

The Senate Legal and Constitutional Affairs References Committee

An Inquiry into

The Operation of Commonwealth Freedom of Information Laws

SUBMISSION

By: Mr Paul Hayes

4 May, 2023

Introduction

The submission by Mr Paul Hayes (**Author**) is in response to calls for submissions by the Senate Legal and Constitutional Affairs References Committee which is conducting an Inquiry into the Commonwealth Freedom of Information (*FoI*) Laws.

This submission does not deal with the substance of the Author's application; namely whether he is entitled to the document sought in his FoI application. This is a live issue that remains before the Office of the Australian Information Commissioner (**OAIC**). Rather, this submission primarily provides a case study of the Author's current and ongoing experience of the process as an FoI Applicant and is germane to paragraphs (b), (c) and (d) of the Inquiry's Terms of Reference.

As indicated in the summary timeline below, the Author's FoI application has remained with the OAIC for over 2 years without resolution. Disappointingly, even after this lengthy period, the most recent communication from the OAIC (**9 March, 2023**) states that the FoI application has not yet been allocated to a review adviser and that any allocation may still be some time away.

Executive Summary - Timeline¹

On **22 December, 2020**, the Author made his original FoI Application. The FoI Application is for a specific report being a Public Interest Disclosure Investigation Report authored by the Commonwealth Ombudsman (***the Ombudsman***) and dated 31 January 2020 (***The Ombudsman's Report***).

On **27 January, 2021**, the Ombudsman's FoI Officer made a decision declining to release the Ombudsman's Report.

On **19 February, 2021**, the Author sought an internal review of the decision.

On **22 March, 2021**, the Ombudsman's FoI Appeals Officer made a decision declining to release the Ombudsman's Report.

On **19 April, 2021**, the Author made application to the OAIC seeking a review of the Ombudsman's decisions.

On **7 March, 2022**, the OAIC advised the Author that they had assessed his request as suitable for review.

As at the date of this submission, the OAIC has had the matter for over **2 years** and, as far as the Author is aware, has not allocated the matter to a review officer/adviser² let alone reached a decision in the matter.

Factual and Contextual background³

Introduction

The Indigenous Land and Sea Corporation (***the ILSC***) is a Commonwealth statutory agency originally established in 1995 and whose current enabling statute is the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*. The ILSC is an independent agency but comes within the portfolio responsibility of the

¹ See **Annexure 1** for a more comprehensive summary of the Author's FoI dealings with various agencies.

² Both terms *review officer* and *review adviser* are used by the OAIC but the Author is not clear if these refer to two different positions or just one.

³ The content of this *Factual and Contextual Background* is drawn from information publicly available from documents released pursuant to a number of different FoI applications (principally made by persons other than the Author) to both the ILSC and the OAIC.

Minister for Indigenous Australians. At all relevant times for the purpose of this submission, **The Hon Ken Wyatt MP** was the Minister for Indigenous Australians (*the Minister*).

Critical Background Events

On **12 October, 2020** the Minister wrote to the Chair of the ILSC enclosing an independent external review of governance at the ILSC and also making a reference to the Ombudsman's Report in the following terms:

*"Coupled with the adverse findings and concerns outlined in the Commonwealth Ombudsman Public Interest Disclosure Investigation Report of 31 January 2020, I am very concerned for the governance of the ILSC."*⁴

It is apparent that the Ombudsman's investigation which led to the Ombudsman's Report dated back at least to April, 2019. On **5 April, 2019**, the ILSC Board resolved to meet the personal legal expenses of the then ILSC Group CEO arising out of an inquiry then being undertaken by the Commonwealth Ombudsman. The ILSC Board resolved:

*"To meet the request of the Group CEO to meet his personal legal expenses arising out of an inquiry being undertaken by the Commonwealth Ombudsman to the extent of assisting in responding to the matters raised by the Ombudsman."*⁵

The Ombudsman inquiry related to allegations of workplace bullying and harassment.⁶

The Chair of the ILSC excused himself from this part of the ILSC Board the meeting. The minutes note that no conflict of interest was declared but the Chair "*noted for good practice he would excuse himself from*" this Item.⁷ The Board resolution arose from a request from Group CEO dated **3 April, 2019** which noted his "*need to respond to the allegations made against me*".⁸

On **5 May, 2020** the Minister wrote to the ILSC Chair advising that the Minister did not agree with the ILSC Board's proposal that the Group CEO be provided with a 15% lump sum performance payment. The Minister noted:

*"I wish to advise you and the ILSC Board that I do not support a performance payment for Mr Maher. I am aware, as are you, of concerns about the governance of the ILSC during the relevant reporting period. I do not support the proposal."*⁹

On **15 June, 2020** the Minister reiterated his position in a letter to the ILSC Chair. Neither letter from the Minister sets out his specific governance concerns.

