



Level 7
133 Mary Street
Brisbane Q 4000

PO Box 10143
Adelaide Street
Brisbane Q 4000

Phone (07) 3234 7373
www.oic.qld.gov.au

ABN: 70 810 284 665

Office of the Information Commissioner Queensland

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

The Queensland Office of the Information Commissioner (**Qld OIC**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's (**the Committee**) inquiry into the operation of Commonwealth FOI laws. Qld OIC notes that the inquiry's terms of reference are as follows:

The operation of Commonwealth Freedom of Information (FOI) laws, with particular reference to:

- (a) *the resignation of the Commonwealth Freedom of Information Commissioner and the resulting impacts;*
- (b) *delays in the review of FOI appeals;*
- (c) *resourcing for responding to FOI applications and reviews;*
- (d) *the creation of a statutory time frame for completion of reviews; and*
- (e) *any other related matters.*

Qld OIC's submission canvasses all items of the Terms of Reference. As an external review body comparable to the Office of the Australian Information Commissioner (**OAIC**), with some 30 years' experience in dealing with and resolving applications for external review¹ of information access and amendment decisions, Qld OIC believes we can offer information that may aid the Committee in its consideration of these key procedural issues.

About the Qld OIC

Qld OIC is an independent statutory body that reports to the Queensland Parliament. Qld OIC was initially created with the enactment of the *Freedom of Information Act 1992* (Qld) (**FOI Act (Qld)**). Qld OIC was continued in existence when the FOI Act (Qld) was replaced by the *Right to Information Act 2009* (**RTI Act**) and the *Information Privacy Act 2009* (**IP Act**).

Qld OIC has a statutory obligation to facilitate greater and easier access to information held by Queensland government agencies. Relevantly, this includes conducting external reviews of Queensland agency and Ministerial decisions about access to and amendment of information. As noted, this is a role which we have continually performed since late 1992.²

¹ The equivalent of what the *Freedom of Information Act 1982* (Cth) (**FOI Act**) refers to as 'IC review' as provided for and governed by Part VII of that Act.

² Under first the FOI Act (Qld) - and then the information access and amendment regimes set down in the RTI and IP Acts.

(a)-(c) Dedicated access commissioner; appeal/review delays; resourcing

Qld OIC cannot speak directly to the resignation of the former FOI Commissioner, Mr Leo Hardiman PSM KC. Qld OIC would expect, however, that that resignation will only serve to compound difficulties OAIC is reported to be encountering in managing and resolving IC review³ workloads.

The position of FOI Commissioner was established in 2010.⁴ The position was vacated on 31 December 2014,⁵ from which date it remained, on our understanding, unoccupied up until Mr Hardiman's appointment in March 2022. OAIC annual reports indicate that during that period, OAIC experienced a substantial growth in demand for IC review services⁶ – services the Commonwealth Parliament, in establishing the position, presumably intended would be substantially advanced by the FOI Commissioner.⁷

Qld OIC notes that a broadly similar situation existed in Queensland. From creation of the position of Information Commissioner in 1992 until 2005, the role (at that time, substantially the equivalent of the Commonwealth FOI Commissioner) was performed by the Queensland Ombudsman,⁸ a statutory officer with an entirely discrete, and substantial, remit of work. During this time, Qld OIC accumulated a backlog of external review applications.

The appointment of a dedicated Information Commissioner in 2005,⁹ coupled with appropriate resourcing, allowed Qld OIC to make significant inroads into that backlog. By 30 June 2007, Qld OIC had fully cleared the backlog.¹⁰

Qld OIC's role and structure were substantially expanded with enactment of the RTI and IP Acts in 2009 – the Information Commissioner took on considerably more responsibilities (including in the field of information privacy). Critically, however, a statutory officer-holder role dedicated to dealing with information access functions was maintained during this expansion, with the establishment of the position of Right to Information Commissioner (**RTI Commissioner**).¹¹

The position of RTI Commissioner has been continuously occupied since its creation, such that Queensland has not been without a dedicated information access

³ That is, external review of Commonwealth agency and Ministerial decisions, conducted under Part VII of the FOI Act.

⁴ With the passage of the *Australian Information Commissioner Act 2010*.

