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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Estimates

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Tuesday, 22 October 2019

Members in attendance: Senators Kim Carr, Chandler, Chisholm, Hanson, Henderson, Keneally, Kitching, Lambie, Lines, McKim, O'Sullivan, Patrick, Siewert, Dean Smith, Steele-John, Stoker, Walsh, Waters.

Senator PATRICK: You mentioned a British police officer. I presume all of your roles require Australian citizens. Do you have any foreigners in your office?

Ms Stone: We have dual citizens, but all of our staff are Australian citizens.

Senator PATRICK: Okay, thank you.

Senator KIM CARR: There's just one question I've got. **CHAIR:** Certainly, Senator Carr. You have the call.

Senator KIM CARR: I understand that this oversight responsibility you have over the other agencies is a matter of concern to you.

Ms Stone: I'm sorry, which other agencies?

Senator KIM CARR: The Department of Home Affairs, for instance, in terms of the construction of new legislation. I understand there have been a number of occasions on which you've been made aware of national security bills through media reports. Is that correct?

Mr Blight: That was true in the past. More recently, it's fair to say we have had constructive engagement with the Home Affairs legislation area and the Attorney-General's Department.

Senator KIM CARR: So you are advised, for instance, of the Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Bill 2019? You were consulted on that matter, were you?

Ms Stone: Yes, we were.

Senator KIM CARR: Did you express any concerns about that bill?

Ms Stone: When we comment on legislation, we are very mindful that we do not make policy. We comment in relation to oversight matters, so our concerns are to make sure that the legislation as proposed would enable us to oversee the activities we need to oversee. We don't comment on policy.

Senator KIM CARR: In what form are you able to express concerns about a bill?

Ms Stone: We will make submissions to the department that has responsibility for the bill. We make submissions to PJCIS. We have members of our office who are involved in negotiating, discussing and liaising with the department responsible for the drafting of the bill.

Senator KIM CARR: When was the last time you found out about a bill through the media rather than the through formal departmental communications?

Ms Stone: That was quite some time. In that case—if I'm remembering right, and my deputy will correct me if I'm wrong—it wasn't that we found out about the existence of the bill; it was the most recent iteration of it.

Mr Blight: It's at least six months. Our relationships have improved significantly.

Senator KIM CARR: It's improved in the last six months?

Mr Blight: I said at least six months.

Ms Stone: I would have thought it was a bit longer.

Mr Blight: It could have been longer.

Ms Stone: We have no complaints in that regard at the present time.

Senator KIM CARR: I'm pleased to hear that. It's just that the Department of Home Affairs has had responsibility for these matters now for over 12 months. So it's taken a while to get used to their new role, has it? Or your new role.

Ms Stone: I couldn't comment on that.

Senator KIM CARR: Thank you very much. I will put the rest on notice.

CHAIR: The officers of the IGIS are now excused with our thanks.

Proceedings suspended from 16:03 to 16:15

Office of the Australian Information Commissioner

CHAIR: I welcome officers representing the Office of the Australian Information Commissioner. Thank you for joining us today. Would you like to make an opening statement before we go to questions?

Ms Falk: I would, if the committee has the time. I think it would be useful for me to paint a picture of the work of my office, if that's acceptable.

CHAIR: Thank you. Please do.

Ms Falk: Thank you for that opportunity. The committee would be aware that the role and purpose of my office is to promote and uphold privacy and access to information rights, and of course I'm appearing today at a time when there is great focus on the community's access to information held by government and on the individual's right to have their personal information protected. No-one could miss the national Right to Know campaign across the major media outlets this week. The campaign shares its name with the international movement in support of access to government information, which holds Right to Know Day around the world on 28 September each year. That includes Australia, where it's supported by my office and my counterparts across Australia. Just last week the United Nations General Assembly recognised the importance of this global movement and proclaimed 28 September as the International Day for Universal Access to Information.

My office has recently conducted a survey in relation to freedom of information and the community's attitudes, and it also highlights the value that Australians place on their right to access government information. The survey found that 84 per cent of people said their right to access information held by the government was important and 37 per cent had tried to do so using a range of methods, including, of course, agency websites and freedom of information requests. Most respondents who tried to access information were successful in doing so on at least one occasion, but 15 per cent said they did not get all the information that they wanted.

The community are exercising their right to access information from Australian government agencies and ministers and seeking review of decisions under the FOI Act in increasing numbers. As our annual report shows—it was tabled yesterday—the number of FOI requests made to Australian government agencies and ministers grew by 13 per cent last financial year, to 38,879. The percentage of FOI requests granted in full was 52 per cent, partial access was granted for 35 per cent of requests, and 13 per cent of requests were refused. In 2017-18, there was a significant improvement in the proportion of FOI requests processed within the statutory time frame, from 58 per cent to 85 per cent. However, this slipped slightly to 83 per cent in the last financial year, showing that continued focus is required on the part of agencies and ministers to comply with statutory processing time frames.

An important object of the FOI Act is to facilitate and promote public access to information promptly and at the lowest reasonable cost. So we continue to work with agencies to improve these processing times. We're encouraging agencies to make the system work more efficiently for the community by publishing more information proactively, particularly information that's frequently requested, and by making personal information available through administrative access schemes. This will also reduce agencies' administrative load in processing FOI requests.

Turning to applications to my office, the number of applications for Information Commissioner review of FOI decisions grew last year by 16 per cent, to 928, and over the past four years the number of IC review applications to my office has risen by more than 80 per cent. Through our early intervention procedures and other measures, we have improved our finalisation rates in response to these pressures, and in 2018-19 we finalised 659 Information Commissioner reviews, which was an eight per cent increase from the previous year. In fact, over the past four years, we have increased our finalisation rate by 45 per cent. Where possible, we're dealing with applications covering similar issues as a cohort, to provide additional guidance to agencies in handling FOI requests and, of course, to influence better practice.

Since I've been in the role, we have extensively reviewed our processing and implemented further workflow management and process efficiency measures, but the substantial and sustained increase in IC review applications over recent years has widened the gap between incoming work and finalisations, and has resulted in increased delays and backlogs. In order to meet the timeliness objective of the FOI Act and provide faster outcomes for the community, additional resources are required, and the IOC continue to work with government in relation to our resourcing needs.

Turning to privacy issues, we're also finding efficiencies to manage the increasing volume of work, particularly in helping people resolve complaints about the handling of personal information. We received 12 per cent more complaints last year. The majority of complaints were driven by privacy practices in six sectors: finance, government, health, telecommunications, retail and, of course, online services. The most common issues raised with us are about use and disclosure, security, access, collection and quality of personal information. Our early resolution processes are continuing to have a positive impact, and we finalised six per cent more privacy complaints than the previous year.

We're in the process of implementing additional changes to the way we handle privacy complaints to further improve our finalisation rates. We're supported by the additional funding provided in the last budget for timely responses to privacy complaints, and we're addressing delays and backlogs in that area. This additional privacy

funding will also support a new privacy regime for social media and online platforms that trade in Australians' personal information. Internally, we're also increasing our proactive enforcement capability.

I welcome the government's commitment to strengthening the Privacy Act to protect personal information through measures including increased enforcement mechanisms, and I've also made submissions around the need for a broader review of the Privacy Act to ensure it remains fit for purpose in our current environment.

The past year's focus on digital platforms both here and overseas has demonstrated the scale of the challenges that we confront in safeguarding personal information, and, taken alongside the consumer data right—a major change to our regulatory framework which we're implementing alongside the ACCC early next year—and other recent developments in technology and artificial intelligence, it's timely to consider the scope and settings of the Privacy Act overall.

Of course, there's a global dimension to the work of my office, and so cooperation with other regulatory authorities around the world is critical to mitigating privacy risks. We're actively engaged with international counterparts on regulatory action. We're making progress towards globally interoperable approaches to privacy so that our citizens' data is protected, wherever it may flow, and so that the economic benefits of data innovation can be safely realised. Thank you. That concludes my opening remarks.

