The Operation of Commonwealth Freedom of Information Laws
Inquiry by the Senate Legal and Constitutional Reference Committee (2023)

Submission by John McMillan

I make this submission as a person who formerly held the position of Australian Information Commissioner (2010-15). In addition, I have had a long-standing personal interest in freedom of information laws, dating back to my role in the 1970s as a joint-founding member of the Freedom of Information Campaign Committee. I also pursued my interest in FOI as a legal academic and in the former role of Commonwealth Ombudsman (2003-10).

The Committee's Terms of Reference for this review focus specifically on the operation of the FOI review and appeal process, but also invite comment on 'any other related matters'. My comments are cast broadly, in recognition of the fact that the appeal and review process is part of a broader FOI framework and set of objectives. I commence by placing the recent resignation of the FOI Commissioner in a longer historical context of FOI controversy.

A history of FOI tumult

The enactment of the *Freedom of Information Act 1982* was a radical milestone in Australian public law. The FOI Act sought to reverse an unbroken tradition of Crown secrecy. The prevailing convention was that government information was akin to property and could be managed by government (and withheld or released) on a discretionary and largely unreviewable basis.[1]

Unsurprisingly, the Labor Government proposal in 1972 to enact an FOI law met stiff opposition from within the government administration. The law was enacted ten years later under the Coalition Government, after several interdepartmental and parliamentary committee inquiries.

In the following decade the Act was amended several times to tighten its provisions in a way that could impede access (eg, through access charges). Special functions conferred on the Ombudsman during that decade were repealed soon after when the Ombudsman complained that the office was not properly resourced to exercise the functions.

Several subsequent independent reports were strongly critical of FOI administration and outcomes, and proposed major reforms.[2] This included a report in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs, a joint report in 1995 by the Administrative Review Council and the Australian Law Reform Commission, and two reports in 1999 and 2006 by the Commonwealth Ombudsman.

An outcome of those reform proposals was the substantial amendment of the FOI Act in 2010 and the creation of the Office of the Australian Information Commissioner (including the position of FOI Commissioner). The OAIC had early support across government in promoting a pro-disclosure culture. But, once again, this epiphany was short-lived and there was an increasing number of FOI battles following dubious decisions by agencies and minister's offices to deny FOI requests.

[1] Following the decision of the High Court in 1978 in *Sankey v Whitlam* (1978) 142 CLR 1 a court could overturn a Crown privilege claim in relation to government documents sought for the purpose of court proceedings.
[2] The history is briefly traced in R Creyke, M Groves, J McMillan & M Smyth, *Control of Government Action: Text, Cases & Commentary* (6th ed, 2022) Ch 19.

This culminated in a government proposal in 2014 to disband the OAIC and abolish the positions of Information Commissioner and FOI Commissioner. While those proposals were not accepted by the Senate, a line can be traced from that controversy to the present tumult surrounding the early resignation of the FOI Commissioner.

It is important to bear that history in mind when considering FOI reform proposals. The lesson is that FOI will encounter turbulence and conflict in every age.[3] FOI operates in a political context. Many disputes of a political nature are essentially about whether information held by government should be released on public interest grounds. The fortune of government and individual ministers can stand or fall in response to information disclosures. The apocryphal description of this inherent tension is that political parties champion FOI when in opposition and quickly lose heart when in government.

An added source of tension and prolonged conflict is that FOI access disputes can be complex and time-consuming. A necessary feature of an FOI scheme is that it lays down precise procedures regarding how access requests (that can be ill-formed and extravagant) are to be handled, and the exemption criteria to be applied in deciding those requests. This draws FOI into a legal paradigm that necessarily confers competing rights on parties; the assertion of those rights can lead to disputation and delay.

Those legal procedures also give an undeclared strategic advantage to government agencies. By the simple act of refusing access an agency can put the applicant to the test, and perhaps delay disclosure to a later and more convenient time. This strategic advantage will accumulate as the government-wide number of refusals grows and the OAIC review backlog expands.

