GRATA FUND

Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

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About Grata Fund

Grata Fund is Australia's first specialist non-profit strategic litigation incubator and funder. We remove financial barriers to court, and support people and communities facing injustice to integrate litigation with movement-driven campaigns. We focus on supporting public interest cases in the areas of human rights, climate justice and democratic freedoms.

Acknowledgement

We acknowledge the Gadigal and Bedegal people who are the Traditional Owners of the land on which we work. We pay respect to the tens of thousands of years of stories and community life that has thrived in the Eora Nation and to the Elders past, present and emerging. This always was and always will be Aboriginal land.

Executive Summary

The public's right to access government information is an essential part of a healthy democracy. In this way, Australia's freedom of information (**FOI**) system should offer the community a powerful tool by which they can effectively hold the government to account and participate in its decision-making.

Grata Fund is actively involved in advocacy, strategic litigation and education concerning the operation of Australia's FOI laws. In this submission, we draw on this work and our ongoing engagement with public interest users of the FOI system to highlight the following problems plaguing the system:

- the unreasonable and **lengthy delays** at every stage of the application and review process;
- the inappropriate and excessive **reliance on exemptions** from disclosure by government agencies and ministers;
- problematic interpretations of FOI laws by the Australian Information Commissioner which, in effect, excludes documents held by **outgoing ministers** from being the subject of FOI requests; and
- the **unreasonable expense** of FOI applications.

Together, these problems are contributing to decay in democratic accountability in Australia.

We make the following recommendations to fix the FOI system:

Recommendation 1: The agency or minister receiving an FOI application should be limited to 30 days to review the request, with a 14-day extension of time available only for specified consultations.

Recommendation 2: The Office of the Australian Information Commissioner (**OAIC**) should publish guidelines to set required ratios of departmental FOI officers to FOI applications received, including minimum staff numbers within agencies, and monitor agencies' compliance with these ratios.

Recommendation 3: Agencies should be resourced to implement recommendations 1 and 2 above.

Recommendation 4: The Information Commissioner Review (**IC Review**) process should be simplified and truncated, with timeframes legislated for each stage of the process as follows (and as depicted in Appendix 1):

(a) within **seven days** of receiving the IC Review application, the OAIC must notify the relevant agency or minister of the application;

(b) the agency or minister must then, within **14 days** of receiving the OAIC notice, provide all relevant documents concerning the FOI application to the OAIC, including any written submissions as to its position;

(c) the FOI applicant may also make further submissions in addition to their IC Review application within the same 14 days;

(d) the agency or minister may make a request for further time to provide the documents or submissions if the application is voluminous or complex. The Information Commissioner may grant an extension of time of **no more than 14 days** if it considers the extension is justified;

(e) failure to provide the documents subject of the FOI application within time, without reasonable excuse, should be an offence – as is already the case for non-compliance with notices issued under s 55R of the FOI Act;

(f) if the agency or minister does not provide submissions within time, the Information Commissioner must proceed with the IC Review process. Any submissions received after the deadline may be considered, but only if this does not delay the IC Review process;

(g) the Information Commissioner must make their decision within **60 days** from the date set out in paragraph (b) above, or as extended by paragraph (d);

(h) where the Information Commissioner has not made a decision within **90 days** from the date set out in paragraph (b) above, or as extended by paragraph (d), the FOI applicant may appeal directly to the AAT;

(i) the agency or minister must comply with the decision within **28 days** from the date of the decision, or appeal to the AAT.

Recommendation 5: The OAIC and incoming FOI Commissioner should be resourced to implement the IC Review process recommended above.

Recommendation 6: Departmental and ministerial FOI officers and public service staff should be required to complete more training which emphasises the objects of the FOI Act and a pro-disclosure approach to reviewing FOI requests.

Recommendation 7: Performance assessments of FOI officers and their managers should be tied to the quality of their decision-making on FOI applications.

Recommendation 8: The Government should conduct a review of the exemptions available in the FOI Act.

Recommendation 9: The FOI Act should be amended to clarify that the time for determining whether a document is 'an official document of the Minister' is the time at which the FOI application was made.

Recommendation 10: The FOI Act should be amended to require ministers to transfer documents subject to FOI requests to the OAIC prior to leaving office. The intentional failure to transfer documents should be an offence.

Recommendation 11: The FOI Act should be amended to remove fees and charges in respect of FOI applications.

Recommendation 12: A joint parliamentary committee should be established to provide ongoing oversight and accountability of the integrity of departmental FOI processes and the OAIC, following reforms to the FOI system.

Introduction

Grata Fund welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the operation of Commonwealth FOI laws.

The FOI system plays a vital role in Australia's representative democracy by enabling the public to participate in and scrutinise government decision-making. At the outset of this submission, we draw attention to the objects of the *Freedom of Information Act 1982* (Cth). They are to:[1]

> give the Australian community access to information held by the Government of the Commonwealth, by:
>
> (a) requiring agencies to publish the information; and
>
> (b) providing for a right of access to documents.