CHAIR: Thank you very much. Senator Chisholm, you have the call.

Senator CHISHOLM: Just for your information, Chair, I've got some specific questions, and then Senator Carr's got some follow-up general questions.

CHAIR: Okay. You know we're working in 10-minute blocks?

Senator CHISHOLM: Yes.

CHAIR: Great.

Senator CHISHOLM: Ms Falk, how long have you been in your role? I heard you say 'since I've been here'; I just don't know what year you started.

Ms Falk: I commenced acting in the role on 24 March 2018 and I was appointed on 16 August 2018.

Senator CHISHOLM: Okay. Could you outline the investigation that was undertaken into Wilson Asset Management?

Ms Falk: In relation to that matter, my office did conduct inquiries. The matter was finalised by way of an enforceable undertaking from that particular entity. The enforceable undertaking had requirements to ensure that any data that may have been collected was deleted and also that process and systems changes were put in place. The enforceable undertaking made requirements to ensure that any data that may have been collected was deleted and that processing systems changes were put in place.

Senator CHISHOLM: What prompted the investigation in the first place?

Ms Falk: That investigation, I think, is on the public record and known, in terms of an issue that arose prior to the last federal election in relation to the collection of personal information through a particular website.

Senator CHISHOLM: Sure, but what prompted it? What led the organisation to conduct an investigation?

Ms Falk: I made inquiries in relation to that matter because I had had complaints from members of the public who raised issues around the handling of their personal information by that particular entity.

Senator CHISHOLM: So where that ended was with the enforceable undertaking?

Ms Falk: That's correct.

Senator CHISHOLM: Is there any more information you could provide around the details of what that undertaking was?

Ms Falk: The details of the undertaking that was entered into are on the public record on my website.

Senator CHISHOLM: As far as the organisation is concerned, is the issue now finalised, or, as part of that enforceable agreement, is there ongoing action that the commission has to be participating in?

Ms Falk: In relation to enforceable undertakings, there are generally requirements to report on compliance with the undertaking and, subject to that report being made, that would conclude the matter.

Senator CHISHOLM: So that requires you to make that report, or the organisation?

Ms Falk: The organisation—to make the report.

Senator CHISHOLM: Has that been completed yet?

Ms Falk: The last part of the reporting to my office is due in November.

Senator McKIM: Good afternoon. I wanted to ask a couple of questions about the MOU that your office has with the department about the National Facial Biometric Matching Capability. Firstly, can I just confirm this is the latest copy of the MOU, updated on 21 May 2019? That was the most recent one I could find. Is that the most recent version of the MOU?

Ms Falk: I'd need to confirm that.

Senator McKIM: Just for your office's reference, that's the one I'm going to be relying on for my questions. For context, I should say that this MOU talks about the interoperability hub, which we can shorten to mean the hub, which is the router that facilitates the, hopefully, secure exchange of biometric data between Commonwealth, state and territory governments. After the section that deals with the hub, it says 'other face matching services may be added over time'. Can I ask firstly whether any other face matching services have been added over time?

Ms Falk: I think that those questions would be best directed to the department. I understand that the Department of Home Affairs is the agency that administers the hub.

Senator McKIM: In fact, this is an MOU between the AGD and your office.

Mr Moraitis: That was before the machinery of government changes. That would have been the situation, but we no longer run anything to do with that stuff.

Senator McKIM: So why is the Office of the Australian Information Commissioner not able to answer that question?

Ms Falk: In relation to the MOU that you've have referred to, my office did enter into an MOU. The arrangements were that my office would undertake two privacy assessments of the management of the system. That has been deferred.

Senator McKIM: Did you say deferred?

Ms Falk: It has been deferred on the basis that the system is not fully functioning. The legislation has not passed, so it is deferred until such time as it would be appropriate for us to assess the way in which the system is operating in accordance with the privacy safeguards.

Senator McKIM: Would you expect those privacy safeguards to be contained in the legislation? Please, if it's not a fair question for you, just say so.

Ms Falk: The way in which it would operate is that the handling of the information would be authorised by law, and therefore the way in which that information is to be handled would be set out in the enabling legislation. To the extent to which the Privacy Act might still apply, it would apply in terms of data breach notifications that might occur and so on.

Senator McKIM: Thank you. That's helpful. When you say that it's been deferred, had your office done any work in regard to those privacy assessments before the deferral?

Ms Falk: We had not undertaken any assessments, no.

Senator McKIM: Has your office been consulted during the development of the legislation?

Ms Falk: Yes, it has.

Senator McKIM: Is that an ongoing process, or do you think the consultation with your office is now complete?

Ms Falk: In terms of the interaction with my office, we have been engaged with, firstly, the Attorney-General's Department and now the Department of Home Affairs since around 2015, in terms of the development of the capability. There were a series of privacy impact assessments that were undertaken in developing the proposal. My office had some interaction in relation to those privacy impact assessments. We have also commented on the draft bill. I have made submission to the relevant committee in relation to it. My office also participates in committees in terms of the governance of this particular—

Senator McKIM: You mean intergovernmental committees, with other agencies.

Ms Falk: That's right.

Senator McKIM: Thanks. That's really helpful. Mr Moraitis, can I just ask you a quick follow-up. By the way, I should indicate, Commissioner, that that MOU was downloaded off your office's website this morning, so you might want to have a look at that with a view to possibly changing it if it has in fact been superseded. That's what I wanted to check with Mr Moraitis: is it right that this MOU, which was signed between the Attorney-General's Department and the Office of the Australian Information Commissioner, has now been superseded by a new one that's been signed, presumably, by the home affairs department?

Mr Moraitis: It's almost two years since that transition happened. I assume that's what happened.

Senator McKIM: This was last updated on 21 May this year, which was actually after the machinery-of-government changes. I'm just wondering if we can have an explanation.

Mr Moraitis: I don't know. We had an MOU and, as Ms Falk mentioned, we worked very closely back in 2015-16 on this and, in particular, the privacy impact statement dimension of all this. Since the middle of 2017, we haven't been involved in facial biometrics anyway. I can't really speak on how or why the MOU, on the OAIC side, has us as one of the parties. I assume the new MOU—as they say in the law, mutatis mutandis—is the same; it's just that the title's changed. That's my assumption.

Senator McKIM: Thanks. Ms Falk, could you please take on notice whether this MOU that I'm referring to, which is between your office and the Attorney-General's Department and was last updated on 21 May this year, has been superseded by an MOU between your office and Home Affairs. Are you able to answer that now?

Ms Falk: I will take it on notice. I'm advised that the MOU was varied, and it is with the Department of Home Affairs at this point, but I will check the details and make sure I give you an accurate description.

Mr Moraitis: Can I just add that usually, with machinery-of-government changes, things transition to the receiving agency. There are a lot of transitional things, but the instrument and the content of the instrument are transferred. So, irrespective of the title, the mutual obligations and responsibilities continue. But you're right: it should have a change of title.

Senator McKIM: That's fine. Thanks, Mr Moraitis. Ms Falk, I want to ask questions about another matter. This is a complaint which has been lodged with your office—not about your office, by the way—and I've been asked to raise this by the complainant, Mr Nauroze Anees, who's put a complaint in to your office about Minister Peter Dutton. Mr Anees informs me that he still, despite lodging the complaint many months ago, doesn't understand how he can provide evidence to your office to substantiate his complaint. Are you aware of that complaint?

Ms Falk: In relation to individual complaints, there are of course secrecy provisions in my enabling legislation which seek to protect the confidentiality of parties to matters. The particular issue that you raise is not one that I have particular information to hand about.

Senator McKIM: I think given that answer I will write to you about that, which will enable me to share with you the complainant's concerns in a way that's not public.

Ms Falk: Thank you, Senator. I appreciate that.

Senator KIM CARR: The commission put out a press release on 26 September, the International Right to Know Day. Given that it's an international event, do you have any view about whether or not there is a problem with the right to know in Australia?

Ms Falk: That's a broad question.

