Australian Government
Department of Home Affairs

Department of Home Affairs' submission to the Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

Legal and Constitutional Affairs References Committee

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Submission to the Inquiry into the operation of Commonwealth Freedom of Information laws

The Department of Home Affairs (the Department) appreciates the opportunity to provide a submission to the Legal and Constitutional Affairs References Committee Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (the Inquiry).

The Department is committed to promoting Australia's representative democracy by upholding the objects of the *Freedom of Information Act 1982* (the FOI Act), enabling applicants to access and amend information, and championing government accountability and transparency.

The Department's submission to the Inquiry focusses on ideas and recommendations on how the FOI Act can be modernised and improved to better align its objectives with community need and provide the public with access to information promptly and at the lowest reasonable cost.

Background

The Department receives the highest number of FOI requests of any Australian Government agency, representing 43 per cent of all Commonwealth FOI requests in the Financial Year (FY) 2021-22. The nearest agency, Services Australia, received 14 per cent of Commonwealth FOI requests during the same period.

The Department's caseload consists of access requests for personal and non-personal documents, and requests to amend personal information.

Personal access requests typically relate to visa and citizenship processing documents, such as client and/or detention files, assessment and processing notes, decision records, submitted application forms, audio files and CCTV footage. Personal access documents are often sought to enable applicants to engage with government agencies and other institutions such as banks or insurance companies.

Non-personal access requests typically consist of policy and procedural documents, Ministerial submissions and briefs, Departmental reports, official correspondence, and operational statistics. Non-personal documents are sought by various members of the public including: politicians, journalists, migration agents/lawyers, academics and community interest groups.

Amendment requests are received from applicants seeking to change, correct or update personal information held in Departmental records and systems, including names and dates of birth.

In FY 2021-22, the Department:

- Received 14,652 access requests, comprising of 12,798 (87%) personal and 1,854 (13%) non-personal requests.
- Finalised 12,555 access requests, comprising 10,680 (85 per cent) personal and 1,875 (15 per cent) non-personal requests. The Department assessed 1,514,829 pages in the course of its decision-making on access requests. The average number of pages released by the Department in FY 2021-22 was 165 per personal request and 18 per non-personal request, with 48 per cent of documents released in full.
- Received 1,193 and finalised 1,166 amendment requests.
- Received 141 and finalised 156 requests for internal review.
- Received notification of 918 commenced Information Commissioner (IC) reviews (representing seven per cent of the Department's FOI caseload), and finalisation of 614 IC reviews.

The Department's FOI program is currently costed at approximately $6.5 million in FY 2022-23. These costs include personal access releases made under the *Privacy Act 1988* (the Privacy Act).

Response to Terms of Reference

The Department submits the following response to the Terms of Reference:

a) The resignation of the Commonwealth Freedom of Information Commissioner and the resulting impacts

The continuing appointment of a FOI Commissioner is integral to the successful operation of information access legislation and programs.

A FOI Commissioner is required to:

- Champion the objects of the FOI Act.
- Lead modernisation and improvement of the FOI Act and *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the FOI Guidelines).
- Provide guidance and support to Australian Government agencies administering the Act, including consulting on any operational changes required to improve service delivery and applicant outcomes.
- Streamline the processing of Information Commissioner (IC) reviews to allow for more timely outcomes.
- Build community confidence in the proper administration of the FOI Act and, by extension, the Australian Government's commitment to accountability, transparency and representative democracy.

The Department submits that it is vital the FOI Commissioner appointment is filled as the leadership provided by the position adds significant value to Commonwealth agencies administering the FOI Act, and in doing so shapes the success of information access programs. Timely appoint of a new FOI Commissioner would also reassure the Australian public that the government values and seeks to uphold the objectives of the FOI Act.

The Department looks forward to the appointment of a new FOI Commissioner and continuing its productive working relationship with the OAIC.

b) Delays in the review of FOI appeals

The Department acknowledges that the backlog of IC reviews currently with the FOI Commissioner, and that a number of these stem from the rise in FOI applications received by the Department.

It is further acknowledged that extended delays in assessment of IC reviews can result in adverse consequences for FOI applicants, agencies and the community. The Department submits that more timely review decisions would allow the IC to provide the following value to FOI applicants, Commonwealth agencies and the community:

- Prompt IC review outcomes would better support government transparency and accountability of contemporary decisions, and allow for timely scrutiny of Minister's and agencies decisions and operations. The current delays in IC review means that currency, relevance and/or value of IC decisions or documents eventually released to applicants is diminished by time.
- Agencies' interpretation and application of the FOI Act would not risk becoming misaligned with that of the FOI Commissioner and OAIC. The Department learns from IC decisions and trains staff to apply these learnings to future FOI assessments; it is therefore important that IC decisions are current, relevant and consider up-to-date legislation and case law.
- In the case of personal access and amendment requests, timely reviews would reduce impediments to an applicant's ability to engage with Australian Government departments and/or access government services.

