

Submission to Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

5 June 2023

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Contents

Recommendations	1
1. Introduction	4
2. Delay in processing of FOI requests and Information Commissioner Reviews.....	5
Delays in internal agency processing of requests	6
Availability of extensions of time.....	7
Case Study 1: Detention health information and statistics requests from the Department of Home Affairs.....	9
Delays in IC Reviews of requests.....	9
Case Study 2: NDIA request for access to the AFSRs	11
3. Prioritising transparency and disclosure	11
The importance of agency culture	11
The role of the OAIC.....	12
Case Study 3: Post-settlement FOI to NDIA	13
Interagency and intra-agency collaboration.....	14
Case Study 4: FOI for video footage	16
Access to disclosure logs	17
4. Application of law and exemptions	19
OAIC Guidelines.....	19
Public interest factors	20
Commercially valuable information.....	21
Change of Minister	22
5. Access Issues	23
View only access	23
Fees, charges and costs	24

Recommendations

Recommendation 1: Ratios of FOI staff-requests

The OAIC publish guidelines to set required ratios of departmental FOI officers to FOI requests. The OAIC monitor agencies' compliance with the guideline ratios by annually collecting and publishing data on the number of FOI decision-makers within each agency in the preceding year. In combination with the data on the number of FOI requests each agency receives in the preceding year, the OAIC publish the staff ratios for each agency.

Recommendation 2: Increased resourcing to agency processing functions

The Government increase funding to agencies as necessary to meet ratios set under Recommendation 1 and to address current delays in processing FOI requests.

Recommendation 3: OAIC investigations of processing delays

The FOI Act be amended to require the OAIC to undertake an investigation of any agency with rates of processing of FOI requests outside of statutory timeframes above a certain threshold. The threshold be determined by the Minister in consultation with the OAIC, and set by regulation from time to time.

Recommendation 4: More limited powers to extend agency processing time

Powers in the FOI Act to extend time for agencies to process FOI requests should be more limited. In exceptional circumstances, the agency or Minister receiving a FOI request may apply to the OAIC for one extension of up to 30 days by providing reasons for why the extension is required. The extension period sought should be proportionate to the justification for the extension. No further extensions should be available.

Recommendation 5: Strict time limits for IC Reviews

The IC Review process be simplified and truncated, with timeframes legislated for each stage of the process. We endorse Recommendation 4 from the Grata Fund submission to this Inquiry, which provides a sensible, step-by-step solution for simplifying the time limits for IC Reviews.

Recommendation 6: Joint Parliamentary Committee to oversee FOI system

A joint parliamentary committee be established to provide ongoing oversight and accountability of the integrity of departmental FOI processes and the OAIC.

Recommendation 7: Greater resourcing of the OAIC's transparency-promotion functions

Government increase funding for the OAIC's training, guidance, and investigation functions. In particular, the OAIC be allocated specific funding to conduct 'own motion' investigations of agencies.

Recommendation 8: APS Values to refer to FOI

APS Value 4 should be amended to make specific reference to the FOI Act and its role in promoting open government.

Recommendation 9: Policies and training for FOI responses

Agencies ensure policies applicable to all staff reflect the importance of the FOI Act, and the responsibility of all staff members and teams to contribute to FOI processing.

Recommendation 10: Interagency processes for FOI responses

Government adopt interagency processes for responding to FOI requests and establishing clear responsibilities and timeframes for interagency co-operation. This could include a 'whole of government' process, or memoranda of understanding between certain agencies.

Recommendation 11: Disclosure log compliance with OAIC Guidelines

The FOI Act be amended to require agencies comply with OAIC Guidelines in relation to disclosure logs.

Recommendation 12: Inclusion of decision records in disclosure logs

The OAIC Guidelines be amended to require agency disclosure logs to include the decision records for each set of documents released.

Recommendation 13: Government conduct a review of the exemptions in the FOI Act

The Government conduct a review of the exemptions in the FOI Act to better reflect the principle of open government. The review should consider whether the exemptions under the FOI Act are in the public interest, and whether the distinction between exemptions under Part IV Division 2 of the FOI Act and the conditional exemptions under Division 3 should be maintained.

Recommendation 14: The OAIC amend the OAIC Guidelines to provide greater guidance on exemptions

The OAIC clarify the OAIC Guidelines to ensure that exemptions are applied narrowly and give effect to the beneficial nature of the Freedom of Information Act 1982 (Cth). The OAIC provide regular training to agencies to improve agency decision-making in applying the exemptions.

Recommendation 15: Consultation with applicant on public interest factors in favour of disclosure

The FOI Act should be amended to require agencies to consult with the applicant when considering if public interest factors in favour of disclosure apply. Applicants should be given up to 5 business days to provide a response, which can be increased by a further 5 business days only at the request of the applicant, during which the processing time for the FOI request is suspended.

Recommendation 16: List additional public interest factors for disclosure

The Government review s 11B of the FOI Act with a view to including additional public interest factors.

Recommendation 17: Remove the exemption for trade secrets and commercially valuable information

The Government amend the FOI Act to delete s 47 and expand s 47G to include trade secrets and commercially valuable information.

Recommendation 18: FOI requests to apply to Ministerial documents as at the time of the request

The Government amend the FOI Act to clarify that the time for determining whether a document was 'an official document of the Minister' is the time at which the FOI application was made.

Recommendation 19: Ministerial document transfer requirements

The Government amend the FOI Act to require ministers to transfer documents subject to FOI requests to the OAIC. The intentional failure to transfer documents should be an offence.

Recommendation 20: OAIC publication of agency data on forms of access granted

The OAIC to obtain data from agencies on the forms of access that agencies grant, and whether that form is consistent with the form requested, and publish that data in its annual report.

Recommendation 21: Review of methods for providing view-only access to footage

The Government consider what technological options are available for sharing footage on a view-only basis, without requiring an applicant to attend in-person at an agency office.

Recommendation 22: Removal of fees and charges

The Government amend the FOI Act to remove all fees and charges in respect of FOI applications.

1. Introduction

Open government is vital to a well-functioning democracy. Australia's Freedom of Information ('FOI') framework is crucial to ensuring that our government remains transparent and accountable. For this reason, the objects of the *Freedom of Information Act 1982* (Cth) ('FOI Act') include promoting Australia's representative democracy by providing for public participation, to lead to better-informed decision-making, and increasing scrutiny, discussion, comment and review of governmental activities.¹

The Public Interest Advocacy Centre ('PIAC') has long-standing interest and expertise in the operation of the FOI Act. Over four decades, PIAC has assisted many individuals and groups to access government-held information. We make requests for documents to expose unfair practices, to challenge unjust decisions and policies, and to inform the legal advice and assistance we give our clients: people experiencing disadvantage.