The ILSC 2019-2020 Annual Report noted:

⁴ See ILSC FoI Disclosure Log at <https://www.ilsc.gov.au/about/ilsc-publications/freedom-of-information/> Log No. 19 Document No. 99 (page 380).

⁵ See ILSC FoI Disclosure Log at <https://www.ilsc.gov.au/about/ilsc-publications/freedom-of-information/> Log No. 20 (page 5).

⁶ This is how the matter was described in an email by an Ombudsman Legal Officer to the OAIC of 24 June, 2022. This email was released to the Author as a result of a separate FoI application.

⁷ See ILSC FoI Disclosure Log at <https://www.ilsc.gov.au/about/ilsc-publications/freedom-of-information/> Log No. 20 (page 6).

⁸ See ILSC FoI Disclosure Log at <https://www.ilsc.gov.au/about/ilsc-publications/freedom-of-information/> Log No. 20 (page 4).

⁹ See ILSC FoI Disclosure Log at <https://www.ilsc.gov.au/about/ilsc-publications/freedom-of-information/> Log No. 19 Document No. 62 (page 187).

“The ILSC is aware that the Commonwealth Ombudsman has produced one report in relation to the ILSC in this period. The report has not been made public or provided to the ILSC.” (page 88)

This note was repeated in the ILSC’s 2020-2021 Annual Report (page 116).

It is not clear if these successive annual notes refer to the same report or two different reports.

Conclusion

In conclusion, the publicly available record indicates that during 2019 the Ombudsman conducted a Public Interest Disclosure Investigation into allegations of bullying and harassment within the ILSC. The ILSC Group CEO was at least one of the subjects of the investigation. The ILSC agreed to meet the legal expenses of the ILSC Group CEO in his dealings with the Ombudsman. The Ombudsman produced a report on **31 January, 2020**. That Ombudsman’s Report made adverse findings. However, neither the nature of the adverse findings nor against whom they were made is disclosed by the current publicly available record.¹⁰

The Minister was familiar with the conclusions of the Ombudsman’s Report and had been furnished with an edited version of it.¹¹ The Minister declined to approve a 15% performance pay from ILSC Group CEO in respect of his services during 2018-2019 reporting period noting concerns about governance during that period.

To this day, the Ombudsman’s Report has not been released either in its entirety or in summary form. There is no public transparency or accountability as to the nature or extent of the adverse findings contained in the Ombudsman’s Report into this Public Commonwealth Agency.

The FoI Application

Attached at **Annexure 1** is a detailed timeline of the Author’s FoI dealings with the Department of Prime Minister and Cabinet, the Commonwealth Ombudsman and the OAIC. The Author’s dealings raise significant concerns at various junctures about the competence and timeliness of how the agencies have dealt with his application. These concerns are summarized by way of brief commentary below:

1. **Competency Issue:** On 8 January, 2021 the Ombudsman advised the Author by letter that it could not locate the document. The Ombudsman advised that their difficulties were based on the limited information the Author had provided. The Author’s request was not for a significant body of documents but one very specific document about which forensic identifying detail was provided. Given this high degree of specificity, the inability of the Ombudsman’s preliminary searches to locate the document it authored was surprising and raises significant issues of competence around the searches that had been conducted.
2. **Competency Issue:** The Ombudsman’s letter of 8 January ,2021 also asked the Author to provide a photocopy identification of himself. Such a request has no relevance of any sort in

¹⁰ Accordingly, it is not known if the specific bullying allegations related to the ILSC Group CEO or other persons and it is not known if the ILSC Group CEO was the subject of the adverse findings contained in the Ombudsman’s Report.

