



5 June 2023

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email

Dear Secretary,

### **Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws**

The Centre for Public Integrity welcomes the opportunity to make a submission to the Committee's inquiry into the operation of Australia's FOI laws.

The Centre for Public Integrity is a non-partisan think tank led by integrity experts from academia, public policy, and the judiciary. One of our primary research focuses is **transparency** of information held by government. We welcome the Government's commitment of substantial additional funding to the Office of the Australian Information Commissioner, as well as its decision to separate the functions of Information Commissioner and Privacy Commissioner. We believe that there is now a real opportunity to remedy the other causes of what our research has concluded is a seriously deficient FOI system, and we have designed the attached [Blueprint for Reform](#) in order to achieve this objective.

Our attached paper "*Delay and decay: Australia's Freedom of Information crisis*" was originally released in October 2022. For the purposes of this inquiry, we have updated it to include 2021-22 data.

We hope that our submission is of assistance to the Committee in its important work. If we can be of further assistance, please do not hesitate to contact us.

Yours sincerely,

**Dr Catherine Williams**  
**Research Director**  
**The Centre for Public Integrity**

## Delay and decay: Australia's Freedom of Information crisis

Briefing paper

June 2023

*'The advent of legislation to compel the production of government information in this country is the most concrete demonstration that democracy needs such information and will have it'<sup>1</sup>*

Freedom of access to government information is an internationally recognised right and a vital aspect of the rule of law.<sup>2</sup> In Australia, this access is facilitated by the *Freedom of Information Act 1982* (Cth) (**FOI Act**), which was enacted in response to recognition of FOI's crucial importance in providing accuracy of personal information, transparency and accountability in policy making, and increasing public participation.<sup>3</sup>

These values remain codified in Australia's FOI legislative architecture. For example, section 3(2) of the *FOI Act* provides that the Parliament intends to 'promote Australia's representative democracy by [...] increasing public participation in Government processes, with a view to promoting better-informed decision-making; and increasing scrutiny, discussion, comment and review of the Government's activities'.<sup>4</sup> The section further requires that Government information is 'to be managed for public purposes', and acknowledges that it is a 'national resource'.<sup>5</sup> Section 3(4) provides that it is Parliament's intention that the functions and powers of the Act are to be performed to facilitate and promote public access to information 'promptly and at the *lowest reasonable cost*'.<sup>6</sup>

Despite this explicit recognition, Australia's FOI regime continues to be undermined. Statutory standards are routinely disobeyed, statutory exceptions are abused and the system is plagued by chronic under-resourcing. Our analysis has found that:

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<sup>1</sup> Bret Walker SC, 'The Information that Democracy Needs' (Speech, Western Sydney University Whitlam Oration, June 2018).

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

<sup>3</sup> Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information: Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (Final Report, 6 November 1979) 21-2.

<sup>4</sup> *FOI Act* s 3(2).

<sup>5</sup> *Ibid* s 3(3).

<sup>6</sup> *Ibid* s 3(4) (emphasis added).

- Despite demand changing little, the speed with which FOI requests have been resolved has been falling: in 2011-12, 1.3 per cent of FOI requests were over 90 days late; by 2021-22, this figure ballooned to **19 per cent**. Over this same period, the total proportion of decisions made outside the statutory period increased from 11.5 per cent to **30 per cent**.
- Between 2011-12 and 2021-22 the number of appeals to the AAT increased **190 per cent** from 20 to 58, despite minimal increase in the number of FOI requests.
- Since 2011-12 the proportion of claims granted in full has fallen by over **30 per cent**. This has been accompanied by a more than **60 per cent** increase in the proportion of claims refused in full.

The delays are appalling. The consequences of the delays are appalling. The Centre for Public Integrity urges the Parliament to restore Australians' ability to access information held by government by urgently implementing our [FOI Blueprint for Reform](#).

Each of the reforms we recommend would be easily implemented in harmony with the existing system. Together, they would revitalise Australia's broken FOI system.

## Australia's Freedom of Information regime

Australia's FOI regime is governed by the *Freedom of Information Act 1982* (Cth) (**FOI Act**). The FOI Act was passed in 1982 by the Fraser Government, after being proposed by the Whitlam Government in 1974 and considered in numerous reports throughout the 1970's. The Act formed a key element of other contemporaneous public law reforms known as 'New Administrative Law'.<sup>7</sup>

Broadly, the FOI Act's two key functions can be distilled into *information publication* and *access to documents* – with the latter largely serving as an extension of the baseline disclosure in the former.

### Information publication

In response to perceived public service secrecy in the public service prior to reforms,<sup>8</sup> Part II of the Act requires most government agencies to publish accessible baseline

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<sup>7</sup> Lynsey Blayden, 'Seeing the New Administrative Law in a "green light"', *Australian Public Law* (Web Page, 16 April 2021) <<https://www.auspublaw.org/blog/2021/04/seeing-the-new-administrative-law-in-a-green-light>>.

<sup>8</sup> Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, 669.

information regarding their functions, activities, non-APS staff, organisational structure and general operational information.<sup>9</sup>

### Access to documents

Part III of the FOI Act governs access to information. Section 11 of the Act grants every person 'a *legally enforceable right* to obtain access [...] to a document of an agency; or an official document of a Minister'.<sup>10</sup> Access to documentation is limited by numerous statutory exemptions.<sup>11</sup> At first instance, access requests are made in writing directly to the relevant agency or Minister;<sup>12</sup> if a request is refused, the applicant may request an internal review of the decision by an employee other than the original decision maker or appeal directly to the Information Commissioner.<sup>13</sup> Decisions not finalised within the statutory timeframe of 30 days, or decisions refused again after internal review, may also be directly appealed to the Information Commissioner.<sup>14</sup>

### The Office of the Australian Information Commissioner

Before 2010, appeals after internal review could only go to the Administrative Appeals Tribunal (**AAT**) at a cost for \$639 per review. In 2010, in response to concerns about the efficiency and fairness of the AAT appeals process, the *Australian Information Commissioner Act 2010* (Cth) (**AICA Act**) was passed. The *AICA Act* established the offices of Information Commissioner and Freedom of Information Commissioner, and brought the Australian Privacy Commissioner within the ambit of the Act.

