

6 JUNE 2023

## Submission to the Senate inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

The Australian Conservation Foundation (ACF) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee on the operation of Commonwealth FOI laws.

### Introduction

ACF is Australia's national environment organisation. We are over 700,000 people who speak out for the air we breathe, the water we drink, and the places and wildlife we love. We are proudly independent, non-partisan and funded by donations from our community.

ACF is an experienced applicant for information under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**). ACF makes applications to better understand government decision-making and processes relating to the environment. ACF has been, and is currently, involved in internal, Information Commissioner (IC) and Administrative Appeals Tribunal (AAT) FOI review proceedings. ACF is also waiting on a Federal Court decision following the appeal of an AAT FOI decision.

ACF welcomes the Senate inquiry into the operation of Commonwealth FOI laws. The delays in the FOI system and the culture of non-disclosure are contrary to the headline objective of the FOI Act to “*give the Australian community access to information held by the Government of the Commonwealth*”.

In 2021 ACF published the [Access Denied](#) report which included immediate recommendations, including that:

1. The OAIC investigate negative trends in the outcome of requests for environmental information
2. The complementary hours for determining charges be increased
3. Search terms used to search for and retrieve documents be provided to applicants
4. Guidance be developed on recording official information in non-official formats (eg SMS, WhatsApp)
5. Departmental budget decisions ensure FOI KPIs are met
6. All agency heads make AGS training compulsory to receive delegate status to process FOI requests.

The long-term recommendations included a Parliamentary inquiry into transparency followed by legislative reform and a uniform transparency regime across Australia.



---

## (a) Resignation of the Commonwealth FOI Commissioner and the resulting impacts

ACF submits the resignation of the FOI Commissioner, in the circumstances made public, points to the need for better resourcing and cultural improvement in the FOI system. This evidence follows a plethora of existing evidence and requires an immediate and material response from government.

## (b) Delays in the review of FOI appeals

Delay has been a constant problem in the FOI system from the early days of the FOI Act.<sup>1</sup> Now is the time for material steps to be taken to rectify this situation. Delays in the FOI process frustrate the objects of the FOI Act and result in a process that is too tardy to provide the transparency it is required to deliver. That tardiness also results in a process that is an inefficient and wasteful use of Commonwealth resources.

Two types of review occur under the FOI Act. An internal review under Part VI and a review by the Information Commissioner under Part VII.

It is uncontroversial that there is systemic problem with delay in the review process. ACF urges the committee to look closely at the cause of this and formulate specific measures that can be readily implemented. This must include better resourcing of the IC and FOI services within departments. It also requires cultural change.

ACF reviewed 109 applications in the Access Denied report.

At the departmental level one third of decisions were significantly overdue, almost half of the overdue decisions were more than eight weeks out of time. These delays are not explicable by complexity. ACF received 18 decisions in which no documents were located. The average processing time to receive these decisions was 73 days.

ACF also analysed decisions of the IC in Access Denied. Of the decisions relating to environmental information, 50% were handed down over a year from the date the IC review application was made.

In the recent decision of *Patrick v AIC*<sup>2</sup> the Federal Court found, based on evidence provided by the IC, that “*the causes of the lengthy delays [in IC reviews] were common and the combined force of the evidence pointed to an unquestionable shortage of resources*”. The Court concluded that the delay in determining of the applicant’s FOI review applications was not “unreasonable” because the reasonableness of time in decision-making was evaluated by reference to the resources allocated to the IC, which was a matter for Parliament. Subject to an appeal of this

---

<sup>1</sup> See for example [Open Government - A Review of the Federal Freedom of Information Act 1982 \[1995\] ALRC 77](#)

<sup>2</sup> [Patrick v Australian Information Commissioner \(No 2\) \[2023\] FCA 530](#)



---

decision, the position could not be clearer on this term of reference. Parliament needs to act to improve the timeliness of IC decision-making.