Those underlying pressures are difficult to dislodge. They are built into the fabric of the FOI scheme. The consequence is that FOI is unlikely ever to work as harmoniously or efficiently as people may hope. It therefore becomes necessary to canvass a broad range of options for improving FOI administration and outcomes.

The unrealised promise to update the FOI regime

Government recognised at the time of the FOI and OAIC reforms in 2010 that the changes were far-reaching. It anticipated that some changes may not play out as expected and that unforeseen difficulties could arise. With that in mind government put arrangements in place for two early reviews of the Act.

One was a review of the FOI charges regime that was initiated by the Minister within the first year of the new reforms commencing. This review was undertaken by the Information Commissioner and reported to government in February 2012.[4]

The other was a broad FOI review required by the Act to commence two years after the new changes commenced.[5] This review was undertaken by Mr Allan Hawke AC and reported in July 2013.[6]

Both reviews made extensive recommendations for changing the FOI Act and FOI administration. Many of the recommendations touch directly or indirectly on FOI reviews and appeals and the role of the FOI Commissioner. An important contribution to the independent

[3] I expand on this theme in J McMillan, 'FOI in Australia: building on a turbulent past', Auspublaw blog (2016). See also 'Transparent Government – Are We Travelling Well?' (2021) 28 Aust Jnl of Administrative Law 259.
[4] OAIC, *Review of charges under the Freedom of Information Act 1982,* Report to the Attorney-General (2012).
[5] *Freedom of Information Act 1982* (Cth) s 93B
[6] *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013).

Hawke review was a comprehensive joint submission from the Information and FOI Commissioners.

There has been no government response to either report. This is disappointing in a practical sense as it has meant that many substantial options for streamlining and improving FOI administration have languished.

It has also been disappointing at a cultural level as government silence has reinforced the belief that it is not intrinsically committed to FOI ideals. Recommendation 1 of the Hawke review was that a more comprehensive review of the FOI Act was needed.

The need for such wide-ranging review is now stronger than ever. An uncomfortable dimension of the FOI Act is that it was enacted in a very different age – against an unbroken tradition of government secrecy, and in an era of hard copy record keeping. Those features are embedded in the terms and philosophy of the current FOI Act. Not surprisingly, they lie behind many of the awkward and disappointing trends in Australian FOI practice.

The need to review and update the FOI Act was recognised in Australia's *First Open Government National Action Plan 2016-18*. This Plan was adopted by Government as a condition of membership of the international Open Government Partnership. Australia's commitments included the following:

> *Access to government information*
>
> - Information management and access laws for the 21st century
> - Understand the use of freedom of information
> - Improve the discoverability and accessibility of government data.

No substantive action has been taken – or at least published – on any of those projects. This is disappointing. It is common now that the information a person seeks from government under FOI is not in documentary form. There have also been revolutionary changes over the past four decades in how government agencies make information available through web publication, online mechanisms and administrative access schemes.

In summary, it is essential in reviewing the FOI review and appeal processes to view them in a broader setting of unfulfilled measures to review and improve FOI administration and outcomes in Australia.

Building a pro-disclosure culture in government

The FOI Act is premised on the reality of disagreement and contestation about information disclosure. The role of the FOI Commissioner springs from that premise.

It is equally important, however, to step back and remember that an object of the FOI is to 'facilitate and promote public access to information, promptly and at the lowest reasonable cost'.[7] Consequently, any measures that advance that object will correspondingly supplement the expectations that attach to the FOI Commissioner's role.

A core feature of the FOI Act from the outset was that access requests would be unnecessary, and hence disputes could be avoided, if the Act required disclosure of specified categories of information. Accordingly, the Act required agencies to publish information that explains their role, structure, functions, FOI procedures, categories of documents and their 'internal law' (policies and guidelines applied in making decisions that affect members of the public).

[7] *Freedom of Information Act 1982* (Cth) s 3(4).

