of this assessment are the Department of Health and the Digital Transformation Agency. Assessment finalised. Report published on 25 June 2021. • Assessment 2: 7 October 2020 the OAIC commenced assessment of access controls applied to the use of COVID app data by State/Territory health authorities. The targets of this assessment are all State and Territory health authorities. • Assessment 3 – 12 November 2020 the OAIC commenced assessment. App functionality vs privacy policy. Assessment finalised and report published on 26 October 2021.

			<ul style="list-style-type: none"> • Assessment 4 - 13 November 2020 the OAIC commenced assessment. Periodic COVID app data deletion • Assessment 5 - End of pandemic COVID app data deletion
--	--	--	---

CDR for period 1 July 21 – 31 December 21

CDR Enquiries managed by the OAIC

Type	2020-21	2021-22
Open CDR Enquiries	0	0
Closed CDR Enquiries	16	19
Total CDR Enquiries	16	19

- CDR Enquiries received data includes all matters found to be related to CDR, received by telephone, written and in person channels, including from the CDR online complaint tool (cdr.gov.au)

CDR enquiries closed within 10 days – Target 90%

Time taken to close (Days)	2020-21	2021-22
% Enquiries closed within 10 days	56%	74%
Number enquiries closed within 10 days	9	14
% Enquiries closed in more than 10 days	44%	26%
Number enquiries closed in more than 10 days	7	5

CDR Complaints managed by the OAIC

Type	Number received	Issue	Outcome	Average time taken
Alleged CDR Complaints	6	2 - Not CDR Data 2 - Respondent not CDR participant 2 - Complaints Open at 31 Dec 21	Not CDR Complaints	28.3 days
Complaints with no CDR relevance	10	10 - Not related to CDR	Referred to privacy case management (PCM)	See PCM stats

CDR Contacts received via the CDR Online Complaint Tool

Type	2020-21	2021-22
Enquiry	42	37
Report	3	3
Complaint	17	16
Total	62	56

CDR contacts received via the online complaint tool and referred to ACCC

Type	2020-21	2021-22
Enquiry	35	24
Report	3	0
Complaint	0	0
Total	38	24

- Complaints are not within ACCC remit – all are triaged to OAIC
- CDR contacts received via the online complaint tool and referred to ACCC are not entered into the OAIC's Resolve database.

Total CDR contacts received via the online complaint tool and referred to OAIC

Type	2020-21	2021-22
Enquiry	8	15
Report	0	3
Complaint	17	16
Total	25	34

- Reports - Of the three reports submitted through the online complaint tool, none had CDR relevance. Two were found to be privacy enquiries and one was a privacy complaint.
- Complaints – where the CDR team assesses a complaint may have privacy relevance it is passed to the privacy team for investigation or closure, otherwise will be closed.
- * Of the total 16 complaints received, no complaints have been assessed as relating to the CDR.

OAIC Staffing figures

Total Staff: Overview

(As at)	31 December 2021	30 September 2021	28 April 2021	May 2020	May 2019	May 2018	May 2014
FTE	112	127	121	102	84	75	83
ASL	119	121	119	94	86	74	77
Headcount	124	142	136	109	95	91	97

FTE represents an 'as at' figure, whereas the ASL figure represents the average staffing from 1 July - 31 December 2021

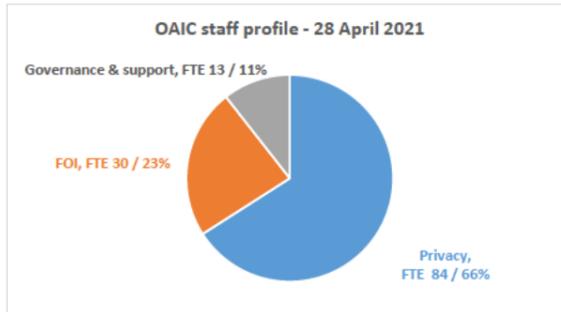
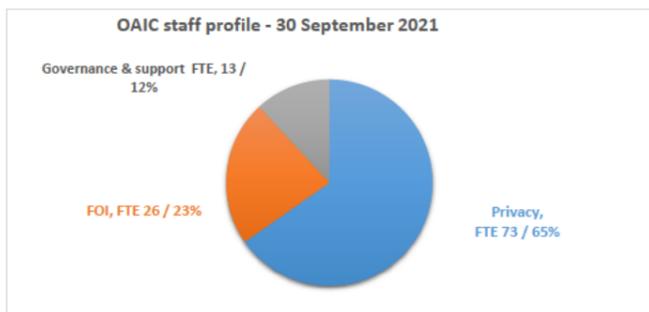
Funding: FTE

(As at)	31 December 2021	30 September 2021	28 April 2021	May 2020	May 2019	May 2018	May 2014
Budget	127	127	121	102	74	65	67
ADHA MOU	0	0	0	0	10	10	16
Total		127	121	102	84	75	83

Represents FTE which can be afforded by internal budget

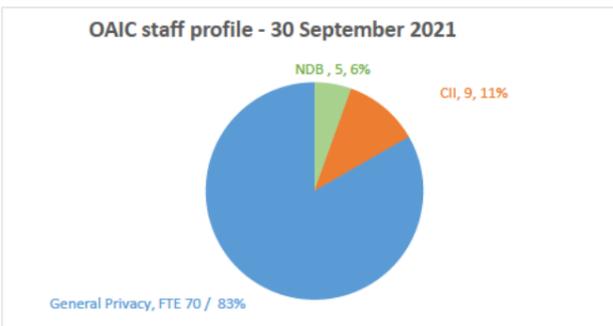
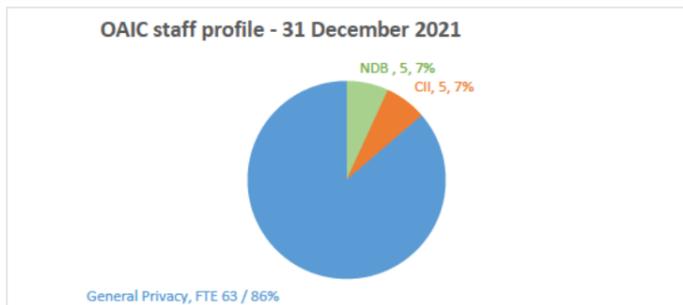
Staffing allocation by function (APS staff)

	As at 31 December 2021		As at 30 September 2021	
	APS FTE	%	APS FTE	%
Privacy	73	65%	84	66%
FOI	26	23%	30	23%
Governance & support	13	12%	13	11%
Total	112		127	



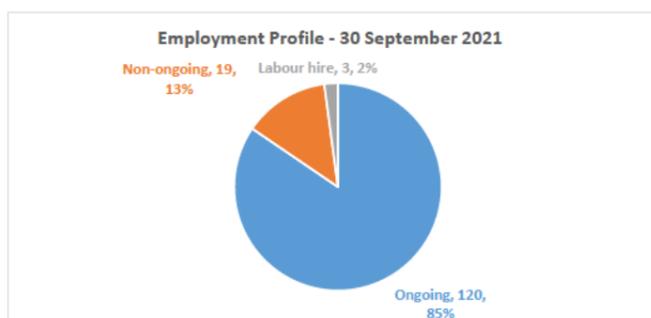
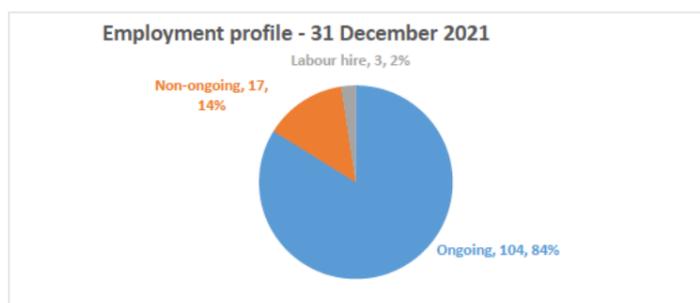
CII & NDB allocation:

	As at 31 December 2021		As at 30 September 2021	
	FTE	%	FTE	%
NDB	5	7%	5	5%
CII	5	7%	9	11%
General Privacy	63	86%	70	83%
Total	73		84	



Employment type:

	As at 31 December 2021		As at 30 September 2021	
	Headcount	%	Headcount	%
Ongoing	104	84%	120	85%
Non-ongoing	17	14%	19	13%
Labour hire	3	2%	3	2%
Total	124		142	



Done ←

(Financial year)	General staffing details:					
	2021/22 (as at 31 December)	2020/21	2019/20	2018/19	2017/18	2016/17
Positions advertised	9	21	12	15	14	14
Engagements permanent	13	30	24	20	10	10
Engagements temporary	4	25	19	8	11	11
Internal Promotions	8	12	18	16	9	9
Total	25	67	61	44	30	30

(Financial year)	2016/17	2015/16	2014/15
Positions advertised	15	17	10
Engagements permanent	14	24	7
Engagements temporary	6	1	2
Internal Promotions	12	12	5
Total	32	37	14

	Turnover: Terminations (APS staff only)					
	2021/22 (as at 31 December)	2020/21	2019/20	2018/19	2017/18	2016/17
Permanent	24	21	17	19	15	15
Temporary	7	13	9	5	3	3
Total	31	34	26	24	18	18
Turnover % (based on permanent staff cessations)	23%	18%	18%	24%	21%	21%

	2016/17	2015/16	2014/15
Permanent	11	15	28
Temporary	2	1	3
Total	13	16	31
Turnover % (based on permanent staff cessations)	13%	19%	48%

(Financial year)	Leave: Unplanned sick leave per FTE					
	2021/22 (as at 31 December)	2020/21	2019/20	2018/19	2017/18	2016/17
Hours	14.25	47.25	70.43	87.58	77.22	77.22
Days	1.9	6.3	9.39	11.68	10.33	10.33

(Financial year)	2016/17	2015/16	2014/15
Hours	83.23	83.38	80.71
Days	11.52	11.12	10.76

(As at)	Leave: Excess leave (number of staff)					
	2021/22 (as at 31 December)	2020/21	2019/20	2018/19	30/06/2018	30/06/2017
Dispute resolution	14	13	0	3	4	4
Regulation and Strategy	5	2	0	1	2	2
Operations	5	5	0	2	2	2
Executive	5	2	0	2	1	1
Total	29	22	0	8	7	7

(As at)	30 June 2017	30 June 2016	30 June 2015
Dispute resolution	6	0	0
Regulation and Strategy	3	3	1
Operations	1	2	2
Executive	1	2	2
Total	10	5	3

Note 1: At present 29 staff are deemed to have excessive leave credits (ie 30+ days). As per OAIC's Enterprise Agreement, the Australian Information Commissioner or delegate may direct an employee to take annual leave within a reasonable period to reduce their accumulated annual to 6 weeks. The reasonable period would not usually be longer than 6 months but in exceptional circumstances may be a longer period. Due to the pandemic, the OAIC Executive has not exercised the discretion to deem officers to be on leave. This is closely monitored to ensure staff are taking appropriate time away from work. Over the new year period, 6 of the 29 staff have reduced their excess leave below 30 days, with 8 further staff with plans in place to reduce their excess throughout February and March 2022.

Commissioner brief: Budget and resourcing February 2022

KEY MESSAGES

- Total appropriation for 2021-22 is \$26.730million
- 2021-22 ASL – cap 147; the internal budgeted cap 127; Actual FTE at 31 December 2021 is 111.
- The 2021-22 Budget provided ongoing funding for FOI Commissioner appointment.
- 2021-22 MYEFO provides additional \$1.997million for transition of ICT services and Federal Court proceedings. It also provides \$0.912 for the expansion of Digital Identity in 2022-23.
- Funding reduces from 1 July 2022 due to terminating measures.

KEY BUDGET NOTES

1 July 2021

- MYEFO 2021-22 increased revenue by \$1.447 million from \$25.283million to \$26.730million. Total capital revenue increased from nil to \$0.550million.

Funding is for:

- Transition of ICT shared services \$1.098million plus \$0.550million capital.
- Federal Court proceedings: \$0.349million
- The published PBS includes \$150,000 in MOU funding. Actual MOU is \$252,500. (Actual figures will be updated in 2022-23 PBS.)
- Total MYEFO published funding is \$26.880million including MOU and 147 ASL
- OAIC will seek permission to operate at loss of \$1.630million for transition of payroll and finance services to Service Delivery Office. The transition is self-funded.
- The 2021-22 Budget provides \$5.951million across five key areas:
 - Transition of ICT shared services \$1.098million
 - Federal Court proceedings: \$0.349million
 - Freedom of Information: \$980,000
 - Expansion of Consumer Data Right: \$1.454million
 - Digital Health: \$2.070million.

1 July 2022

- Terminating measures will reduce the OAIC's appropriation by approximately 31% on July 2022 to \$18.443 million.
- The ASL will be 128. Of those, 23 ASL are linked to the below terminating measures. It is estimated the internal budget will enable up to 87ASL to be employed.
- The terminating measures are:
 - timely responses to privacy complaints and strengthened enforcement action relating to social media (\$7.5million)
 - expanding Digital Identity System (\$261,000)
 - Transition of ICT services and Federal Court proceedings (\$1.447million)

1 July 2023

- Further terminating measures will reduce the OAIC's appropriation by a further 22% to \$14.216 million.
- ASL cap is 104. Of this, 24 ASL are linked to the above terminating measures. It is estimated the internal budget will require staffing to reduce to 70.
- The terminating measures are:
 - Expansion of Consumer Data Right (\$1.454million)
 - My Health Record (\$2.070million)
 - Expanding digital identity (\$0.782million)

1 July 2024

- The OAIC's appropriation will increase slightly by 0.8% to \$14.326 million.
- The ASL staffing cap remains steady at 104.

General background**2021-22 Budget**

- The OAIC is also transiting its payroll and finance services from Australian Human Rights Commission to Service Delivery Office. The transition is scheduled for completion by June 2022. The total cost is approximately \$1.630million. The OAIC is self-funding the transition and has applied for permission to operate at loss up to this amount.

- The ASL staffing cap is 147. Of those, 23 ASL are linked to measures (Attachment D). The internal budget will enable up to 127ASL to be employed.
- The published PBS includes \$150,000 in MOU funding. Actual anticipated MOU funding is \$252,000 and \$177,500 each year to 30 June 2024. *Actual estimates can only be updated in the next full budget round 2022-23 (i.e. not MYEFO round).*
- MYEFO provides \$1.098million for the transition of ICT services from AHRC to DESE. A further \$0.550million is provided for capital hardware purchases.
- MYEFO provides \$0.349million for Federal Court proceedings.
- 2021-22 Budget allocates \$980,000 or \$3.949million over the forward estimates for the appointment of Freedom of Information Commissioner and 3 support staff.
- 2021-22 Budget allocates \$1.454million in 2021-22 and 2022-23 for the expansion of the Consumer Data Right.
 - This is in addition to the approximate \$3.058million per year the received in the 2018-19 Budget. (\$12.911million over forward estimates including a once-off capital injection for new office space of \$860,000).
- 2021-22 Budget allocates funding for the OAIC's regulatory oversight of the MyHealth Records system. \$2.070million is provided for 2021-22 and 2022-23 and replaces MOU arrangement with the Australian Digital Health Agency.
- The above MyHealth appropriation includes 12.8 ASL, however the funding is reassignment of MOU to base appropriating and does not represent an increase in funding or ASL.

Other

- The OAIC is in discussions with Government regarding future funding. This includes continuation of existing appropriation and staffing levels. The OAIC works in collaboration with other agencies and alerts government to funding requirements where appropriate.
- OAIC has not received additional funding for its COVID Safe app regulatory role.
- OAIC has not received additional resourcing for the Notifiable Data Breach Scheme.

2021-22 FUNDING AND BEYOND**Appropriation**

	2020-21	2021-22	2022-23	2023-24	2024-25
Appropriation	\$20,948,000	\$26,907,500	\$18,443,500	\$14,216,000	\$14,326,000
MOUs	\$2,323,500	\$252,000	\$177,500	\$177,500	—
Total	\$23,345,500	\$26,730,000	\$18,620,500	\$14,393,500	\$14,326,000
Difference from prior year		+\$3,884,500	-\$8,109,500	-\$4,227,000	-\$67,500

STAFFING AS AT 30 SEPTEMBER

- The ASL is the average staffing level over time. FTE is Full Time Earnings at a point in time. For example, the FTE for 31 December represents just pay period 13. Whereas the ASL is the total average staffing for the period of 1 July to 31 December 2021.
- Year-to-date ASL is 119
- 31 December 2021 FTE is 112 (detailed below)
- Current recruitment agency staff is 3
- Prior periods FTE detailed below:

	31 December 2021	30 September 2021	28 April 2021
OAIC	112 FTE	127 FTE	119 FTE
Privacy	73 / 65%	84 / 66%	82 / 68%
NDB <i>(included in privacy)</i>	5 / 7%	5 / 5%	8 / 7%
FOI	26 / 23%	30 / 22%	23 / 19%
Governance & support	13 / 12%	13 / 11%	16 / 13%

BRIEF ATTACHMENTS

- Attachment A: Possible questions
- Attachment A: Specific funding measures and associated staffing
- Attachment C: 2020-21 Operating Loss
- Attachment B: Historical overview of the OAIC's budget
- Attachment D: Excerpts — previously resource discussions

Updated by	Reason	Approved by	Date
Brenton Attard	February 2022 Estimates	Brenton Attard	

POSSIBLE QUESTIONS

Funding has been provided for the Freedom of Information Commissioner, when will they be appointed?

On 13 August Ms Elizabeth Hampton was appointed as Acting Freedom of Information Commissioner whilst the process to appoint an ongoing Commissioner is underway. The OAIC's statutory appointments are managed by Attorney-General's Department who are best placed to answer the question.

The funding also provides for an additional Assistant Commissioner and 2 officers (who have already been engaged).

Will the additional FOI funding reduce the time to process FOI matters?

The additional FOI funding in the Budget is welcome and will provide for the appointment of an FOI Commissioner and 3 FOI staff, including support staff.

It follows a significant rise in the amount of work coming into our FOI area, including applications for IC reviews and extension of time applications from agencies.

For example, there has been a 140% increase in the number of FOI Information Commissioner Review applications in the four years since 2015-16 (from 510 received in 2015-16 to 1,224 received in 2020-21). 882 IC Review applications have been received from 1 July to 31 December 2021.

During 2015-16 to 2020-21, the OAIC increased the number of finalised FOI Information Commissioner Review applications by 124% (from 454 finalised in 2015-16 to 1,018 finalised in 2020-21). During the period of 1 July to 31 December 2021 693 IC Review applications were finalised. The gap between cases received and finalised has resulted in an increase in time to resolve Information Commissioner Review applications.

The additional resources will assist the OAIC in starting to close that gap.

We will also continue to look for and implement further efficiencies to help address the volume of incoming work, however a further investment in officer-level resourcing is likely to be required to allow the OAIC to meet its KPI for IC reviews.

'What was the impact of COVID-19 on the operations of the OAIC?'

- Staff directed to COVID-19 related work remained steady at 20.5FTE throughout 2021 (approximately 18% of OAIC's workforce at 3 December 2021).
- Impact on OAIC operations included:

- Corporate Services: WFH transition planning and implementation; addressing equipment needs; support for mental wellbeing; revised learning and development.
- Regulation and Strategy: Significant COVIDSafe assessment activity and provision of privacy guidance – such as in relation to the COVIDSafe app, businesses collecting personal information and in relation to privacy risks related to working from home.
- Increase in response time to enquiries resulting from a change from a call line to a call back system, necessitated by working from home.
- Freedom of Information (FOI): Substantial increases in the number of Information Commissioner (IC) review applications, FOI complaints and extension of time applications requiring decisions by the OAIC.

The OAIC's funding reduces significantly in 2022-23. What are you doing about this?

The OAIC has raised the matter of its future funding with Attorney-General's Department and the Attorney-General. The reduction in funding from 1 July 2022 relates to two terminating measures:

- Statutory obligations and social media valued at \$7.5million
- Expanding Digital Identity valued at \$261,000.

The reduction in funding is also attributed to the reduction in MOU revenue. Our MOUs are generally held for one to two years and then re-negotiated.

Did the OAIC receive additional resources for the Notifiable Data Breaches scheme or the COVIDSafe App?

No, there were no additional resources provided for either function, work is prioritised within the existing resource allocation.

What activities were undertaken with the increase of funding by \$25.121million allocated for over three years commencing in the 2019-20 Budget?

This funding was provided to 'facilitate timely responses to privacy complaints and strengthen enforcement action relating to social media and online platforms'. Following this allocation, the OAIC addressed its privacy backlog and commenced proceedings in the Federal Court in relation to Facebook Inc and Facebook Ireland. The OAIC has also taken regulatory action in relation to a number of other online platforms. For example:

- The OAIC and five other data protection and privacy regulators from around the world issued a joint letter to video conferencing providers setting out principles to guide them in addressing key privacy risks and is participating in further joint engagement with these companies.

- The OAIC has opened a joint investigation with the UK Information Commissioner's Office (ICO) into the personal information handling practices of Clearview AI Inc., focusing on the company's use of 'scraped' data and biometrics of individuals.
- The OAIC is regulating the COVIDSafe app and any private sector digital check in service providers.
- The OAIC is doing preparatory work to develop a binding code that applies to social media and online platforms.
- Resolution of backlogs in privacy complaint management.

Did this funding include an allocation for freedom of information?

No. The funding is for privacy functions. The office continues to look for and implement opportunities to increase productivity in relation to its freedom of information regulatory functions.

What will funding for Expanding Digital Identity be used for in 2021-22?

The funding in 2021-22 will enable the OAIC to undertake two privacy assessments (audits) to proactively monitor the privacy protections built into the Digital Identity program, which will assist the Digital Transformation Authority to mitigate privacy risks with the system. The first assessment is planned to commence in the next quarter. This funding also includes provision for the OAIC to develop guidance about the privacy aspects of the Digital Identity system.

The OAIC will seek additional funding to undertake its expanded regulatory role under the Digital Identity legislation.

SPECIFIC FUNDING MEASURES – INCLUDING DATES AND ASSOCIATED ASL**KEY DATES**

- 1 July 2024: OAIC's appropriation \$14.326million and ASL cap of 104. Slight adjustment relates to indication rates
- 1 July 2023: Terminating measures reduce the OAIC's appropriation by approximately 23% to \$14.216million with a reduced ASL cap of 104
- 1 July 2022: Terminating measures reduce the OAIC's appropriation by approximately 301% to \$18.443million with a reduced ASL cap of 128.
- MYEFO 2021: Budget provides \$1.447million for the transition of ICT services from AHRC to DESE. A further \$0.550million is provided for capital hardware purchases.
- Additionally, \$0.349million is provided for Federal Court proceedings and \$0.912million in the 2022-23 year for the Expansion of Digital Identity.
- 1 July 2021: Budget provides additional \$4.508million for Freedom of Information Commissioner, expanded Consumer Data Right, Digital Health. This is an increase of 16%. ASL increases from 124 to 147.
- 1 July 2020: 2021-22 Forward Estimates provides \$0.261million for Expanding Digital Identity
- 1 July 2019: 2019-20 Budget provides \$329,000 to the 2018-19 base and \$2.256million over the forward estimates for the expansion of Medicare data matching.
- 1 July 2019: 2019-20 Budget provides \$25.121million over three years to enhance funding for statutory obligations and social media.
- 30 June 2019: Enhanced Welfare Payment Integrity – non-employment income data matching (commenced MYEFO 2015-16) measure valued at \$1.326million terminates.
- 1 July 2018: 2018-19 Budget provides \$12.91million over the forward estimates for CDR
- 22 February 2018: NDB Scheme commenced, no additional funding received to date

Privacy Complaints and social media (terminating)

	2019-20	2020-21	2021-22	2022-23	2023-24
Appropriation	\$7,734,000	\$7,887,000	7,500,000	—	—
Capital	\$2,000,000	—	—	—	—
Total	\$9,734,000	\$7,887,000	\$7,500,000	—	—

Expanding Digital Identity (terminating)

	2020-21	2021-22	2022-23	2023-24	2024-25
Appropriation	—	\$261,000	—	—	—
Capital	—	—	—	—	—
Total	—	\$261,00	—	—	—

Digital Health (terminating)

	2020-21	2021-22	2022-23	2023-24	2024-25
Appropriation	—	\$2,070,000	\$2,070,000	—	—
Capital	—	—	—	—	—
Total	—	\$2,070,000	\$2,070,000	—	—

Freedom of Information

	2020-21	2021-22	2022-23	2023-24	2024-25
Appropriation	—	\$984,000	\$985,000	\$988,000	\$992,000
Capital	—	—	—	—	—
Total	—	\$984,000	\$985,000	\$988,000	\$992,000

CDR (including expansion)

	2019-20	2020-21	2021-22	2022-23	2024-25 & beyond
Appropriation	\$3,178,000	\$3,036,000	\$4,512,000	\$4,512,000	\$3,058,000
Capital	—	—	—	—	—
Total	\$3,178,000	\$3,036,000	\$4,512,000	\$4,512,000	\$3,058,00

MBS/PBS

	2019-20	2020-21	2021-22	2022-23	2023-24 & beyond
Appropriation	\$571,000	\$565,000	\$560,000	\$560,000	\$560,000
Capital	—	—	—	—	—
Total	\$571,000	\$565,000	\$560,000	\$560,000	\$560,000

National security

	2020-21	2021-22	2022-23	2023-24	2024-25
Appropriation	\$965,000	\$965,000	\$965,000	\$965,000	\$965,000
Capital	—	—	—	—	—
Total	\$965,000	\$965,000	\$965,000	\$965,000	\$965,000

MOUs

	2020-21	2021-22	2022-23	2023-24	2024-25
ADHA	2,070,000	—	—	—	—
ACT Gov't	\$177,500	\$177,500	\$177,500	\$177,500	—
DHA – NFBMC	—	—	—	—	—
DHA – PNR	\$75,000	\$75,000	—	—	—
Other	—	—	—	—	—
Total	\$2,322,500	\$252,500	\$177,500	\$177,500	—

STAFFING ASSOCIATED WITH SPECIFIC BUDGET MEASURES

- 23 ASL for statutory obligations and social media
- 15 ASL for CDR
- 8 ASL for expanded CDR
- 3 ASL for Medicare data matching
- 13 ASL for Digital Health
- 3 ASL for FOI Commissioner support staff.

2020-2021 Operating Loss

- The OAIC obtained government’s approval to operate at a financial loss of \$850,000 (excluding depreciation and amortisation). The loss was to enable the OAIC to transition its shared services provider to Department of Finance, Service Delivery Office, aligning with the Shared Services Program.
- The OAIC’s total permitted operating loss was \$1.751million including depreciation, amortisation and transition to shared services (i.e., \$901,000 + \$850,000).
- The total underlying loss (excluding depreciation, amortisation, and principal lease payments) reportable to government was \$1.985million and principally due to workload pressures in relation to government priorities for which the OAIC was not funded, higher than anticipated legal expenditure, and OAIC’s preparations to change corporate service providers.
- The total loss in the financial statements was \$3.128million. This figure represents the full financial view, including depreciation, amortisation and transition to shared services.

During the 2020-21 financial audit, the Australian National Audit Office reviewed whether the OAIC is able to continue as a going concern. The ANAO commenced these enquiries due to the prior year losses and depletion of financial reserves.

While the ANAO confirmed OAIC is viable as a going concern, the OAIC was required to include an appropriate disclosure note in its financial statements regarding measures being taken to ensure the OAIC could continue to meet its commitments as and when they fall due.