- Due to attrition of key FOI or Departmental staff and/or Machinery of Government changes, multi-year delays means that work on an IC review often needs to be replicated as new agency staff need to research and re-assess the reasons for the original FOI decision in order to respond to IC Notices. Timely reviews would provide a greater likelihood that the same staff who decided on the original request would be available to provide submissions to the IC.
- Community confidence in the proper administration of the FOI Act would be enhanced, which could increase public participation and enable the very representative democracy that the Act seeks to promote.

In its current form, the FOI Act both drives demand for IC reviews and limits the FOI Commissioner's ability to respond to IC review requests.

Section 54E of the FOI Act requires that review of all section 15AC 'deemed refused' requests be undertaken by the FOI Commissioner, which directs FOI applicants to the OAIC when FOI requests fall outside of statutory timeframes. The Department seeks to process the majority of access requests in chronological order, unless compelling or compassionate circumstances exist. When 54V and 54Z Notices are issued by the OAIC in relation to 15AC deemed refused requests, the Department is required to reallocate resources away from operational teams processing in-time or on-hand 15AC deemed refused requests to process IC reviews. In practice, this means the Department may be required to prioritise 35 day-old IC review requests over on-hand 100 day-old requests. This delays other FOI applicants' access to documents, encourages applicants to seek IC review as a means of expediting their request, and results in flow-on adverse impacts on the Department's service delivery and statutory compliance – which drives further IC review requests and increases the age of the backlog.

Section 55K of the FOI Act requires the FOI Commissioner to make decisions on all IC reviews. This is not practical given the volume of IC review requests received by the OAIC each year (1,995 IC review requests received in FY2021-22, of which 1022 originated with the Department). It is notable that 89 per cent of IC review requests lodged in relation to the Department in Quarters 2 and 3 in FY 2022-23 relate to the absence of a decision within statutory timeframes (section 15AC deemed refused requests), rather than the merits of a decision (substantive IC review requests). Enabling the section 55K power to be delegated could dramatically lift the number of substantive IC reviews able to be completed, which the Department submits should be the primary focus of the FOI Commissioner. The Department's suggestions for managing the volume of section 15AC deemed refused IC reviews are at Recommendations 5 and 9.

The Department recognises the impacts that ongoing delays in the IC reviews program has on FOI applicants, agencies, and the community. The Department is committed to working with the FOI Commissioner and OAIC to resolve the external review backlog as soon as practicable.

c) Resourcing for responding to FOI applications and reviews

The Department has finalised 14,615 FOI and Privacy access requests and 822 FOI amendment requests FY2022-23 to the end of March. During this period, the Department achieved a statutory compliance rate of 82 and 90 per cent respectively for its non-personal access and amendments caseloads and reduced its overdue personal access caseload by 51 per cent.

The Department has improved its FOI policy, procedures and systems since the *Commissioner initiated investigation into the Department of Home Affairs* of December 2020, and has a forward work program of business and systems improvements. The Department's success in reducing its personal access backlog and maintaining an improved compliance rate for the non-personal requests, speaks to the success of these measures.

Funding for the Department's FOI program is allocated from the Department's base budget, and is not linked to peaks in service demand. That is, there is no demand-driven funding mechanism for FOI work. Resources required to respond to IC reviews are absorbed within this set of allocated resources.

The Department's FOI program competes with law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs, settlement services, immigration and border-related programs for funding. The Department submits that the additional capacity and practices required to drive service improvement in its FOI caseload can be found via legislative reform of the FOI Act. For example, it may be appropriate to consider alternate funding models for Commonwealth FOI programs (see Recommendations 1, 3 and 22 below).

d) The creation of a statutory timeframe for completion of reviews

The Department does not support the creation of statutory timeframes for completion of IC reviews under the current legislative framework.

The FOI Commissioner's ability to complete external reviews and investigations is driven by case volume and complexity, the section 55K delegation, and the OAIC's available resources; introduction of statutory timeframes alone will not change these factors or enable decisions to be made faster.

The Department's recent experience is that a combination of funding, resources, and both process and systems improvements is required to improve FOI processing efficiency. Backlogs of work can easily form if there is a surge in applications or if the volume or complexity of documents being requested per application increases.

Creating a statutory timeframe for IC reviews will require agencies to respond to IC Notices under tighter timeframes, which will require FOI agencies to re-allocate more resources away from in-time caseloads. The Department submits that a statutory timeframe is not a practical solution to delays in IC review outcomes, and may have the unintended consequence of increasing the number of IC review requests and/or making the review caseload harder to manage.

e) Recommendations:

The Department submits that legislative change is required to simplify and modernise FOI review rights. The Department recommends:

1. **Review of the current Agency-led funding model for Commonwealth FOI programs**

   Commonwealth FOI programs are funded by individual departments and agencies which must balance multiple competing operational priorities when determining budget allocations. Under current arrangements, agencies are required to absorb the peaks of access demand, which can have significant impacts on service delivery and statutory timeframes.