That is, the Act gives the Australian community a ***right*** to access information. The intention of this right is to 'promote Australia's representative democracy' by increasing public participation in government processes and increasing scrutiny and review of government activities, recognising that information held by the government is a 'national resource'.[2]

This right to access information is often forgotten in the administration of the FOI system, buried in the excessive reliance on exemptions, technicalities and delays.

In recognition of the importance of the FOI system, Grata Fund launched our FOI Project to assess and address failures in the operation of FOI laws when it comes to public interest information. While the objects of the Act remain important and appropriate, in our experience the operation of the FOI system has failed to live up to those objects.

The reasons expressed by the former FOI Commissioner for his resignation and the release of correspondence between him and the Australian Information

[1] *Freedom of Information Act 1982* (Cth), s 3(1).
[2] Ibid, ss 3(2)-(3).

Commissioner[3] illustrate the significant problems in the administration of the FOI system, both in its under-resourcing and its apparent cultural problems.

This submission draws on Grata Fund's experience from our FOI Project, including in our support for three FOI proceedings currently before the Federal Court. We address four related issues:

- the unreasonable and **lengthy delays** across the FOI system, including at the initial application stage as well as at the review stages;
- the inappropriate and excessive **reliance on exemptions** from disclosure, which contributes to delays in the process;
- problematic interpretations of FOI laws by the Information Commissioner which, in effect, exclude documents held by **outgoing ministers** from being the subject of FOI requests; and
- the **unreasonable expense** of FOI applications.

We make recommendations on how the FOI system should be improved, including through greater resourcing for FOI applications and reviews, the creation and amendment of statutory timeframes for responses, and the truncation of the review process to minimise delays.

Unreasonable delays

The FOI system is plagued by unreasonable and lengthy delays which, in some cases, have led to documents being disclosed several years after the request was initially made. This makes it difficult for Australians to obtain information which they have a right to access and leads to difficulties in holding governments accountable. By the time information is disclosed, the moment for accountability may have passed. This is especially the case where there has been a Cabinet reshuffle or a change of government during the FOI review process, as discussed below.

While the Committee's terms of reference focus on 'delays in the review of FOI appeals', it is important for the Committee to consider the full lifecycle of an FOI application to understand the various bottlenecks where delay occurs. Delays at the initial stage are a key driver of overall delays in the process, made worse by delays at the Information Commissioner stage.

[3] Christopher Knaus, ' FOI commissioner complained of being ignored and 'limited' staff before resigning, tense emails reveal', *The Guardian* (online, 12 May 2023) <https://www.theguardian.com/australia-news/2023/may/12/foi-commissioner-complained-of-being-ignored-and-limited-staff-before-resigning-tense-emails-reveal>.

Delays at the agency/minister stage

When an FOI application is made to a government agency or a minister, the agency or minister must acknowledge receipt within 14 days and must 'take all reasonable steps' to notify the applicant of a decision within 30 days.[4]

However, this 30-day period is subject to numerous extensions. It can be extended for further periods of 30 days or more where:

- the agency or minister unilaterally determines that consultation is required for certain types of documents affecting foreign entities, Commonwealth-State relations, businesses or personal information;[5]
- where the Information Commissioner considers that an extension application is justified because the agency or minister considers the request is complex or voluminous;[6]
- where the applicant agrees;[7] or
- if the agency or minister fails to make a decision within the original or extended timeframe, the application is 'deemed' refused. Despite the deemed refusal, the agency or minister can *again* apply for further time from the Information Commissioner to deal with the request.[8]

In effect, this means that the statutory timeframe for making a decision will frequently be well over 30 days. This is especially because applicants will commonly agree to an extension of time. This happens because of the limited value in refusing the extension, due to the way in which deemed refusals work and delays at the Information Commissioner review (**IC Review**) stage, as discussed below.

Even then, the Office of the Australian Information Commissioner's Annual Report shows that a significant percentage of FOI requests are responded to outside of this often-extended statutory timeframe. In the 2021-2022 financial year, 30% of all FOI requests were responded to outside of the statutory timeframe.[9] In 19% of cases, the delay was more than 90 days over the statutory timeframe (which includes any extensions of time).[10]

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[4] *Freedom of Information Act 1982* (Cth), s 15(5).
[5] Ibid, sub-ss 15(6), (7), (8).
[6] Ibid, s 15AB.
[7] Ibid, s 15AA
[8] Ibid, s 15AC.
[9] Office of the Australian Information Commissioner, *Annual Report 2021-22* (Report, 28 September 2022), 147.
[10] Ibid.