	2020-21	2019-20
Operating loss	\$3.128M	\$0.12M
Assets	\$4.537M	\$10.613M

Post 2014-15 Budget overview

Year	Total	Commentary
2014-15	\$12,820,000	ASL: 64
Appropriation	\$9,963,000	Total appropriation was \$9,963,000. Prior to efficiency dividends amounts include: <ul style="list-style-type: none"> • initial appropriation \$7,191,000 • \$2,812,000 in the Supplementary Budget Estimates
MOU	\$2,857,000	Includes Dept. Health amount of \$1,976,000
2015-16	\$11,801,000	ASL: 64
Appropriation	\$9,328,000	Total appropriation was \$9,328,000. Prior to efficiency dividends amounts include: <ul style="list-style-type: none"> • Initial appropriation of \$5,698,000 for the privacy function and \$1,709,000 for continued FOI function • New measure: National Security \$1,130,000 (+6.04SL) • MYEFO measure: Welfare Data Matching: \$818,000 (Nil ASL)
MOUs	\$2,473,000	Includes Dept. Health amount of \$1,865,500
2016-17	\$13,482,000	ASL: 71
Appropriation	\$10,622,000	Total appropriation was \$10,622,000 million Includes known measures: <ul style="list-style-type: none"> • National Security: \$1,089,000 (-0.26ASL = inc. 5.78) • Welfare Data Matching: \$1,311,000 (Nil ASL)
MOU	\$2,860,000	Includes ADHA amount of \$2,076,700
2017-18		ASL: 75
Appropriation	\$10,711,000	Total appropriation was \$10,711,000. Prior to efficiency dividends amounts include: <ul style="list-style-type: none"> • New measure: \$379,000 return of FOI from AAT in MYEFO Known measures: <ul style="list-style-type: none"> • National Security: \$988,000 (inc. 5.78 ASL) • Welfare Data Matching: \$1,311,000 (Nil ASL)
MOU	\$2,590,000	Includes ADHA amount of \$1,688,400
2018-19	\$15,890,000	ASL cap: 93
Appropriation	\$13,825,000	Total appropriation is \$13,825,000. Prior to efficiency dividends amounts includes: New measures: <ul style="list-style-type: none"> • Consumer Data Right \$2,779,000 (ongoing) (+10ASL) • MBS/PBS \$329,000 (ongoing) (+3 ASL) Known measures: <ul style="list-style-type: none"> • National Security: \$965,000 (inc. 5.78 ASL)

		<ul style="list-style-type: none"> Welfare Data Matching: \$1,326,000 (Nil ASL)
MOU	\$2,065,000	Includes ADHA value of \$2,070,000
Capital	\$860,000	Once-off equity injection
2019-20	\$23,234,000	ASL cap: 124
Appropriation	\$20,941,000	<p>Total appropriation is \$20,941,000. Prior to efficiency dividends amounts include:</p> <p>New measure:</p> <ul style="list-style-type: none"> Statutory obligations and social media \$7,734,000 (+23 ASL) <p>Known measure:</p> <ul style="list-style-type: none"> National Security: \$965,000 (inc. 5.78 ASL) Consumer Data Right: \$3,178,000 (+5 ASL = inc. 15 ASL) MBS/PBS: \$571,000 (inc. 3 ASL) <p>Less terminating measure:</p> <ul style="list-style-type: none"> Welfare Data Matching -\$1,326,000 (Nil impact on ASL)
MOU	\$2,293,000	ACT / ADHA / Home Affairs MOU (NFBMC)
Capital	\$2,000,000	Once-off equity injection
2020-21	\$23,270,500	ASL cap: 124 Budget cap: 120
Appropriation	\$20,948,000	<p>Total appropriation is \$20,948,000. Prior to efficiency dividends amounts include:</p> <p>Known measures:</p> <ul style="list-style-type: none"> National Security: \$965,000 (inc. 5.78 ASL) Consumer Data Right: \$3,036,000 (inc. 15 ASL) MBS/PBS: Medicare data matching \$565,000 (inc. 3 ASL) Statutory obligations and social media \$7,887,000 (inc. 23 ASL) <p><i>Excluding known measures, the base balance is \$8,495,000</i></p>
MOU	\$2,322,500	ACT / ADHA / Home Affairs MOUs: PNR
Capital	\$268,000	Unspent capital carried forward from prior years
2021-22	\$26,907,500	ASL cap: 147 Budget cap: 127
Appropriation	\$26,730,000	<p>Total appropriation is \$26,730,000. Prior to efficiency dividends amounts include:</p> <ul style="list-style-type: none"> New measure: Transition of ICT shared services and Federal Court Proceedings costs \$1,447,000 (Nil ASL) New measure: Expanding Digital Identity \$261,000 (Nil ASL) New measure: Consumer Data Right \$1,454,000 (inc. 8 ASL) New measure: My Health Record \$2,070,000 (inc. 12.8 ASL) FOI Commissioner & support \$984,000 (inc. 3 ASL). <p>Known measures:</p> <ul style="list-style-type: none"> National Security: \$965,000 (inc. 5.78 ASL) Consumer Data Right: \$3,058,000 (inc. 15 ASL)

		<ul style="list-style-type: none"> • MBS/PBS: Medicare data matching \$560,000 (inc. 3 ASL) • Statutory obligations and social media \$7,500,000 (inc. 23 ASL) <p><i>Excluding known measures, the base balance is \$8,431,000</i></p>
MOU	\$252,500	ACT MOU, PNR
Capital	\$550,000	Capital injection
2022-23	\$18,620,500	ASL cap: 128 Budget cap: 87
Appropriation	\$18,443,000	<p>Total appropriation is \$18,443,000. Prior to efficiency dividends amounts include:</p> <p>New measure:</p> <ul style="list-style-type: none"> • Expanding Digital Identity: \$0.782million (inc. 3.5ASL) <p>Known measures:</p> <ul style="list-style-type: none"> • National Security: \$965,000 (inc. 5.78 ASL) • Consumer Data Right: \$4,512,000 (inc. 15 ASL + 8ASL) • MBS/PBS: Medicare data matching \$560,000 (inc. 3 ASL) • My Health Record \$2,070,000 (inc. 12.8 ASL) • FOI Commissioner & support \$985,000 (inc. 3 ASL) <p>Less terminating measures:</p> <ul style="list-style-type: none"> • New measure: Transition of ICT shared services and Federal Court Proceedings costs \$1,447,000 (Nil ASL) • Statutory obligations and social media -\$7,500,000 (-23 ASL) • Expanding Digital Identity -\$261,000 (Nil ASL) <p><i>Excluding known measures, the base balance is \$8,569,000</i></p>
MOU	\$177,500	ACT MOU
Capital	\$130,000	Capital injection
2023-24	\$14,393,500	ASL cap: 104 Budget cap: 67
Appropriation	\$14,216,000	<p>Total appropriation is \$14,216,000. Prior to efficiency dividends amounts include:</p> <p>Known measures:</p> <ul style="list-style-type: none"> • National Security: \$965,000 (inc. 5.78 ASL) • Consumer Data Right: \$3,058,000 (inc. 15 ASL) • MBS/PBS: Medicare data matching \$560,000 (inc. 3 ASL) • FOI Commissioner & support \$988,000 (inc. 3 ASL) <p>Less terminating measures:</p> <ul style="list-style-type: none"> • Expanding Digital Identity: \$0.782million (inc. 3.5ASL) • Consumer Data Right \$1,454,000 (inc. -8 ASL) • My Health Record \$2,070,000 (inc. -12.8 ASL). <p><i>Excluding known measures, the base balance is \$8,645,000</i></p>
MOU	\$177,500	ACT MOU
Capital	Nil	n/a

2024-25	\$14,326,000	ASL cap: 104 Budget cap: 67
Appropriation	\$14,326,000	Total appropriation is \$14,326,000. Prior to efficiency dividends amounts include: Known measures: <ul style="list-style-type: none"> • National Security: \$965,000 (inc. 5.78 ASL) • Consumer Data Right: \$3,058,000 (inc. 15 ASL) • MBS/PBS: Medicare data matching \$560,000 (inc. 3 ASL) • FOI Commissioner & support \$992,000 (inc. 3 ASL). <i>Excluding known measures, the base balance is \$8,751,000</i>
MOU	Nil	n/a
Capital	Nil	n/a

Excerpts — previous resource discussions**Tuesday 26 October 2021**

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

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

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

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

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

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

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

Estimates Thursday, 27 May 2021

Senator KIM CARR: It was previously indicated that you needed an additional nine FOI officers, in terms of the increase in existing numbers. Is that still the case?

Ms Falk: Now that we have the budget announcement of \$980,000 for the next financial year for the FOI commissioner and for three additional staff, we are preparing to welcome the new commissioner and to look at what that will look like in terms of our future projections for the work of the office. However, I've outlined for the committee that we have a significant number of matters on hand at present—over 1,200—and that we have a significant number—over 600—that are over 12 months old. I am currently recalibrating and looking at what staffing levels are needed into the future, and I will provide advice to government about that in coming weeks.

Senator KIM CARR: You say you will provide advice to government. Do you anticipate that the additional resource will cover that backlog?

Ms Falk: I think that the appointment of the commissioner and the additional three staff will go some way to assist in the workload management issues. But I think that we will require some additional staffing if we are to resolve those older cases in a more timely manner.

Senator PATRICK: Thank you very much. If these questions have been covered, just say so. Regarding the timing of the appointment of the new Freedom of Information Commissioner, when might we expect an advertisement—however you go about doing that? What do you think, typically, the process will be in terms of engaging someone, having their feet under the desk and signing off on FOI reviews?

Ms Falk: The question has not been asked. The appointment will be a matter for the department, so I will refer that to the secretary.

Mr Anderson: We'll proceed with expedition. It will be a merit process. There'll be an advertisement. There'll be a panel convened. We try and do these things as quickly as possible. Then it will be a question of the person who's appointed to the position. There might be a question as to how quickly they can actually take up the role or whether they need any period to separate themselves from whatever they were doing beforehand.

Senator PATRICK: It will be an advertised role?

Mr Anderson: That's indeed true.

Estimates Tuesday, 23 March 2021

Senator PATRICK: Well, it might not have been a joke, but it might have been humorous. Perhaps more disturbingly, you gave some answers on your capacity to deal with reviews and you said that last year it was 829 and that you expected a similar number this year, next year and the year after. But you then showed projections on the number of requests that you're likely to deal with. Last year you had 1,066 reviews but only 829 were completed. This year, you're expecting 1,226, with only 829 as a capacity. It just keeps going up: 1,410, with the same capacity; 1,622 for 2022-23 with capacity to conduct only 829. So you're just going to be in a situation where you have twice the number of applications that you can actually handle. I think I might have characterised it—

CHAIR: Do you have a question, Senator Patrick?

Senator PATRICK: I think I might have characterised it as a train smash. What are we going to do here? It's getting out of control.

Ms Falk: Your question is: what are we to do? From my statutory office's perspective, we seek to deal with each and every matter as efficiently and effectively as possible, of course also paying regard to proper administrative law-making and taking the time that's needed on each matter. I've mentioned a number of the strategies that we've put in place. We have seen those work. I have only projected finalising 829 in the out years in that question on notice; however, I can see that we are already on track to finalising more than that this financial year. So we continue to do better; however, I do hold the view that, without some additional resources, it will be difficult for the office. We'll continue to be challenged in terms of having that backlog and having those older matters, despite our best efforts.

Senator PATRICK: It's an important function. Minister, I just wonder whether you could comment on the huge difference between the number of applications and the resources available?

Senator Stoker: Look, it's something I'm prepared to work with you on some more, because I know you are very passionate about this, Senator Patrick. There is a tension between the policy work of the commission and the review work. There's always a tension between the amount of resources one wants and the limits that exist for us in the real world. I can see that the commissioner is working very hard to get that balance right. The government is giving her as much support as we can to do that important role.

Senator PATRICK: Were you offering to have a conversation with me about FOI?

Senator Stoker: Yes, absolutely.

Senator PATRICK: Alright. I will take you up on that. You may regret that, minister!

Senator Stoker: That's alright.

Senator PATRICK: I can talk about it a lot. But thank you very much.

Senator Stoker: Look, it's something I'm prepared to work with you on some more, because I know you are very passionate about this, Senator Patrick. There is a tension between the policy work of the commission and the review work. There's always a tension between the amount of resources one wants and the limits that exist for us in the real world. I can see that the commissioner is working very hard to get that balance right. The government is giving her as much support as we can to do that important role.

Senator PATRICK: Were you offering to have a conversation with me about FOI?

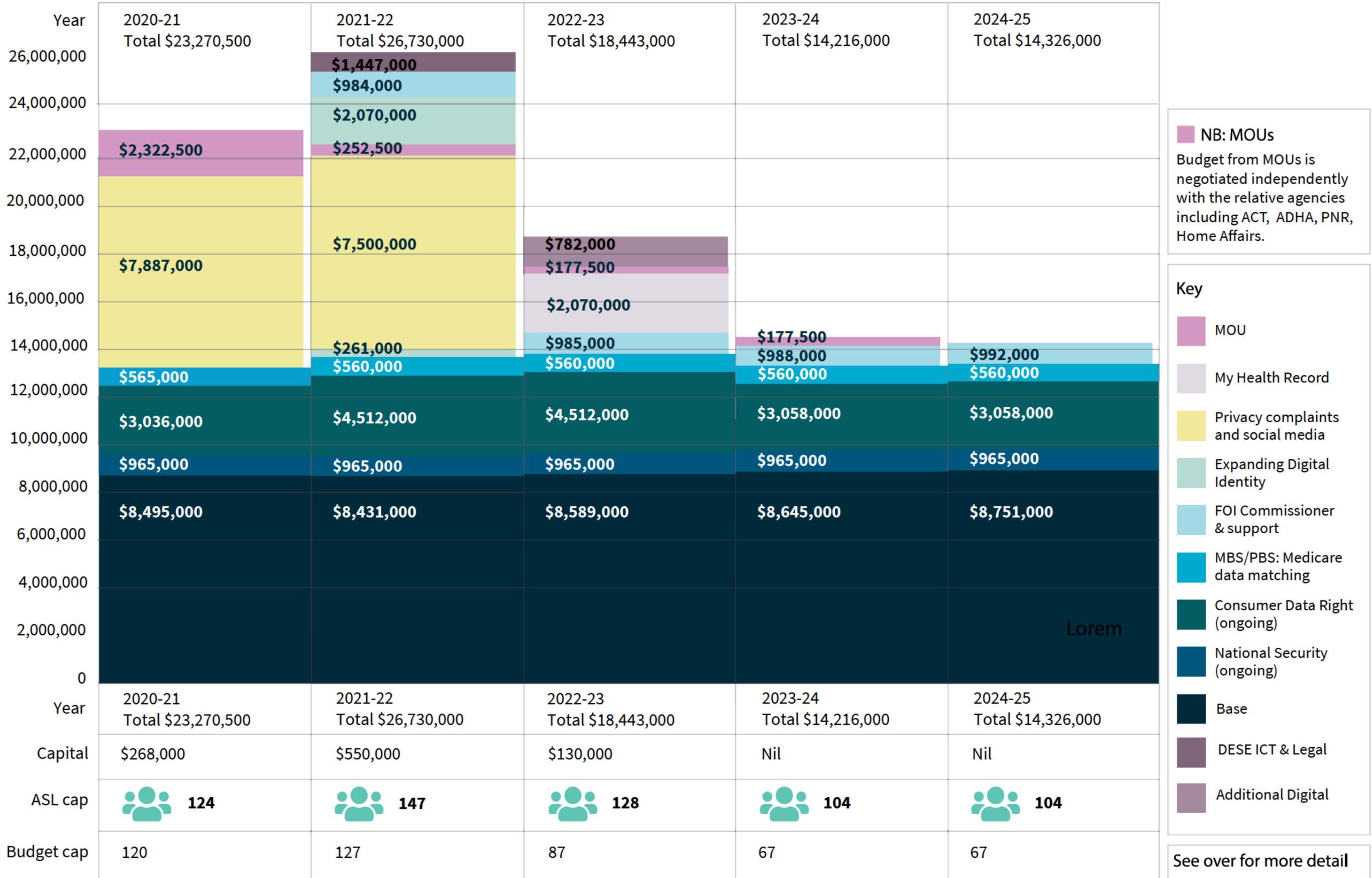
Senator Stoker: Yes, absolutely.

Senator PATRICK: Alright. I will take you up on that. You may regret that, minister!

Senator Stoker: That's alright.

Senator PATRICK: I can talk about it a lot. But thank you very much.

Data showing funding from 2020-21 forward



NB: MOUs
Budget from MOUs is negotiated independently with the relative agencies including ACT, ADHA, PNR, Home Affairs.

Key

- MOU
- My Health Record
- Privacy complaints and social media
- Expanding Digital Identity
- FOI Commissioner & support
- MBS/PBS: Medicare data matching
- Consumer Data Right (ongoing)
- National Security (ongoing)
- Base
- DESE ICT & Legal
- Additional Digital

See over for more detail

Known measures

Base funding appropriation

Requirement:

- Per Outcome 1 of the Portfolio Budget Statement:

“Provision of public access to Commonwealth Government information, protection of individuals’ personal information, and performance of information commissioner, freedom of information and privacy functions.”

National security

Requirement

- Regulatory oversight of privacy implications arising from the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 and the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015.
- Oversight includes provision of guidance material, assessments, advice and complaint handling activities.

Privacy complaints and social media

Requirement:

- to facilitate timely responses to privacy complaints and strengthen enforcement action relating to social media and other online platforms

Consumer Data Right

Requirement

- The OAIC and Australian Competition and Consumer Commission (ACCC) co-regulate the CDR scheme. The OAIC will be the primary complaint-handler and will have responsibility for overseeing the privacy aspects of the scheme. The OAIC will also work closely with the ACCC to deliver a consumer education campaign and to publish guidance for consumers and industry.

Digital Identity Program

Requirement

- The OAIC will perform ongoing assurance through two audits and the development of guidance material relating to the Digital Identity program.

MBS/PBS

Requirement

- The OAIC will be the complaint handling body for the guaranteeing Medicare regime, and will offer the mechanism through which consumers can seek a formal remedy to redress a breach of their privacy; and respond to general enquiries from the community. This includes investigating and taking enforcement action in relation to breaches of the scheme, including the conduct of Commissioner-Initiated Investigations.
- The funding will also enable the OAIC to undertake two privacy assessments (audits) per year to proactively monitor whether information subject to the new arrangements is being maintained and handled in accordance with the relevant legislative obligations, and recommend how areas of non-compliance can be addressed and privacy

risks reduced.

Freedom of Information Commissioner and support

Requirement

- Appointment of a Freedom of Information Commissioner and support staff

MOUs

ACT Government: Provision of Privacy Services \$177,500 (1 July 2018 to 30 June 2021 and 1 July 2021 to 30 June 2024)

Requirement:

- Reporting**
One annual report for each year of the Term of the MOU about its operation in a form that can be tabled in the Legislative Assembly (s 54 report)
- Complaints and Enquiries**
Respond to complaints or enquiries.
- Assessments**
One assessment per year for the term of the MoU.
- Privacy Professional Network**
Access to Privacy Professional Network meetings.
- Guidance**
The Commissioner will review and update the Commissioner’s website content and guidance material in relation to the Information Privacy Act.
- Data Breach Notifications**
Where ACT agencies notify the Commissioner of a data breach, the Commissioner will register the breach and provide further advice. Provision of advice or further services will be at the Commissioner’s discretion.
- Policy and Legislation Advice**
Includes limited advice to agencies, scrutiny of Bills, appearances before the ACT Legislative Assembly at Estimates Committees and advice to Members of the ACT Legislative Assembly.

Department of Home Affairs: National Facial Biometric Matching Capability \$75,000 (MOU deferred)

Requirement:

- Assessment**
Conduct a privacy assessment of Affair’s management of the National Driver Licence Facial Recognition Solution (NDLFRS).

Department of Home Affairs: Passenger Name Records \$75,000 (2021/22)

Requirement:

- Assessment**

Conduct a assessment of Home Affairs’ handling of Passenger Name Record data and provide a report.

Australian Digital Health Agency: Healthcare Identifiers Service and MyHealth Records \$2.070million (2020/21)

Requirement:

- Complaints**
Receive and respond to complaints relating to all privacy aspects of the My Health Records system and the HI service
- Commissioner Initiated Investigations**
The OAIC will investigate, where appropriate, acts and practices that may be a misuse of Healthcare Identifiers or a contravention of the My Health Records Act, on the Commissioner’s own initiative.
- Data Breach Notifications**
Deal with DBNs received relating to the MHR system and the HI service. Investigate failures to notify data breaches.
- Assessments**
Conduct a minimum of two assessments in relation to the MHR system and the HI service. This will be subject to a work plan developed by the OAIC in consultation with the ADHA.
- Enquiries**
Respond to privacy related enquiries about the handling of MHR information and the HI service.
- Guidance Materials**
Prepare and/or update written guidance materials for individuals and entities on the MHR system, MHR information, the HI service, and handling HI information.
- Speeches, articles and media**
OAIC will prepare HI and MHR speeches, articles and media comments on privacy matters.
- Consultations**
The OAIC will participate in consultations and comment on digital health developments that relate to the HI service and My Health Record system, including commenting on draft legislation that may interact with the HI Act and the My Health Records Act.

Commissioner brief: Performance outcomes

Key messages: 2021-22

- To date in 2021-22, the OAIC is currently meeting **2 of 8 PBS KPIs** and is on track to meet **2 of 8 KPIs**:
 - 80% of privacy complaints finalised within 12 months (91% completion)
 - 80% of FOI Information Commissioner Reviews are finalised in 12 months (81% completion)
 - 80% of Notifiable Data Breaches are finalised within 60 days (partially achieved 76%)
 - 90% of written enquiries are finalised within 10 working days (partially achieved 85%)
- In 2020–21 we achieved 3 PBS KPIs: finalising FOI complaints (82%), handling Notifiable Data Breaches (80%) and finalising privacy complaints (94%).

Key Facts, Figures and Funding

Performance actual achievements 2021–22 (to 30 December 2021 – YTD)	
Handling privacy complaints	
<ul style="list-style-type: none"> • 80% of privacy complaints are finalised within 12 months 	<ul style="list-style-type: none"> • Currently above target: 91% of privacy complaints finalised within 12 months
Handling data breach notifications	
<ul style="list-style-type: none"> • 80% of Notifiable Data Breaches are finalised within 60 days • 80% of My Health Record data breach notifications are finalised within 60 days 	<ul style="list-style-type: none"> • Not currently being achieved: 76%, down 4% compared to 2020-21 • Currently not being achieved: 0% <ul style="list-style-type: none"> ○ open case received 20/5/21 ○ <i>no cases received in 2021–22</i>
Conducting Privacy Commissioner-initiated investigations (CIIs)	
<ul style="list-style-type: none"> • 80% of privacy CIIs are finalised within eight months 	<ul style="list-style-type: none"> • Not currently being achieved: 25% completed within 8 months • <i>Privacy CIIs are not meeting the KPI for finalisation within 8 months.¹</i> • <i>No FOI CIIs have been opened during this financial year.²</i>
Providing an Information Commissioner review function	

¹ The new methodology implemented will impact reporting against this KPI in the future.

² Last Senate Estimates 3 CIIs were reported as finalised in the previous period. However only one CII proceeded to investigation (and finalisation) and the other 2 were closed with no investigation being commenced. The OAIC Annual Report 2020-21 refers to one FOI CII being closed during the reporting period.

<ul style="list-style-type: none"> 80% of Information Commissioner reviews are completed within 12 months 	<ul style="list-style-type: none"> Currently above target: 81%, up 8% compared to 2020-21 (73%) <i>Not achieved in the past 3 financial years</i>
Handling FOI complaints.	
<ul style="list-style-type: none"> 80% of FOI complaints are finalised within 12 months 	<ul style="list-style-type: none"> Not currently being achieved: 60%, down 22% compared to 2020-21 <i>Performance against this target is affected by the OAIC's focus on closing complaints open for more than 12 months (down from 64% 2020-21 to 35% 2021-22).</i>
Conducting FOI Commissioner-initiated investigations.	
<ul style="list-style-type: none"> 80% of FOI CII are finalised within eight months 	<ul style="list-style-type: none"> Not applicable: no CII opened YTD³
Providing a public information service.	
<ul style="list-style-type: none"> 90% of written enquiries are finalised within 10 working days 	<ul style="list-style-type: none"> Not currently being achieved: 85% finalised YTD, up 21% compared to 2020-21 <i>Not met in the previous 2 financial years</i>

Other background – KPI Trends from 2017 to 2022 [2021-22FY as at 30 December 2021]

Performance actual achievements FY17–18 to FYFY 21–22

Privacy complaints: 80% finalised within 12 months

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	97%	2,683	83	2,766
2018–2019	95%	2,774	146	2,920
2019–2020	87%	2,928	438	3,366
2020–2021	94%	2,015	136	2,151
2021–2022	91%	1,053	106	1,159

³ Last Senate Estimates 3 CII were reported as finalised in the previous period. However only one CII proceeded to investigation (and finalisation) and the other 2 were closed with no investigation being commenced. The OAIC Annual Report 2020-21 refers to one FOI CII being closed during the reporting period.

Notifiable Data Breaches: 80% of NDBs are finalised within 60 days.

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	97%	194	6	200
2018–2019	79%	720	191	911
2019–2020	62%	603	370	973
2020–2021	80%	790	197	987
2021–2022	76%	394	124	518

Data breach notifications: 80% of My Health Record notifications finalised within 60 days.

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	100%	29	-	29
2018–2019	77%	25	8	33
2019–2020	57%	4	3	7
2020–2021	50%	1	1	2
2021–2022	0%	0	0	0

Privacy Commissioner-initiated investigations: 80% finalised within eight months

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	72%	13	5	18
2018–2019	86%	6	1	7
2019–2020	38%	8	13	21
2020–2021	20%	2	8	10
2021–2022	25%	1	3	4

Information Commissioner reviews: 80% completed within 12 months

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	84%	513	97	610

2018–2019	73%	481	178	659
2019–2020	72%	597	232	829
2020–2021	73%	740	278	1018
2021–2022	81%	563	131	694

FOI complaints: 80% finalised within 12 months

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	83%	24	5	29
2018–2019	82%	18	4	22
2019–2020	52%	37	34	71
2020–2021	82%	142	32	174
2021–2022	60%	58	18	97

FOI Commissioner-initiated investigations: 80% finalised within eight months

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	0%	-	-	-
2018–2019	0%	-	-	-
2019–2020	0%	-	-	-
2020–2021	0%	-	1	1
2021–2022	0%	-	-	-

Enquiries: 90% of written enquiries finalised within 10 working days

Financial Year	KPI Outcome	Cases Closed on time	Cases Not Closed on time	Total Cases
2017–2018	74%	3,811	1225	5,036
2018–2019	92%	4,479	390	4,869
2019–2020	76%	3,495	1041	4,536
2020–2021	65%	3,766	2,060	5,826
2021–2022	85%	2,019	353	2,372

Document history

Updated by	Reason	Approved by	Date
Eduardo Devia	February 2022 Senate Estimates	Sarah Croxall	17/01/22

Commissioner brief: OAIC's APS Census Results

Key messages

- The OAIC's 2021 APS Survey results overall demonstrated staff are highly engaged and committed and that there has been a pleasing improvement across a number of areas (including internal communications and management). It also highlights areas for improvement
- 80% response rate (1% increase)
- 75% overall employee engagement score (remains steady)
- 67% overall wellbeing index score (4% decrease)
- 64% overall innovation index score (-2% variance from APS average)

Areas of strength

- 91% believe strongly in the purpose and objectives of OAIC (8% higher than APS average)
- 97% are happy to 'go the extra mile' (5% higher than APS average)
- 70% are satisfied overall with their job (5% increase)
- 89% of staff consider they receive the respect they deserve from their colleagues (15% increase)
- 59% of staff are inspired to do their best work every day (7% increase)
- 65% of staff believe their immediate supervisor is invested in their development (6% increase)

Areas for further work

- 57% of staff consider the agency does a good job of promoting health and wellbeing (16% decrease from OAIC 2020 results)
- 34% of staff consider their workgroup has the tools and resources needed to perform well (29% lower than APS average)
- 88% of staff consider their workload to be above capacity [either slightly (36%) or well above (52%)]
 - At least to some extent both these issues speak to resourcing levels
- 66% of staff indicated they wanted to leave their position within the next two years (7% higher than APS average)
- 62% of staff are satisfied with the recognition they receive for doing a good job (7% decrease from OAIC 2020 results)
- 70% staff think their SES manager ensures work contributes to OAIC's strategic direction (7% decrease)

Next steps

- The OAIC Executive and senior leaders have met to consider the census results. The Highlights Report has been circulated to staff, discussed in an all-staff meeting and has been considered in further detail in small groups at a branch level.
- The Executive will draw upon outcomes of these discussions, and suggestions from focus group meetings held to consider the workload issues following the delayed 2020 census, to develop an action plan to identify short, medium and long term strategies.

Document history

Updated by	Reason	Approved by	Date
Mark Smolonogov	February 2022 Senate Estimates	Brenton Attard	24/01/2022

Commissioner brief: Alinta Energy

Key messages

- On 3 March 2020, we commenced preliminary inquiries with Alinta in response to media reports regarding Alinta's privacy compliance. The matter remains open, however the OAIC does not report on matters under current inquiry or investigation and rarely reports where a matter is escalated to investigation.
- The APPs do not generally prevent an organisation from sending personal information overseas. However, organisations need to carefully consider steps that may need to be taken to comply with the APPs when doing so.
 - However certain types of personal information are subject to data localisation requirements. For example, part IIIA of the Privacy Act, restricts sending information held in the Australian credit reporting system overseas.

Critical facts

- On 2 March 2020, the media reported a whistle blower raising issues regarding Alinta's privacy compliance. In particular, the reports referred to an internal audit by Ernst & Young into Alinta's privacy compliance.
- On 3 March 2020 we commenced preliminary inquiries with Alinta. The inquiries related to APP 8 – Cross-border disclosure of personal information. s 47E(d)
- The OAIC has made other telephone inquiries with Treasury and FIRB
- The Senate Economic References Committee inquiry into foreign investment proposals has considered Alinta, and the Commissioner appeared on 15 May 2020.

s 47E(d)

Possible questions

How do Privacy Act requirements interact with FIRB conditions?

- The requirements are separate. However, the APPs require reasonable steps to be taken to ensure protection of personal information and to ensure an overseas recipient does not breach the APPs, and these requirements may apply at the same time as FIRB conditions in some instances. FIRB may consult the OAIC in relation to privacy impacts of foreign investment proposals.

Is there a higher risk of identity theft when personal information is held offshore?

- APP 11 requires that organisations must take reasonable steps to protect personal information they hold from misuse, interference and loss, as well as unauthorised access, modification or disclosure. Organisations need to ensure that the controls around the information —the access controls, the physical security and the governance—meet that 'reasonable steps' test. The location of the data is one aspect that any organisation will need to consider in their risk assessment before sending personal information overseas.

What are the information handling obligations on vendors when selling a business?

- Disclosures of personal information are permitted if they are related to the reason the information was collected and within the reasonable expectations of the individuals concerned.
- How the APPs apply on completion of the sale depends on whether there will be a change in the legal entity holding the personal information and whether the purchaser contemplates operating a similar business.
- Where personal information is sold and will be used by the purchaser to deliver a service which is essentially the same to that offered by the original owner, such a disclosure is likely to be consistent with either the primary purpose of collection, or with what customers might reasonably expect, and be permitted under APP 6.

What are the information handling obligations on purchasers when buying a business?

- A purchaser has obligations under APP 3 and APP 5 when collecting information from the vendor at completion and then under APP 6 when using or disclosing that information. It also has obligations under APP 10 to ensure the quality of the information. APP 7 obligations may arise if information is used for direct marketing.
- At the point at which the purchaser of a business considers any significant changes regarding how it uses or discloses the customer information received, it would need to consider its obligations under APP 6. This would likely include considering:
 - whether or not the individuals consented to the proposed new use or disclosure

- whether or not the new use or disclosure would be reasonably expected by the individuals, having regard to matters including the circumstances in which the information was originally provided by the customers.

Other background

Information in the public domain regarding this matter

- **On 3 March 2020**, the OAIC announced it was making preliminary inquiries into Alinta's handling of Australians' personal information.
- **On 15 May 2020**, the Commissioner advised the Senate Economic References Committee inquiry into foreign investment proposals that the OAIC:
 - had been contacted by third parties with an interest in the matter
 - wrote to Alinta directly (a copy of this initial correspondence was provided in confidence to the Committee)
 - had received information back from Alinta
 - have had telephone contact with the FIRB
 - had not written to Electricity Monster or any other entities.

Document history

Updated by	Reason	Approved by	Date
Michael Foot	Senate Estimates February 2022		

Commissioner brief: International regulatory developments

Key messages

- Globally interoperable data protection laws are increasingly important to protect individuals online and reduce regulatory friction for business - particularly noting increased cross-border data flows. This was an important aspect of OAIC submission to the Privacy Act Review.
- The OAIC actively engages with a range of international privacy and data protection networks. Since October 2018, I have been a member of the Executive Committee of the Global Privacy Assembly. The Global Privacy Assembly is the leading global forum of data protection and privacy authorities with over 130 members across all continents.
- International engagement ensures the OAIC learns from others' experiences, identifies areas of synergy and facilitates international collaboration, including on enforcement. The OAIC has MOUs with the Data Protection Commissioner of Ireland (April 2014), the UK Information Commissioner's Office (January 2020) and the Singaporean Personal Data Protection Commission (March 2020). The OAIC is currently in discussions with the UK ICO and the Singaporean Personal Data Protection Commission to continue with the MOUs, given the benefits of these relationships. For example, under our MOU with the ICO we undertook a joint investigation into the information handling practices of Clearview AI.
- We work closely with Australian government agencies on initiatives that facilitate cross-border transfers of data while protecting privacy, such as working with the Attorney-General's Department to implement the APEC Cross-Border Privacy Rules (CBPRs) in Australia, and providing advice to the Department of Foreign Affairs and Trade in relation to Australia's Free Trade Agreements.
- In January 2021, the Australian Government elevated the bilateral relationship with Malaysia to a Comprehensive Strategic Partnership (CSP). As part of this, areas for data protection cooperation with the Malaysian Department of Personal Data Protection (JPDP) will be explored.
-
- We monitor international privacy developments, particularly in Europe, the UK, Canada and the USA, to inform both the advice we provide to Australian Government and our own regulatory action. For example, we have closely been monitoring the UK's children's code and the introduction of the Californian Consumer Privacy Act in light of the Government's proposed online privacy code.