Senator KIM CARR: It is. It gives you a chance to give us a broad answer.

Senator Payne: You are asking the commissioner in her capacity as commissioner and not for her personal opinion presumably?

Senator KIM CARR: No, I'm not asking for a personal opinion. The commission put out a press release on 26 September, International Right to Know Day—

Senator Payne: I haven't seen the press release, but I will take your word for it.

Senator KIM CARR: and I'm asking: does the commission have a view that there's a problem about the right to know in this country.

Ms Falk: Perhaps I could take the question in this way: in terms of my role, it's to have the ability to handle Information Commissioner reviews and complaints and to publish statistics on the operation of the FOI Act as it applies to government agencies. In my opening statement, I drew attention to some statistics about the health of the system in terms of Australians exercising their right to know or their right to request government-held information. That right is one that is enshrined in the FOI Act. Individuals do have the right to access documents held by government and ministers in their official capacity in relation to official documents relating to agencies unless an exemption applies. The numbers of matters that go through the system give you a sense of what's happening on the agency side. For the operation of my office, I've set out some workload statistics about the issues that my office is dealing with. But, perhaps to take it at a broader level, the Right to Know Day was an opportunity for me to remind all government agencies of the importance of access to government-held information and the important role of FOI practitioners in ensuring that they're assisting applicants in defining the

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scope of what they're requesting and ensuring that they're taking a proactive or pro-disclosure approach to providing information.

Senate

Senator KIM CARR: Your opening statement said that the percentage of FOI requests granted in full was 52 per cent.

Ms Falk: That's correct.

Senator KIM CARR: Do you regard that as satisfactory?

Ms Falk: As I said, there's a legally enforceable right to access government-held information, subject to the operation of exemptions. What the statistics indicate is that, in a number of cases, agencies are applying exemptions in relation to the requests that are made.

Senator KIM CARR: That's not the question I asked you. Do you think 52 per cent is satisfactory?

Ms Falk: It's difficult to answer the question in a binary way, because of the qualifications that I've set out.

Senator KIM CARR: You've made the statement. You put out a press statement saying that government agencies could do more to make information available for the benefit of citizens. I've asked you if you think we've got a problem, and I didn't hear an answer to that question. So I then asked you if you thought the figure of 52 per cent of FOI requests was good enough, and I don't think I heard an answer there. You said you couldn't answer in a binary way. What's the point of your office?

Ms Falk: In terms of your question around the statement that I put out, it was to encourage the pro-disclosure approach to providing information. You've also asked me whether or not there's a problem with the FOI system. There's always room for improvement and, indeed, they're the messages that I also put out around the Right to Know day. The areas that I have drawn to agencies' attention are the ones that I've outlined; in particular is assisting applicants and ensuring that agencies don't take an overly technical approach to the scope of FOI requests. Also there's room for improvement in terms of timeliness, and I've asked agencies to give that particular focus.

The other aspect of that is for agencies to look at what information is being requested and to look at whether or not that could be made available through administrative access systems—for instance, self-service online portals. Also there's the kind of information that's being requested; can that be grouped and then proactively provided? So we're looking at ways in which the resourcing that's required for FOI processing across government can be mitigated through those proactive mechanisms.

Senator KIM CARR: Let's have a look at this. Do you have any sense in which some departments were better than others in responding to FOI requests?

Ms Falk: The issue around timeliness does vary amongst departments. There are a number of departments, if you take the issue of timeliness, that are 100 per cent compliant. There are processing times that are set out in the FOI Act that must be adhered to. Some of the agencies are not adhering to those time frames, and that's of concern. The FOI Act also sets out mechanisms whereby, if delay is going to be experienced, an applicant can be asked for their agreement to extend time. Alternatively, an application can be made to my office to determine an extension of time request where it's particularly complex or voluminous.

Senator KIM CARR: Which is the worst department for compliance with the FOI Act?

Ms Falk: In terms of all of the departments, the top 20 departments are listed in my annual report. Each of those agencies reports a number of statistics in terms of its FOI processing. The Department of Home Affairs receives the most requests for FOI across the whole of the Commonwealth, currently at around 17,725. So that's a significant number. Timeliness has been an issue with that department. In 2016-17, only 25 per cent of requests were processed within the statutory time frame. That has been significantly improved over the last two years to 74 per cent processed within time. One of the key factors in relation to that, as I reported last financial year, was that the Department of Home Affairs instituted an administrative access program. So it shows you the value of those proactive administrative access programs, but more work needs to be done in relation to timeliness with that particular department.

Senator KIM CARR: I've been advised that in the 2018-19 period there were 4,274 occasions of FOI requests for the Department of Home Affairs and there was a failure to make decisions within the 30-day statutory period on all occasions. Is that the case?

Ms Falk: I'm not familiar with that particular statistic. The statistics that are set out in my annual report refer to financial year, and at the conclusion of the financial year the Department of Home Affairs provided decisions in relation to FOI requests in 74 per cent of matters.

Senator KIM CARR: According to the department's own statistics, in 2013-14 there were 160 failures—that's one per cent of the total number. But according, as I say, to their own figures this has now risen to 98,000 requests, and the failure to make decisions in the 30-day statuary period had increased to some 24,358 occasions, 25 per cent of all requests over that same period. So it's gone from one per cent in 2013 to 25 per cent over the five-year period. That strikes me as a very substantial deterioration.

Ms Falk: The statistics that I have provided today are drawn from the annual reports from my office, and those statistics are required to be provided by agencies under the FOI Act.

Senator KIM CARR: It's not just a guidance matter, though, is it? These provisions that you're referring to are not just there as a bit of a guide; they're actually a requirement at law.

Ms Falk: They're statutory requirements.

Senator KIM CARR: Yes, so in fact it could be said that there have been breaches of the law in at least 25 per cent of cases.

Ms Falk: In relation to how the FOI Act works, where there is going to be a delay in a matter, I've set out the process that needs to be followed. Where that's not followed, an individual can make a complaint to my office.

Senator KIM CARR: Could it be the case that it's a question not just of a culture of secrecy but of a culture of lawlessness in that department?

Ms Falk: That's not a question that I feel I'm able to answer.

Senator KIM CARR: Minister, perhaps you could help me. It goes beyond just a culture of secrecy; it goes to a question of lawlessness.

Senator Payne: Is that a proposition you're putting to me, Senator?

Senator KIM CARR: Yes, I'm putting it to you.

Senator Payne: I don't agree with that. I think you, having formerly been a minister involved in directing and administering departments, would be aware that from time to time there are issues.

Senator KIM CARR: I'd like to think my record was better than that.

Senator Payne: They are not necessarily desirable, I absolutely acknowledge, but from time to time there may be issues around reporting processes and things like that. We would hope that they are addressed and rectified and that reporting comes back to the centre, where it should be and where the commissioner has every right to expect it should be. But I don't have the detail available to me on those instances that the commissioner obviously has had and that you may also have—I'm not sure. I don't have the detail available to me on those instances to make a sweeping generalisation such as you have suggested or particularly to use a word like 'lawlessness'.

Senator KIM CARR: It just strikes me that there have been breaches of the law in at least 25 per cent of cases. That's what I thought the commissioner was saying.

Senator Payne: It's what you are saying. Senator KIM CARR: Is that not a fair—

Senator Payne: I really wish you would not put words in the mouths of officials or, for that matter, of me.

Senator KIM CARR: You know I wouldn't do that. I thought that was the clear implication: that there'd been breaches of the law—a statutory obligation—in 25 per cent of cases by the Department of Home Affairs. Is that not the case, Commissioner?

Ms Falk: It is a statutory requirement to process FOI requests within 30 days. If they cannot be processed in that time, there is a mechanism to seek agreements or else to seek a decision from my office in relation to that.

Senator KIM CARR: Let me be clear, because you can see I'm having difficulty with this quite startling statistic that you've revealed. Is there not a breach of the law in 25 per cent of cases with the Department of Home Affairs?