⁵ With the resignation of Dr James Popple.

⁶ For example, OAIC experienced an 80% increase in IC review applications in the period 2015/16 to 2018/19 (OAIC Annual Report 2018-19, <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports/annual-report-201819/part-2-performance>, accessed 11 April 2023). A further increase of 15% was experienced from 2018/19 – 2019/20 (<https://www.transparency.gov.au/annual-reports/office-australian-information-commissioner/reporting-year/2019-20-11>, Indicator 2.5 (accessed 11 April 2023), 15% from 2019/20-2020/21 (OAIC Annual Report 2020/21, page 42 – accessible at https://www.oaic.gov.au/_data/assets/pdf_file/0020/10829/oaic-annual-report-2020-21.pdf (accessed 11 April 2023), and a 63% increase in the 2020/21-2021/22 period (with Mr Hardiman only being in office for the final three months of that latter period) (OAIC Annual Report 2021/22, page 14, accessible at https://www.oaic.gov.au/_data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf (accessed 11 April 2023)).

⁷ Noting that reviewing decisions under Part VII of the FOI Act comprises one of several 'freedom of information functions' under section 8 of the *Australian Information Commissioner Act 2010*, which functions are assigned to the FOI Commissioner under section 11 of that Act.

⁸ Up until the passage of the *Ombudsman Act 2001* (Qld), the Queensland Ombudsman was formally known as the 'Parliamentary Commissioner for Administrative Investigations'.

⁹ Again, noting that in 2005, the Queensland Information Commissioner position was broadly comparable to the Commonwealth FOI Commissioner role, being tasked with delivering the equivalent of IC review functions. The appointment of a stand-alone Information Commissioner was accompanied by reforms establishing Qld OIC as a fully independent entity under the *Financial Administration and Audit Act 1977* (Qld) (repealed), Qld OIC having up until that time shared corporate support/financing resources with the Queensland Ombudsman.

¹⁰ Qld OIC Annual Report 2006-07, accessible at https://www.oic.qld.gov.au/_data/assets/pdf_file/0007/7783/report-oic-annual-report-2006-2007.pdf

¹¹ Which role, alongside the Queensland Privacy Commissioner, serves as deputy to the Information Commissioner: section 148 of the RTI Act. The position of RTI Commissioner is now largely the analogue of the Commonwealth FOI Commissioner role.

commissioner responsible for functions including external review¹² since 2005. Over that period, Qld OIC has, in the main, avoided any further substantial review backlog.

Qld OIC's experience suggests that a stand-alone information access commissioner, adequately resourced, is important to appeal resolution timeliness and to avoiding backlog accrual.¹³ This is particularly so in circumstances where, as in the case of OAIC, demand for IC review services has continued to grow year-on-year.

(d) Time limits

The imposition of time limits on IC review functions potentially creates other risks for stakeholders. Qld OIC notes that of jurisdictions with determinative appeal or review bodies,¹⁴ only Victoria and Western Australia currently contain such limits.

Qld OIC considers there to be sound policy and practical reasons for the absence of review timeframes. By the time a contested information application falls to be determined by an appeal or review body, the issues may well be complex (and include substantial 'missing documents' or adequacy of search issues). There may also be a substantial quantity of information in dispute. Requiring a review body to resolve such matters within an arbitrary time frame may prejudice the quality of the analysis that body can undertake, and lead to hurried, compromised decision-making; to the prejudice of review participants and public confidence in the FOI framework.

Further, from a practical perspective, imposing a time limit begs the question as to the consequence to flow if that time limit is not met. Time limits at the initial decision-making level can be satisfactorily 'enforced' by a deeming provision, under which the agency is taken to have made a decision refusing access to requested information – which then enlivens review rights. Imposing such a consequence at the appeal level,¹⁵ however, risks creating a situation entirely contrary to the very purpose of the FOI Act: by foreclosing an applicant's right of access, without the merits of their case having been subject to considered review and decision.

In the Commonwealth context, it may be possible to avoid the undesirable situation canvassed in the preceding paragraph, by allowing for applicants to seek review by the AAT¹⁶ of deemed refusals flowing from OAIC failure to meet a statutory deadline.¹⁷ This may not confer any substantial practical benefit, the task of review simply being moved from a specialist body to a generalist review tribunal, itself likely charged with a substantial workload outside of FOI review.