In our current work, we regularly seek information from the Department of Home Affairs ('DHA'), the National Disability Insurance Agency ('NDIA'), and Services Australia – the agencies typically receiving the highest volume of FOI requests each year.²

In recent years we have observed:

- inadequate resourcing for agencies and the Office of the Australian Information Commissioner ('OAIC');
- adoption of restrictive legal interpretations by agencies and the OAIC; and
- unsupportive attitudes among some government bodies – which others have termed a 'culture of secrecy'.³

These trends have led to an unreasonably slow and constrained FOI system, and the erosion of governmental accountability. PIAC therefore welcomes the Legal and Constitutional Affairs References Committee's ('Committee') inquiry into these laws.

Our submission outlines our concerns with the sustained delays at all levels in the handling of FOI requests and reviews, the overly-broad application of statutory exemptions to disclosure, and the need for a cultural renewal to promote proactive transparency by government agencies. In

¹ *Freedom of Information Act 1982* (Cth) (*FOI Act*), s 3(2).

² Office of the Australian Information Commissioner (OAIC), *Annual report 2021-22* (Report, 28 September 2022) 134 <https://www.oaic.gov.au/data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_fina.pdf> (OAIC Annual Report 2021-22); OAIC, *Annual report 2020-21* (Report, 23 September 2021) 132 <https://www.oaic.gov.au/data/assets/pdf_file/0020/10829/oaic-annual-report-2020-21.pdf>; OAIC, *Annual report 2019-20* (Report, 21 September 2020) 139 <https://www.oaic.gov.au/data/assets/pdf_file/0021/9291/oaic-annual-report-2019-20.pdf>; OAIC, *Annual report 2018-19* (Report, 12 September 2019) 166 <https://www.oaic.gov.au/data/assets/pdf_file/0024/9285/oaic-annual-report-2018-19.pdf>; OAIC, *Annual report 2017-18* (Report, 17 September 2018) 154 <https://www.oaic.gov.au/data/assets/pdf_file/0012/9300/oaic-annual-report-2017-18.pdf>; OAIC, *Annual report 2016-17* (Report, 14 September 2017) 93; OAIC, *Annual report 2015-16* (Report, 27 September 2016) 137; OAIC, *Annual report 2014-15* (Report, 28 September 2015) 111; and OAIC, *Annual report 2013-14* (Report, 23 September 2014) 127.

³ See Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis*, (Report, August 2022) <<https://publicintegrity.org.au/research/papers/delay-and-decay-australias-freedom-of-information-crisis/>> (*Delay and Decay Report*).

light of these concerns, we agree with former Commissioner Leo Hardiman KC's assessment that:

'Further changes are...necessary...to ensure that the timeliness of IC reviews and, consequently, access to government-held information, is increased.'⁴

Urgent reforms are needed in order to restore the integrity of Australia's FOI system, and to equip the OAIC to ensure the FOI Act's objectives are fulfilled.

We note that PIAC has had the benefit of reviewing an advanced draft of the Grata Fund's submission to this inquiry; many of our recommendations concur with and/or endorse those of the Grata Fund.

2. Delay in processing of FOI requests and Information Commissioner Reviews

If the FOI system is to promote open government and democratic accountability, information must be released in a timely manner. Unfortunately, as we discuss below, processing times for FOI requests by government agencies, and reviews by the Information Commissioner ('IC Reviews'), have blown out dramatically in recent years. These delays have serious negative consequences for the FOI regime, and for its objects.

In our view, delay in processing FOI requests and IC Reviews is the single biggest issue facing the FOI system today.

The delays in the system are cumulative: agency delays in processing initial FOI requests and internal reviews are compounded by OAIC delays, such that one FOI application can stretch across multiple years. And for many FOIs, extended delays will mean that the information is no longer relevant by the time it is disclosed. Public reporting has pointed to several recent examples where this has happened:

- On 14 January 2017, journalist Justin Warren requested access to information from Services Australia about the use of income averaging to calculate Centrelink debts – commonly referred to as 'Robodebt'. After delays in processing his request at the department and the OAIC, his IC Review was only finalised on 11 November 2019 – as the Robodebt scheme was already coming to a close.⁵
- In Senate Estimates in February 2023, Information Commissioner Falk and Senator David Shoebridge discussed a FOI request for governmental plans in the event of the death of the monarch; during the processing of which the monarch *did* die. As at the date of that Estimates hearing, the IC Review remained ongoing.⁶
- In 2020, Senator Rex Patrick requested information about the allocation of grants for the Community Sport Infrastructure Grant Program. His IC Review was decided on 28 February

⁴ Leo Hardiman PSM KC, Statement regarding resignation of my appointment as Commonwealth Freedom of Information Commissioner, *LinkedIn* (Internet post, 7 March 2023), <https://www.linkedin.com/posts/eo-hardiman-psm-kc-78123a123_statement-regarding-resignation-of-my-appointment-actvty-7038267602107854848-1n85/>.

⁵ Warren; *Services Australia and (Freedom of information)* [2022] AATA 4191.

⁶ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 13 February 2023, 137, (Sen. David Shoebridge; Angeline Falk, Australian Information Commissioner).

2023, well after the government and Ministers responsible for the grants in question had left office.⁷

PIAC has found that delays have had similarly frustrating impacts on our own work. For example:

- Delays in DHA releasing immigration detention health information and statistics constrained our ability to identify systemic issues and provide advice to clients (described in Case Study 1 below); and
- Delays in the NDIA processing our request for the NDIA's Annual Financial Sustainability Reports ('AFSRs') diluted the relevance of the information finally released (described in Case Study 2 below).

PIAC's experience is that delays cause a loss of confidence in the FOI system. In some cases, clients and partners have declined our suggestions to lodge FOI requests and told us that, while the information sought would be valuable, it would be of little use if only released after many months. Similarly, in some of PIAC's projects, significant delays have led us to seek information by other means (such as using informal release processes by agencies) or simply proceed without it.

In our experience, 'FOI fatigue' amongst practitioners in the community legal centre sector is common, reflecting the demoralisation and cynicism that comes from repeated experiences of significant delay with the FOI system.

Delays in internal agency processing of requests

The FOI Act requires government bodies to process FOI requests within 30 days.⁸ However, in recent years there has been a steady and significant increase in agencies failing to comply with this timeframe. In the 2018-19 financial year, only 2% of FOI requests were decided by departments more than 90 days late; this has ballooned to 10% in 2019-20, 12% in 2020-21, and 19% in 2021-22.⁹ Across all agencies within the Commonwealth Government, only 70% of FOI requests were decided within statutory timeframes in 2021-22.¹⁰

Of ten requests for non-personal information PIAC made since 2020, half were decided by the responsible agency outside of the statutory time limit. One request took ten months to be processed; another was lodged nine months ago and is still awaiting a decision from the relevant agency.

The OAIC's most recent annual report lists agency explanations for delays, including redirection of staff away from FOI processing, increasing FOI workloads, and the need to set priorities within their FOI caseloads.¹¹ Each of these factors suggests agencies need more staff and resources to address FOI delays.