Critical facts

1. Global Privacy Assembly

- ExCo position:
 - Angelene Falk is a member of the Executive Committee, and chairs the Strategic Direction Sub Committee of the Executive Committee (SDSC). Angelene Falk undertakes both these roles as Privacy Commissioner.
 - In October 2020, the OAIC was re-elected to the GPA Executive Committee for a further two years until October 2022.
 - This will be the last year Angelene Falk will be a member of the Executive Committee, and chair the Strategic Direction Sub Committee of the Executive Committee (SDSC).
 - The previous GPA Chair and UK Information Commissioner, Elizabeth Denham, requested the Australian Information Commissioner to stand for re-election to the Executive Committee. The re-election occurred at the virtual closed session on 15 October 2020.
- Virtual Engagement: Global Privacy Assembly's Closed Session, 2021:
 - Due to the COVID-19 pandemic, the Global Privacy Assembly's (GPA) Annual Conference was virtually from 18-21 October 2021. Angelene Falk, Elizabeth Hampton, David Stevens and Melanie Drayton attended the conference.
- COVID-19 related activities:
 - In 2020, the GPA's Executive Committee has established a GPA COVID-19 Taskforce for one year to consolidate data protection authorities and stakeholders' efforts, maximise the voice of the GPA, gather expertise, and assist GPA members and observers in addressing emerging privacy issues posed by COVID-19. In 2021, this group was given a further mandate in acknowledgement of the need to continue and broaden its work. The group is now known as the Working Group on data sharing for the public good. Its mandate has evolved to focus on data protection and privacy issues and concerns related to sharing of personal data as the global pandemic response shifts towards economic recovery.
 - In March 2021, the GPA's Executive Committee published a joint statement which stressed the importance of privacy by design in the sharing of health data for domestic or international travel requirements.
 - In March 2020, the GPA Executive Committee released a statement on COVID-19. The statement recognised that data protection requirements will not stop the critical sharing of information to support efforts to respond to the pandemic.
- OAIC engagement on GPA Working Groups:
 - The OAIC engages in the following working Groups of the GPA:
 - Digital Citizen and Consumer Working Group (DCCWG)
 - International Enforcement Cooperation Working Group
 - GPA COVID-19 Working Group
 - Ethics and Data Protection in Artificial Intelligence Working Group

- Policy Strategy Working Group 1 (Global frameworks and standards)
- The OAIC is co-chair of the DCCWG with OPC Canada. The OAIC supported Canada in organising a GPA Conference side webinar which was held on 3 November 2021. Melanie Drayton attended and chair the event.

2. Asia Pacific Privacy Authorities (APPA) Forum

- The OAIC participated in virtual meetings of the Asia Pacific Privacy Authorities forum in December 2021 (56th APPA) and June 2021 (55th APPA). These meetings provide the OAIC with an opportunity to learn from the experiences of our counterparts in the Asia Pacific region.
- During the most recent Forum, OAIC Executive discussed with Privacy Commissioners and professionals from the Asia Pacific region topical issues in privacy regulation, privacy challenges and issues raised by COVID-19, investigations and enforcement, awareness and outreach, and law reform. The OAIC presented on the Australian experience in relation to facial recognition technologies, and investigations into 7-eleven and Clearview. The OAIC also moderated a panel on guidance and enforcement.
- The OAIC will attend the 57th APPA forum in June 2022.

3. GPEN Sweep

- The Global Privacy Enforcement Network (GPEN) was established in 2010 upon recommendation by the Organisation for Economic Co-operation and Development.
- In 2020, the OAIC participated in the 2020-21 GPEN Sweep.
- The aim of this sweep was to better understand, at the practical level, if and how privacy considerations have been taken into account by the organizations responsible for various COVID-19 solutions and initiatives and what level of engagement DPAs have had with those organizations in their jurisdiction (whether via assessments of contact tracing apps or any other public or private sector initiative).
- The GPEN sweep report was published on 6 October 2021.

4. Recent collaboration with international regulators

Country/Authority	Form of collaboration	Collaboration activities
-------------------	-----------------------	--------------------------

S 47E (d)

S 47E (d)

S 47E (d)

Possible questions

- ***Does Australia need to obtain EU adequacy? What are the barriers, if any?***

This is a matter for the Attorney-General's Department.

In the OAIC's December 2021 submission to the Privacy Act Discussion paper, the OAIC submitted that removing the small business exemption would bring Australia in line with comparable international privacy regimes. The small business exemption has proved to be one of the major issues for Australia in seeking adequacy under the GDPR. An adequacy decision would require the European Commission (EU Commission) to decide that Australia ensures an adequate level of protection to personal data. Adequacy would allow entities subject to the GDPR to transfer personal data to entities in Australia without any specific authorisation or further steps. The adequacy of Australia's privacy regime was considered by the EU in 2001, but the Article 29 Data Protection Working Party found that further safeguards were needed. One of their key concerns was the small business exemption, as any data transfers to Australian businesses could be to a small business operator that is not subject to the Privacy Act.¹

¹ https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp40_en.pdf

Transferring data to Australia on a basis other than adequacy faces additional hurdles under the GDPR that may discourage information flows.²

Following the Schrems II decision, an Adequacy decision might mitigate any regulatory uncertainty for Australian businesses which are currently subject to the other data transfer mechanisms under the GDPR, most likely to be Standard Contractual Clauses. However, adequacy must be constantly monitored to ensure the receiving country's framework remains adequate.

The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the UK under the GDPR and the LED ([the Law Enforcement Directive](#)), and Uruguay as providing adequate protection.

- ***Does Australia need to obtain UK adequacy?***

This is a matter for the Attorney-General's Department. A UK Adequacy decision might mitigate any regulatory uncertainty for Australian businesses dealing with the UK, following its exit from the EU. In August 2021, the UK DCMS published a Mission Statement with respect to international data transfers. Under this Mission Statement the UK indicated that:

- now the UK has left the EU, they are able to independently strike data adequacy decisions with our international partners.
- data 'adequacy' is a status granted by the UK to countries which provide high standards of protection for personal data. An 'adequacy' determination means that personal data can be transferred from the UK to that country freely, in accordance with the terms of the relevant adequacy decision.
- The UK has identified Australia as one of the priority destinations for adequacy (along with Brazil, Colombia, Dubai, India, Indonesia, Kenya, the US, South Korea and Singapore)

Given the scale and scope of international developments in privacy frameworks, the current review of the Privacy Act may be necessary to ensure that Australia's framework provides a high standard of protection of personal data to obtain UK Adequacy.

- ***Does the GDPR (or other international instrument) show that the Privacy Act requires amendments?***

There have been many international developments to privacy frameworks – over the last few years Europe, Canada, America, New Zealand and Singapore, to name a few, have all moved to update their frameworks to reflect the technological advancements brought by the digital economy. The Australian Government is undertaking a review of

² See Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] OJ L 199/31 [18]–[22].

the Australian Privacy Act. Given the scale and scope of environmental change, the current review of the Privacy Act is necessary to ensure that this framework is proportionate, sustainable and responsive to emerging privacy risks into the future. It also presents an opportunity to ensure Australia's framework remains global interoperable by connecting with other frameworks to ensure Australian's data is protected wherever it flows. As part of this review, the OAIC is committed to scrutinising other frameworks.

My Office has made recommendations regarding ensuring that any requirements that are adopted fit within the Australian context, whilst ensuring that Australia's privacy framework is interoperable with other frameworks around the world.

While the GDPR tends to be more prescriptive than the principles-based Australian Privacy Principles (APPs), many GDPR requirements would be expected of entities in their complying with relevant APPs or other Privacy Act obligations.

In the OAIC's December 2021 submission to the Privacy Act Discussion paper, the OAIC has put forward recommendations which would bring the Privacy Act more in line with the GDPR, including for example:

- to replace the word 'about' with 'relates to' in the definition of personal information (recommendation 2),
- removing the small business exemption (recommendation 17),
- strengthening notice requirements (recommendations 26-32),
- requiring collection of personal information to be fair and reasonable (recommendations 33-40),
- introducing a right to erasure (recommendation 55).

- ***Will Australian businesses be impacted by the Schrems II decision?***

The influence of this decision on international data transfers more generally is likely to be significant and we will be monitoring developments in this area and its impact for Australian businesses. The Court of Justice of the European Union (CJEU) decision found that EU and US companies could no longer use the EU-US Privacy Shield as a valid transfer mechanism due to the ability of US law enforcement and national security to access the transferred data.

It also called into question the use of Standard Contractual Clauses as a transfer mechanism, calling on companies to undertake a case-by-case assessment of the surrounding environment to determine whether the data is adequately protected from acquisition by public authorities. Companies would need to assess the surrounding environment and legal frameworks and adopt supplementary measures to ensure its protection.

This part of the decision has potential implications beyond the EU-US Transatlantic border transfers, and may have implications for Australian businesses. In June 2021, the European Commission adopted two sets of standard contractual clauses, one for use between controllers and processors and one for the transfer of personal data to third countries to take account of the Schrems II judgement.

Regulatory developments

International regulatory developments related to surveillance

- In all jurisdictions (Europe, United Kingdom, United States, Canada, New Zealand) the use of surveillance devices is likely to collect personal information (or personal data) and is covered by privacy legislation and regulations.
- Generally, in each jurisdiction there are exceptions relating to the use of surveillance for the purposes of law enforcement and national security.
- The use of surveillance for law enforcement and national security purposes is in some instances regulated by standalone legislative frameworks. For example, the UK has a standalone Surveillance Camera Commissioner to encourage compliance with the Surveillance Camera Code of Practice which applies to local authorities and the police operating surveillance camera systems.

Singapore's Privacy Law reform

- On 2 November 2020, Singapore passed a bill that reformed Singapore's privacy laws ([Personal Data Protection \(Amendment\) Act 2020](#)). Changes to the Act include a mandatory data breach notification regime, an expanded consent-based framework, increased financial penalties for breaches of the PDPA, and a new right of data portability for individuals. Certain key amendments came into force on 1 February 2021, including new criminal offences for individual, mandatory data breach notification regime, consent exceptions.

New Zealand's Privacy Law reform of 2020

- In June 2020, New Zealand passed a bill that reformed New Zealand's privacy laws. The amendments include enhanced powers for the New Zealand Privacy Commissioner, stronger protections for cross-border data transfers, and new mechanisms that promote early intervention and risk management by entities, rather than relying on data subjects' complaints. The amendments took effect on 1 December 2020.

UK Children's Code (previously known as Age Appropriate Design Code)

- UK's Children's Code (previously known as Age Appropriate Design Code) contains 15 standards that online services need to follow. This ensures they are complying with their obligations under data protection law to protect children's data online.

- As of 1 September 2021, all online businesses that are likely to be accessed by children under 18 must comply with the UK's Children's Code.

Developments in the EU

- On 6 December 2021, the European Commissioner published a summary report on the public consultation on the Data Act. According to the report, the Data Act aims to ensure fairness in the allocation of data value among actors in the data economy and to foster access to and use of data. The Data Act will not alter data protection legislation and will seek to preserve incentives in data generation.
- On 21 April 2021, the European Commission introduced a Proposal for the regulation on artificial intelligence (AI) to address the risks of AI, such as live facial scanning. The draft regulation includes fines of up to 6% of a company's annual revenue for non-compliance (fines that are higher than those levied under the GDPR), and a prohibition in principle on 'remote biometric identification', such as the use of live FRT for law enforcement purposes, with a narrow exception for some law enforcement purposes such as searching for a missing child or thwarting a terror attack. The EDPS has [supported](#) the European Commission's proposal, however, once again reiterated a call for a temporary ban on the use of remote biometric identification systems in public areas.
- As part of the implementation of the EDPB 2021-2023 strategy, the EDPB has agreed on the newly established Support Pool of Experts (SPE) project plan. The SPE aims to provide support to EDPB Members through their expertise useful for investigations and enforcement activities and to enhance cooperation and solidarity between EDPB Members by sharing, reinforcing and complementing strengths, and addressing operational needs.
- On 14 December 2021, the EDPB adopted its contribution to the European Commission's evaluation of the Data Protection Directive with Respect to Law Enforcement (Directive (EU) 2016/680) (LED) under Article 62 of the GDPR.
- On 14 December 2021, following public consultation, the EDPB adopted a final version of the Guidelines on examples regarding data breach notifications. These guidelines complement the Article 29 Working Party guidance on data breach notification by introducing more practice orientated guidance and recommendations. They aim to help data controllers in deciding how to handle data breaches and what factors to consider during risk assessment.

US State based privacy developments

- The Californian Consumer Privacy Act (CCPA) came into effect on 1 January 2020, with enforcement taking effect on 1 July 2020.
- On 2 March 2021, the Virginia Consumer Data Protection Act was signed into law, making it the second state to pass comprehensive privacy legislation.
- On 8 July 2021, Colorado became the third US state to pass comprehensive privacy legislation (the Protect Personal Data Privacy Act).

- There are currently [active privacy bills in Alaska, Florida, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Ohio, Pennsylvania and Washington.](#)

APEC CBPRs

- The APEC Joint Oversight Panel endorsed Australia's application to participate in the Cross-Border Privacy Rules (CBPRs) system in November 2018.
- The CBPRs were developed by participating APEC economies with the aim of building consumer, business and regulator trust in cross border flows of personal information.
- They require participating businesses to develop and implement data privacy policies consistent with the APEC Privacy Framework. These are assessed against the minimum program requirements of the APEC CBPR system by an Accountability Agent, an independent APEC recognised private sector entity.
- It is intended that the OAIC will have oversight responsibilities once the system is implemented in Australia.
- The Attorney-General's Department will work with the OAIC and stakeholders to implement the system in Australia.
- Currently the 9 participating economies are USA, Mexico, Japan, Canada, Singapore, the Republic of Korea, Australia, Chinese Taipei, and the Philippines.
- APEC is currently undertaking a study to review the APEC CBPR system. As part of this study, APEC officials interviewed Australia as a CBPR economy. AGD attended the interview on behalf of Australia, and the OAIC provided input into this interview process, and attended the interview as an observer. The APEC Policy Support Unit has provided an interim report into the APEC CBPR system, but is still considering the interviews with CBPR economies, with a view to incorporating them into a final report.

Document history

Updated by	Reason	Approved by	Date
	Estimates February 2022		

Commissioner brief: My Health Record

Key messages

- Since 1 July 2021, the OAIC has been funded through a direct appropriation for its regulatory role in relation to the *Privacy Act 1988*, *My Health Records Act 2012* and *Healthcare Identifiers Act 2010*. This replaces the previous Memorandum of Understanding (MOU) arrangement with the Australian Digital Health Agency (ADHA). Under the new funding arrangement, the OAIC continues to undertake regulatory oversight of the privacy aspects of the My Health Record system, including:
 - responding to enquiries and complaints
 - handling data breach notifications
 - providing privacy advice, and
 - conducting privacy assessments
- The AHDA have advised the OAIC that the recommendations made in the Australian National Audit Office's (ANAO) performance audit of the My Health Record system (2019) have now been implemented. The OAIC continues to engage with the ADHA to ensure that the recommendations are incorporated into ongoing business practice and that oversight and compliance measures are maintained, including:
 - Reviewing the ADHA's end-to-end privacy risk assessment and engaging closely with the ADHA to ensure appropriate governance and ongoing compliance is in place (Recommendation 1)
 - Consulting with the ADHA on their Compliance Framework (Recommendations 2 and 4)
 - Delivering a suite of Emergency Access guidance for healthcare providers, in consultation with the ADHA and other key stakeholders (Recommendation 2).
- The My Health Record system is a key element of the ADHA's National Digital Health Strategy. The current strategy is due to end in 2022 and the ADHA are developing the next strategy, which will replace the existing strategy for the next five years. The OAIC has been updated on the broad progress of the strategy and we anticipate that we will be consulted on the draft strategy in the coming weeks.
- The OAIC is monitoring and engaging with the ADHA in relation to additional functionality being developed for the My Health Record system to support the rollout of Covid-19 vaccine records and pathology reports, including in the My Health Record mobile app environment.
- On 24 February 2020, Professor John McMillan AO was appointed to conduct a review of the *My Health Records Act 2012* (MHR Act). The OAIC made a submission to the review on 30 October 2020 which identifies a number of privacy risks and makes recommendations for legislative amendment.

- On 11 February 2021 the *Review of the My Health Records Legislation Final Report* (report) was tabled in Parliament. The report makes 33 recommendations. The government has not formally responded to the report, however the OAIC understands that the Department of Health are taking a phased approach to the recommendations and are currently working to progress some of the higher priority recommendations. The OAIC has not been consulted to date on any draft proposals to amend the My Health Record legislation.

Enquiries, complaints and NDBs

- During the 2020-21 financial year, the number of MHR enquiries and complaints received by the OAIC remained low, continuing the trend of the previous financial year. The first half of 2021-22 also reflects low enquiry numbers and 3 complaints have been received. The decrease in complaints and enquiries compared to the 2018-2019 financial year can be attributed to lower community interest in the MHR system compared to the 2018-2019 when there was high community interest during the opt-out period.

	July 2012 (MHR system commencement) to 30 June 2018	1 July 2018 to 30 June 2019	1 July 2019 to 30 June 2020	1 July 2020 to 30 June 2021	1 July 2021 to 31 December 2021
Enquiries	83	145	7	11	9
Complaints	12	57	10	7	3
Mandatory data breach notifications	88	35	1	3	1

- The number of data breach notifications has also remained low over the past two financial years and into 2021-22. This decrease may be attributed to a lower incidence of intertwined medical records than in previous financial years.

Review of the My Health Records Act

- On 24 February 2020, Professor John McMillan AO was appointed to conduct a review of the MHR Act and provide a report to the Minister for Health by 1 December 2020.
- The review was required under s 108 of the MHR Act and aimed to ensure the legislation underpinning the My Health Records system is enabling the system to work as well as it can for all Australians.

- The review report supports some of the recommendations made by the OAIC, including:
 - direct appropriation to the OAIC for its privacy oversight work in relation to MHR (Rec 1)
 - the Department of Health should continue to discuss options with state and territory health agencies for extending the Australian Information Commissioner's privacy oversight to all actions under the MHR Act (Rec 9)
 - the OAIC's jurisdiction under the MHR Act be extended to include oversight of the privacy aspects of the registration process (Rec 10)
 - the OAIC should be allowed to share information with the System Operator, the Department of Health and Services Australia for the purpose of the Commissioner exercising powers or performing functions or duties under the MHR Act (Rec 11)
 - amendments be made to the way young people are dealt with under the MHR Act (Recs 20-24)
 - the Department of Health consider whether amendments should be proposed to the provisions of the MHR Act and MHR Rule 2016 that deal with managing and accessing the MHR of a deceased person (Rec 25)
- Other recommendations in the McMillan review report depart from the recommendations made in the OAIC's submission, including:
 - that MHR data breach notification requirements, while separate, should be aligned to the Privacy Act requirements (Rec 8)
 - the Department of Health consider whether amendment of s 64 of the MHR Act (emergency access) is desirable to specify less demanding criteria for emergency record access, remove the requirement that every use of the power be notified individually to the System Operator and provide that s 75 of the MHR Act (data breach notification) does not apply to an action taken under s 64 (Rec 16).
 - amending the prohibitions relating to employers and insurers, to allow an insurer or employer to rely on MHR health information included in a report from a healthcare provider if the provider confirmed the information was being given at the request of the patient and with due regard to the patient's best interests (Rec 18).

ANAO Audit

- On 25 November 2019, the ANAO released its final audit report on the Implementation of the My Health Record system. The objective of the audit was to

assess the effectiveness of the implementation of the MHR system under the opt-out model.

- Generally, the ANAO found that:
 - implementation of the MHR system was largely appropriate
 - implementation planning for and delivery of MHR under the opt-out model was effective
 - risk management for the expansion program was partially appropriate
 - monitoring and evaluation arrangements are largely appropriate.
- The report made five recommendations:
 - **Recommendation 1:** ADHA conduct an end-to-end privacy risk assessment of the operation of the My Health Record system under the opt-out model, including shared risks and mitigation controls, and incorporate the results of this assessment into the risk management framework for the My Health Record system.
 - **Recommendation 2:** ADHA, with the Department of Health and in consultation with the Information Commissioner, should review the adequacy of its approach and procedures for monitoring use of the emergency access function and notifying the Information Commissioner of potential and actual contraventions (closed).
 - **Recommendation 3:** ADHA develop an assurance framework for third party software connecting to the My Health Record system — including clinical software and mobile applications — in accordance with the Information Security Manual.
 - **Recommendation 4:** ADHA develop, implement and regularly report on a strategy to monitor compliance with mandatory legislated security requirements by registered healthcare provider organisations and contracted service providers.
 - **Recommendation 5:** ADHA develop and implement a program evaluation plan for My Health Record, including forward timeframes and sequencing of measurement and evaluation activities across the coming years, and report on the outcomes of benefits evaluation.
- On 20 February 2020, the ADHA published its Implementation Plan in response to the audit report.
- The AHDA have confirmed the recommendations made in the ANAO's performance audit have now been implemented. However, the OAIC continues to engage each month with the ADHA to ensure that the recommendations are incorporated into ongoing business practice and that oversight and compliance measures are maintained.

New Guidance

- On 30 June 2021, the OAIC published a suite of guidance for healthcare providers about the My Health Record Emergency Access function. The guidance was developed in consultation with the ADHA and key stakeholders representing peak healthcare provider and consumer groups. The new resources include detailed website content featuring case studies and compliance tips, complemented by a printable flowchart and FAQs. The OAIC also recently participated in the recording of an Emergency Access podcast, which is targeted at healthcare providers and supports and promotes the new written resources.
- In September 2020, the OAIC published a short resource for healthcare providers explaining the security requirements established in Rule 42 of the My Health Records Rule 2016. My office is currently developing further supporting guidance which will include a Rule 42 template and explanatory material.

Possible questions

What is the OAIC's role and regulatory experience in the MHR system?

- The OAIC is the independent regulator of the privacy provisions relevant to the MHR system. The OAIC has carried out this role since the My Health Record system commenced in 2012.
- The OAIC responds to enquiries and complaints; receives mandatory data breach notifications; conducts privacy assessments; and advises on the privacy aspects of the system. The MHR Act and Privacy Act provide a range of investigative and enforcement mechanisms to the OAIC.

Has the OAIC considered the McMillan review report?

- We have reviewed the McMillan final report and are pleased that many of the recommendations made in the OAIC's submission were supported. There were some recommendations in the final report which do not align with our submission, including:
 - that MHR data breach notification requirements, while separate, should be aligned to the Privacy Act requirements (Rec 8)
 - the Department of Health consider whether amendment of s 64 of the MHR Act (emergency access) is desirable to specify less demanding criteria for emergency record access, remove the requirement that every use of the power be notified individually to the System Operator and provide that s 75 of the MHR Act (data breach notification) does not apply to an action taken under s 64 (Rec 16).
 - amending the prohibitions relating to employers and insurers, to allow an insurer or employer to rely on MHR health information included in a report from a healthcare provider if the provider confirmed the information was

being given at the request of the patient and with due regard to the patient's best interests (Rec 18).

- We would be keen to provide further input on any plans the Department of Health or ADHA are developing in relation to the implementation of any recommendations in the report.

Do you agree that the MHR Act and Privacy Act data breach schemes should be harmonised?

- As stated in our submission to the McMillan review, the OAIC acknowledges that there are potential challenges for healthcare providers having to comply with two schemes with different reporting thresholds. While harmonising the reporting obligations under the MHR scheme with the Privacy Act NDB Scheme may address these challenges, the OAIC is concerned that:
 - the lower data breach notification threshold required for information held in the MHR system was designed as a privacy enhancing measure, given that the MHR system is a searchable network of connected registered repositories storing sensitive personal information, and
 - the lower threshold ensures data breach reporting that may not relate to incidents giving rise to serious harm, but which may point to systemic issues in the ecosystem.
- On balance, the OAIC recommended maintaining the existing MHR data breach scheme which captures a broader range of data breaches compared to the NDB scheme, in recognition of the sensitive information held in the MHR system.

What are the OAIC's views on the system's security arrangements?

- A key focus of the OAIC's MHR assessments in 2020-21 has been assessments of Registered Portal Operators (RPOs) operating mobile apps accessing the MHR system and whether their handling of personal information in relation to the MHR system through their mobile apps was in accordance with APP 1.2 (open and transparent management of personal information) and APP 5 (notification of the collection of personal information).
 - The assessments found that RPOs were taking reasonable steps in relation to their obligations under APPs 1.2 & 5. These assessments also identified privacy issues relating to the management of personal information and notification requirements and made 5 recommendations.
- The OAIC also followed up an assessment conducted in 2018 in relation to a private hospital's implementation of the OAIC's assessment recommendations.
 - The scope of the original assessment was whether the private hospital was taking reasonable steps to secure personal information in accordance with APP 11 and to protect healthcare identifiers it holds in accordance with the Healthcare Identifiers Act 2010.

- The follow up ensured the hospital met the requirements to have an access security policy and staff training under Rule 42 of the My Health Records Rule 2016.

Key dates

- On 11 February 2021, the review of the MHR Act concluded with the publication of the *Review of the My Health Records Legislation Final Report*.
- On 20 February 2020, the ADHA published its Implementation Plan in response to the ANAO's audit report on the MHR system.
- On 25 November 2019, the ANAO released its audit report: *Implementation of the My Health Record system*.
- The opt-out period started on 16 July 2018 and concluded on 31 January 2019 (having been extended on two occasions).

Document history

Updated by	Reason	Approved by	Date
Diana Weston	February 2022 Senate Estimates	Kellie Fonseca	21 January 2022

Commissioner brief: National Data Commissioner

Key messages

- The Office of the Australian Information Commissioner (OAIC) is supportive of the Productivity Commission's (PC) underlying policy objectives in its *Data Availability and Use Inquiry* report, which seek to enable better use of, and greater access to, valuable government-held data.
- The Data Availability and Transparency (DAT) Bill has now been introduced into Parliament. The Senate Finance and Public Administration Committee handed down its report on the Bill on 29 April. The OAIC understands that amendments are being made to the Bill before it's reintroduction into Parliament.
- The Commonwealth Privacy Act or equivalent State/Territory privacy legislation will continue to apply where data sets that are shared under this framework include personal information.
- The OAIC made a public submission to the Senate inquiry that identified opportunities to further enhance the privacy protections in the framework, for example, by placing a greater emphasis on agencies using datasets that do not contain personal information.
- We also raised the proposed consequential amendment to the Freedom of Information Act, which proposes to effectively exempt any data that government agencies share with each other through the scheme. The proposal seems unnecessarily broad and risks misalignment with the objects of the Freedom of Information Act to provide a legal right to access to documents. The proposal reduces the information access rights of individuals, impacting on their ability to seek access to their own personal information and understand how agencies are using this information.
- The Senate Committee report recommended that consideration is given to whether amendments could be made to the Bill, or further clarification added to the explanatory memorandum to provide additional guidance regarding privacy protections, particularly in relation to the de-identifying of personal data that may be provided under the Bill's data-sharing scheme.¹
- The OAIC welcomes the collaborative approach that the Office of the National Data Commissioner has taken to developing this data sharing framework so far. We look forward to continuing to work with the ONDC to ensure that data can be shared safely and securely under this framework, and in line with community expectations, particularly through the Australian Information and Privacy Commissioner's membership on the National Data Advisory Council (NDAC).

1

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/DataTransparency/Report

Critical Issues

- The release of the Exposure draft of the DAT legislative package in September 2020 and the introduction of the DAT Bill into Parliament in December 2020 was met with some concern from privacy experts and the media, some of which have raised questions about the privacy and security aspects of the data sharing proposals e.g. citing lack of trust in government agencies to handle data safely, based on past data incidents, no ability for individuals to object or appeal decisions to share data.²
- The Labor Senators' dissenting report following the Senate Committee inquiry into the DAT Bill recommends that the Bill is not passed, primarily due to concerns that the Bill would undermine current privacy protections and does not represent a proportionate means to achieve the objective of better management, regulation and use of public sector data.
- The OAIC supports better use of government-held data in the public interest but will continue to advocate for strong privacy safeguards in the Data Availability and Transparency framework.

Possible questions

Does the Information Commissioner have a role in regulating the Data Availability and Transparency system?

- The Australian Information and Privacy Commissioner's remit will not be affected by the Data Availability and Transparency Bill. I will continue to be the regulator of the Privacy Act, including in relation to any personal information handled under the DAT system. Entities who wish to be accredited to participate in the DAT system must be covered by the Privacy Act.
- The National Data Commissioner will be responsible for the operation of the Data Availability and Transparency system.
- My office will work with the Office of the National Data Commissioner to share information, where appropriate, including information about any trends in notifiable data breaches or privacy complaints that may impact on the operation of the DAT scheme.

Will the Data Availability and Transparency legislation override the Privacy Act?

- The legislation will invoke the 'required or authorised by law' exception to certain Australian Privacy Principles (APPs), however the Privacy Act will continue to apply to Australian Government agencies and private sector organisations participating in the scheme, including the Notifiable Data Breaches scheme and APPs relating to governance, notice and security.

² <https://www.abc.net.au/news/2020-09-16/government-draft-law-share-personal-data-between-agencies/12666792>

- Australian Government agencies operating under the DAT legislation will also have obligations under the Australian Government Agencies Privacy Code, which, among other things, requires agencies to undertake a Privacy Impact Assessment for high privacy risk projects.

Will government-held personal information be shared without individual's consent?

- Under the proposed regime, the Privacy Act will continue to apply, however agencies will be authorised by law to share personal information for limited purposes. The Data Sharing Principles encourage the use of consent unless it is unreasonable or impractical.
- The Minister's response to the Scrutiny committee advised that he proposed to table an addendum to the EM 'as soon as practicable' which would outline 'key information and examples' about the meaning of 'unreasonable or impracticable' to assist to clarify the interpretation of paragraph 16(2)(c) of the Bill. The proposed addendum would direct users to relevant guidance issued by the Australian Information Commissioner on the standard of consent.
- APP 5 regarding notice will still apply to Government agencies under the Data Availability and Transparency scheme. Where possible the OAIC encourages government agencies to attempt to seek consent of an individual in relation to secondary uses where reasonable and practical, to ensure community support for the scheme.

Key dates

- The PC conducted an *Inquiry into Data Availability and Use* in 2016 and the first half of 2017. **The PC released its Draft Report on 3 November 2016, and its Final Report on 8 May 2017.** Government released its response on 1 May 2018, agreeing to the majority of recommendations and announcing the NDC and the DS&R Bill. In mid-2018 PMC held public consultations on the NDC and the proposed Data Sharing and Release Bill, including 8 workshops with other agencies and 31 roundtable discussions across Australia. PMC also received 108 public submission to its *New Australian Government Data Sharing and Release Legislation: Issues paper for consultation*.
- **On 9 August 2018**, the Interim National Data Commissioner, Deborah Anton, was appointed.
- **On 15 March 2019**, the ONDC and PMC released the *Best Practice Guide to Applying Data Sharing Principles*.
- **On 27 March 2018**, the Australian Information Commissioner and Privacy Commissioner was appointed as one of three Government members of the National Data Advisory Council.

- **On 3 September 2019**, the ONDC released the *Data Sharing and Release: Legislative Reforms Discussion Paper*. Consultation Closed on 15 October 2019.
- The OAIC has provided comments on two versions of the draft Data Availability and Transparency Bill: on **17 December 2019** and **17 January 2020**.
- The OAIC also made a submission to the consultation on the Exposure Draft of the Data Availability and Transparency legislative package in **November 2020**, and the Senate Committee inquiry into the draft legislation in **March 2021**.
- The Senate Finance and Public Administration Committee handed down its report on the Bill on **29 April 2021**.
- The ONDC announced the development and testing of ‘Dataplace’ on **20 August 2021**, the platform that will be used by third-parties in the DAT Scheme to apply for accreditation and request access to data, and by agencies to respond to requests and manage data sharing agreements. The Australian Information Commissioner has been briefed on ‘Dataplace’ by the ONDC in her capacity as a member of the National Data Advisory Council.

