



Australian Government

Australian Financial Security Authority

Senate Legal & Constitutional Affairs Committee Inquiry

The operation of Commonwealth FOI laws

Matters of relevance to the Inquiry

1. On 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (the Inquiry), to the Legal and Constitutional Affairs References Committee (the Committee). The Australian Financial Security Authority (AFSA) provides this submission to the Committee, with particular reference to handling resource-intensive or potentially vexatious applicants, in respect of the following matters of relevance to the Inquiry's terms of reference:
 - (c) resourcing for responding to FOI applications and reviews; and
 - (e) any other related matters.

Background

2. AFSA is an executive agency in the Attorney-General's portfolio responsible for Australia's personal insolvency, personal property securities and criminal asset management systems.
3. AFSA is a government system stakeholder and practitioner, as well as a regulator. We have around 400 staff, and offices in every capital city (except Darwin), who may act as delegates of the Registrar of the Personal Properties Securities Register, the Inspector-General in Bankruptcy, the Official Trustee (OT), and the Official Receiver in carrying out the day-to-day administration of the systems AFSA is responsible for.
4. It is common practice for small and medium agencies to resource their FOI capacity to deal with FOI requests based on an assessment of average trends. Presently, and historically, AFSA has a single FOI officer who deals with the 40 to 50 FOI applications usually received each year.

Resource-intensive applicants

5. By way of context, a bankrupt would typically interact with the OT for a period of 3 years (which is the usual duration of bankruptcy from declaration to discharge). While many cases are relatively straightforward, the OT is also very experienced with administering complex estates involving litigious and non-compliant individuals.
6. Some individuals will pursue legal challenges to the declaration of bankruptcy and the actions of AFSA officials, resulting in an interaction with the OT over a much longer period. Commensurately, the files held by AFSA on these estates are substantial.
7. In cases where a valid FOI application is received that relates to the administration of a bankrupt estate, it is necessary for the FOI coordinator to liaise with the delegate or delegates of the OT who are administering the bankruptcy. Assessment of a straightforward FOI request can demand significant AFSA resources to perform the activities specified in s 24AA(2) of the FOI Act.
8. Where an FOI applicant makes numerous requests within a short timeframe requiring examination of complex and voluminous case files, this presents further resourcing strain. In some instances, even after exercising the practical refusal reason, the continued actions of the FOI applicant may raise questions about whether the applicant should be considered vexatious under the FOI Act.
9. As with other agencies, AFSA has experience with several unreasonable and potentially (or declared) vexatious FOI applicants. It is often the case that requests are intermingled with a range of grievances and complaints that have been or are being dealt with by other parts of AFSA.
10. Resources must be allocated to distinguish those parts of the communications that can be responded to as an FOI application, from those parts not amenable to the FOI process.
11. Where litigation is part of the background to FOI applications and interactions with AFSA, the requests:
 - relate to documents linked to matters before a court/tribunal where the applicant could use procedures of the court or tribunal to seek access to those documents;
 - may be frequently embedded in other correspondence;
 - may indicate the applicant has not made reasonable attempts to moderate the frequency of requests or limit the administrative impact that these requests cause;
 - are predicated upon unsupported, unfounded and unreasonable assertions of illegality, fraud and misconduct against the OT and AFSA officers, which have been considered previously or are under review at the time;
 - may seek explanations or answers to questions relating to the administration of a matter, interspersed with requests for documents; and
 - frequently seek the same or similar documents that have been the subject of previous requests with minor alterations of form without changing the substance of the request.
12. This pattern of interactions may be associated with other communication issues when engaging with the agency, such as:

- frequent, continual correspondence, challenging and questioning actions taken or decisions made;
 - court proceedings initiated against the agency or individual staff members; and
 - complaints about the agency's conduct.
13. AFSA always endeavours to provide a single response to the totality of requests, dealing with both FOI and non-FOI issues. However, where applicants display the characteristics outlined above, the ongoing and repeated need to engage with the applicant, to refine or clarify FOI requests, is resource intensive for an agency of our size.
14. To limit the impacts, AFSA may notify the applicant that resources would only be allocated to requests that contained mixed requests if the balance of convenience favoured a single response being provided.
15. A further escalation may be to notify the applicant that, for an FOI application to be processed from their communication, it must:
- be confined to seeking access to documents;
 - not contain extraneous material; and
 - addressed only to AFSA's FOI inbox (i.e. not sent or copied to other email addresses).
16. Our experience is that, for some individuals, this does not result in the desired change in behaviour. AFSA has also attempted to engage the 'practical refusal reason' process in response to relevant requests. However, that process itself requires considerable resources (for example, in estimating the time required to process a request, and in suggesting ways in which the request can be revised). In AFSA's view, it is not a reasonable or sustainable option.
17. In practice, under the FOI Act, AFSA has no option but to continue to allocate resources to clearly separate requests for documents from other extraneous assertions, allegations and requests, unless we pursue a declaration from the Office of Australian Information Commissioner (the OAIC) that the applicant is vexatious.

Vexatious applicants

18. AFSA is of the view that there is insufficient guidance and support available from the OAIC for small to medium agencies with limited FOI resources to reasonably manage resource-intensive and potentially vexatious applicants.
19. The current OAIC guidance is unclear on the criteria for establishing when an applicant may be considered a vexatious applicant ([Attachment A](#)). Improved guidance would assist small to medium agencies, like AFSA, with setting parameters when dealing with unreasonable applicants, as well as identifying when an applicant starts to demonstrate vexatious behaviours.
20. Further, an agency with a single FOI officer (such as AFSA) must weigh up the resources required to determine what evidence is available and appropriate to seek a declaration that an applicant is vexatious; and then, with the limited guidance available, build the necessary evidence base to support a decision by the OAIC and engage with the applicant as recommended. Resources are also required to ensure we continue to meet any ongoing FOI requests that are received.

21. Small and medium agencies often have limited capacity to allocate suitable resources to deal with an unexpected surge in FOI requests, particularly from an unreasonable applicant. Agencies like AFSA may be better able to deal with these surges if they are afforded merit based special consideration. This may be achieved by expressly correlating the size of an agency as an element in the OAIC structured framework for determining applications for a vexatious applicant declaration under s89L for the purposes of the FOI Act.

Recommendations

22. AFSA proposes that the Committee considers the following:

- a) That OAIC guidance relating to s89L provide greater emphasis on “the size of the agency and the resources it can reasonably allocate to FOI processing” and refer to the capacity of small agencies processing requests from applicants who display particular communication patterns and litigious characteristics, in considering the “burden on the agency or a burden that is excessive and disproportionate to a reasonable exercise by an applicant of the right to engage in access actions”.
- b) The OAIC guidance expressly incorporates a correlation of the size of an agency as an element in the OAIC structured framework for determining applications for a declaration under s89L as to whether the applicant is a vexatious applicant under the FOI Act.
- c) The OAIC guidance expressly recognises the public interest issues raised by applicants seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.

Attachment A

Extracts from the Information Commissioner's FOI Guidelines on vexatious declarations

- 12.26 An abuse of process that is grounded in unreasonably interfering with an agency's operations can, under s 89L, arise from either a particular access action (s 89L(1)(b)) or a pattern of repeated access actions (s 89L(1)(a)). The more usual situation will be a pattern of repeated requests, bearing in mind that an agency can initiate a practical refusal process for a particular access action that could have an unreasonable workload impact on the agency (s 24).
- 12.27 Factors that may be considered in deciding whether there is a pattern of repeated access actions that unreasonably interfere with an agency's operations include:[\[26\]](#)
- the total number of a person's access actions to the agency in a specific period, and in particular, whether a high number of access actions has led to a substantial or prolonged processing burden on the agency or a burden that is excessive and disproportionate to a reasonable exercise by an applicant of the right to engage in access actions
 - the impact of the person's access actions on FOI administration in the agency, and in particular, whether a substantial workload impact has arisen from the nature of a person's access actions, such as multiple FOI requests that are poorly-framed or for documents that do not exist, requests for documents that have already been provided or to which access was refused, or requests that are difficult to discern and distinguish from other complaints a person has against the agency. It is nevertheless important to bear in mind that an individual, who may lack both expertise in dealing with government and a close knowledge of an agency's records management systems, may make access requests that are poorly framed, overlapping or cause inconvenience to an agency
 - the impact of the person's access actions on other work in the agency, and in particular, whether specialist or senior staff have to be redeployed from other tasks to deal with FOI requests, or whether the requests have caused distress to staff or raised security concerns that required separate action
 - whether the agency has used other provisions under the FOI Act to lessen the impact of the person's access actions on its operations (see [\[12.11\]](#) [below])
 - the size of the agency and the resources it can reasonably allocate to FOI processing
 - whether the person has cooperated reasonably with the agency to enable efficient FOI processing, including whether the person's access actions portray an immoderate prolongation of a separate grievance the person has against the agency, or the continued pursuit of a matter that has already been settled through proceedings in another dispute resolution forum
 - whether the person has previously been declared vexatious
 - whether deficiencies in an agency's FOI processing or general administration have contributed to or might explain a person's access actions (see [\[12.13\]](#) above).
- 12.33 In general, prior to deciding to apply for a declaration an agency should tell the person concerned that the option is being considered and invite them to consult with a view to removing the need for a declaration. If this has not occurred, the agency should include the reasons for not telling the person concerned in their application to the Information Commissioner.

