THE OPERATION OF COMMONWEALTH FREEDOM OF INFORMATION LAWS

This is a submission to Senate Legal and Constitutional Committee's inquiry into the operation of Commonwealth Freedom of Information (FOI) laws. The submission draws on my extensive experience of the operation of the Federal FOI system which has, to date, involved more than 400 FOI applications across the full breadth of government, including reviews by the Office of the Australian Information Commissioner, the Administrative Appeals Tribunal (AAT) and the Federal Court.

INTRODUCTION

I start with an introduction, an important context, to the submission and then deal specifically with each of the terms of reference.

Importance of FOI

The role that the FOI Act plays in our responsible system of government was recognised in the High Court case, *Eagan and Willis [1998] HCA 71*, where Justices Guadron, Gummow and Jaynes stated [at 42]:

> *In Australia, s 75(v) of the Constitution and judicial review of administrative action under federal and State law,* ***together with freedom of information legislation****, supplement the operation of responsible government in this respect.*

Objects of the Act

The objects of the FOI Act are as follows (with some emphasis).

> (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
>
> (a) requiring agencies to publish the information; and
>
> (b) providing for **a right of access to documents.**

> (2) The Parliament intends, by these objects, **to promote Australia's representative democracy by** contributing towards the following:
>
> (a) **increasing public participation in Government processes, with a view to promoting better-informed decision-making;**
>
> (b) **increasing scrutiny, discussion, comment and review of the Government's activities.**
>
> (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
>
> (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, **promptly** and at the lowest reasonable cost.

Delay

Delay is the enemy of FOI. It serves as a cancer on the objects of the FOI Act.

The fact is that most FOIs are returned to applicants with overzealous (and sometime completely unreasonable) exemption claims, and by the time the applicant successfully exercises the review rights afforded by the FOI Act, the information provided to them is of historical use only. A major cause of the delay is the time it takes for matters to progress through an Information Commissioner's review.

In a recent judgement handed down in *Patrick v Australian Information Commissioner (No 2) [2023] FCA 530* the Court found there were very significant delay in the conduct or Information Commissioner reviews, but it was decided the delay was not (legally) unreasonable on account lack of resourcing by the Parliament. Justice Wheelahan stated in his judgement [at 6]:

> *It is ultimately for the Commonwealth Parliament to legislate so as to appropriate monies to the Office of the Australian Information Commissioner in order to enable the discharge of the Commissioner's statutory functions.*

Recommendation

It is recommended (1) that the Senate pay attention to the statement from the Court in *Patrick v Australian Information Commissioner (No 2) [2023] FCA 530* directed at the Parliament.

THE RESIGNATION OF THE COMMONWEALTH FOI COMMISSIONER

There are three Commissioner positions created by the Australian Information Commissioner's Act; an Information Commissioner, an FOI Commissioner and a Privacy.

The three Commissioner's positions have not been filled simultaneously for a decade.

It is pleasing that the Attorney-General has announced an intention to appoint a Privacy Commissioners, in addition to the Information Commissioner, and is seeking to replace the recently resigned FOI Commissioner.

As to why FOI Commissioner resigned, I will leave that the Committee to examine Mr Hardiman PSM KC. What is obvious from his communique on LinkedIn was that he was put into an impossible situation, where he was being asked to take responsibility and accountability for the train smash that is IC review regime without the requisite resources and authority to deal with the situation.

I will, however, point out that, contrary to the statements of the Information Commissioner at the most recent Budget Estimate, the FOI Commissioner had worked on proposed changes to the FOI Act prior to his departure. Figure 1 is a truncated email – the original was two pages (redacted) – obtained using FOI.

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Monday, 20 February 2023 12:45 PM
To: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>
Subject: Potential legislative amendments [SEC=OFFICIAL]

Hi Leo

As discussed, following the Executive Committee meeting, I had undertaken to provide a list of legislative amendments that may improve IC review procedures/processes.

Please see the proposed amendments to the *Freedom of Information Act 1982* below:

s 47C(1)

[redacted]

Figure 1 - Email with proposed FOI Act Amendments (Truncated 2 Page Email)

Inquiry Recommendations

It is recommended (2) the inquiry calls the Mr Hardiman PSM KC to provide evidence relevant to the terms of reference of the inquiry.

