



Law Council
OF AUSTRALIA

The operation of Commonwealth Freedom of Information laws

Senate Legal and Constitutional Affairs References Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

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Introduction

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee (**Committee**) in response to its inquiry into the operation of Commonwealth Freedom of Information (**FOI**) laws (**Inquiry**).
2. Freedom of access to government information is a fundamental aspect of the rule of law, and is recognised by Article 19 of the International Covenant on Civil and Political Rights,¹ which protects the freedoms of opinion and expression. In this regard, the United Nations Human Rights Committee states:²

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.

3. Such access is facilitated in Australia by the *Freedom of Information Act 1982* (Cth) (**FOI Act**), designed to ensure open and accountable government by providing members of the public with a statutory and enforceable right of access to documents in the possession of government departments, agencies, and ministers.³
4. The Law Council is of the strong view that the transparency afforded to the FOI scheme, through the FOI Act, is critical to the effective operation of the administrative law system and, more broadly, to the integrity of Australia's democratic institutions.⁴
5. Section 3 of the FOI Act expresses a clear legislative objective to give the Australian community access to information held by the Government of the Commonwealth, by requiring agencies to publish the information and providing for a right of access to documents.⁵ It also identifies the underlying Parliamentary intentions as:
 - contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making;⁶
 - increasing scrutiny, discussion, comment and review of the Government's activities;⁷ and

¹ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

² Human Rights Committee, *General Comment No. 34: Article 19 – Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).

³ Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC), *Open Government – A Review of the Federal Freedom of Information Act 1982* (Report 77, December 1995) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC77.pdf>>..

⁴ Law Council of Australia, *Performance and integrity of Australia's administrative review system* (Submission, 7 December 2021) <<https://lawcouncil.asn.au/publicassets/b3de0516-505d-ec11-9445-005056be13b5/4137%20-%20Inquiry%20into%20administrative%20review%20system.pdf>> 37.

⁵ *Freedom of Information Act 1982* (Cth) s 3(1).

⁶ *Ibid* s 3(2)(a).

⁷ *Ibid* s 3(2)(b).

- increasing recognition that information held by the Government is to be ‘managed for public purposes, and is a national resource’.⁸
6. In addition, subsection 3(4) provides that the functions and powers provided by the FOI 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’.
 7. Despite the codification of these objectives and intentions through the *Freedom of Information Amendment (Reform) Act 2010* (Cth) (**FOI Reform Act**), the Law Council is concerned that Australia’s FOI regime continues to be undermined in practice by significant challenges in accessing information. These challenges arise due to bureaucratic and administrative delays, excessive document redaction, under-resourcing, and an overreliance on statutory exemptions—inconsistent with the intent behind the FOI Act and broader community expectations.
 8. In effect, these systemic practices shield information from public scrutiny, restrict transparency of decisions made by Commonwealth agencies, and limit timely and informed public discourse on government policies. To this extent, the Law Council welcomes the establishment of the Inquiry and any subsequent consideration of reforms to Australia’s FOI laws to ensure their effectiveness in promoting open and accountable governance.
 9. This submission addresses each substantive term of reference before making the following recommendations to improve Australia’s FOI system:
 - The Office of the Australian Information Commissioner (**OAIC**) must be properly resourced to finalise Information Commissioner reviews (**IC reviews**) in a timely way, and to assist agencies to build a culture of disclosure.
 - The Government and its agencies must be properly supported to carry out their obligations lawfully under the FOI Act, and to implement the administrative access scheme more extensively.
 - Consideration should be given to removing, or otherwise amending, paragraph 11C(3)(c) of the FOI Act in relation to publication of released information.
 - Consideration should be given to relocating the Information Commissioner’s review function, potentially to the new body replacing the Administrative Appeals Tribunal (**AAT**).

Terms of reference

The resignation of the Commonwealth FOI Commissioner and the resulting impacts

10. The *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**) established the OAIC to oversee the operation of the FOI Act and the *Privacy Act 1988* (Cth), and to exercise strategic functions concerning government information management.⁹ The AIC Act provided that the OAIC would house the existing position of the Privacy Commissioner in addition to the new roles of the Australian Information Commissioner and FOI Commissioner (together, **the Commissioners**) within it.

⁸ Ibid s 3(3).

⁹ *Australian Information Commissioner Act 2010* (Cth) s 4.

11. Appointed under subsection 14(2) of the AIC Act, the FOI Commissioner is responsible for the effective management of FOI functions, including:¹⁰

- promoting awareness and understanding of the FOI Act and its objects;
- conducting reviews of FOI decisions made by agencies and Ministers;
- compliance activities, including monitoring and undertaking investigations; and
- reporting on FOI matters.

Dr James Popple was appointed the inaugural Commonwealth FOI Commissioner on 1 November 2010.¹¹ In the interest of full disclosure, it is noted that Dr Popple is now the CEO of the Law Council.

12. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010 (Cth) (**FOI Reform Bill**) provided that:¹²

... the Australian Information Commissioner, supported by the FOI Commissioner, will act as an independent monitor for FOI and will be entrusted with a range of functions designed to make the Office of the Australian Information Commissioner both a clearing house for FOI matters and a centre for the promotion of the objects of the FOI Act.

13. In May 2014, the Australian Government announced as part of its 2014–15 Federal Budget that it intended to abolish the OAIC and the positions of Information Commissioner and FOI Commissioner, with funding to cease by the end of that year.¹³ In October 2014, the Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth) (**FOI Amendment Bill**) was introduced, which sought to enable those changes.

14. Dr Popple resigned as FOI Commissioner in December 2014. The then Information Commissioner, Professor John McMillan AO, continued to exercise the FOI functions in the absence of an FOI Commissioner. In June 2015, Professor McMillan resigned, and the Privacy Commissioner, Mr Timothy Pilgrim, was additionally appointed as acting Information Commissioner in July 2015.¹⁴

15. While the OAIC's resources were severely depleted in preparation for its intended abolition, Senate crossbenchers were unwilling to pass the FOI Amendment Bill and it lapsed at the prorogation of the Parliament in April 2016.¹⁵ In May 2016, as part of the 2016–17 Federal Budget, the Government announced it would partially restore the funding of the OAIC, primarily to facilitate its privacy functions.¹⁶ Mr Pilgrim's

¹⁰ Attorney-General's Department, Freedom of Information Commissioner (Web Page, 2023) <<https://www.ag.gov.au/about-us/careers/statutory-appointments/freedom-information-commissioner>>.

¹¹ Office of the Australian Information Commissioner (OAIC), Freedom of Information Commissioner – James Popple (Web Page (Archived) 2014) <<https://web.archive.org/web/20140813033318/http://www.oaic.gov.au/about-us/who-we-are/our-executive/freedom-of-information-commissioner-james-popple>>.

¹² Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 1.

¹³ Richard Mulgan, The slow death of the Office of the Australian Information Commissioner, *The Sydney Morning Herald* (Online, 26 August 2015) <<https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>>.

¹⁴ *Ibid.*

¹⁵ Richard Mulgan, The slow death of the Office of the Australian Information Commissioner, *The Sydney Morning Herald* (Online, 26 August 2015) <<https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>>.

¹⁶ Paris Cowan, OAIC saved from dissolution, *IT News* (Online, 3 May 2016) <<https://www.itnews.com.au/news/oaic-saved-from-dissolution-418971>>.

appointment as Information Commissioner and Privacy Commissioner was made substantive in September 2016.¹⁷

16. Upon Mr Pilgrim's retirement in March 2018, Ms Angelene Falk was appointed acting Information Commissioner and Privacy Commissioner, which became substantive appointments in August 2018.¹⁸ The office of FOI Commissioner remained vacant until Mr Leo Hardiman PSM KC was appointed on 22 March 2022, commencing his five-year-term on 19 April.¹⁹ The Law Council welcomed this appointment and the corresponding funding, noting:²⁰

Considering the importance of FOI, the Law Council is pleased the role of FOI Commissioner has been permanently filled for the first time in nearly eight years.

The Law Council notes that funding was allocated in the 2021–22 Budget to support appointment of the FOI Commissioner and a dedicated team of support staff, which will provide additional capability and capacity and is an important step towards ensuring effective, quick and independent responses to information requests.

17. On 5 March 2023, Mr Hardiman resigned as FOI Commissioner, effective from 19 May 2023.²¹ In announcing his decision, Mr Hardiman publicly expressed concerns and frustration about chronic delays in the FOI system, the consequences for government transparency, and his lack of power to bring about change.²² He wrote:

Further changes are ... necessary in my view to ensure that the timeliness of IC reviews and, consequently, access to government-held information, is increased. The making of those changes is not within the powers conferred on me as FOI Commissioner. I will not be able, in the absence of those changes, to increase timeliness of IC reviews and access in a way which best promotes the objects of the FOI Act. I have accordingly decided the most appropriate course is to resign my appointment.²³

18. Ms Toni Pirani has since been appointed Acting Freedom of Information Commissioner,²⁴ and applications for the position of FOI Commissioner closed on 26 May 2023.²⁵

¹⁷ Paris Cowan, Pilgrim permanently appointed Information Commissioner, *IT News* (Online, 28 September 2016) <<https://www.itnews.com.au/news/pilgrim-permanently-appointed-information-commissioner-438416>>.

¹⁸ OAIC, Who we are (Web Page, 2023) <<https://www.oaic.gov.au/about-the-OAIC/who-we-are>>.

¹⁹ OAIC, FOI Commissioner appointed to OAIC (Media Release, 22 March 2022) <<https://www.oaic.gov.au/newsroom/foi-commissioner-appointed-to-oaic>>.

²⁰ Law Council of Australia, Appointment of Freedom of Information Commissioner (Media Release, 23 March 2022) <<https://www.lawcouncil.asn.au/media/media-statements/appointment-of-freedom-of-information-commissioner>>.