   Under the *FOI Charges Regulations 2019*, agencies are only able to charge for access to non-personal documents, which represents just 26 per cent of all Commonwealth access requests (OAIC Annual Report 2021-2022, p135).

   The Department submits that the drafters of the FOI Act in 1982 could not have envisaged the volume of information sought by the Act in 2023, and that it may now be appropriate to consider alternate funding models which ensure the viability of FOI programs. This review could consider whether agency-led funding models continue to meet the needs of applicants and agencies, and whether cost recovery mechanisms should be introduced to offset the significant resourcing and administration required to process FOI access requests and reviews (see recommendation 22 for further).

2. **Amendment of section 55K of the FOI Act to enable the FOI Commissioner to delegate IC decision-making powers to nominated OAIC officers.**

   Delegating nominated OAIC staff to make IC review decisions would enable the regulator to make IC review decisions within shorter timeframes whilst ensuring the that FOI Commissioner is focussed on the most complex of IC reviews and issues.

3. **Amendment of sections 54B and 54N to enable a registration fee to be charged for all substantive internal review and IC review requests.**

   Registration fees are required by a number of regulatory bodies, including the Administrative Appeals Tribunal.

   Introduction of a review registration fee would offset the administrative and processing costs associated with processing substantive review requests for both the OAIC and agencies.

   Applying a review registration fee would also encourage review applicants to lodge detailed and targeted review requests, which would enable decision-makers to more efficiently identify and address key areas of applicant concern, thereby promoting effective and timely decision-making.

4. **Amendment of section 54L(2) of the FOI Act to require agencies to undertake internal review of all substantive access refusal decisions prior to IC review rights being activated.**

   Requiring applicants to seek internal review before IC review would enable agencies to identify and quickly remedy any errors in FOI decision-making, implement a positive feedback loop to support training and development of staff, reduce the administrative burden currently associated with processing IC reviews, and provide agencies with greater ability to manage internal resources and caseloads.

   The proposed change to section 54L could be supported by enhanced regulatory oversight, including:

   - A requirement that each Commonwealth agency report any substantive internal review request more than 30 days over its statutory timeframe to OAIC. Referrals should include the name and contact details of the applicant, the scope of the request, and a summary of work done to date on the review. This would promote the accountability of agencies to process requests within statutory timeframes, and enable the FOI Commissioner and/or OAIC to intercede on delayed requests which significantly align with the objects of the Act.
   - A requirement that any substantive internal reviews that exceeds its statutory timeframe by more than 60 days be transferred to OAIC for assessment. Referrals to include a detailed explanation of the reason for the delay, the work done to date, and the key complexity of the review request. This would enable OAIC to understand and resolve the complexity of decision making, clarify complex issues to agencies, and ensure that the applicant receives an outcome to their request in the shortest possible timeframe.

5. **Amendment of section 54E of the FOI Act to require agencies to undertake internal review of all 15AC deemed refused decisions prior to IC review rights being activated.**

   Enabling agencies to manage 15AC deemed refused reviews would take significant pressure off the OAIC in terms of IC review volumes and would enable agencies to manage FOI caseloads whilst prioritising compelling or compassionate requests for rapid response.

   This option would also provide agencies with greater ability to manage internal resources whilst continuing to process the majority of requests in chronological order. The proposed change to section 54E could be supported by enhanced regulatory oversight, including:

   - A requirement for each Commonwealth agency to submit a Case Management Plan to the OAIC explaining how it intends to prioritise and allocate 15AC deemed refused review requests.
   - A requirement for agencies to regularly report the processing age and reasons for 15AC ‘deemed refused’ requests falling more than 30 days overdue to the OAIC.

6. **Amend section 54C(3) of the FOI Act to allow an additional 30 days for external consultations to be undertaken for internal reviews, similar to provisions contained in sections 26A, 27 and 27A.**

   When an agency conducts an internal review of a FOI request, it conducts a *de novo* decision, which requires a fresh assessment of the request. In many instances, this requires fresh consultation with state and territory agencies, businesses and individuals. The time required for these consultations is provided for in sections 26A, 27 and 27A of the FOI Act, but is not extended to internal reviews.

   Introducing extended time for necessary internal review consultations would reduce the need for agencies to seek extensions of time from OAIC under section 54D(4), thereby reducing the administrative work undertaken by both the OAIC and agencies.

Other recommendations

The Department submits the following recommendations for the consideration of the Senate Inquiry.

This series of recommendations seek to:

- align information access and amendment procedures with the contemporary and future needs of applicants, and
- simplify the processes for the FOI Commissioner, OAIC and Commonwealth agencies by resolving legal complexities and removing administrative steps that are of little value and make the legislation practically difficult to administer.

Some of the recommendations are more closely aligned with the needs of Commonwealth agencies that receive high volumes of FOI requests, such as the Department. However, if adopted, the Department's recommendations will enable all Commonwealth agencies to more efficiently and effectively manage FOI caseloads, thereby improving the quality and timeliness of information access and amendment decisions, and reducing demand for IC review.

