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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. VID519 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

SENATOR REX PATRICK

Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Affidavit of: **Elizabeth Hampton**
Address: 175 Pitt Street Sydney NSW 2000
Occupation: Deputy Commissioner, Office of the Australian Information Commissioner
Date: 5 August 2022

Contents

| Document number | Details | Paragraph | Page |
|-----------------|---|-----------|------|
| 1 | Affidavit of Elizabeth Hampton affirmed on 5 August 2022 | 1 – 49 | 1 |
| 2 | EH-1 OAIC annual report for the financial year ending 30 June 2017 | | 14 |
| 3 | EH-2 OAIC annual report for the financial year ending 30 June 2018 | | 226 |
| 4 | EH-3 OAIC annual report for the financial year ending 30 June 2019 | | 438 |

Filed on behalf of (name & role of party) Australian Information Commissioner (the Respondent)
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| Document number | Details | Paragraph | Page |
|-----------------|---|-----------|------|
| 5 | EH-4 OAIC annual report for the financial year ending 30 June 2020 | | 662 |
| 6 | EH-5 OAIC annual report for the financial year ending 30 June 2021 | | 842 |

I **ELIZABETH HAMPTON**, of 175 Pitt Street Sydney NSW 2000, Deputy Commissioner, sincerely declare and affirm:

1. I am a Deputy Commissioner at the Office of the Australian Information Commissioner (**OAIC**).
2. I am authorised to make this affidavit on behalf of the respondent, the Australian Information Commissioner (**Information Commissioner**).
3. By making this affidavit, I do not intend and have no authority to waive privilege in any communication, or record of communication, that is the subject of the respondent's legal professional privilege. Nothing in this affidavit ought to be construed as involving a waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.
4. I make this affidavit from my own knowledge unless otherwise stated. Where I depose to matters that I have been told by somebody else, I believe those matters to be true.
5. In this affidavit, I will describe the following:
 - (a) **Part A** – my background and roles at the OAIC;
 - (b) **Part B** – the structure and functions of the OAIC; and
 - (c) **Part C** – the resources available to the OAIC to perform its functions.

Part A – Background

6. I have been employed by the Australian Public Service (**APS**) since October 1994. I joined the Office of the Australian Information Commissioner (**OAIC**) in January 2019 in the role of Deputy Information Commissioner (**Deputy Commissioner**).
7. I held the role of Deputy Commission until August 2021. I then held the position of acting Freedom of Information Commissioner (**FOI Commissioner**) from August 2021 until April 2022. I resumed the role of Deputy Commissioner in April 2022 following the appointment of Leo Hardiman PSM QC as FOI Commissioner.

8. Prior to joining the OAIC, I held a number of positions at the Senior Executive Service level in other agencies and government instrumentalities that are part of the APS, including, most recently before I joined the OAIC, as First Assistant Secretary of the Department of Home Affairs.
9. In my role as Deputy Commissioner, I report directly to the Information Commissioner. The current Information Commissioner is Angelene Falk, who was appointed to that role in August 2018. The role of Deputy Commissioner is to assist the Information Commissioner to fulfill her statutory functions under the *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**), including to:
 - (a) Provide strategic advice and management of the day-to-day operations of the OAIC.
 - (b) Acting as a delegate in respect of the Information Commissioner's statutory functions.
 - (c) Develop the capability and capacity of the OAIC to respond to new and emerging regulatory challenges through implementing effective systems, processes, and strategies.
 - (d) Provide effective governance, risk management and compliance with public sector requirements.
 - (e) Ensure effective external engagement and stakeholder relationships, including negotiations with government and business organisations.
 - (f) Represent the Information Commissioner and the OAIC in significant matters, before parliamentary committees, and other public and business forums.
 - (g) Undertake other duties as directed by the Commissioner.
10. In my previous role as the Acting FOI Commissioner, I was responsible for the delivery of the FOI functions, including the conduct of Information Commissioner reviews (**IC Reviews**) pursuant to Part VII of the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Broadly, my role involved:
 - (a) overseeing the conduct of IC Reviews and making decisions pursuant to s 55K of the FOI Act;
 - (b) increasing the capability within the FOI branch (described in paragraph 15(c) below), including by reviewing systems, processes and reporting to improve the efficiency of the branch;
 - (c) establishing clear output expectations for teams or officers, and key areas of focus;
 - (d) engaging with regulated government departments and agencies in relation to information access; and

- (e) liaising with the Information Commissioner in relation to particular matters, including matters that raised novel legal issues.