That feature of the Act was taken a step further in the 2010 reforms, in two ways. First, the Act requires each agency to have an Information Publication Scheme (IPS) that publishes an Agency Plan on intended publication practices, and additional categories of information such as statutory appointments and consultation arrangements (Part II). Secondly, agencies are required to maintain a Disclosure Log that publishes details of information that has been released in response to other FOI requests (s 11C). It was anticipated that proactive disclosure would become more dynamic over time by requiring agencies to review their IPS compliance at least every five years in conjunction with the Information Commissioner (s 9).

The OAIC submission to the Hawke review proposed that the practice of proactive disclosure – 'disclosure by design' – could be taken further. An example that could be implemented by administrative change is the publication of ministerial diaries. Another example that would require legislative amendment is to impose a time limit on the operation of some exemptions. For example, the exemptions that protect internal deliberations could apply to incoming government briefs and parliamentary question time briefs for a limited period of, say, six months (other exemptions may still apply to protect interests such as national security and personal privacy).

Proactive disclosure of this kind would potentially limit the FOI Commissioner's caseload, as the categories of documents just mentioned figure strongly in FOI review and appeal work. This approach is adopted in some other jurisdictions. For example, New Zealand publishes Cabinet submissions and decisions after a short period. Some Australian States and Territories are considering the same option.

Similarly, some State agencies reduced their FOI caseload by establishing clear access or publication rules for certain categories of information that were previously a routine subject of access requests. Two examples are the publication of mining licence information and motor vehicle crash records.

A related approach is the notion of administrative access. A strong theme in the early work of the OAIC was to encourage agencies to establish administrative access schemes that would facilitate free, fast and informal access to government information without requiring applicants to make use of FOI Act request procedures. Guidance on this topic is published on the OAIC website.

Revising FOI fees/charges principles

Fees and charges have always been a vexed issue in the FOI scheme. They can be used by agencies as a cost barrier to thwart FOI access. On the other hand, charges can play a useful role in supporting agencies to initiate discussion with applicants about reducing broad requests to a more manageable level.

The Information Commissioner's charges report in 2012 proposed that the charges principles in the Act be adapted to play a more influential role in forging a constructive discussion between applicants and agencies. This could go a long way to meeting the FOI Act objective that access requests should be dealt with as quickly and inexpensively as possible. FOI objectives are fulfilled when applicants and agencies can reach early agreement on how to satisfy an FOI request.

The main principles in the 2012 report were as follows:

- Agencies are to be encouraged to establish administrative access schemes, under which access requests are dealt with free of charge.

- A person who is dissatisfied with the agency response to an administrative access request cannot be required to pay an initial FOI access charge, for a request made 30 days or more after the initial administrative access request. Further, no processing charge is to be imposed for the first five hours of FOI processing.
- A person who has not used the administrative access process can be required by an agency (in its discretion) to pay an initial $50 access charge, that will also cover the first five hours of processing. In addition, the agency can suspend FOI processing for up to two weeks to enable discussion with the applicant about the terms and scope of the request.
- Additional processing time between 5-10 hours is set at a maximum charge of $50.
- Additional processing above 10 hours may attract an hourly access charge ($30 per hour was suggested at the time).
- After consultation with an applicant, there would be a ceiling on processing time of 40 hours (that is, one week of public service officer time). The agency's 40 hour estimate would be reviewable. It would also be open to an applicant to lodge a fresh FOI request.
- A fee reduction scale would apply to delayed FOI processing, in 25-50-75-100 per cent weekly fee reduction steps.

The stated intention in these proposals was to encourage agencies and applicants to engage in upfront discussion about framing and satisfying requests, with a view in particular to scoping requests at less than 10 hours processing time. The expectation was that charges should be imposed infrequently.

Measures that stimulate dialogue and agreement between agencies and applicants should be encouraged. Regrettably, as I noted above, there has been no government response to the charges report.

