

## **Crikey's submission to the Legal and Constitutional Affairs References Committee's inquiry into the operation of Commonwealth freedom of information (FOI) laws**

As a small independent media outlet long concerned with government transparency and accountability, *Crikey* welcomes the opportunity to make a submission to the committee's inquiry into the operation of Commonwealth freedom of information (FOI) laws.

Australia's FOI laws allow newsrooms to inform readers of matters in the public interest, as well as members of the public to access information outside the parameters of newsgathering should they choose to do so.

For the news organisations that can afford to dedicate ample time and resources to peppering government agencies with enquiries tuned to narrowly defined parameters — and later managing their progress — the system can extract information so consequential that in some cases ministers are left with no choice but to resign. Reporters can use FOI requests to force government figures into answering follow-up questions. They can also be used to request modelling for major spending decisions, to obtain context and communicate on ministerial decisions, or to simply follow up on something mentioned briefly during question time or Senate estimates.

Even with the significant issues that are the subject of the upcoming Senate inquiry, the information journalists have revealed using the FOI system has been hugely consequential in informing readers of government decisions.

Via an FOI request made by the ABC, Australians learned the taxpayer-funded Future Fund had invested some \$3 million in an Adani-owned company funding a rail link between the controversial Carmichael coal mine and the Great Barrier Reef.<sup>1</sup> Despite Home Affairs spending thousands of public dollars fighting FOI requests for documents, Australians learned the full details of Peter Dutton's decision to allow two au pairs to stay in the country. Australians learned, via an FOI request lodged by *The Sydney Morning Herald*, that then-health minister Greg Hunt refused a formal meeting with Pfizer's top executives about the coronavirus vaccine while other countries were on track to sign deals for millions of doses.<sup>2</sup> Most recently revealed under FOI by *Guardian Australia* was the explosive letter sent from the ACT Director of Public Prosecutions

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<sup>1</sup> <https://www.abc.net.au/news/2020-12-16/future-fund-invests-millions-in-adani-project/12984734>

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<https://www.smh.com.au/politics/federal/millions-of-doses-pfizer-approached-australia-first-for-vaccine-deal-20210908-p58pv6.html>

Shane Drumgold to the territory's police chief alleging officers engaged in a "very clear campaign" to pressure him not to prosecute the alleged rape of Brittany Higgins.<sup>3</sup>

Australia could once proudly claim to be a pioneer when it comes to FOI legislation, decades ahead of other Westminster-style parliaments. The *Freedom of Information Act* was passed in 1982 and its original spirit — including acknowledging the public's right to access official information — has been described as "quite admirable, even inspiring" by prominent integrity advocate and barrister Geoffrey Watson SC. The Australian government acknowledges that information is a "valuable and powerful resource" that is managed for public purposes and that access to this "national resource" should be prompt and at the lowest reasonable cost.<sup>4</sup> But the current reality of navigating the FOI system as a journalist in this country does not reflect these stated aspirations.

When *The New York Times* arrived in Australia, its Sydney bureau chief Damien Cave — who had worked in dozens of countries, from Mexico to Iraq — couldn't believe how the government "doesn't feel any obligation to the public" to explain its actions. "Secrecy is the default setting," Cave told *Crikey*, describing Australia's government. "What needs to change is for governments to start moving towards seeing transparency as the default."

In our *REDACTED*<sup>5</sup> series on Australia's broken FOI system, journalists and editors from across the country described pursuing requests as like "squeezing blood from a stone", expressing sheer exasperation at the obstructionist tactics often deployed against them, described invariably as administrative torture so unfathomable as to be undemocratic. Many journalists describe lodging FOI requests only to have them rejected outright, delayed, accepted at a prohibitive cost no news outlet could justify, or returned to them so heavily redacted that the endeavour was rendered pointless.

As Greens Senator David Shoebridge, who introduced the motion to establish the inquiry, told *Crikey*: "It's freedom of information only for the bloody-minded, the well-resourced, or the fixated."