Part B – The OAIC

11. The establishment of the OAIC in November 2010 brought together in one agency the functions of the previous Privacy Commissioner and the Office of the Privacy Commissioner, and the new functions established by the amendment of the FOI Act in 2010.
12. The Information Commissioner is the head of the OAIC, an agency established by the AIC Act. The OAIC consists of the Information Commissioner, the FOI Commissioner and the Privacy Commissioner, and the staff engaged in accordance with Div 3 of Pt 3 of the AIC Act.
13. The OAIC is responsible for carrying out the “privacy functions” as defined in s 9 of the AIC Act, the “freedom of information functions” (or **FOI functions**), as defined in s 8 of the AIC Act and the “information commissioner functions”, as defined in s 7 of the AIC Act. The information commissioner functions are principally the Ministerial reporting and advisory functions of the Information Commissioner.
14. Angelene Falk was appointed as Information Commissioner and Privacy Commissioner on 16 August 2018. At that time, the office of FOI Commissioner was vacant and the Information Commissioner exercised the information commissioner functions, FOI functions and privacy functions. The office of FOI Commissioner was vacant from January 2015 until I was appointed to act as FOI Commissioner pursuant to s 21 of the AIC Act in August 2021. As already noted, Mr Leo Hardiman PSM QC commenced in the position of FOI Commissioner in April 2022.
15. The OAIC is comprised of the following four branches:
 - (a) Dispute Resolution branch, which is responsible for privacy dispute resolution, managing enquiries, resolving and investigating privacy complaints, privacy Commissioner initiated investigations (**CIIIs**) and their outcomes and administering the Notifiable Data Breaches scheme. The Dispute Resolution branch is led by the Assistant Commissioner (Dispute Resolution).
 - (b) Regulation and Strategy branch, which is responsible for providing strategic policy advice and guidance to individuals, government and business, the OAIC’s assessment (audit) program and the OAIC’s international strategy, developing regulatory and statutory instruments. Since 2019, the Regulation and Strategy branch has undertaken the OAIC’s functions in relation to the Consumer Data Right (**CDR**). This branch is led by the Assistant Commissioner (Regulation and Strategy).

- (c) FOI branch (previously known as the 'FOI Regulatory Group'), which is responsible for undertaking IC Reviews, monitoring, investigating and reporting on compliance through FOI complaints and Commissioner initiated FOI investigations, determining applications for vexatious applicant declarations and extensions of time, collecting information and statistics from agencies and ministers about FOI matters and providing advice and guidance on FOI and information access related matters. The FOI branch is led by the Assistant Commissioner (Freedom of Information).
- (d) Corporate branch, which includes legal services, strategic communications and corporate services and is led by the Assistant Commissioner (Corporate).

Privacy functions

16. The OAIC's "privacy functions" are those conferred under Commonwealth legislation that concern the privacy of an individual, which include the functions conferred under the *Privacy Act 1988* (Cth) (**Privacy Act**), the *Crimes Act 1914* (Cth), the *Data-matching Program (Assistance and Tax) Act 1990* (Cth), the *National Health Act 1953* (Cth), the *My Health Records Act 2012* (Cth) (**My Health Records Act**), the *Healthcare Identifiers Act 2010* (Cth) and the *Telecommunications Act 1997* (Cth).
17. At the time of its establishment in 2010, the OAIC assumed the privacy functions that had previously been undertaken by the Privacy Commissioner and the Office of the Privacy Commissioner. Since 2010, a number of additional privacy functions have been conferred on the Information Commissioner. The significant statutory changes that have conferred additional privacy functions on the OAIC include:
- (a) the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), which commenced on 12 March 2014 and which amended the Privacy Act by (among other things) introducing:
- i. the new Australian Privacy Principles (which replaced the "Information Privacy Principles" in effect);
 - ii. new provisions allowing for more comprehensive credit reporting (and greater investigation and enforcement power for the OAIC); and
 - iii. new provisions regarding the development and maintenance by the OAIC of codes of practice about information privacy and a code of practice for credit reporting;
- (b) the My Health Records Act (formerly known as the "*Personally Controlled Electronic Health Records Act 2012* (Cth)"), which conferred functions on the OAIC with respect to the 'My Health Record' system, including investigating an act or practice that may

be an interference with the privacy of a healthcare recipient under the My Health Records Act;