These delays have been increasing significantly: from 2% of FOI decisions being made over 90 days late in 2018-2019, to 19% in 2021-2022. The table below shows the percentage of FOI requests which were determined more than 90 days over the (potentially extended) statutory timeframe, year-on-year between 2018 and 2022.[11]

Year	% FOI decisions more than 90 days late
2018-2019	2%
2019-2020	10%
2020-2021	12%
2021-2022	19%

Some agencies and ministerial offices are especially slow to respond to FOI requests. In 2021-2022, the Treasurer and Prime Minister's offices responded within the statutory timeframe (including where there have been extensions) in only 25% and 26% of cases respectively.[12]

We submit that a major reason for these consistent delays is the lack of consequences in the Act for delays by the agency or minister.

Where the agency or minister fails to make a decision within the timeframe, the application is deemed refused. Where there has been a deemed refusal, the applicant may apply for internal review of the decision[13] or apply directly to the Information Commissioner for review.[14] However, as discussed in the next section, there are lengthy delays at the IC Review stage too. During the intervening period, the agency or minister continues to have an obligation to provide a statement of reasons for refusal of the FOI request,[15] and it may vary or substitute the decision (including if it was a deemed refusal).[16]

In effect, the agency or minister continues to be able to make the decision until the Information Commissioner makes their decision. There are no penalties or consequences for failing to meet statutory timeframes. Given the serious delays at the IC Review stage – in some cases almost five-year delays – it means the agency or minister can have years to make decisions without any consequences. For this

[11] Ibid.
[12] Ibid, 146.
[13] *Freedom of Information Act 1982* (Cth), s 54(2).
[14] Ibid, s 54L.
[15] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [3.163].
[16] *Freedom of Information Act 1982* (Cth), s 55G.

reason, there is limited utility in an applicant refusing to agree to an extension-of-time request. It is very unlikely to lead to a quicker decision as there is no imperative for the relevant decision-maker to accelerate the process.

Delays at Information Commissioner review stage

Given the considerable delays at the initial stage, an FOI applicant will often have waited several months for a decision (or deemed decision) before having an opportunity to make an IC Review application. Unfortunately, the delays are made worse at the IC Review stage. Contrary to the timeframes for agencies and ministers, the Information Commissioner is not subject to any statutory timeframes.

In a recent report, The Australia Institute found that over 60 IC Review applications had been awaiting determination for more than four years.[17] More than 957 reviews were over 12 months old.

The severity of the delays was recently highlighted by the Federal Court in *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530. Grata Fund provided advocacy support to former Senator Rex Patrick in this case, which concerned significant delays in multiple IC Review applications he had lodged. Justice Wheelahan remarked on the 'very significant delays where IC reviews may lie dormant for long periods and take years to complete' and identified the causes of delay being an 'unquestionable shortage of resources'. His Honour held that it was ultimately for Commonwealth Parliament to determine appropriate funding to the OAIC in order to 'enable the discharge of the Commissioner's statutory functions'.[18]

Extraordinarily, the Court found that in some cases, the OAIC had not even allocated an IC Review to a review adviser/officer in over two and a half years due to severe under-resourcing. As the Court held, 'Two and a half years is a very long period of time for the sixth IC review to have remained, effectively, untouched by the Information Commissioner'.[19]

Issues in the IC Review process can be identified by breaking down, broadly, the stages of the review:

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[17] The Australia Institute, *Nothing to see here: Australia's broken freedom of information system* (Discussion Paper, March 2023) <https://australiainstitute.org.au/wp-content/uploads/2023/03/P1342-Nothing-to-see-here-Australias-broken-FOI-system-WEB.pdf>, 13.
[18] *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [6].
[19] Ibid, [183].

Application stage	The IC Review process commences upon an IC Review application being made under s 54N.
Preliminary inquiries and consultation stage	Following the application, there are then periods of preliminary inquiries and notifications. These include: • requirements for the Information Commissioner to inform the person, agency or minister who made the decision: s 54Z • requirements by the agency or minister subject of the review to notify affected third parties 'as soon as practicable': ss 54P, 54Q • the ability of the Information Commissioner to make preliminary inquiries of the review parties to determine *whether or not* to undertake the IC Review and to exercise their discretion not to undertake such a review: ss 54V, 54W None of these periods are subject to any statutory timeframe. Sections 54V, 54W and 54Z do not even require the Information Commissioner to conduct their notification, preliminary inquiries or exercise their discretion within a 'reasonable' or 'practicable' timeframe. Indeed, we have seen cases where the Information Commissioner has taken months to simplify *notify* the relevant agency or minister of an IC Review application. During this initial assessment process, IC Review applications will also be allocated to a specific 'review adviser' within the OAIC for case management. This apparently straightforward process has been subject to significant multi-year delays due to the volume of IC Review applications received.[20] In *Patrick v Australian Information Commissioner (No 2),* the Federal Court found that one IC Review application had not been allocated to a review adviser almost three years after it was initially lodged.[21] The Court considered there appeared to be an 'inevitable inability to allocate reviews to an adviser in a timely manner' due to resourcing constraints.[22]
Information gathering stage	Once the Information Commissioner decides to proceed with the review, they may conduct the review without holding a hearing or otherwise 'in whatever way he or she considers appropriate': s 55.