Key facts and figures

- Since the appointment of the first interim National Data Commissioner on 9 August 2018, the Office of the NDC (ONDC) has undertaken extensive consultation with stakeholders to develop its Data Availability and Transparency framework.
- The OAIC broadly considers the privacy-related aspects of the Bill to be appropriate, including:
 - The framework to ensure privacy coverage of non-APP entities
 - The data breach reporting scheme, which deems the Data Custodian (Commonwealth agency) as the data holder for the purposes of any actual or suspected data breach, and therefore responsible for notifying under Part IIIC of the Privacy Act
 - Permitted purposes for sharing limited to research and development, government policy and programs, and government service delivery. The use of data by Government for compliance, law enforcement and national security purposes has been explicitly precluded.
- In addition to concerns about the carve out of the scheme from the FOI Act, the OAIC remains concerned about the following aspects of the DAT framework:
 - The Bill should include a requirement that Data Custodians must not share personal information where the data sharing purpose can reasonably be met by sharing de-identified information (as opposed to the current formulation in the data principle, which says: ‘only the data reasonably necessary to achieve

the applicable data sharing purpose' should be shared; and 'the sharing of personal information [should be] minimised as far as possible without compromising the data sharing purpose.)'

- Commonwealth Government agencies should be required to undertake the same accreditation process as other entities who wish to be accredited users, rather than automatically being accredited under the current formulation of the Bill
- The Bill should include additional protections to ensure that personal information only exits the scheme in specific and confined circumstances.
- The Information Commissioner will continue providing advice on privacy matters, including the ethical use of data and building trust, through its role as a member of the National Data Advisory Council.

Relevant findings from ACAPs 2020

- Almost 9 in 10 Australians want more control and choice over the collection of their personal information.
- Australians are more likely to be comfortable (36%) with government agencies sharing information with other government agencies now, compared with 30% in 2017. Similarly, the proportion of people who are uncomfortable with this practice (40% in 2020) has decreased since 2017 (45%).
- Government use of personal data is much less likely to make Australians uncomfortable than other practices. Australians are just as likely to be comfortable (37%) as uncomfortable (34%) with a government body using biometrics and smart technologies for the delivery of services (e.g. to verify people's identity by phone).
- 40% of Australians are comfortable with a government agency using the personal information that was provided to them for research or service and policy development, and 27% are uncomfortable. This result is generally consistent with the 2017 survey (up 2% comfortable and down 3% uncomfortable).
- Australians are increasingly questioning data practices where the purpose for collecting personal information is unclear, with 81% considering 'an organisation asking for information that doesn't seem relevant to the purpose of the transaction' as a misuse (up 7% since 2017).

Document history

Updated by	Reason	Approved by	Date
Rebecca Brown	February 2022 Senate Estimates	Sarah Croxall	25/01/2022

Attachment A: Intersection between NDC and OAIC's regulatory powers

The National Data Commissioner's functions and powers are set out in (NDC) Chapter 4 of the Data Availability and Transparency Bill 2020 (DAT Bill).

The explanatory memorandum to the DAT Bill notes that the NDC is the regulator and champion of the data sharing scheme established by this Bill. The NDC will provide oversight and guidance to ensure the scheme operates as intended, driving cultural change and supporting capability building among data scheme entities to promote better sharing and release of public sector data.

The NDC's primary functions relate to advice, advocacy, guidance and regulation (including accreditation).

Paragraph 302 of the EM notes that the NDC may perform their advocacy function by undertaking, developing, or supporting educational programs. Such programs enable the Commissioner to support best practice and promote new or emerging ways of managing and sharing data. These programs could be undertaken by the Commissioner, or the Commissioner may expend money to engage contractors to design or run the programs on the Commissioner's behalf. It is not intended for the Commissioner to grant funding to other bodies or organisations to run educational programs.

The below table sets out the functions and powers of the NDC and identifies areas of potential overlap with the Australian Information Commissioner's powers, where relevant.

NDC	AIC
<p>Advice related functions</p> <p>The NDC's advice related functions are to do the following on the Commissioner's own initiative or on request by the Minister:</p> <ul style="list-style-type: none"> • advise on matters relating to the operation of the DAT Act and other laws that relate to the DAT Act • inform the minister about actions to be taken by data scheme entities in order to comply with the DAT Act • report/make recommendations to the Minister in relation to the DAT Act or the need for or desirability of legislative or administration action in relation to the DAT Act. 	<p>Potential overlap with Information Commissioner function to report to the Minister on issues to do with information handling in Government and Privacy Act advice related functions.</p> <p>It is possible that the NDC's advice to the Minister would include advice that relates to privacy issues, given the privacy protections contained in the DAT Act.</p>

Guidance related functions

The NDC can make:

- data codes under section 126 of the DAT Act, including:
 - setting out how the data definitions in s 10, and provisions of Chapters 2 (including section 13) and 3, are to be applied or complied with
 - imposing additional requirements to those imposed by Chapters 2 and 3, so long as the additional requirements are not contrary to, or inconsistent with, those Chapters
 - dealing with the internal handling of complaints
 - dealing with the management of complaints under Part 5.3 and impose additional requirements to those set out in that Part, so long as the additional requirements are not contrary to, or inconsistent with, that Part;
 - dealing with any other matters the Commissioner considers relevant to the data sharing scheme.
- guidelines about the operation of the DAT Act under s 127, which may include principles and processes relating to:
 - any aspect of the data sharing scheme
 - any matters incidental to the data sharing scheme, including data release, data management and curation, technical matters and standards, emerging technologies.

Potential overlap with the guidance related functions in the Privacy Act.

It is likely that the NDC's data codes and guidelines will touch on privacy issues, as they are relevant under the DAT Act e.g. consent, de-identification / data minimisation / circumstances in which personal information should or should not be shared.

The ONDC has committed to enter into an MOU with the OAIC to set out how the agencies will work together in relation to privacy issues that arise under the DAT Act.

Regulatory functions

The NDC regulates and enforces the data sharing scheme by performing functions and exercising the powers conferred by

The NDC has many of the same regulatory and enforcement functions and powers as the Australian Information Commissioner. These will overlap with the AIC's

Chapter 5 of the DAT Act and the Regulatory Powers Act as it applies in relation to the DAT Act. These powers are:

- Accrediting entities, imposing and varying conditions of accreditation, suspending or cancelling accreditation.
- Handling complaints from data scheme entities about potential breaches of the DAT Act by another data scheme entity, including investigating complaints and taking enforcement action against the entity for a breach.
- Conducting assessments to ensure data scheme entities are operating in accordance with the Act.
- Conducting an own motion investigation if the NDC reasonably suspects a data scheme entity has breached the Act.
- The Commissioner has power to require persons to give information, and has monitoring and investigation powers in relation to certain provisions of this Act. The Commissioner may transfer matters to a more appropriate agency, which could include the police if an offence is involved.

The NDC has the following enforcement abilities:

- Making recommendations to a data scheme entity
- Giving directions if satisfied the entity has breached the DAT Act
- Issuing an infringement notice or applying to a court for a pecuniary penalty order if an entity contravenes a civil penalty provision
- Accepting an enforceable undertaking in relation to any aspect of the DAT Act
- Applying to a court for an injunction if a data scheme entity has contravened or is proposing to contravene a civil penalty provision.

functions/powers if the NDC takes regulatory action against a data shame entity that is also the subject of a privacy complaint or investigation.

The DAT Act contains a mechanism for the NDC to transfer complaints to another more appropriate regulator.

Advocacy function

The NDC has an advocacy function of promoting understanding and acceptance of:

- the benefits of, and best practice in, sharing and releasing public sector data
 - safe data handling practices.
-

Commissioner brief: Privacy law reform

Key messages

- The OAIC welcomes the Government's commitment to strengthen the Privacy Act to ensure Australians' personal information is protected in the digital age, including the introduction of higher penalties for privacy breaches, a code of practice for social media and online platforms (the online privacy code) and a review of the Privacy Act.
- The reforms outlined in the Government's response to the Digital Platforms Inquiry final report are critical to ensuring that our regulatory framework protects personal information into the future and holds organisations to account.
- The OAIC has worked closely with the Attorney-General's Department on developing options for reform for the Privacy Act Review Discussion Paper, and to finalise the draft legislation that will introduce the online privacy code framework. These were both released for public consultation in October last year.
- The release of the Discussion Paper is a critical step in ensuring our privacy framework can support fair and reasonable handling of personal information and protect Australians' data wherever it flows.
- The well-considered and reasoned proposals and options put forward in the Discussion Paper, were informed by hundreds of submissions and feedback from a diverse range of stakeholders in response to the Department's earlier Issues Paper.
- In our response to the Discussion Paper, we made detailed recommendations drawing on our regulatory experience and how these potential reforms would operate in practice.
- Our recommendations seek to ensure Australia's privacy regime continues to operate effectively for all and promotes innovation and growth by:
 - protecting consumers from individual and collective privacy risks and harms
 - empowering consumers to take control of their personal information through new rights and enhanced transparency requirements
 - enhancing the framework of organisational accountability and personal information handling to ensure regulated entities are confident to innovate and use data within the boundaries of the law, informed by community expectations
 - establishing a regulatory framework that supports proactive and targeted regulation, strategic enforcement, efficient and more direct avenues of redress for individuals, and appropriate deterrents against mishandling of personal information.
- The draft Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 will increase penalties for serious or repeated breaches of privacy,

and introduce new code-making powers to enable the development of the online privacy code under the Privacy Act.

- The growth of social media and large online platforms has posed new challenges to the protection of individuals' privacy in the digital age. While the Australian Privacy Principles provide a well-established, technology-neutral framework, the online privacy code will enable specific and targeted regulation to address the particular and pressing challenges posed by social media and other online platforms. In particular, the online privacy code will address key issues around transparency, notification and consent, and include specific rules for children and other 'at-risk' groups in the online environment.
- The draft legislation also contains new information sharing powers, which will facilitate engagement with domestic regulators and with our international counterparts. The new information sharing powers are critical to ensuring the OAIC can continue to perform our regulatory role efficiently and effectively.

Critical Issues

- The Australian Government's response to the ACCC's *Digital Platforms Inquiry Final Report*, included commitments to:
 - consult on draft legislation for the reforms announced in March 2019 to increase the penalties under the Privacy Act to match the Australian Consumer Law and require development of a binding online privacy code
 - Consult on recommendations to:
 - Update the definition of personal information
 - Strengthen notification requirements
 - Strengthen consent requirements and pro-consumer defaults
 - Introduce direct rights of action for individuals
 - Conduct a broader review of the Privacy Act and related laws to consider whether broader reforms are necessary in the medium-to-long terms.
- The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021, which will increase penalties under the Privacy Act, introduce new information-sharing powers, and require the development of an online privacy code, was released for public consultation on Monday 25 October for a period of **6 weeks**.
- Amongst other key measures, the Bill states that the online privacy code must require 'organisations providing social media services' to take *all reasonable steps* to:
 - verify the age of individuals to whom the social media service provides an electronic service
 - obtain the consent of a parent or guardian of a child who has not reached 16 years before collecting, using or disclosing personal information of the child, and

- if the social media service becomes aware after it collects, uses or discloses personal information of an individual that the individual is a child who has not reached 16 years, obtain the consent of a parent or guardian of the child as soon as practicable after becoming so aware.
- Social media services must also ensure that the collection, use and disclosure of children's personal information is fair and reasonable in the circumstances, with the best interests of the child as the primary consideration.
- The Privacy Act review commenced in October 2020, and is considering issues including:
 - the scope and application of the Privacy Act
 - whether the Privacy Act effectively protects personal information and provides a practical and proportionate framework for promoting good privacy practices
 - the effectiveness of enforcement powers and mechanisms under the Privacy Act and how they interact with other Commonwealth regulatory frameworks.
- The Discussion Paper for the review of the Privacy Act was released for public consultation on Monday 25 October for a period of **10 weeks**.

Possible questions

Are you happy with the Government's timeline for privacy law reform?

I welcome the commitments to reform made in the Government's response to the DPI report. The reforms are an important step in enabling effective regulation of personal information handling, in line with community and business expectations for the digital environment. A privacy framework that empowers consumers and allows them to trust that their personal information will be protected supports both innovation and economic growth.

The Discussion Paper for the review of the Privacy Act, and the draft Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 were released for public consultation on 25 October and these have now closed.

How is your office participating in this law reform process?

As Australia's national privacy regulator, the OAIC is working with the Government and other stakeholders during the reform process by sharing our expertise and the intelligence gathered through our regulatory work.

We have focused a team to lead the development of the code and the OAIC's engagement with the Privacy Act review. We will be drawing on our regulatory experience to make recommendations to Government about improvements to Australia's privacy framework that support my four key priorities:

1. Enabling privacy self-management — ensuring there are sufficient clear and understandable options built into the system
2. Organisational accountability — ensuring there are sufficient obligations on organisations that deal with personal information built into the system
3. Global interoperability — making sure our laws continue to connect around the world, so our data is protected wherever it flows and reduce the regulatory burden on international businesses
4. A contemporary approach to regulation — having the right tools to regulate in line with community expectations.

We will continue to engage with the Attorney-General's Department as they move into the final stages of the Privacy Act Review, including developing proposals for reform to be considered by government, and as they progress the draft legislation that will, amongst other measures, increase penalties under the Privacy Act and require the development of an online privacy code.

We also look forward to engaging with industry and other key stakeholders as these processes continue into 2022.

Do we need GDPR style protections in Australia? What can we learn from other data protection regimes that may be of benefit to Australians?

My Office is actively considering what lessons can be learned from the GDPR and other international privacy regimes. In our submission to the Privacy Act Review Discussion Paper, the OAIC made recommendations about alignment with the GDPR where we consider that it provides a useful and feasible model for reform in Australia. However, we have also provided advice and insight to Government on other options for reform that will best suit the needs of Australians and the digital economy, where appropriate.

The OAIC supports greater interoperability of our privacy rules with other jurisdictions, as this will help minimise regulatory friction for business and ensure Australians' data is protected wherever it flows.

What have you been doing to prepare for the development of the online privacy code?

The OAIC has a dedicated project team that has been established to work with industry on the development of the online privacy code. The team is currently conducting preparatory work to plan the project, including how we will engage with industry and other key stakeholders to ensure that the code is fit-for-purpose.

While this is an industry-led code, the OAIC will be closely monitoring its progress and development. We also intend to support the code developer/s by being transparent about my expectations at the outset. We plan to publish a position paper that sets out a series of policy positions and expectations about how the code developer should address both the procedural matters for developing the online privacy code, including drafting and

consultation requirements, and how the code should address the substantive prescribed matters set out in the Bill.

We also intend to continue discussions with other Government agencies that have either completed or are progressing their own code-making processes to leverage their insights and experiences, including the Australian Competition and Consumer Commissioner (the News Media Bargaining Code), the Australian Communications and Media Authority (the Code of Practice on Disinformation and Misinformation) and the Office of the eSafety Commissioner (industry codes under the *Online Safety Act 2021*).

Are the measures in the Bill around age verification privacy invasive? Are you concerned about age verification from a privacy perspective?

Privacy and online safety have distinct but complementary roles to play to keep individuals safe online. In particular, privacy, security and online safety are all essential components in the ring of defence that is being built to address the risks faced by Australians in the online environment. It's important to get all three components right.

To that end, we think it's important that any age verification measures designed to protect childrens' privacy on social media are proportionate to the privacy and security risks that may arise from the collection of additional personal information in order to verify age.

We note that the measures in the Bill will require social media organisations to take 'reasonable steps' to verify age and parent or guardian consent, which will enable a flexible and proportionate response to age verification measures.

Like the approach under the Children's Code in the UK, the 'reasonable steps' approach proposed in the Bill would involve establishing age to the level of certainty that is appropriate to the risks that may arise to children from the particular social media service. The Bill is not prescriptive about exactly what methods social media services should use to verify age. What's appropriate for one site may not be appropriate in all circumstances.

We think it's incumbent on industry to develop solutions to age verification and we're interested in hearing other's perspectives. In addition to the current consultation on the Bill, we also note that the eSafety Commissioner has issued a call for evidence to inform the development of an implementation roadmap for a potential mandatory age verification regime for online pornography.

While age verification measures are important, the broader objective of the OP code is to increase privacy protections across the board. It will enable specific and targeted regulation to address the particular challenges posed by social media, data brokers and other large online platforms. In particular, it will be required to address key issues around

transparency, notification and consent, in addition to the specific rules for children and other 'at-risk' groups in the online environment.

Key dates

- The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 was released for public consultation on 25 October for a period of **6 weeks**.
- The Privacy Act review commenced in October 2020 with the release of an Issues Paper that sought feedback on potential issues relevant to reform.
- The Discussion Paper for the review of the Privacy Act was released for public consultation on 25 October for a period of **10 weeks**.

Overview of OAIC recommendations

- The OAIC made 113 recommendations in our submission to the Privacy Act Review Discussion Paper which addressed the following key matters:
 - The introduction of an overarching standard that personal information is fair and reasonable
 - Enhanced organisational accountability requirements
 - An enforcement framework that supports strategic and proportionate regulation
 - Better supported privacy self-management that gives individuals ongoing control of their information
 - A clear framework for overseas data flows to ensure data is protected wherever it flows
 - Greater access to justice options for individuals who have experienced a privacy interference
 - A simple civil penalties regime supported by infringement notices
 - Enhanced legislative flexibility to provide greater clarity and certainty where needed, while maintaining the existing principles-based approach to the APPs
 - Consistent protections across the economy that align with overseas laws
 - Greater alignment of core concepts internationally and domestically
 - Greater guidance for regulated entities about the information handling practices that will meet regulatory and community standards.

Document history

Updated by	Reason	Approved by	Date
Rebecca Brown	Estimates February 2022	Sarah Croxall	

Commissioner brief: Vaccine certificates

Key messages

- There are currently varied requirements at the federal and state and territory level for individuals to be vaccinated in order to undertake certain activities, including international travel, accessing venues such as hospitality and retail, and in order to undertake certain types of work.
- Where an individual is required to be vaccinated, there may also be requirements for that individual to provide proof of their COVID-19 vaccination status. Vaccination status information is sensitive health information and is afforded higher protections under the Privacy Act 1988.
- The OAIC has issued guidance for employers and employees as well as businesses in relation to their privacy obligations when collecting COVID-19 vaccination status information from employees, customers and other individuals.

Critical facts

Requirements within Australia to get vaccinated and provide proof of vaccination

- Fully vaccinated Australia citizens, permanent residents and eligible visa holders can now travel to and from Australia without needing to apply for a travel exemption if they can provide proof of vaccination. As of 19 October 2021, Australians who travel overseas can access an internationally recognised vaccination certificate to prove their vaccination status abroad. The international vaccination certificate includes a QR code that is readable globally and which complies with the standards set out by the International Civil Aviation Organisation. This is known as the Visible Digital Seal Non-Constrained Checker (VDS-NC). The certificate displays the individual's passport details to facilitate identity verification.
- State and territory governments have made public health orders requiring certain workers to be vaccinated against COVID-19. For example, there are public health orders that apply across jurisdictions in relation to aged care workers and health workers. Additionally, some industries or Australian businesses (such as Qantas and SPC) have mandated that their employees be vaccinated.
- Individuals can access their COVID-19 proof of vaccination in various ways, including through the Medicare Express app, their MyGov account and their My Health Record. Individuals can also choose to save a copy of their vaccination certificate to their digital wallet or share it with a state or territory check-in app.
- The OAIC published updated guidance for employers and employees in relation to the collection of vaccination status information on 23 September 2021. The key privacy considerations are:

- You can only collect information about employee's vaccination status in particular circumstances where the **employee consents and the collection is reasonably necessary** for your workplaces' functions and activities.
- You must have **clear and justifiable reasons** for collecting employee vaccination status information for it to be reasonably necessary. If you do not have clear and justifiable reasons, you should not collect vaccination status information.
- You can collect vaccination status information **without consent only in circumstances where the collection is required or authorised by law** (including a state or territory public health order or direction).
- Only the **minimum amount of personal information** reasonably necessary to maintain a safe workplace should be collected, used or disclosed.
- Vaccination status information should only be used or disclosed on a '**need-to-know**' basis.
- You must **inform** employees about how their vaccination status information will be handled.
- Ensure you take **reasonable steps to keep employee vaccination status and related health information secure**.
- Additionally, some state and territory governments have made public health orders requiring individuals to be vaccinated in order to access certain premises such as hairdressers, indoor recreation facilities and non-critical retail.
- The OAIC has [published guidance for businesses](#) in relation to the collection of COVID-19 vaccination status information from their customers. The key privacy considerations are:
 - **Sighting** vaccination status information instead of collecting the information and storing it in a record is a preferable and more privacy protective approach.
 - You can collect vaccination status information from customers and visitors if you are **required or authorised by a law** to collect this information (for example, if a public health order or direction requires or authorises you to collect evidence of vaccination).
 - If there is no law requiring or authorising the collection, you can only collect vaccination status information if it is **reasonably necessary for your business's functions and activities** and you have contained the customer or visitor's **consent**.

- You should only collect, use and disclose the **minimum amount of vaccination status information** from customers and visitors necessary to achieve your purpose.
- You must be **transparent** with your customers and visitors and provide them with information about why their vaccination status information is being collected and how it will be handled.
- You must ensure that you **take reasonable steps to keep customer and visitor vaccination status information secure** and destroy the information once it is no longer reasonably necessary for the purpose for which you collected it.

OAIC engagement regarding COVID-19 vaccine certificates

- The OAIC has published guidance for employers and employees regarding collection of vaccination status information (updated on 23 September 2021), as well as guidance for businesses (published on 12 November 2021).
- On 2 September 2021, the OAIC and state and territory privacy commissioners and ombudsmen produced National COVID-19 Privacy Principles to support a nationally consistent approach to solutions and initiatives designed to address the ongoing risks related to the COVID-19 pandemic. These principles are:
 - **Data minimisation:** The collection of personal information, including sensitive information such as health information, should always be limited to the minimum information reasonably necessary to achieve a legitimate purpose.
 - **Purpose limitation:** Information that is required to be collected for a specific purpose related to mitigating the risks of COVID-19 should generally not be used for other purposes. This is particularly important to ensure that Australians can have trust and confidence that their personal information is protected so they can continue to support the public health response.
 - **Security:** Reasonable steps must be taken to protect Australians' personal information from misuse, interference and loss, and from unauthorised access, modification or disclosure. In line with community expectations, personal information should be stored in Australia.
 - **Retention/deletion:** Personal information should be destroyed once it is no longer needed for the purpose for which it was collected. The Australian community expects that the information they provide to support the COVID-19 public health response will not be retained indefinitely and should be deleted as soon as it is no longer needed.
 - **Regulation under privacy law:** Australians' personal information should be protected by an enforceable privacy law to ensure that individuals have redress if their information is mishandled, either the Privacy Act or a state or

territory privacy law. This extends rights and protections to all Australians where their information is being shared for public health purposes.

- The OAIC received briefings from key agencies in 2021 in relation to developments related to vaccine certificates, including from Services Australia in relation to the COVID-19 digital certificate and from DFAT in relation to the international vaccine certificate.
- The OAIC provided privacy advice to Services Australia regarding enhancements to the COVID-19 digital certificate to enable it to be downloaded into commercial digital wallets and shared with state and territory check-in apps.
- The OAIC continues to provide advice and guidance to agencies, businesses and the community to ensure that personal information is protected as part of the ongoing public health response.

Possible questions

Does your office support the use of vaccine certificates?

- My office has provided guidance and advice to ensure that vaccine certificates in Australia are developed and implemented in compliance with privacy laws and guided by privacy best practice. This is especially important where sensitive information, such as health information, is involved, noting that a higher degree of protection is afforded to sensitive information under the Privacy Act.
- My office has proactively sought, and continues to have ongoing engagement with key agencies involved in the development and rollout of vaccine certificates, with the goal of ensuring that privacy remains at the forefront of the public health response.
- We have also convened the National COVID-19 Privacy Team between my office and state and territory privacy authorities to provide rapid responses to proposals with national privacy implications arising from the pandemic.
- We are continuing our close engagement with relevant stakeholders and we continue to publish guidance and advice where necessary.

What are the key privacy considerations relating to vaccine certificates?

- Data minimisation: the less data that is collected, the less risk there is of personal information being caught up in a data breach. The starting point is whether personal information needs to be collected at all. Consideration should be given to whether a vaccination certificate can simply be sighted instead.
- Purpose limitation: Information that is required to be collected for a specific purpose related to mitigating the risks of COVID-19 should generally not be used for other purposes. This is particularly important to ensure that Australians can have trust and confidence that their personal information is protected so they can continue to support the public health response to COVID-19.

- Organisations that collect Australians' sensitive health information must be able to take reasonable steps to secure it from loss, theft, or unauthorised access or disclosure. Personal information should be destroyed once it is no longer needed for the purpose for which it was collected.
- While large organisations and health service providers have existing obligations under the Privacy Act to protect personal information, not all employers or businesses are covered by Commonwealth privacy law, and private sector employee records are exempt.

Are you concerned about Individual Healthcare Identifiers on vaccine certificates?

- The OAIC is the independent regulator of the privacy aspects of the [Healthcare Identifiers Act 2010](#) (HI Act), which imposes strict obligations in relation to how IHIs should be handled.
- My office has engaged closely with Services Australia over the past six months in relation to development of COVID-19 vaccine certificates to ensure a privacy best practice approach, in particular around the handling of IHIs.
- The OAIC will shortly be issuing practical guidance for businesses, employers and individuals who may be handling IHIs which are included on some COVID-19 vaccine certificates.
- The OAIC's guidance recommends that businesses, employers and individuals should:
 - Sight vaccination certificates, rather than collect a copy of vaccination certificates were possible
 - Where you are required or authorised to collect proof of vaccination, consider options that do not involve collecting an IHI. For example, as individuals to provide a version of the certificate which does not contain an IHI or redact the IHI from the vaccination certificate.
 - Consider removing any IHIs already collected in your records and ensure you handle and secure IHIs in accordance with requirements set out in the HI Act.

Key dates

- 31 March 2021 - the GPA Executive Committee published a joint statement on the use of health data for domestic or international travel purposes.
- 17 June 2021 - the Department of Foreign Affairs and Trade (DFAT) and Services Australia provided a joint briefing to the National COVID-19 Privacy Team on proposals to implement a national and international vaccine certificate.
- 2 September 2021- the OAIC and state and territory privacy commissioners and ombudsmen produced the National COVID-19 Privacy Principles.

- 23 September 2021 - OAIC published updated guidance for employers and employees regarding collection of COVID-19 vaccination status information.
- 12 November 2021 - OAIC published guidance for businesses regarding collection of COVID-19 vaccination status information.

Document history

Updated by	Reason	Approved by	Date
Elizabeth King	February 2022 Senate Estimates	Kellie Fonseca	20/01/22

Commissioner brief: Digital Identity

Key messages

- The OAIC welcomes the development of and consultation on legislation for the Digital Identity System.¹
- The legislation contains strong privacy protections applying to identity service providers, credential service providers, attribute service providers and identity exchanges to ensure that the identity information of Australians is protected. We are continuing to work with the DTA to ensure protections are appropriate.
- The OAIC is pleased to have been proposed as the independent privacy regulator in the draft legislation through the application of the APPs to accredited entities that are not subject to comparable state or territory privacy legislation and regulating the additional privacy protections that are introduced through legislation.
- The OAIC continues to regulate the Privacy Act as it applies to APP entities who have been accredited to participate in the Digital Identity system, prior to the commencement of the legislation.²
- The Digital Transformation Authority (DTA) has received funding to expand Digital Identity to connect a greater number of services to the system (including state and territory services) over the next three years. The OAIC received funding in the 2021-22 financial year to undertake two privacy assessments (audits) of the system and develop guidance materials.³ The first assessment is planned to commence this quarter.
- The OAIC will seek additional funding to undertake its expanded regulatory role under the Digital Identity legislation.
- We welcome the opportunity to continue engaging with the DTA in its development of a privacy protective scheme and governance mechanisms between the Oversight Authority and the OAIC through our monitoring, guidance and advice functions.

Critical Issues

- The DTA is currently undertaking two main areas of work in relation to Digital Identity:
 - Developing legislation to underpin this scheme. This will enable the scheme to be used by State and Territory governments and the private sector, in addition to

¹ On 30 September 2021 the DTA commenced exposure draft consultation on a legislative package for the Digital Identity System, consisting of the Trusted Digital Identity Bill, Trusted Digital Identity Framework Accreditation Rules and Trusted Digital Identity Rules.

² A number of Australian Government agencies are already accredited and participating in the Digital Identity system as an identity exchange (Services Australia), identity service providers (myGovID, operated by the ATO; Digital iD, operated by Australia Post), credential service providers and attribute service providers. Recent news reports indicate that private sector entities have also been accredited as an identity service provider ([OCR Labs - click for media release](#)) and an identity exchange ([eftpos' connectID - click for media release](#)) under the existing Trusted Digital Identity Framework, which has been operating for a number of years:

³ See p 291 of OAIC 2020-21 PBS: <https://www.ag.gov.au/system/files/2020-10/17%202020-21%20Office%20of%20the%20Australian%20Information%20Commissioner%20PBS.PDF>

Federal Government agencies. The legislation includes additional privacy protections related to the scheme.

- The DTA received funding in the 2020-21 Budget to expand the scheme over the next three years. This includes the rollout of the scheme to myGov and a greater number of consumer-facing services integrated with the scheme. It also received funding in MYEFO for two years commencing 2022-23 to continue the Digital Identity system.⁴
- The OAIC is involved in both of these projects:
 - The OAIC has consulted with the DTA since 2015 on the development of the Trusted Digital Identity Framework, which is the system of rules and protocols that underpin the Digital Identity scheme.
 - We are now engaging with the DTA on the development of legislation for the Digital Identity scheme, including as a member of the Steering Committee (OAIC Band 2), and as an observer on an IDC to develop the legislation for the scheme (OAIC EL2). It is proposed that the OAIC will take on the privacy regulatory functions under this legislation.
- The expansion of the Digital Identity System is intended to be used across many widely used consumer-facing Government services, including Centrelink, Medicare and the ATO. Legislation will also enable State/Territory agencies and private sector services to participate in the Commonwealth Digital Identity System and will therefore involve identity verification across jurisdictions. The privacy and security of the system will be critical issues.

Possible questions

What is the OAIC's role in relation to Digital Identity?

- The OAIC is proposed to be the independent privacy regulator for the Trusted Digital Identity Framework (TDIF) and the Trusted Digital Identity System (TDIS).
- The OAIC has worked with the DTA since the commencement of work on the Trusted Digital Identity Framework, providing advice on the privacy aspects of the framework. This role is continuing throughout the development of legislation for the Digital Identity scheme, and expansion of the scheme to a wider range of services across government. This work aligns with our strategic priority, set out in our Corporate Plan, to influence and uphold privacy frameworks, scrutinising policy and legislative reform to ensure that these frameworks remain appropriate.

Do you think that the Digital Identity scheme adequately protects the privacy of individuals?

- The OAIC has been pleased with the inclusion of additional privacy safeguards for the TDIF and Digital Identity System.

⁴ MYEFO p 220.

- The OAIC submission to the DTA’s consultation on exposure draft legislation provided additional comments on how to promote best privacy practice approach in the new legislation and ensure alignment with the standard set by existing privacy legislation.

The OAIC has received funding for Expanding Digital Identity commencing in 2021-22. Are you required to undertake any activities this financial year and what will you do with the funding next financial year?