Section 8 of the *AICA Act* enumerates the FOI functions of the OAIC: these include, amongst other things, helping agencies to comply with their disclosure obligations, providing advice and training, issuing FOI guidelines, and performing merits review. The latter is the OAIC's most important statutory function, with unsuccessful applicants permitted to appeal to the Information Commissioner after failing either at first instance, or after internal review, to obtain access to documents sought. Parties dissatisfied with the merits review outcome may still apply to the AAT, and AAT decisions may be appealed to the Federal Court of Australia on matters of law.<sup>15</sup> As Federal Court and AAT action remain open to the parties, the Information Commissioner's review powers add an additional layer to what is already a byzantine appeals process. Figure 1 schematically represents the current process for FOI requests and their respective appeals.

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<sup>9</sup> *FOI Act* pt II.

<sup>10</sup> *Ibid* s 11(2)(a)-(b).

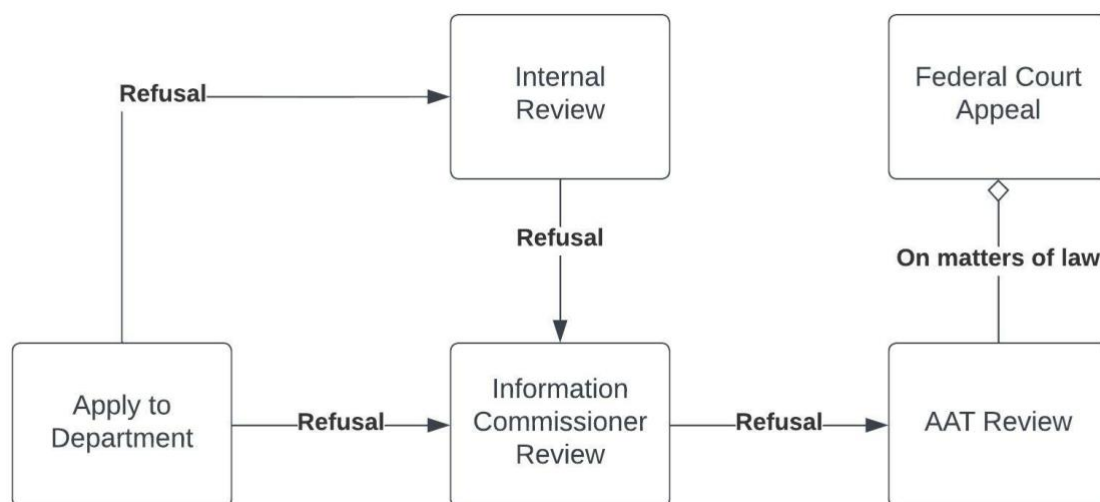
<sup>11</sup> *Ibid* pt IV.

<sup>12</sup> *Ibid* s 15.

<sup>13</sup> *Ibid* pt VI.

<sup>14</sup> *Ibid* pt VII.

<sup>15</sup> *FOI Act* div 10.



**Figure 1: Appeal process established by the FOI Act**

### Performance of the current FOI regime

The introduction of the OAI in 2010 was supposed to speed up and cheapen the FOI appeal process by providing a flexible clearing house antecedent to the AAT. According to Geoffrey Watson SC, it has in fact 'had the opposite effect' on cost and speed.<sup>16</sup> This conclusion is corroborated by the OAI's own data.

Figure 2 shows that since 1984-5 the number of FOI requests has hovered between 20,000 and 45,000 per year, with no structural trend. For example, 2003-04 saw FOI applications peak at 42,627, then halve to 21,587 by 2009-10 and once again steadily increase. The median number of FOI requests throughout this period was 33,644 per year. These data suggest that the baseline demand from citizens for governmental information seems to have changed little since the FOI regime was introduced in 1982.

<sup>16</sup> Geoffrey Watson SC, 'Buried at Sea: The Loss of our Freedom to Access Governmental Information, *Australian Public Law* (Web Page, 10 November 2021) < <https://www.auspublaw.org/blog/2021/11/buried-at-sea-the-loss-of-our-freedom-to-access-governmental-information/>>.