[20] Ibid, [74].
[21] Ibid, [116]-[124].
[22] Ibid, [133].

	There is a requirement that they conduct the IC review 'in as timely a manner as is possible', but otherwise there is no statutory timeframe: s 55(4)(c). The OAIC Guidelines also do not specify a timeframe, although – in a footnote – they note that the target is to ensure 80% of IC Review matters are finalised within 12 months.[23] During the IC Review, the Information Commissioner has broad information-gathering powers: Div 8. The Commissioner may, in short, issue notices to produce specified documents or information (s 55R), including documents claimed to be exempt (ss 55T, 55U), or require the agency or minister to conduct further searches for documents (s 55V). However, none of these provisions are subject to any statutory timeframe. Notices to produce issued under s 55R must specify a time for compliance that is not less than 14 days from the date of the notice, but otherwise there is no statutory timeframe for compliance. There is also no statutory timeframe for agencies or ministers to conduct any further searches or produce requested exempt documents. Indeed, the OAIC's practice is to make requests for documents from agencies or ministers informally first.[24] It may be that extensions of time are also given, informally, to agencies and ministers to provide the relevant documents. According to the OAIC Guidelines, the OAIC only tends to rely on its formal information-gathering powers under the above provisions if an agency or minister first fails to respond to the informal requests.[25]
Preliminary assessment	While the Act does not require the Information Commissioner to undertake a preliminary assessment, this preliminary assessment process is set out in the OAIC Guidelines.

[23] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-10-review-by-the-information-commissioner#_ftn26>, footnote 26.
[24] *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [72].
[25] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [10.20], [10.100]-[10.101].

	The Guidelines provide that after receiving the relevant documents and submissions, the IC Review officer may 'decide to form a preliminary view of the matter' and advise the parties as relevant.[26] If the preliminary view is against the agency or minister, the Information Commissioner or delegate will invite the agency or minister to issue a revised decision or to make submissions in response. If the preliminary view is against the applicant, the Information Commissioner will invite the applicant to withdraw the IC Review application or make submissions in response. This preliminary assessment process, again, is not subject to any statutory timeframe.
Decision	Once the IC Review process is complete, the Information Commissioner must make a decision in writing: s 55K. In practice, these decisions are typically drafted by review advisers who are managing 20-30 IC Review applications at any given time.[27] It is estimated that a reasonably experienced review adviser will take one week to draft a decision, assuming that they work full-time and spend limited time case-managing other IC Reviews. Once the decision has been drafted, the FOI Commissioner will review the entire IC Review file and draft decision, before either settling the decision and reasons, or working to resolve any outstanding issues.[28] Again, there is no statutory timeframe for this decision to be made. Once the decision is made, the agency or minister must comply with it: s 55N. However, there is no specified timeframe for compliance.
Appeals	The Information Commissioner's decision may be appealed to the Administrative Appeals Tribunal (**AAT**) (s 57A) or on a question of law to the Federal Court (s 56). FOI applicants do not have an automatic right to appeal to the AAT without first applying for IC Review.

[26] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [10.108]ff.
[27] *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [75].
[28] Ibid, [77].

The above breakdown illustrates the inefficient and leisurely process of the IC Review. Despite having powers to compel the production of documents, on pain of imprisonment,[29] the Information Commissioner prefers to informally request and wait for documents from agencies and ministers. It is unclear why, as a matter of course, documents subject to an FOI application are not automatically produced by agencies and ministers to the Information Commissioner upon notification that an IC Review has commenced.

The preliminary assessment process also highlights the inefficiency and lack of urgency in this process. It is unclear why the agency or minister ought to be invited to issue a revised decision if the Information Commissioner considers, on a preliminary assessment, that the information should be released. That decision should simply be made by the Information Commissioner.

The OAIC Guidelines indicate that the reason for this approach is to facilitate alternative dispute resolution, 'to help resolve applications promptly'.[30] However, by this stage of the process, the agency or minister has likely had several months to consider its decision. It may also have reviewed the request a second time under the internal review process, should the applicant have sought internal review. The agency or minister will also have had the chance to make submissions to the Information Commissioner or their delegate. The alternative dispute resolution approach is unnecessary in circumstances where the agency or minister has already had numerous opportunities, and given the IC Review concerns the correct application of legislation, not a disagreement between private persons.

