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International Access to Information Day ICON session: September 2022

# International Access to Information Day ICON session: September 2022

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28 September 2022

## Introduction

To mark International Access to Information Day (IAID) 2022, we hosted a livestreamed event for ICON members featuring Attorney-General and Cabinet Secretary, the Honourable Mark Dreyfus KC MP, Australian Information Commissioner and Privacy Commissioner Anjele Falk, Freedom of Information Commissioner Leo Hardiman PSM KC, and Director-General, National Archives of Australia, Simon Froude.

The Attorney-General's speech is provided below.

## Media

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## Speaking notes

### **Australian Information Commissioner and Privacy Commissioner Angelene Falk**

Good morning, I am Angelene Falk, the Australian Information Commissioner and Privacy Commissioner.

Welcome to this special [ICON](#) session for International Access to information Day 2022.

I would like to acknowledge the traditional custodians of the lands on which we meet virtually today throughout the country. I also pay my respects to Elders past, present and emerging and I extend that respect to First Nation's people here today.

International Access to Information Day is a day in which we express our commitment to promote and uphold the fundamental right of the community to access government information.

This morning we are very fortunate to present, a pre-recorded address due to Parliament sitting, from Attorney-General and Cabinet Secretary the honourable Mark Dreyfus, KC MP, and we will be joined by Freedom of Information Commissioner Leo Hardiman PSM KC and Director-General of National Archives of Australia Simon Froude.

This year's international theme chosen by UNESCO is 'artificial intelligence, e-governance and access to information', which encourages us to explore how our digital world can improve access to information.

In exploring the theme of openness through e-governance, we recognise that how government agencies build e-governance systems and digital platforms has a direct impact on information access for all members of the Australian community.

As data custodians of the Commonwealth, we all have a responsibility to manage the information of government as a national resource, for public benefit. To realise the value of government held information and achieve the objectives of agencies, access by design must be built into information management by default.

This requires internal and external facing information systems to build in access to information as a key design feature, enabling proactive disclosure, administrative access or to enable an efficient response to an FOI request.

To begin our discussion of these themes, I have great pleasure in introducing the honourable Attorney-General, Mark Dreyfus, KC MP to mark this day.

## **Attorney-General and Cabinet Secretary the honourable Mark Dreyfus, KC MP**

I acknowledge the Traditional Custodians of the lands on which we meet, and pay respect to their Elders past and present.

I extend my respect to all Aboriginal and Torres Strait Islander peoples present today.

Thank you for the invitation to speak today as we mark International Universal Access to Information Day – also known as Right to Know Day.

I am honoured to be recognising this important day as Australia's Attorney-General.

I would like to acknowledge the Australian Information Commissioner and Privacy Commissioner, Ms Angelene Falk, and Freedom of Information Commissioner, Mr Leo Hardiman PSM KC.

This global event recognises the importance of the community's right to know and to access to government-held information.

It also reinforces the role of government in promoting transparency and accountability.

Regrettably, the previous government did not believe that Australians have a right to know.

In contrast, the Albanese Government is committed to restoring public trust and strengthening standards of integrity in our federal government.

Open access to information is essential for good decision-making, genuine engagement in democratic government, and combatting corruption.

Citizens need this access to know how they are being governed.

The Information Commissioner's theme for this year's International Universal Access to Information Day is 'openness through e-governance'.

Our lives are increasingly conducted online.

The shift to a digital economy and online service delivery elevates the importance of correctly designing access to information systems and processes that are fit for the digital age.

All government agencies need to ensure that digital access systems are user-friendly and people-centred, and which build community trust by reinforcing more effective and efficient access to information.

Government has the opportunity to make better decisions and deliver services more seamlessly to Australians by making better use of data.

Taking advantage of this opportunity means we need to focus on some specific things.

The Australian Government generates a lot of data as a result of our activities, and we need to manage it well.

We anticipate the use of data by Government and in the broader economy will continue to grow exponentially.

In many cases, the value of data increases significantly when it is linked – whether with other data we hold, or data held by others.