Ms Falk: I think it's the use of the word 'breach' that I'm-

Senator KIM CARR: Well, how would you like to describe it? If we say that there's a failure to meet their statutory obligation, would that be a nicer way to put it?

Ms Falk: There has been a failure to meet the statutory obligation.

CHAIR: Senator Carr, we're at more than the 10-minute block. Do you have a lot more? **Senator KIM CARR:** I want to pursue this just a little bit in regard to another aspect.

CHAIR: I understand that. Can you be a bit more precise about how much you have to go?

Senator KIM CARR: I've been very precise, actually. The question of lawlessness was a very precise issue.

CHAIR: Precise about the time, Senator Carr.

Senator KIM CARR: I will seek to finish this section in a few minutes if I could.

CHAIR: That is less than five?

Senator KIM CARR: Yes, that's what I believe, but it'll depend on the answers, Madam Chair. As you know, I say this again and again. I just want to be clear about this: the culture of openness across departments and Commonwealth agencies is an expectation, of your office, isn't it, Commissioner? You would expect that?

Ms Falk: The FOI Act has a prodisclosure approach embedded in it, and the objects of the act are to provide access to government-held information in a timely manner at the lowest reasonable cost.

Senator KIM CARR: The Australian Information Commissioner Act 2010 did provide for three separate information officers: Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner. You've actually got to do all of that, don't you? Is that still the way it works, or has it changed?

Ms Falk: I exercise all of the functions that you've outlined.

Senator KIM CARR: Yes. But there was a requirement under the act for there to be three separate officers undertaking that work; is that correct? Certainly that's what the explanatory memorandum set out when the bill was dealt with in 2010.

Ms Falk: The act makes provision for the appointment of up to three commissioners.

Senator KIM CARR: So what's happened? Why has there been a refusal to appoint a Freedom of Information Commissioner? Can you help me understand that?

Ms Falk: I think that's a question for government.

Senator KIM CARR: Minister, can you help me with that? Why has there been no Freedom of Information Commissioner appointed?

Senator Payne: I'll take that on notice.

Senator KIM CARR: It would be a clear breach of the will of parliament, wouldn't it, that that event that has not taken place?

Senator PAYNE: I said I would take that on notice.

Senator KIM CARR: Perhaps you could answer this question on notice as well: is this not a clear breach of the will of the parliament, given the explanatory memorandum and the original intent of this bill? We're now some years after the government has had an opportunity to fulfil this bill. The home affairs department is having a little trouble fulfilling its statutory obligations. Surely this is a case where the government's leading on this issue as well. It's failing to meet its obligations, its statutory obligations.

Senator Payne: As I said, I don't have those details with me. I will take that on notice. I might also ask Ms Chidgey or Mr Moraitis if they have anything to add.

Mr Moraitis: I'll just mention a few things. A few years ago there was a suggestion that the commission be abolished and incorporated into the Human Rights Commission. That didn't proceed. Since then—

Senator KIM CARR: You should be pleased about that. Who made that suggestion?

Mr Moraitis: It was around 2014-15 if I recall correctly.

Senator KIM CARR: Yes, but who made that suggestion? Was that the government's suggestion, was it?

Mr Moraitis: Yes, not a departmental one. Since that period, the positions have existed technically; it's just that the same person has been fulfilling those functions. I'll ask Ms Chidgey to elaborate on how that's worked. Some funding that was withdrawn was returned, but there were also some back office functions that were merged, which meant that there was \$2 million returned, rather than \$3 million.

Ms Chidgey: I'd just add that the act allows the Information Commissioner to perform all the functions and powers of the FOI Commissioner. That model has been operating effectively since July 2015.

Senator KIM CARR: Right. But it's hardly a good model, is it? You can't actually ask departmental officers across the Commonwealth to meet their obligations when the government doesn't meet its obligations under the act.

Ms Chidgey: It is meeting the obligations under the act.

Mr Moraitis: Senator, Ms Chidgey just explained that.

Senator Payne: Ms Chidgey just explained what the act says.

Senator KIM CARR: It's an interpretation you put on it. Did the explanatory memorandum set out three positions to be filled by three separate people? Is that a fact or not?

Ms Chidgey: There are three positions in the act, but they can all be performed by the Information Commissioner.

Senator KIM CARR: Yes, and that's a latter date interpretation.

CHAIR: Senator Carr, let the witness finish her answers before you start speaking over her.

Senator Payne: I'm not sure that it's an interpretation. If it's a provision of the act, it's not an interpretation of the act; it's a provision.

Senator KIM CARR: Was it set out in the explanatory memorandum that these positions be filled by three separate people?

Mr Moraitis: I don't recall.

Ms Chidgey: I don't have the explanatory memorandum.

Senator KIM CARR: Perhaps you could take that on notice for me.

Mr Moraitis: We'll take it on notice.

Senator KIM CARR: You could perhaps correct me if I'm wrong. I'll come back to that, because obviously we're going to need to spend some more time on this. I'll come back in my next round.

Senator HENDERSON: Commissioner, I'd like to ask you about the funding for the Office of the Australian Information Commissioner; in particular, the amount of additional funding committed by the government for the office in the last budget.

Ms Falk: In terms of the operating budget of the Office of the Australian Information Commissioner, the total revenue for this financial year is \$23.234 million. That includes appropriation of \$20.941 million and a sum which comes to the office through memorandums of understanding of around \$2.3 million. In terms of the second part of your question, around the additional funding provided to the office, the 2019-20 budget allocated \$25.121 million over three years to undertake functions around the handling of personal information and taking enforcement action. The purpose of the funding is to ensure timely handling of privacy complaints, also particularly focused on regulating the online environment. It is envisaged that my office would create a regulatory code that would apply to online providers such as social media companies, and it would set out particular protections in terms of vulnerable Australians, including children.

Senator HENDERSON: Could you go into a bit more detail as to why you are particularly focused on investing more in the online environment? Obviously that has added to the demands on the role of the office. Could you expand on that a bit more?

Ms Falk: It has. We can see globally the use of personal information increasing exponentially. Of course there are great economic benefits to be achieved by the use of personal information, but at the same time it needs to be kept secure and handled appropriately. In terms of the online environment, a number of incidents have occurred that have heightened the community's awareness about the collection of personal information, some relating to Facebook, for example. Also the ACCC conducted an extensive inquiry into digital platforms. That report was released earlier this year. I understand that the government is considering those recommendations.

Senator HENDERSON: In regard to the particular challenge faced by the online platforms, how have you been able to combat that challenge and, in particular, better safeguard the privacy of Australians in this difficult global environment?

Ms Falk: For this financial year and the coming years one of the key regulatory focuses of my office, outlined in the corporate plan, is regulating the online environment. In terms of how we intend to tackle the issue, firstly, at the global level I am a member of the executive committee of an international grouping of my counterparts around the world. My deputy commissioner is currently in Albania at our annual meeting. What I am seeking to do there is to ensure that we have information-sharing frameworks and cooperation in place so that I can regulate and enforce privacy with my global counterparts internationally.

On the domestic front, I should go back one step: we undertake education in terms of the community understanding how their information is being handled, and we work with other government agencies or regulators in increasing the community's knowledge so that they can take control of their personal information, and at the same time educating entities in terms of their obligations. The government has announced earlier this year its intention that there be legislation so that a code particular to the online environment will be made. That's a code that my office would be tasked with developing. It would involve extensive consultation, both with the

community and with the online social media and other regulated platforms. Then there would of course be regulatory action that could flow, should the requirements of that code not be met.

So one of the big shifts in my office at present is shifting from an organisation that has predominantly been, in terms of privacy, an alternative dispute resolution body focused on conciliation, with administrative decisions being made in only some cases. It's clear that the community expectation of regulators—also the government has announced its intention to increase penalties under the Privacy Act and the enforcement mechanisms available to me—that a strong enforcement approach is required. That means increasing our capability. We are increasing the ASL, up to 124 staff, this financial year. We are currently at around 90 and we will be looking particularly at increasing our capability to act in that enforcement role.