The Court decision contains a table from the OAIC evidence which indicates the number of unresolved cases with the OAIC was 851, 1089, 1295 and 1869 in the financial years since 2018-19. The decision finds that as at 13 March 2023, with the IC sat 42 reviews lodged in 2018, 220 in 2019 and 325 in 2020.<sup>3</sup> The decision's explication of the OAIC process and funding will assist the Committee.

ACF experience of delays in the review process is explained further in the following case studies.

### **EPBC Fast-Track**

On 31 July 2020 ACF applied to the Minister for the Environment for documents about the Australian government's post-Covid decision to 'fast-track' environmental approvals for 15 major projects. The Minister refused access to the documents on 29 September 2020. On 14 October 2020 ACF sought IC review. Five months later, on 9 February 2021 the IC decided not to undertake a review. ACF applied to the AAT. The AAT process proceeded almost to hearing – at the last minute, on 7 October 2021, the Minister agreed to release all the documents without a hearing.

### **Development in the Toondah Ramsar Wetland**

ACF sought information from the Minister for the Environment about the controversial proposal for commercial development within the Toondah Harbour Ramsar wetland in Queensland.

On 13 February 2019 ACF sought documents in relation to meetings between the Department and the Proponent. Following a partial refusal, on 11 July 2019, ACF sought IC review. Almost one year later, on 15 June 2020, the OAIC decided not to determine the review. On 10 July 2020 ACF sought review in the AAT. Following further partial release of documents the AAT found in favour of the Minister on 14 December 2021 – almost 18 months after application to the AAT was made. ACF appealed that ruling to the Federal Court and awaits a decision.

On 15 February 2019, ACF sought meeting notes from an identified series of meetings (May 2016 - March 2018) between the Proponent and Department. The Department determined to release the documents. The Proponent challenged that decision via internal review – that was decided against the Proponent on 25 July 2019. Almost one year later, on 15 June 2020 the OAIC declined to determine the matter. The Proponent sought review in the AAT on 13 June 2020. Four years and four months after the request was made, ACF waits on the decision of the AAT.

---

<sup>3</sup> Ibid at [67] and [81].





---

On 29 September 2019 ACF made a request under the FOI Act to the Department of the Environment and Energy. The request was confined to “briefs” prepared in one month in 2019. The Department determined to release the documents. The Proponent challenged that decision via internal review – that was decided on 25 July 2019. Almost one year later, on 15 June 2020 the OAIC declined to determine the matter. The Proponent sought review in the AAT on 13 June 2020. Three years and nine months after the request was made ACF waits on the decision of the AAT.

The delay in obtaining these documents reduces the transparency of the EPBC assessment and approval process.

### (c) Resourcing for responding to FOI applications and reviews

Resourcing needs to be adequate to meet the objectives of the FOI Act. The decision of the Federal Court in *Patrick v AIC* is stark in its identification of delay and the direct relationship to resourcing.

ACF submits resources are also required to shift the culture. This is based on ACF’s significant experience in the making and pursuing of FOI applications. There is a culture of non-disclosure as a precautionary measure for officers and a preference to hand applications to the IC or AAT to make the decision in favour of disclosure. That culture is not consistent with the intent of the legislation and leads to inefficiency in the system.

ACF submits the Committee should recommend statutory timeframes with consequences for internal and IC review. Departments and the IC should be resourced to achieve decisions in those timeframes. Regardless of that reform the Committee should make recommendations about timeframes that are consistent with the objects of the FOI Act.

ACF also considers it likely these improvements will reduce litigation before the AAT and Federal Court. Costs to the Commonwealth from contesting FOI applications is increasing. APS legal costs associated with FOI has more than doubled between FY15-16 and FY21-22. The APS litigation costs associated with FOI increased by 65% between FY20-21 (\$1,254,301) and FY21-22 (\$2,077,876).<sup>4</sup>

### Recommendations

- i. Resourcing of FOI processing must be at a level that will ensure statutory timeframes are met. Where timeframes do not exist resourcing should be responsive to current FOI KPIs.
- ii. All agency heads should make AGS training compulsory in order to receive delegate status to process FOI requests; create a culture of transparency; and ensure a standardized approach.

---

<sup>4</sup> Data from ‘Identified non-labour costs of FOI’ table in the relevant year Annual Reports.