¹¹ An email from the Ombudsman to the OAIC of 24 June, 2022 refers to a redacted form of the document having been provided to the Minister. This email was released to the Author as a result of a separate FoI application.

relation to the FoI request.¹² The Author pointed this out and the issue was not pressed. The irrelevant request again raises issues of competence as it suggests that the Ombudsman is unaware of the matters relevant to an FoI request.

3. **Timeliness Issue:** The Ombudsman's letter of 8 January, 2021 requested that the Author agree to a 7 day extension to the 30 day statutory deadline to reach a decision. This was surprising given the specificity and limited nature of the Author's FoI application. One reason for the Ombudsman's request was the Christmas shut down period. This shut down period is an annual event, and accordingly should be clearly planned for by all Government agencies and not used as a pretext for not meeting statutory time frames.
4. **Timeliness Issue:** By email of **12 May, 2021** the OAIC advised that it would take 8 – 12 weeks to assess the review request and then another 12 months to allocate the matter to a review officer. Despite this 8 – 12 week estimate, the Author had no further contact from the OAIC until **7 March, 2022**, almost a full **10 months** after he was advised of an 8-12 week time frame.
5. **Communication Issue:** The Author's first follow-up email to the OAIC of **23 February, 2022** asking for an update met with no response.
6. **Timeliness Issue:** The OAIC advised the Author by email on **7 March, 2022** that his application had been assessed as suitable for review. The email then advised that the OAIC could provide no time frame for when the review might commence. The inability of the OAIC to provide even an outer time frame for the commencement of the review is clearly unsatisfactory.
7. **Timeliness Issue:** Nearly two months after the OAIC made a decision to review, it contacted the Ombudsman on **3 May 2022** providing that office with similar advice and requesting information by **24 May, 2022**.¹³ It is unclear why the OAIC did not contact the Ombudsman on **7 March, 2022**.
8. **Timeliness Issue:** Despite the original OAIC request that the Ombudsman provide its response by **24 May, 2022**, the Ombudsman requested 4 extensions to that deadline and the OAIC acceded to each request taking the last agreed deadline to **18 July, 2022**. The Ombudsman:
 - (i) failed to meet each extended deadline; and
 - (ii) breached three deadlines, belatedly asking for an extension to two of them; and
 - (iii) breached the last deadline of **18 July, 2022** without ever asking for an extension and that breach continued for **40 days** without explanation.¹⁴

This sequence of deadline extensions and breaches is inconsistent with paragraph 10.23 of the FoI Guidelines;

¹² The request was also arguably a breach of the *Privacy Act 1988 (Cth)* and the Australian Privacy Principle 3.1 which provides that an *agency must not collect personal information unless the information is reasonably necessary for, or directly related to, one of the agency's functions or activities*. The request for the Author's photographic ID would appear unrelated to its functions or activities in dealing with the Author's FoI request.

¹³ To the extent that this paragraph 7 and the following paragraph 8 refers to email correspondence between the agencies to which the Author was not a party, these emails were released to the Author as a result of a separate FoI Application.

¹⁴ Paragraph 8 summarises the Author's understanding of these inter-agency dealings to which he was not a party but which became apparent after the release to the Author of relevant correspondence pursuant to a separate FoI request. More detail of that inter-agency correspondence is provided at **Annexure 2**.

“The IC review process is intended to be efficient and lead to resolution as quickly as possible. To maintain efficiency, the OAIC relies on:

- timely responses to requests for documents at issue and submissions from the parties.”*

9. **Timeliness and Communication Issue:** During the period of **3 May, 2022** to **6 September, 2022**, the OAIC failed to proactively update the Author on their dealings with the Ombudsman but provided limited and belated information from time to time in response to follow up queries from the Author.
10. **Timeliness Issue:** On **6 September, 2022** some **4 months** after receiving the OAIC section 54Z notice, the Ombudsman finally provided its substantive response.
11. **Timeliness issue:** On **27 September, 2022** the OAIC provided the Author with the Ombudsman response some **21 days** after its receipt by the OAIC. The OAIC requested the Author to respond within **14 days**. This **14 day** period was put to the Author despite:
 - (a) The Ombudsman taking **4 months** to provide its views; and
 - (b) The OAIC having already had the matter before it for some **17 months**.
12. **Communication Issue:** The Author (having been granted an extension) provided his submissions on **15 October, 2022**. The Author requested the OAIC for an update over 4 months later on **24 February, 2023**. No response was received.
13. **Timeliness Issue:** In response to a further follow-up email from the Author of **9 March, 2023**, the OAIC advises the Author on **9 March, 2023** that the matter is awaiting allocation to a review adviser and this may not occur for some time. **This is the most recent communication from the OAIC.**