Senator HENDERSON: In terms of your enforcement, you're talking about breaches of individual privacy, but also in relation to failure to comply with FOI requests?

Ms Falk: I'm particularly talking about privacy in relation to what I've just said. In relation to FOI, I also have the ability to deal with complaints around processing and also to conduct investigations on my own initiative. But in terms of the budget funding, it was specific for privacy regulation. The enforcement that I'm talking about can range from, for instance, working with regulated entities to have enforceable undertakings, to improve practice and ensure that the handling of personal information is improved, through to me being able to make a determination that's enforceable in the Federal Court, through to seeking civil penalties in the Federal Court. All of those enforcement actions can exist in a systemic way, and I can take that action on my own initiative.

Senator KIM CARR: In terms of the review of FOI decisions, you'll notice that there's been an increase in the number of direct requests to you. How many concern the Minister for Home Affairs?

Ms Falk: In relation to Information Commissioner reviews and the requests for those reviews that involve the Minister for Home Affairs, I don't have that information to hand. I'd need to take that information on notice.

Senator KIM CARR: I take it that these were matters in regard to what's termed deemed refusals? Is that right?

Ms Falk: In relation to deemed refusals, what that is referring to is that where an agency does not meet the statutory time frame they are deemed to have made a decision refusing access to documents. Some of those decisions come to my office for Information Commissioner review, but they are one part of the matters that come to my office for Information Commissioner review.

Senator KIM CARR: So you can't tell me how many have come before you relating to the failure to meet the 30-day statutory period? Do you have that figure with you?

Mr Solomon: No.

Ms Falk: I don't have that to hand. I'd need to take that on notice. Senator KIM CARR: So you don't have a ballpark figure on you?

Ms Falk: I don't. I'm sorry.

Senator KIM CARR: You'll be able to tell me if there's been any occasion where the minister has actually met his 30-day statutory obligation?

Ms Falk: My annual report reports statistics in terms of the Department of Home Affairs. I don't have specific statistics in relation to the minister. I'd need to look at whether we could provide you with those statistics under notice.

Senator KIM CARR: You deal with ministerial offices all the time, don't you? That's part of your role?

Ms Falk: In what regard?

Senator KIM CARR: I take it that before you have to make decisions, wouldn't it be the case you engage with ministerial officers to find out what's happening with an FOI request?

Ms Falk: Staff of my office would engage with whoever the decision-maker was in relation to FOI requests.

Senator KIM CARR: Is the Minister for Home Affairs' office cooperative?

Ms Falk: I don't have information to hand in relation to that. I don't engage with ministers or government agencies specifically in relation to matters. I'm the independent decision-maker.

Senator KIM CARR: How do you gather information, then?

Ms Falk: Staff of my office would issue information requests from the decision-maker, and that would be provided.

Senator KIM CARR: So they'd gather information for you to make an independent decision?

Ms Falk: That's right.

Senator KIM CARR: Did I hear you correctly in your opening statement? Did you actually say that you're under-funded?

Ms Falk: I did raise the issue of resourcing in terms of FOI. It's a matter that's been discussed before this committee on a number of occasions, where I've indicated that really where the stresses in the system lie, from the OIC's perspective, are with the need for more staffing. I've set out the fact that we've had an 80 per cent increase in Information Commissioner reviews and I have worked very purposefully since being in the role on looking at how we can increase our efficiency. Over that same period of time—the four-year period—we have increased our efficiency by 45 per cent. But I've formed the view, having conducted a number of reviews of the way in which we're carrying out our work, that the only way in which the gap is to be bridged is for additional staffing resources to be provided.

Senator KIM CARR: I see. I was just trying to reconcile the line of questioning from Senator Henderson with your statement, that's all. When was the first time you requested additional funding?

Ms Falk: I'd need to take that on notice.

Senator KIM CARR: Are you sure you need to? Most officers in your position would be able to tell very quickly when they first sought additional resources, given the growth in the workload.

CHAIR: The question's asked and answered. She's taken it on notice.

Senator KIM CARR: I'm just surprised that you need to take that on notice. Because what—

Ms Falk: It's been a matter of discussion with this committee and also, of course, with government during my term. I'm just unable to recall, with accuracy, the first occasion on which that occurred.

Senator KIM CARR: I see what you mean. I do apologise. In my experience, officers in your position are able to identify at least the year in which they asked for additional resources.

Ms Falk: I have asked for additional resources since being appointed to the position in August last year but, in terms of the first occasion subsequent to that date, I would need to check.

Senator KIM CARR: I see. That's where the confusion lies. So, since August last year, you've been seeking additional support?

Ms Falk: Sometime after that date, Senator.

Senator KIM CARR: And what was the government's response?

Ms Falk: The government has acknowledged my request and is working through it in terms of normal budget processes.

Senator KIM CARR: I appreciate that agencies will ask for additional resources and it won't necessarily be the same amount as the ERC thinks you're entitled to, but what is, in your assessment, the requirement? How much do you need to do your job in terms of the report that you've given to us today about the additional demand on your agency?

Ms Falk: The amount of additional resources depends on the objective which is sought to be achieved. Of course, the more staffing resources that you have for processing Information Commissioner reviews and complaints, the quicker they can be processed.

Senator KIM CARR: So you don't have a figure?

Ms Falk: I think that there needs to be an increase in the staffing resources, and the quantum of that does depend on the time in which the backlog is sought to be addressed and also the ultimate goal in terms of how quickly Information Commissioner reviews should be handled.

Senator KIM CARR: So how much did you ask for?

Ms Falk: Senator, you appreciate that the information I've provided to government is through budget processes. I can give you an indication that, at present, my funding envelope allows for around 19 case officers to work on FOI reviews—there are additional staff who work on the FOI function more broadly—but just looking at FOI reviews, there'd need to be at least a half increase in the number of those staff.

Senator KIM CARR: What you mean by 'a half'?

Ms Falk: A half again.
Senator KIM CARR: So—
Ms Falk: Another nine staff.

Senator KIM CARR: What will that cost in terms of your normal profile?

Ms Falk: I'd need to see if we've got any figures to hand in relation to that, but it would be the cost of those staff

Senator KIM CARR: It depends on what they're paid, doesn't it? Those nine staff are not all SES staff, are they?

Ms Falk: No, they're case officers.

Senator KIM CARR: So you'd be able to indicate roughly what it would cost to fund nine staff.

Ms Falk: I've put forward to government the cost of that and also any capital costs that might be needed to accommodate those staff.

Senator KIM CARR: Can you take that on notice, please?

Ms Falk: Thank you.

Senator KIM CARR: In terms of the data breaches, there's a requirement for six-monthly reporting. Is that the case in terms of agencies to provide you with information on data breaching?

Ms Falk: In relation to notifiable data breaches, there's a requirement for any entity covered by the Privacy Act—which includes many government agencies, and also the private sector—to report to me, and also to notify affected individuals, in certain circumstances. Where there is a likely risk of serious harm to affected individuals occurring, that reporting needs to occur. It needs to occur as soon as practicable after becoming aware of that situation. Sometimes entities need to undertake further investigations to be satisfied that a notifiable breach has occurred. Ordinarily, that should occur within 30 days.

Senator KIM CARR: I see. How many data breaches have been notified under the scheme in the second quarter of 2019?

Ms Falk: The second quarter of 2019 might be something that my colleague has to hand. Otherwise, I can take it on notice—

Senator KIM CARR: Could you, please?

Ms Falk: but I can advise that in the first year of the scheme we received 950 notifiable data breaches.

Senator KIM CARR: Can you outline where these 950 incidents came from?

Ms Falk: Yes. I have produced quarterly reports which set out both the sectors that are reporting and also the main causes of data breaches. The main sector is the health sector, followed by the financial sector. The causes of data breaches are predominantly through malicious and criminal activity, particularly the use of phishing attacks and other methods to compromise credentials such as usernames and passwords.