7. **Review section 3 of the FOI Act to ensure the objects of the Act are fit-for-purpose and represent a modern and forward-thinking approach to information access.**

   Section 3(2) of the FOI Act states that the purpose of the Act is to promote Australia's representative democracy by increasing public participation in Government processes with a view to promoting better-informed decision making and increasing scrutiny, discussion, comment and review of the Government's activities.

   These objects are most closely aligned with the non-personal requests received by the Department, which represented just 15 per cent of its access decisions in FY 2021-22.

   The prevalence of personal access requests received by the Department indicates that the objects of the FOI Act no longer align with community need. It is notable that the Privacy Act reforms are currently considering how long and under what circumstances organisations are required to retain personal information whilst the FOI Act requires agencies to provide access to personal information and documents for 20 years (or longer for National Archives Australia).

   The Department submits the drafters of the FOI Act could not have envisaged the modern information-based context in which individuals need to access their own information (often in large volumes) to engage with Commonwealth and state government agencies and participate in the community and economy.

   This presents an opportunity for the Inquiry to review the intent and objects of the FOI Act some 40 years after it was written to ensure it remains fit-for-purpose and considers contemporary use of the Act.

8. Amend section 12 of the FOI Act to promote the *Privacy Act 1988* as the primary channel for personal information access requests.

The ability of applicants to access and amend information under the FOI Act is duplicated by an ability to access and seek correction to personal information under the Privacy Act, as per Australian Privacy Principle (APP) 12.1.

This duplication has resulted in a number of Australian Government agencies operating different information access and amendment programs under the FOI and Privacy Acts for the same types of documents. This has the potential to confuse, prevent or dissuade applicants from seeking access or update to important personal documents. Further, the FOI and Privacy Acts currently provide different assessment obligations and review rights, which may disadvantage applicants depending on the access programs preferred by agencies.

The Department submits that personal information should be released via the Privacy Act as the primary means of access. This requirement would provide certainty for applicants, ensure consistency across all Commonwealth agencies, and align the access and review rights of all personal information access applicants. The Department submits that this change could be reflected in amendment of section 12 of the FOI Act to make applicants ineligible from lodging a personal access request under the FOI Act unless they could demonstrate that they had first pursued access under APP 12 or other access pathways provided by legislation.

9. Amend section 15AC(3) of the FOI Act to enable agencies to appropriately process 15AC deemed refusal requests

Section 15AC of the FOI Act was introduced by the *Freedom of Information Amendment (Reform) Act 2010*. Under section 15AC(3), an FOI request is 'deemed refused' by the principal officer of the agency once the statutory timeframe expires.

There is no express power in the FOI Act for an initial decision-maker to revisit a decision (beyond section 15AC(5)), resulting in the agency becoming *functus officio* (without power) once a statutory timeframe has expired. This view is supported by comments made in obiter by *Tracey J in Knowles vs Australian Information Commissioner* [2018] FCA 1212 in which his Honour noted that a deemed refusal under section 15AC(3) operated 'as the substantive decision' and any subsequent purported decision by an agency on the merits of a request for documents would arguably be made without jurisdiction.

In its current form, 15AC creates a practical problem for the administration of the FOI Act. As of 30 March 2023, the Department had 2,558 deemed refused requests on hand, consisting of 2,498 personal and 60 non-personal requests. If functus officio applies as stated in the FOI Act, the Department does not have jurisdiction to make decisions on these requests.

In apparent recognition of this problem, the FOI Guidelines [at 3.163] state:

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister ***continues to have an obligation to provide a statement of reasons on the FOI request****. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. The competing view — that a decision maker is functus officio if a deemed decision arises — would have the consequence that an applicant's right of access under the FOI Act would be impeded through delay on an agency's part and could only be revived by an application for IC review. This result would be contrary to the objectives and requirements of the FOI Act.* [Emphasis added]

The contradiction between 15AC and the FOI Guidelines places the Department at legal risk as it currently processes all FOI deemed refused requests. If 15AC were to be interpreted as currently written, this work would need to cease resulting in significant adverse impacts on the ability of FOI applicants to access documents.

The Department submits the intent of the FOI Act should be clarified to provide clear direction to agencies as to their obligations and/or ability to make decisions on deemed refused requests. A practical outcome would be to refine the FOI Act to operate in line with section 33(1) of the *Acts Interpretation Act 1901*, which states:

'Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires'.