In conclusion, at the time of writing this submission, the second anniversary has passed since the matter came before the OAIC and the matter is yet to be allocated to a review adviser for a substantive consideration of the merits of the review. This is despite the OAIC advice of 12 March, 2021 (see para 4 above) suggesting such allocation should occur roughly by August, 2021. Further, this is in the context of an FOI application that relates to one very specific document.

Recommendations

- 1. The FoI Act should prescribe clear time frames for the OAIC to perform its statutory review functions.**
- 2. The OAIC should be appropriately staffed and resourced so that it can readily meet such time frames.**
- 3. If the OAIC does not meet its statutory time frames without good reason, then there should be a statutory deeming of a decision in favour of release of the documents to the FoI Applicant. This deeming mechanism should only be over-ruled by the Federal Court on application by the OAIC with the OAIC having the burden of proving there was good cause for the OAIC not meeting the statutory time frame.**
- 4. The OAIC should be staffed with competent, proactive and diligent officers.**
- 5. The OAIC should be obliged to communicate with each review applicant proactively and in any event at least once a month on the progress of the review application (even if nothing has happened).**
- 6. The OAIC should answer phone calls on Fridays, a practice they do not currently undertake.**

Annexure 1

Timeline of Author's FoI Dealings with Agencies

Date	Author Letter/Email	Agency Response	Summary
22.12.20	FoI Request to Department of Prime Minister and Cabinet ¹⁵		FoI Request to DPMC for a Public Interest Disclosure Report prepared by the Ombudsman relating to the Indigenous Land and Sea Corporation dated 31 January, 2020.
05.01.21		DPMC	DPMC response notifying Author of transfer of his request to the Ombudsman being the more appropriate agency.
08.01.21		Ombudsman	<p>Ombudsman advice that the Ombudsman has carriage of FoI request but a preliminary search has been unable to locate the document. Letter requests additional information about the document by no later than 15.01.21. Letter also asks that Author agrees to extend the statutory 30 day deadline by 7 days.</p> <p>The letter also queries Author as to his relevant involvement in the matter and requests a copy of his photo-identification.</p>
09.01.21	Response to Ombudsman		<p>Author explains the document is one referred to by the Minister for Indigenous Australian the Hon Ken Wyatt in a letter to the Directors of the ILSC of 12 October, 2020. Author provides a link to the document on the ILSC website.</p> <p>Author declines to provide advice as to his involvement in the matter or his photo ID as neither matter has any relevance to his FoI application or the applicability of the relevant FoI laws. ¹⁶</p> <p>Author agrees to the requested extension.</p>

¹⁵ The Minister for Indigenous Australians came within the Department of Prime Minister and Cabinet.

¹⁶ The Ombudsman did not subsequently press either of these requests.

27.01.21		Ombudsman	Decision on FoI request declining to release the document in its entirety.
19.02.21	FoI Review Request to Ombudsman		Author requests Ombudsman to conduct an internal review.
22.03.21		Ombudsman	Internal Review Decision declining to release the document in its entirety.
19.04.21	Author Review request to OAIC		Author requests OAIC to conduct a review of the Ombudsman decision.
06.05.21		OAIC	OAIC asks Author to provide copy of Ombudsman decision.
07.05.21	Author Email to OAIC		Author provides OAIC with Ombudsman Internal Review decision.
12.05.21		OAIC	OAIC advises 8-12 weeks to assess the review request then another 12 months to allocate the matter to a review officer.
23.02.22	Author Email to OAIC		Author requests an update on the review process.
06.03.22	Author Email to OAIC		Author notes no response to his email of 23.02.22 and again requests an update.
07.03.22		OAIC	OAIC advises Author that the application has been assessed as suitable to review but the review has not yet commenced. OAIC advises they cannot advise a time frame when the review might commence.
03.05.22		OAIC	OAIC advises that Ombudsman has today been advised that OAIC will conduct a review and OAIC has requested information from the Ombudsman. OAIC advises Author they will provide an update when OAIC has heard from the Ombudsman.
19.07.22	Author Email to OAIC		Author requests further update noting statutory time frames to obtain information from Ombudsman are likely to have passed.