The second major cause of data breaches is what we've called the human factor, or human element. That's individuals sending information to the wrong recipient in error, or otherwise an error that's caused by human intervention.

Senator KIM CARR: Has there been a growth in the third quarter of 2019?

Ms Falk: My recollection of the numbers we've received each quarter is around 245, but my colleague has advised me that in the quarter ending at the end of September this year we received 134 notifications. So that's quite a decrease.

Senator KIM CARR: Let's just be clear, and I'm sorry if I'm obtuse on this: this is from Commonwealth agencies and the private sector?

Ms Falk: That's correct.

Senator KIM CARR: Right. So are there hospitals? You said health and finance.

Ms Falk: Yes, that's right. I should point out that under the Privacy Act, in general, small business operators are exempt. However, health service providers, regardless of size or annual turnover, are covered. So it would cover all private sector health providers, regardless of size.

Senator KIM CARR: Have you done any benchmarking about how we compare as a country with other countries?

Ms Falk: We have looked internationally. In terms of the reporting per population, the amount of reporting that's happening in Australia is in line with global trends. The health sector is one of the key reporting areas internationally. If you look at the UK position and also the Dutch position, you'll see that's the case.

In terms of international reporting, the threshold for reporting a notifiable data breach differs a little to the Australian threshold. So the requirement to report occurs more frequently under the General Data Protection Regulation, which is in force in the European Union.

Senator KIM CARR: I see. If I can be clear about this: you said there were 134 in the third quarter of 2019—that's 134 incidents?

Ms Falk: Yes.

Senator KIM CARR: How many people do you think might have been affected by that?

Ms Falk: I don't have those statistics to hand, but I can provide that on notice.

Senator KIM CARR: Thank you, if you wouldn't mind. I've asked for the second quarter and the third quarter, and could you follow that up with how many people you think might be affected in those incidents?

Ms Falk: Yes.

Senator KIM CARR: Thank you very much. And in regard to the comparison, the comparative figure per capita, are you able to give us any indication of how we're comparing with, say, the United Kingdom, Canada and comparable countries?

Ms Falk: I do have statistics on comparability. As I said, the system is not directly comparable, but to the extent to which I'd need to put some qualifiers around it, I can still provide you with what I think could be some useful information.

Senator KIM CARR: How many commission led investigations have you undertaken into the data breaches notified under the scheme in 2019?

Ms Falk: Perhaps I'll just quickly explain the context in which we deal with notifiable data breaches. Our first priority is to ensure that individuals are notified and the information that's required to be provided to individuals is so provided. We will then work with the entity to make sure that the incident has been contained and that remedial steps have been put in place to prevent a recurrence. Where the incident raises concerns around the security of the entity, then we may make additional preliminary inquiries. I can also undertake investigations on my own initiative. The number of matters that we have made preliminary inquiries into would be a matter that I might need to take on notice.

Senator KIM CARR: If you wouldn't mind. In the case of the United Kingdom, the United Kingdom information office imposed a fine of \$223 million on British Airways over circumstances where 500,000 customers' details were stolen following a web hack in 2018. And in the United States there was a \$123 million fine issued to the Marriott Hotel as a result of data breach with its Starwood subsidiary. Do we have any similar circumstances in Australia?

Ms Falk: There have been breaches notified to my office that have affected large numbers of Australians, and I have a number of investigations that are currently active.

Senator KIM CARR: Yes, active investigations, but the credit reporting agency Equifax, for instance, reached a settlement with the US Federal Trade Commission and their Consumer Financial Protection Bureau for a data breach within its organisation which cost the company more than half a billion US dollars. Are we looking at any similar matters at law within Australia?

Ms Falk: I do have a number of active investigations that are in hand. I previously outlined some of my regulatory powers. They include making a determination, which can make declarations around agencies or organisations changing their practices.

Senator KIM CARR: I'm sorry to labour this, but you have said now a couple of times that you have investigations. What enforcement options are available other than to investigate?

Ms Falk: I'm outlining those. I can make an enforceable determination that's enforceable in the Federal Court that would require the organisation, for instance, to improve its security practices. I can also take an enforceable undertaking from an entity that would also be enforceable in the Federal Court if it's not complied with. I can also seek civil penalties from the Federal Court.

Senator KIM CARR: Have you undertaken any action at law through courts to have an enforceable action undertaken?

Ms Falk: Not at present. I mentioned the additional funding that's been provided to the office from 1 July and the fact that I'm increasing the enforcement capability of the office. It's very important that we're able to exercise all of the regulatory powers, and it's that capability that I'm looking to develop.

Senator KIM CARR: Is it your intention to actually seek legally enforceable undertakings with penalties such as of the type that I've indicated that are occurring in the United Kingdom and the United States?

Ms Falk: I would take the most appropriate regulatory outcome in the case. Sometimes that can be achieved through an enforceable undertaking. At other times it's more appropriate to make a binding decision or to seek enforceable penalties. I have a regulatory action policy that sets out all of that regulatory action that I might take. I would decide which was most appropriate given the facts and circumstances. In all cases I'm looking for what is going to be of the most benefit to the Australian community.

Senator KIM CARR: So you have the legal capacity to have fines imposed of the type that I've indicated?

Ms Falk: I can seek civil penalties through the courts. I cannot impose a fine myself.

Senator KIM CARR: Not individually, but through the court system. That exists?

Ms Falk: Yes.

Senator KIM CARR: And it is a matter that you are actively considering now?

Ms Falk: Yes.

Senator KIM CARR: You've moved to a six-monthly reporting requirement—is that correct?

Ms Falk: Yes.

Senator KIM CARR: Why?

Ms Falk: I made an administrative decision, an operational decision, to report quarterly for the first year of the operation of the notifiable data breaches scheme, so that I could give transparency to how the scheme was operating, the causes, the sectors. The real purpose for that was to identify where the effort needs to be put by regulated entities in improving their security posture. What we found is great consistency through that 12 months, and I determined that we could move to a six-monthly reporting requirement, which would still give that transparency, given that the issues that we're seeing remain constant, and that our efforts be put into our educative efforts in terms of prevention, which is always better than cure.

Senator KIM CARR: So is it a funding constraint?

Ms Falk: No, it's not. It's an operational decision in terms of the best utilisation of the resources of the office.

Senator PATRICK: Just to get an idea in terms of performance or delays in terms of IC reviews, do you have the numbers there for IC reviews that have taken more than 12 months? Just the outstanding ones at this point in time? The number of IC reviews that are currently on your books that have taken longer than 12 months?

Ms Falk: The statistics that I have at hand will tell me the 2018-19 financial year statistics in terms of the numbers that were more than 12 months that we finalised, which was 177 matters and 27 per cent.

Senator PATRICK: I'm interested in the ones that haven't been finalised. You might recall that at one time I asked for statistics on those that were still outstanding after a year, still outstanding after two years, and I remember there was one that was really quite lengthy in that you'd had the matter for a number of years.

Ms Falk: May I take the specific question on notice? I might be able to provide you with some other information that goes partway to answering that question.

Senator PATRICK: Okay.

Ms Falk: At the end of quarter 1 we had 850 matters on hand. In terms of the numbers awaiting allocation, you'll recall that when we receive a matter, it's triaged and we seek to resolve the matter through earlier resolution. For those matters that are unsuccessful and require a deeper analysis through to potentially a decision by myself, we have 330 matters awaiting allocation.

Senator PATRICK: I might put some questions on notice to get the exact statistics that I'm after. It'll be consistent with the previous question on notice that I asked. In a previous estimates you talked about a company called Synergy coming in to do a review. Can you tell the committee about the output of that review and what's happened?