- 
- iii. All staff with delegate status to process FOI requests should receive regular training targeted at increasing their knowledge of the matters of public interest that are relevant to the FOI requests they process.
  - iv. Decision-makers should lose their delegation either permanently or temporarily (pending training) if they are responsible for repeated adverse findings or unexplained delays on decisions.

#### (d) The creation of a statutory time frame for completion of reviews

The current system is simply not working. Statutory timeframes would be a useful reform, particularly in light of the decision in *Patrick v AIC*. However statutory timeframes are not sufficient in themselves. This is clear from the failure to meet statutory timeframes at the Departmental level.

Consequences must be attached to the failure to meet the statutory deadline. The key consequence must be a deemed decision to disclose. ACF submits the Committee should work through the detail of a deemed disclosure regime and make detailed recommendations for law reform to achieve this. The key challenge will be ensuring deemed disclosure does not prejudice “*person(s) or organisations concerned*” (section 27 & 27A) from being consulted and having the opportunity to exercise review and appeal rights. ACF submits that deemed disclosure could only occur where a person or organisation concerned has been given notice of the deemed decision and is given an opportunity to seek review.

For completeness, ACF submits that the deemed affirmation of original decision in section 54D is insufficient.

#### Recommendations

- i. The FOI Act should be amended to include statutory timeframes to determine IC reviews.
- ii. The FOI Act should be amended to include a deemed disclosure regime where there is a failure to decide an FOI application, internal review, or IC review within the statutory timeframe. The deemed decision to release the information should be subject to person or organisation concerned review.

#### (e) Any other related matters

##### **Culture of Non-Disclosure**

Over the six-year period prior to the appointment of Leo Hardiman KC as Commonwealth Freedom of Information Commissioner (FY15-16 to FY20-21), the percentage of FOI requests refused outright by agencies within an environment-related portfolio increased by nearly 50%.

In FY15-16, 22% of ACF’s FOI requests to the former Department of Agriculture, Department of Environment, and Department of Industry, Innovation and Science (DIIS) were refused outright. In FY20-21, 33% of ACF’s requests to





---

the Department of Agriculture, Water, and Environment (**DAWE**) and the Department of Industry, Science, Energy and Resources (**DISER**) were refused outright.

In the same period, the percentage of requests released in full nearly halved. In FY15-16, 23% of ACF's FOI requests to the former Department of Agriculture, Department of Environment, and DIIS were granted in full. In FY20-21, 12% of ACF's FOI requests to the DAWE and the DISER were refused outright.

Following the appointment of Leo Hardiman KC as Commonwealth FOI Commissioner, there was improvement in access to information. The percentage of FOI requests refused outright by agencies within an environment-related portfolio decreased from 33% in FY20-21 to 28% in FY21-22. The percentage of FOI requests granted in full by agencies within an environment-related portfolio increased from 12% in FY20-21 to 16% in FY21-22.

### Charges

Between FY15-16 and FY21-22, the average amount charged per request for environmental portfolios (\$33.67) was double the average cost for all requests across government (\$15.57).<sup>5</sup> ACF submits the recommendations in the [Access Denied](#) report (at page 35) remain relevant to the current FOI regime and are responsive to this TOR.

### Partial Release Decisions

The timeframes for making an application for internal or IC review under sections 54B and 54S of the FOI Act each commence on the day after the notice of the reviewable decision was given, even where documents to be partially released are still subject to third party review rights. This is unfair to the FOI applicant. The extent of redactions applied are critical to whether the FOI applicant makes an application for review, and any supporting submissions.

ACF submits these timeframes should instead commence after copies of the partially released documents are provided to the FOI applicant (without precluding the FOI applicant from requesting review earlier). This would likely reduce the volume and scope of applications for review.

Adam Beeson

General Counsel

Australian Conservation Foundation

---

<sup>5</sup> Per OAIC Data from FY15-16 to FY20-21, using OAIC groupings of "Agriculture" "Environment" and "Industry" (names varied slightly through the years). Only included requests for non-personal data.