One way this could be achieved is by tasking the OAIC with setting the number of FOI officers an agency is required to have available to process requests, at a certain ratio to the number of FOI requests received by each agency, in the preceding year. This would require Government to

⁷ *Rex Patrick and Attorney-General (Freedom of information)* [2023] AICmr 9.

⁸ *FOI Act* s 15(5).

⁹ *OAIC Annual Report 2021-22*, 147.

¹⁰ *Ib d*, 146.

¹¹ *Ib d*.

provide sufficient funding to employ the required number of FOI officers and require departmental executive staff to allocate resources internally to ensure these ratios are maintained throughout a funding period.

The disparate processing rates between different agencies could also be addressed in part through greater OAIC oversight. As we discuss below at Part 3 of this submission, the OAIC should be resourced to make more extensive use of its investigation powers under Part VIIB of the FOI Act.

As a particular measure, we suggest that the Government amend the FOI Act to require that the OAIC commence an investigation into any agency which has repeatedly failed to meet the statutory processing timeframes. We suggest that the rate could be decided between Government and the OAIC or be left for the Minister to decide through regulation from time to time, but we suggest might be appropriately set at 25% of all requests being processed outside of the statutory timeframes in a financial year.

Recommendation 1: Ratios of FOI staff-requests

The OAIC publish guidelines to set required ratios of departmental FOI officers to FOI requests. The OAIC monitor agencies' compliance with the guideline ratios by annually collecting and publishing data on the number of FOI decision-makers within each agency in the preceding year. In combination with the data on the number of FOI requests each agency receives in the preceding year, the OAIC publish the staff ratios for each agency.

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Availability of extensions of time

Agencies may request an extension of time to process an FOI request in circumstances including where the request is complex or requires consultation with third parties.¹² Extensions of time are preferable to an agency disregarding statutory processing timeframes altogether, but still result in delay of the release of information.

The OAIC reported that in the 2021-22 financial year, requests for extensions of time by agencies rose by 33%; out of 25,303 FOI requests in total, agencies made 4,925 requests for extensions of time.¹³

¹² FOI Act ss 15(6)-(8), 15AA, 15AB.

¹³ OAIC Annual Report 2021-22 49.

The OAIC should publish statistics on requests for extensions of time on an agency-by-agency basis. This would increase public accountability and oversight over the process, and could reveal instances of poor agency practice that the OAIC could address directly with the particular agency. Publication of information on delays could also demonstrate which agencies require greater resourcing to meet complex and voluminous FOI caseloads, instead of requesting regular extensions to manage requests.

As the various powers to extend time are cumulative, the use of multiple extensions in a single case can create significant delay. It is possible, in a single FOI application, for:

- An applicant to agree to a 30 day extension of time (s 15AA); then
- The agency to extend time by 30 days after determining that it needs to consult with a third party (s 15(6)); then
- The agency to seek and receive a further 30 day extension of time from the OAIC based on the complexity of the request (s 15AB).

This would amount to a total of 120 days for the agency to process the FOI request. Such an extended processing period does not accord with the objects of the FOI Act.

The FOI Act should be amended to limit the extension provision to state that the agency or Minister handling the FOI request may only seek one extension, of up to 30 days, in exceptional circumstances and by application to the OAIC. To improve transparency in FOI handling, an agency or Minister should be required to justify the reasons for the extension, and the amount of time sought should be proportionate to those reasons (eg an extension of seven days may be appropriate for consulting a third party on a simple FOI request).

To reduce the practice of extensions being routinely granted, such an extension should only be granted if the OAIC is satisfied there are 'exceptional circumstances' warranting the extension. Exceptional circumstances might include scenarios such as:

- Requests for an unusually voluminous and complex number of documents, beyond what could ordinarily be expected in an agency's caseload;
- A large, sudden and unexplained spike in the number and size of FOI requests received by an agency; and
- The need for unusually complex consultations with third parties or other agencies, beyond what would ordinarily be expected in the agency's caseload.

Importantly, it should not cover situations such as staff unavailability (except in exceptional circumstances), or an agency devoting resources to other priorities. It is within the power of agencies to plan for such contingencies – particularly if Recommendation 1 above is adopted – and they should be expected to do so.

Recommendation 4: More limited powers to extend agency processing time

Powers in the FOI Act to extend time for agencies to process FOI requests should be more limited. In exceptional circumstances, the agency or Minister receiving a FOI request may apply to the OAIC for one extension of up to 30 days by providing reasons for why the extension is required. The extension period sought should be proportionate to the justification for the extension. No further extensions should be available.

Case Study 1: Detention health information and statistics requests from the Department of Home Affairs

To better understand the experiences and issues faced by people with Hepatitis C in immigration detention, last year PIAC sought statistics from DHA.

- On 14 April 2022, PIAC requested information from DHA relating to the number of people in immigration detention facilities with Hepatitis C, and/or receiving Hepatitis C treatment, as at the date of the request.
- On 20 April 2022, DHA asked PIAC to revise the request to more specifically identify the documents sought, and we did so on 28 April 2022.
- On 19 May 2022, DHA informed us that the volume of documents requested may give rise to a 'practical refusal reason', and invited PIAC to further revise our request by 2 June 2022.
- On 26 May 2022, PIAC requested information about the number of documents concerned, the nature of those documents, and to which parts of the request they related, to assist in responding to DHA. DHA did not reply to this letter.
- On 2 June 2022, despite receiving no response from DHA, PIAC revised the scope of the request.
- On 28 June 2022, DHA was deemed to have refused the request.
- On 30 June 2022 PIAC applied for IC Review. As at the date of this submission, that review application has not been determined.
- On 26 August 2022, DHA released several documents in response to the initial FOI request. This release occurred 59 days outside of the statutory processing time (being the timeframe for processing following the deemed refusal). In total 134 days had passed since PIAC made the FOI request.

By the time PIAC received the statistics they were over four months old and unlikely to reflect the current position in immigration detention. Additionally, delays on behalf of the OAIC meant the request for review had no impact on the timely production of information from the agency.

Delays in IC Reviews of requests

Delays in the processing of IC Reviews have grown at a similar pace. The average time taken to resolve IC Reviews has grown from 2.5 months in 2016-17 to 6.3 months in 2021-22,¹⁴ with each year since 2015-16 showing a greater number of review applications lodged with the OAIC than it was able to resolve.¹⁵

The average timeframes for the slowest-processed IC Reviews are also concerning. In 2021-22, 17% of IC Reviews were not processed within 12 months.¹⁶ The Information Commissioner reported in Senate Estimates in February of this year that the OAIC had in progress:

- 124 review applications lodged in 2023;
- 808 review applications lodged in 2022;
- 464 review applications lodged in 2021;
- 329 review applications lodged in 2020;
- 238 review applications lodged in 2019; and

¹⁴ *Delay and Decay Report*; and *OAIC Annual Report 2021-22* 14.

¹⁵ *Delay and Decay Report*; and *OAIC Annual Report 2021-22* 43-44.

¹⁶ *OAIC Annual Report 2021-22* 14.