We need to treat people's data with respect, through consideration of ethical and appropriate use of data, keeping it secure, and meeting strong privacy standards.

The Albanese Government is committed to my department completing the Privacy Act Review to ensure that individuals' privacy is protected and that consumers are empowered while at the same time, acknowledging the importance of commercial interests and ensuring that our digital economy can prosper.

Today, we also acknowledge the importance of the *Freedom of Information Act 1982* (FOI Act).

This Act, now in operation for almost 40 years, provides everyone with a legally enforceable right to obtain information from a government agency or minister, whether it is information about themselves or information about government policy.

The Government strongly supports the effective operation of the FOI Act to ensure that it continues to meet the objectives of:

- increasing scrutiny of the government's activities
- developing further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process
- improving the quality of decision making by government
- enabling individuals to have access to information about them that is held on government files.

The proactive disclosure of government-held information promotes open government and advances our system of representative democracy.

I acknowledge the great work done by the Australian information access commissioners and ombudsmen to develop the Open by Design Principles. The principles recognise that:

- information held by government and public institutions is a public resource
- a culture of transparency within government is everyone's responsibility
- appropriate, prompt and proactive disclosure of government-held information informs community, increases participation and enhances decision-making, builds trust and confidence, is required and permitted by law and improves efficiency.

Notably, the Office of the National Data Commissioner is responsible for implementing the Data Availability and Transparency Act (DATA) scheme, which is a new way for sharing government data.

The scheme will enable Australian Government agencies to safely, accountably and transparently share public sector data, where appropriate, with accredited users, and contains strong safeguards to manage the risks of increased public sector data sharing.

I strongly encourage all Australian governments and public institutions to commit to being Open by Design, by building a culture of transparency and by prioritising, promoting and resourcing proactive disclosure.

Today, I also re-pledge Australia to the Open Government Partnership.

This partnership, totalling 77 countries and 106 local governments and representing over two billion people, is based on the idea that an open government is more accessible, more responsive, and more accountable to citizens.

I intend to restore the forum that will co-develop Australia's Open Government National Action Plan.

I thank the Information Commissioner for inviting me to speak today.

There is further work to be done by government and civil society to ensure open access to information.

I trust that you will be inspired by the panel discussion that follows and the events being organised by the Information Commissioner this week.

I want to conclude by assuring you all that the Albanese Government is firmly committed to transparency and accountability, to ensure we have better government for all Australians.

## **Australian Information Commissioner and Privacy Commissioner Angelene Falk**

I express my thanks to the Attorney-General for those important remarks emphasising the critical role access to information plays in the economy, in supporting open government and advancing our system of representative democracy.

I also appreciate the Attorney-General highlighting the [Open by Design principles](#), which Australia's information commissioners and ombudsmen developed and released last year.

They provide a blueprint to government agencies on how to build a culture of transparency, and to encourage and authorise the proactive release of information and promote openness by design and default.

Before we hear from our FOI Commissioner Leo Hardiman and the Director-General of National Achieves Simon Froude, I will make a few remarks about the fundamental principles that underpin International Access to Information Day.

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Corruption.

Article 19 of the ICCPR states that:

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [his] choice.*

These commitments are also reflected in the United Nations' Sustainable Development Goal 16 to which Australia is a signatory. This recognizes that open government policies that concentrate on citizen engagement and access to information can increase public trust.

A target of goal 16 is to

Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.

So, access to information is a fundamental principle, a foundation of our democratic way of life, and necessary for the exercise of other rights and freedoms.

The OAIC, which regulates both freedom of information and privacy laws, sits at the intersection of these rights.

We bring together access to information and the importance of protecting and respecting personal information.

As I have said before, I do not think there is an inherent tension between these two roles – between ensuring that personal information handling is transparent and personal information is protected, and the other is about making information widely available.

Australia's privacy and freedom of information laws are strongly complementary – so much so that I think that the administration of each would be weaker in the absence of the other.

Getting our privacy settings right is critical to realising the FOI Act objects of:

- providing access to information in effective and efficient ways
- to ensuring that government held information is managed as a national resource
- to ensure government held information is used for the public's benefit to inform evidence-based policy making and to support innovation.