²¹ James Massola, FOI Commissioner quits after less than a year in the job, *Sydney Morning Herald* (Online, 6 March 2023) <<https://www.smh.com.au/politics/federal/foi-commissioner-quits-after-less-than-a-year-in-the-job-20230306-p5cptq.html>>.

²² Leo Hardiman PSM KC, Statement regarding resignation of my appointment as Commonwealth Freedom of Information Commissioner (LinkedIn Post, 5 March 2023) <https://www.linkedin.com/posts/leo-hardiman-psm-kc-78123a123_statement-regarding-resignation-of-my-appointment-activity-7038267602107854848-1n85>.

²³ *Ibid.*

²⁴ OAIC, Senate Estimates opening statement (tabled) May 2023 (Web Page, 23 May 2023) <<https://www.oaic.gov.au/newsroom/senate-estimates-opening-statement-may-2023>>.

²⁵ Attorney-General's Department, Freedom of Information Commissioner (Web Page, 2023) <<https://www.ag.gov.au/about-us/careers/statutory-appointments/freedom-information-commissioner>>.

19. The Law Council is concerned that Mr Hardiman's resignation, after less than one year in the role, is a symptom of an FOI regime that is unable to properly give effect to its legislative objectives. Specifically, and as canvassed below, the FOI scheme's functionality has been undermined by systemic issues, in which the under-resourcing of the OAIC and delays at the agency level are heavily contributing factors.

Delays in the review of FOI appeals

IC review system

20. Part VII of the FOI Act provides for the review of IC reviewable decisions: that is, an agency or Minister's decision to refuse access or grant access in response to an FOI request:
- In the case of a decision to refuse access, an IC reviewable decision is the initial decision; a decision on internal review; or a decision refusing to allow a further period for making an application for internal review of an access refusal decision.²⁶
 - In the case of a decision to grant access, an IC reviewable decision is the initial decision, or a decision on internal review.²⁷
21. An IC review officer from the OAIC will manage the IC application for review, including undertaking the preliminary assessment. However, only one of the Commissioners can make the final decision on a review.²⁸
22. Section 57A provides for an application to be made to the AAT for review of an IC reviewable decision. The Information Commissioner can also decline to undertake a review if the Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT, in which case the applicant may seek review by the AAT of that decision.²⁹

Background

23. In 1995, the Australian Law Reform Commission (**ALRC**) and Administrative Review Council (**ARC**) produced the joint report, *Open Government: a review of the federal Freedom of Information Act 1982*.³⁰ In relation to external reviews of FOI decisions, the report recommended that the AAT should remain the sole external determinative reviewer of FOI decisions.³¹
24. Despite that recommendation, the system of Information Commissioner review was introduced when the AIC Act and the FOI Reform Act came into force in 2010, and has now been in operation for over a decade.

²⁶ *Freedom of Information Act 1982* (Cth) s 54L.

²⁷ *Ibid* s 54M.

²⁸ *Australian Information Commissioner Act 2010* (Cth) ss 10, 11, 12, 25(e).

²⁹ *Freedom of Information Act 1982* (Cth) ss 54W(b) and 57A(1)(b).

³⁰ ALRC and ARC, *Open Government – A Review of the Federal Freedom of Information Act 1982* (Report 77, December 1995) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC77.pdf>>.

³¹ *Ibid* 119 [Recommendation 84].

25. In his second reading speech for the FOI Reform Bill in November 2009, Mr Anthony Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade, said:³²

The establishment of an Information Commissioner and an FOI Commissioner, as independent officers, will address a long-standing lacuna in effective FOI administration. In addition to promotional, monitoring and guidance functions, the commissioners will directly participate in the process by reviewing access decisions made by agencies and ministers. Review of a decision by the Information Commissioner will not replace review by the AAT. A party can still apply for AAT review after the Information Commissioner review, if needed. Both forums will offer full independent merits review, unfettered by the limiting effects of conclusive certificates. Retaining an option of review by the AAT, an experienced review body, will be particularly important for highly contested FOI matters.

Information Commissioner review will be characterised by reduced formality and adversarial contest, with most applications determined on the papers. The commissioners will be able to dispose of an application where an agreement is reached between the parties or by determination if no compromise is reached.

Following public consultation on the exposure draft, the applicant will have the option of seeking an internal review or going directly to the Information Commissioner for review of an initial FOI decision. By making internal review optional, agencies should be encouraged to make the best possible access decision in the first instance.

Delays and backlogs

26. The Law Council understands that one of the persistent difficulties that has been faced in the performance of the IC review function has been the inability for decisions to be delivered in a timely way. At the most recent Senate Estimates hearings on 23 May 2023, Ms Falk agreed that 'delays in the system are affecting applicants' ability to get timely access to information'.³³
27. As elaborated on in its response to term of reference (c) below, the Law Council understands that delay may have already occurred at the agency level in the processing of an FOI request. Current wait times can exceed one year, and released material is often highly redacted. These delays at the agency level remain relevant to the effective operation of the IC review system.
28. The OAIC's 2021–22 Annual Report reports that 83 per cent of applications for IC review had been finalised within 12 months, and that the average time taken to finalise an IC review was 6.3 months.³⁴ However, the Law Council is aware that these figures do not tell the full story, and is concerned that these figures give the impression that contested IC reviews are determined within a similar timeframe. They are not. For example, the average timeframe, as reported by the OAIC in its Annual Report,

³² Anthony Byrne MP, Freedom of Information Amendment (Reform) Bill 2009 (Second Reading Speech, 26 November 2009) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-11-26/0021/hansard_frag.pdf;fileType=application%2Fpdf>.

