

To: Committee Secretary

Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

legcon.sen@aph.gov.au;

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CommonwealthFOI2023/Terms_of_Reference

Author Information

Dr A.J. George, College of Law, School of Business and Law, Central Queensland University, focuses on contracts and regulatory structures that incentivise innovation in R&D partnerships. Drawing on her expertise in systems thinking and prior legal practice experience in intellectual property, technology licensing and competition law, her work targets drivers best designed to grow collaborative cultures in Australia through shaping frameworks that achieve better outcomes.

Professor J. Tarr, QUT Faculty of Business & Law, is a commercial law and emerging technology regulation specialist. As a complex contracts specialist with particular expertise in risk management, insurance and consumer protection, her research focusses on innovation, effective regulatory frameworks and best practice contracting structures to support future enterprise targets. With a strong law reform and comparative law background, her research focuses on driving best outcomes through appropriate information disclosure, minimisation of overprocessing and red tape, and efficiency enhancement in risk allocation.

Terms of Reference

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.

To The Committee Secretary and Members of the Committee

A. Delays in review of FOI appeals

As academic researchers with experience in seeking FOI disclosure for purposes of informing background considerations and dynamics as to how particular policy frameworks have been devised, we are familiar with the issue of time delays, undue road blocks and the impact limited (and subsequently depleted) resourcing has created for the FOI Office and its staff. Rather than add further to the already well documented mountain of evidence around one year+ delays procuring

basic background documents represents¹ – standardly our experiences to date – we support the broadly reported incidents as documented by the media, academia and in litigation to date.

Such delays necessarily undermine the transparency, accountability and fairness cornerstone principles of our system. Beyond this, however, as academic researchers we find failures in this respect frequently undermine our capacity to track and assess historically the efficacy of particular policy approaches. This in turn has flow on impact on the capacity of this sector to contribute meaningfully to developing new options in the future.² Given the public investment into expertise generation in this sector, it, in our opinion, represents an often undervalued loss of resources otherwise available to helping shape Australia's policy futures.

B. Resignation of the Commonwealth Freedom of Information Commissioner and the resulting impact

Former Commissioner Hardiman KC's appointment to this role was strongly welcomed in the wake of the seven year vacancy that followed Abbott government budget and financing cuts. With the OAI's short history from 2010 on having commonly been described as 'rocky' in relation to ongoing budget cut backs, reallocations and staffing challenges,³ and financial and staffing frameworks before this time equally subject to disconcertingly regular concern and review,⁴ it was hoped this appointment flagged a new approach. Instead, it has merely underscored the non-viability of a statutory framework that, through budget lines for resourcing, is a de facto mechanism for governments of the day to control disclosure timelines.

The recently announced return to the three commissioner model along with the May 2023-24 Federal Budget funding uplift of an additional \$17.8m for 2023-24 financial year and \$44.3m to support the OIAC privacy agenda over the following four years is of course a step forward. This said, as funds are tagged for privacy activities – including notably the substantial workload notifiable data breaches have generated to date and will no doubt continue to create in the wake of exponentially

¹ Australia's FOI backlog: 587 cases unsolved three years on, Knaus, C. The Guardian, 21 March 2023; Delay and Decay: Australia's Freedom of Information Crisis, The Centre for Public Integrity, 2022; REDACTED, Your Right to Know, Crikey 8 part series, 2023 <https://www.crikey.com.au/topic/redacted-your-right-to-know/>.

² See, for example, *Forty Years of Freedom of Information: Accountability, Policymaking and the National Innovation and Science Agenda*. (2020) Public Law Review, 31(2), pp. 189-211. (George, A, Tarr, J. et al – available at <https://eprints.qut.edu.au/202742/>; [A case study in innovation policymaking: standard contracts as a tool to improve university-industry collaboration](#), (2023) Journal of Science & Technology Policy Management (George, A., Tarr, J, advance electronic release 9 May 2023).

³ See notes 1 and 2 above: *Forty Years of Freedom of Information: Accountability, Policymaking and the National Innovation and Science Agenda*. Public Law Review, 31(2).