This commonality of interests is instructive in how it supports access to information, and I believe, makes it easier for your agencies, and you as FOI practitioners, to comply with the FOI Act.

Because building in both [Open by Design](#) and [Privacy by Design](#) enables access to information in the most efficient and effective manner to support economic and democratic wellbeing, based on a strong foundation in privacy and data protection.

This year's theme — artificial Intelligence, e-governance and access to information — encourages us to consider how we enhance openness through e-governance.

It recognises the importance of building robust e-governance systems and platforms that enable access to information to all members of the Australian community.

This year we are urging agencies to tailor your digital strategy to implement a best practice approach to achieving that goal.

The digital environment offers many opportunities in this regard.

It requires taking a life cycle approach to information management that builds access to information into the design of systems and processes.

As a result, information is assessed for publication at the outset and managed accordingly. Any limitations on publication are recorded, making subsequent requests more seamless to process. And digital information is stored so it may be readily searched and retrieved.

For publicly facing systems, proactive publication through websites and access through self-serve models can provide access to government held information at scale.

The result is a more efficient and effective FOI system where information is made available promptly and at the lowest reasonable cost, a key objective of the FOI Act.

A number of agencies have made great progress in this regard, with entities like the ATO and Services Australia providing access to personal information for millions of Australians.

But more needs to be done. There are concerning delays in processing by some agencies. This IAID, we encourage you to make a commitment to review your electronic information holdings and ensure you have the right e-governance to facilitate prompt access to information.

To discuss the themes of International Access to Information Day further we will now hear from the FOI Commissioner Leo Hardiman followed by the Director General of the National Archives of Australia, Simon Froude.

## **Freedom of Information Commissioner, Mr Leo Hardiman PSM KC**

Stated succinctly, my key focus is on ensuring that the OAIC and agencies work together to make the Commonwealth FOI system function as effectively as possible for the benefit of the Australian public.

It has been clear to me in this initial period of my appointment as FOI Commissioner that, together, we can do more to improve the system's effectiveness, including, as we are discussing today, by governing our e-resources in ways which increase openness and improve access to government-held information.

A good picture of the current performance of the FOI system can be seen from statistics for the 2021–22 year which the OAIC, with input from agencies and ministers' offices, has



recently compiled for annual reporting purposes.

These statistics tell us the following:

The number of FOI requests made to Australian Government agencies decreased by 2% (to 34,236 in total).

That decrease mainly reflects decreases in requests made to the agencies that receive the highest number of FOI requests for personal information.

Requests for personal information were 6% lower than the previous year, while requests for other (non-personal) information were 12% higher.

The reason for this decrease is not entirely clear but appears likely to have been assisted, to some extent at least, by an increased agency focus on proactively providing individuals with online access to their own personal information.

Significantly, the statistics show that overall timeliness in processing FOI requests is a continuing concern and that some agencies are clearly finding it difficult to meet their FOI obligations.

The percentage of FOI requests processed within the applicable statutory timeframe decreased 70%. This was a 7% decrease on the previous year.

This reflects a continuing decrease over the past 4 years from 2018–19, when 83% of all decisions were decided within the applicable statutory timeframes.

Agencies relied heavily on two grounds of exemption to refuse access to information. The personal privacy exemption in s 47F of the FOI Act remained the most claimed exemption, arising in 39% of cases where exemptions were claimed. The second most claimed exemption is the 'certain operations of agencies' exemption in s 47E of the Act, arising in 25% of cases where exemptions were claimed.

Agencies and ministers also issued 2,353 practical refusal notices under s 24AB of the FOI Act. While this is a 25% decrease on the previous year, the overall number remains high.

There was a 10% increase in the total charges agencies notified during the year, but a 7% decrease in the total charges collected by agencies (which ultimately only amounted to \$75,537 in total).

The total reported agency costs for processing FOI requests over the year were \$64.56 million, a 5% increase on the previous year.

During the year, the OAI received 1,995 IC reviews – a 63% increase on the previous year. This was mainly due to an increase in the number of IC review applications relating to deemed access refusals: 1,107 compared to 465 the previous year.