This inefficient approach by the Information Commissioner appears to be the result of funding constraints. The Court in *Patrick v Australian Information Commissioner (No 2)* emphasised 'resourcing constraints' throughout its decision, finding on multiple occasions that even if the Information Commissioner exercised her powers more quickly, IC Reviews would not have been finalised more quickly due to the lack of resources.[31]

The undue emphasis on dispute resolution, combined with the severe underfunding of the Information Commissioner, seriously undermines the effectiveness of the FOI framework in facilitating public participation in government processes, and

[29] It is an offence to fail to comply with a notice to produce, with the maximum penalty being imprisonment for six months: *Freedom of Information Act 1982* (Cth) s 55R(5).
[30] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [10.53].
[31] See e.g., *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [128], [132]-[133].

increasing scrutiny and review of government activities, as the Act's objects provide. By the time an IC Review is completed, the value of the information in scrutinising government activities may be lost.

For example, Grata Fund is providing support to Rex Patrick in another proceeding before the Federal Court, concerning the Information Commissioner's decision in respect of an FOI application made to former Attorney-General Christian Porter.[32] In that case, Mr Patrick made an IC Review application in June 2020, while Mr Porter was still the Attorney-General. The Information Commissioner failed to finalise her decision until almost three years later, on 28 February 2023. During that period, the Attorney-General had changed twice. The Information Commissioner's decision was, extraordinarily, that:

> Following changes to the person occupying the role of 'Attorney-General' I am satisfied that the current Attorney-General does not have possession of any document at issue.[33]

This example is not uncommon. In the five months of 2023 alone, Grata Fund's FOI Project has received several inquiries concerning IC Reviews that have taken so long to complete that the documents originally requested are no longer available because the relevant minister, or government, has changed.

Recommendations for reform

We recommend the *Freedom of Information Act* be amended to simplify the processes both at the initial agency/minister stage and at the IC Review stage. We propose a more streamlined model for FOI applications as follows.

Recommendation 1: The agency or minister receiving an FOI application should be limited to 30 days to review the request, with a 14-day extension of time available only for specified consultations.

As discussed above, there are currently numerous extensions available to the agency or minister receiving an FOI application, which push out the intended timeframe of 30 days. We consider the only extension that should be available are those relating to consultations required for certain types of documents affecting foreign entities, Commonwealth-State relations, businesses or personal information.[34] This extension should be limited to 14 days.

[32] *Rex Patrick and Attorney-General (Freedom of information)* [2023] AICmr 9 (28 February 2023).
[33] Ibid, [2].
[34] *Freedom of Information Act 1982* (Cth) sub-ss 15(6), (7), (8).

The agency or minister should no longer be able to obtain further extensions by seeking the consent of the applicant (who has little choice but to agree) or by applying to the OAIC. Applications not determined within time are deemed refused, and the relevant agency or minister will continue to have the obligation to provide a statement of reasons for refusal of the FOI request,[35] or to substitute the deemed refusal with a decision granting access.[36]

This proposed truncation of the process at the initial stage serves two purposes. First, and most importantly, it allows an FOI applicant to move ahead with their request to the OAIC without further delay. Second, it puts greater onus on agencies and ministers to respond to FOI applications promptly, rather than requesting applicants agree to extensions as a matter of course. Following the usual process, agencies and ministers would still have the opportunity to defend against making a release of information.

Given the purpose of the FOI Act, we consider 30 days, plus an additional maximum of 14 days for applications requiring consultation, to be a reasonable period of time to deal with most FOI applications. In rare cases where FOI applicants seek an especially voluminous amount of documents, the agency or minister should work with the FOI applicant to narrow the scope of the application, or to recommend splitting the application into multiple parts and lodging smaller parts as new applications in a staggered process. This would allow the agency or minister to, in essence, deal with the FOI application in batches.

Recommendation 2: The OAIC should publish guidelines to set required ratios of departmental FOI officers to FOI applications received, including minimum staff numbers within agencies, and monitor agencies' compliance with these ratios.

The FOI Commissioner's role includes monitoring and reporting of compliance by agencies with the FOI Act.[37] As part of that role, the FOI Commissioner should consider how to improve the performance of agencies in meeting their statutory obligations, including through recommendations for staffing numbers and ratios. These recommendations should be made in the OAIC Guidelines and the relevant agencies and ministers should be advised. As part of their FOI reporting, agencies should in turn publish information about whether it has met the recommended ratio for FOI staff.

[35] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [3.163].
[36] *Freedom of Information Act 1982* (Cth), s 55G.
[37] *Australian Information Commissioner Act 2010* (Cth), s 8(g).

Recommendation 3: Agencies should be resourced to implement recommendations 1 and 2 above.

The Government should ensure that funding is increased to agencies as necessary to meet recommended staffing ratios and to meet statutory timeframes for processing FOI requests. This is fundamental to ensuring that the objects of the FOI Act are met.

Recommendation 4: The IC Review process should be simplified and truncated, with timeframes legislated for each stage of the process.