DELAYS IN THE REVIEW OF FOI APPEALS

Original and Internal Review Decision Making

Poor Decision Making

The Information Commissioner will not receive an FOI review request unless an FOI applicant is dissatisfied with an original or internal review decision of an agency or minister.

Causes of poor agency decisions include:

- A lack of training (and therefore confidence) for decision makers
- Internal pressures from the line areas inside Agencies
- Pressure (direct or cultural) from politics.

When erroneous FOI decisions are made, a person's right to participate in democracy suffers, particularly when the review path (with the Information Commissioner) is clogged.

Incorrect original and internal review decisions are not just harmful to democratic processes, they waste taxpayers' resources and taxpayers' money. Two case studies are presented below:

Case Study – National Cabinet

When Prime Minister Morrison first formed up National Cabinet to deal with COVID-19, he decided to cast a Cabinet secrecy blanket over the forum.

In July 2020 I decided to crack open the vault. I FOI'ed the Department of Prime Minister and Cabinet (PM&C) for access to the minutes of a single National Cabinet meeting, challenging the Prime Minister's claim that the National Cabinet was legally a Cabinet.

Noting National Cabinet was a novel concept, it was perhaps forgivable that the original decision maker inside PM&C applied a Cabinet exemption to the documents I requested. The decision was referred to the Information Commissioner who correctly exercised her s 54W(b) FOI Act discretion to not review the matter so that it could be dealt with by the AAT.

In May 2021 the matter was argued before Federal Court Justice White by Senior Counsel on my side and King's Counsel on PM&Cs side. In August 2021 Justice White determined National Cabinet was not a Cabinet for the purposes of the FOI Act. The Government did not appeal the decision.

Having established the precedent I then asked, across two FOI request, for the agendas and minutes of the first 20 meetings. PM&C consciously and disgracefully refused follow the precedent set in the AAT.

That led to a second contest that tied up the Information Commissioner's and the AAT's resources. PM&C held its hollow ground until the day before the first AAT hearing, when it capitulated. Over the month of May PM&C handed over six sets of documents (other National Cabinet matters had been joined to the ATT proceeding).

The cost to the taxpayer of this second and unnecessary fight in the ATT has run to several hundred thousand dollars of taxpayers' money.

Case Study – Albanese's Diaries

In another matter being played out in the AAT, as the Senate conducts this inquiry, PM&C have acted contrary to the rule of law, belligerently ignoring a binding decision of the Full Federal Court.

AFR Journalist Ronald Mizen made a request for Prime Minister Albanese's diary after he'd reached 100 days in office (15 weekly view pages of his diary).

I made a separate request for the first 197 days of the PM's diary (29 weekly view pages of his diary), overlapping the 100 day request of Mizen.

In both case the requests were refused on the basis that processing them "would unreasonably divert" staff resources and also unreasonably interfere with Mr Albanese's work. They were decisions that flew in the face of the Full Federal Court in *Attorney-General v Honourable Mark Dreyfus [2016] FCAFC 119* that determined it was not an unreasonable diversion of resources for (then) Attorney-General Brandis' office to process 237 days of the (then) Minister Brandis' diary with 17 staff.

Prime Minister Albanese has about 55 staff members in his office. The two requests knocked back by PM&C fit well within the bounds of the Full Federal Courts decision.

The Mizen request is now in the AAT, while I have asked to be joined to the proceedings. As well as denying public access to information that should be in the public domain, significant AAT and Australian Government Solicitor resources will be consumed on a decision, which by the doctrine of *stare decisis*[1] will almost certainly see the AAT overturning PM&C's decision.

General observations

Considering decision making across a very large number of FOI applications, a common theme is risk aversion and timidity on the part of many FOI decision makers, especially when responding to applications for documents that may have political sensitivity.

FOI decision makers are generally not overtly political in their handling of decisions (though some clearly do trim their sails according to the direction of the political wind), but many see the release of information as potentially risky – not to the national interest, but in terms

[1] Stare decisis is the legal doctrine of determining points in litigation according to precedent. It brings consistency and predictability to the application of the law.

of political blowback and anger from Ministers and Departmental Senior Executives. In these circumstances delay, excessive and unjustified redactions and reliance on lengthy review processes to duck shove responsibility are commonplace.