Applications for extensions of time have also increased significantly. Over the year the OAIC received 4,925 requests for, and notifications of, an extension of time, a 33% increase compared to the previous financial year.

There was a 6% increase – to 3,212 – in notifications of extension of time agreements between agencies and applicants under s 15AA of the Act.

So, what do these statistics tell us about the current state of the FOI system?

Agencies are finding it increasingly difficult to meet the statutory processing timeframes for FOI requests.

This is resulting in significant increases in agencies seeking extensions of time and in applicants seeking IC reviews.

The system is increasingly process-driven. Extension of time, practical refusal and charging processes may in some cases be being used in a way which does not best promote prompt and cost-effective access to information.

The total cost of the system, ultimately borne by the taxpayer, is significant.

Greater focus on reducing the burden on the FOI system is needed, most obviously through a focus on both proactive disclosure and better facilitation of access, both of which can be greatly assisted by appropriate e-governance.

As practitioners will know, The FOI Act does not restrict the circumstances in which government information can be released.

Indeed, the Act includes mechanisms to foster greater openness and transparency in government, with a view to reducing the need for formal requests for access.

One significant mechanism established by the Act is the Information Publication Scheme, or 'IPS', which requires agencies to publish specified categories of information and encourages agencies to proactively release other information to the public.

The IPS, and indeed broader proactive administrative access, should as a matter of routine be considered when designing IT systems, programs and platforms to increase agencies' focus on possible proactive disclosure of information at the earliest possible stage – that is, before that information is created or brought into existence.

It may also be possible to establish e-governance arrangements to assist in tracking information suitable for publication through the IPS or other proactive administrative publication mechanisms.

I mention that the OAIC is currently reviewing its guidance on the IPS contained in Part 1 of the FOI Guidelines and a revised Part 13 will shortly be released for consultation.

Beyond entirely proactive disclosure, including through formalised mechanisms such as the IPS, agencies should consider how good e-governance could assist in the management of their FOI workloads and the facilitation of access under the Act.

At a mechanical level, the use of well-designed and fit for purpose automated forms and case management systems should be considered as part of agencies' e-governance measures to assist in the efficient management of FOI workloads.

At a cultural level, a particular issue I am seeing in the FOI system is a tendency to resort to process. By this I mean there is a tendency in some agencies to automatically resort to the formal FOI process in managing every access request, rather than considering whether information could be provided more promptly on an administrative basis outside that process.

This may well be driven by constraints on human resources, and perhaps also by the lawyer-focused nature of the FOI practitioner workforce.

But it seems to me that a little more time invested at the beginning of an FOI process could create greater efficiencies and improve stakeholder relationships. And good e-governance has a part to play.

By way of example, in the IC review process I have seen several matters where an agency does not hold or produce information in the precise form requested by an applicant.

However, the agency does hold or produce information which relates more broadly to the applicant's request and which it could provide to the applicant on an administrative basis with a view to the applicant's FOI request being withdrawn.

A practical approach to this kind of scenario would see the agency offering the applicant the information it holds or produces, explaining why it is unable to provide the information in the precise form requested, and seeking to handle the matter outside the formal FOI process.

Good e-governance could assist with that kind of practical approach. For example:

The design of the system which results in the production of the available information could have incorporated proactive publication, enabling FOI practitioners to more immediately direct an FOI applicant to the published information

Alternatively, the system design could include greater internal agency visibility of the information produced, including for FOI practitioners, to enable more proactive consideration of whether to offer disclosure of the information to an applicant.

Of course, on the flip side of this, appropriate use of electronic communication mechanisms, including email, when dealing with members of the public is also an aspect of good e-governance. In the kind of example I've just given, the resort to process means

communications generally occur exclusively via email. It may be that in many cases a more pragmatic resolution of an FOI request can be achieved by speaking directly with an applicant.

In the context of e-governance and access, it is also important to recognise the existence of s 17 of the FOI Act, which is a statutory recognition that access to information can often be facilitated by the use of IT equipment available to agencies.

That provision, although 40 years old, forms an element of e-governance in the Commonwealth FOI context.