After the 30-day period (or 44-day period, with extension) has elapsed under our recommended FOI model, or upon an access refusal decision being made, an applicant may make an IC Review application to the OAIC. The IC Review process should then be truncated as follows:

(a) within **seven days** of receiving the IC Review application, the OAIC must notify the relevant agency or minister of the application;
(b) the agency or minister must, within **14 days** of receiving the OAIC notice, provide all relevant documents concerning the FOI application, including any written submissions as to its position. That is, it should no longer be the OAIC's job to request the relevant documents from the agency or minister. Instead, the FOI Act should require relevant documents to be provided upon notification;
(c) the FOI applicant may also make further submissions in addition to their IC Review application within the same 14 days;
(d) the agency or minister may make a request for further time to provide the documents or submissions if the application is voluminous or complex. The Information Commissioner may grant an extension of time of **no more than 14 days** if it considers the extension is justified. This shifts the OAIC's power to grant extensions of time from the initial stage to the IC Review stage;
(e) failure to provide the documents subject of the FOI application within time, without reasonable excuse, should be an offence – as is already the case for notices issued under s 55R;
(f) if the agency or minister does not provide submissions within time, the Information Commissioner must proceed with the IC Review process. Any submissions received after the deadline may be considered, but only if this does not delay the IC Review process;
(g) the Information Commissioner must make their decision within **60 days** from the date set out in paragraph (b) above, or as extended by paragraph (d);

(h) where the Information Commissioner has not made a decision within **90 days** from the date set out in paragraph (b) above, or as extended by paragraph (d), the FOI applicant may appeal directly to the AAT;
(i) the agency or minister must comply with the decision within **28 days** from the date of the decision, or appeal to the AAT. That is, if the Information Commissioner's decision is that the document should be released in full or in part, the document must be so released within 28 days, subject to an appeal being lodged within time.

This proposed process is depicted in a flowchart at Appendix 1.

Subject to the above, the Information Commissioner should retain their power to conduct the IC Review in whatever way they consider appropriate. For example, hearings may be held, or the application may be determined on the papers, or alternative dispute resolution may be facilitated.

This also means that the preliminary inquiry process set out under s 54V of the Act and the preliminary assessment process set out under the OAIC Guidelines should be absorbed within the above timeframe and truncated process. That is, the Information Commissioner may decide to conduct preliminary assessments in an appropriate case, but this does not affect the timeframes above.

This proposed process means that, assuming all available extensions are granted in a given case, the full process would take no more than 167 days – essentially five months.

We recommend limiting the Information Commissioner to two months after receipt of the relevant documents to make their decision. This contrasts against the OAIC's current stated goal of finalising 80% of IC Review applications within 12 months. We consider two months is a reasonable period of time, noting the AAT aims to make its decision within two months,[38] and the Federal Court of Australia within three months,[39] and noting the proposed truncation of the IC Review process.

Where the OAIC has still not made a decision within a *further* 30 days, the applicant should be entitled to appeal directly to the AAT.

[38] Administrative Appeals Tribunal, *Decision* (Web Page) <https://www.aat.gov.au/steps-in-a-review/other-decisions/decision>.
[39] Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management*, 10 August 2022, [16.1].

Recommendation 5: The OAIC and incoming FOI Commissioner should be resourced to implement the IC Review process recommended above.

Given the significant delays currently plaguing the OAIC, it requires an immediate funding boost to clear the backlog. As at 13 March 2023, there was a total of 2,035 IC Reviews awaiting finalisation by the OAIC, many of which had been awaiting allocation to a review adviser for over two years.[40] In *Patrick v Australian Information Commissioner (No 2)*, the Federal Court considered seven of the applicant's IC Review applications and found that 'the causes of the lengthy delays were common and the combined force of the evidence pointed to [the OAIC's] unquestionable shortage of resources'.[41]

The FOI Act serves an important function in providing Australians with a 'right' to access documents which are a 'national resource'. The OAIC must be adequately resourced to ensure this right is fulfilled.

Likewise, the FOI Commissioner must be adequately resourced to implement this process. We note there is an ongoing recruitment process for a new FOI Commissioner. In light of the complaints made by the former FOI Commissioner concerning the diversion of FOI resources to other OAIC functions,[42] the incoming FOI Commissioner must be given the resources to fulfil their statutory obligations.

Overuse of exemptions

The FOI Act provides that agencies and ministers must provide access to documents requested under the Act, unless the document is exempt or conditionally exempt.[43] This must be read in line with the objects of the Act recognising the right of access to documents and the intention that such information is a national resource.

In our experience, agencies and ministers rely excessively on exemptions to refuse FOI requests or to heavily redact any documents released. An indicator that exemptions are being overused is the very high rate at which access refusal decisions are set aside or varied on review by the Information Commissioner.

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[40] *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [81].
[41] Ibid, [6].
[42] Christopher Knaus, ' FOI commissioner complained of being ignored and 'limited' staff before resigning, tense emails reveal', *The Guardian* (online, 12 May 2023) <https://www.theguardian.com/australia-news/2023/may/12/foi-commissioner-complained-of-being-ignored-and-limited-staff-before-resigning-tense-emails-reveal>.
[43] *Freedom of Information Act 1982* (Cth), s 11A.