- The funding in 2021-22 (\$261,000) will enable the OAIC to undertake two privacy assessments (audits) to proactively monitor the privacy protections built into the Digital Identity program, which will assist the Digital Transformation Authority to mitigate privacy risks with the system. The first assessment is planned to commence this quarter. This funding also includes provision for the OAIC to develop guidance about the privacy aspects of the Digital Identity system. This guidance is currently in development.
- The OAIC will seek additional funding to undertake it’s expanded regulatory role under the Digital Identity legislation.

ConnectID said in a statement ([link](#)) that use cases for digital identity include age verification for online liquor sales. Do you think there are sufficient privacy protections for age verification in digital identity?

- Any use of age verification within digital identity will benefit from the same privacy protections as the treatment of other attributes of individuals.
- In addition, the legislation will include some requirements for participating relying parties in the government’s trusted digital identity system to provide an alternative channel to digital identity for accessing services.
- The OAIC will continue to engage to ensure privacy safeguards are appropriate.

Key dates

- 2014: The Financial Systems Inquiry (FSI) recommended a ‘national strategy for a federated-style model of trusted digital identities’.
- 2015: DTA commenced work on the FSI recommendation, with the development of the Trusted Digital Identity Framework (TDIF).
- 2019: DTA receives funding to develop legislation to underpin the Digital Identity scheme, which will incorporate many of the TDIF requirements into law and enable the scheme to be used by State and Territory governments and the private sector, in addition to Federal Government agencies.
- 2020: DTA receives approval for funding to expand the Digital Identity scheme to a larger range of Commonwealth Government services, including many consumer-facing services such as MyGov. OAIC receives funding as part of the budget measure (JobMaker Plan – Digital Business Plan) to undertake two assessments and produce guidance.

- 2021:Exposure draft consultation on a legislative package including the Trusted Digital Identity Bill, Trusted Digital Identity Framework Accreditation Rules and Trusted Digital Identity Rules took place from 30 September to 27 October 2021.

Key Facts

- The Trusted Digital Identity System will act as a single, secure way to use government and private sector services online. It intends to replace the 100-point identification check and remove the need to visit government offices with identity documents. It also provides a way of accessing other attributes of an individual. The TDIS will include a legislated requirement for relying parties to provide an alternative channel (subject to certain exceptions), but the TDIF will not include the same requirement.
- Digital identity more broadly is currently in limited use, primarily for businesses and their representatives through the myGovID portal, which is operated by the ATO. It currently operates through the Trusted Digital Identity Framework (TDIF), which sets rules and standards for entities accredited under the TDIF. The scheme is also being piloted for some community-facing services, including the Unique Student Identifiers scheme, and any member of the community can create a digital identity through the myGov app.
- The TDIF aims to increase safety, security, consistency and reliability when accessing government services online. Collectively, the TDIF documents sets the standards for:
 - How personal information is handled by participating agencies and organisations
 - The useability and accessibility of identity services
 - Identity system security and fraud protection
 - Identity system management and maintenance
 - Framework governance.
- Recently the DTA has begun accrediting private sector entities under the TDIF.
- The DTA was provided with funding to develop the Trusted Digital Identity Bill (the Bill) which will underpin the scheme and incorporate many of the TDIF requirements into legislation. The legislation includes additional privacy protections, including:
 - requiring express consent before attributes or restricted attributes are disclosed from accredited entities to relying parties to another
 - restricting the use and retention of biometrics other than for the purpose of verifying a person's identity or limited testing and fraud prevention purposes
 - restrictions on profiling individuals based on digital identity information
 - restrictions on using digital identity for prohibited enforcement purposes or marketing
 - certain deletion requirements
 - consistent data breach notifications for participants in DTA digital identity program not subject to the Privacy Act mandatory data breach requirements.

These apply to participants under the TDIF and to those onboarded to the TDIS. The OAIC is given additional civil penalty powers in relation to these additional privacy protections but only in relation to participants onboarded to the TDIS.

Other relevant restrictions for the scheme include a requirement to make use of the TDIS voluntary for individuals unless an exception applies.

OAIC position on Digital Identity Bill

- The OAIC has made three submissions to DTA consultations during the development of the Digital Identity legislation.⁵
- The OAIC's submissions were focused on ensuring that:
 - Privacy protections are contained in primary legislation, rather than subordinate instruments such as the Operating Rules, and seek to build on, rather than duplicate or conflict with, the Privacy Act.
 - All entities operating under the Trusted Digital Identity legislation are covered by the Privacy Act or comparable State/Territory privacy legislation, and that all entities have data breach notification obligations.
 - The OAIC is responsible for undertaking the privacy regulatory functions under the legislation, the legislation facilitates accountability and appropriate information sharing between the OAIC, Oversight Authority and other State/Territory Privacy Commissioners, and that regulatory overlap and duplication is minimised.
 - The Information Commissioner is given comprehensive regulatory functions and powers to effectively oversee the new privacy protections, including the ability to bring civil penalty proceedings and issue infringement notices.
 - The legislation enshrines the voluntary nature of participation in the Digital Identity system by requiring entities to provide individuals with alternative channels to verify their identity, subject to narrowly defined exemptions.
 - Law enforcement access to the digital identity system is only permitted in limited circumstances, and that these are reasonable, necessary and proportionate to achieving a legitimate objective.

Document history

Updated by	Reason	Approved by	Date
-------------------	---------------	--------------------	-------------

⁵ Submission to Digital Identity Legislation consultation paper: <https://www.oaic.gov.au/engage-with-us/submissions/digital-identity-legislation-consultation-paper-submission-to-the-digital-transformation-agency/>

Submission to Digital Identity Legislation position paper: <https://www.oaic.gov.au/engage-with-us/submissions/digital-identity-legislation-position-paper/>

Submission to Digital Identity legislation exposure draft consultation –<https://www.oaic.gov.au/engage-with-us/submissions/trusted-digital-identity-bill-legislative-package-exposure-draft-consultation> .

Naomi Lampe	February 2022 Senate Estimates	Sarah Croxall	14/1/22
-------------	-----------------------------------	---------------	---------

Commissioner brief: FOI IC reviews

IC review applications **RECEIVED**

The increase in *IC review applications received* from 2015-16 to 2020-21 was **140%**

When extrapolated from the first 6 months, the number of applications expected for 2021-22 is **1764**. That is a **246% increase** on 2015-16.

2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 (to 31/12/21)
510	632	801	928	1066	1224	882 38% increase on same period 2020-21

IC review applications **FINALISED**

The increase in *IC review applications finalised* from 2015-16 to 2020-21 was **124%**

When extrapolated from the first 6 months, the number of finalisations expected for 2021-22 is **1388**. That is a **206% increase** on 2015-16.

2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 (to 31/12/21)
454	515	610	659	829	1018	694 37% increase on same period 2020-21

The **average time to finalise** IC reviews has steadily increased:

2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 (to 31/12/21)
190 days (6.3 months)	204 days (6.8 months)	237 days (7.8 months)	246 days (8.1 months)	252 days (8.3 months)	216 days (7.1 months)

Number **finalised in less than 12 months**:

2018-19	2019-20	2020-21	2021-22 (to 31/12/21)
481	597 (24.1% increase on 18-19)	740 (24% increase on 19-20)	562 (extrapolated to 1124 for full year) (52% increase on 20-21) (134% increase on 18-19)

- In 2020-21 we finalised 73% of IC reviews within 12 months (740).
 - 57% of IC reviews (580) finalised within 120 days, compared to 48% (395) for 2019-2020.
- In the first 6 months of 2021-22 (to 31 December 2021) we are meeting our target of finalising 80% of IC reviews within 12 months.
 - 81% of IC reviews within 12 months (562).
 - A significant number of these matters (150) were closed under s 54N as invalid (out of jurisdiction, misdirected, out of time, copy of decision not provided, or not an IC reviewable decision).
 - In 2019-20, 19% (161) were closed as invalid under s 54N.
 - This increased during 2020-21, when 28% of all IC reviews were closed as invalid under s 54N (285).
 - 70% of IC reviews (483) were finalised within 120 days during that period.

IC review applications **ON HAND**

The **number** of IC reviews on hand has steadily increased:

<i>As at 30/6/19</i>	<i>As at 30/6/20</i>	<i>As at 31/12/20</i>	<i>As at 30/4/21</i>	<i>As at 30/6/21</i>	<i>As at 31/12/21</i>
850	1088	1218	1291	1295	1,485

The **age** of IC reviews on hand has steadily increased:

Age	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	228	39%	190	22%	270	25%	264	20%	346	23%
Between 4 months and 6 months	94	16%	106	12%	108	10%	85	7%	102	7%
Between 6 and 9 months	122	21%	147	17%	142	13%	144	11%	128	9%
Between 9 and 12 months	56	10%	157	18%	108	10%	135	10%	130	9%
Between 12 and 18 months	59	10%	166	20%	168	15%	226	17%	207	14%
Between 18 and 24 months	17	3%	68	8%	175	16%	180	14%	210	14%
Over 24 months	5	1%	16	2%	117	11%	261	20%	362	24%
Over 12 months	81	14%	250	30%	460	42%	667	52%	779	52%
Total	581	96%	850	100%	1,088	100%	1,291	100%	1,485	100%

- Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December 2021.

Cases Open - FOI IC Reviews

Cumulative	2017-18		2018-19		2019-20		2020-21		2021-22	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%	# Cases	%
< 4 months	228	39%	190	22%	270	25%	264	20%	346	23%
< 6 months	322	55%	296	35%	378	35%	349	29%	448	30%
< 9 months	444	76%	443	52%	520	48%	493	40%	576	39%
< 12 months	500	86%	600	71%	628	58%	628	50%	706	48%
<18 months	559	96%	766	90%	796	73%	854	68%	913	61%
<24 months	576	99%	834	98%	971	89%	1,034	80%	1,123	76%
Over 24 months	5	1%	16	2%	117	11%	261	20%	362	24%
Total	581	100%	850	100%	1,088	100%	1,295	100%	1,485	100%

• Data includes figures as at 30 June for FY2016-17 to FY2020/21. For FY2021/22 the data includes figures as at 31 December 2021.

- In accordance with the scheme envisaged by the FOI Act, the OAIC seeks to resolve IC reviews informally using alternate dispute resolution in appropriate cases (without them progressing to a formal decision by the Information Commissioner), including:
 - providing an appraisal or preliminary view
 - trying to reach agreement between the parties
 - In 2020-21 we finalised:
 - 964 IC reviews without a formal decision being made (95%) - an increase compared with 94% in 2019-20.
 - 409 IC reviews where the applicant withdrew their application (40%).
 - 14 IC reviews by written agreement between the parties under s 55F of the FOI Act.
 - 54 decisions of the Commissioner under s 55K of the FOI Act.
 - In 2021-22, as of 31 December 2021, we finalised:
 - 639 IC reviews without a formal decision being made (92%) - a decrease compared with 95% in 2020-21.
 - 352 IC reviews where the applicant withdrew their application (51%).
 - 3 IC reviews by written agreement between the parties under s 55F of the FOI Act.
 - 55 decisions of the Commissioner under s 55K of the FOI Act.
- IC reviews are assessed for complexity.
 - Case categories assist with efficient case management and developing strategies to address the increasing numbers of IC review applications on hand.
 - On 31 December 2021, of the 1,485 IC reviews on hand, 568 were categorised as complex (38%), which involves review of multiple exemptions, affected third parties and a large volume of material (categories 3, 4, 5.3, 5.4).

Processing efficiency

- Structure enhances early resolution processes:
 - All matters are triaged on the day they are received. Invalid applications finalised on the same day as receipt.
- External-facing initiatives:
 - Website project – currently developing a wizard tool to triage applications made via the OAIC’s website. The wizard tool will minimise the number of invalid applications.
 - Developed ‘smartforms’ for agencies to lodge EOT applications – collects all necessary information; integrates directly into case management system.
 - The publication of a procedure direction for applicants – this clarifies the OAIC’s procedures for applicants and provides guidance about what the OAIC may require during an IC review. The Direction took effect on 1 September 2021.
- Internal initiatives:
 - Batching like cases for efficiency
 - Case categorisation – identifying complexity and an appropriate review path, as well as ensuring cases are appropriately allocated to case officers.
 - Improving case management database workflows to assist case officers more efficiently progress IC reviews, FOI complaints and EOT applications.
 - Searches cohort project – to progress a large cohort of IC reviews which related to the adequacy of searches - maximise efficiency from batching issues
 - Deemed matters:
 - preliminary inquiries under s 54V made quickly and response required within 7 days
 - if delays, s 55E notice issued requiring a statement of reasons within 14 days
 - where there will be delay by the agency, direction issued under s 54Z, notifying the commencement of the IC review; statement of reasons under s 55E; compelling production of documents under s55T

Possible questions

- ***Why does the Australian Information Commissioner take so long to make IC review decisions - other jurisdictions have a 30 day time limit?***

There is no statutory timeframe in the FOI Act.

To afford procedural fairness, the OAIC ensures parties have an adequate opportunity to consider all information (including the submissions of other parties) and to make their own submissions.

The OAIC encourages informal resolution of reviews, which includes the ability of the agency to make a revised decision under s 55G of the FOI Act giving more access. Sometimes informal resolution does not result in the matter settling and a formal decision is required.

- ***What proportion of FOI decisions do you set aside on review?***

The Commissioner has the power to affirm, vary or set aside a decision after the Commissioner has undertaken a review.¹

Since 2015 the proportion of FOI decisions:

- set aside on review
 - *increased* from 27.5% (2015-16) to 41% (2020-21)
- affirmed on review
 - *decreased* from 48.75% (2015-16) to 46% (2020-21)
- varied on review
 - *decreased* from 23.75% (2015-16) to 13% (2020-21).

The proportion of FOI decisions varied on review fluctuated between:

- 23.75% in 2015-16
- 7% in 2018-19
- 13% in 2020-21.

¹ After an application is made to the Information Commissioner for IC review, an agency or minister may (at any time during the IC review) revoke or vary an access refusal decision to favour the applicant by giving access to a document in accordance with the request (s 55G(1)(a)), relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)), or requiring record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)). The revised decision will be the decision under review (s 55G(2)(b)).

	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-21	2021-22 (to 31/12/21)
Affirmed by IC without s 55G	28 (35%)	48 (46.15%)	59 (48%)	16 (26%)	16 (32%)	20 (37%)	23 (42%)
s 55K – affirmed by IC after s 55G	11 (13.75%)	17 (16.35%)	9 (7%)	3 (5%)	8 (16%)	5 (9%)	7 (13%)
Vary	19 (23.75%)	16 (15.38%)	10 (8%)	4 (7%)	7 (14%)	7 (13%)	6 (11%)
Set Aside	22 (27.5%)	23 (22.12%)	45 (37%)	37 (62%)	19 (38%)	22 (41%)	19 (34%)
Total:	80	104	123	60	50	54	55

In comparison:

- over the last 4 years the percentage of reviews by the NSW Information Commissioner that recommended that the agency make a new decision has remained reasonably stable at around 50%.²
- agencies reported to the Office of the Victorian Information Commissioner (OVIC) that of 32 reviews decided by the Victorian Civil and Administrative Tribunal (VCAT) in 2020-21, agency decisions were affirmed in full in 26 cases. It was also reported that VCAT varied agency decisions in 5 cases and overturned agency decisions in 1 case.³

Caution should be exercised in making a direct comparison with these jurisdictions, as different jurisdictions have different legislative frameworks: for example, Victoria does not have an Information Publication Scheme, nor does it have a framework that provides for exemptions that are subject to a public interest.

94% of the 829 IC reviews closed in 2019-20, were finalised other than by the Commissioner making a formal decision under s 55K of the FOI Act.

95% of the 1018 IC reviews closed in 2020-21, were finalised other than by the Commissioner making a formal decision under s 55K of the FOI Act.

² [https://www.ipc.nsw.gov.au/sites/default/files/2021-09/NSW Information Commissioner%27s 10-Year GIPA Data Analysis Overview 2010-2020 September 2021.pdf](https://www.ipc.nsw.gov.au/sites/default/files/2021-09/NSW%20Information%20Commissioner%27s%2010-Year%20GIPA%20Data%20Analysis%20Overview%202010-2020%20September%202021.pdf)

³ <https://ovic.vic.gov.au/wp-content/uploads/2021/10/OVIC-Annual-Report-2020-21-Digital.pdf>

- ***How many matters are being declined to allow the applicant to go directly to the AAT? Please provide an example of when this has happened.***

Under s 54W(b) of the FOI Act, the Information Commissioner may decline to undertake an IC review where the Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than by the Information Commissioner first.

- In 2019-20, 83 declined under s 54W(b) (10% of the 829 reviews finalised).
- In 2020-21, 139 declined under s 54W(b) (14% of the 1018 reviews finalised).
- In 2021-22 (to 31 December 2021), 42 reviews declined under s 54W(b) (6% of the 694 reviews finalised).

In February 2021, FOI Guidelines were updated (at [10.88] - [10.89]) as follows:

The Information Commissioner may decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the IC reviewable decision (s 54W(b)). It is intended that the Information Commissioner will resolve most applications. Circumstances in which the Information Commissioner may decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
 - where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

Example – National Cabinet:

- In the period 1 July 2020 to 10 January 2022, the OAIC received 18 IC review applications for matters involving documents of National Cabinet. Of those matters, 11 remain open and 7 were closed under s 54W(b) of the FOI Act to permit the applicant to apply to the AAT.

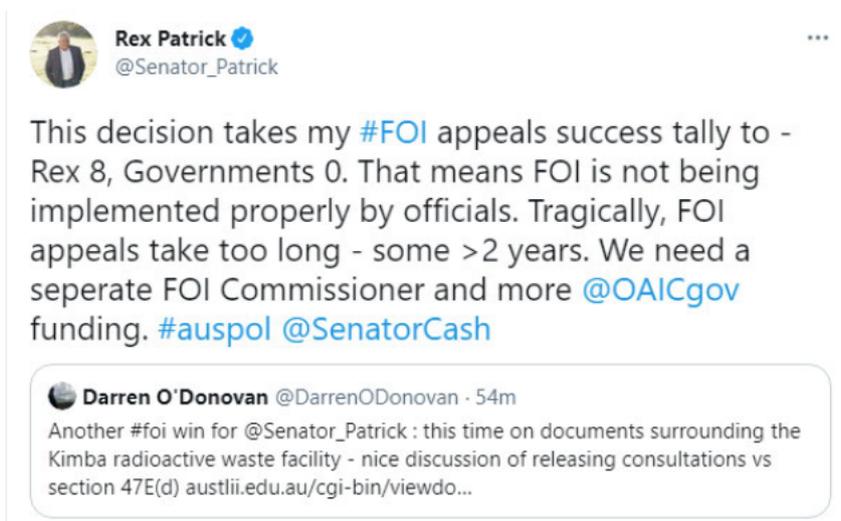
- In the period 1 July 2020 to 10 January 2022, the OAIC also received 5 IC review applications for matters involving documents of a Committee of National Cabinet. Of those matters, 3 remain open and 2 were closed under s 54W(b) of the FOI Act to permit the applicant to apply to the AAT.
- In matters finalised under s 54W(b) prior to August 2021, my office considered it was in the best interests of the administration of the Act that the matters be considered by the AAT because:
 - The subject matter is complex. The Information Commissioner had not previously considered whether National Cabinet could be considered a committee of Cabinet for the purposes of the FOI Act and there was no available precedent on this issue.
 - The IC review process, which is intended to be informal, and consistent with the objects of the FOI Act, is designed to provide prompt and cost effective access to information, would be unsuitable in this instance due to the likely need for factual evidence from the Cabinet office or the Prime Minister and may be more appropriately handled by the processes of the AAT.
- The Administrative Appeals Tribunal (AAT) considered matters relating to ‘National Cabinet’ in *Patrick and Secretary, Department of Prime Minister and Cabinet* (Freedom of Information) [2021] AATA 2719 (5 August 2021). His Honour, Justice White ordered that Senator Patrick be granted access to documents he requested.
- Since Justice White’s AAT decision, the OAIC has not declined any National Cabinet related matters to the AAT under s 54W(b) of the FOI Act **solely** because of that complexity – that is, matters are referred where there are additional complexities involved.
 - The OAIC has only declined one National Cabinet matter under s 54W(b) of the FOI Act since Justice White’s AAT decision (MR21/00935).
 - The review was referred because:
 - the applicant asked to have the matter referred to the AAT
 - public accessibility to documents that fell within the scope of the FOI request, as relevant to the National Cabinet, was highly contested, and the subject was of significant public and media interest, and
 - there was a distinct possibility that should the IC review have continued, it would have been appealed by either party to the AAT. It was therefore desirable for the efficient administration of the FOI Act that decision was reviewed by the AAT at first instance.

- **Summary of recent litigation commenced by Senator Rex Patrick**

On 29 April 2021, Senator Rex Patrick tweeted:



On 19 April 2021, Senator Rex Patrick tweeted:



s 47E(d)

[Redacted]

[Redacted]

[Redacted]

Senator Patrick lodged Federal Court proceedings on 9 September 2021 alleging unreasonable delays in conducting reviews of his IC review applications.

The Federal Court held a case management and interlocutory hearing on 26 November 2021. The parties lodged an agreed a set of orders on 8 November 2021. In accordance with the agreed set of orders, Senator Patrick lodged an amended concise statement with the Federal Court on 10 December 2021, limiting the legal question referred to the Federal Court to 9 of the 23 applications listed.

The Federal Court has set a hearing date for 25 March 2022 to determine the interlocutory application as to costs.

- ***On 2 February 2021, the Canberra Times reported on the large and increasing number of contractors and labour hire staff working in and with Australian Government agencies. What impact does this have on the public's right to access government held information?***

The public have a legally enforceable right to access documents held by Australian Government agencies. This means that the right of access is not affected by the use of labour hire contractors. Labour hire contractors undertake the agency's work and as a result the documents they create are 'documents of an agency' and subject to the FOI Act.

Section 6C of the FOI Act contains a requirement for Commonwealth contracts for the provision of services to include a term that requires the contracted service provider to provide documents to the agency if the agency receives a request under the FOI Act. This means that agencies cannot avoid their legal obligations under the FOI Act by contracting a service provider to perform the agency's functions or exercise the agency's powers.

- ***On 15 January 2021, the Guardian reported findings of an audit of FOI outcomes by the Australian Conservation Foundation dated 15 January 2021 which concluded that Australia's FOI system was dysfunctional and that an independent investigation of the way the Prime Minister and ministers treat request for access to government documents was needed. What do you say to these findings?***

The ACF audit was conducted in relation to 'environment-related' FOI requests made to federal and state departments and agencies over a five year period. The data reported is not for all Australian Government agencies and does not include the three agencies that together account for 70% of all FOI requests made to Australian Governments (Department of Home Affairs, Services Australia and the Department of Veterans' Affairs).

It also appears that the ACF report also only considers or focusses primarily on non-personal FOI requests, which comprised 19% of all FOI requests in 2019-20.

The report recommends that my office investigate the actions of ministers and the prime minister's office. My power to investigate complaints about action taken under the FOI Act is in relation to agencies only; I have no power under Part VIIB of the

FOI Act or s 8 of the *Australian Information Commissioner Act 2010* to investigate the actions of ministers.

- **Grata Fund report – see separate brief.**

Attachment A: IC review statistics - FOI closures 2011-12 to 2020-21, IC review time to finalisation, IC review outcomes

Attachment B: Explanation of IC review outcomes

Attachment C: Summary of issues arising in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [\[2020\] AATA 4964](#) (9 December 2020)

Attachment D: Breakdown of Commissioner decisions 2011-2021

Document history

Updated by	Reason	Approved by	Date
Justin Lodge	February 2022 Senate Estimates		

Attachment AFOI closure breakdown 2011-12 to 2020-21

Table 1: Overview of IC review applications received and finalised

Type	11-12	12-13	13-14	14-15	15-16	16-17	17-18	18-19	19-20	20-21	21-22 To 31/12/21
IC reviews received	456	507	524	373	510	632	801	928	1066	1,224	882
IC reviews finalised	253	419	646	482	454	515	610	659	829	1018	694
IC reviews with s 55K decision	25	89	98	128	80	104	123	60	50	54	55
IC reviews without s 55K decision	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)	487 (79.84%)	599 (90.90%)	779 (94%)	964 (95%)	639 (92%)

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	11-12	12-13	13-14	14-15	15-16	16-17	17-18	18-19	19-20	20-21	21-22 To 31/12/21
120 days	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)	235 (39%)	266 (40%)	395 (48%)	578 (57%)	483 (70%)
within 6 months	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)	285 (47%)	336 (51%)	452 (55%)	627 (62%)	505 (73%)
within 9 months	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)	418 (69%)	409 (62%)	527 (64%)	686 (67%)	527 (76%)
within 12 months	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)	513 (84%)	482 (73%)	592 (71%)	737 (73%)	561 (81%)
over 12 months	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)	97 (16%)	177 (27%)	237 (29%)	281 (28%)	133 (19%)
Total	253	419	646	482	454	515	610	659	829	1018	284

Table 3: Overview of IC review outcomes

IC Review Decisions	11-12	12-13	13-14	14-15	15-16	16-17	17-18	18-19	19-20	20-21	21-22 To 31/12/21	
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34	81	103	161	285	150	
s 54R – withdrawn	108	95	111	59	81	115	131	199	180	266	341	
s 54R – withdrawn / conciliated	-	13	71	51	78	93	64	76	154	143	11	
s 54W(a) – deemed accept PV / appraisal	-	2	27	26	7	0	0	-	-	-	-	
s 54W(a)(i) – lacking in substance etc	42	86	170	87	94	66	79	126	90	61	34	
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57	59	34	76	51	53	
s 54W(a)(iii) – lost contact	9	9	0	5	5	3	10	5	6	5	5	
s 54W(b) – refer AAT	22	17	41	61	32	15	16	31	83	139	42	
s 54(c) – failure to comply	-	2	0	0	0	0	0	-	-	-	-	
s 55F – set aside by agreement	-	0	1	0	2	7	15	13	12	1	-	
s 55F – varied by agreement	2	0	1	2	7	5	27	12	17	13	3	
s 55F – affirmed by agreement	-	0	1	2	1	1	0	-	-	-	-	
s 55G – substituted	-	7	6	5	16	15	5	-	-	-	-	
Subtotal without s55K	238	330	548	354	374	411	487	599	779	964	639	Total 15/16 - 21/22
s 55K – affirmed by IC without s55G	17	58	32	48	28	48	59	16	16	20	23	210
s 55K – affirmed by IC after s55G	-	-	8	5	11	17	9	3	8	5	7	60
s 55K – set aside by IC	8	28	53	52	22	23	45	37	19	22	19	187
s 55K – varied by IC	0	3	5	23	19	16	10	4	7	7	6	69
Subtotal with s55K	25	89	98	128	80	104	123	60	50	54	55	526
Total	253	419	646	482	454	515	610	659	829	1018	694	4,778

Table 4: Age of IC review cases open in particular periods

Fiscal Year	Open less than 12 Months	Open between 12 and 18 Months	Open Between 18 and 24 Months	Open Between 24 and 36 Months	Open more than 36 Months	Total Open	Received	Closed	Oldest case date received
2014-2015	182	10	11	7	6	216	373	482	15/09/11
2015-2016	258	14				272	510	454	21/01/15
2016-2017	372	17	1			390	633	515	4/01/16
2017-2018	501	59	17	5		582	801	610	4/01/2016
2018-2019	601	166	68	16		851	928	659	10/01/2017
2019-2020	630	166	175	112	6	1089	1066	829	10/01/2017
2020-2021	630	224	180	200	61	1295	1224	1018	27/03/2017
2021-2022Q1 & Q2	706	207	210	266	96	1485	881	694	31/03/2017 (next is 5/5/17)

Table 5: Number of IC reviews finalised in particular periods

Row Labels	Less than 1 month	Within 2 months	Within 3 months	Within 4 months	Within 6 months	Within 9 months	Within 12 months	Over 12 Months	Grand Total
2014-2015	57	90	112	165	242	297	340	142	482
2015-2016	45	100	148	196	267	345	394	60	454
2016-2017	57	94	149	198	291	388	444	71	515
2017-2018	80	148	207	235	284	412	507	103	610
2018-2019	113	175	239	266	332	407	482	177	659
2019-2020	199	284	354	395	452	527	592	237	829
2020-2021	265	135	59	24	22	22	34	133	694

Explanation of IC review outcomes

IC review outcome	Explanation of provision	Example of IC review finalised under this provision
s 54N – out of jurisdiction	Section 54N of the FOI Act sets out the formal requirements for an IC review application.	An application is made for IC review of a decision made by a NSW agency. The FOI Act only applies to Australian Government agencies; not State government bodies.
s 54R – withdrawn	Section 54R permits the IC review applicant to withdraw their application in writing at any time before the Information Commissioner makes a decision under s 55K.	The individual no longer seeks access to the documents they initially requested for their own reasons.
s 54R – withdrawn/conciliated	This review outcome is used when the withdrawal of the IC review application follows conciliation of the review application by OAIC staff.	Where OAIC staff clarify the circumstances in which a particular exemption applies so that the IC review applicant understands that the reviewable decision is consistent with the FOI Act and existing case law and is unlikely to be set aside on review.
s 54W(a) – deemed acceptance of preliminary view/appraisal	This review outcome is no longer used by the OAIC.	
s 54W(a)(i) – lacking in substance, misconceived etc	Section 54W(a)(i) gives the Information Commissioner discretion not to undertake an IC review, or not to continue to undertake an IC review, if the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.	An agency refuses access to a document because it cannot be found and records indicate the document has been destroyed in accordance with the relevant Records Disposal Authority. In this circumstance because the document has been destroyed, conducting a review will confer no practical benefit to the applicant and therefore the review application is taken to be lacking in substance.
s 54W(a)(ii) – failure to cooperate	Section 54W(a)(ii) gives the Information Commissioner discretion not to undertake an IC review, or not to continue to undertake a review, if the IC review applicant has failed to cooperate in progressing the IC review application, or the IC review, without reasonable excuse.	If a person applies for IC review of a deemed refusal decision (that is, when an agency has failed to make a decision within the statutory period and is deemed to have refused the request) and the agency subsequently makes a decision, the OAIC will ask the applicant to confirm whether they want to continue with the review and if so, to identify the aspects of the decision they disagree with. Following various attempts to contact the applicant, if the applicant does not provide a response indicating whether they wish to continue with the review, the application may be finalised under this ground.

IC review outcome	Explanation of provision	Example of IC review finalised under this provision
s 54W(a)(iii) – lost contact	Section 54W(a)(iii) gives the Information Commissioner a discretion not to undertake an IC review, or not to continue to undertake a review, if the IC cannot contact the IC review applicant after making reasonable attempts.	OAIC staff will try to contact IC review applicants several times using all contact details provided in the applicant’s IC review application before this discretion is exercised.
s 54W(b) – refer to AAT	Section 54W(b) gives the Information Commissioner a discretion not to undertake an IC review, or continue to undertake a review if satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal.	<p>In deciding to exercise this power the Information Commissioner may consider a range of factors including one or more of the following:</p> <ul style="list-style-type: none"> • 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 • the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, or • the FOI request under review is complex or voluminous and the matter could more appropriately be handled through the procedures of the AAT.
s 54W(c) - failure to comply	Section 55(2)(e) empowers the Information Commissioner to give written directions as to the procedure to be following in relation to IC reviews generally or a particular IC review. Section 54W(c) allows the Commissioner to finalise a review if the IC review applicant fails to comply with a direction issued under s 55(2)(e).	For example, the Commissioner may issue a direction to compel an IC review applicant to identify the exemptions that they contend have been wrongly applied in the reviewable decision. Should the applicant fail to do this, the matter may be finalised under this provision.
s 55F – set aside by agreement	Under s 55F, the review parties can reach agreement about the terms of a decision on the review. This can dispose of all or part of the IC review application.	The review parties may agree to narrow the scope of the original request to exclude certain documents and the agency may then agree to process the request within a specific timeframe.
s 55F – varied by agreement		
s 55F – affirmed by agreement		
s 55G - substituted	Section 55G allows an agency to vary, or set aside and substitute an access refusal decision to favour the applicant at any time during an IC review. The Information Commissioner must then deal with the IC review application as if it were	An agency may decide that certain documents are no longer exempt due to the passage of time and vary the reviewable decision to provide access to those documents. The revised decision will then be the IC reviewable decision.