⁴ See, for example, Open Government: a review of the federal Freedom of Information Act 1982, Australian Law Reform Commission 77 (1995) <http://www.austlii.edu.au/au/other/lawreform/ALRC/1995/77.htm>; 'Needs to Know': Report on Investigation of administration of FOI in Commonwealth Agencies, June 1999, https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/26269/investigation_1999_03.pdf; Scrutinising Government: Administration of the Freedom of Information Act 1982, March 2006 (McMillan, J., Report by the Commonwealth Ombudsman).

improving cyber hacking systems – categorisation of these steps as ‘too little too late’ will prove accurate.⁵

C. Resourcing for responding to FOI applications and reviews; the creation of a statutory time frame for completion of reviews

Why this is the case becomes particularly clear in the context of the recent *Patrick* Federal Court judgment.⁶ In *Patrick*, Federal Court intervention was sought under s 7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to specified cases that were substantially outstanding (up to 3+ years). Judicial orders were sought, as per the text below,⁷ absent a formal time frame specified in the Act for a determination, ‘reasonableness’ of the delay becomes the relevant standard. In making this determination, the Court therefore took into account in each instance the severe staff shortages and resourcing constraints, observing that ‘an unquestionable shortage of resources’ for the volume of work before the body was occasioning delay and driving out the timelines. This, the Judge concluded, meant the delay was reasonable – and that ‘inappropriate judicial interference with the decisional freedom of an executive body’ would result if orders were issued. ‘Whether the situation is acceptable is not a question for the court to decide’ – but rather fell to the Commissioner to resolve as to how s/he used his or her resources – and how as the bottom line the Commonwealth saw fit to legislate funding.

Against this reasoning and the current statute’s framing, we therefore lend strong support to the proposition that a pressing need exists for a considered overhaul of the FOI framework – and resulting budget and staffing capacities that flow from this.

Absent a formal trigger point being established in the Act which in turn attracts penalties for non-compliance, continuation of the ‘unreasonable delay’ standard will ensure the Office remains subject, as commentators have standardly referred to it, to productivity constraints through ‘starving’ of FOI resources.

Commissioner Hardiman’s unwillingness to further enable this dynamic is therefore to be applauded. The capacity of the Albanese government to rectify this and restore the critical role transparency and timely access to what are publicly owned information documents will be something that requires close scrutiny going forward.

Recommendations:

⁵ See Attachment 1 for an extract from the Federal Court *Patrick v Australian Information Commissioner* judgment as to the nature of the staffing needs and challenges the Court considered. Per paras 82-92, *Patrick v Australian Information Commissioner* [2023] FCA 530

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0530>.

⁶ *Patrick v Australian Information Commissioner* [2023] FCA 530

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0530>

⁷ **7 Applications in respect of failures to make decisions**

(1) Where:

(a) a person has a duty to make a decision to which this Act applies;
(b) there is no law that prescribes a period within which the person is required to make that decision; and
(c) the person has failed to make that decision;

a person who is aggrieved by the failure of the first-mentioned person to make the decision [may apply to the Federal Court](#) or the Federal Circuit and Family Court of Australia (Division 2) [for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay](#) in making the decision.

In the face of the recent major privacy breaches of trusted institutions that have impacted so many Australian citizens, we believe it timely:

- 1) To substantially reconsider the critical importance privacy, information and access to policies plays in this country – and what resources will be necessary to deal with this across the next decade.
- 2) To establish at a minimum a statutory time frame for completion of reviews so as to ensure financial resourcing needs are provided to support FOI requirements and that accountability in real terms is established for non-compliance.

Conclusion:

More than four decades after the Freedom of Information Bill 1978 (Cth) made Australia the first Westminster style government globally to enact FOI legislation. Supporting and effectively using this critical office remains an ongoing challenge. In the absence of a Federal Bill of Rights, Australia's integrity bodies including the FOI Commissioner, Privacy Commissioner, Information Commissioner and Ombudsman Offices discharge critical obligations in driving accountability and fairness in the operation of the executive government. Further, as Australia's former High Court Chief Justice, Sir Anthony Mason AC KBE, observed '*... elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for the decisions and actions in government to inform the people so that they make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely government by the people.*'⁸

Ensuring therefore that FOI legislation is adequately drafted and its associated organisations are sufficiently resourced is core to short and long term efficacy. Given the well documented backlogs,⁹ funding shortages and political resourcing dynamics that currently undermine its efficacy – and indeed the regular cycles that regularly repeat these dynamics and resultant debates¹⁰ – the opportunity to entrench more permanent solutions to preserve system efficacy should be embraced.

Thank you for your consideration of this matter

A.J. George, J. Tarr

Attachment 1

As per Patrick v the Information Commissioner (2023), Wheelahan, J. – extracted in relation to establishment of unreasonable delay and operational challenges within the office.