Inquiry Recommendation

It is recommended (3) the inquiry calls a selection of decision makers and hear from them, in camera, as to the challenges and pressures they face at the FOI front line.

Recommendations

It is recommended (4) that all FOI officers receive training from a properly resourced Office of the Australian Information Commissioner.

It is recommended (5) that successful appeals against an FOI decision be recorded on a decision maker's personal and considered as part of future performance assessments.

IC Reviews

An FOI Black Hole

When people are dissatisfied with an Agency or Minister's original FOI decision that can make an application to the Information Commissioner to review it.

Unfortunately, the Office of the Australian Information Commissioner is an FOI black hole. Review requests enter and don't ever come out (in a useful time frame).

At Budget Estimates the Information Commissioner laid out the situation in terms of the number of reviews still on foot from various years.

- 2018 - 34 matters
- 2019 - 172 matters
- 2020 - 310 matters
- 2021 - 451 matters
- 2022 - 702 matters
- 2023 - 391 matters

The number speak for themselves.

Resources

See the next heading.

Processing Mess

The problems at the OAIC are not just ones related to resources. The Information Commissioner is her own worst enemy.

There is a common law obligation for the Information Commissioner to come to the correct of preferrable decision when she conducts her reviews, but there is statutory requirement that she must do so in a timely fashion (as per 55(4)(c) FOI Act). The Information Commissioner seems to adopt an almost 'High Court' view in her decision making (except the High Court is faster) rather than properly balancing the common law and statutory requirements, also recognising that she is the first level of independent review.

I will come to a proposed method to properly triage and deal with IC review requests shortly, but before doing so I lay out nine issues of processing mess that were fully evidenced and put before the Federal Court in *Patrick v Australian Information Commissioner (No 2) [2023] FCA 530*.

1. There are very long periods of delay in IC reviews as matters wait for allocation to a review officer, long periods of inactivity without explanation, and a number of occasions where changes in personnel assessing an application cause delay. This is mainly, but not exclusively, a resourcing issue.
2. Numerous delays arise from repetitive extensions of time for agencies to comply with informal "requests" (in contrast to formal "notices") and these are amplified by numerous failures to apply good case management procedures to follow up (either adequately, or at all) on previous requests or notices issued to the relevant agency, or on due dates previously granted by extension.
3. There are internal OAIC decisions to exercise particular powers to issue information gathering notices, followed by failures to do so once the internal OAIC decisions have been made.
4. There are instances of consideration of whether to exercise the power under s 54W(b) FOI Act (decision not to undertake an IC review where desirable that the decision be considered by the AAT), but the power is not exercised.
5. There have been indications from agencies that they will make a s 55G revised decision, followed by the Information Commissioner waiting for the revised decisions for extended periods with little to no progress towards a decision in the meantime. Section 55G(2) FOI Act requires the Information Commissioner to deal with the revised decision in place of the original decision, but there is no obligation on the Information Commissioner to simply wait … and wait … and wait for the revised decision to be made, nor to be notified when an agency indicates it is considering revising its decision, or intends to do so.
6. The Information Commissioner employs an overly convoluted "procedural fairness" process which involves giving rights of response to the agency and the applicant repeatedly, such that the process becomes circular. The procedure adopted in this respect goes beyond the requirement to ensure that each party is given a reasonable opportunity to present its case and is overly technical and time consuming. Submissions are provided by applicants together with the IC Review application. Agencies provide submissions in response to s 54Z requests. These are provided to the applicant and further submissions invited. The applicant's further submissions are provided to the agency for response. It's like a long grand slam tennis match without seeded players or any excitement.

7. The distinction between "procedural fairness steps" and "alternative dispute resolution methods" used by the Information Commissioner is by no means clear.
8. Agency makes submission which may include new grounds of exemption that require further consideration or clarification.
9. Review process can take so long that events overtake the application.in some cases the information Commissioner failed to obtain the document which were the subject of the IC review in a timely manner, that documents become "lost" as a result of a change of Minister.

This is a bureaucratic mess of shameful proportions that often serves to deny the purpose of the FOI Act.