- 47 review applications lodged in 2018.¹⁷

These extensive OAIC delays accord with PIAC's experience. In recent years, PIAC staff have filed three IC Review applications, on:

- 18 January 2022;
- 30 June 2022; and
- 22 August 2022.

All three remain outstanding.

In light of these delays, PIAC has elected not to review several agency FOI decisions, including in cases where an agency has failed to make a decision within the statutory timeframe and the FOI request is subject to a 'deemed refusal'. It is possible that current IC Review statistics do not reflect the true level of applicant dissatisfaction with agency handling of FOI requests, as the OAIC delays would likely deter other applicants.

Delays in the OAIC's processing of IC Reviews create other flow-on effects. The FOI Act provides that failure of an agency to process an FOI request in time leads to a 'deemed refusal' of the request.¹⁸ The intention of the deemed refusal provision is to create a pathway for an applicant to escalate the application to expedite access to the requested information. However, where OAIC reviews are dramatically delayed, this pathway does not provide the remedy it is meant to ensure.

Because of the lack of available, effective remedies, applicants may feel compelled to consent to requests for extensions of time,¹⁹ since a deemed refusal may only further delay the FOI request. Delayed IC Reviews also mean that there is less incentive for agencies to process requests within time, given the low risk of an IC Review resulting in a different decision and highlighting the agency's delays.

The OAIC requires an urgent injection of resources to address the substantial backlog of IC Review applications, as well as to keep up with its ongoing caseload. Better OAIC resourcing is the single most important step the Government can take to address the crippling FOI backlogs.

Provided the OAIC is properly resourced, we support the introduction of time limits relating to the IC Review process. The Grata Fund submission provides a detailed proposal to reform, simplify and truncate the IC Review process. Rather than restate those recommendations, we endorse the Grata Fund submission on this issue.

Recommendation 5: Strict time limits for IC Reviews

The IC Review process be simplified and truncated, with timeframes legislated for each stage of the process. We endorse Recommendation 4 from the Grata Fund submission to this Inquiry, which provides a sensible, step-by-step solution for simplifying the time limits for IC Reviews.

¹⁷ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 13 February 2023, 137, (Angeline Fak, Australian Information Commissioner).

¹⁸ *FOI Act* s 15AC.

¹⁹ *FOI Act* s 15AA provides an agency or Minister may extend the statutory time limit by consent of the applicant or OAIC.

Case Study 2: NDIA request for access to the AFSRs

The financial sustainability of the NDIS has been a high profile political issue in recent years. In 2021, amid significant proposed reforms by the then-government and an ongoing public debate over the costs of the NDIS, PIAC sought release of documents relating to the NDIA's AFSRs for current and previous years prepared by the NDIA pursuant to a statutory mandate. These AFSRs and related documents would inform public debate on the trajectory of the NDIS and allow scrutiny of the proposed reforms to reduce costs.

- On 7 July 2021, PIAC requested access to the Annual Financial Sustainability Reports for each financial year from 2013-2021, and the underlying assumptions and modelling.
- On 3 August 2021, the NDIA informed PIAC that the volume of documents requested may give rise to a 'practical refusal reason', and invited PIAC to revise the request by 17 August 2021.
- On 16 August 2021, PIAC agreed to revise the request to dispense with the assumptions underlying the modelling.
- On 20 September 2021, the NDIA refused access to the documents on the basis they contained 'deliberative matter' (FOI Act, s 47C).
- On 20 October 2021, PIAC requested internal review.
- On 19 November 2021, the NDIA delivered its internal review decision, agreeing to provide PIAC with the AFSRs subject to substantial redactions made on the basis of the:
 - preservation of Commonwealth-State relations (s 47B(a));
 - protection of agency deliberative processes (s 47C); and
 - protection of certain agency operations (s 47E).

The NDIA's redactions obscured so much information that we could not understand the context of many of the AFSRs' conclusions.

- On 18 January 2022, we applied for IC Review, which at the date of this submission has not been determined.
- On 2 November 2022, the NDIA published the historical AFSRs on its website, without redaction.

After nearly 18 months of seeking the AFSRs, the NDIA did not notify PIAC when it published the reports on its website. We are unaware of any link between the NDIA's publication and PIAC's ongoing IC Review; but PIAC considers that this highlights the way in which delayed IC Reviews can render the process redundant. Additionally, the disclosure of the full AFSRs suggests that the NDIA's initial refusal decision, and the application of substantial exemptions on internal review, was not justified.

3. Prioritising transparency and disclosure

The importance of agency culture

The FOI system seeks to balance a number of interests including public accountability and transparency, a variety of genuine interests in secrecy, confidentiality or privacy, and resource demands on agencies. Its implementation requires complex decision-making and planning by agencies. Unless the mechanisms involved are guided by an agency culture that values openness and disclosure, there are multiple ways in which the system can become ineffective or lose sight of its initial purpose.

Given this, the culture of agencies should be a vital concern for this Committee. An agency culture that welcomes transparency is more likely to devote sufficient resources to FOI processing to prevent delays; implement systems to make the FOI system more effective and user-friendly; and reduce internal and OAIC review workloads by making appropriate first-instance decisions. Perhaps most critically, an agency culture of transparency promotes public trust in decision-making and preserves citizens' trust in their government.

PIAC has concerns about the cultural attitudes towards the release of information under the FOI Act within some agencies. In many of our cases, statutory exemptions have been applied too broadly by first-instance FOI decision-makers – a view that is supported by the high rates of decisions overturned on internal review or by the OAIC.²⁰ In other cases, FOI departments have failed to respond to, or even acknowledge, our correspondence concerning delays (illustrated below in Case Study 3). FOI decision-makers have also told us of their difficulties obtaining co-operation from within their own agencies when trying to locate or disclose documents. These practices suggest, at least, a lack of proactive concern for transparency from the agencies involved and a de-prioritising of FOI compliance in comparison to other agency roles or functions.

We submit ongoing oversight of the FOI system, and the role of agency culture within it, will ensure implementation of the FOI Act improves. We therefore recommend a Joint Parliamentary Committee be established to provide ongoing oversight and monitoring of the FOI system.

Recommendation 6: Joint Parliamentary Committee to oversee FOI system

A joint parliamentary committee be established to provide ongoing oversight and accountability of the integrity of departmental FOI processes and the OAIC.

The role of the OAIC

The cultural concerns outlined above could in part be addressed by reducing the delays at the OAIC. If IC Reviews were conducted in a timely manner, the OAIC could provide an effective remedy for poor individual decisions and its published decisions could normatively improve agency practices (including by reprimanding inappropriate conduct). The need to improve agency culture provides another reason to urgently reduce OAIC delays.

The OAIC also performs its critical function of promoting transparency in government by:

- providing training and guidance to government employees;
- issuing guidelines for agencies to comply with their obligations under the FOI Act; and
- conducting investigations into agencies.

Given the significance of its mandate, the OAIC must be appropriately resourced and supported to perform these functions.