IC review outcome	Explanation of provision	Example of IC review finalised under this provision
	an application for review of the varied or substituted decision.	
s 55K - affirmed by the Information Commissioner	Section 55K requires the Information Commissioner, after undertaking an IC review, to make a decision in writing affirming, varying or setting aside the IC reviewable decision. This finalises the IC review.	All s 55K decisions are published on the Australasian Legal Information Institute (AustLII) website - http://www7.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AICmr/ .
s 55K - affirmed by Information Commissioner following revised decision		
s 55K - set aside by Information Commissioner		
s 55K - varied by Information Commissioner		

Estimates 23 March 2021

[21:24]

Senator PATRICK: Ms Falk, going back to my questions on notice from the last estimates—and thank you for your answers—there were some statistics given in relation to journalists and some of their late requests. Some journalists were waiting between one and two years for responses to IC reviews, 55 of them, and more than two years, 31. I know you can't give priority to journalists because the FOI Act treats everyone equally, including me as a senator, and that's proper, but can you understand how that sort of time frame is extremely unhelpful for journalists who are trying to report? They have a very important function in a democracy to report on issues not historically but currently.

Ms Falk: I appreciate the issue that you are raising. It's to do with the timeliness of the IC review function of my office. If I can, I will make a couple of points. You're aware that many of our matters are handled in a timely way. We strive to have 80 per cent of the IC reviews handled within 12 months of receipt. Last year we didn't reach that target; it was 72 per cent. This year we've increase our target a little, to 73 per cent year to date, but we're still falling short of it. We have put in place a number of different pilot programs—conferencing programs—to try to be as efficient as possible, and I can see from our statistics that we're on track to finalising even more matters than we had the previous year. But, notwithstanding that, there is a considerable number of matters that are over one year old and, indeed, over two years old, and a number of those are, I appreciate, from journalists or politicians who consider they have public interest matters that they wish to put before me.

Senator PATRICK: I saw the numbers on politicians. Eleven are for one to two years and I think six are for more than two years. That tells me I'm the only politician doing FOIs, I think!

Senator SCARR: That was a joke!

Ms Falk: I did smile. It was late, but I did smile.

Senator PATRICK: Well, it might not have been a joke, but it might have been humorous. Perhaps more disturbingly, you gave some answers on your capacity to deal with reviews and you said that last year it was 829 and that you expected a similar number this year, next year and the year after. But you then showed projections on the number of requests that you're likely to deal with. Last year you had 1,066 reviews but only 829 were completed. This year, you're expecting 1,226, with only 829 as a capacity. It just keeps going up: 1,410, with the same capacity; 1,622 for 2022-23 with capacity to conduct only 829. So you're just going to be in a situation where you have twice the number of applications that you can actually handle. I think I might have characterised it—

CHAIR: Do you have a question, Senator Patrick?

Senator PATRICK: I think I might have characterised it as a train smash. What are we going to do here? It's getting out of control.

Ms Falk: Your question is: what are we to do? From my statutory office's perspective, we seek to deal with each and every matter as efficiently and effectively as possible, of course also paying regard to proper administrative law-making and taking the time that's needed on each matter. I've mentioned a number of the strategies that we've put in place. We have seen those work. I have only projected finalising 829 in the out years in that question on notice; however, I can see that we are already on track to finalising more than that this financial year. So we continue to do better; however, I do hold the view that, without some additional resources, it will be difficult for the office. We'll continue to be challenged in terms of having that backlog and having those older matters, despite our best efforts.

Senator PATRICK: It's an important function. Minister, I just wonder whether you could comment on the huge difference between the number of applications and the resources available?

Senator Stoker: Look, it's something I'm prepared to work with you on some more, because I know you are very passionate about this, Senator Patrick. There is a tension between the policy work of the commission and the review work. There's always a tension between the amount of resources one wants and the limits that exist for us in the real world. I can see that the commissioner is working very hard to get that balance right. The government is giving her as much support as we can to do that important role.

Senator PATRICK: Were you offering to have a conversation with me about FOI?

Senator Stoker: Yes, absolutely.

Senator PATRICK: Alright. I will take you up on that. You may regret that, minister!

Senator Stoker: That's alright.

Senator PATRICK: I can talk about it a lot. But thank you very much.

Senator Stoker: If that's the only regret I live with, I'm doing okay.

Senator PATRICK: Thank you very much, Minister, Commissioner and Chair.

CHAIR: Commissioner, that brings to an end the inquiry into the office of the Australian Information Commissioner. Thank you very much for your time and for your evidence this evening.

Ms Falk: Thank you.

Previous Estimates

Senator PATRICK: What's the average time it takes to get from an application to a case officer being assigned?

Ms Falk: I'll have to take that on notice. It changes, depending on the circumstances. And can I just be clear that we're talking along the same terms. When the matter arrives at the OAIC, it will be assessed and contact will be made. It will be triaged. There might be initial information sought, so there are time periods for that. And there will be also attempts at early resolution. If the matter is more complex and early resolution doesn't seem viable in the situation then what we're experiencing at present is a delay in allocating to a case officer for that. Perhaps I would call it more complex work that needs to be handled on the case.

Senator PATRICK: That's my own personal experience, and it seems to be quite a long time before you get assigned a case officer. Is it three months?

Ms Falk: That period of time has increased.

Senator PATRICK: Can you provide that on notice? The 120 days, in my view, is probably mostly taken up just even getting to a case officer—which I find totally unacceptable, I might point out.

Ms Falk: In the 120 days, as I said, there is active work done on the matters as soon as they're received. In the early resolution process, where we're experiencing the greatest delays are those matters that then need to go to more formal submissions. I can come back to you on notice with time periods there.

The response to the honourable senator's question is as follows:

The 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.

The OAIC generally acknowledges receipt and triages an IC review application within three days of receipt, makes preliminary inquiries within two weeks and commences an IC review between three to eight weeks of receipt.

The process and timeframe for each review varies depending on the circumstance. For example, where an FOI decision is not made within the statutory timeframes, a decision to refuse access to a document is 'deemed' to have been made by the agency or minister. The IC review process for 'deemed' decisions is separate to the process followed where an applicant seeks IC review of an FOI decision where a statement of reasons has been provided by an agency or minister. In IC review applications involving 'deemed' decisions, the OAIC will conduct preliminary inquiries and may also issue a notice to the agency or minister to produce a statement of reasons and key documents within a specified timeframe.

Where an applicant seeks IC review of an FOI decision where a statement of reasons has been provided by an agency or minister, various case management events will generally occur early in the process, including case assessment by a senior officer, preliminary inquiries with an agency or minister, or issuing a notice to the agency or minister that an IC review has been commenced and requesting submissions and key documents to be considered during the IC review. These events will generally have occurred prior to formal allocation to a review officer.

Once allocated, opportunities to facilitate further informal resolution will be explored. This may include inviting the agency or minister to finalise a matter by agreement with the applicant or to make a revised decision in the applicant's favour.

In the 2017-18 year, 39% of IC review applications finalised were closed within 120 days of receipt and a further 30% were closed within 9 months of receipt.

At 31 October 2018, the time from receipt to formal allocation for those matters not resolved in the early stages was 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 a case officer can vary considerably from a few weeks to a number of months.

Attachment C**Summary - Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information) [2020] AATA 4964 (9 December 2020)**

On 9 December 2020, Deputy President Britten-Jones set aside a decision by the Department of the Prime Minister and Cabinet (the Department) to refuse access to documents requested by Senator Patrick, finding that the document was not exempt under ss 33(a)(ii), 47C, 47D or 47G1(a) of the FOI Act.

Background

- On 6 September 2018, the Auditor-General completed an audit report on the acquisition by the Department of Defence of a fleet of vehicles described as ‘protected mobility vehicles – light’ (aka ‘Hawkei’). The report was not released publicly, but was provided to the Prime Minister under s 37(5)(b) of the *Auditor-General Act 1997* because the Attorney-General had issued a certificate under s 37(1)(b) of the AG Act on the basis that disclosure would be contrary to the public interest.
- Senator Patrick made his FOI request directly to the Department and therefore no issue arises with respect to transfer of the request under s 16(2) of the FOI Act (documents originating with the Auditor-General).
- The Department refused access on 7 December 2018, on the basis that the Department is exempt from the operation of the FOI Act under s 7. In the alternative, the Department said the document was created by an exempt body and the Department was not required to give access.
- Senator Patrick sought IC review of the decision and the IC review was finalised under s 54W(b) on 21 May 2019. Senator Patrick subsequently applied to the AAT.

Issues

- Although the access refusal reason was initially under s 7, this is not referenced in the decision. It appears this claim was abandoned as parts of the report were made public, after which material was claimed to be exempt under ss 33(a)(ii), 47C, 47D and 47G1(a).
- On 30 June 2020, with the consent of the parties, the Tribunal amended the Department’s access refusal decision of 7 December 2018 under s 26(1)(b) of the AAT Act and the applicant was granted access to further parts of the report.
- The scope of the Tribunal's review was confined to the paragraphs which the Secretary claimed to be exempt under ss 33(a)(ii), 47C, 47D and 47G1(a).
- Evidence was sought from the IGIS. The IGIS advised that he was not appropriately qualified to give evidence on the issue of what harm, if any, may be caused by disclosure of the material at issue.

Whether document exempt under s 33(a)(ii) (defence of the Commonwealth)

- The Tribunal found that document was not exempt under s 33 as disclosure would not, or could not reasonably be expected to, cause damage to the export prospects of the Hawkei, or, by extension, defence of the Commonwealth. The Tribunal reached this conclusion because much of the disputed material was already

publicly available. It noted that some of the material had originally been sourced from the public domain, that on numerous occasions it repeats information that is publicly available elsewhere, and that the disputed material is not materially different to publicly available information.

Whether document conditionally exempt under s 47G(1)(a) (business information)

- The Tribunal found that the documents were not exempt under this section for the reasons given above – disclosure of the disputed material would not, or could not be expected to, have an adverse impact on Thales, given the amount of material already in the public domain.

Whether document conditionally exempt under s 47D (financial or property interests of the Commonwealth)

- The Tribunal found that documents were not exempt under s 47D for the same reasons discussed above – disclosure would not, or could not be expected to, have a substantial adverse impact, or any impact, on the financial interests of the Commonwealth, given the amount of material already in the public domain.

Whether documents conditionally exempt under s 47C (deliberative processes)

- The Tribunal considered the report did not involve the weighing up or evaluation of competing arguments or the exercise of a judgment in developing and making a selection from different options, so did not involve a deliberative process. Rather the Tribunal concluded the report to be ‘a statement of factual findings and assessment of the effectiveness and value for money of a procurement project. It was a final statement of the Auditor-General exercising his statutory function to provide information to Parliament. Rather than disclosing a deliberative process, the Redacted Report discloses a final conclusion based on an analysis of factual findings’.

Attachment D

Break down of Commissioner IC Review decisions 2011-2021

2011 Decisions

Name	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Decisions total 2011
<i>James Popple</i>	1		1	1		1	1	1	1		1	1	9
<i>John McMillan</i>												2	2
Monthly total	1		1	1		1	1	1	1		1	3	11

2012 Decisions

Name	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Decisions total 2012
<i>James Popple</i>	4	2	4	2	2	3	1	3	2	2	2	2	29
<i>John McMillan</i>											1	1	2
<i>Timothy Pilgrim</i>				1							3		4
Monthly total	4	2	4	3	2	3	1	3	2	2	6	3	35

2013 Decisions

Name	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Decisions total 2013
<i>James Popple</i>	5	1	3		3	2	1	4	1	2	1	3	26
<i>John McMillan</i>		2 (*1 x 2 apps ⁴)						4	1				7
<i>Timothy Pilgrim</i>		3	3 (*1 x 4 apps ⁵)						3	2 (*1 x 2 apps ⁶)	4	5	20
<i>Toni Pirani</i>		4	13 (*1 x 2 apps ⁷)	19 (*1 x 2 apps ⁸ , *1 x 8 apps ⁹)									36
Monthly total	5	10	19	19	3	2	1	8	5	4	5	8	89

⁴ *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013): MR11/00046, MR11/00072

⁵ *'H' and Attorney-General's Department* [2013] AICmr 17 (1 March 2013): MR11/00198, MR11/00199, MR11/00200, MR11/00201

⁶ *'AO' and Department of Veterans' Affairs* [2013] AICmr 77 (21 October 2013): MR11/00339, MR12/00227

⁷ *'O' and Department of Immigration and Citizenship* [2013] AICmr 27 (15 March 2013): MR11/00282, MR11/00283

⁸ *'AB' and Australian Securities and Investments Commission* [2013] AICmr 48 (22 April 2013): MR12/00128, MR12/00217

⁹ *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49 (22 April 2013)

MR11/00445, MR11/00446, MR11/00447, MR11/00448, MR11/00449, MR11/00450, MR11/00451, MR11/00452

2014 Decisions

Name	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Decisions total 2014
<i>John McMillan</i>	1		-	1	-	-	2 (*1 x 2 apps ¹⁰)	-	-	1	-	-	5
<i>James Popple</i>	2	3	3	3	3	6	1 (9 apps ¹¹)	-	-	1 (3 apps ¹²)	2	5	29
<i>Timothy Pilgrim</i>	7	10 (*1 x 3 apps ¹³)	2 (*1 x 2 apps ¹⁴)	2	10	12	5	6	1	6	19	5	84
<i>Karen Toohey</i>	-	-	-	-	-	-	-	3	17	4	-		24
Monthly total	10	13	5	6	13	18	8	9	18	12	21	11	143

¹⁰ *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 (30 July 2014): MR13/00486 and MR14/00242

¹¹ *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 (31 July 2014): MR13/00325, MR13/00326, MR13/00327, MR13/00328, MR13/00329, MR13/00330, MR13/00334, MR13/00338, MR13/00339

¹² *'DI' and Department of Agriculture* [2014] AICmr 116 (28 October 2014): MR12/00520, MR12/00521, MR13/00026

¹³ *'BE' and Ors and Australian Taxation Office* [2014] AICmr 16 (12 February 2014): MR11/00441, MR11/00453, MR11/00458

¹⁴ *Leda Manorstead Pty Ltd and Department of the Environment* [2014] AICmr 26 (4 March 2014): MR12/00112, MR12/00517

2015 Decisions

Name	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15	Sep-15	Oct-15	Nov-15	Dec-15	Decisions total 2015
<i>John McMillan</i>	1	1 (*1 x 2 apps ¹⁵)	-	7	1	1	3	-	-	-	-	-	14
<i>Timothy Pilgrim</i>	9	8	3	1	3	6	4	6	6	5	4	*1 x 2 apps ¹⁶)	56
Monthly total	10	9	3	8	4	7	7	6	6	5	4	1	70

2016 Decisions

Name	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16	Aug-16	Sep-16	Oct-16	Nov-16	Dec-16	Decisions total 2016
<i>Timothy Pilgrim</i>	5	3	10	6	7	5	5	6	11	5	6	12	81
Monthly total	5	3	10	6	7	5	5	6	11	5	6	12	81

¹⁵ *Wright & Parnell and Department of the Prime Minister and Cabinet* [2015] AICmr 13 (3 February 2015): MR13/00461 and MR13/00485

¹⁶ MR14/00366 and MR14/00363

2017 Decisions

Name	Jan-17	Feb-17	Mar-17	Apr-17	May-17	Jun-17	Jul-17	Aug-17	Sep-17	Oct-17	Nov-17	Dec-17	Decisions total 2017
<i>Timothy Pilgrim</i>	10	8	9	10	12	10	7	7	10	20	15	10	128
Monthly total	10	8	9	10	12	10	7	7	10	20	15	10	128

2018 Decisions

Name	Jan-18	Feb-18	Mar-18	Apr-18	May-18	Jun-18	Jul-18	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Decisions total 2018
<i>Angelene Falk</i>	-	-	-	-	4	2	2	3	2	2	4	2	21
<i>Timothy Pilgrim</i>	14	13	21	-	-	-	-	-	-	-	-	-	48
Monthly total	14	13	21	-	4	2	2	3	2	2	4	2	69

2019 Decisions

Name	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Decisions total 2019
<i>Angelene Falk</i>	4	3	5	1	2	29 (1 x2 apps ¹⁷)	2	6	1	5	3	3	64
<i>Elizabeth Hampton</i>	-	-	-	-	-	-	4	-	-	-	-	-	4
Monthly total	4	3	5	1	2	29	6	6	1	5	3	3	68

2020 Decisions

Name	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20	Sep-20	Oct-20	Nov-20	Dec-20	Decisions total 2020
<i>Angelene Falk</i>	4	5	-	3	3	11	2	12	-	1	5	-	46
<i>Elizabeth Hampton</i>	-	-	-	-	-	-	-	-	4	-	-	7	11
Monthly total	4	5	-	3	3	11	2	12	4	1	5	7	57

¹⁷ *Macquarie Group Limited and Australian Securities and Investments Commission (Freedom of information) [2019] AICmr 39 (12 June 2019); MR17/00356 and MR17/00357*

2021 Decisions

Name	Jan-21	Feb-21	Mar-21	Apr-21	May-21	Jun-21	Jul-21	Aug-21	Sep-21	Oct-21	Nov-21	Dec-21	Decisions total 2021
<i>Angelene Falk</i>	-	3	2	3	-	9	2	-	-	-	1	1	19
<i>Elizabeth Hampton</i>	-	-	-	-	-	7	-	3	5	4	17	17	53
Monthly total	-	3	2	3	-	16	2	3	5	4	18	18	74

Commissioner brief: 2020-21 Australian Government agency and ministerial FOI statistics and trends in the use of exemptions under the FOI Act¹

Key messages

- Under s 8J of the *Australian Information Commissioner Act 2010*, the Information Commissioner has power to collect information and statistics from agencies and ministers about FOI matters including:
 - the number of FOI requests and amendment applications received
 - outcomes
 - charges collected
 - number of internal reviews.
 - Agencies enter FOI statistics into an online portal each quarter. The statistics in this brief are based on the data reported by agencies and ministers.
- The **number of FOI requests** made to agencies and ministers in 2020-21² decreased by 16% over the previous year to 34,797 (when there was a 6% increase in the number of requests compared with the previous year).
 - The decrease in total number of requests in 2020-21 is largely the result of a decrease in requests for personal information experienced by Home Affairs, Services Australia, Veterans' Affairs and the National Disability Insurance Agency (NDIA).
 - The Department of Home Affairs, Services Australia and the Department of Veterans' Affairs together continued to receive the majority of FOI requests received by Australian Government agencies (68% of the total). Of these, 89% are from individuals seeking access to personal information.
- Of all FOI requests made to agencies and ministers, 77% were for **personal information** (26,715) and 23% for **non-personal** (8,802). This trend has been consistent over the past 4 years.
- 26,680 FOI **requests were decided**³ in 2020-21.
 - 10,978 FOI requests were granted in full in 2020-21 (41% of all requests decided).
 - This is a decline on 2019-20, when 47% of all FOI requests decided were granted in full.
 - There has been a gradual decline in the number of FOI requests granted in full dating back to 2011-12.

¹ All percentages have been rounded to whole numbers in this brief.

² In 2020-21, 283 agencies and ministers reported FOI statistics to the OAIC.

³ Covers access granted in full, in part or refused.

- 10,984 FOI requests were granted in part in 2020-21 (41% of all requests decided).
 - This is an increase on 2019-20, when 38% of all requests decided were granted in part.
- 4,718 FOI requests were refused in 2020-21 (18% of all requests decided).
 - This represents an increase in requests refused compared with 2019-20, when 15% of all requests were refused.
- 10,660 of all FOI requests decided involved **exemption claims** (40% of requests decided).⁴ FOI requests can also be refused where:
 - the documents sought were not subject to the FOI Act
 - no relevant documents could be found in the possession of the agency (s 24A of the FOI Act)
 - a 'practical refusal reason' existed in relation to the request (under s 24 of the FOI Act), for example, if it was decided that processing the request would involve a substantial and unreasonable diversion of the agency's resources (following the request consultation process in s 24AB).
- 77% of all FOI requests decided in 2020-21 were decided within the **statutory timeframe**.
 - This is a decline from 2019-20 (79%) and 2018-19 (83%)
 - This may be due to the impact of the COVID-19 pandemic on agencies and ministers' ability to process FOI requests.
- There was a 7% decline in the **amount of charges notified** in 2020-21 (\$247,572) from 2019-2020.
 - There was a 8% decline in the **amount of charges collected** in 2020-21 (\$81,353) from 2019-20.
- The total **cost attributable to processing** FOI requests in 2020-21 was \$61.48 million, approximately 4% less than the previous financial year's total (\$63.91 million).
 - This is different to trends in previous years where there have been increases in costs. In 2019-20, there was a 7% increase over the previous year's total of \$59.9 million.
 - The reason for the decrease in the overall cost of FOI activity is a 4% decrease in the total staff hours devoted to FOI in 2020–21 and an 11% decrease in requests determined compared with 2019–20.

⁴ See Attachment B for further information on the percentage of requests in which no exemptions were relevant or claimed has varied over the past 10 years: 60% in 2020-21.

- There was an increase in the proportion of new documents made available for **direct download from their disclosure logs**: 83% in 2020-21 compared to 75% in 2019-20.

2021-22 Statistics (1 July 2021 – 31 December 2021) *

- **Please note the statistics below are point in time statistics, based on reports generated on 4 February 2022. Agencies and ministers are able to update and amend at any time until 21 July 2022.**
- **17,914** FOI requests made to agencies and ministers:
 - 72% personal (12,962)
 - 28% other (4,952)
- **12,441** FOI requests decided:
 - 4,534 FOI requests were granted in full (36% of all requests decided).
 - 5,257 FOI requests were granted in part (42% of all requests decided).
 - 2,650 FOI requests were refused (21% of all requests decided).
- 75% of requests determined were decided with the statutory timeframe.
- 5,953 of all FOI requests decided involved exemption claims (48% of requests decided)
- The Cabinet documents exemption (s 34) was used 101 times.
- **Top 5 exemptions**

Exemption	Times exemption applied
Personal privacy (s 47F)	2,988
Certain operations of agencies (s 47E)	1,998
Documents affecting enforcement of law and protection of public safety (s 37)	481
Deliberative processes (s 47C)	460
Secrecy provisions of enactments (s 38)	457

Possible questions

- **Does the current FOI system give the public access to information promptly and at the lowest reasonable cost?**
 - Each year, agencies and ministers' offices need to submit statistics to the OAIC
 - My annual report for last financial year shows there are still high numbers of applications being dealt with across government - 34,797 applications, although this is a 16% decrease from last year when applications were 41,333. The majority of those applications are granted in full or in part, with the smaller amount that are refused. Those refusals relate to the application of exemptions.
 - Those statistics give us a snapshot of the way in which the FOI system is operating. What they don't tell us is the number of applications that are granted without going through an FOI process but through what we would call **administrative access**—that is, accessing personal information through myGov and other schemes. We understand there are very large numbers of information provided through those mechanisms.
 - The third mechanism, which helps to ensure the timely access to government-held information, is proactive publication. My office has been encouraging agencies to proactively release information as well as to ensure compliance with disclosure log requirements.

- **How has the COVID-19 pandemic affected access to government documents through FOI?**

While some agencies have attributed decreases in the number of FOI requests received during 2020-21 to the impact of the COVID-19 pandemic, the decrease in total FOI requests (6,536 fewer than in 2019-20) is largely the result of a decrease in requests for personal information experienced by Home Affairs, Services Australia, Veterans' Affairs and NDIA.

The COVID-19 pandemic affected the ability of some Australian Government agencies to respond to FOI requests within the statutory timeframes in the FOI Act.

In some agencies, FOI staff were deployed to work in frontline customer service roles while the internal redeployment of other staff to meet service delivery needs, which made it difficult to obtain documents to satisfy FOI requests and to engage with decision makers, many of whom assumed additional responsibilities to respond to the pandemic.

Some agencies were impacted by reduced staff numbers and difficulties in searching and retrieving documents in a remote working environment and challenges in remotely onboarding and training new FOI staff.

Other agencies were impacted by the complexity of some requests, particularly requests relating to the government's response to the COVID-19 pandemic.

As a result, some agencies and ministers found it difficult to meet the statutory timeframes in the FOI Act. However, overall, we received 13% fewer notifications and applications for extensions of time during this financial year when compared with 2019-20.

- **What action is the OAI proposing to take to address poor compliance with statutory timeframes?**

Work to promote compliance with statutory timeframes includes:

- making decisions on extension of time applications (see Com brief – EOTs [D2021/000981](#))
 - using our formal powers to require provision of a statement of reasons when a person seeks review of a deemed refusal (see Com brief – IC reviews - [D2021/000977](#))
 - investigating complaints about delay, including a Commissioner initiated investigation (CII) into the Department of Home Affairs' compliance with statutory timeframes with respect to processing FOI requests for access to non-personal information.
 - We recently wrote to agencies following the analysis of 2020-21 statistical returns. We wrote to those agencies identified as consistently and/or significantly non-compliant with statutory timeframes. We have recommended those agencies consider adopting the recommendations we made in Department of Home Affairs CII and have sought information about their governance arrangements in relation to FOI operations. We are considering the agencies' responses.
 - providing assistance through our enquiries phone line
 - publishing regular e-newsletters for FOI practitioners
 - publishing resources on our website, including checklists to streamline the FOI request process.
- **Why is personal privacy the most used exemption when 77% of all requests are for personal information?**
 - A request for access to the personal information of another person is categorised as a 'predominantly personal' FOI request. As a result, it is not correct to say that 77% of all requests are for a person's own personal information, although a large number are.
 - Agencies and ministers must consult affected third parties before making a decision if it appears that the affected third party might reasonably wish to make a contention that a document is conditionally exempt under s 47F and

that giving access to the document would, on balance, be contrary to the public interest for the purposes of s 11A(5) of the FOI Act.

- The FOI Act allows personal information to be removed from documents before being released and in many cases removal of a name or telephone number protects the privacy of a third party but allows the FOI applicant to access the substance of the requested document, consistent with the objects of the FOI Act.
- While it is the most used exemption, use of the personal privacy conditional exemption has decreased over time. In 2020-21, it was applied in approximately 38% of all requests in which an exemption was applied (it was applied in approximately 48% of requests in 2011–12). This may reflect the increasing use of administrative access schemes to provide individuals with access to their own personal information.

- **Why has the use of s 47E (certain operations of agencies) increased?**

The certain operations of agencies conditional exemption has 4 subsections:

- prejudice the effectiveness of procedures or methods for the conduct of tests, examinations, or audits by an agency
- prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency
- substantial adverse effect on management of staff
- substantial adverse effect on agency operations.

Section 47E has a wide scope.

The largest increase in the use of s 47E has been over the past 5 years. This may reflect the view of the Information Commissioner, as expressed in IC review decisions, that some of the impacts that disclosing the names and contact details of staff may have are more appropriately addressed under s 47E, rather than s 47F (personal privacy).

- ***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'. This exemption, which is subject to a public interest test, 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 could be significantly impacted if the deliberative processes of government are not subject to an overriding public

interest test. The objects of the FOI Act 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.

Key dates

- 1 November 2010 – the *Freedom of Information Amendment (Reform) Act 2010* came into effect. This resulted in some exemptions which were previously non conditional becoming subject to a public interest test (e.g., personal privacy).
- The data used in this brief has been sourced from the OAIC's FOI annual reports from 2011–12 to 2020-21.