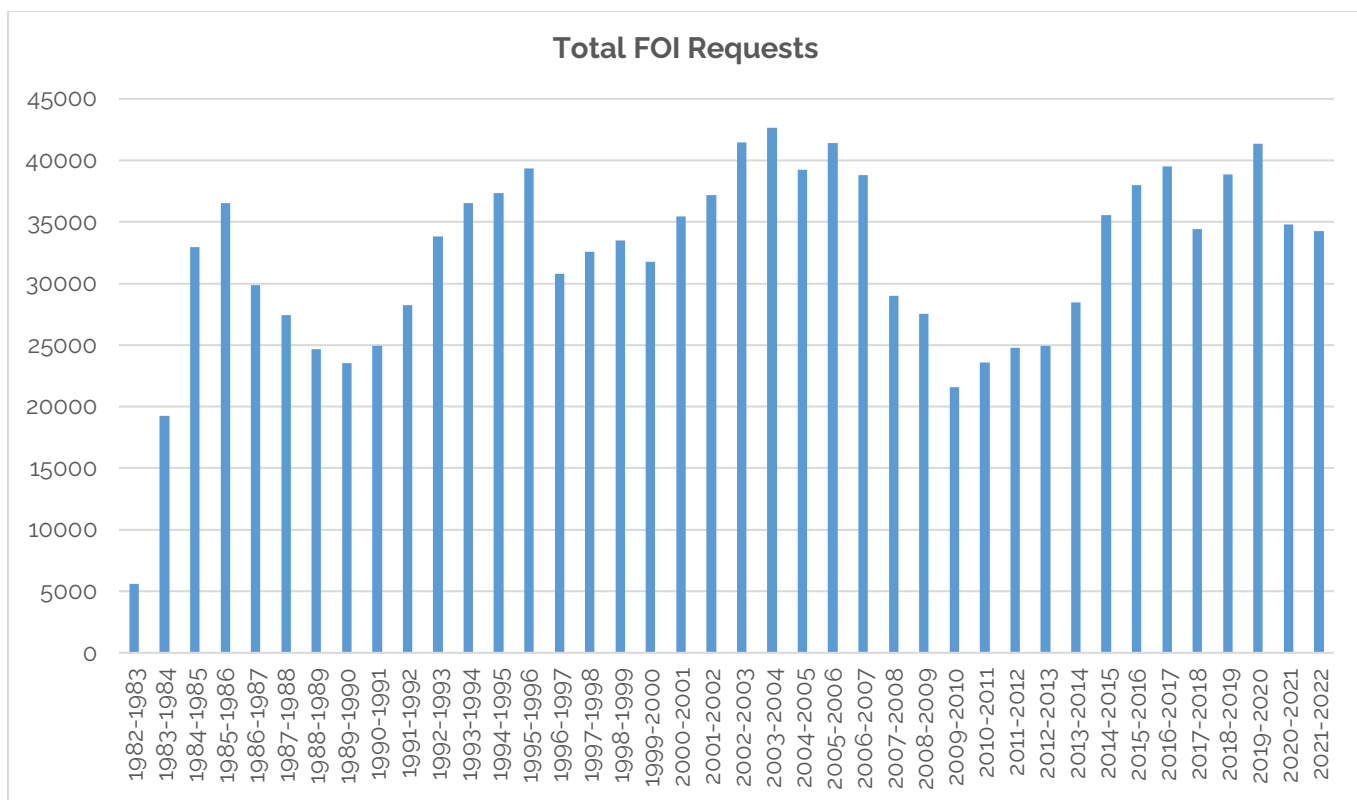
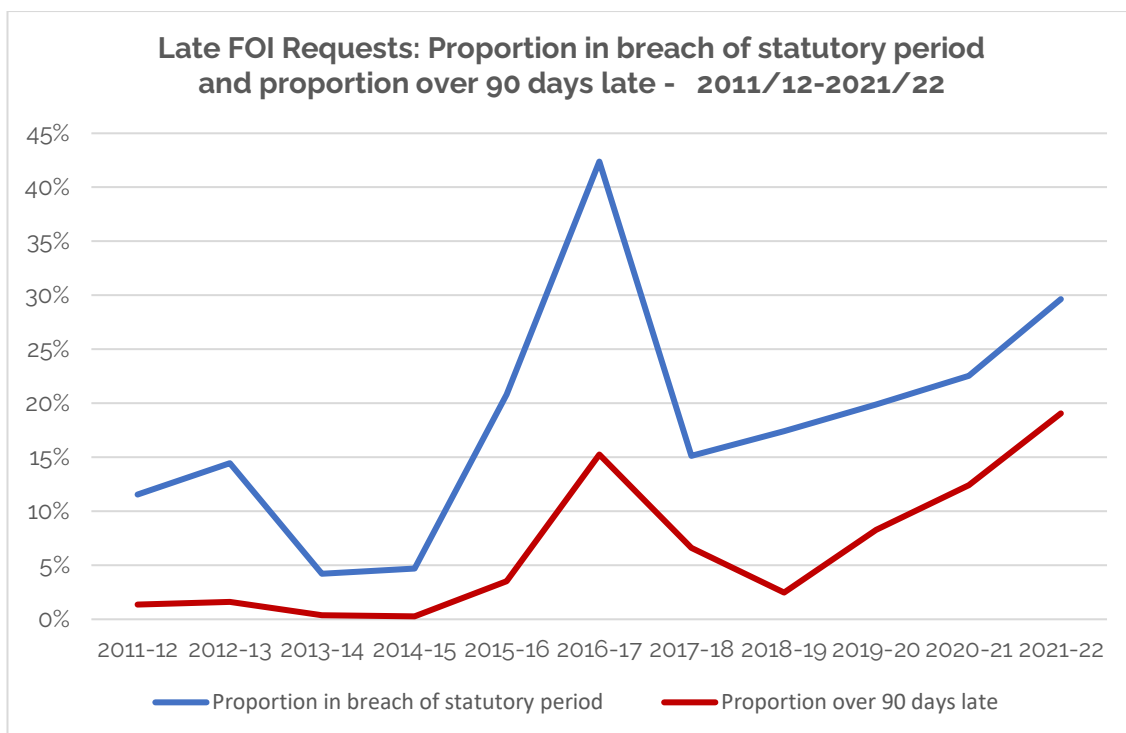


Figure 2: Total FOI Requests made to Departments / Agencies 1982-2022<sup>17</sup>

Despite demand changing little, the speed with which FOI requests have been resolved has been falling. Section 15(5)(b) of the FOI Act requires that requests should be resolved 'as soon as practicable', but 'no later than the end of the period of 30 days after the day on which the request is received'.<sup>18</sup> The statutory timeline is increasingly ignored. For example, in 2011-12, 1.3 per cent of FOI requests were over 90 days late; by 2021-22, this figure ballooned to 19 per cent. Over this same period, the total proportion of decisions made outside the statutory period increased from 11.5 per cent to 30 per cent: 2016-17 was particularly noticeable, with almost *half* of FOI requests being resolved outside of the statutory timeframe.

<sup>17</sup> 'Freedom of information statistics', *data.gov.au* (Data Set, 27 October 2021) <  
<https://data.gov.au/dataset/ds-dga-b0771c28-09cc-4c4e-9e61-9a96f6e3d040/details>>.

<sup>18</sup> FOI Act s 15(5)(b).