- (c) the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth), which amended the Privacy Act by introducing new provisions to establish a statutory "Notifiable Data Breach" scheme (**NDB Scheme**) to be regulated by the OAIC as of 22 February 2018. The NDB Scheme requires an entity covered by the Privacy Act to notify affected individuals and the OAIC when a data breach is likely to result in serious harm to an individual whose personal information is involved; and
 - (d) the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth), which inserted a new Part IVD into the *Competition and Consumer Act 2010* (Cth) to establish the CDR. These new statutory provisions concern the rights of consumers and small to medium enterprises to access, and have control over, their data to readily enable transfer of data between service providers in designated sectors (so as to improve their ability to compare and switch between products and services). As of 13 August 2019, the OAIC became a co-regulator with the Australian Competition and Consumer Commission of the CDR, with the CDR commencing on 1 July 2020.
18. In addition, the OAIC has a memorandum of understanding with the Australian Capital Territory Government to provide privacy services to ACT public sector agencies, including responding to enquiries from the public about the *Information Privacy Act 2014* (ACT) and the Territory Privacy Principles scheduled to that Act.
19. The OAIC's privacy functions are largely undertaken by the Dispute Resolution and the Regulation and Strategy branches. These are the two largest branches of the OAIC in terms of the number of full-time equivalent (**FTE**) staff. As at the date of making this affidavit, the Dispute Resolution branch has the equivalent of approximately 37 FTE employees and the Regulation and Strategy branch has the equivalent of approximately 27 FTE employees.

FOI functions

20. The AIC Act provides for the appointment of the FOI Commissioner, who has the FOI functions as defined in s 8. The FOI functions are also conferred on the Information Commissioner.
21. The OAIC's FOI functions involve:
- (a) conducting IC Reviews pursuant to Part VII of the FOI Act;
 - (b) assessing complaints under Part VIIB of the FOI Act in connection with actions taken by a government agency in the performance of its functions or the exercise of its

powers under the FOI Act, and undertaking investigations (including investigations of its own initiative);

- (c) assessing and determining applications from Commonwealth agencies and Ministers for an extension of time to process a request for information made under Part III the FOI Act; and
 - (d) providing guidance and advice to individuals and Commonwealth agencies and Ministers about FOI rights and obligations (including publishing guidelines under the FOI Act and fact sheets, and hosting the Information Contact Officer Network (a network for Australian Government FOI practitioners) conference, which allow the OAIC to report and provide guidance on noticeable trends across its various functions, including its privacy functions).
22. The FOI branch is responsible for undertaking most of the office's FOI functions, however the OAIC's in-house legal team is responsible for managing requests for release of information by the OAIC pursuant to Part III of the FOI Act. These are not FOI functions conferred by the AIC Act, but rather the obligations that apply to most Commonwealth government agencies under the FOI Act.
23. As at the date of making this affidavit, the FOI branch has the equivalent of approximately 18 FTE staff and is led by the Assistant Commissioner (Freedom of Information). For the financial year ending 30 June 2020, the FOI branch had an average staffing level (**ASL**, which is an indicator of the average number of FTE employees over a period of time, excluding staff in a Senior Executive Service position) of 14 staff; for the financial year ending 30 June 2021, the FOI branch had an ASL of 19 staff.

IC Reviews

24. The process of conducting IC Reviews is outlined in Part 10 of the Guidelines published pursuant to the FOI Act (**FOI Guidelines**).
25. The IC Review process is intended to be informal and non-adversarial, and to enable timely resolution of IC Reviews. Since 1 July 2013, the OAIC has set itself a benchmark to resolve 80% of IC Review applications within 12 months of their receipt. However, the number of IC Reviews received by the OAIC increased by 15% or more in each of the 2018-19 (938 received), 2019-20 (1,066) and 2020-21 (1,224) financial years, and by 60% in the 2021-22 financial year (1,955); the number of IC Reviews received in the 2021-22 financial year is more than three times the number received in the 2016-17 financial year (632 applications received). The number of IC Reviews finalised by the OAIC has also increased over the past few financial years; 2018-19 (659 resolved);

2019-20 (829 resolved); 2020-21 (1,018 resolved); and 2021-22 financial year (1,380 resolved).