The resources of the Information Commissioner

86 The Office of the Australian Information Commissioner is funded through an annual appropriation as part of the Commonwealth Budget process. The Office is required to undertake its functions with the funding allocated to it annually, and within the bounds of the average staffing level cap fixed for the Office as part of the Budget.

⁸ *Australian Capital Television Pty v Commonwealth* (1992) 108 A.L.R. 557.

⁹ Australia's FOI backlog: 587 cases unsolved three years on, Knaus, C. The Guardian, 21 March 2023; Delay and Decay: Australia's Freedom of Information Crisis, The Centre for Public Integrity, 2022; REDACTED, Your Right to Know, Crikey 8 part series, 2023 <https://www.crikey.com.au/topic/redacted-your-right-to-know/>;

¹⁰ See note 2, above.

87 Each year, the Office receives funding from the Commonwealth which is not tied to a specific purpose or function, but which is provided to enable the Office to perform its ongoing privacy, FOI, and Information Commissioner functions generally. This funding was referred to in the evidence as *base operating funding*. The base operating funding is allocated across all of the branches of the Office to enable them to perform their various functions. Additional funding may be received from the Commonwealth for specific purposes or functions, which was described as *specific funding*.

88 For the financial years ending 30 June 2017 through to 30 June 2019 the Office received ongoing base operating funding in the amount of approximately \$8.2 million to \$8.4 million. For the financial years 2020 to 2022 the ongoing base operating funding increased to approximately \$9.5 million per year as a result of specific funding relating to particular privacy functions being re-allocated to the base operating funding allocation, with the relevant privacy functions becoming part of the ongoing functions of the Office.

89 Since the 2018-19 financial year, the Office of the Australian Information Commissioner has received a number of funding allocations for the purpose of particular privacy functions. Although the total appropriated to the Office has therefore increased since 2016-17, that primarily reflects grants of specific funding in that period for additional, specific privacy functions conferred on the Office.

90 Since 1 July 2016, the only specific funding allocated to the Office of the Australian Information Commissioner for its FOI functions was \$3.9 million over four years and ongoing (approximately \$1 million per year), which was allocated in the 2021-22 Budget for the appointment of an FOI Commissioner, one staff member at SES 1 level, which is a role that is part of the Office's executive, and two support staff. As a result of this additional funding, the acting FOI Commissioner was appointed in August 2021 and the full time FOI Commissioner commenced in April 2022. In addition, the additional funding permitted the appointment of the Assistant Commissioner (Freedom of Information) and two additional review advisers in the FOI branch to help manage IC review applications. Other than the specific funding allocated in the 2021-22 Commonwealth Budget for the appointment of an FOI Commissioner and three additional staff to assist with the FOI functions, since 1 July 2016 the Office has not received any increase in its funding (base or specific) to enable more staff to be allocated to undertake IC reviews.

91 In her affidavit, Elizabeth Hampton, a Deputy Commissioner of the Office, deposed that she had previously undertaken work to estimate the number of additional staff that the FOI branch would require in order to be able to respond to the increased number of IC reviews received each year. In October 2019, Ms Hampton estimated that the Office would require an additional nine full time equivalent staff (in addition to the 19 full time equivalent staff in the team at the time) to process the IC reviews on hand at that time on an assumption that the number of IC reviews that were expected to be received in the 2019-20 financial year would be the same as the number received in 2018-19 (928). In October 2020, based on an assumption that the number of IC reviews received by the Office would continue to increase by 15% each year on the number received in the 2019-20 financial year, Ms Hampton estimated that the FOI branch would require a total of 35 full time equivalent staff in the 2021-22 financial year and 28 full time equivalent staff in the 2022-23 financial year to manage the existing caseload of IC reviews on hand, as well as the number of IC reviews expected to be received in the future over that period. The assumption that the number of IC reviews received by the Office would continue to increase by 15% each year in 2021-22 and 2022-23 proved to be inaccurate because in 2021-22, the Office received 1,955 applications for IC review, which was approximately 60% more than the number received in the previous financial year.

92 In the annual report of the Office of the Australian Information Commissioner for the 2021-22 year, the Information Commissioner stated that during the year the work of the Office continued to increase in volume and complexity. In relation to the Office's complaint and review role, the Commissioner referred to the significant increase of 63% in applications for IC review and a 42% increase in FOI complaints. The Commissioner stated that while each year the Office finalised

more IC review applications, it continued to face significant challenges. In the same report, the FOI Commissioner referred to the increase in demand for FOI regulatory services, including a significant increase in the number of IC reviews and FOI complaints received year on year.