Solutions

Assuming the significant under-resourcing issue is addressed, there are ways to illuminate the processing mess highlighted above.

The process undertaken by the Information Commissioner can be contrasted with the procedure undertaken by the South Australian Ombudsman under s 39 of the Freedom of Information Act 1991 (SA) whereby:

1. An application is received by the Ombudsman.
2. Upon an application being made, submissions and documents are sought from the relevant agency.
3. When these are received, a provisional decision is prepared by the Ombudsman and provided to the parties with an invitation to make submissions.
4. Upon considering the parties' submissions, the Ombudsman finalises the decision.

The process takes about 4 months.

To give an idea of the brutal but effective approach taken by the South Australian Ombudsman, I lay out some paragraphs from a provisional decision.

32. *That said, although I must accept the broad application of clause 1(1)(e), the agency still bears the onus of placing the material required to justify its determination before me.[8] Insofar as the agency has relied upon clause 1(1)(e), this includes providing evidence that there has been a relevant deliberation or decision of Cabinet, and that the documents contain information concerning that deliberation or decision.[9]*
33. *In its determination the agency has simply relied upon the wording of clause 1(1)(e) and no additional information has been provided in either the internal review determination or additional submissions to my Office. As such, I can only rely on the contents of the documents to conduct my assessment. As it appears that the majority of the documents would pre-date a relevant deliberation or decision of Cabinet if, and the agency has not provided any evidence of a deliberation or decision having actually occurred, I cannot be satisfied that clause 1(1)(e) is applicable.*
34. *Whilst I can see that some documents, for example document 3, anticipated a Cabinet decision being made by way of noting, there is insufficient information available to me to conclude that the decision did in fact eventuate.*

35. *Accordingly, I am not satisfied that the agency had provided sufficient information for me to confirm any exemption on the basis of clause 1(1)(e). That said, I acknowledge that there is a clear relationship between many of the documents and Cabinet generally, and therefore foreshadow to the applicant that I may be persuaded to determine otherwise based on the agency's response to this provisional determination.*

…

43. *Having reviewed the relevant documents, it is unclear how any of the effects anticipated by subclauses 4(2)(a)(iii), (iv) and (v) could reasonably be expected to eventuate from their disclosure. Similarly, it is not clear to me why disclosure would be contrary to the public interest noting that it is unclear why disclosure would prejudice the 'safety of the community'.*
44. *Should the agency wish to maintain this claim of exemption, it will need to provide further submissions specifically identifying how the requirements of each subclause is met, and how disclosure would be contrary to the public interest when weighed against the public interest in disclosure. The submissions should specifically relate to the contents of the documents.*

…

62. *The agency determined that documents 12-20 are exempt on the basis of clause 16(2), however it is again noted that in its determination the agency has copied the submissions of the consulted agency verbatim, and I am mindful that those submissions were provided in relation to document 12 only.*
63. *As with clause 9(1), the agency has provided no submissions of its own in support of clause 16(2), nor has it explained why the submissions from Renewal SA regarding document 12 can also be applied to documents 13-20.*

…

65. *I accept that the purchase of land for government functions is a commercial activity. I also accept that, in conducting this activity, Renewal SA will find itself in competition with other prospective buyers of land. That said, I am not satisfied that the disclosure of document 12 would prejudice that competitiveness.*

…

69. *The FOI Act requires agencies to give reasons for refusing access to requested documents. In my view, this requires an agency to link the exemption claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents.*
70. *In this case the agency has provided a brief and vague explanation of each exemption clause relied upon and has repeated that explanation verbatim for each document. In my view this is not sufficient to fulfil the requirements of section 48.*
71. *Further, the submissions in support of clause 9(1) and 16(2) have been copied verbatim from the consultation response from Renewal SA. It is unclear whether the agency gave any independent consideration to those exemption clauses. Whilst I accept that an agency can be persuaded by the response from an interested party, ultimately the obligation remains with the agency to make its own determination and justify that determination accordingly.*
72. *I also note that although Renewal SA was only consulted about document 12 and submitted that only part of the document was exempt, the agency has applied that*

reasoning to the entirety of documents 12-20. Again, whilst I would expect the agency to form its own view which may not be consistent with that of an interested party, I am concerned that the agency took a substantially more restrictive approach than Renewal SA but declined to provide its own reasons for doing so.