21.07.22		OAIC	OAIC advises they have not yet heard from Ombudsman and Ombudsman had requested an extension of time to respond which was granted by OAIC to 18 July, 2022. OAIC noted this time has passed so they have today again written to Ombudsman requesting a response within a week.
21.07.22	Author Email to OAIC		Author notes the Ombudsman's disappointing lack of response and the OAIC generous extensions. Author asks that OAIC be more proactive in updating him on progress.
27.07.22	Author Email to OAIC		Author notes week extension has passed and seeks update from OAIC.
29.07.22	Author Email to OAIC		Author notes no response to his email of 27.07.22 and notes he tried to call OAIC without success as they do not take calls on Fridays. Author again asks for an update.
13.08.22		OAIC	OAIC advises that OAIC still has not heard from the Ombudsman and they will seek to escalate the matter within the Ombudsman office if they do not hear today.
13.08.22	Author Email to OAIC		Author expresses his concerns about ongoing delays in procuring information from Ombudsman.
26.09.22	Author Email to OAIC		Author follows up OAIC requesting update.
27.09.22		OAIC	OAIC encloses submission from Ombudsman and requests Author to respond by 11 October, 2022.
28.09.22	Author Email to OAIC		Author requests an extension for his submission to 27 October noting previous lengthy delays by Ombudsman.
10.10.22	Author Email to OAIC		Author follow-up request for response to his extension request of 28.09.22.
10.10.22		OAIC	OAIC grants Author requested extension to 27 October, 2022.
15.10.22	Author Email to OAIC		Author encloses his submission in response to Ombudsman submission.

19.10.22	Author Email to OAIC		Author resends submissions as email of 15.10.22 inexplicably bounced back.
24.02.23	Author Email to OAIC		Author requests OAIC for update.
09.03.23	Author Email to OAIC		Author notes no response to his email of 24.02.23 and again requests update.
09.03.23		OAIC	OAIC advises the matter is awaiting allocation to a review adviser but the allocation may not occur for some time.

Annexure 2

Summary of Inter-Agency OAIC and Ombudsman Dealings Regarding Extension Requests

Date	Correspondence	Summary	Deadline Breach ¹⁷
3 May, 2022	OAIC to Ombudsman	Letter asking Ombudsman for relevant documents and any submissions ¹⁸ by 24 May, 2022 .	
24 May, 2022	Ombudsman to OAIC	Email requesting an extension to 14 June, 2022 .	
25 May, 2022	OAIC to Ombudsman	Email granting extension to 14 June, 2022 .	
7 June, 2022	Ombudsman to OAIC	Email requesting for extension to 21 June, 2022 .	
14 June, 2022	OAIC to Ombudsman	Email granting further extension to 21 June, 2022	Ombudsman breached 21 June deadline and only sought retrospective extension on 24 June.
24 June, 2022	Ombudsman to OAIC	Email requesting further extension to provide submissions to 1 July, 2022 .	
28 June, 2022	OAIC to Ombudsman	Email granting extension to 1 July, 2022 .	Ombudsman breached deadline of 1 July and only sought retrospective extension on 1 July.
4 July, 2022	Ombudsman to OAIC	Email requesting further extension to 18 July, 2022 .	
15 July, 2022	OAIC to Ombudsman	Email granting further extension to 18 July, 2022 .	Ombudsman breached this deadline without seeking any extension and remained by breach for 40 days without apparent explanation.
21 July, 2022	OAIC to Ombudsman	Email noting no response received from Ombudsman.	
10 August, 2022	OAIC to Ombudsman	Email noting no response received from Ombudsman.	
6 September, 2022	Ombudsman to OAIC	Letter enclosing Ombudsman Submission.	

¹⁷ This column refers to a deadline (including any extended deadline) set by the OAIC which was breached by the Ombudsman.

¹⁸ Being a generic description of the documents more specifically particularised in the table in paragraph 10.100 of the FoI Guidelines.