Ms Falk: There have been a number of endeavours undertaken by my office to review processing times and the way in which we handle IC reviews and complaints in order to increase efficiencies. One of the things that we've done—and I will certainly come to your question specifically about the Synergy report—is to conduct some modelling so that we're very clear around case management times. The second thing that we have done is some internal restructuring. The third thing that we have done is have an external consultant come in to give an external view of our processes. We've mapped those processes, looked for areas for efficiencies, and instituted some changes as a result. The report has been finalised and the team has undertaken a three-month trial. The focus of

the trial has been to focus our efforts on both the early resolution but also the older matters that you mentioned. We sought to resolve as many of the older matters as possible within that three-month time period.

Senator PATRICK: And how did you go?

Ms Falk: We didn't quite meet our goal. My deputy would describe it as an ambitious or stretch goal. We wished to seek to resolve 50 per cent of the older matters within three months, and we managed to resolve 25 per cent of those matters.

Senator PATRICK: I think it's fair to say that the statistics show there are improvements, but your case load is increasing and that's led in some sense to the call for greater resources?

Ms Falk: Yes. Over the past four years, there's been the 80 per cent increase in Information Commissioner review applications to my office. If I compare that same period of time in terms of increasing efficiencies, we've increased efficiencies by 45 per cent. But notwithstanding our very best efforts and the very best efforts of my staff, to whom I'm very grateful and appreciative, a gap remains between the volume of the work coming into the office and the staff that's needed in order to process those matters.

Senator PATRICK: Ms Chidgey, you mentioned that all was fine and dandy before in response to Senator Carr's question about three commissioners.

CHAIR: I don't remember that language, but I like it!

Senator PATRICK: It was along those lines. That seems inconsistent with some evidence that was taken by the Legal and Constitutional Affairs References Committee in relation to a proposed bill, where Mr Walter said that there are undoubtedly stresses in the system. You seem to have an optimistic view about the situation.

Ms Chidgey: I'm not sure what Mr Walter was referring to. My evidence was that the Australian Information Commissioner Act allows the Information Commissioner to perform the functions of the other commissioner roles and that that was working.

Mr Moraitis: I think Mr Walter was correctly alluding to what are stresses, as Ms Falk has pointed out. She's been in consultations with us about her budget pressures. We're cognisant of those and aware of the parameters of her needs. Ultimately it's a matter for government to deal with resources. That's the best I can say at this stage.

Senator PATRICK: Sure. I was just querying the comment that had been made.

Mr Moraitis: We didn't say it was 'fine and dandy'.

Senator PATRICK: It was working.

Ms Chidgey: It was very specifically about the ability of the Information Commissioner to perform the functions of the FOI Commissioner.

Senator PATRICK: So you don't think that if you had additional resources to make independent decisions—like an FOI Commissioner—that, indeed, some of the backlog that we've just discussed wouldn't be resolved?

Ms Chidgey: There's a question about the resources for the office as a whole, whether that's an extra commissioner or other staff.

Mr Moraitis: Conversely, you could argue that you could have nine extra FTE and you have a single person doing all three functions, and that achieves the objective. That's an alternative.

Senator PATRICK: I think I FOIed the commissioner's diary at some stage. She looked pretty busy and didn't seem to have a lot of time to do independent decisions, actually. Going back to the matter that was raised by Senator Carr in respect of Home Affairs, Home Affairs did provide statistics that said they had received applications in 2017-18 and had—I'm just rounding here—15,000 applications; and closer to 19,000 applications in 2019-20. And they were running, in both those years, 3,721 and 3,746 deemed refusals. That goes to the question Senator Carr was asking. In some respects it isn't a breach of law in the context that there's a statutory provision that says it is a deemed refusal. It's at that point that people are now entitled to come to you, to conduct a review, with an understanding that they've been denied access. Is that the correct interpretation of the act?

Ms Falk: If the FOI request is not processed within the statutory time frame, the agency or minister is deemed to have refused access, and that triggers the ability for my office to conduct a review for—

Senator PATRICK: So, in some sense, the statute cleans up the mess from Home Affairs. However, in many instances, the person FOling Home Affairs wouldn't necessarily be privy to or understand their rights, in relation to a deemed refusal, or wouldn't understand the concept. They'd just say, 'It's late. They're not responding and they are really hard to get hold of. For me to get access to the status of an FOI I've had to ring the minister's office for them to get in contact with us, because they only have an FOI email address.' Is there anything you can do, by way of training or other mechanisms, particularly in relation to Home Affairs, to either encourage extensions of

time, for which everyone is informed, and/or some intervention that allows, in the case of a 30-day deemed refusal, a letter to go out to advise people of their rights?

Ms Falk: Thank you, and I'll give close consideration to the matters you have raised. I had a recent meeting of information contact officers in September, which was all of the FOI practitioners across the Commonwealth. A number of the issues that you've raised we've sought to lay out to practitioners, in terms of the importance of communication to the public around where their application is up to and ensuring that individuals do understand their rights. In terms of issues of training, I'll take those matters on notice and give it close thought.

Senator PATRICK: It goes to my next round of questions, which relate to the activities of Professor McMillan, the first Information Commissioner, who had a program of training for FOI officers across each of the agencies. Would it be fair to say that the effort that he put in, at the time, is not being replicated by your office, perhaps on account of a lack of resources?

Ms Falk: I mentioned the information contact officers network. We meet twice a year. My staff, then, convene a round of meetings with all of the 20 top agencies, individually, discussing their issues and making clear the expectations of my office. That has proved to be very effective. In between those times, we use our online mechanisms to ensure that IC reviews, updates to the guidelines and other guidance is provided to information officers. We do think that there's more that can be done from a proactive, educative position of the office. We are particularly looking at the kind of induction that's provided to new recruits across the APS, in terms of their FOI responsibilities. One of the things that's important, I think, to remember is that FOI is a whole-of-agency obligation, including line areas who have to provide the documents. It's not just the FOI practitioners who are responsible for ensuring the timeliness issue, in particular, is addressed. These are matters we are moving forward with, and we're doing that in the best way we can on the resources we have.

Senator PATRICK: Once again, this is not a criticism; I'm just trying to understand the situation. You'd be aware of a couple of media reports. I'll just go to two of them. One was in relation to an SBS journalist who sought application to the Department of Defence on some costs associated with Minister Price's travel. They got a response back, saying: 'We'll give you that answer if you front up \$2½ thousand.' That sort of thing, I would have thought, would disturb you. They weren't asking for invoices, just an adding of the total cost. I think section 15 allows someone to go in and add up a number and send that number to an FOI applicant.

Ms Falk: Charges do not need to be levied. They are a discretionary matter for government agencies and ministers to consider. My guidelines set out the kinds of factors that should be considered when deciding whether to levy a charge—for instance, the information that's sought and the public interest, the nature of the request and so on. When I look at the agency statistics in terms of charges overall across government agencies, there has been a decrease, if you look at the holistic scale, in the amount of charges that have been levied by government agencies. However, there has been an increase in the collection of those charges by agencies.

Senator PATRICK: I just wonder, if you see a media article like that, whether it doesn't raise your eyebrow and make you think, 'Right: I'd better go and have a bit of a look at that.'

Ms Falk: I was concerned about the matters that were raised, and I was pleased to see that they were rectified. I should say, in terms of broader messages to the APS, that we are updating our FOI guidelines in relation to charges, in relation to drawing out those matters that I've particularly raised in terms of the discretionary nature of charges and how they should be used.

Senator PATRICK: Finally, you will have seen an article about a whistleblower inside PM&C who had basically initiated a PID stating that across 25 FOIs there was basically flagrant disregard for the law in responding to FOI applicants and that had caused the department to conduct a review. Are you privy to the outcome of that review? Have you looked at what happened, noting that it is a PID and there are secrecy provisions around PIDs? But, once again, it is an alarming allegation, and I'm just wondering whether or not you pick up the phone, whether you execute a power of some sort to go and also examine what might be going on.

Ms Falk: I've not had any personal involvement in relation to the matter you raise.

Senator PATRICK: But you're aware of it?

Ms Falk: There's been a lot of media in recent times. I have some recollection of the matters you're talking about, but I'd need to consider it more carefully.

Senator PATRICK: All right. Thank you.