We particularly encourage the greater use of systemic 'own motion' investigations by the OAIC. 'Own motion' investigations could provide a more strategic way to improve structural issues with an agency's handling of FOIs. An excellent example of such an investigation was the Commissioner's 2020 investigation into DHA's FOI Act compliance, which resulted in a series of

²⁰ OAIC Annual Report 2021-22, 151, 153.

recommendations to address the Department's persistent issues of delay and to improve the Department's inadequate FOI systems. While issues with DHA persist, the OAIC's scrutiny and suggested reforms were a welcome step toward prioritising transparency.

Since its inception in 2010, the OAIC has only conducted five 'own motion' investigations.²¹ In addition to the investigations suggested at Recommendation 3, the OAIC should be encouraged to conduct more frequent own motion investigations into agency FOI performance, and given specific funding tied to this function. Rather than viewing investigations as exceptional rebukes to an agency, investigations by the OAIC should be viewed as part of a continuing dialogue between agency and review body, and the OAIC trusted to help an agency improve its performance.

Recommendation 7: Greater resourcing of the OAIC's transparency-promotion functions

Government increase funding for the OAIC's training, guidance, and investigation functions. In particular, the OAIC be allocated specific funding to conduct 'own motion' investigations of agencies.

Case Study 3: Post-settlement FOI to NDIA

PIAC acted for a NDIS participant in a review before the Administrative Appeals Tribunal ('AAT'). In June 2022, the matter settled, in part on the basis that our client would get additional funding for him to live in his preferred disability housing.

In the course of correspondence regarding settlement, the NDIA's representatives referred to the 'Home and Living Team' at the NDIA having made a 'determination' about the appropriate funding for our client. Our client was eager to know the basis for this determination, since it would likely affect his future dealings with the NDIA.

- On 22 June 2022, PIAC made a FOI request for a copy of the 'determination', enclosing a copy of the relevant correspondence from the NDIA's representative.
- After seeking an extension, on 19 August 2022, the NDIA made a decision stating that the Home and Living Team did *not* make any such determination.
- PIAC sought clarification from the NDIA's representative, who confirmed their understanding that a determination was made by the Home and Living Team but provided no further explanation.
- Despite putting this to the NDIA, the FOI team reiterated their position that the determination did not exist and noted that PIAC could make a new FOI request for 'any documents that may exist in relation to these AAT processes involving [consultation with NDIA staff regarding settlements]'.
- PIAC responded to the NDIA's FOI team requesting additional clarification on 31 August 2022 and 6 September 2022 but received no further response.

Although the NDIA's AAT instructors, the Home and Living Team, and the FOI team were each presented with conflicting correspondence from elsewhere in their agency, none attempted to resolve the discrepancies for us. Ultimately, each declined to engage in further

²¹ See OAIC, Freedom of information reports, *Office of the Australian Information Commissioner*, (Website, 2023) <<https://www.oaic.gov.au/freedom-of-information/foi-reports>>.

correspondence with us, or respond to our queries. It seems apparent that the teams involved did not take responsibility for resolving the outstanding issues raised by the FOI request.

- On 27 October 2022, PIAC lodged a second FOI request with the NDIA, differently worded, seeking documents relating to the 'consultation' surrounding the client's settlement.
- The NDIA sought, and PIAC agreed to, an extension of time until 26 December 2022.
- The NDIA sought multiple further extensions of time from the OAIC, until 3 March 2023.
- On 3 March 2023, the NDIA sought a further extension of time from the OAIC, until 31 March 2023.
- Before this extension request could be decided, the OAIC wrote to PIAC on 20 March 2023 and informed PIAC that, 'On 17 March 2023, the NDIA advised that they would like to withdraw the extension request because '[u]nfortunately we don't have capacity to currently to further address this extension.' Accordingly, the processing time for this second FOI request expired on 3 March 2023.
- On 5 April 2023, a NDIA FOI officer called PIAC and suggested a revision of the scope of the initial request. This call was followed by an email of the same date.
- On 11 April 2023, PIAC wrote to the NDIA, agreeing to revise the scope of the request subject to the NDIA confirming further details.
- This FOI request remains undetermined.

Interagency and intra-agency collaboration

FOI requests require co-operation across government. FOI teams most commonly process requests by consulting with other business areas in their agency. At other times an agency may need to seek documents from or refer a request to another agency.

Unfortunately, PIAC has encountered difficulties with each of these steps. In the matter set out at Case Study 3, different teams within the NDIA each disclaimed responsibility for providing the documents, extensively delaying release of the requested documents (which are still outstanding).

Similarly, in the matter set out at Case Study 4, difficulties in interagency cooperation led to significant delays in production of documents. In that example the request was directed to the Australian Federal Police ('AFP'), for material that originated with DHA but which we understood was in the possession of both agencies. In that request, there appeared to be confusion about:

- which agency held the relevant documents;
- which agency was responsible for reviewing the documents to determine the response;
- which, if either, agency was bound by the statutory timeframes in the FOI Act; and
- which agency was responsible for facilitating access to the materials (where certain CCTV footage was made available on an inspection only basis).

Because of this confusion, from the time the AFP issued a decision to grant inspection only access to the CCTV footage, a further 6 months was required to organise and make arrangements with the AFP and DHA to finally view the footage in person at a DHA facility. This was on top of the very extensive delays that had elapsed between the initial FOI request being lodged and the AFP providing the requested non-CCTV material, despite those documents totalling less than 10 pages of material.

Government should build agency cultures where teams and departments take responsibility for resolving FOI requests, rather than shifting the issue to other teams or departments. The APS Values, set out at s 10 of the *Public Service Act 1999* (Cth), include:

'Accountable

(4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility'

This should be amended to specifically refer to the importance of the FOI Act to promoting open and accountable government.

Within agencies, policies applicable to all staff should reflect the importance of FOI processing, and the responsibility of all teams in assisting to locate and provide documents in response to requests. Where necessary, agencies could ask the OAIC to provide training about the agency's FOI obligations.

Government should also facilitate the smooth processing of FOI requests between agencies. This could occur by developing a policy for coordinating interagency handling of FOIs, or through memoranda of understanding between agencies that frequently consult and coordinate in response to requests. Any policy or memoranda should prescribe which agency retains responsibility for the request, procedures for consultation and timeframes for release of information. Arrangements of these kinds could ensure FOI teams are effectively and efficiently working together to locate, review and release documents, in compliance with their obligations under the FOI Act.

Recommendation 8: APS Values to refer to FOI

APS Value 4 should be amended to make specific reference to the FOI Act and its role in promoting open government.

Recommendation 9: Policies and training for FOI responses

Agencies ensure policies applicable to all staff reflect the importance of the FOI Act, and the responsibility of all staff members and teams to contribute to FOI processing.

Recommendation 10: Interagency processes for FOI responses

Government adopt interagency processes for responding to FOI requests and establishing clear responsibilities and timeframes for interagency co-operation. This could include a 'whole of government' process, or memoranda of understanding between certain agencies.