Alternative options to deemed refusals would appear to be limited to deeming that access to information should be granted, or providing for no real practical consequence if the review body fails to meet the deadline – beyond, possibly, notifying

¹² The equivalent, as noted above, of IC reviews in the Commonwealth FOI framework.

¹³ Qld OIC notes that the importance of resourcing was recently emphasised by the Centre for Public Integrity, in its August 2022 paper on the operation of the Commonwealth FOI scheme: 'Delay and Decay: Australia's Freedom of Information Crisis', Briefing Paper, August 2022. Accessible at: <https://publicintegrity.org.au/wp-content/uploads/2022/09/FOI-Delay-and-Decay-Final.pdf> (accessed 24 May 2023).

¹⁴ Such as ourselves, and OAIC.

¹⁵ I.e., by including in the FOI Act a provision to the effect that the OAIC is taken to have made a decision affirming the underlying decision of an agency or Minister to refuse access to information, where the former fails to resolve an IC review within the prescribed time period.

¹⁶ Or any appeals body proposed to replace the AAT, Qld OIC noting that the Australian Government has announced that it will abolish the AAT: <https://www.ag.gov.au/legal-system/new-system-federal-administrativereview> (accessed 31 May 2023).

¹⁷ As is the position in Victoria – section 49J of the Victorian *Freedom of Information Act 1982*.

review participants.¹⁸ The former risks the release of information disclosure which would be contrary to the public interest, such as sensitive personal information of third parties. The latter can likely be achieved by way of policy and performance measures and non-legislated client service standards. In this context, regular reporting on performance may help to improve efficiency in application resolution.¹⁹ Reporting of this kind also brings transparency and accountability to the process. Transparency, because it serves to ensure that all stakeholders are informed of the Commission's timeliness in the performance of its functions and accountability to ensure that those charged with overseeing the Commission's performance are aware of any delays, thereby encouraging continuous improvement and, if necessary, the provision of additional resources.

(e) Related matters – encouraging pro-active disclosure

As in Queensland, access to Commonwealth government information is framed around a 'push' model of proactive disclosure. The aim of such a model is that formal statutory information access applications should be required only as a last resort, with agencies releasing information as a matter of course, unless there is a good reason not to. This proactive disclosure approach not only increases accountability and transparency and helps build trust in government, but, correctly implemented, should also operate to mitigate the need for formal applications under the FOI Act – and, potentially, abate the flow of review or appeal applications.

Fundamental to the successful implementation of such a push scheme is ensuring that public sector leaders inculcate within their agencies a culture of transparency. Through both messaging and actions, agency leadership should strive to embed an environment of openness, in which proactive disclosure of information is seen as the starting point or default position.²⁰

Another, concrete measure to facilitate proactive release of information – and thus reduce the need for formal requests – is the development, maintenance and, importantly, publication by agencies of an information asset register (IAR). Properly maintained IARs help agencies to identify information holdings that may be suitable for proactive publication, and to inform members of the community of those

¹⁸ Qld OIC notes that the 30 day deadline imposed on the Western Australian Information Commissioner may be extended by the Commissioner, where the Commissioner considers that it is impracticable to make a decision within that time: section 76(3) of the *Freedom of Information Act 1992* (WA). No consequence appears to attach to a failure by the Commissioner to make a decision within 30 days. As discussed further below, reporting on performance may aid timeliness – while this can be undertaken without legislative mandate, OIC does note the existence of statutory obligations to report, where a decision is not made within a prescribed time (in contexts other than information access): see, for example, section 85 of the *Health Ombudsman Act 2013* (Qld), which requires the Queensland Health Ombudsman to report where investigations under that Act are not completed within 12 months.

¹⁹ OIC makes general performance information available on our website: which information is updated on an ongoing basis, during a reporting year – e.g. <https://www.oic.qld.gov.au/about/our-organisation/our-performance>.