10. **Amend section 15(5)(b) to exclude weekends and/or public holidays from statutory timeframes;**
11. **Review section 15(5)(b) to consider graded statutory timeframes which consider the disparate work effort required to process requests; and**
12. **Introduce a subsection of section 15 (similar to 15(6) and 15(7)) which provides a 14 day extension of time to consult with other government agencies and/or contractors.**

Section 15(5)(b) prescribes a 30 day statutory timeframe for notification of a decision on an FOI request, unless extended by other provisions in the Act (notably operation of sections 15AA, 15AB, 15AC, 24AB, 26A, 27, 27A and 29). The 30 day statutory timeframe consists of calendar days and does not take into account non–working days, such as weekends and public holidays. This means that the statutory timeframe for processing an FOI request can be significantly reduced depending on when the application is received and the number of non-working days in that month. For example, a FOI request lodged on 1 April 2023 would be due on 1 May 2023, despite 13 days in April being lost to weekends and public holidays.

The extremely high volume of requests received by the Department means that it is frequently unable to process FOI access requests within statutory timeframes. Resources required to process incoming requests on Day 1 of the statutory timeframe are almost always already allocated to on-hand in-time and backlog caseloads, so that new FOI requests are queued and then processed on chronological order. The ability of the Department to meet statutory timeframes does not correlate to a lack of productivity: in FY 2022-23 to the end of March 2023, the Department has finalised 12,954 requests (45 per cent more requests than the same period in FY 2021-22), for a statutory compliance rate of just 38 per cent. Rather, the statutory timeframes provided in the FOI Act assume that Commonwealth agencies have infinite resources available to meet highly disparate demands for service. The average length of documents released by the Department FY 2022-23 to end of March is 190 pages for personal requests and 23 pages for non-personal requests. Documents need to be located and retrieved from the Department's extensive digital holdings – see Recommendation 19 for further information. The same statutory timeframe applies to all FOI access requests, irrespective of the search and retrieval effort required to identify and extract documents in scope of the request, or the volume, page-length and complexity of any identified documents. In practice, these factors directly impact the Department's ability to meet the statutory due date. For example, a hundred page hard-copy document located offshore takes significantly longer to retrieve, digitise and assess than a single page electronic report which can be immediately downloaded and assessed. Similarly, a document which requires extensive consultation and application of exemptions takes significantly longer to process than a single page full release document. The Department submits that the statutory timeframes set for processing FOI requests need to consider the disparate work effort required to process different types of requests, and that it may be appropriate to consider graded statutory timeframes that consider known complexities.

It is notable that consultation with Commonwealth agencies and/or contractors does not extend the statutory timeframe of a request. This is important and necessary work, which can deplete the statutory processing times by up to two weeks. The Department submits that provisions similar to section 26A, 27 and 27A of the FOI Act should be extended to inter-agency consultation to promote quality decision-making.

Commonwealth agencies must contend with interplaying complexities when processing FOI requests; the complexities directly impact agencies' ability to meet statutory timeframes. The Department submits that statutory timeframes set down by the FOI Act need to be reviewed to provide reasonable and achievable timeframes for processing requests, which balance applicants' information needs, service demand, and the finite operational capacity of agencies.

13. **Amend section 15AA(b) to remove the requirement for an agency to notify the OAIC of a client's agreement to a 15AA EOT; and**

14. **Amend sections 15AB and 15AC to include timeframes for the OAIC to either respond to an agency on EOT requests or allow the EOT to be deemed approved.**

    The FOI Act contains provisions for Extensions of Time (EOTs) in sections 15AA, 15AB, 15AC and 51DA.

    Section 15AA enables an agency to seek an extension of up to 30 days from the applicant and requires notification to the OAIC of any agreed extension; the latter appears to be a redundant administrative step. Section 15AB enables an agency to seek an extension of time to process complex and voluminous requests, whilst section 15AC enables the agency to seek additional time to process a deemed refused request.

    The Department's experience is that the EOT provisions are not fit for purpose. If an applicant declines a 15AA request for an EOT, the Department has little recourse to prevent the request from becoming deemed refused. Further, the Department's policy is to only request an EOT if it can complete the request in the extended timeframe. In the vast majority of personal access requests, this is not possible due to the volume and size of request on hand and the Department's policy of processing access requests in chronological order, where possible.

    The Department does seek 15AB and 15AC EOT from the OAIC for non-personal requests but has experienced waits of up to three weeks for response, by which time the requests have fallen outside of statutory timeframes and/or been finalised.

    The Department submits that EOT provisions within the FOI Act need to be reviewed to provide reasonable and achievable measures to extend statutory timeframes and enable timely agency processing.

15. **Amend section 24AB(8) to remove the time required to assess whether a request consultation response resolves a practical refusal reason from statutory timeframes.**

    Section 24AB requires agencies to engage in a request consultation process in the event that the Department identifies a practical refusal reason (as per section 24AA).

    The FOI Act allows 14 days for this consultation to occur, during which the statutory timeframe is paused. Request consultation is an important processing step, which the Department frequently uses to engage with applicants.

    Under section 24AB(8) of the FOI Act, processing of a request resumes at the time the applicant makes a revised request or indicates that they do not wish to revise the request. If the applicant's response is sent on a weekend or public holiday, the agency loses valuable processing days.