26. Despite significant increases over those years in the number of IC Reviews resolved, the OAIC was not able to meet the target of resolving 80% of IC Reviews within 12 months of their receipt for the 2018-19, 2019-20 and 2020-21 financial years, although it did meet the target in the 2021-22 financial year.
27. Statistics about the number of IC Reviews received and finalised each year are recorded in the annual reports of the OAIC. Now produced and shown to me and marked as:
 - (a) **EH-1** is a true copy of the annual report of the financial year ending 30 June 2017
 - (b) **EH-2** is a true copy of the annual report of the financial year ending 30 June 2018
 - (c) **EH-3** is a true copy of the annual report of the financial year ending 30 June 2019
 - (d) **EH-4** is a true copy of the annual report of the financial year ending 30 June 2020
 - (e) **EH-5** is a true copy of the annual report of the financial year ending 30 June 2021
28. Although the number of IC Reviews resolved each year has increased significantly, the rising number of applications received each year has resulted in an increasing number of IC Review applications which have been open for greater than 18 months. Data extracted from the OAIC's case management database indicates that in the 2016-17 financial year, there was only 1 IC Review that had been on foot for greater than 18 months, whereas by 2020-2021, there were 441 IC Reviews that had been open for greater than 18 months.
29. To address the increasing number of IC Review applications that are lodged with the OAIC each financial year, the OAIC has sought to refine the IC Review process and implement new measures over the past few financial years, with a view to resolving those applications as efficiently as possible. Changes to the IC Review process have included:
 - (a) changes to the process, templates and timeframes for managing review of 'deemed' decisions by agencies;
 - (b) increased automation of "smart forms" so that data populated into the forms are automatically populated into the OAIC's case management database, with automatic population of template letters sent by the OAIC to the parties;
 - (c) adjustments to clearance processes, with increased use of functions within the case management system and reduction in reliance on more manual arrangements;

- (d) further development of management information reporting through the reporting tool called "PowerBI", which automated, simplified and improved existing reporting from the office's case management system; and
 - (e) updated internal process documentation so that processes are clearly understood by staff.
30. In addition, the OAIC has sought to reduce the reliance on FOI processes by encouraging agencies and Ministers to proactively publish information of interest to the public, and provide 'self-service' portals through which individuals can access their own personal information. The OAIC has also assisted government departments and agencies by:
- (a) conducting training sessions with government agencies on how to efficiently address FOI requests;
 - (b) providing detailed guidance on the operation of the FOI regime (including conducting workshops to explain how exemptions to FOI requests operate and seeking extensions of time); and
 - (c) conducting information sessions for the Information Contact Officers Network to further develop capability within the FOI system and discuss emerging trends and issues.

FOI Complaints

31. Part VIIB of the FOI Act provides for the OAIC to receive and investigate complaints from members of the public regarding the manner in which a government agency handled a particular FOI request, or the agency's systems for processing and addressing FOI requests (**FOI Complaints**). Part 11 of the FOI Guidelines published by the OAIC outlines the circumstances in which it is appropriate for a person to make an FOI Complaint, rather than seek an IC Review in relation to a particular FOI request.
32. After receiving an FOI Complaint, the OAIC makes preliminary inquiries of the respondent agency to determine whether or not to investigate the complaint. Some FOI Complaints are withdrawn after the OAIC has made preliminary inquiries and provided information to the complainant. The Information Commissioner also has a discretion to decide not to investigate a complaint in the circumstances set out in s 73 of the FOI Act. If the Information Commissioner decides to commence an investigation, further information is sought to enable notice to be given to the respondent agency under s 86 of the FOI Act addressing the results of the investigation (as defined in s 87 of the FOI Act), the investigation recommendations (as defined in s 88 of the FOI Act) and the reasons for the investigation results and recommendations.

33. There are substantially fewer FOI Complaints than IC Reviews. FOI Complaints often raise issues such as an agency's failure to meet statutory timeframes or processes, or problems with consultation under practical refusal decisions. Over the past three financial years, the number of investigations that the OAIC completed as a result of FOI Complaints are as follows:

| | FOI Complaints received | FOI Complaints finalised | FOI Complaints finalised following investigation |
|-----------|-------------------------|--------------------------|--|
| FY2019-20 | 109 | 71 | 27 |
| FY2020-21 | 151 | 174 | 3 |
| FY2021-22 | 214 | 223 | 42 |

FOI Commissioner Initiated Investigations

34. The Information Commissioner may initiate an investigation on her own motion under section 69(2) of the FOI Act in relation to an action taken by an agency in the performance of functions or the exercise of powers under the FOI Act.

Extension of time applications

35. With respect to FOI requests made to government agencies or Ministers under Part III of the FOI Act, the FOI Act requires:
- (a) the OAIC to be notified of agreements between the parties to an FOI request (being the party making the request for documents and the relevant government agency or Minister) to extend the timeframe for the agency to respond to the request (under section 15AA); and
 - (b) the OAIC to determine requests for extensions of time (**EOT**) made by the government agency or Minister, by either granting the application, granting an EOT with an amended timeframe, or refusing the application entirely (under section 15AB).
36. In addition to these, the OAIC is required to make a decision in relation to applications by agencies or Ministers pursuant to ss 15AC, 51DA and 54D of the FOI Act, and applications by an individual for an extension of time to make an IC Review application under Part VII of the FOI Act. Although the OAIC receives a large volume of EOT requests each year, processing and determination of the requests is generally straightforward and requires significantly less resources than the FOI branch's other functions.