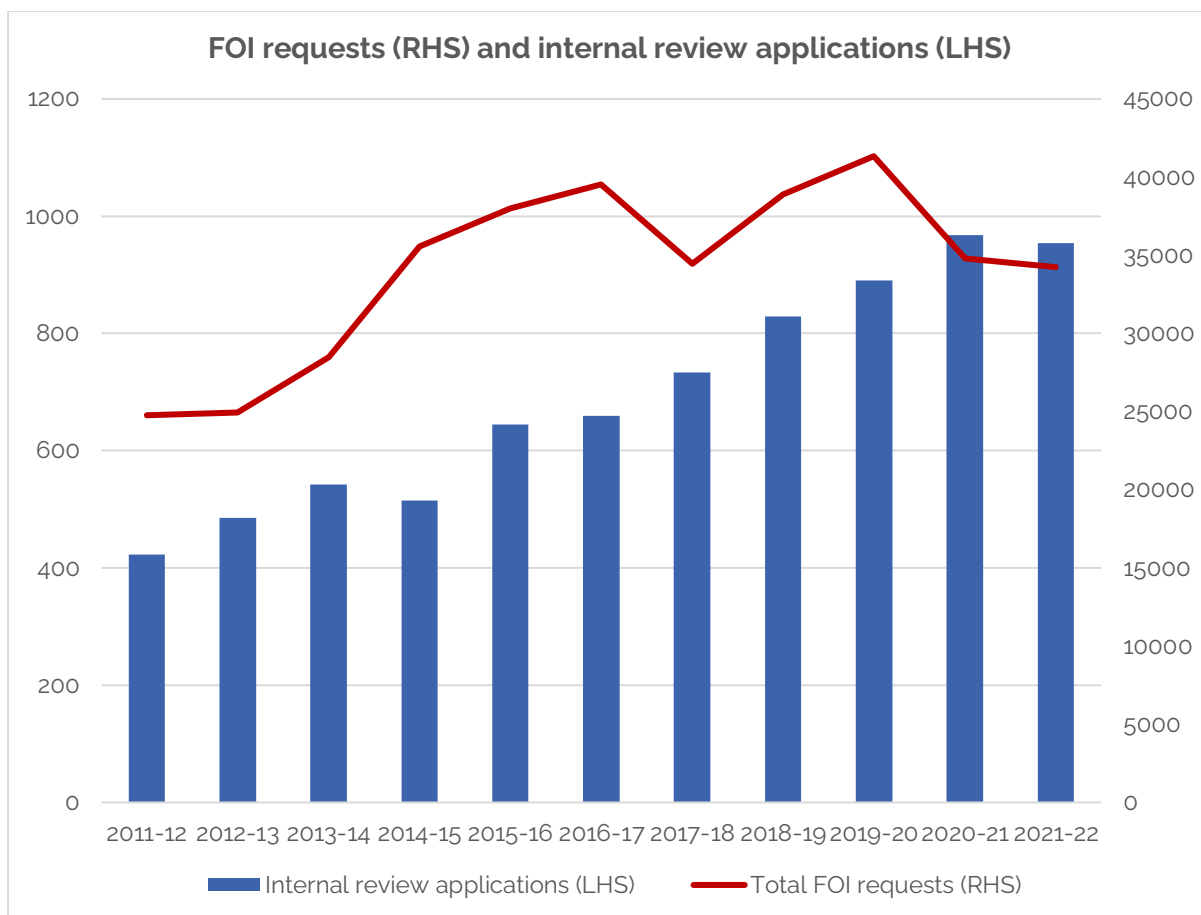
**Figure 3: Late FOI Requests: Total late proportion and proportion over 90 days late<sup>19</sup>**

Such significant statutory delays should by no means be taken lightly, with every delay a breach of the agency’s statutory obligation. Indeed, Senator Kim Carr has described such delays as not emanating from a ‘culture of secrecy’ but emblematic of a ‘culture of lawlessness’.<sup>20</sup>

Significant delays, as well as arguable abuse of the exemption criteria (see further) have, understandably, lead to a clogged and slow system littered with hurdles. There are increasing delays at first instance, internal review and Information Commissioner review. For example, Figure 4 demonstrates that while the number of FOI requests increased 38 per cent between 2011-12 and 2021-22, the number of internal review applications increased by 126 per cent over this same period.

<sup>19</sup> Office of the Australian Information Commissioner, Annual Reports 2011/12-2021/22.

<sup>20</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 October 2019, 114 (Senator Kim Carr).



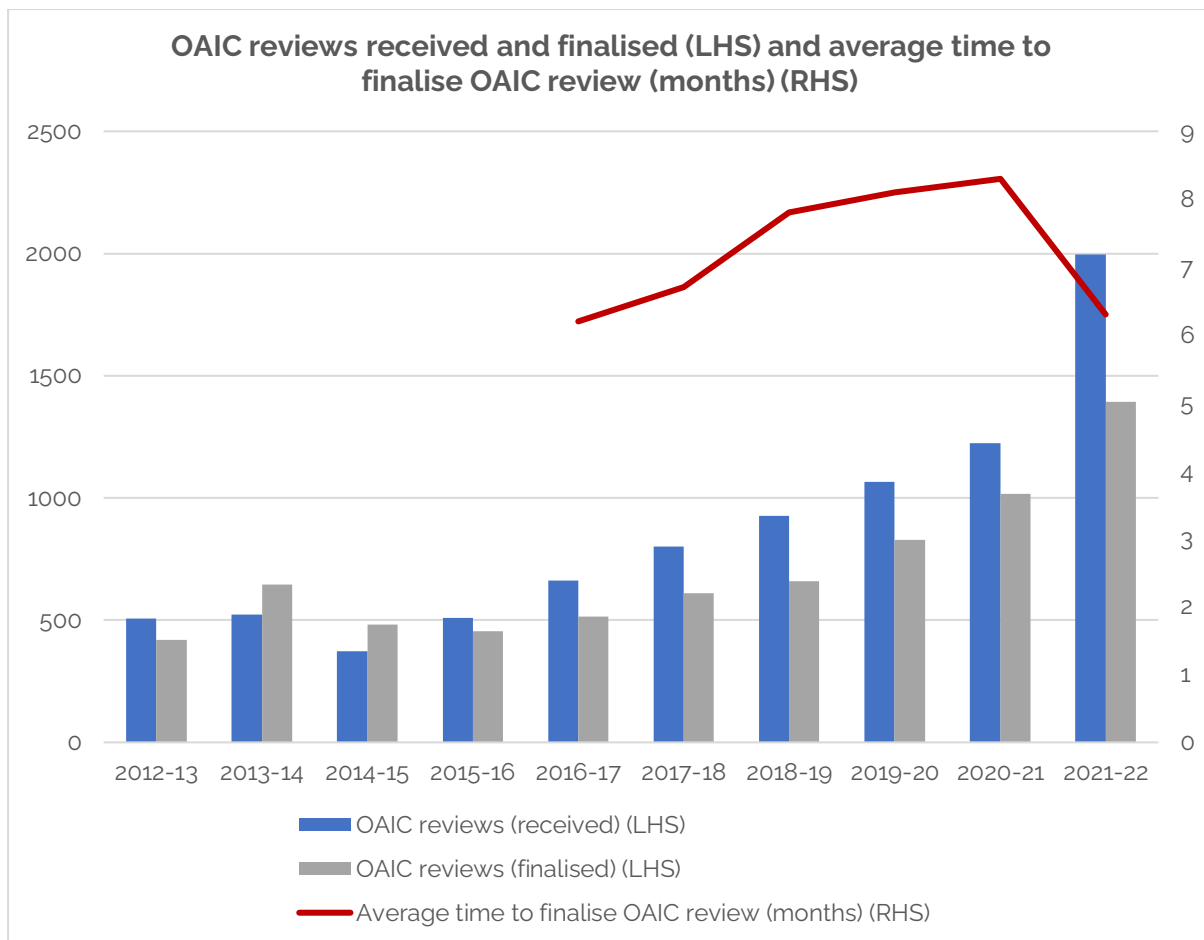
**Figure 4: FOI Requests (RHS) and Internal Review Applications (LHS)<sup>21</sup>**