    Further, section 24AB(8) does not consider the time required to assess whether the applicant's response resolves the practical refusal reason. When an applicant responds to a request consultation with a revised scope, the Department essentially receives a new request. Accordingly, it may take several days to re-consult with operational areas and/or undertake a second round of search and retrieval activities to determine if the request can be processed, which depletes the remaining statutory timeframe available to process the request.

    The Department submits that 24AB(8) should be amended to enable agencies to undertake necessary 24AB assessment tasks outside of statutory timeframes.

16. Amend section 15(2) of the FOI Act to require personal identifiers to be provided for all FOI access requests. Subsequently amend section 24AA(1) to include a lack of personal identifiers as a practical refusal reason.

Section 15(2) of the FOI Act does not require an applicant to identify themselves by name or other personal identifiers when making an FOI application.

The Department holds extensive personal information about millions of people – extending to health, detention records, movement records, identity information and documents, and refugee claims. The Department also frequently receives FOI requests from applicant's seeking to access other people's personal information, specifically: celebrities, sportspeople, politicians, people of high public profile or who are engaged in judicial proceedings, and current or ex family members.

The personal information held by the Department is financially valuable to bad actors and criminals seeking to engage in identity theft and fraud. Further, the information could place those fleeing domestic or criminal violence at risk of harm if personal details such as their address, place of work or school were inadvertently released to FOI applicants misusing section 15(2). Similarly, foreign governments could use the information and documents they hold to meet the current 15(2) identity requirements, which could enable them to monitor offshore citizens by accessing their personal information. The Department submits that, in its current form, the lack of personal identifiers required under section 15(2) is problematic for the safe and proper administration of both the FOI and Privacy Acts.

Similarly, section 15(2) does not consider the possibility of foreign interference via the FOI Act as a means of influencing or disrupting Australian democracy and/or causing economic loss. If FOI applicants are not required to identify themselves, the Department has no way of knowing to whom it is releasing information. The Department routinely receives requests from anonymous applicants seeking information about a variety of topics including counter-terrorism, cyber security and national security settings. If released, the information sought could pose significant risk to Australia's security and population. Under current 15(2) arrangements, the Department has no recourse to consider the identity, location or intent of FOI applicants. Whilst other protections are already enshrined in the FOI Act via exemptions do protect this information, the Department submits that requiring applicants to provide personal identifiers when lodging an FOI access request would go further to mitigating these risks.

The drafters of the FOI Act could not have anticipated the volume or type of personal information held by the Department, or the rise of identity theft and/or fraud since the Act commenced in 1982. It is vital that the Department be able to verify the identity of FOI applicants at time of registration, particularly when they are seeking to access personal information. The Departments submits that section 15(2) should be amended to require FOI applicants to identify themselves by identity standards used to access other Government services to protect and support effective administration of the FOI Act.

17. Amend 15(2A) of the FOI Act to enable agencies to determine channels for lodgement of FOI requests.

Section 15(2A) prescribes the channels by which FOI applications can be made. These channels do not align with the digital-first strategy of the Australian Government. It would be preferable for FOI requests to be lodged under arrangements determined by individual agencies, given the disparate size and nature of agency functions, FOI caseloads and the needs of FOI applicants.

For example, with certainty over lodgement processes Commonwealth agencies could design online forms which assist applicants to submit valid FOI requests that meet scope and identity requirements, thereby reducing the need for section 15(2)(b) practical refusals or enabling direction of applicants to faster and more appropriate channels for their information request. Further, requiring applicants to lodge FOI request via specified channels would promote the administrative efficiency of agencies and encourage adoption of supporting digital technologies.

18. **Review the FOI Act to ensure it appropriately considers digital documents, information and records; and**

19. **Amend section 37 of the FOI Act to introduce a new exemption to protect information that would or could reasonably be expected to expose government systems to cybercrime.**

    In the 40 years since the FOI Act was written, advancements in digital technology have fundamentally altered the way Commonwealth agencies operate and interact with the community.

    The Department currently operates 479 business systems which contain personal and operational data. It holds 600 million digital records in its main record management system, and is expected to exceed 1.1 billion digital records within two years. Digital markers, including metadata, are captured at each step of a client's engagement with the Department, often over a period of years. The information held by the Department in its records and systems has extremely high value and could be used to breach individuals' privacy, disrupt border protection and law enforcement activities, and threaten national security.

    The large number of systems and files held by the Department make identification, search and retrieval of documents administratively complex. Without specific identifying information, it can be difficult to identify the exact document the applicant seeks to access from millions of records, and be certain all relevant records have been located.

    The FOI Act does not expressly consider the rise of digital technologies beyond reference to 'electronic documents' and a requirement to produce a document via the ordinary use of a computer system under section 17. The FOI Act needs to be modernised to reflect the fact that agencies now primarily hold digital records.