As practitioners will know, s 17 operates where information sought by an FOI applicant is not contained in discrete form in the documents of an agency.

In essence, where an agency can create a document containing the information sought in discrete form by using IT facilities 'ordinarily available' to it, s 17 requires the agency to create the document for the purpose of providing access to it in accordance with the FOI Act.

In a recent IC review decision, [Ryan Turner and Department of Home Affairs](#), I considered the operation of s 17 and, in particular, when IT facilities can properly be said to be 'ordinarily available' to an agency for the purposes of the section.

The sole existing judicial authority on that issue – the decision of the Full Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation*, decided in 2013 – suggests that the circumstances in which IT facilities are 'ordinarily available' to an agency are relatively narrow.

If a detailed code, or a program, would need to be developed and written before a computer could be used to produce a document, the computer is unlikely to be 'ordinarily available'.

That is not, in my view, an invitation to agencies to take a narrow view of how they construct IT systems so as to limit the scope of the requirement in s 17.

Rather, 40 years after the enactment of s 17, with almost unimaginable advances in technology, and with an Australian Government focus on openness through e-governance, agencies should in fact be taking the opposite approach.

That is, they should be directing their attention to ensuring that their IT systems and programs are designed so that the maximum amount of information relevant to the Australian community can be produced in documentary form by the ordinary use of those systems and programs.

By way of practical example, when a reporting system is being developed it should be built with as broad a reporting capacity as is reasonably practicable so that, for example, data within the system can be manipulated to produce reports which might foreseeably be of interest to the public and aid openness in government.

This might, for example, include capacity to combine different data sets in various ways, or to create cumulative rather than ‘point in time’ data outputs.

I note also that the more ‘ordinarily available’ an agency’s IT facilities are to produce information, the less likely it will be that a charge to produce the information will be necessary or appropriate.

This is because the ordinary use of a computer to generate a document containing information is unlikely to involve significant time or expenditure to warrant the recovery of costs.

Rather, the imposition of a charge for the generation of documents using a computer may often be more likely to involve an inefficient use of Commonwealth resources.

For more about the application of charges where information is to be extracted from IT systems, I refer you to my recent decision in [‘ABX’ and Department of Veterans’ Affairs](#)<sup>27</sup>.

The point in saying all of this is, of course, that the proper design of IT systems to readily facilitate the creation of information in documentary form for release in accordance with the FOI Act clearly furthers the objects of the FOI Act, especially by facilitating access to information more promptly and at the lowest reasonable cost.

Thank you.

## **Australian Information Commissioner and Privacy Commissioner Angelene Falk**

Thank you to all our participants today.

International Access to Information Day is also an opportunity to acknowledge your important work, as expert FOI practitioners exercising your functions, to as far as possible, facilitate and promote public access to information promptly and at the lowest reasonable cost.

If you would like to know more about International Access to Information Day, to find out about other events, or to find handy resources, please visit our website at [Oaic.gov.au/IAID](http://Oaic.gov.au/IAID).

I also encourage you to watch the Solomon Lecture which will be held at 10:30 am this morning, hosted by Queensland’s Office of the Information Commissioner.

This year’s lecture will be delivered by Ian Hamm, Chair of the Historical Records Taskforce with the Healing Foundation, who will discuss the importance of truth through Aboriginal eyes.

Australian Information Access Commissioners and Privacy Authorities have recognised the important role of historical records in truth telling and sharing history, intergenerational healing, redress and reparations for Stolen Generation survivors and their families.

The [Healing Foundation](#)'s *Principles for nationally consistent approaches to accessing Stolen Generations records* will inform ongoing discussions about greater national consistency.



We are committed to working together with the Healing Foundation and stakeholders to champion timely, easy access to records through informal access schemes wherever possible, with formal access applications required only as a last resort.

Thank you for the work you do and for joining us on International Access to Information Day 2022.

## Resources available

Visit [oaic.gov.au/iaid](https://oaic.gov.au/iaid) for more information about #AccessToInfoDay 2022.

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#### **Acknowledgement of Country**

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