73. *I take this opportunity to remind the agency that section 20(4) of the FOI Act requires that the agency turn its mind to whether granting partial access to a document is practicable and desired by the applicant.*

Inquiry Recommendation

It is recommended (6) the inquiry calls the South Australian Ombudsman to hear of his process to deal with FOI reviews in a timely fashion.

Recommendations

It is recommended (7) the Information Commissioner should engage in the triage and processing manner described (and depicted) immediately below

It is recommended (8) that, where a strong precedent exists, a quick decision should be made in accordance with the decision.

It is recommended (9) that, where a relatively simple matter is received, the Information Commissioner should adopt a quick and brutal South Australian Ombudsman style review.

It is recommended (10), where a matter is complex, it be referred to the AAT using section 54W(b) of the FOI Act.

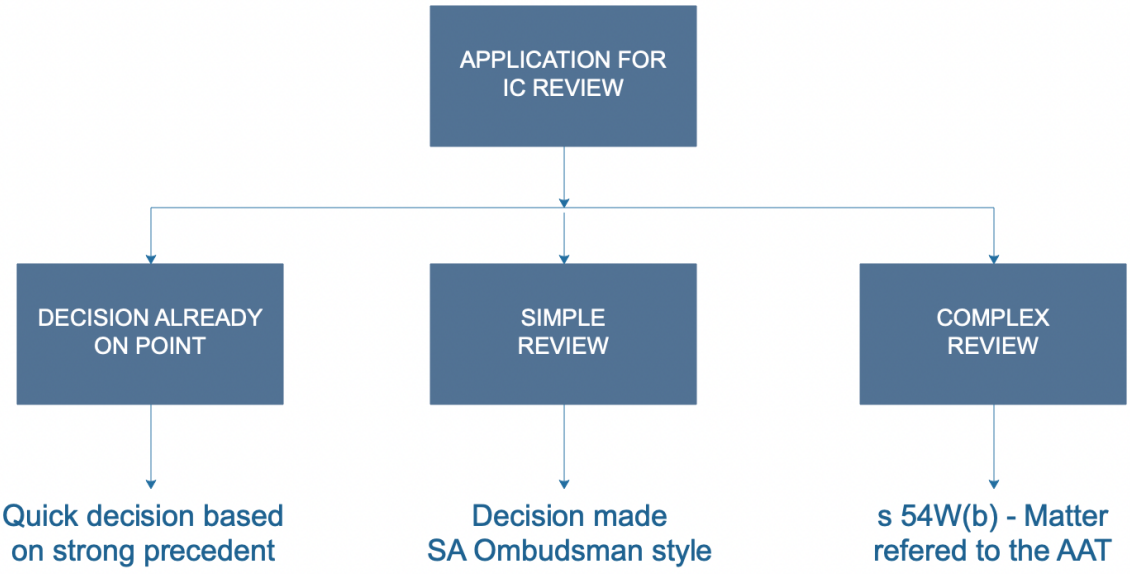

Figure 2 – FOT Triage for Efficient Processing

Resourcing for responding to FOI applications and reviews

The OAIC has had a dramatic increase in the number of IC review applications with no funding increases. A child would understand that this is a recipe for disaster; so too would a government not interested in transparency. One can only conclude that the present deplorable situation has arisen as a consequence of the deliberate policy choices of successive governments.

Recommendation

It is recommended (11) the FOI function of the Office of the Australian Information Commissioner receive a significant funding boost – sufficient to deal with the current backlog and then the ongoing number of FOI review applications received.

The creation of a statutory time frame for completion of reviews

Section 55(4)(c) of the FOI Act required the Information Commissioner to conduct the IC review in as timely a manner as is possible. This has not been occurring.

Recommendation

It is recommended (12) that a statutory time frame is established for conducting an IC review (that is not referred to the AAT under s 54W(b) of the FOI Act). An approach, as is the case for the Information Commissioner in NSW, should be to place a three month time limit for decision making after the OAIC has received all the necessary information to conduct the review.

Appearance

I would be happy to appear before the Committee if it would be of further assistance.