    Digital information and architecture contained in documents has the potential to expose vulnerabilities in government systems, which may lead to cyber-attacks on agencies, businesses and individuals. Release of digital code, which may seem innocuous, may reveal information which exposes government systems to infiltration. The current raft of exemptions contained in the FOI Act do not expressly consider the risks posed by cybercrime, in terms of national security, defence, law enforcement, and protection of public safety. The Department submits that new and specific exemptions need to be considered to protect digital information and architecture. The Department encourages engagement with our Department in relation to cyber security policy to ensure any reforms are in line with the government's Cyber Security Strategy.

20. **Amend section 22 of the FOI Act to expressly permit non-SES staff names to be redacted as irrelevant information.**

    Departmental staff work on the frontline of border protection, law enforcement, detention, and visa and citizenship functions. This work includes making decisions that adversely affect individuals, such as a decision to refuse or cancel a person's visa or remove someone from Australia (including where the person may have a substantial criminal record).

    The rise of digital technologies has made it far easier for agency staff to be identified and targeted via their digital footprints. The Department has documented a number of cases of its staff being harassed and receiving personal threats to their safety as a result of their names being known. The Department has also recently received a number of FOI access requests seeking personal information about specific staff members who have refused the FOI applicant's visa application, including requests for the decision maker's citizenship status, education, qualifications and employment records. These requests indicate that some dissatisfied members of the public actively research, and may seek to approach, Departmental staff.

The Department currently redacts all non-SES staff names contained within documents under section 22 of the FOI Act as irrelevant information. Agencies have a primary duty of care to ensure, so far as is reasonably practical, the health and safety of its officers under the *Work Health and Safety Act 2011* (WHS Act). The Department submits that agencies have legislative and policy mechanisms (including the *Public Service Act 1999*) to ensure that staff are accountable for their work, and that public release of person performance outcomes to private individuals could reasonably be expected to expose staff to unnecessary risk of harm.

Accordingly, to avoid any doubt as to the appropriateness of current practices, the Department recommends that the names of all non-SES Commonwealth agency staff should be expressly deemed 'irrelevant material' via amendment of section 22 of the FOI Act.

21. Amend Part V of the FOI Act regarding amendment of personal information

The Department is the gateway to migration to Australia, receiving 2,826,227 visa applications and 144,763 citizenship by conferral applications in FY2021-22. Each interaction with the Department is anchored by an identity, which is presented to the applicant by a client and subsequently shared and built upon by other government agencies. New permanent residents use their Department-recognised identities to access Medicare and Services Australia, obtain state-based drivers licenses, enrol children in school, rent or buy a house, and gain employment. The Department is therefore central to the ability of all travellers and migrants to establish a government-recognised identity footprint in Australia.

Under Part V of the FOI Act, FOI applicants can seek to change core aspects of their identity after a visa, permanent residency and citizenship has been granted. This can include key personal identifiers such as their name, date of birth and/or place of birth. In most instances, these changes are minor and seek to correct the spelling or cultural presentation of names. However, the Department has also received a number of requests to change birthdates by up to 10 years, which significantly changes the applicant's life story and calls into question the motives of the applicant and integrity of all information previously assessed by the Department.

The Department has robust three pillars identity assessment protocols systems to verify the identity of visa and citizenship applicants, and implements an Identity Lock Down policy in relation to the issue of ImmiCards. By comparison, the FOI Guidelines [at 7.42] have a much lower evidentiary threshold, requiring an agency or Minister to be 'reasonably satisfied that a current record of personal information is either not correct or should not be amended'. The Department submits that this low threshold is flawed and creates the potential for bad actors to exploit government systems and services, at heavy social and financial cost to the Australian Government; in the worst of circumstances, changing core identity details could enable bad actors to endanger public safety.

The ability for applicants to amend information under the FOI Act is duplicated by an ability under the Privacy Act (APP 13) to correct personal information to ensure that it is 'accurate, up-to-date, complete, relevant and not misleading'. As previously identified, the FOI Act and Privacy Act have different processing obligations and review rights.

The Department recommends that Part V of the FOI Act be amended to require all personal amendments to be processed under the Privacy Act, as the function more closely aligns to APP 13 and having two systems for personal identity amendments creates unnecessary risk and duplication.

The Department further recommends:

- that there should be a limit to the number of times core biodata, such as name and date of birth, can be altered with a set period.
- that consistent identity practices and standards for identity amendment – including the three pillars assessment or similar best practice - be required across all Commonwealth agencies to promote identity integrity.

- the adoption of the Digital Transformation Agency's proposed 'Tell Us Once' program, which would enable changes of personal information to be shared between agencies, prevent duplicate identities from being created, and reduce the administrative burden placed on applicants seeking to update their personal information.

22. Review the FOI Act to consider whether cost recovery mechanisms should be introduced for personal access requests.

Section 29 of the FOI Act enables agencies to charge applicants for access to non-personal documents, in line with section 7(1) of the *Freedom of Information (Charges) Regulations 2019.*

Personal access requests currently constitute 87 per cent of the Department's FOI program, resulting in more than 11,300 personal access requests FY2022-23 to end of March 2023; this is 13 per cent higher that the Commonwealth agency average as reported in the OAIC Annual Report 2021-2022.