³³ Angelene Falk, Evidence given to the Senate Legal and Constitutional Affairs Legislation Committee (Estimates, 23 May 2023) 119.

³⁴ OAIC, Annual Report 2021-22 (October 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf> 43.

includes reviews that have been withdrawn. In this respect, IC reviews that require an ultimate determination and reasons are reportedly taking much longer—as long as five years.³⁵

29. The Law Council acknowledges that the OAIC continues to experience a significant legacy workload of IC reviews which have accrued due to under-resourcing and increased demand for reviews.³⁶ Ms Falk provided evidence at Senate Estimates that, as at 22 May 2023, the OAIC had 2,060 IC review matters on hand, including:³⁷
- 34 matters where the review was lodged with the OAIC in 2018 (the earliest being 19 February);
 - 172 matters from 2019;
 - 310 matters from 2020;
 - 451 matters from 2021;
 - 702 matters from 2022; and
 - 391 matters from 2023.
30. Beyond these statistics, the Law Society of New South Wales and the Law Council's Administrative Law Committee have provided the following timeline of an actual FOI request, which is not atypical:
- **13 June 2018:** The FOI request was made.
 - **August 2018:** The FOI request had been modified and one responsive document had been identified. Access was refused.
 - **19 September 2018:** Access refusal was confirmed on internal review.
 - **18 October 2018:** The applicant applied for external IC review.
 - **12 May 2023:** The applicant was advised that the original decision was confirmed.
31. Regardless of the merits of the above request, the Law Council holds significant concerns over a four-and-half-year delay in the finalisation of an IC review process in relation to just one document. Such delays are unacceptable. They make a mockery of the transparency objectives in subsections 3(2) and (4) of the FOI Act, and undermine public confidence in the law and the processes of democracy and representative government.
32. In addition, these delays inevitably erode the value of any information eventually obtained through the FOI process. In some instances, delays have the same effect of refusing access—for instance, when there is a change of Minister before a decision has been made, and an argument arises that the document in question is not in the possession of the new Minister.³⁸
33. The Law Council recognises that the primary reason for the delays at the IC review stage is the lack of resources available to the Information Commissioner, FOI Commissioner, and Privacy Commissioner to perform this function. This may, in part, lie in the resources that need to be deployed when exercising the statutory functions

³⁵ Christopher Knaus, Australia's FOI backlog: 587 cases remain unresolved three years on, *The Guardian* (Online, 21 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/21/australia-foi-freedom-of-information-backlog-587-cases-unresolved-more-than-three-years>>.

³⁶ Angelene Falk, Evidence given to the Senate Legal and Constitutional Affairs Legislation Committee (Estimates, 23 May 2023) 120-127.

³⁷ *Ibid* 120.

³⁸ Angelene Falk, Evidence given to the Senate Legal and Constitutional Affairs Legislation Committee (Estimates, 23 May 2023) 119.

additional to conducting IC reviews (e.g. reviewing the operation in each agency of the information publication scheme).³⁹ However, the root cause appears to lie in the lack of time and assistance to dispose of IC reviews. More resources are clearly required if the Commissioners—especially the FOI Commissioner—are to perform their review function in a proper and timely manner.

34. The object of the review system introduced in 2010, so far as the IC review function is concerned, is to have a simpler and more efficient system. The review system was to be one that typically involved reviews being conducted on the papers, with a capacity to hold hearings only in unusual circumstances or after consideration of an application to do so, and with as little technicality and formality as possible.⁴⁰ Further, the Commissioner would be free to conduct an IC review 'in whatever way he or she considers appropriate'.⁴¹
35. The goals of simplicity, efficiency and speed have not been achieved and cannot be achieved if those making review decisions have inadequate resources. Adequate resources must be measured against the number of review applications and, the complexity of some of the reviews.
36. As Ms Falk stated in Senate Estimates on 23 May 2023, 'I share the view that additional resources are needed for FOI. I have sought to enable that to the extent that I can within my control.'⁴² She further explained that, in the context of the 2023–24 Federal Budget, she put to the Attorney-General's Department the need for additional resources and funding for the FOI functions of the OAIC, in addition to its privacy functions.⁴³ While the 2023–24 Budget contained dedicated funding for the OAIC to progress investigations and enforcement action in response to privacy and data breaches and enhance data and analytics capability, there does not appear to be similar funding to support its FOI responsibilities.