Revising the FOI review and appeal process

The OAIC submission to the Hawke review made numerous proposals to streamline the FOI review and appeal process. The only proposal that appears so far to have been implemented by government is to permit the delegation of the IC review function to senior OAIC officers.[8]

Other proposals that are fully explained in the joint submission include:

- Authorise the Commissioner to remit a matter to an agency or minister for reconsideration (Rec 7)
- Broaden the grounds on which the Commissioner can decide not to undertake a review (Rec 8)
- Provide a clearer mandate and powers for the Commissioner to resolve IC review applications by agreement between the parties to a review (Rec 9)
- Resolve the complexity and uncertainty in FOI Act provisions on third party review rights (Rec 10)
- Clarify the application of secrecy provisions in other legislation to IC reviews (Rec 11)
- Remove the barrier to delegation of Commissioner complaint handling powers (Rec 12)
- Broaden the grounds on which the Commissioner can decide not to investigate a complaint (Rec 13)
- Revise the vexatious applicant provisions to enable an agency to refuse a request on this basis, rather than having to seek from the Commissioner a declaration applying generally to the applicant (Rec 26).

Rethinking the IC review function

[8] The IC review function is provided for in s 55K of the FOI Act. Delegation occurs under the *Australian Information Commissioner Act 2010* (Cth) s 25.

A fundamental innovation of the FOI Act in 1982 was that access refusals would be externally reviewable by the Administrative Appeals Tribunal. As expected the AAT undertook reviews in a customary adversarial manner that involved presentation of competing views by applicants and agencies, and AAT resolution of disputes by the publication of closely-reasoned legal decisions.

The 2010 FOI Act reforms built on that principle of independent review by creating the IC review function. The framework is similar to that for AAT reviews: the FOI Act lays down a detailed procedure for the conduct of reviews; a Commissioner is to make a decision affirming, varying or setting aside the decision under review; and the decision must include 'a statement of reasons for the decision' (s 55K(4)). The *Acts Interpretation Act 1901* (Cth) s 25D provides that this reference to a statement of reasons means a statement that sets out (in addition to reasons) 'the findings on material questions of fact and … the evidence or other material on which those findings were based'.

Those provisions tap into a well-established administrative law tradition that reasons statements can be formal, elaborate, lengthy – and time consuming to prepare.

While many IC reviews are resolved by the OAIC through discussion and negotiation with applicants and agencies, a large number are also resolved through a formal IC review decision. These are published on the Austlii website and carry precedential weight. They sit alongside a large number of AAT review decisions on FOI appeals.

Modification of that formal review process should now be considered. The FOI Act has been operating for over 40 years. Many of the exemption criteria are unchanged. There is a large body of settled precedent on FOI provisions. This is supplemented by extensive FOI guidelines published by the OAIC.

One option for modifying this process may be to allow an IC review process to be concluded by a ruling that goes no further than recording whether the IC review application is upheld and, for example, whether particular documents in dispute are assessed as exempt or non-exempt. This brief statement of findings would be provided to the parties but not published. The presumptive timeline for preparing the statement would be four weeks. A party that did not accept the statement could apply for a more formal IC review decision. An application fee would apply - $100 for applicants and $500 for agencies. A party could alternatively apply for an AAT review (where higher application fees apply).

An added cost pressure could be imposed on agencies to accept the initial OAIC ruling. Section 66 of the FOI Act currently provides that the AAT may recommend that government is to reimburse the costs of a successful FOI applicant. The Act could similarly provide that the Information/FOI Commissioner could rule that an agency that had unsuccessfully sought formal IC review of an initial ruling was to reimburse all or part of an applicant's costs.

The above proposal is put forward to prompt discussion on the need to explore options for streamlining and accelerating the IC review process. Adaptations of this proposal could be considered. The aim should be to devise procedures that will hasten the FOI application and review process. Timely disclosure is integral to the objectives of the Act.