As Figure 5 shows, Information Commissioner appeals have steadily increased since 2012-13. However, like other elements of the system, the Information Commissioner’s review capability continues to be eroded. Despite completing more reviews than received in 2013-14 and 2014-15,<sup>22</sup> since 2015-16 the growth in appeals to the Information Commissioner has significantly outpaced the growth in the Information Commissioner’s ability to finalise them. Until 2021-22, when there was a welcome improvement, this was leading to – among other externalities – a continual increase in the average time to finalise a review.

<sup>21</sup> Office of the Australian Information Commissioner, Annual Reports 2011/12-2021/22.

<sup>22</sup> The OAIC often maintain a ‘backlog’ of complaints on hand. Therefore, in some years more may be completed than received, and vice-versa.





**Figure 5: Information Commissioner Reviews Received and Finalised (LHS) and Average Time to Finalise Review (Months) (RHS)<sup>23</sup>**

<sup>23</sup> Office of the Australian Information Commissioner, Annual Reports 2011/12-2021/22.

The significant delays and inability to complete Information Commissioner merits reviews is partly attributable to the lack of sufficient staff to manage the increasing number of claims. Indeed, these concerns have been expressed by the OAIC itself. Before the Senate Legal and Constitutional Affairs Legislation Committee in 2019, Information Commissioner Angelene Falk expressed the view that a 'gap remains between the volume of work coming into the office and the staff that's needed in order to process those matters'.<sup>24</sup> She specifically requested that the OAIC be allocated funding for *50 per cent* more staff to deal with Information Commissioner reviews.<sup>25</sup>

In addition to the vast increase in the number of internal reviews and Information Commissioner reviews, Figure 6 reveals that the number of appeals to the AAT has also drastically increased. Between 2011-12 and 2021-22 the number of appeals increased 190 per cent from 20 to 58, despite minimal increase in the number of FOI requests at first instance.

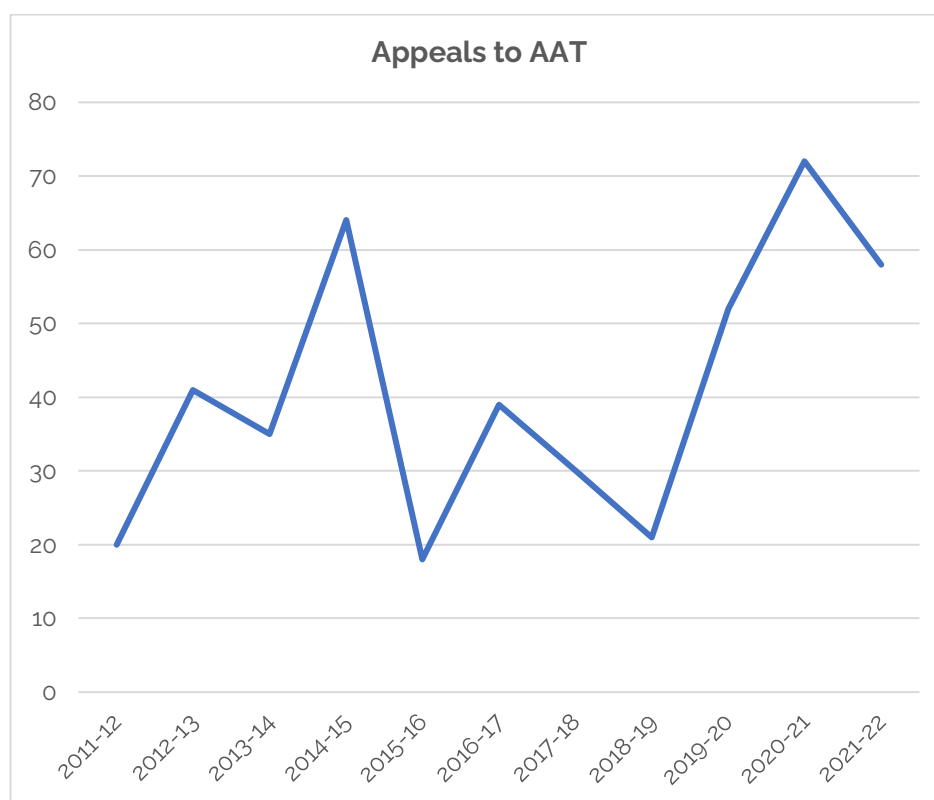


Figure 6: Appeals to AAT

<sup>24</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 October 2019, 126 (Angelene Falk).

<sup>25</sup> Ibid 107.

## The culture of secrecy

The FOI Act is clear that Australians have a right to information, but this is qualified by the numerous statutory exceptions which often stand in the way of meritorious claims.