Resourcing for responding to FOI applications and conducting reviews

Delays in agencies' responses to FOI applications

37. Paragraph 15(5)(b) of the FOI Act requires that FOI requests be resolved 'as soon as practicable', but 'no later than at the end of the period 30 days after the day on which the request is received'. Given that the effect of delay is non-disclosure during the period of review, it is critical that agencies have adequate resourcing, governance and systems of accountability in place to ensure compliance with statutory timeframes for processing FOI requests.⁴⁴

³⁹ *Australian Information Commissioner Act 2010* (Cth) ss 7, 8, 10, 11, and *Freedom of Information Act 1982* (Cth) s8F

⁴⁰ Anthony Byrne MP, Freedom of Information Amendment (Reform) Bill 2009 (Second Reading Speech, 26 November 2009) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-11-26/0021/hansard_frag.pdf;fileType=application%2Fpdf>.

⁴¹ *Freedom of Information Act 1982* (Cth) s 55(2)(a).

⁴² Angelene Falk, Evidence given to the Senate Legal and Constitutional Affairs Legislation Committee (Estimates, 23 May 2023) 122.

⁴³ *Ibid* 122-123.

⁴⁴ OAIC, Department of Home Affairs' compliance with the statutory processing requirements under the *Freedom of Information Act 1982* in relation to requests for non-personal information (Commissioner-initiated investigation report, December 2020) <https://www.oaic.gov.au/__data/assets/pdf_file/0021/8562/department-of-home-affairs-cii-report-including-secretary-comments.pdf> 3.

38. However, the OAIC's 2021–22 Annual Report lists factors identified by agencies as impacting their ability to manage their FOI workloads, including:⁴⁵
- high staff turnover;
 - difficulty recruiting staff, particularly experienced FOI practitioners;
 - the onboarding and training of new FOI staff who may be in other geographical locations; and
 - the increased complexity and volume in the FOI request caseload.
39. In the experience of the legal profession, the speed with which FOI requests have been resolved has been falling. It is common to receive a response from an agency to an FOI request outside the statutory 30-day period. This is a breach of the Act. These observations are supported by data from OAIC's 2021–22 Annual Report:⁴⁶
- 30 per cent of all FOI requests determined in the 2021–22 financial year were not processed within the applicable statutory timeframe (compared with 21 per cent in 2019–20 and 17 per cent in 2018–19);
 - some agencies decided fewer than 50 per cent of FOI requests within the statutory timeframes, including Sport Integrity Australia (17 per cent) and the Department of Home Affairs (45 per cent);
 - 19 per cent of FOI requests were decided more than 90 days over the applicable statutory period (compared with 12 per cent in 2021–21, 10 per cent in 2019–20 and 2 per cent in 2018–19).
40. These delays have adverse consequences for individuals and Australia's FOI and administrative law frameworks more broadly. As noted by the OAIC:
- ... this decline in timeliness negatively impacts the rights of members of the public to access information, including individuals seeking their own personal information.*⁴⁷
41. In addition to this failure of Commonwealth agencies' to meet their statutory obligation to respond to an FOI request within 30 days, the Law Council has received reports that section 15AA of the FOI Act is also routinely breached by agencies, such as the Department of Home Affairs, by failing to notify an applicant of a request to extend the period of time to respond to an FOI request by 30 days. The Departments are breaching their statutory obligations without penalty. To the extent that this is occurring, at the very fundamental level the lack of communication regarding the timeframe to respond to a request compromises public confidence in administrative processes that fail to comply with its statutory obligations. This discourages individuals from engaging with the FOI system.

Quality of agency decision-making

42. The OAIC's 2021–22 Annual Report provides that the OAIC set aside 35 per cent of the 103 decisions it reviewed under section 55K of the FOI Act in that financial year

⁴⁵ OAIC, Annual Report 2021-22 (October 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf> 146.

⁴⁶ OAIC, Annual Report 2021-22 (October 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf> 146-148.

⁴⁷ Ibid 146.

and varied an additional 10 per cent of decisions.⁴⁸ This raises concerns about the quality of decisions made by agencies in response to FOI requests.

43. The Law Council recognises that the limited resources of agencies, particularly smaller agencies, can adversely affect the quality of decision making under the FOI Act. While the OAIC publishes guidance on its website consistent with its obligation under section 93A of the FOI Act to 'issue guidelines for the purposes of the Act',⁴⁹ the Law Council is concerned that the OAIC may not currently be able to provide sufficient levels of education and training to support agencies to build a culture of disclosure. The effect is that agencies may adopt an approach to FOI requests that favours refusal of access.
44. In this respect, the Centre for Public Integrity has reported that the proportion of FOI requests granted in full by agencies has decreased by more than 30 per cent since the 2011–12 financial year, whereas there has been a 50 per cent increase in the proportion of claims refused in full.⁵⁰ This data suggests, concerningly, that there may be a trend away from disclosure.