In 2021-2022, out of 103 IC Review decisions made by the Information Commissioner (or FOI Commissioner) under s 55K, 45% resulted in a variation to or a setting aside of the initial decision. That is, in 45% of these cases, the Information Commissioner decided that the agency or minister had made the wrong decision. Of the remaining 55% of decisions that were affirmed, 18% of those decisions were revised by the agency or minister during the IC Review to give greater access to the documents.[44] Put another way, this means that 54% of IC Review decisions resulted in the agency or minister's original decision being changed, whether by the Information Commissioner or by the agency/minister themselves.

The table below shows the percentage of IC Review decisions which resulted in a change to the agency or minister's original decision, whether as a result of the Information Commissioner's decision or a result of a changed decision by the agency or minister during the IC Review process:

Year	**% of original decisions changed during IC Review[45]**
2018-2019	72%[46]
2019-2020	68%[47]
2020-2021	63%[48]
2021-2022	54%

These figures demonstrate that in the vast majority of IC Review applications which result in a decision by the Information Commissioner, the agency or minister has misapplied the FOI Act.

The issues in FOI administration point to an overarching cultural problem in the way that federal government bodies approach their duties to disclose information. Unfortunately, the practices adopted by some government bodies in responding to FOIs are inconsistent with their obligations under the FOI Act. Rather than assisting

[44] Office of the Australian Information Commissioner, *Annual Report 2021-22* (Report, 28 September 2022), 153.
[45] These percentages are calculated by adding the number of s 55K decisions which varied or set aside the original decision, and the number of decisions where the agency or minister changed their original decision during the IC Review process which were then affirmed by the Information Commissioner, divided by the total number of s 55K decisions made.
[46] Office of the Australian Information Commissioner, *Annual Report 2018-19* (Report, 12 September 2019), 189-190.
[47] Office of the Australian Information Commissioner, *Annual Report 2019-20* (Report, 21 September 2020), 155.
[48] Office of the Australian Information Commissioner, *Annual Report 2020-21* (Report, 23 September 2021), 146.

the public to obtain information, it appears that some government bodies are actively seeking to resist applications.

This excessive and incorrect use of exemptions contributes to the unreasonable delays both at the initial stage and the IC Review stage by increasing the complexity of FOI applications and increasing the workload required to (incorrectly) redact information. It also increases the workload of the Information Commissioner in considering excessive exemption submissions, and increases the cost in administering the FOI system. Most importantly, it contributes to a failure to meet the Act's objectives, by preventing the proper release of government information, or by delaying the release to such a time where the information may no longer be as relevant to government scrutiny.

We make the following recommendations to reduce overreliance on FOI exemptions and increase efficiency in the administration of the FOI system.

Recommendation 6: Departmental and ministerial FOI officers and public service staff should be required to complete more training which emphasises the objects of the FOI Act and a pro-disclosure approach to reviewing FOI requests.

There is clearly a cultural and competency problem in the administration of the FOI scheme. It should not be the case that, consistently, some 50% to 70% of agency and ministerial decisions reviewed by the Information Commissioner are set aside or changed. Further training should be conducted, with training being overseen by the OAIC, which emphasises the objects of the FOI Act and the fact that the exemptions should be just that – *exemptions* to the general rule that documents are released. FOI officers should be trained to apply a 'when in doubt, send it out' approach. The OAIC should be sufficiently resourced to provide oversight of FOI training.

All public service agency staff should also receive general training, as part of their ordinary continuing professional development, on the importance of FOI in Australia's representative democracy. Agency staff should have a working knowledge of the objects of the FOI Act given that they will be the ones searching for relevant documents or information and considering whether exemptions should be applied.

Recommendation 7: Performance assessments of FOI officers and their managers should be tied to the quality of their decision-making on FOI applications.

Performance reviews of FOI officers and their managers should consider the number of their decisions that are subsequently changed or set aside on IC Review.

Disciplinary sanctions should be applied to FOI officers and managers who repeatedly make decisions which are contrary to FOI law. This is appropriate given the public detriment and waste of resources associated with incorrect FOI decisions.

Recommendation 8: The Government should conduct a review of the exemptions available in the FOI Act.

We endorse the observations and recommendations made by the Public Interest Advocacy Centre (**PIAC**) in their submission to this Committee, concerning the overly broad exemptions available in the FOI Act, along with the sweeping manner in which they are applied. This includes concerns about the way in which the public interest is balanced when considering the application of conditional exemptions. We support PIAC's longstanding recommendation that the Government commission a review into the exemptions available and their use under the Act.