Attachments

Attachment A: Table 1: FOI requests received, outcomes and compliance with statutory timeframe (2016-17 to 2020-21)

Attachment B: Exemptions

Attachment C: Charges

Attachment D: Practical refusal

Attachment E: Disclosure logs

Attachment F: Costs of administering FOI by the Australian Government

Attachment G: Media articles

Attachment H: FOI statistics – Prime Minister's Office

Attachment H1: FOI statistics – Department of the Prime Minister and Cabinet

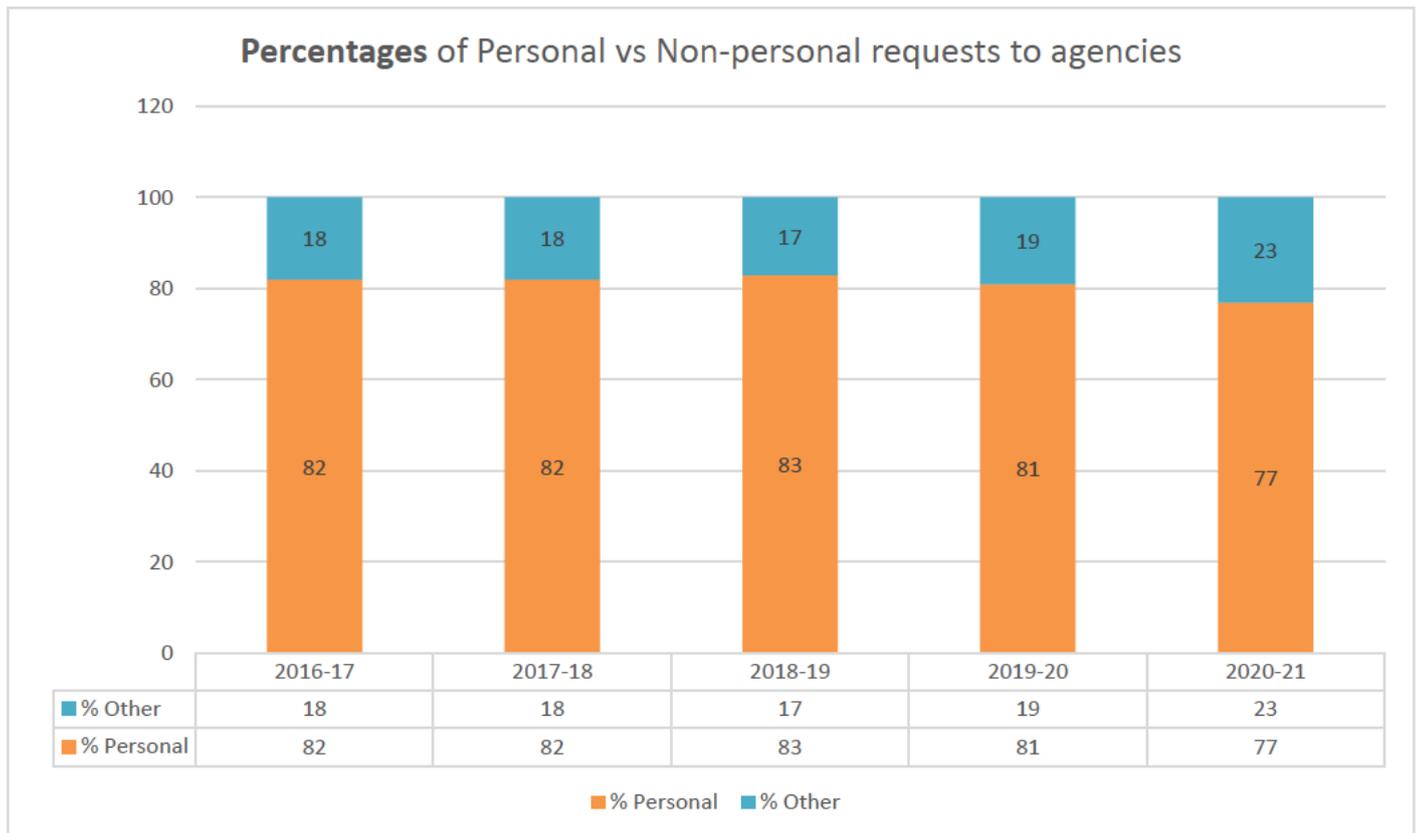
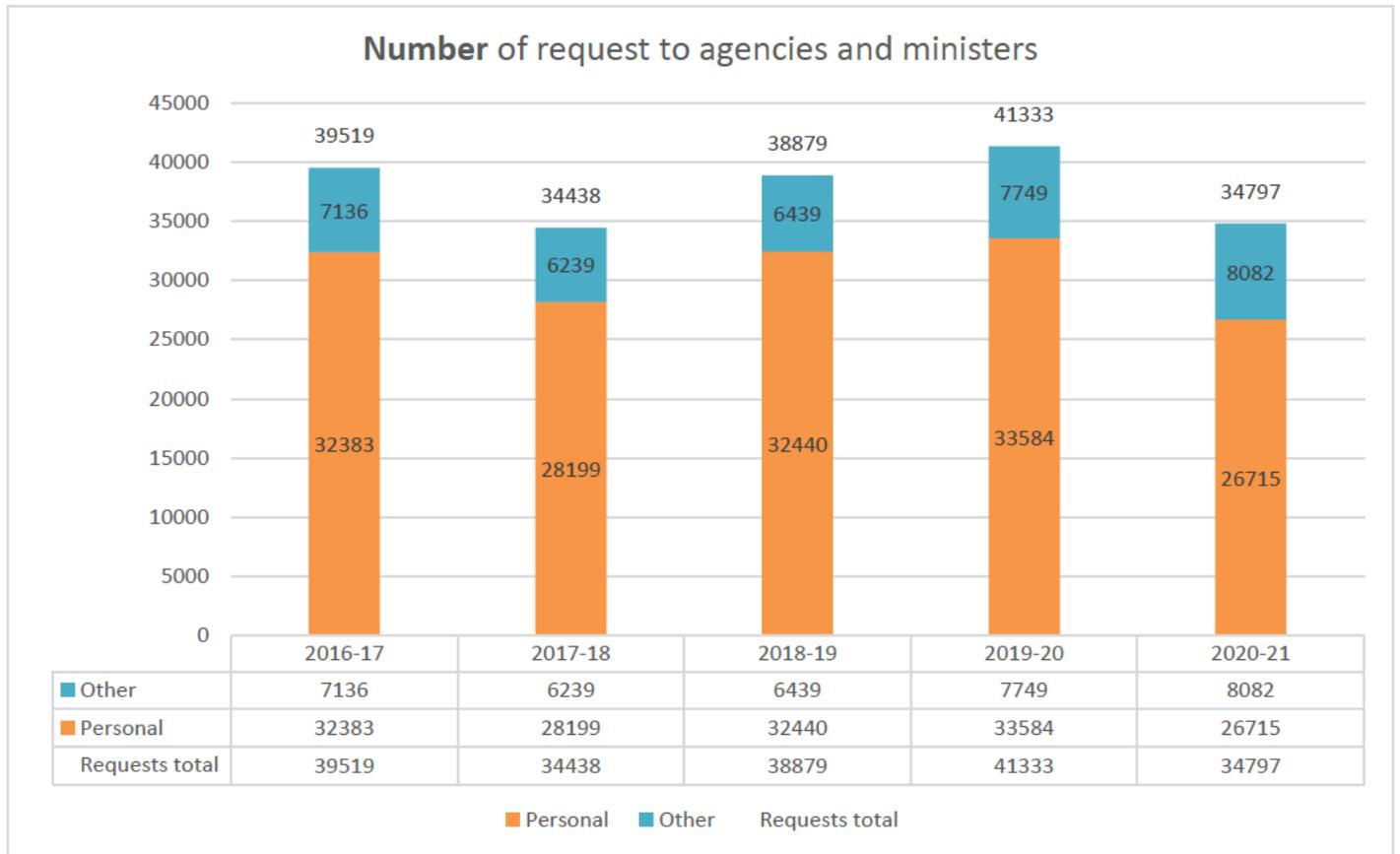
Attachment I: FOI statistics – Administrative Appeals Tribunal

Document history

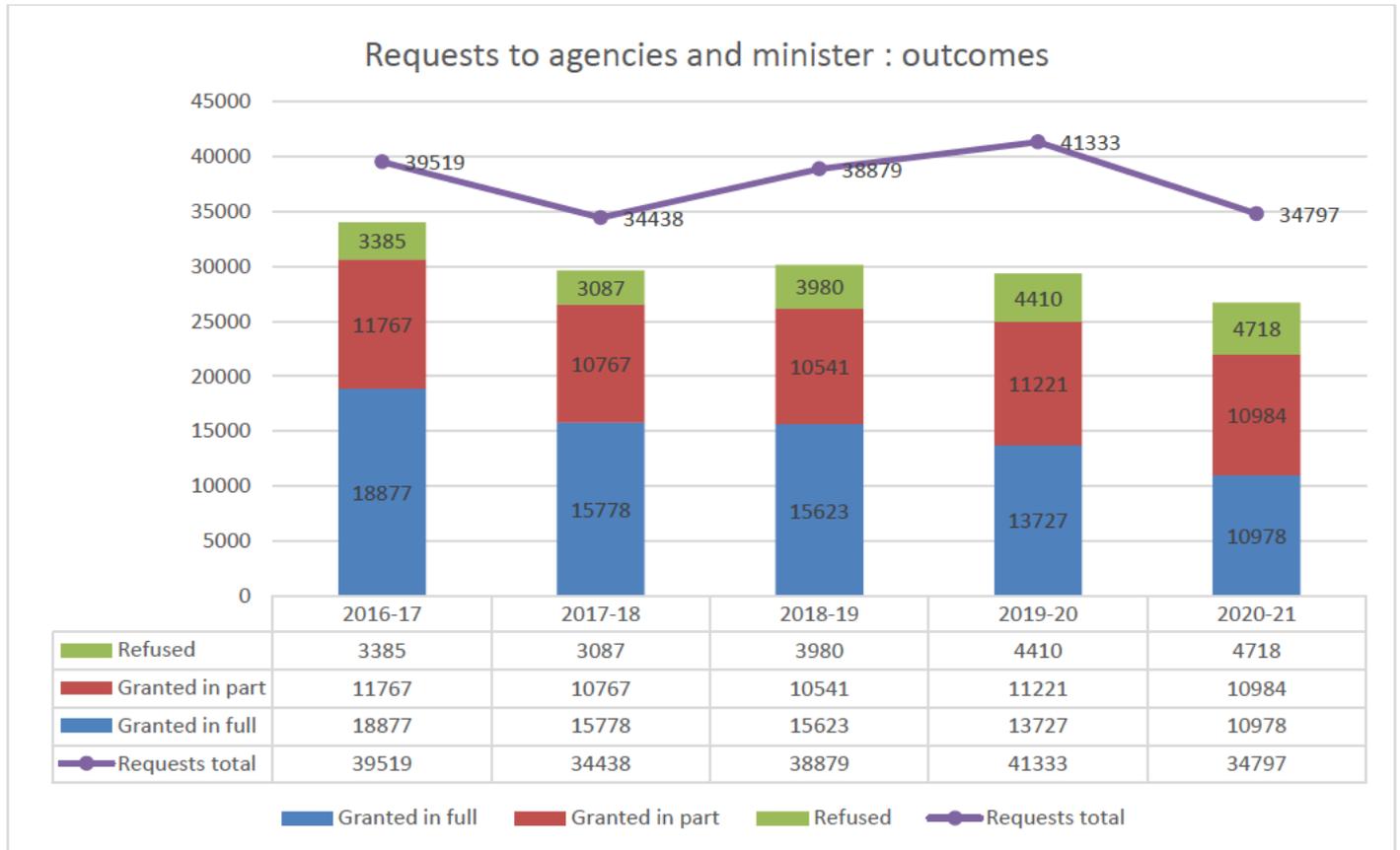
Updated by	Reason	Approved by	Date
Suseela Durvasula 11.01.21	Senate Estimates February 2022		

Attachment A

FOI requests received by agencies and ministers, outcomes and compliance with statutory timeframe



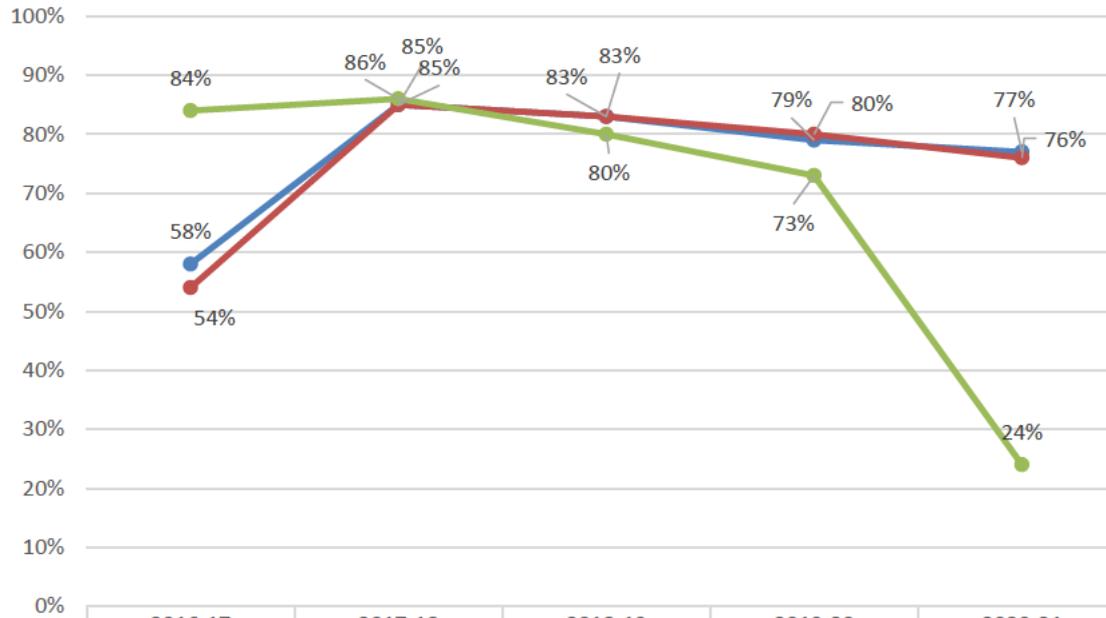
- The decrease in total number of requests in 2020-21 is largely the result of a decrease in requests for personal information experienced by Home Affairs, Services Australia, Veterans' Affairs and the NDIA.
- In 2020–21, 26,715 FOI requests (or 77% of all requests received) were for documents containing personal information. This is a lower proportion than in previous years; in 2019–20, 81% of all requests were for predominantly personal information, in 2018–19 it was 83%, in 2017–18, 82% and in 2016–17 it was 82%.
- The decrease in the proportion of personal FOI requests may be the result of agencies increasingly making documents available to members of the public using online portals such as myGov and through other administrative access schemes, such as those implemented by the NDIA, Veterans' Affairs and Services Australia.
- For example, the NDIA received 40% fewer requests in 2020–21 compared with 2019–20. On 1 June 2020, it made changes to improve National Disability Insurance Scheme participants' access to their personal information through a [Participant Information Access scheme](#), which gives participants administrative access to their personal information outside the FOI process. Veterans' Affairs also received 21% fewer requests in 2020–21 compared to 2019–20, stating it has processed more requests for personal information relating to current claims under [administrative access schemes](#). Services Australia experienced a 38% decrease in requests. Where possible, it continues to process access requests for person information under its [personal information release](#) scheme.



- The percentage of requests granted in full has gradually declined since 2011–12.
 - In 2011–12, **59%** of all requests were **granted in full**, 29% were granted in part and approximately 12% were refused.⁵
 - In 2014–15, approximately **57%** of all requests were **granted in full**, 33% were granted in part and approximately 10% were refused.
 - In 2018-19, approximately **52%** of all requests were **granted in full**, 35% were granted in part and approximately 13% were refused.
 - In 2019–20, approximately **47%** of all requests were **granted in full**, 38% were granted in part and approximately 15% were refused.
 - In 2020-21, approximately **41%** of all requests were **granted in full**, 41% were granted in part and approximately 18% were refused.

⁵ These figures are taken from the 2011–12 annual report, which says that no exemptions were applied in 57.8% of all requests decided. The annual report also says that in 36.1% of all requests decided exemptions were applied. This leaves 6.1% of all requests unaccounted for.

Agency compliance with statutory processing times



	2016-17	2017-18	2018-19	2019-20	2020-21
Processed within statutory timeframes	58%	85%	83%	79%	77%
Personal	54%	85%	83%	80%	76%
Other	84%	86%	80%	73%	24%

Processed within statutory timeframes Personal Other

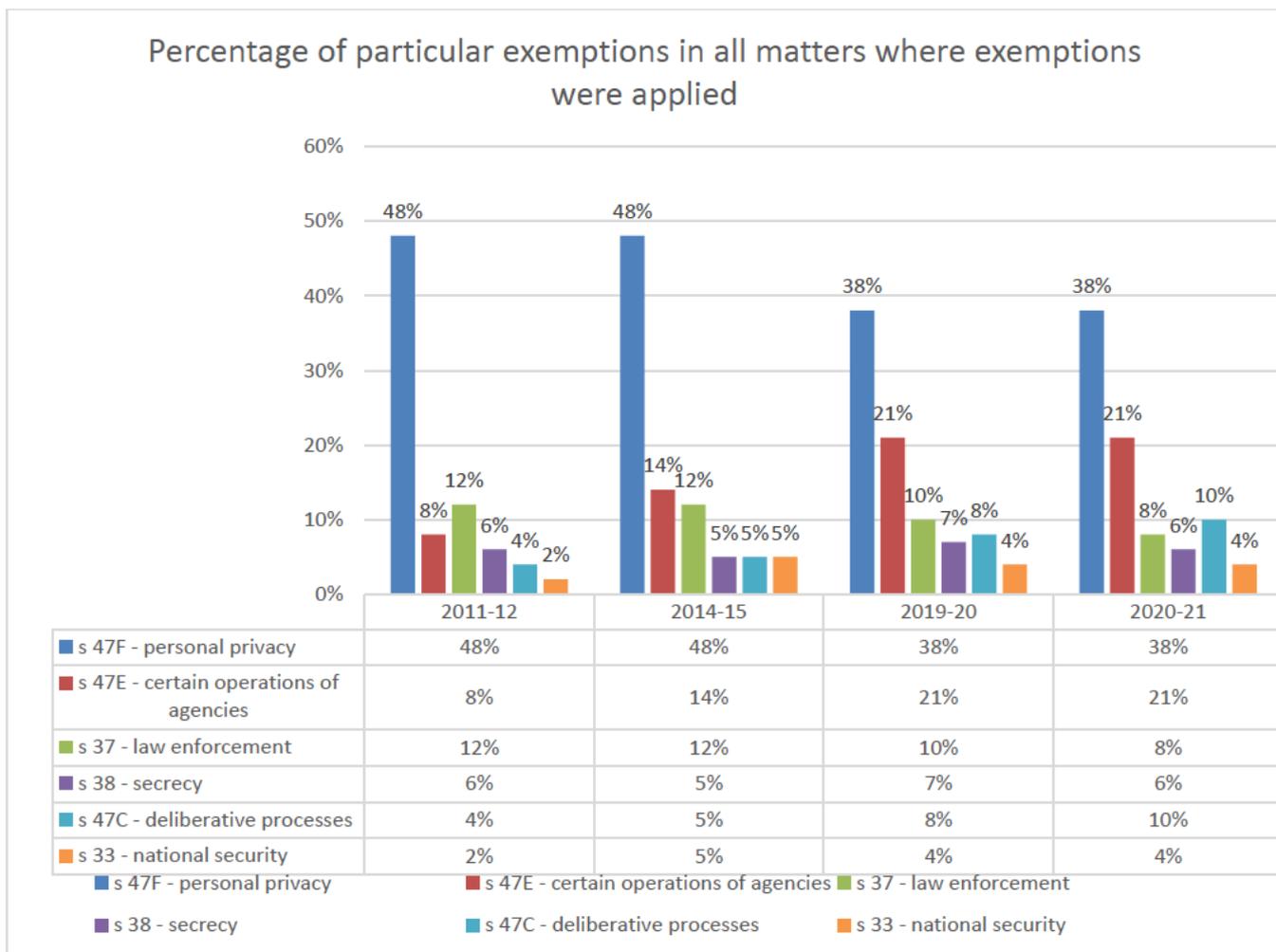
Attachment B

Exemptions

Number and percentages of requests made by agencies where **no exemptions claimed**

Table 2: Top 5 exemptions (and percentages) 2020-21

Exemption	Percentage of FOI requests in which exemption applied
Personal privacy (s 47F)	38%
Certain operations of agencies (s 47E)	21%
Deliberative processes (s 47C)	10%
Documents affecting enforcement of law and protection of public safety (s 37)	8%
Secrecy provisions of enactments (s 38)	6%



- The type of exemptions applied are generally consistent from year-to-year.
- The **personal privacy** conditional exemption (s 47F) of the FOI Act has been the most used exemption every year since 2011–12:

2011-12	2015-16	2019-20	2020-21
48%	48%	38%	38%
of all FOI requests in which exemptions were applied			

- The use of the **certain operations of agencies** conditional exemption in s 47E has increased since 2011–12:

2011-12	2015-16	2019-20	2020-21
8% (3 rd most used)	14% (2 nd most used)	21% (2 nd most used)	21% (2 nd most used)
of all FOI requests in which exemptions were applied			

- The documents affecting enforcement of law and protection of public safety exemption (s 37) has decreased, however it remains one of the most used exemptions:

2011-12	2015-16	2019-20	2020-21
12% (2 rd most used)	12% (3 rd most used)	10% (3 rd most used)	8% (4 th most used)
of all FOI requests in which exemptions were applied			

- The documents to which secrecy provisions of enactments apply exemption (s 38) was applied:

2011-12	2014-15	2019-20	2020-21
6% (4 th most used)	5%	7% (5 th most used)	6% (5 th most used)
of all FOI requests in which exemptions were applied			

- The deliberative processes conditional exemption (**s 47C**) was applied:

2011-12	2014-15	2019-20	2020-21
4% (6 th most used)	5% (5 th most used)	8% (4 th most used)	10% (3 rd most used)
of all FOI requests in which exemptions were applied			

- The documents affecting national security, defence or international relations exemption (s 33):

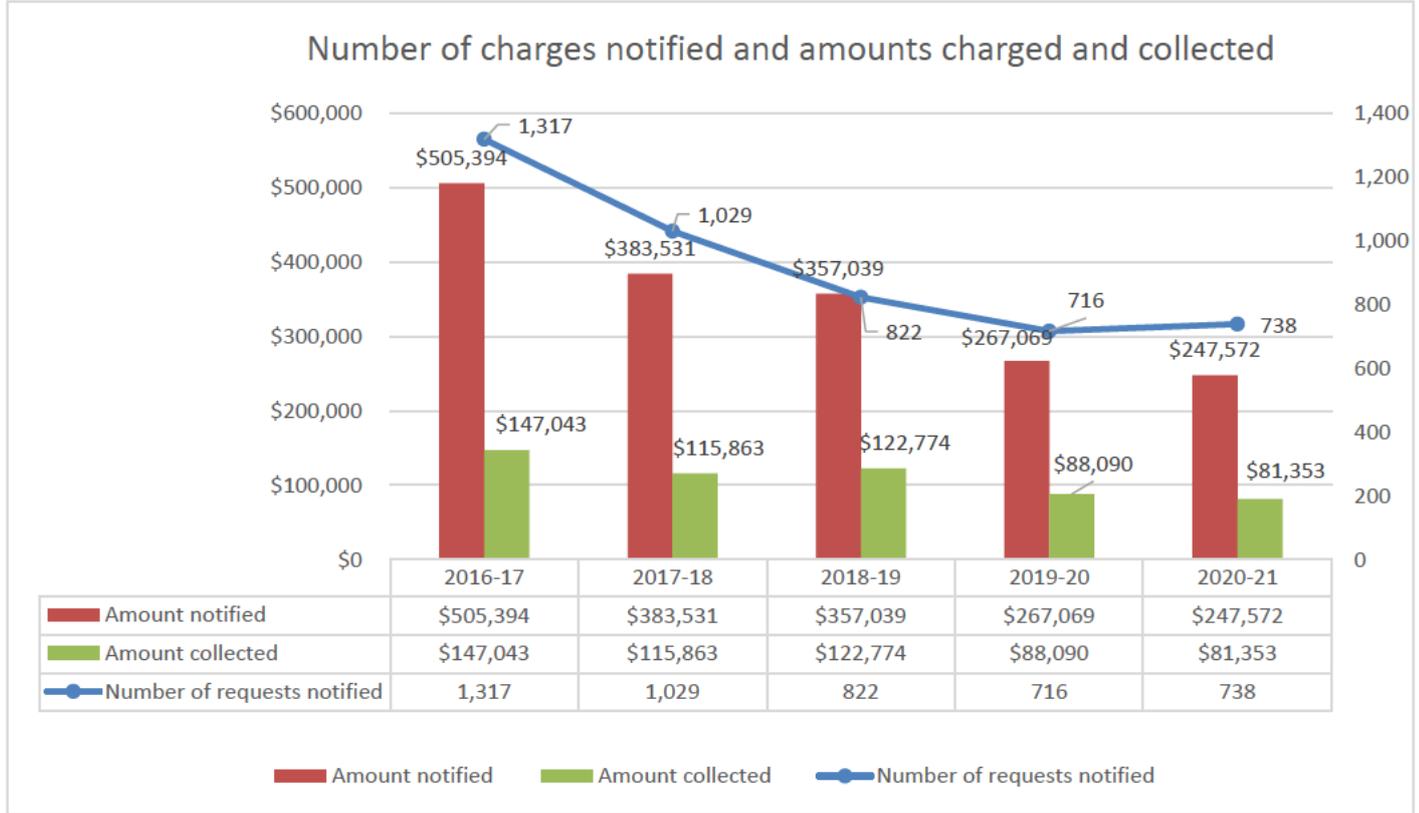
2011-12	2014-15	2019-20	2020-21
2% (10 th most used)	5% (6 th most used)	4% (6 th most used)	4% (6 th most used)
of all FOI requests in which exemptions were applied			

- The least used exemptions, consistent from year-to-year, are:
 - ss 45A (Parliamentary budget office documents)
 - 47A (electoral rolls)
 - 47H (research)
 - 47J (the economy)

Each of the above comprise less than 0.2% of all exemptions applied.

- Exemptions applied by agencies may change on review (data collected is for primary decisions on access).

Table 3: Charges – notified and collected 2016-17 to 2020-21



Period	Number of requests notified	Amount notified	% change from previous	Amount collected	% change from previous
2020-21	738	\$247,572	-7%	\$81,353	-8%
2019-20	716	\$267,069	-25%	\$88,090	-28%
2018-19	822	\$357,039	-7%	\$122,774	+6%
2017-18	1,029	\$383,531	-24%	\$115,863	-21%
2016-17	1,317	\$505,394	+1%	\$147,043	—

Attachment D**Practical refusal**

- In 2020-21, agencies and ministers sent 17% fewer notices of an intention to refuse an FOI request for a practical refusal reason than in 2019-20.
 - 3,143 in 2020-21, compared with 3,803 in 2019-20.
- The reason for this decrease was a decrease in the number of practical refusal notices issued by Home Affairs⁶:

	2020-21	2019-20
Issued practical refusal notices	2,007 (13% of all requests)	2,728 (15%)
Subsequently processed request	1,218 (61%)	1,259 (46%)

- If no response is received to a s 24AB notice the FOI request is taken to have been withdrawn (s 24AB(7)).
 - Of the 3,143 notices issued by agencies, 1,520 were subsequently refused or withdrawn (48%). This is a decrease compared to the proportions in 2019-20 (57%)⁷ and 2018-19 (77%).
 - Lower proportions of FOI requests subsequently refused or withdrawn after a practical refusal notice is issued, suggests agencies have been better at assisting applicants to revise the scope of their request so they can be processed.
 - This signals an improvement in the effectiveness of agency consultations under s 24AB in 2020-21 when compared with previous years.

⁶ Based on revised figures provided by the Department of Home Affairs. Published as erratum – appendix G 2020-21 annual report.

⁷ Based on revised figures provided by the Department of Home Affairs. Published as erratum – appendix G 2020-21 annual report.

Attachment E**Disclosure logs**

- Australian Government agencies reported publishing 2,480 new entries in disclosure logs during 2020-21.
- This is approximately 27% higher than 2019-20, when 1,949 entries were added.
- Documents were available for download directly from the agency or minister's website in relation to 2,056 requests.
- Documents were available from another website in relation to 54 requests.
- 370 entries were made available by another means (usually upon request).
- There has also been an increase in the proportion of new documents which members of the public can access directly from agency websites: 83% in 2020–21 compared to 75% in 2019–20.

Costs of administering FOI by the Australian Government

- In 2020-21 the total cost attributable to processing FOI requests was **\$61.48 million**
 - a 4% decrease over the previous financial year's total of \$63.91 million.
 - attributable to a 4% decrease in total staff hours devoted to FOI in 2020-21.
 - General legal advice costs increased 16% from 2019-20.
 - \$719,718 in 2019-20 to \$834,454 in 2020-21.
 - Litigation costs increased approximately 38% from 2019-20.
 - \$911,551 in 2019-20 to \$1,254,301 in 2020-21.
 - General administrative costs decreased approximately 31% from 2019-20.
 - \$136,634 in 2019-20 to \$94,678 in 2020-21
 - Training expenses increased 64% over 2019-20.
 - \$168,339 in 2019-20 to \$276,042 in 2020-21
 - 'Other' non-labour costs increased 43% from 2019-20.
 - \$242,585 in 2019-20 to \$348,097 in 2020-21
- The average cost per FOI request determined (granted in full, in part or refused) was \$2,305 in 2020-21. This is a 8% increase from \$2,177 in 2019-20 as agencies spent longer on processing each request.
- The total reported cost attributable to compliance with the Information Publication Scheme in 2020–21 was \$990,278, 20% less than in 2019–20 (\$1,242,976).

Attachment G – Media

- Christopher Knaus, 19 August 2021, 'Coalition 'unlawfully' blocking freedom of information requests', <https://www.theguardian.com/australia-news/2021/aug/19/coalition-unlawfully-blocking-freedom-of-information-requests>

Key points from article:

- References Grata Fund report:
 - use of cabinet exemption
 - refusal of FOI requests for text, Whatsapp, Signal and other electronic messages
 - documents in a minister's office 'cease to exist' when minister changes role
- Lack of resourcing for OAIC contributes to delay
- Agencies only granted 26% of FOI requests for non-personal information in full in 2019-20; 34% granted in part and 41% refused.
- About 10% of FOI requests were decided more than 90 days late, a five-fold increase from the previous year.
- Delays continue to worsen
- States that the Grata Fund report identifies an 'overarching cultural problem' that actively resists disclosure.

Relevant statistics:**Use of the Cabinet Exemption**

- Section 34 is a low proportion of the total overall exemptions claimed
 - in 2020-21 it was 8% of all FOI requests in which an exemption was claimed.
- There has been a slight increase in the use of the s 34 exemption in the last 3 years:
 - 139 s 34 exemptions were claimed in 2020-21
 - 187 in 2019-20
 - 129 in 2019-19
 - 68 claimed in 2017-18.

Requests for non-personal information:

Year	# requests non-personal information	% granted in full	% granted in part	% refused
2020-21	5,956	26%	34%	40%
2019-20	5,576	26%	33%	41%
2018-19	4,585	23%	37%	40%

Timeliness:

Year	% processed within statutory timeframes	< 30 days beyond statutory timeframes	< 60 days beyond statutory timeframes	< 90 days beyond statutory timeframes	90+ days beyond statutory timeframes
2020-21	77%	6%	2%	2%	12%
2019-20	79%	7%	2%	2%	10%
2018-19	83%	8%	4%	3%	2%

- **Information Publication Scheme** – there is continued commitment across government to compliance with IPS requirements and principles, although a decline was observed in the 4 key areas of compliance measured in both the 2012 and 2018 surveys – for further information see Commissioner brief **Commissioner brief: Proactive disclosure: Information Publication Scheme and disclosure logs** [D2022/000237](#)
- In September 2021, the OAIC published the [Disclosure Log Desktop Review](#) which identified whether agencies and ministers are complying with their disclosure log obligations, and the extent to which they make documents available for download from their websites. The review found that while most agencies are largely compliant with their obligations, some agencies require people to contact them for access to the documents listed on their disclosure log.

Details from Attachment 1 – Commissioner – consider omitting

Period	# requests to agencies and ministers	% personal (P) vs other (O)	Granted in full ⁸	Granted in part ⁹	Refused ¹⁰	% processed within statutory timeframe
2020-21	34,797 (-16%)	77% (P) (26,715) (-4%) 23% (O) (8,082) (+4%)	41% (10,978) (-6%) 86% (P) (9,419) 14% (O) 1,559	41% (10,984) (+3%) 82% (P) 18% (O) 8,968	18% (4,718) (+3%) 50% (P) (2,337) 50% (O) 2,381	77% (20,663) (-2%) 76% (P) (15,661) 84% (O) (5,002)
2019-20	41,333 (+6%)	81% (P) (33,584) (-2%) 19% (O) (7,749) (+2%)	47% (13,727) (-5%)	38% (11,221) (+3%)	15% (4,410) (+2%)	79% (23,066) (-4%) 80% (P) (19,002) 73% (O) (4,064)
2018-19	38,879 (+13%)	83% (P) (32,440) 17% (O) (6,439)	52% (15,623) (+2%)	35% (10,541) (+1%)	13% (3,980) (-3%)	83% (24,893) (-2%) 83% (P) (21,233) 80% (O) (3,660)

⁸ Expressed as a percentage of all FOI requests decided during the year.

⁹ Expressed as a percentage of all FOI requests decided during the year.

¹⁰ Expressed as a percentage of all FOI requests decided during the year.