Case Study 4: FOI for video footage

PIAC represented a client in relation to incidents that occurred while they were in immigration detention. PIAC's advice and assistance to this client was delayed and hindered by the processing of an FOI request by several government agencies.

- On 20 January 2021, PIAC made an FOI request (on behalf of the client) to the AFP, seeking copies of documents about two previous matters where the client had been accused of crimes while in immigration detention. In particular, PIAC needed access to the video footage of these incidents in order to advise the client.
- On 11 February 2021, the AFP requested that PIAC agree to a 30 day extension of time to process the request.
- On 15 February 2021, PIAC emailed the AFP and said it did not agree to the extension of time. PIAC noted that the documents were being sought for an urgent and time-sensitive purpose.
- The AFP sought an extension of time from the OAIC; while PIAC explained to the OAIC why it opposed an extension of time, on 25 February 2021 the OAIC granted the AFP an extension of time to 12 March 2021 on the basis that the 'request is complex'.
- On 5 March 2021, the AFP sent PIAC a Notice of Intention to Refuse FOI Request, saying that the work to process the request would 'substantially and unreasonably divert the resources of the AFP'.
- On 17 March 2021, PIAC wrote to the AFP and agreed to revise the scope of its request to more specifically identify the documents being sought. The revised scope continued to include access to the video footage PIAC needed.
- On 24 March 2021, the AFP informed PIAC that the FOI could be processed with this revised scope, but that to do so would require consultation with a 'third party' – such that the FOI request would be due by 30 April 2021.
- On 23 September 2021 (146 days after the due date for the request), the AFP wrote to PIAC requesting consent to exclude certain already-released documents, and some CCTV footage, from the request.
- On 24 September 2021, PIAC agreed to exclude the already-released documents but did not agree to exclude the CCTV footage.
- On 15 October 2021, the AFP telephoned PIAC and asked for consent to split the request into two parts; the first part relating to the documents requested, and the second part relating to the CCTV footage. PIAC agreed to this split.
- On 21 October 2021, the AFP decided the split FOI request relating to the documents, and released the documents requested. This decision was 174 days after the due date of the request, and 274 days after PIAC made the request.
- On 2 December 2021, the AFP informed PIAC that, as the footage was provided by DHA, the AFP was consulting with DHA about release of the footage. The AFP told PIAC that DHA were willing to only provide 'view only' access to the footage, and asked PIAC to contact DHA at an email address provided, to discuss and make arrangements to view the footage.
- On 6 December 2021, PIAC emailed DHA at the email address provided by the AFP.

- On 21 December 2021, after receiving no response from DHA, PIAC sent a further email to DHA (copying in the AFP FOI team). PIAC requested that the footage be shared remotely to facilitate viewing, especially in light of ongoing COVID case numbers.
- On 22 December 2021, the AFP emailed PIAC saying that the AFP had been contacted by DHA, and that DHA had requested that the AFP make arrangements for PIAC to view the footage. The AFP said this would need to be arranged in 2022.
- On 7 January 2022, a senior AFP FOI officer telephoned PIAC and said that it would not be possible to release the footage to PIAC to view via electronic means (such as a time-expiring link) as they need somebody to be in the room to prevent any unauthorised recording of the footage.
- Later on 7 January 2022, the AFP issued an FOI decision to PIAC, granting PIAC 'view-only' access to ten CCTV recordings at the offices of the AFP or another suitable venue. This decision was 252 days after the due date of the request, and 352 days after PIAC made the request.
- On 20 January 2022, PIAC emailed the AFP for an update about access arrangements to the CCTV footage.
- On 21 January 2022, the AFP replied to PIAC saying that they were waiting to hear further from DHA and would respond to PIAC next week.
- On 22 April 2022, PIAC emailed the AFP again requesting an update on the access arrangements.
- On 29 April 2022, the AFP informed PIAC that they were continuing to await a response from DHA.
- After further correspondence, on 16 May 2022 the AFP provided PIAC with a contact email address for a person at the Australian Border Force ('ABF'), who could be contacted to arrange viewing of the footage at DHA offices. On the same day, PIAC emailed that ABF contact.
- On 20 May 2022, the ABF advised PIAC that the footage was located at Villawood Immigration Detention Centre and could be viewed during business hours.
- Multiple attempts by PIAC to view the footage were cancelled due to difficulties with availability, including due to a PIAC staff member contracting COVID.
- On 5 July 2022, 531 days after making the initial FOI request, PIAC staff members were finally able to attend the Centre and view the footage.

The enormous delays in providing access to this footage significantly affected PIAC's ability to provide timely legal advice and assistance to our client.

Access to disclosure logs

The FOI Act requires agencies to publish a 'disclosure log' on their website, making available all non-personal information and documents that have been released in response to FOI requests.²² This is an important feature of the FOI system, demonstrating government transparency and promoting efficiency by reducing the need for repeat requests.

²² FOI Act, s 11C.

The OAIC Guidelines suggest best practice for agency disclosure logs.²³ These Guidelines recommend disclosure log documents should be made available for direct download from the website, rather than simply providing a description of the documents and making them 'available upon request'.²⁴

PIAC has observed that several agencies do not follow the OAIC Guidelines' suggested best practice. For instance, both the NDIA and Services Australia disclosure logs require interested parties to send an email to the agency to access documents, which creates additional work for the FOI team and is an unnecessary additional hurdle for the public. In our view, the FOI Act should be amended to require agencies to comply with the OAIC Guidelines with respect to disclosure logs.

Another issue with disclosure logs occurs where an agency publishes the documents (often with redactions reflecting FOI exemptions applied) but not information about the FOI request and/or the rationale for the exemptions applied.²⁵ This can make it difficult to understand the context of the documents, or to know whether further requests would be useful.

Prior to 2019, DHA's disclosure log allowed interested parties to download the documents released and the Department's decision record for the FOI request.²⁶ This was a valuable and efficient practice. PIAC recommends that the OAIC Guidelines be amended to promote (or, as per above, require) this practice.

Recommendation 11: Disclosure log compliance with OAIC Guidelines

The FOI Act be amended to require agencies comply with OAIC Guidelines in relation to disclosure logs.

Recommendation 12: Inclusion of decision records in disclosure logs

The OAIC Guidelines be amended to require agency disclosure logs to include the decision records for each set of documents released.

²³ OAIC, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (online, February 2022) <<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>>, at Part 14 (OAIC Guidelines).

²⁴ Ibid, [14.42].

²⁵ See National Disability Insurance Agency, FOI Disclosure Log, *National Disability Insurance Scheme*, (23 May 2023) <<https://www.nds.gov.au/about-us/policies/freedom-of-information/foi-disclosure-log>>; Department of Home Affairs, FOI Disclosure Logs 2023, *Department of Home Affairs* (9 March 2023) <<https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2023>>; and Services Australia, Freedom of Information Disclosure Log, *Services Australia* (25 May 2023) <<https://www.servicesaustralia.gov.au/freedom-of-information/disclosure-log>>.