Change of Minister

FOI requests can be made to ministers for access to 'an official document of the Minister'.[49] A serious consequence of lengthy delays in the FOI system is the impact it has on applications for these documents. This is because delays have been so lengthy that the relevant minister subject to the FOI request is reshuffled or leaves office.

In these circumstances, the Information Commissioner has adopted a very narrow interpretation of the meaning of 'an official document of the Minister'. The Commissioner has consistently considered that:[50]

> Where an FOI request is made to a minister and there is a change of minister in the course of the request or an IC review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply as the document is no longer an 'official document of a minister'.

This interpretation leads to the absurd consequence that a minister and the government can escape scrutiny through ministerial reshuffles. For instance, where there is controversy surrounding a particular minister's actions, and a journalist has made an FOI request for documents relating to that controversy, the minister (and government) can avoid accountability by resigning or moving to another portfolio after the FOI application has already been made. If that minister does not make the

[49] *Freedom of Information Act 1982* (Cth), s 11A(1)(a)(ii).
[50] Office of the Australian Information Commissioner, *FOI Guidelines* (February 2022), [2.52].

document available to their replacement or to their agency (there appears to be no obligation they do so), the document will no longer be available to the public. Even where documents are transferred to the National Archives, they will ordinarily not be available for public access for 21 years.[51]

This is even more absurd where the document was available at the time of the request but is no longer available solely because the Information Commissioner has taken too long to conduct the IC Review. Grata Fund has been contacted by four different FOI applicants this year in relation to documents no longer available because of the change of government in May 2022. On each occasion, the documents were sought years before the election.

We consider the Information Commissioner's interpretation is wrong. As noted, Grata Fund is supporting Rex Patrick's proceedings in the Federal Court challenging this interpretation.

Regardless of the outcome of the proceedings, we consider the FOI Act needs to be amended to ensure that where an FOI application has been made, it is not rendered invalid simply because the minister has left office.

Recommendation 9: The FOI Act should be amended to clarify that the time for determining whether a document is 'an official document of the Minister' is the time at which the FOI application was made.

This amendment would ensure that once an FOI application is made to a minister, if the document was in that minister's possession at the time of the application, it will remain an 'official document of the Minister' even if that minister leaves office. This would prevent ministers from circumventing the FOI Act and ensure the Information Commissioner must decide IC Reviews on their merits rather than on the basis that a particular minister has left office.

Recommendation 10: The FOI Act should be amended to require ministers to transfer documents subject to FOI requests to the OAIC prior to leaving office. The intentional failure to transfer documents should be an offence.

Where an FOI application has been made, and the relevant minister resigns or leaves office before the application and IC Review process has been finalised, the minister must transfer a copy of the documents to the OAIC for preservation. In combination with Recommendation 9, this ensures that those documents are still subject to FOI

[51] *Archives Act 1983* (Cth), ss 3(7), 21, 31.

processes, and ensures that scrutiny cannot be avoided by ministers simply resigning. The OAIC should be required to preserve those documents until the completion of all FOI processes, including any IC Reviews and further appeals.

Unreasonable costs of FOI

Grata Fund has previously raised concerns in relation to the costs associated with making FOI requests, and the fact that this can hinder government transparency and accountability.[52] We observed that high fees may be imposed regardless of the quality or quantity of the documents to which access is granted. For example, the Australian Conservation Foundation (**ACF**) was asked to pay $500 for documents relating to climate change and the Government's 2015 intergenerational report. After paying the fee, the ACF received only two pages out of 243 requested pages. These pages were partially redacted and mostly irrelevant.[53]

In these circumstances, we endorse PIAC's observations and recommendation in their submission to this Committee that, except where the applicant is vexatious, no fees should be payable for FOI applicants. This amendment would reflect the fact that government information is a 'national resource'.

Recommendation 11: The FOI Act should be amended to remove fees and charges in respect of FOI applications.

Ongoing oversight

In our submission, Grata Fund stresses the importance of the FOI system to Australia's representative democracy. The objects of the FOI Act themselves indicate Parliament's intention for the FOI system to increase scrutiny of government decision-making and public participation. We submit that the recommendations proposed above will go some way to ensuring these objects are met.

We further recommend a joint parliamentary committee be established to ensure oversight and monitoring of the FOI system. While we welcome this Committee's

[52] Grata Fund, *FOI Litigation Hit List: Challenging government secrecy in the courts* (Report, August 2021), 14.
[53] Christopher Knaus and Jessica Bassano, 'How a flawed freedom-of-information regime keeps Australians in the dark', *The Guardian* (Online, 2 January 2019) <https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>.

inquiry, the longstanding failures of the FOI system require ongoing oversight to ensure its implementation improves.

Recommendation 12: A joint parliamentary committee should be established to provide ongoing oversight and accountability of the integrity of departmental FOI processes and the OAIC, following reforms to the FOI system.

Grata Fund welcomes the opportunity to discuss our submission further with the Committee.

Appendix 1: New IC Review process recommended by Grata Fund