The OAIC philosophy and structure

The creation of the OAIC in 2010 was a landmark and far-reaching development. FOI and Privacy were brought together in a single scheme under an over-arching program of enlightened information policy and practice. Individual commissioners would have a separate and shared responsibility for those three areas. I was a strong advocate for this model of

information management during my time as Information Commissioner (and, in principle, I remain so).

Though this was a new concept and approach to information management and access, it is important to recall that it was prompted by a desire to reform FOI processes. The reports that instigated the reforms (such as the ARC/ALRC report in 1995 and the Ombudsman report in 2006) were principally about FOI shortcomings. Similarly, FOI was the main focus of the consultation undertaken by government in the lead-up to the 2010 reforms. The creation of the OAIC was accompanied by a wholesale revision of the FOI Act.

It is ironic, against that background, that this Senate Committee inquiry is prompted by an apparent breakdown in FOI administration and outcomes. This comes on the back of a long period (2015-2022) in which the position of FOI Commissioner was not filled. It is particularly disturbing that the FOI Commissioner reportedly resigned after dissatisfaction with lack of support for his position within the OAIC.

It is appropriate, accordingly, to stand back and ask whether the OAIC structure provides the best home for the FOI function. I stress that the following comments are observations rather than criticisms of the OAIC. I am not personally aware of the challenges or choices that faced the OAIC since I left office. I remain impressed by the quality and professionalism of the OAIC's work.

In its foundation years the OAIC paid great attention to exploring and articulating the broad concept of information policy. Significant research was undertaken in this area, leading to the publication of numerous reports and guidelines – such as the 'Principles on Open Public Sector Information' (May 2011). The OAIC also held a National Information Policy Conference attended by over 300 participants.

A great deal of attention was similarly paid to the FOI function. An extensive range of FOI guidelines, fact sheets and agency resources were published. Important events were hosted, such as a conference to celebrate the thirtieth anniversary of the FOI Act. The Information and FOI Commissioners regularly presented at seminars and conferences held both in and outside government. An example is that soon after commencing as Information Commissioner I presented at a meeting of the Secretaries Board, followed by presentations to senior executive meetings at two-thirds of government departments. Generally, the three commissioners accepted they had a shared responsibility for FOI, Privacy and Information Policy functions.

That active and broad-based program was substantially undermined by the Government proposal in 2014 to disband the OAIC and abolish the positions of Information Commissioner and FOI Commissioner. Though those proposals were never implemented they seem to have cast a long shadow.

OAIC work is principally dominated nowadays by its privacy function. Information policy is no longer mentioned on the OAIC's homepage. It is a minor sub-heading under the homepage link, 'About the OAIC'. The 'Information Policy Resources' link refers to six publications that were published between 2011-14.

The FOI resources on the website have been updated but seem largely to be the same publications from the early years. The fortieth anniversary of the FOI Act in 2022 was marked by a seminar hosted by the Australian Government Solicitor rather than the OAIC. Nearly all items in the OAIC 'Newsroom' deal with privacy or OAIC corporate developments.

As a personal observation I note that, as Commissioner, I gave a large number of speeches on FOI and Information Policy. These are no longer accessible from the OAIC website. It

advises that older speeches are available from the National Library Trove website, but nor could I locate any at that site. By contrast, all speeches and statements I made as Commonwealth Ombudsman from 2003-10 are still accessible on that office website. A strong theme I urged in many speeches I made as Information Commissioner was that, in a digital age, agencies must guard against their history becoming digital dust.

While I still believe strongly in the original OAIC concept, I accept that it may be time to rethink whether the administration of the FOI Act (including the role of FOI Commissioner) should be moved to a different platform. FOI reform was the impetus for the creation of the OAIC. If this is no longer working a different model should be considered. An option floated in earlier reports was to constitute a separate office of Deputy Commonwealth Ombudsman (FOI).

At any rate, it seems hard any more to justify a three commissioner model for the OAIC, particularly when that office does not herald its separate information policy function. I appreciate that this may be a matter beyond the Terms of Reference of the present Senate Committee inquiry. The Committee may nevertheless wish to note this issue for further government consideration.