Refusal to release information

45. In 2017, the Australian National Audit Office (**ANAO**) reported that the number of FOI Act exemptions being claimed across all entities across the Commonwealth had increased by almost 70 per cent between 2012 and 2017. Further, it reported that the use of the exemptions for 'documents affecting national security, defence or international relations'⁵¹ and 'certain operations of agencies'⁵² had increased by almost 250 per cent and 320 per cent, respectively, during that period.⁵³
46. In addition, recent high-profile AAT decisions⁵⁴ have demonstrated incorrect reliance by agencies on the statutory exemptions in Part IV of the FOI Act, particularly the exemptions relating to 'documents affecting national security, defence or international relations'⁵⁵ and Cabinet documents.⁵⁶
47. The Law Council has also received anecdotal feedback from the legal profession that agencies are increasingly relying on section 24AA of the FOI Act to refuse access to information on the basis that a practical refusal reason exists: that is, that the work involved in processing the request would 'substantially and unreasonably divert the resources of the agency from its other operations'.⁵⁷ While the Law Council notes that section 24AB requires agencies to provide the applicant with an opportunity to revise the application, such as by revising its scope, it is apparent that some agencies

⁴⁸ OAIC, Annual Report 2021-22 (October 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf> 44, 153.

⁴⁹ OAIC, Freedom of information guidelines (Web Page, 2023) <<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>>.

⁵⁰ The Centre for Public Integrity, "Delay and Decay: Australia's Freedom of Information Crisis" (Briefing Paper, August 2022) <<https://publicintegrity.org.au/wp-content/uploads/2022/09/FOI-Delay-and-Decay-Final.pdf>> 10.

⁵¹ *Freedom of Information Act 1982* (Cth) s 33.

⁵² *Ibid* s 47E.

⁵³ Australian National Audit Office, Administration of the *Freedom of Information Act 1982* (Report, September 2017) <https://www.anao.gov.au/sites/default/files/ANAO_Report_2017-2018_8.pdf> 9, 37.

⁵⁴ See, e.g., *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* AATA 2719 (5 August 2021).

⁵⁵ *Freedom of Information Act 1982* (Cth) s 33.

⁵⁶ *Ibid* s 34.

⁵⁷ *Ibid* s 24AA(1)(a)(i).

may be placing excessive reliance on section 24AA. In some circumstances, this may discourage an applicant from pursuing the request further.

The creation of a statutory timeframe for completion of reviews

48. Noting that the OAIC's Corporate Plan specifies a benchmark target to complete 80 per cent of IC reviews within 12 months,⁵⁸ consideration could be given to the creation of a statutory timeframe, with the opportunity for extension, for completion of IC reviews, subject to close consultation with the OAIC.
49. The Law Council considers that legislative guidance on how long it should take for the OAIC to complete an IC review would benefit the operation of the FOI system as a whole. However, the Law Council queries how this statutory timeframe would work in practice. For instance, it queries whether at the end of the statutory timeframe there would—or should—be a deemed decision in favour of, or against, the applicant. Either option is likely to impact on third parties whose information is contained in the documents that are the subject of IC review.
50. The Law Council also queries how such statutory timeframes, if implemented, would be monitored and enforced, and what accountability measures would be imposed on the OAIC to promote compliance.
51. The Law Council emphasises that, to be effective, a statutory timeframe for completion of reviews must be supported by commensurate and appropriate funding to enable the OAIC to comply. The recent case of *Patrick v Australian Information Commissioner (No 2)*⁵⁹ (**Patrick**) found that the OAIC's current shortage of resources has meant that delays of several years for IC reviews to be finalised are not legally unreasonable. In this respect, it is inconceivable that a statutory timeframe, on its own, would meaningfully address the existing delays at the IC review stage unless there is a corresponding increase in resourcing which can directly decrease the processing times for FOI matters.

⁵⁸ OAIC, Corporate Plan 2022-23 (August 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0035/38897/OAIC-Corporate-Plan-2022-23.pdf> 22.

⁵⁹ [2023] FCA 530.

Suggested changes to the FOI system

Resourcing of the OAIC

Recommendation

- **The OAIC must be properly resourced in order to finalise IC reviews in a timely way and to assist agencies to build a culture of disclosure.**

52. Consistent with the submissions set out above, fundamentally the identified issues cannot be addressed unless the OAIC is properly resourced. A failure to resource ensures IC reviews will continue to be incapable of being resolved in a timely way. A failure to properly resource will result in agencies being unable to develop and build a culture of disclosure. The objectives of the act cannot be met without these resources. The OAIC should also have the capacity to address systemic issues through, among other measures, education, training and monitoring.
53. The Law Council notes that, as part of the 2023–24 Federal Budget, the OAIC received an increase in funding, including:
- an extra \$17.8 million in the 2023–24 financial year;⁶⁰
 - \$44.3 million over four years, and \$8.4 million per year ongoing, to support a standalone Privacy Commissioner, progress investigations and enforcement action in response to privacy and data breaches, and enhance its data and analytics capability;⁶¹ and
 - additional funding over \$9.2 million over two years to continue to regulate privacy aspects of government initiatives, specifically the Consumer Data Right, My Health Record and Digital Identity.⁶²
54. The Law Council welcomes this much-needed increase in funding, especially to address increasing concerns regarding privacy, security and data protection that are naturally at the forefront of minds in the wake of recent cyber incidents involving the theft of personal data.⁶³
55. However, as confirmed by Ms Falk at Senate Estimates in May 2023, no additional funding has been allocated to support the OAIC’s regulatory oversight of FOI processes,⁶⁴ despite the critical role of these processes in enabling an open and transparent democracy. In addition, the OAIC’s funding is expected to reduce to approximately \$24 million in the 2025–26 financial year, which is greater than a 25 per cent reduction in the OAIC’s budget for the current financial year of \$33 million.⁶⁵