²⁶ See Department of Home Affairs, FOI Disclosure Logs 2018, *Department of Home Affairs*, <<https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2018>>; See Department of Home Affairs, FOI Disclosure Logs 2018, *Department of Home Affairs*, (1 July 2020) <<https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2018>>.

4. Application of law and exemptions

PIAC has consistently noted our concerns about the broad exemptions in the FOI Act.²⁷ These exemptions greatly impede the ability of individuals and civil society to freely access information and ensure government decision-making is transparent and accountable. We maintain our previous recommendation that a review be conducted of both the exemptions and conditional exemptions in the Act to consider whether each is in the public interest, so that unnecessary exemptions can be limited or removed.

Recommendation 13: Government conduct a review of the exemptions in the FOI Act

The Government conduct a review of the exemptions in the FOI Act to better reflect the principle of open government. The review should consider whether the exemptions under the FOI Act are in the public interest, and whether the distinction between exemptions under Part IV Division 2 of the FOI Act and the conditional exemptions under Division 3 should be maintained.

OAIC Guidelines

The OAIC Guidelines play an important role in establishing norms of best practice for agencies considering exemptions. Agencies are required to consider the OAIC Guidelines under the FOI Act and have an incentive to apply the OAIC Guidelines, as their decisions are otherwise more likely to be overturned on IC Review.²⁸ The OAIC Guidelines provide an invaluable resource for individuals and agencies to understand the FOI regime, and discourage over-broad use of exemptions by agencies.²⁹ The role of the Guidelines is particularly significant in light of the relatively small numbers of published AAT and court decisions providing guidance for how particular exemptions should be applied.

We consider that the OAIC Guidelines could provide further guidance. At present, the OAIC Guidelines for most exemptions largely set out the legislation and refer to existing case law, and only rarely provide additional commentary on best practice interpretations of the exemptions.

In this context, agency decision-makers exercise substantial discretion in applying exemptions, which can sometimes result in agencies claiming sweeping exemptions to limit disclosure. For example, Case Study 2 above shows the NDIA relied on several exemptions in the FOI Act to extensively redact information, citing the need to protect a range of interests. Given the documents were subsequently published in full, our view is those exemptions were applied in an unnecessarily broad fashion.

Agency decision-making could be improved by amending the OAIC Guidelines to provide further commentary on best practice for applying exemptions. These amendments should clarify that exemptions should be construed narrowly (in keeping with the objects of the legislation) and

²⁷ See, for instance Cohen, M et al, *Review of Freedom of Information Laws* (7 December 2012), Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2012/12/review-freedom-of-information-laws>, 10; and Farthing S, Santow E, *Freedom of Information Amendment (New Arrangements) Bill 2014* (6 November 2014), Public Interest Advocacy Centre, available at https://piac.asn.au/wp-content/uploads/14.11.06_freedom_of_information_amendment_new_arrangements_bill_2014_submission_to_the_parliamentary_committee.pdf.

²⁸ FOI Act, s 93A(2).

²⁹ Significantly, this deterrent effect is weakened by the current backlog for IC Reviews. Where applicants are deterred from seeking review by the delay, IC Reviews are less likely to enforce the OAIC Guidelines and correct poor practice.

provide more detailed commentary about the OAIC's interpretation of the exemption. Making this commentary available would make agency decisions more consistent and predictable, and result in fewer appeals. This would promote greater trust and transparency, and alleviate downstream pressure on internal review and IC Review.

Recommendation 14: The OAIC amend the OAIC Guidelines to provide greater guidance on exemptions

The OAIC clarify the OAIC Guidelines to ensure that exemptions are applied narrowly and give effect to the beneficial nature of the Freedom of Information Act 1982 (Cth). The OAIC provide regular training to agencies to improve agency decision-making in applying the exemptions.

Public interest factors

Where a document falls within a 'conditional exemption', the decision-maker must determine whether disclosure would, on balance, be contrary to the public interest. This balancing exercise recognises that the public interest in disclosure will often outweigh the governmental interests in secrecy reflected by the conditional exemptions.

Nonetheless, in many matters PIAC considers agencies have applied an inappropriately secretive approach to document disclosure. For instance, we regularly see agencies rely on s 47E(d) to deem documents conditionally exempt on the basis that their disclosure would 'have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'. In cases where this section is invoked, we find that agencies will almost always find that disclosure is against the public interest.

We have seen the NDIA apply this section in relation to how it:

- provides senior staff and ministers with briefs of advice;
- arranges specialist panels to design support packages for participants; and
- applies methodologies and standard procedures to determine appropriate levels of support.

We have seen DHA apply the same methods to exclude information about its operation of immigration detention facilities, and modes of questioning used to evaluate the credibility of people seeking asylum.

In our experience, where an FOI request touches on areas of sensitivity agencies are very unlikely to find disclosure is in the public interest. We consider the agency reasons provided reflect an inappropriately narrow consideration of relevant public interest factors (such as, in the examples above, the importance of transparency in controversial government decision-making and operations concerning vulnerable people).

As recommended above, one way to address this would be for the OAIC Guidelines to better clarify the scope of conditional exemptions, and the need for a transparent approach to public interest balancing. In relation to s 47E(d), for example, this could include clarifying that the legislative wording of 'substantial adverse effect' sets a high bar for the conditional exemption, and that it should only apply where agencies cannot reasonably conduct their operations without maintaining secrecy. The OAIC Guidelines could also require agencies to provide evidence for any alleged substantial adverse effects of disclosure when applying the public interest test.

Another partial solution would be to give applicants the opportunity to comment and make submissions to an agency about any additional public interest factors that may apply. At present, PIAC regularly encounters matters where agencies do not provide us with such opportunity, and where the agency's ultimate reasons for decision disclose consideration of only a limited range of public interest considerations. The OAIC could help avoid these cases by amending its Guidelines to require agency consultation with applicants before deciding to refuse access based on the public interest test.

In order to avoid this consultation contributing to further delays, the applicant should be invited to comment on any relevant public interest factors within five business days. During this period, the processing period for the FOI request should be suspended until the FOI applicant responds or five business days lapses. The period should only be extended by a maximum of a further five business days, and only at the request of the applicant.

It is often difficult for applicants to make detailed arguments about the applicable public interest factors without having the opportunity to review the contents of the documents. The FOI Act presently outlines at s 11B several factors that, where relevant, must be considered in favour of disclosure. The wording of the section makes clear (and the OAIC Guidelines underscore) this list is non-exhaustive; but agency decision-makers may not look beyond these factors unless so prompted. Section 11B could be amended to explicitly include factors relating to the public interest in matters such as:

- Possible assistance to scrutiny or investigation of misconduct, maladministration, or inappropriate conduct by agencies or staff.
- Revealing reasoning behind significant government decisions that affect large numbers of people.
- Enabling scrutiny of, in particular, government decisions affecting vulnerable groups of people.
- Preservation of public trust in Australia's democratic governance.