Part IV of the FOI Act details the statutory exceptions to access to freedom of information.<sup>26</sup> It is upon these exceptions that claims are refused either in full or in part at both first instance and appeal. A handful of agencies are completely exempt from FOI requests.<sup>27</sup> Exceptions to request from non-exempt agencies are either outright or are public interest conditional exemptions. Outright FOI exemptions include:

- Documents affecting national security, defence or international relations;
- Cabinet documents;
- Documents affecting enforcement of law and protection of public safety; and
- Documents to which secrecy provisions of enactment apply

Public interest conditional exemptions are governed by s 11A(5) of the FOI Act, and s 11B provides the 'public interest calculus' according to which determinations are made. The section requires that access must be given to all conditionally exempt documents unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. Division 3 outlines the public interest conditional exemptions as, among others:

- Documents affecting Commonwealth-State relations;
- Documents relating to the deliberative processes of the Commonwealth government;
- Documents relating to procedures and operations of agencies;
- Documents which may have a substantial adverse effect on Australia's economy.

Each exception appears, *prima facie*, to be reasonable. The processes by which they are applied, however, are prone to abuse. Sections 11A(3)-(5) of the Act provide that access is to be granted or refused by the '*agency or Minister*'.<sup>28</sup> Indeed, internal reviews, while conducted by a different individual, are still conducted by the original agency.

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<sup>26</sup> FOI Act pt IV.

<sup>27</sup> Ibid sch 2.

<sup>28</sup> Ibid ss 11A(3)-(5).

While refusals at first instance must be supported by reasons in writing, the internal nature of exemption determinations allows documents to be refused on fabricated grounds with no repercussions.<sup>29</sup> Internally embarrassing or politically sensitive documents may be refused by the relevant agency at least twice for periods frequently outside of the statutory 30-day period, before reaching the OAI, where applicants face another delay of up to eight months. Such delays serve to dissuade prospective applicants. Moreover, the salience of a given issue has usually drastically decreased by the time it reaches the Information Commissioner for review.

Perhaps more worrying than the incessant clogging in the appeals system of the FOI regime is the emergent 'culture of secrecy'. This is most clearly seen in Figure 7, and the change in accepted claims at first instance by the relevant department. Since 2011-12 the proportion of claims granted in full has fallen by over 30 per cent. This has been accompanied by a more than 60 per cent increase in the proportion of claims refused in full.

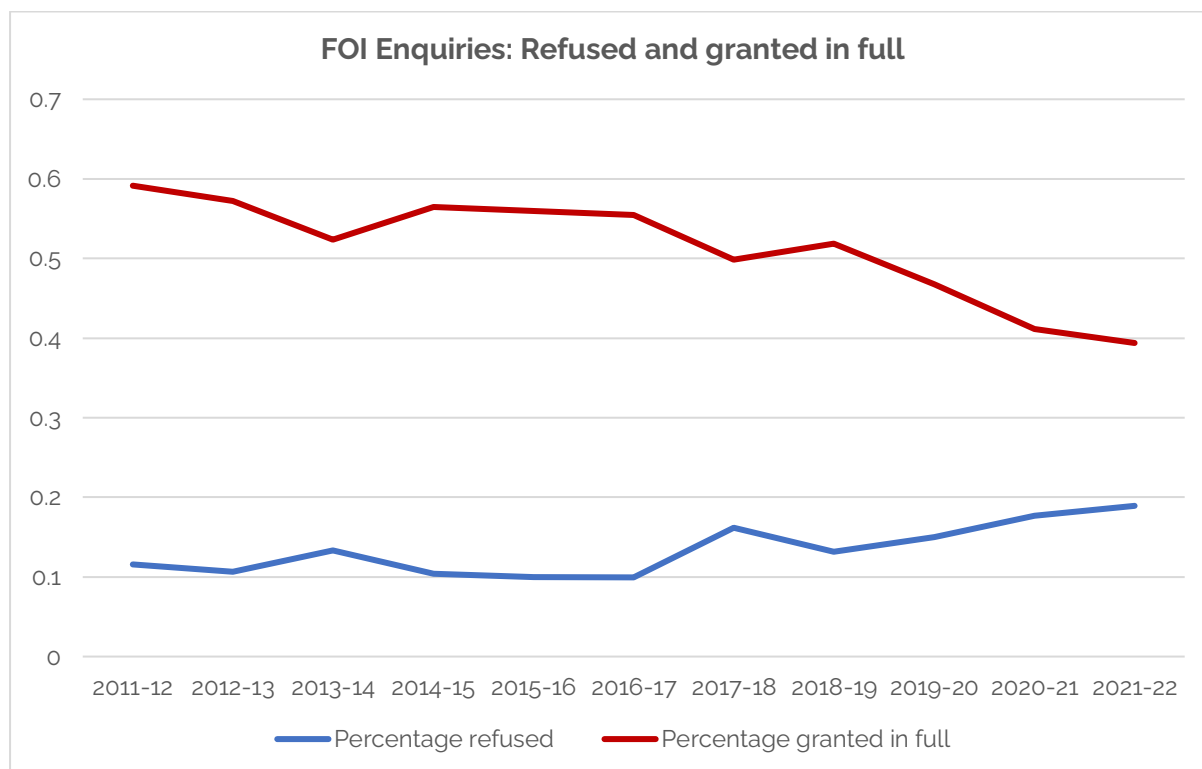


Figure 7: FOI Enquiries: Refused and granted in full<sup>30</sup>

These figures are the most troubling. For example, in 2021-22 slightly over 34,000 FOI requests were made. In that same year there were 954 internal review requests, 1995 requests made for Information Commissioner review and 58 appeals were made to the

<sup>29</sup> FOI Act s 26A.

<sup>30</sup> See *ibid.*

AAT. Most FOI first instance refusals were never appealed, despite the potential (yet ultimately unknown) merits of the claims.

With over 20 per cent of internal reviews granting access at least in part to the originally refused decision, many meritorious claims are unduly refused and delayed by the current FOI system.<sup>31</sup> The relatively low proportion of claims appealed either to internal review or the Information Commissioner directly further demonstrates that the substantial issues with the system are coming to fruition at first instance.