⁶⁰ OAIC, OAIC welcomes additional Budget funding (Media Release, 9 May 2023) <<https://www.oaic.gov.au/newsroom/oaic-welcomes-additional-budget-funding>>.

⁶¹ Commonwealth of Australia, Budget 2023–24, Budget Measures (Budget Paper No. 2) <https://budget.gov.au/content/bp2/download/bp2_2023-24.pdf> 13.

⁶² OAIC, OAIC welcomes additional Budget funding (Media Release, 9 May 2023) <<https://www.oaic.gov.au/newsroom/oaic-welcomes-additional-budget-funding>>.

⁶³ See Law Council of Australia, Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 (Submission, 8 November 2022) <<https://www.lawcouncil.asn.au/publicassets/4d6e625a-8760-ed11-9475-005056be13b5/2022%2011%2008%20-%20S%20%20Privacy%20Legislation%20Amendment%20Bill%202022.pdf>>

⁶⁴ Angelene Falk, Evidence given to the Senate Legal and Constitutional Affairs Legislation Committee (Estimates, 23 May 2023) 125.

⁶⁵ Attorney-General’s Portfolio Budget Statements 2023–24 (Budget Related Paper No. 1.2., May 2023) <<https://www.ag.gov.au/system/files/2023-05/2023-24-AG-PBS.PDF>> 321.

56. The Law Council is concerned about the impact of these funding decisions on the OAIC and the FOI system more broadly. It notes, with concern, the recent outcome of *Patrick*, as mentioned above. As noted, in that decision, Wheelahan J found that, while there are ‘very significant delays’ in processing FOI reviews at the OAIC, these delays are not legally unreasonable, given the OAIC’s ‘unquestionable shortage of resources’.⁶⁶ Further, he found that it is up to the federal government to provide the OAIC with appropriate funding to ‘enable the discharge of the Commissioner’s statutory functions’.⁶⁷

Support of Government and its agencies

Recommendation

- **The Government and its agencies must be properly supported to carry out their obligations lawfully under the FOI Act and implement the administrative access scheme more extensively.**

57. The Government and its agencies must be properly supported to carry out their obligations lawfully under the FOI Act. Consideration might be given to better supporting first-instance decision makers within each agency, including by locating them within, or adjacent to—and reporting to—the in-house legal function.
58. In addition, while statutory timeframes should be enforced more effectively, consideration should be given to expanding the scope for agencies to extend the statutory timeframes in limited circumstances, where necessary, to achieve better decisions at first instance.
59. It should also be emphasised that an ‘administrative access’ scheme exists,⁶⁸ and agencies should accordingly consider releasing information without the need for a formal process under the FOI Act. Consideration should be given to assisting agencies to implement the administrative access scheme more extensively, so that more information is captured, or more guidance is provided to agencies on when information can be provided through that scheme.

Publication of released information

Recommendation

- **Consideration should be given to removing, or otherwise amending, paragraph 11C(3)(c) of the FOI Act in relation to publication of released information.**

60. When a person has been given access to all or part of a document following an FOI request, Commonwealth agencies must ‘publish the information to members of the public generally on a website’,⁶⁹ subject to specific exceptions.⁷⁰ Subsection 11C(3) of the FOI Act provides three options in this respect:

⁶⁶ Ibid [6].

⁶⁷ Ibid.

⁶⁸ OAIC, Administrative Access (Web Page, 2018) <<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/administrative-access>>.

⁶⁹ *Freedom of Information Act 1982* (Cth) s 11C(3).

⁷⁰ Ibid s 11C(1).

- making the information available for downloading from the website;
 - publishing on the website a link to another website, from which the information can be downloaded; or
 - publishing on the website other details of how the information may be obtained.
61. While some agencies, such as the Department of Home Affairs,⁷¹ the Treasury,⁷² and the Department of Prime Minister and Cabinet,⁷³ have made these documents available for downloading, either in full or in part, through their FOI 'Disclosure Log' web pages, others, such as Services Australia⁷⁴ and the Attorney-General's Department,⁷⁵ have not. These departments have instead provided a contact email address to request a copy of any document listed.
62. Subsection 11C(1) of the FOI Act already provides several safeguards which prevent the listing of FOI disclosures relating to potentially sensitive information on an agency's Disclosure Log. Therefore, it appears unnecessary, and is likely a barrier, for members of the public to be required to email the agency to request a copy of a document to which access has already been granted under the FOI Act.
63. To assist in fostering a 'pro-disclosure culture'⁷⁶ among agencies, the Law Council accordingly recommends that consideration be given to removing paragraph 11C(3)(c) of the FOI Act, so that agencies do not have the option of providing an email address in place of ensuring documents are available to download and view online.
64. Alternatively, paragraph 11C(3)(c) could be amended to narrow the circumstances in which it is permissible for an agency to publish 'details of how the information may be obtained', to limit the scope for agencies to rely upon this paragraph for all documents listed in their FOI Disclosure Logs.