The Department's average personal information access release is currently 190 pages per request and it has already released more than two million pages for personal requests in FY2022-23. A large proportion of personal FOI access requests are for documents previously provided to or by the applicant (such as visa or citizenship applications, supporting evidence, birth and marriage certificates, photos, decision letters etc.) or entire client files spanning years. On occasion, these documents are sought more than once per FOI applicant, such as when an applicant changes Migration Agent.

The Department does not currently have any recourse to charge an administrative or processing fee for the substantial work required to complete personal access requests, with the result that agencies – and by extension taxpayers – are funding private individuals' to access their own documents. The Department submits that at some point the onus must pass to individuals to retain and manage important personal documents.

Further, the lack of any administrative or processing fee encourages applicants to request more documents than they possibly need, on the basis that the documents are 'free'. Imposing an administration fee would encourage FOI applicants to be as targeted as possible with their requests, and retain copies of important personal documents, which would promote processing efficiencies for agencies.

It is arguable whether the objects of the FOI Act, as written in 1982, envisaged the scale of eventuating FOI programs or the nature and volume of personal access requests made under the Act. The Department submits that the introduction of cost-recovery mechanisms is appropriate to recognise and offset the costs associated with FOI processing, and would enable agencies to re-direct funding to frontline services which benefit the whole community.

Concluding statement

The Department supports the valuable regulatory work of the FOI Commissioner and the OAIC, and the leadership and guidance this oversight provides to agencies administering the FOI Act.

As a leading Commonwealth FOI agency, the Department submits that a progressive reform agenda is required to improve and modernise the FOI Act, which will in turn reduce the number of IC reviews on hand and allow for timely outcomes for review applicants.

The Department's suggestions for legislative review, as presented in this document, are practical, promote the objects of the FOI Act, and will enable more effective FOI service delivery by both OAIC and agencies.

The Department submits that any reform of the FOI Act must consider the intent of the Act in balance with the reality and complexities of digital technologies, records and channels to ensure that administration of the Act is functional and sustainable. Reforms should also be consistent with proposed Privacy Act reforms, which are contemplating significant changes to APP12 and APP13.

The Department welcomes the Senate Inquiry and looks forward to its recommendations.

Summary of recommendations

1	Review the current Agency-led funding model for Commonwealth FOI programs.
2	Amend section 55K of the FOI Act to enable the FOI Commissioner to delegate IC decision-making to nominated OAIC officers.
3	Amend sections 54B and 54N to enable a registration fee to be charged for all substantive internal review and IC review requests.
4	Amend sections 54L of FOI Act to require agencies to undertake internal review of all substantive access refusal decisions prior to IC review rights being activated.
5	Amend section 54E of the FOI Act to require agencies to undertake internal review of all 15AC deemed refused decision prior to IC review rights being activated.
6	Amend section 54C(3) of the FOI Act to allow an additional 30 days for external consultations to be undertaken for internal reviews, similar to provisions contained in sections 26A, 27 and 27A.
7	Review section 3 of the FOI Act to ensure the objects of the Act are fit-for-purpose and represent a modern and forward-thinking approach to information access.
8	Amend section 12 of the FOI Act to promote the Privacy Act 1988 as the primary channel for personal information access requests.
9	Amend section 15AC(3) of the FOI Act to enable agencies to appropriately process section 15AC deemed refused requests.
10	Amend section 15(5)(b) to exclude weekends and/or public holidays from statutory timeframes.
11	Review section 15(5)(b) to consider graded statutory timeframes which consider the disparate work effort required to process requests.
12	Introduce a subsection of section 15 (similar to 15(6) and 15(7)) which provides a 14 day extension of time to consult with other government agencies and/or contractors.
13	Amend section 15AA(b) to remove the requirement for an agency to notify the OAIC of a client's agreement to a 15AA EOT.
14	Amend sections 15AB and 15AC to include timeframes for the OAIC to either respond to an agency on EOT requests or allow the EOT to be deemed approved.
15	Amend section 24AB(8) to remove the time required to assess whether a request consultation response resolves a practical refusal reason from statutory timeframes.
16	Amend section 15(2) of the FOI Act to require personal identifiers to be provided for all FOI access requests. Subsequently amend section 24AA(1) to include a lack of personal identifiers as a practical refusal reason.
17	Amend 15(2A) of the FOI Act to enable agencies to determine channels for lodgement of FOI requests.

18	Review the FOI Act to ensure it appropriately considers digital documents, information and records.
19	Amend section 37 of the FOI Act to introduce a new exemption to protect information that would or could reasonably be expected to expose vulnerabilities in government systems to cybercrime.
20	Amend section 22 of the FOI Act to expressly permit non-SES staff names to be redacted as irrelevant information.
21	Amend Part V of the FOI Act regarding amendment of personal information.
22	Review the FOI Act to consider whether cost recovery mechanisms should be introduced for personal access requests.