But this culture of, at worst, obfuscation and, at best, cumbersome and under-resourced bureaucracy doesn't just impact journalists. In fact, as *Crikey's REDACTED* series

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<https://www.theguardian.com/australia-news/2022/dec/08/bruce-lehrmann-trial-brittany-higgins-dpp-direct-or-public-prosecution-shane-drumgold-act-police>

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<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information>

<sup>5</sup> <https://www.crikey.com.au/topic/redacted-your-right-to-know/>

emphasises, “what separates freedom of information laws from other mechanisms of political accountability, like Senate estimates or press conferences, is that it is just as accessible to a member of the public” — or at least, it should be.

The Australia Institute’s Democracy & Accountability Program director Bill Browne told *Crikey* that one of the surprising findings of the organisation’s review of the FOI system was how many individuals were using requests for private matters like their visa applications. Beyond that, “at its best, you do see people unearthing not just information that’s of personal interest, but details of how government operates that have broader implications and are of general interest”.

A well-designed and resourced FOI system unimpeded by political interference or underfunding is a key opportunity for government to restore the public’s trust.

Unfortunately, the resignation of the Commonwealth FOI commissioner less than a fifth of the way through his appointment — because he didn’t have the powers to make necessary “changes” to this system — speaks to the enormity of the task at hand. In September 2022, the Centre for Public Integrity said the number of FOI requests responded to late (past the statutory 30-day period) had doubled in the decade to 2022 to 22.5%.<sup>6</sup>

Addressing the delays in the review of FOI appeals, increasing the resources to respond to FOI requests, and potentially creating a statutory time frame for the completion of reviews are all worthy considerations for this inquiry. As is examining the issue of outsourcing. Resources aside, the widespread delays and refusals are not purely procedural but often political. When *The Age* applied for documents about a \$1 billion contract to a company run by the then-federal Liberal Party treasurer, the results were repeatedly delayed for six months until a series of heavily redacted documents were supplied<sup>7</sup>. Home Affairs fought for three years to prevent releasing documents about its immigration detention centre operating manual.<sup>8</sup>

Australia is the only Five Eyes member country that has no explicit constitutional framework for protecting free expression or a free press, and is the only of these countries, other than the UK, that makes intelligence agencies immune from FOI requests<sup>9</sup>. Australia currently lags at 27th on the Press Freedom Index.<sup>10</sup> For the

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<sup>6</sup> <https://publicintegrity.org.au/media-release-foi-delays-double-in-10-years/>

<sup>7</sup> <https://yourrighttoknow.com.au/media-freedom/one-billion-dollar-government-travel-contract/>

<sup>8</sup>

<https://www.theguardian.com/australia-news/2020/mar/06/home-affairs-fought-for-three-years-to-stop-ser-co-detention-centre-manual-release>

<sup>9</sup> <https://www.jstor.org/stable/j.ctt22rbjhf>

<sup>10</sup> <https://rsf.org/en/index>

government to truly honour the guiding ethos of its FOI legislation, it must forgo its sense of entitlement to secrecy and respect the public's entitlement to transparency, either directly or via a free and independent press.

While in opposition, Labor decried the lack of disclosure under various Coalition governments. It slammed Scott Morrison's secret ministries, tutted at Malcolm Turnbull's rejection of FOI requests to access government briefs, and condemned Tony Abbott's "war on truth" when it came to providing information on asylum seeker tow-back operations. It promised a new, cleaner politics — pledging to scrap the "fatally compromised" Administrative Appeals Tribunal, review public sector board appointments, and address a "jobs for mates" culture.

And yet, the motion to establish the FOI Senate inquiry was supported by the Coalition and the entire crossbench with only Labor opposed. Stepping up to refine and properly resource Australia's broken FOI system is an opportunity for an ambitious and committed government to rebuild trust at a time when Australians' confidence in the public service and government is plummeting.<sup>11</sup> Government information is a "national resource", as the government itself acknowledges — it's time to return it to the people.

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<sup>11</sup><https://www.themandarin.com.au/205672-australias-ethical-dilemma-domestic-trust-in-government-trending-downwards/>