²⁰ The important role of leadership in fostering a culture of transparency was stressed by the New Zealand Chief Ombudsman, in a recent report on the operation of that jurisdiction's *Official Information Act 1982*: the Chief Ombudsman noting that an 'agency's culture around transparency, openness, and the strength of its OIA practices flows from the attitudes, messaging, and actions of its senior leaders...Words...are not enough. Public service staff receive signals from senior leaders not only through overt messaging, but through their actions. However vocal leaders may be about the importance of openness and compliance with the OIA, the message is diluted if they do not model openness and provide staff with the systems and support to facilitate the release of information.' 'Ready or not? A report on the public sector, the OIA and the pandemic', The Ombudsman New Zealand, September 2022, page 22. Accessible at <https://www.ombudsman.parliament.nz/sites/default/files/2022-09/Ready%20or%20Not%20Thematic%20report%20of%20the%20Chief%20Ombudsman%20September%202022.pdf> (accessed 25 May 2023).

holdings, thereby avoiding the need for resort to formal statutory application mechanisms (including potential appeal/external review).²¹

Qld OIC's recent audit of three Queensland government agencies indicates, however, that further work is necessary to achieve maturity in this area.²² Importantly, the three audited departments do not publish their IAR, or a redacted version of it on their website. As a result, members of the public may seek access under a legislative process such as an RTI or FOI request to information that the agency has already determined is suitable for disclosure or administrative release.

Qld OIC notes the OAIC has, too, identified the maintenance of IARs as a challenge impacting a reasonable number of Commonwealth agencies.²³ This suggests that overall administration of the Commonwealth FOI regime, too, may benefit from renewed attention to proactive disclosure measures.

Relatedly, in 2020-21 Qld OIC examined minimum reporting requirements concerning Queensland public officer personal interests, gifts and overseas travel – topics identified by us as matters of high public interest. In our report to the Queensland Legislative Assembly on this issue,²⁴ Qld OIC encouraged agencies *to go beyond mere compliance* [with minimum reporting standards] *and proactively disclose more information and make it easy to find on their websites*.²⁵ Among other things, we observed that embracing '*proactive and timely disclosure*' of such information not only fosters public trust, but ensures the '*community gets immediate access to government information. This can decrease the cost of responding to requests for information, including handling applications made under the legislative process*'.²⁶ Qld OIC would anticipate these observations may be applicable to comparable jurisdictions.

Conclusion

Qld OIC appreciates the opportunity to make this submission. Should the Committee have any questions or require further information, please do not hesitate to contact this Office on 07 3234 7373 or email: administration@oic.qld.gov.au.

Yours sincerely

Paxton Booth
A/Information Commissioner

Stephanie Winson
Right to Information Commissioner

²¹ A statutory RTI/FOI application for information an agency has already determined is suitable for release should, as a matter of logic, be capable of timely and expeditious determination at the agency level. It is quite possible, however, that the addition of such uncontentious applications to the queue of total applications being dealt with by agencies – particularly those with large application workloads – will result in at least some of the former 'going deemed'. In other words, due to competing priorities, busy agencies may well fail to deal with such uncontentious applications within the time prescribed in the relevant legislation, resulting in the making of a deemed refusal of access decision that then does require the applicant to seek the intervention of the review body such as the OAIC, to have their access request satisfied.

²² '*Publishing Official information assets: Supporting the push model through proactive disclosure*', Report No 3 to the Queensland Legislative Assembly for 2022-23, March 2023. Accessible at: https://www.oic.qld.gov.au/_data/assets/pdf_file/0020/58034/Publishing-OFFICIAL-information-assets.pdf

²³ OAIC's 2018 *Information Publication Scheme Survey* notes that 48 per cent of agencies identified '*robust information asset management including establishment and maintenance of an information asset register*' as a challenge to publishing public sector information: <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/information-publication-scheme/information-publication-scheme-survey-2018/full-report#fnref22>

²⁴ 'Minimum reporting requirements: Personal interests, gifts and benefits, overseas travel', Report No 5 to the Queensland Legislative Assembly for 2020-21, June 2021 (**Minimum Reporting Report**). Accessible at: https://www.oic.qld.gov.au/_data/assets/pdf_file/0004/48568/Minimum-Reporting-Requirements-Report-Final.pdf

²⁵ Minimum Reporting Report, page 1.

²⁶ As above, page 2.