- 12.34 An application for a vexatious applicant declaration must include:
- background information about the person's access actions and how the agency or minister dealt with those access actions
 - a clear statement of the grounds on which the agency or minister seeks the declaration
 - evidence that supports those grounds, such as copies of correspondence with the person, or file notes documenting interactions between the person and agency staff
 - any proposed terms or conditions which the agency or minister believes the declaration should include (see [12.45] for examples of previous terms and conditions in declarations).
- 12.35 In preparing the proposed terms or conditions, the agency or minister should consider:
- the length of the declaration sought (in general, the Information Commissioner is of the view that a declaration should be made for definite period, however, extenuating circumstances may require an ongoing declaration)
 - whether the declaration should apply to any outstanding access actions (see [12.38]-[12.44]), and
 - whether the agency or minister is seeking that the person be named in the published decision (see [12.48]).
- 12.36 If the agency or minister contends there has been unreasonable interference with the operations of an agency under s 89L(4)(b), an agency should provide:
- information about the proportion of requests by the person in relation to requests by other FOI applicants, and
 - submissions on the number of hours spent on the person's access actions.
- 12.39 In making a declaration, the Information Commissioner may decide that an agency is no longer required to process an existing access action or that an agency is not required to process access actions commenced after a particular date. Such a term is likely to only be made in circumstances where the specific access actions on hand are shown to involve an abuse of process.
- 12.42 The FOI Act does not expressly state whether an agency or minister is required to continue processing access actions that were on hand when the agency or minister applied to the Information Commissioner for a declaration, or were received while the Information Commissioner is considering the application. Given the significance of suspending a person's rights under the FOI Act, it will usually be prudent for agencies to continue to process the access actions. Deficiencies in an agency's administration in processing FOI requests of a person sought to be declared vexatious may be a factor weighing against making a declaration. The OAIC should be advised if any fresh access actions are made while the application is being considered by the Commissioner.
- 12.43 In circumstances where an agency or minister is making an application to the Information Commissioner for a term of the declaration providing that the agency or minister is not required to process existing access actions, the agency or minister should consult the OAIC about whether existing access actions must be processed, including any fresh actions made while the matter is being considered by the Commissioner.

12.11 The FOI Act enables an agency to take steps (other than applying for a vexatious applicant declaration) to regulate or reduce the impact that individual requests may have on the workload or operations of the agency. An agency's recourse to these other measures in relation to a particular applicant may be a relevant consideration for the Information Commissioner in deciding whether to make a declaration against that person. Alternatives available to an agency include:

- consulting an applicant about the nature of a request (s 15(3)) and other means of satisfying the applicant's desire to obtain government information (see Part 3 of these Guidelines)
- seeking an applicant's agreement to an extension of processing time (s 15AA)
- applying to the OAIC for an extension of processing time if the FOI request is complex or voluminous (s 15AB), or after a decision has become a deemed refusal decision (s 15AC, 54D and 51DA)
- requiring an applicant to engage in a request consultation process if the agency believes there may be a practical refusal reason for refusing a request that substantially and unreasonably diverts the resources of the agency from its other operations, or if the request does not adequately identify the documents requested (ss 24, 24AA, 24AB)
- notifying an applicant that a charge is payable for a request for information other than personal information that involves more than five hours of decision-making time (s 29).