There are several recent conspicuous and publicly available examples of AAT and Information Commissioner decisions which demonstrate some of the (potentially many) abuses of the exemption system:

- In *Patrick v Secretary, Department of PMC* [2021] the AAT overturned a decision to withhold Auditor-General report on national security grounds which found that Commonwealth had not achieved value for money in defence procurement;<sup>32</sup>
- In *Patrick v Secretary, Department of PMC* [2020] the AAT overturned a decision to exempt National Cabinet documents under 'Cabinet' exception contained in s 23 of the *FOI Act*;<sup>33</sup>
- In August 2022, after three years of delay, the Information Commissioner ruled that an Australian Federal Police letter detailing potential 'improper conduct overseas' by former MP George Christensen was *not* exempt on national security grounds.<sup>34</sup>

Indeed, in 2017, before the most severe years of degradation of the FOI system, the Auditor-General found that the number of exemptions being claimed by all entities across the Commonwealth had increased by 68.4 per cent between 2012 and 2017, with the use of the 'National Security' exemption<sup>35</sup> under climbing by almost 250 per cent, and the use of the 'Certain Operations' exemption<sup>36</sup> climbing by almost 320 per cent.<sup>37</sup>

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<sup>31</sup> Ibid 56.

<sup>32</sup> *Patrick v Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719.

<sup>33</sup> *Patrick v Secretary, Department of Prime Minister and Cabinet* [2020] AATA 4964.

<sup>34</sup> Anthony Galloway, Jonathan Kearsley and Rob Harris, 'AFP warned George Christensen's Philippines 'activities' put him at risk of compromise', *The Sydney Morning Herald* (online 2 August 2022) <<https://www.smh.com.au/politics/federal/afp-warned-george-christensen-s-philippines-activities-put-him-at-risk-of-compromise-20220802-p5b6kv.html>>.

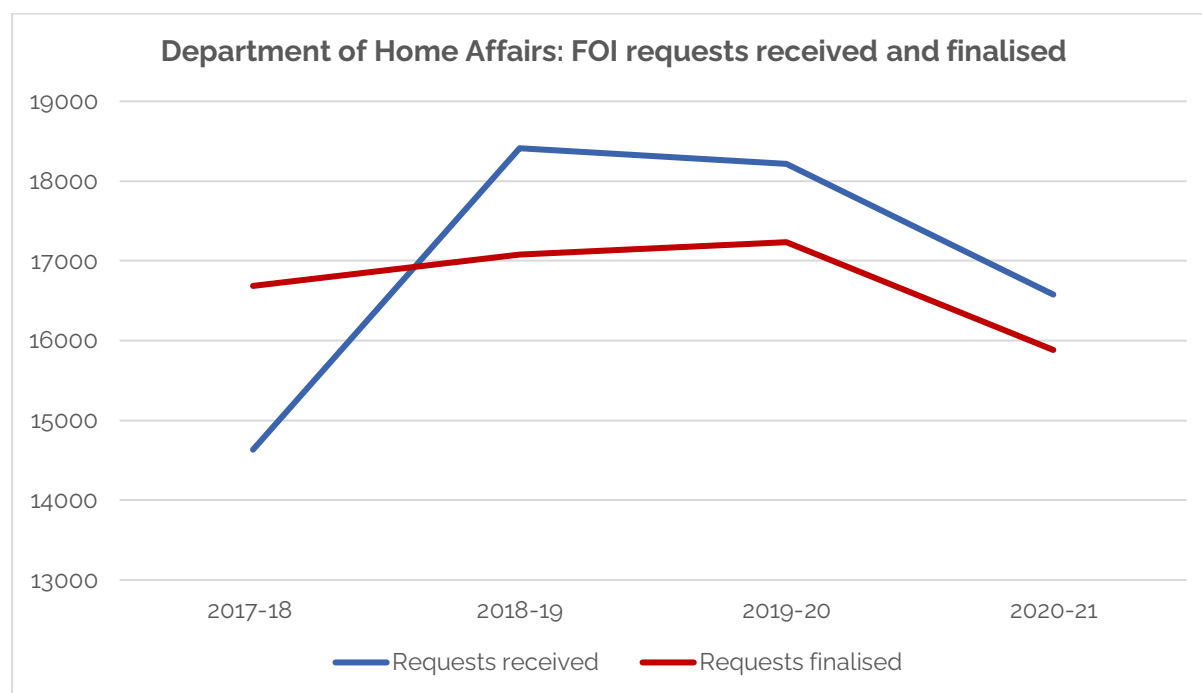
<sup>35</sup> *FOI Act* s 33.

<sup>36</sup> *FOI Act* s 47E.

<sup>37</sup> Australian National Audit Office, *Administration of the Freedom of Information Act 1982* (Report, 19 September 2017) 7.

## A study in systemic failure – the Department of Home Affairs

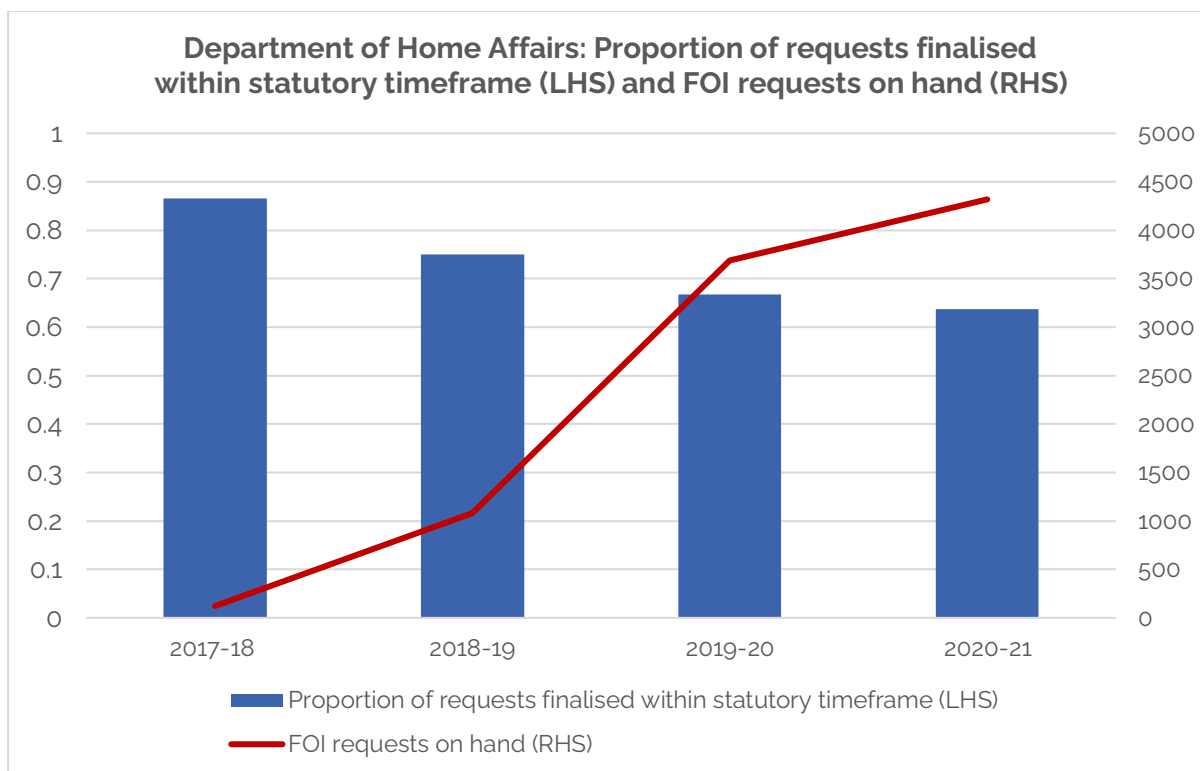
While the Department of Home Affairs was only reconstituted in 2017-18, it is a case study in the failure of Australia's FOI regime both in terms of resourcing and disclosure. Despite finalising more requests than it received in 2017-20, it has since consistently been unable to meet its caseload.