Period	# requests to agencies and ministers	% personal (P) vs other (O)	Granted in full ⁸	Granted in part ⁹	Refused ¹⁰	% processed within statutory timeframe
2017-18	34,438 (-13%)	82% (P) (28,199) 18% (O) (6,239)	50% (15,778) (-2%)	34% (10,767) (-1%)	16% (3,087) (+6%)	85% (26,879) (+27%) 85% (P) (21,952) 86% (O) (4,927)
2016-17	39,519 (+4%)	82% (P) (32,383) 18% (O) (7,136)	55% (18,877)	35% (11,767)	10% (3,385)	58% (19,607) 54% (P) (16,343) 84% (O) (3,264)

Attachment H: Prime Minister's Office (PMO)

Period	# requests received	% personal (P) vs other (O) ¹¹	Granted in full ¹²	Granted in part ¹³	Refused ¹⁴	% processed within statutory timeframe	IC reviews received*
2018-2019	36	0% (P) (0) 100% (O) (36)	0% (0)	3% (2)	97% (61)	19.1% (12)	4
2019-2020	101	0% (P) (0) 100% (O) (101)	1.5% (1)	1.5% (1)	97% (65)	7.5% (5)	22
2020-2021	61	3% (P) (2) 97% (O) (59)	6% (2)	8% (3)	86% (31)	38.9% (14)	12
2021-2022 (to 31.12.21)	42	0% (P) (0) 100% (O) (42)	5.9% (1)	11.8% (2)	82.5% (14)	29.4% (5)	4

*According to Austlii, there were **no IC review decisions** with the Prime Minister as respondent in 2018-19, 2019-20, 2020-21.

EXTENSION OF TIME**PMO 2018-19**

EOT Type	Number received	% Granted (#)	% Declined (#)	% Varied grant (#)	Withdrawn (#)
15AB	0	-	-	-	-
15AC	0	-	-	-	-
15AA	0	-	-	-	-

PMO 2019-20

EOT Type	Number received	% Granted (#)	% Declined (#)	% Varied grant (#)	Withdrawn (#)
15AB	2	-	-	-	100% (2)
15AC	0	-	-	-	-
15AA	2	-	-	-	-

¹¹ Requests received.

¹² Expressed as a percentage of all FOI requests decided during the year.

¹³ Expressed as a percentage of all FOI requests decided during the year.

¹⁴ Expressed as a percentage of all FOI requests decided during the year.

PMO 2020-21

EOT Type	Number received	% Granted (#)	% Declined (#)	% Varied grant (#)	% Withdrawn (#)	% Invalid (#)
15AB	1	100% (1)	-	-	-	-
15AC	6	83% (5)	17% (1)	-	-	-
15AA	0	-	-	-	-	-

PMO 2021-22 (to 31 December 2021)

EOT Type	Number received	% Granted (#)	% Declined (#)	% Varied grant (#)	% Withdrawn (#)	% Invalid (#)
15AB	0	-	-	-	-	-
15AC	2	100% (2)	-	-	-	-
15AA	0	-	-	-	-	-

Attachment H.1: Department of Prime Minister and Cabinet (PMC)

Period	# requests received	% personal (P) vs other (O) ¹⁵	Granted in full ¹⁶	Granted in part ¹⁷	Refused ¹⁸	% processed within statutory timeframe	IC reviews received*
2018-2019	170	1% (P) (1) 99% (O) (169)	19% (22)	33% (38)	49% (57)	73% (85)	15
2019-2020	339	2% (P) (8) 98% (O) (331)	14% (32)	23% (52)	64% (146)	94% (216)	21
2020-2021	181	4% (P) (8) 96% (O) (173)	11% (16)	37% (56)	52% (79)	97% (146)	28
2021-22 (to 31.12.21)	164	5% (P) (8) 95% (O) (156)	8% (7)	30% (25)	62% (52)	82% (69)	16

EXTENSION OF TIME**PMC 2018-19**

EOT Type	Number received	Granted	Declined	Varied grant	Withdrawn	Invalid
15AB	42	88% (37)	5% (2)	2% (1)	5% (2)	-
15AC	3	67% (2)	33% (1)	-	-	-
54D	1	100% (1)	-	-	-	-
15AA	25	-	-	-	-	-

PMC 2019-20

EOT Type	Number received	Granted	Declined	Varied grant	Withdrawn	Invalid
15AB	7	57% (4)	43% (3)	-	-	-
15AC	4	50% (2)	25% (1)	25% (1)	-	-
15AA	22	-	-	-	-	-

¹⁵ Requests received.¹⁶ Expressed as a percentage of all FOI requests decided during the year.¹⁷ Expressed as a percentage of all FOI requests decided during the year.¹⁸ Expressed as a percentage of all FOI requests decided during the year.

PMC 2020-21

EOT Type	Number received	Granted	Declined	Varied grant	Withdrawn	Invalid
15AB	15	80% (12)	7% (1)	-	13% (2)	
15AC	8	75% (6)	12.5% (1)	-	-	12.5% (1)
54D	1	100% (1)	-	-	-	-
15AA	38	-	-	-	-	-

PMC 2021-22 (to 31 December 2021)

EOT Type	Number received	Granted	Declined	Varied grant	Withdrawn	Invalid
15AB	30	47% (14)	17% (5)	30% (9)	6% (2)	0
15AC	15	73% (11)	6% (1)	0	13% (2)	6% (1)
54D	4	100% (4)	-	-	-	-
15AA	58	-	-	-	-	-

FOI COMPLAINTS - PMC

	Number of complaints received	Number declined	Withdrawn/conciliated	Number investigated	Number ongoing	Not in jurisdiction
2018-19	-	-	-	-	-	-
2019-20	3	-	1	1	-	1
2020-21	2	1	-	1 (ongoing)	-	-
2021-22 (to 31.12.21)	4	0	1		3	

Attachment I: Administrative Appeals Tribunal

Period	# requests received	% personal (P) vs other (O)	Granted in full	Granted in part	Refused	% processed within statutory timeframe	IC reviews received*
2018-19	1,529	99% (P) (1,519) 1% (O) (10)	75% (778)	22% (228)	3% (30)	98% (1,014)	1
2019-20	1,564	99% (P) (1,550) 1% (O) (14)	67% (774)	30% (347)	3% (32)	96% (1,111)	1
2020-21	1,600	98% (P) (1,568) 2%(O) (32)	57% (714)	40% (498)	3% (32)	98% (1,221)	9
2021-22 (to 31.12.21)	782	92% (P) (720) 8% (O) (62)	61% (360)	36% (213)	3% (18)	99% (588)	9

*According to Austlii, there were **no IC review decisions** with the AAT as respondent in 2018-19, 2019-20, 2020-21.

AAT 2018-19

EOT Type	Number received	Granted	Declined	Varied grant
15AB	-	-	-	-
15AC	4	4	-	-
15AA	7	-	-	-

AAT 2019-20

EOT Type	Number received	Granted	Declined	Varied grant
15AB	6	3	-	3
15AC	6	6	-	-
15AA	8	-	-	-

AAT 2020-21

EOT Type	Number received	Granted	Declined	Varied grant
15AB	5	2	-	3
54D	1	-	-	1
15AA	11	-	-	-

AAT 2021-22 (to 31 December 2021)

EOT Type	Number received	Granted	Declined	Varied grant
15AB	1	100% (1)	-	-
15AA	11	-	-	-

FOI COMPLAINTS - AAT

	Number of complaints received	Number declined	Number investigated	Number ongoing
2018-19	-	-	-	-
2019-20	-	-	-	-
2020-21	-	-	-	-
2021-22 (to 31.12.21)	2			2

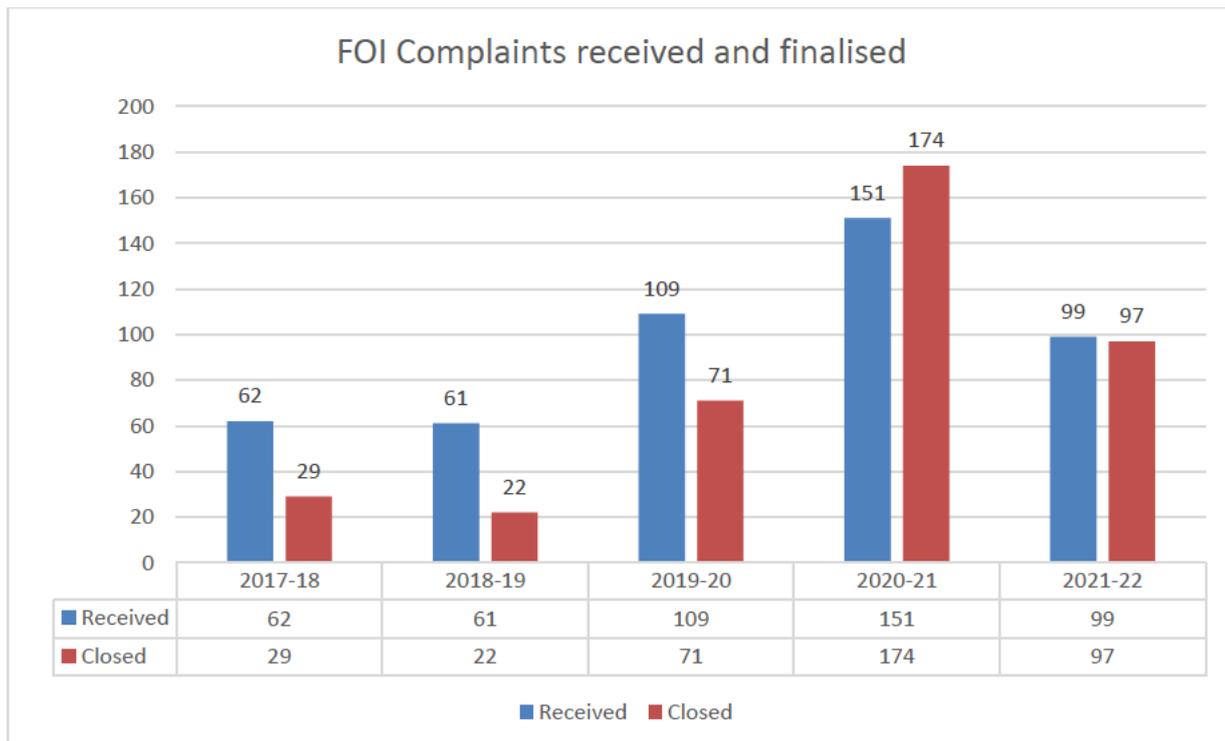
Commissioner brief: FOI Complaint issues

Key messages

- Key activities:
 - Finalisation of a cohort of 17 complaints about the Department of Home Affairs' compliance with statutory processing periods (December 2021).
 - The OAIC is now monitoring agencies implementation of recommendations made under s 88 of the FOI Act (29 recommendation cases), including recommendations to:
 - issue statements – by the CEO or Secretary – to all staff highlighting the agency's obligations under the FOI Act
 - conduct audits on its processes
 - update its policies and procedures in relation to FOI processing consistent with the findings of specific investigations
 - take remedial action including contacting FOI applicants where I found that review rights had not been included in the response to FOI requests pursuant to s 26 of the FOI Act to advise them of their review rights
 - implement training processes for staff including the use of online training
 - improvements in processes to ensure compliance with Information Publication Scheme obligations
 - appoint an Information Champion to provide leadership, oversight and accountability necessary to promote and operationalise compliance by the agency
 - As at 8 February 2022, the OAIC website has been updated to include investigation outcomes conducted between 1 July 2019 and 22 December 2021.
- Complaint issues:
 - The most complained about issue is delay by agencies processing FOI requests.
 - Other complaints relate to (in order of most complained about):
 - failure to provide assistance during the practical refusal consultation process
 - the imposition of charges
 - failure to acknowledge FOI request
 - searches
 - extension of processing time to consult with third party but no consultation required
 - poor administration/customer service

- poor communication/failure to update
 - failure of decision maker to provide name
 - poor record keeping (leading to an inability to find requested documents)
 - the Information Publication Scheme
 - deletion of public servants' personal information from documents before release.
- Making a complaint is not usually an appropriate mechanism where IC review is available, unless there is a special reason.
 - A summary of the de-identified outcomes of finalised FOI investigations is on the OAIC website.
 - As at 31 December 2021 the OAIC had 110 complaints on hand:
 - 15 in relation to Department of Home Affairs
 - 9 in relation to Services Australia
 - 4 in relation to Australian Federal Police

Statistics



Period	Number received	Number finalised	Finalisation timeframe	S 86 notices – with and without recommendations
1 July 2021 – 31 December 2022	99 (tracking 36% increase on the previous year)	97 (tracking 17% increase on previous year)	40% > 12 months 60% < 12 months	33 issued: <ul style="list-style-type: none"> • 29 with recommendations • 4 without recommendations
1 July 2020 – 30 June 2021	151 (increase of 39% on the previous year)	174 (an increase of 145% on previous year)	18% > 12 months 82% < 12 months	3 issued: <ul style="list-style-type: none"> • 2 with recommendations • 1 with suggestions¹
2019-20	109 (increase of 79% on previous year)	71 (increase 223% on previous year)	48% > 12 months 52% < 12 months	46 issued: <ul style="list-style-type: none"> • 27 with recommendations • 19 without recommendations
2018-19	61 (decrease of 2% on previous year)	22 (decrease of 24% on previous year)	18% > 12 months 82% < 12 months	Nil
2017-18	62 (72% increase on previous year)	29 (61% increase on previous year)	17% > 12 months 83% < 12 months	5 issued: <ul style="list-style-type: none"> • 4 with recommendations • 1 without recommendation

- Number of complaints on hand at 31 December 2022: 110
- Percentage of complaints on hand are more than 12 months old: 35%
- In 2020-21 we received 151 FOI complaints (39% increase on the number received in 2019-20).

¹ Subsection 87(d) provides for the Commissioner to make suggestions as part of the investigation results, to the respondent agency which she believes might improve the processes of the agency.

- In Q1 and Q2 2021-22 we received 99 (which is an increase of 36% for the same period last year).
- In 2020-21 we finalised 174 FOI complaints (145% increase on the number closed in 2019-20).
 - In Q1 and Q2 2021-22 we closed 97 FOI complaints (which is a 17% increase on the same period the previous year). Tracking to 194 in 2021-22 – an increase of 11.5% on 2020-21.
- In 2020-21 we finalised 82% (142) of FOI complaints within 12 months.
 - In Q1 and Q2 2021-22 we finalised 60% (58) of FOI complaints within 12 months.
- Early resolution of incoming matters has resulted in 45% (44) of FOI complaints finalised in Q1 and Q2 of 2021-22 being finalised within 120 days.
- For an overview of the status of finalised FOI complaint investigations please see **Attachment A** to this brief.

October 2021 Questions on Notice

- Please see **Attachment B** outlining the following responses to October 2021 Senate Estimate hearings Questions on Notice:
 - LCC-SBE21-023 - Correspondence to departments and agencies regarding improving compliance ([D2021/019080](#))
 - LCC-BE21-106 - Complaints upheld in 2020-21 ([D2021/009237](#))
 - LCC-BE21-105 - Complaints in relation to AGD in 2019-20 ([D2021/009236](#))

Possible questions

Your evidence is that delay is the most complained about issue. What action is the OAIC taking to address this? Work undertaken by my office in promoting compliance with statutory timeframes includes:

- conducting FOI complaint investigations with a focus on making recommendations that assist agencies to comply with statutory timeframes and highlights FOI as a whole-of-agency responsibility
- publication of the outcomes and recommendations of FOI complaint and the CII investigation on the OAIC website for the benefit of agencies and the public
- making decisions on extension of time applications
- using our formal powers to require provision of a statement of reasons when a person seeks review of a deemed refusal
- providing assistance through our enquiries phone line
- publishing regular e-newsletters for FOI practitioners and

- publishing resources on our website, including checklists to streamline the FOI request process.

The OAIC oversees the extension of time provisions in the FOI Act which provides valuable insight into the issues that affect agencies' ability to comply with decision making timeframes. The OAIC is currently reviewing its guidance material to focus on the need for agencies to take action early in the processing cycle and to routinely engage with applicants when processing FOI requests. The OAIC is currently monitoring agencies' compliance with statutory decision making timeframes and we have recently written to agencies which are consistently not complying with statutory timeframes.²

- ***What department or agency is the most complained about and what kinds of complaints are people making?***

Of the **110 complaints open at 31 December 2021**, 9 are about Services Australia and 15 about the Department of Home Affairs. These 2 agencies received the largest number of FOI requests in 2018-19, 2019-20 and 2020-21.

The Department of Home Affairs complaints are almost exclusively about delay. Given the outcome of the recent CII – and the Department's advice that it has accepted all recommendations and has undertaken to implement them in full, I will continue to monitor the Department's timeliness. On 25 November 2021, I finalised 17 complaint investigations regarding the Department's processing of FOI requests for personal information. In those investigations I made recommendations in line with those made in the CII, which the Department has noted. The Department's comments received in response to the Notice on completion is at **Attachment C**. I await the Department's formal advice on the implementation of each recommendation which are due on:

- 28 February 2022 (recommendation 1 and 2)
- 28 March 2022 (recommendation 3)
- 30 May 2022 (recommendation 4).

The complaints about Services Australia are more varied – staff names not appearing in decision letters, failure to acknowledge FOI requests, failure to assist with making an FOI request, searches, delay, charges and poor customer service. Recent investigations regarding these issues have been published on the OAIC website including recommendations that the Acting Freedom of Information Commissioner has made.

- ***What recommendations have you made to improve FOI processing within agencies?***

We consider it appropriate where necessary to not only include recommendations in relation to how the FOI team processes FOI requests but also other areas of an agency that are involved in processing, for instance search and retrieval of documents by the line areas. This approach is consistent with my view that FOI is a whole of agency responsibility.

² See Attachment B to October 2021 QONs

The Acting Freedom of Information Commissioner and I have made a number of recommendations for agencies to:

- issue statements – by the CEO or Secretary – to all staff highlighting the agency’s obligations under the FOI Act
- conduct audits on its processes
- update its policies and procedures in relation to FOI processing consistent with the findings of specific investigations
- take remedial action including contacting FOI applicants where I found that review rights had not been included in the response to FOI requests pursuant to s 26 of the FOI Act to advise them of their review rights
- implement training processes for staff including the use of online training
- improvements in processes to ensure compliance with Information Publication Scheme obligations
- appoint an Information Champion to provide leadership, oversight and accountability necessary to promote and operationalise compliance by the agency.

• ***Are agencies implementing your recommendations?***

Agencies have generally taken steps to implement my recommendations.

• ***What happens if agencies do not implement your recommendations?***

Under s 89 of the FOI Act, the Acting Freedom of Information Commissioner and I have the discretion to issue a notice of implementation requiring an agency to provide particulars of steps the agency has taken to implement a recommendation. Where an agency does not comply with the implementation notice we can then provide a report to the responsible minister.

Document history			
Updated by	Reason	Approved by	Date
Irene Nicolaou	Estimates February 2022		

Attachment A – Summary of outcomes of FOI investigations

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
Department of the Prime Minister and Cabinet	Compliance with statutory processing timeframes.	Non-personal information.	22 November 2019	The Department did not comply with the statutory processing periods in processing 35.56% of FOI requests in the 2017-18 financial year and 72.65% in the 2018-19 financial year.	Four recommendations were made: <ul style="list-style-type: none"> a statement to be issued to all staff highlighting the Department's obligations under the FOI Act. FOI requests are processed in accordance with the objects of the FOI Act the development of policies and procedures in relation to administrative access conduct a review and audit of the Department's FOI processing guidance material and its compliance with statutory timeframes. 	Accepted and implemented.	No further action to be taken.
Australian Federal Police	Compliance with statutory processing timeframes.	Non-personal information.	22 November 2019	The AFP did not comply with the statutory processing periods in processing 34.44% of FOI requests in the 2017-18 financial year and 53.08% in the 2018-19 financial year.	Four recommendations were made: <ul style="list-style-type: none"> a statement to be issued to all staff highlighting the AFP's obligations under the FOI Act. a review of its guidance relating to early assessment of whether an extension 	Accepted and implemented.	No further action to be taken.

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
					<p>of time or consultation may be required</p> <ul style="list-style-type: none"> a review and update its guidance material in line with the findings of the investigation. 		
Services Australia ³	Acknowledgment of FOI requests in accordance with statutory timeframes.	Personal and non-personal information made by post.	22 November 2019	Delay in acknowledging the FOI requests was due to the complainant sending the FOI request as part of 'shared' correspondence addressed to the aged care pension claims nominated PO Box rather than addressed to the FOI or central PO Box, and human error in categorising the documents as FOI requests at the mail sorting stage.	<p>Two recommendations were made:</p> <ol style="list-style-type: none"> to provide general FOI training to the external providers tasked with opening and categorising correspondence to assist in the identification of FOI requests sent to general Departmental post boxes. to review and update its guidance material in line with the findings of the investigation. 	Accepted and implemented.	No further action to be taken
Services Australia ⁴⁵	Approach to the interpretation of the scope of FOI requests	Non-personal and personal	5 December 2020	Services Australia took a narrow approach to requests for information and did not attribute the plain English	<p>Seven recommendations were made.</p> <ol style="list-style-type: none"> A statement is provided to staff highlighting Services 	Accepted and implemented.	No further action to be taken.

³ At the time this investigation commenced the responsible department was the Department of Human Services. On 29 May 2019, the Administrative Arrangements Order established Services Australia.

⁴ At the time this investigation commenced the responsible department was the Department of Human Services. On 29 May 2019, the Administrative Arrangements Order established Services Australia.

⁵ This investigation combined three FOI complaints made under s 70 of the FOI Act. Due to the overlapping issues raised in each FOI complaint the Information Commissioner progressed all three complaints under one investigation.

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
	<p>Approach to processing FOI requests relating to the OCI System</p> <p>Compliance with s 24AB of the FOI Act</p> <p>Combining FOI requests under s 24(2) of the FOI Act</p> <p>Imposition of a charge</p> <p>Payment of charges</p> <p>Disclosure Log content</p> <p>Delays in the provision of documents</p>			<p>meanings to the terms used by applicants when that meaning was ascertainable in satisfaction of paragraph 15(2)(b) of the Act.</p> <p>Services Australia did not comply with the request consultation process under s 24AB. Services Australia did not take into consideration relevant public interest factors when deciding if applying charges is appropriate</p> <p>At the time the decisions were made in the relevant FOI requests, Services Australia's processes for collecting charges imposed under the FOI Act were inconsistent with the objects of the Act</p> <p>Services Australia did not comply with its obligations under s 11C(6) of the FOI Act in relation to the maintenance of its disclosure log.</p>	<p>Australia's obligations under the FOI Act and the pro disclosure emphasis in the Act. This statement should encourage and support staff in meeting their obligations under the FOI Act, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.</p> <ol style="list-style-type: none"> <li data-bbox="1310 758 1668 1189">2. Services Australia take an approach to interpreting the scope of FOI requests in accordance with its obligations under s 15(3) of the FOI Act in a manner that as far as possible, seeks to facilitate and promote public access to information. <li data-bbox="1310 1189 1668 1439">3. Services Australia develop a policy that provides that where information that is subject to multiple FOI requests, it is uploaded onto the 		

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
				<p>Services Australia did not have clear guidance for its FOI officers on:</p> <ul style="list-style-type: none"> a) timeliness to respond to request for assistance during consultation process b) consideration of whether it is appropriate to transfer requests under s 16 once a scope has been revised c) appropriate response times for the provision of documents on the disclosure log d) combining of requests under s 24(2) of the FOI Act, and e) making a decision to impose a charge. 	<p>disclosure log as soon as practicable</p> <ul style="list-style-type: none"> 4. Services Australia update its FOI manual to include references to recent Information Commissioner decisions and FOI Guidelines on: <ul style="list-style-type: none"> a. the imposition of charges b. the interpretation of scope and s 24AB process. 5. Services Australia update its FOI manual to include guidance about: <ul style="list-style-type: none"> a. consideration of s 16 transfers once the scope has been revised b. the provision of documents as soon as practicable under s 11A c. responding to requests for documents held on the disclosure log which are otherwise not readily available, 		

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
					<p>within five working days.</p> <p>d. where there are multiple requests for the same subject matter, implement a process through which they can identify and utilise work previously undertaken.</p> <p>e. when it is appropriate to combine requests under s 24(2).</p> <p>f. factors to consider whether to impose a charge, including factors set out in the Guidelines issued under s 93A of the Act.</p> <p>6. Services Australia within six months⁶ of these conclusions conduct audits on the</p>		

⁶ On 8 July 2020, the Information Commissioner granted an extension of time to respond to recommendation six until 30 October 2020.

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
					<p>following and report back to the OAIC:</p> <p>a. The adherence to the FOI processing manual by FOI officers in relation to matters the subject of recommendation s four and five above.</p> <p>7. Services Australia ensure processes are in place to assist applicants through the s 24AB consultation process.</p>		
Department of Home Affairs	Compliance with statutory processing periods. ⁷	Non-personal information	19 December 2019	The Department did not comply with s 15(5)(b) of the FOI Act.	The Information Commissioner deferred making any recommendations until the outcome of the Commissioner Initiated Investigation into the Department of Home Affairs' compliance with statutory processing periods for non-personal FOI requests. ⁸	No recommendations made.	No further action to be taken pending the outcome of the CII.

⁷ This investigation combined 11 FOI complaints made under s 70 of the FOI Act. Due to the overlapping issue raised in each FOI complaint the Information Commissioner progressed all 11 complaints together.

⁸ Each FOI request forms a case study in the Commissioner Initiated Investigation into the Department of Home Affairs compliance with statutory processing periods for non-personal requests for information.

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
Services Australia ⁹	Consultation process under s 24AB of the FOI Act and internal review process	Personal information	18 February 2020	Consultation process was more appropriately considered in the related IC review process and subsequent decision by the Information Commissioner under s 55K of the FOI Act. Services Australia's internal review process complied with s 54C of the FOI Act.	No recommendations were made.	No recommendations made.	Not applicable.
Airservices Australia	Acknowledgment of FOI requests in accordance with statutory timeframes. Taking reasonable steps to conduct searches for documents within scope of the FOI request. Withholding documents which fell within the scope of the FOI request. Compliance with s 26 of the FOI Act.	Personal information	23 April 2020	At the time of the request, Airservices did not have a formalised process by which employees could access their personnel records. Airservices did not comply with ss 15(5)(a) and 26 of the FOI Act. During the processing of the request Airservices did not take reasonable steps to identify documents within the scope of the request. Airservices reduced the scope of the FOI request without agreement from the applicant.	Four recommendations were made. <ol style="list-style-type: none"> 1. Airservices to issue a statement to all staff reminding them of their obligations under the FOI Act 2. Airservices to establish a general FOI training program for inclusion in its induction process and finalise policies which outline the procedures to follow when processing an FOI request. 3. Airservices to write to each FOI applicant within the past 12 months of which the FOI complaint was made and advise 	Accepted and implemented.	No further action to be taken

⁹ At the time this investigation commenced the responsible department was the Department of Human Services. On 29 May 2019, the Administrative Arrangements Order established Services Australia.

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
					<p>them of their review rights.</p> <p>4. Airservices to conduct an audit within 6 months to track compliance of:</p> <p>a) Policies and procedures and</p> <p>b) Section 26 Notices</p>		
The Australian National University (the ANU)	Compliance with statutory timeframes. Communication regarding the processing delays	Personal information	14 September 2020	<p>The statutory timeframe was not extended by agreement under s 15AA, or as a result of consultation (ss 15(6), 15(8), 26A, 27, 27A), or under ss 15AB or 15AC. The ANU exceeded the statutory processing period by 26 days without authority.</p> <p>The ANU updated the complainant about the processing of the request and provided reasons for the delay.</p>	<p>The ANU should update its 'Guideline 1.15: Freedom of Information processing checklist' and 'Guideline 1.18: Freedom of Information request processing timeframes' to require staff to conduct an early assessment of whether an extension of time may be required and if so, to seek agreement from the FOI applicant to extend the processing period under s 15AA.</p> <p>2. The ANU should update its 'Guideline 1.15: Freedom of Information request processing checklist' and 'Guideline 1.18: Freedom of Information request processing timeframes', to require staff to consider whether it is appropriate to seek an extension of time pursuant to s 15AB where an applicant has not agreed to extend the statutory</p>	Accepted and implemented.	No further action to be taken

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
					processing period under s 15AA, or to seek an extension of time from the Information Commissioner under s 15AC where a decision about an FOI request has not been provided to the applicant within the statutory processing period.		
Department of Home Affairs This investigation was an Commissioner Initiated Investigation under s 69(2) of the FOI Act. A copy of the Report is available here .	Compliance with statutory timeframes for processing FOI request for non-personal information	Non-personal	11 December 2020	The information considered in this investigation indicates that the Department does not have adequate governance and systems of accountability in place to ensure compliance with statutory time frames for processing FOI requests for non-personal information. The other key findings from my investigation may be summarised as follows: a. In a general sense, a greater degree of senior level support and leadership for embedding policies, procedures and systems of accountability for compliance with the statutory processing periods in the FOI Act,	<p>1. Appoint an Information Champion</p> <p>The Information Champion may be supported by an information governance board to provide leadership, oversight and accountability necessary to promote and operationalise compliance by the Department.</p> <p>2. Operational Processes and Procedures</p> <p>The Department prepare and implement an operational manual for processing FOI requests for non-personal information to be approved by the Information Champion referred to in Recommendation 1 and at a minimum:</p> <p>(a) specify the steps that will be taken to ensure compliance with statutory processing</p>	Accepted; to implement.	

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
				<p>would assist the Department in meeting the statutory processing period requirements of the FOI Act.</p> <p>b. With regard to the Department's FOI Section:</p> <p>I. There is evidence that not all of the staff within the FOI Section are available to assist in the processing of FOI requests for non-personal information which has contributed to delays in processing these FOI requests.</p> <p>II. The policies and processes that the Department has in place for the FOI Section do not address the steps required, both in relation to escalation and finalisation of decisions, where</p>	<p>requirements (as set out in more detail in Part 5),</p> <p>(b) specify the steps that will be taken to ensure compliance with section 6C of the FOI Act and the processes to be adopted to request documents from contracted service providers, and</p> <p>(c) include a short form guidance note to assist business areas in processing FOI requests for non-personal information.</p> <p>Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.</p> <p>The steps that will be taken to ensure compliance with section 6C of the FOI Act, as referred to in subparagraph (c), should be replicated in all other policies of the Department which relate to contractual requirements for procurement by the Department.</p>		

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
				<p>delays are contributed to by business areas of the Department or third parties.</p> <p>III. The policies and processes that the Department has in place for FOI requests for non-personal information do not adequately address use of the provisions of the FOI Act which enable an agency to seek an extension of time in processing FOI requests.</p> <p>c. With regard to the business areas of the Department:</p> <p>I. The Department has implemented an approach for processing FOI requests for non-personal information that requires significant</p>	<p>3. Training</p> <p>The Department:</p> <p>(a) undertake and complete training for FOI Section staff and other staff (both decision makers and other staff who assist decision makers), and</p> <p>(b) ensure that online training in processing FOI requests for non-personal information is available to all staff of the Department.</p> <p>New staff joining the FOI Section should be trained within 2 weeks of commencing in the FOI Section.</p> <p>4. Audit of Compliance</p> <p>The Department undertakes an audit of the processing of FOI requests for non-personal information to assess whether Recommendations 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in this CII. The audit should be undertaken either by the Department's internal audit committee or by an external auditor, as</p>		

Respondent agency	Issue(s)	Type of FOI request	Date of Notice on completion	Outcome	Recommendations	Respondent's response to recommendations	Further action to be taken
				<p>engagement by the staff in the business areas to which a relevant FOI request relates. The training and resources made available to those staff does not facilitate processing FOI requests within the FOI Act statutory processing periods.</p> <p>II. The Department's processes for consulting with senior staff, the Department's Media Operations and Minister's Office in relation to FOI requests limits the ability of the Department to meet FOI Act statutory processing periods.</p>	<p>determined by the Department. A copy of the audit report is to be provided to the OAIC.</p>		