OAIC FOI Requests

37. A person may request access to information from the OAIC pursuant to s 15 of the FOI Act.
38. The OAIC has been ranked among the top 20 government departments or agencies by number of FOI requests received each financial year for at least the financial years 2018-19, 2019-20 and 2020-21:
 - (a) in FY2018-19: the OAIC received 244 FOI requests;
 - (b) in FY2019-20: the OAIC received 232 FOI requests;
 - (c) in FY2020-21: the OAIC received 193 FOI requests; and
 - (d) in FY2021-22: the OAIC received 360 FOI requests.
39. As noted above, responding to requests for access to information held by the OAIC under Part III of the FOI Act is not performed by the FOI branch.

Part C – Resources

40. The OAIC is an independent agency that is funded by the Commonwealth government through an annual appropriation as part of the Commonwealth Budget process.
41. The OAIC is required to deliver its functions with the funding allocated to it annually, and within the bounds of the ASL cap fixed for the agency as part of the Budget.
42. Each year the OAIC receives funding from the Commonwealth government which is not tied to a specific purpose or function, but is instead provided to enable the OAIC to perform its ongoing privacy, FOI and information commissioner functions generally. In this affidavit, this is described as 'base operating' funding. Additional funding may be received from the Commonwealth government for specific purposes or functions, which is described as specific funding.
43. The OAIC received ongoing base operating funding from the Commonwealth government in the amount of approximately \$8.2 million to \$8.4 million for the financial year ending 30 June 2017 through to the financial year ending 30 June 2019. The OAIC's ongoing base operating funding has increased to approximately \$9.5 million for the 2020 financial year through to the 2022 financial year as a result of certain specific funding relating to particular privacy functions having been re-allocated to the base operating funding allocation, with the relevant privacy functions becoming part of the ongoing functions of the OAIC.
44. The base operating funding is allocated across all of the branches of the OAIC to enable them to perform their various functions.

45. In addition to base operating funding, the OAIC has received funding as part of the annual Budget for a specific purpose or function.
46. Since the FY2018-19, the OAIC has received a number of funding allocations for the purpose of particular privacy functions. Although the total appropriated to the OAIC has accordingly increased since 2016-17, that primarily reflects grants of specific funding in that period for additional, specific privacy functions conferred on the OAIC.
47. Since 1 July 2016, the only specific funding allocated to the OAIC for its FOI functions was \$3.9 million over four years and ongoing (approximately \$1 million per year), which was allocated in the 2021-22 Budget for the appointment of an FOI Commissioner, one person at "SES 1" level, which is a role that is part of the OAIC's Executive) and two support staff. As a result of this additional funding, I was appointed acting FOI Commissioner in August 2021 and Mr Hardiman PSM QC commenced in the position of FOI Commissioner in April 2022. In addition, the funding permitted the appointment of an Assistant Commissioner (Freedom of Information), which is a new role that replaced the role previously performed by the Principal Director (FOI) with the addition of Executive functions, and two additional review advisers in the FOI branch to help manage IC Review applications.
48. Other than the specific funding allocated in the 2021-22 Commonwealth Budget for the appointment of an FOI Commissioner and three additional staff to assist with the FOI functions, since 1 July 2016 the OAIC has not received any increase in its funding (base or specific) to enable more staff to be allocated to undertake IC Reviews.

49. I have previously undertaken work to estimate the number of additional staff that the FOI branch would require in order to be able to respond to the increased number of IC Reviews received annually. In October 2019, I estimated that the OAIC would require an additional 9 FTE staff (in addition to the 19 FTE staff in the team at the time) to process the IC Reviews on hand at the time, and the number of IC Reviews that were expected to be received in the 2019-20 financial year, which I estimated to be the same as the number received in 2018-19 (928). In October 2020, based on an assumption that the number of IC Reviews received by the OAIC would continue to increase by 15% each year on the number received in the 2019-20 financial year, I estimated that the FOI branch would require a total of 35 FTE staff in the 2021-22 financial year and 28 FTE staff in the 2022-23 financial year to manage the existing caseload of IC Reviews on hand, as well as the number of IC Reviews expected to be received in the future over that period. The assumption that the number of IC Reviews received by the OAIC would continue to increase by 15% each year in 2021-22 and 2022-23 turned out to be inaccurate. In 2021-22, the OAIC received 1,955 IC Reviews, which was 60% more than the number received in the previous financial year.

Affirmed by the deponent)
 at Canberra ACT)
 on 5 August 2022)
 Before me:)
 TAMARA MORETTO)

 Signature of deponent

 Signature of witness

Solicitor