**Figure 8: Department of Home Affairs: FOI Requests Received and Finalised<sup>38</sup>**

While the Department's inability to meet its load appears innocuous, this fed into a backlog of over 4300 uncompleted requests by 2020-21 and an increasing inability to meet the obligatory statutory timeframe.

<sup>38</sup> Department of Home Affairs, Annual Reports 2017-18 – 2021-21.



**Figure 9: Proportion of Requests Finalised within Statutory Timeframe (LHS) and FOI Requests on hand (RHS)<sup>39</sup>**

Throughout this same period, the proportion of claims granting full access fell from 50.7 per cent to 42 per cent, and the proportion outright refused grew from 5.8 per cent to 9.8 per cent.

Indeed, the Department's performance with respect to FOI was so poor that throughout 2020-21 the Information Commissioner conducted a 'Commissioner-initiated investigation', finding that the Department did not have appropriate measures in place to ensure compliance due to 'absence of adequate governance and systems of accountability'.<sup>40</sup>

## Recommendations

The Centre for Public Integrity recommends that reform to the FOI system be pursued as a matter of urgency, via our below [Blueprint for Reform](#).

<sup>39</sup> See *ibid.*

<sup>40</sup> Office of the Australian Information Commissioner, *Annual Report 2020-21* (Report, 23 September 2021) 41.

## Freedom of Information Blueprint for Reform

### Reforms to the *Freedom of Information Act (1982) Cth*

- The *FOI Act* must be clarified to **prevent a change of Minister** or portfolio title from **invalidating existing FOI applications**. This could be achieved by making clear that the time at which an FOI application is made is the time used to determine whether a document was 'an official document of the Minister', and requiring that outgoing ministers transfer documents subject to FOI requests to the OAIC.
- **Disciplinary action** must be available to be used against FOI officers who repeatedly make decisions determined by the Information Commissioner, AAT-replacement or Court to be contrary to the FOI Act (with sanctions corresponding to officer seniority). **Stronger disciplinary sanctions** must be available where decisions known to be contrary to the requirements of the FOI Act are made. Comparable legislation in New South Wales criminalises the following conduct:
  - the making of a decision that an officer knows to be contrary to the Act's requirements;
  - directing an officer to make a decision that the offender knows is not required or permitted by the Act; and
  - influencing the making of a decision in order to produce a decision that the offender knows is not required or permitted by the Act (Division 2 of Part 6 of the *Government Information (Public Access) Act 2009* (NSW)).
- There should be **no fees or charges** associated with FOI applications (unless exceptional circumstances apply)
- **Prescribed consultations must be appropriately limited**. The Department should inform the applicant of any obligation to consult within the first 10 days of the making of an application, and the obligation to consult should only extend the 30-day time limit by **14 days**. Consultation should not be required or permitted where the relevant person/entity is party to a Commonwealth agreement and information relating to that agreement is sought (unless a narrowly-construed trade secrets exemption applies).
- **The Information Commissioner review process must be expedited**. The Commissioner must determine applications within 60 days of receiving the relevant information; in cases where the Commissioner fails to determine an application within 90 days, the applicant may appeal directly to the AAT. Only a non-government party should have recourse to the AAT; if a government wishes to contest an Information Commissioner decision it must instead seek leave from the Federal Court.



- The Statement of Ministerial Standards, and any parliamentary code of conduct, should explicitly recognise the importance of transparency and **require compliance** with the FOI regime.

## Resourcing

- Department FOI Officers must be **senior staff** (level 4 or higher)
- Department FOI Officers must be provided with **ongoing training** by the Information Commissioner. The training should emphasise the objects of the FOI Act, including to increase scrutiny, discussion and review of government activities; it should also teach staff to adopt a 'when in doubt, send it out' approach to FOI requests, and not to apply an overly legalistic approach to exemptions.
- The Information Commissioner must be empowered to set a **ratio** of FOI officers to FOI applications, and mandate minimum staff numbers within departments.
- The FOI Act must emphasise that the Information Commissioner's functions are to be performed **expeditiously**

## Oversight

- The Information Commissioner must conduct **annual audits of the FOI decisions made by government agencies**. In the case of consistently poor decision-making by a Department, an external team from the Information Commissioner should be brought in to take over that Department's FOI processing for a period.
- A **joint cross-party parliamentary committee** must be established in order to provide ongoing oversight and accountability of the integrity of departmental FOI decision-making processes

## **About The Centre for Public Integrity**

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO KC, the Hon Pamela Tate AM KC, the Hon Anthony Whealy KC, Professor George Williams AO, Geoffrey Watson SC, Professor Joo Cheong Tham and Professor Gabrielle Appleby. Former board members include the Hon Tony Fitzgerald AC KC and the Hon David Ipp AO KC. More information at [www.publicintegrity.org.au](http://www.publicintegrity.org.au).