Recommendation 15: Consultation with applicant on public interest factors in favour of disclosure

The FOI Act should be amended to require agencies to consult with the applicant when considering if public interest factors in favour of disclosure apply. Applicants should be given up to 5 business days to provide a response, which can be increased by a further 5 business days only at the request of the applicant, during which the processing time for the FOI request is suspended.

Recommendation 16: List additional public interest factors for disclosure

The Government review s 11B of the FOI Act with a view to including additional public interest factors.

Commercially valuable information

PIAC has repeatedly expressed concern about the broad exemption for trade secrets and commercially valuable information under s 47.³⁰

³⁰ See above n 27.

In 2010, Parliament decided not to make this exemption conditional, and subject to the overriding public interest test. At the time of this change, the Explanatory Memorandum explained the rationale as that ‘information of this type has very high commercial value and includes information that gives business an advantage over its competitors’.³¹ PIAC contends that this is not a sufficient justification. While some trade secrets and commercially valuable information may have ‘high commercial value’ and provide competitive advantage, this private interest should not be able to conclusively prevent disclosure.

This blanket exemption is particularly problematic as the FOI Act does not define key terms such as ‘trade secrets’. Accordingly, the meaning of ‘trade secrets’ may be determined by the entity seeking to withhold the information (such as a commercial third party, driven solely by profit incentives). Adding to the confusion is s 47G which provides a conditional exemption for ‘business information’. Even though the OAIC Guidelines provide some clarification, the overlap between ss 47 and 47G remains confusing and is unnecessary.

Instead, trade secrets and commercially valuable information should be included within s 47G, the business information exemption. This would ensure public interest concerns in openness and transparency are afforded proper weight in each case.

Recommendation 17: Remove the exemption for trade secrets and commercially valuable information

The Government amend the FOI Act to delete s 47 and expand s 47G to include trade secrets and commercially valuable information.

Change of Minister

The OAIC’s narrow interpretation of s 11A(1)(a)(ii) of the FOI Act³² provides that FOI requests made for documents held by a Minister are construed as applying to the specific person acting as Minister at the date of the request, rather than to the Ministerial office. This has created an absurd result where the government can escape scrutiny through ministerial reshuffles – where a Minister leaves their position while an FOI request is being processed, the FOI request will be refused.

PIAC has had the benefit of reviewing the Grata Fund submission, which addresses this issue in detail. PIAC concurs with the Grata Fund’s views on this issue, and endorses its recommendations.

Recommendation 18: FOI requests to apply to Ministerial documents as at the time of the request

The Government amend the FOI Act to clarify that the time for determining whether a document was ‘an official document of the Minister’ is the time at which the FOI application was made.

³¹ Explanatory Memorandum, *Freedom of Information Amendment (Reform) Bill 2009* (Cth), 19.

³² OAIC Guidelines, [2.52].

Recommendation 19: Ministerial document transfer requirements

The Government amend the FOI Act to require ministers to transfer documents subject to FOI requests to the OAIC. The intentional failure to transfer documents should be an offence.

5. Access Issues

View only access

The FOI Act provides that access should generally be given in the form requested by an applicant – whether being given a copy of the document, an opportunity to inspect it, or view footage, or provision of a transcript.³³ Access can only be given in an alternate form where it is necessary to protect agency/Ministerial operations from unreasonable interference, protect the document itself, or avoid infringement of copyright (other than that held by government).³⁴

Despite this, PIAC has found that some agencies are reluctant to provide copies of some requested documents – particularly in the case of video footage. As set out above at Case Study 4, the AFP decided (in consultation with DHA) that PIAC could only be given ‘view-only’ access to video footage, as to do otherwise might compromise the safety and efficient running of the detention centre where the footage was taken, and/or the privacy of any other individuals in the footage.

Providing footage on an inspection only basis increases the difficulty of an applicant effectively using the material to resolve a legal issue. The applicant cannot provide the material to a third party whose opinion may be important for forming a view as to whether litigation should be commenced, such as a barrister or consultant expert witness. The applicant will also be unable use the footage in any pre-litigation alternative dispute resolution procedures that may avoid the need for costly litigation altogether.

In addition, and as Case Study 4 illustrates, requiring an applicant to view footage in person at the premises of an agency can add further delays to the FOI process. It requires logistical coordination with the agency, finding a time for the applicant to travel to the agency’s office within business hours (PIAC staff have been required to travel to DHA offices in Parramatta and to Villawood Immigration Detention Centre to view footage) and a staff member available to supervise the applicant’s review of the footage. All of these requirements place additional burdens on the applicant, and increase the likelihood of delay.

Agencies should be required to provide data to the OAIC on the forms of access granted by them over the previous year, including whether that form was consistent with the form of access requested by an applicant. The data should be published in the OAIC’s annual report. This would allow scrutiny of whether agencies are applying the FOI Act’s provisions about form appropriately, and whether they are giving due weight to the form requested by applicants.

Where footage can only be provided on a view-only basis, consideration should be given to the technological options available for viewing that footage without an applicant having to travel to an agency office. For example, a shareable link to a cloud-based location could be provided to the

³³ FOI Act, s 20(2).

³⁴ FOI Act, s 20(3)(a)-(c).

applicant, subject to appropriate undertakings to ensure footage is not recorded and remains inspection only.

Recommendation 20: OAIC publication of agency data on forms of access granted

The OAIC to obtain data from agencies on the forms of access that agencies grant, and whether that form is consistent with the form requested, and publish that data in its annual report.

Recommendation 21: Review of methods for providing view-only access to footage

The Government consider what technological options are available for sharing footage on a view-only basis, without requiring an applicant to attend in-person at an agency office.

Fees, charges and costs

The FOI Act provides an agency with a discretionary power to charge applicants for access to non-personal information.³⁵ In PIAC's view, the principle of recovering costs from applicants for access to information is at odds with the fundamental principles of open government that FOI is designed to uphold. Access to public information should not be a user-pays system. Instead, the government should bear the cost as part of the democratic responsibilities of transparency and accountability.

We understand that, at present, only a minority of possible charges are imposed by agencies.³⁶ This exercise of discretion by agencies is laudable; but the mere possibility of a charge being imposed may deter applicants from making FOI requests in the first place – particularly applicants without detailed knowledge of the FOI system, or those with limited financial resources.

PIAC submits that the FOI Act should be amended to remove all fees and charges for FOI applicants (unless the applicant is vexatious). This position would provide recognition of the open government imperative in international human rights law.

Recommendation 22: Removal of fees and charges

The Government amend the FOI Act to remove all fees and charges in respect of FOI applications.

³⁵ FOI Act s 29.

³⁶ In 2021-22, agencies assessed a total of \$272,928 of potentially payable charges, relating to 923 requests, but exercised the discretion to only impose \$75,537 of these charges (28% of the total) – *OAIC Annual Report 2021-22*, 144.