⁷¹ Department of Home Affairs, FOI Disclosure Logs 2023 (Web Page, 2023) <<https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2023>>.

⁷² The Treasury, FOI Disclosure Log (Web Page, 2023) <<https://treasury.gov.au/the-department/accountability-reporting/foi-disclosure-log>>.

⁷³ Department of Prime Minister and Cabinet, FOI Disclosure Logs (Web Page, 2023) <<https://www.pmc.gov.au/about-us/accountability-and-reporting/information-and-privacy/foi-disclosure-logs>>.

⁷⁴ Services Australia, Freedom of Information Disclosure Log (Web Page, 2023) <<https://www.servicesaustralia.gov.au/freedom-information-disclosure-log?context=1>>.

⁷⁵ Attorney-General's Department, Freedom of information disclosure log (Web Page, 2023) <<https://www.ag.gov.au/rights-and-protections/freedom-information/freedom-information-disclosure-log>>.

⁷⁶ Anthony Byrne MP, Freedom of Information Amendment (Reform) Bill 2009 (Second Reading Speech, 26 November 2009) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-11-26/0021/hansard_frag.pdf;fileType=application%2Fpdf>.

Location of the Information Commissioner's review function

Recommendation

- **Consideration should be given to relocating the Information Commissioner's review function, potentially to within the new body replacing the Administrative Appeals Tribunal.**

65. The Law Council recognises that this Inquiry provides an opportunity to revisit the recommendations in the ALRC and ARC report, *Open Government: a review of the federal Freedom of Information Act 1982*,⁷⁷ and to consider whether the IC review function may be best housed elsewhere, such as within the new administrative review body that will replace the AAT.⁷⁸
66. Prior to 2010, external FOI reviews were heard directly by the AAT, without first requiring IC review. In the view of the Law Council, there are potential benefits, both in terms of independence and efficiencies, to be gained by returning to this approach. Nonetheless, this suggestion presumes that:
- the new review body is adequately resourced, including in respect of member expertise, and that it is significantly more efficient and functional than the AAT at present;⁷⁹ and
 - given the serious and chronic nature of the OAIC's under-resourcing, losing the IC review function should not exclude the OAIC from receiving any additional resourcing required to properly carry out its other significant functions.
67. The Law Council considers that relocating the IC review function to the new administrative review body ought to provide the OAIC additional capacity to focus on its systemic functions, which should continue to include the right to make submissions on any FOI or privacy matter on foot in the new body, and to receive the submissions of all parties.
68. If the FOI review function were to be relocated to the new administrative review body, the Law Council recommends that serious consideration be given to the following:
- creating a separate FOI division with members who have relevant expertise and experience;
 - providing more flexible rules than other divisions and empowering members to determine the level of formality required;
 - providing an opportunity for streamlined review on the papers, unless either party applies for a hearing or the relevant member considers it desirable in the circumstances;
 - eliminating application fees in the case of streamlined review; and
 - ensuring that adequate resources are available to the new body so that it can efficiently perform this review function.

⁷⁷ ALRC and ARC, *Open Government – A Review of the Federal Freedom of Information Act 1982* (Report 77, December 1995) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC77.pdf>>.

⁷⁸ Attorney-General's Department, *A new system of federal administrative review* (Web Page, 2023) <<https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>>.

⁷⁹ See Law Council of Australia, *Administrative Review Reform Issues Paper* (Submission, 12 May 2023) <<https://www.lawcouncil.asn.au/publicassets/465da1de-65f4-ed11-9482-005056be13b5/12%2005%2023%20-%20S%20-%20Administrative%20Review%20Reform.pdf>>.

69. Consideration be given to ensuring that the complaints power and ancillary powers remain with the Information Commissioner so that it can act as a monitor and enabler for more transparency and on a more efficient basis. This would allow the Information Commissioner to pursue their statutory objectives via a different avenue, and to do so in a more strategic way. This might include, for example, a focus on matters involving whether an adequate search for documents was carried out by an agency, and matters involving refusals to process an FOI application on the basis that the resources of the agency would be unreasonably diverted.
70. The Law Council suggests that the new review body could have the power to refer matters that indicate any systemic issues or wrongdoing to the Information Commissioner. The Information Commissioner, in considering such matters, would then be in the position to make recommendations for any policy and practice reform required and to better focus training and resources on problem areas. The Information Commissioner might also then have capacity to monitor whether the agencies in question have adequately implemented the new review body's decisions, and to focus, and publicly report, on any repeated or deliberate non-compliance.