CHAIR: On that optimistic note, I thank the officers from the Office of the Australian Information Commissioner who are at the table.

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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
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Clarifications to Hansard

I write to you concerning evidence provided to the Senate Standing Committee on Legal and Constitutional Affairs during the Supplementary Budget Estimates hearing on 22 October 2019.

The Office of the Australian Information Commissioner has the following clarifications:

<u>Evidence of Ms Angelene Falk, Australian Information Commissioner and Privacy</u> Commissioner

Clarification 1

On page 81 of the transcript, in an exchange with Senator Carr, Ms Falk said: "... at present, my funding envelope allows for around 19 case officers to work on FOI reviews".

The Office of the Australian Information Commissioner wishes to clarify that not all of the time of the 19 officers in the FOI section is spent on IC reviews.

That section also performs other FOI regulatory functions including processing FOI extensions of time applications and vexatious applicant declarations, investigating FOI complaints, updating the FOI Guidelines, undertaking FOI monitoring work including in relation to the Information Publication Scheme and Disclosure Logs and analysing and reporting FOI statistics provided by Australian Government agencies.



Clarification 2

On pages 82 and 83 of the transcript, in exchanges with Senator Carr, Ms Falk indicated she had been advised there had been 134 notifications for the third quarter.

The Office of the Australian Information Commissioner wishes to clarify that the quoted figure of 134 notifications was for those notifications made under the mandatory Notifiable Data Breach scheme, received in the period 1 July 2019 to 30 September 2019, that had been assessed as primary notifications prior to the Estimates hearing.

The final number of primary notifications for the period, once all assessments have been completed, will be available in the Notifiable Data Breaches report to be publicly released in February 2020 for the period 1 July 2019 to 31 December 2019.

Yours sincerely

Angelene Falk

Australian Information Commissioner

Privacy Commissioner

21 November 2019

Consolidated Questions on Notice (QoNs) – October 2019 Senate Budget Estimates

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OAIC specific questions

The following questions were taken on notice during the October 2019 hearing:

	Senator	QoN No.	Topic	Date Received	Date Due
s 2	2				
	Carr	LCC-SBE-45	Review of FOI decisions	30/10/2019	14/11/2019
	Carr	LCC-SBE-46	Request for additional resources (FOI)	30/10/2019	14/11/2019
	Carr	LCC-SBE-47	Additional staffing resources (FOI)	30/10/2019	14/11/2019
S	22				
Ī	Patrick	LCC-SBE-50	IC reviews remaining unfinalised	30/10/2019	14/11/2019

The following questions were received in writing following the October 2019 hearing:

	Senator	QoN No.	Topic	Date Received	Date Due
s 2	2				
	Carr	LCC-SBE-153	OAIC funding	5/11/2019	8/01/2020



LCC-SBE-45 - Review of FOI decisions

Senator Kim Carr asked the following question on 22 October 2019:

Senator KIM CARR: In terms of the review of FOI decisions, you'll notice that there's been an increase in the number of direct requests to you. How many concern the Minister for Home Affairs?

Ms Falk: In relation to Information Commissioner reviews and the requests for those reviews that involve the Minister for Home Affairs, I don't have that information to hand. I'd need to take that information on notice. Senator KIM CARR: I take it that these were matters in regard to what's termed deemed refusals? Is that right?

Ms Falk: In relation to deemed refusals, what that is referring to is that where an agency does not meet the statutory time frame they are deemed to have made a decision refusing access to documents. Some of those decisions come to my office for Information Commissioner review, but they are one part of the matters that come to my office for Information Commissioner review.

Senator KIM CARR: So you can't tell me how many have come before you relating to the failure to meet the 30-day statutory period? Do you have that figure with you?

Mr Solomon: No.

Ms Falk: I don't have that to hand. I'd need to take that on notice. Senator KIM CARR: So you don't have a ballpark figure on you?

Ms Falk: I don't. I'm sorry.

The response to the honourable senator's question is as follows:

In 2018-19 one (1) Information Commissioner review application was received in relation to the Minister for Home Affairs related to a deemed access refusal.

LCC-SBE-46 - Request for additional resources (FOI)

Senator Kim Carr asked the following question on 22 October 2019:

Ms Falk: I did raise the issue of resourcing in terms of FOI. It's a matter that's been discussed before this committee on a number of occasions, where I've indicated that really where the stresses in the system lie, from the OIC's perspective, are with the need for more staffing. I've set out the fact that we've had an 80 per cent increase in Information Commissioner reviews and I have worked very purposefully since being in the role on looking at how we can increase our efficiency. Over that same period of time—the four-year period—we have increased our efficiency by 45 per cent. But I've formed the view, having conducted a number of reviews of the way in which we're carrying out our work, that the only way in which the gap is to be bridged is for additional staffing resources to be provided.

Senator KIM CARR: I see. I was just trying to reconcile the line of questioning from Senator Henderson with your statement, that's all. When was the first time you requested additional funding?

Ms Falk: I'd need to take that on notice.

Senator KIM CARR: Are you sure you need to? Most officers in your position would be able to tell very quickly when they first sought additional resources, given the growth in the workload.

CHAIR: The question's asked and answered. She's taken it on notice.

Senator KIM CARR: I'm just surprised that you need to take that on notice. Because what—

Ms Falk: It's been a matter of discussion with this committee and also, of course, with government during my term. I'm just unable to recall, with accuracy, the first occasion on which that occurred.

Senator KIM CARR: I see what you mean. I do apologise. In my experience, officers in your position are able to identify at least the year in which they asked for additional resources.

Ms Falk: I have asked for additional resources since being appointed to the position in August last year but, in terms of the first occasion subsequent to that date, I would need to check.

Senator KIM CARR: I see. That's where the confusion lies. So, since August last year, you've been seeking additional support?

Ms Falk: Sometime after that date, Senator.

Senator KIM CARR: And what was the government's response?

Ms Falk: The government has acknowledged my request and is working through it in terms of normal budget processes.

The response to the honourable senator's question is as follows:

The OAIC has provided information to government in relation to additional resourcing, including for its FOI functions.

LCC-SBE-47 - Additional staffing resources (FOI)

Senator Kim Carr asked the following question on 22 October 2019:

Ms Falk: I think that there needs to be an increase in the staffing resources, and the quantum of that does depend on the time in which the backlog is sought to be addressed and also the ultimate goal in terms of how quickly Information Commissioner reviews should be handled.

Senator KIM CARR: So how much did you ask for?

Ms Falk: Senator, you appreciate that the information I've provided to government is through budget processes. I can give you an indication that, at present, my funding envelope allows for around 19 case officers to work on FOI reviews—there are additional staff who work on the FOI function more broadly—but just looking at FOI reviews, there'd need to be at least a half increase in the number of those staff.

Senator KIM CARR: What you mean by 'a half'?

Ms Falk: A half again.
Senator KIM CARR: So—
Ms Falk: Another nine staff.

Senator KIM CARR: What will that cost in terms of your normal profile?

Ms Falk: I'd need to see if we've got any figures to hand in relation to that, but it would be the cost of those

staff.

Senator KIM CARR: It depends on what they're paid, doesn't it? Those nine staff are not all SES staff, are

they?

Ms Falk: No, they're case officers.

Senator KIM CARR: So you'd be able to indicate roughly what it would cost to fund nine staff.

Ms Falk: I've put forward to government the cost of that and also any capital costs that might be needed to

accommodate those staff.

Senator KIM CARR: Can you take that on notice, please?

Ms Falk: Thank you.

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner has estimated that the annual cost to fund nine (9) additional staff to undertake FOI regulatory work, including processing IC review applications, would be approximately A\$1.65 million with an additional capital amount of approximately A\$0.3 million for accommodation in the first year.

LCC-SBE-50 - IC reviews remaining unfinalized

Senator Rex Patrick asked the following question on 22 October 2019:

Senator PATRICK: Just to get an idea in terms of performance or delays in terms of IC reviews, do you have the numbers there for IC reviews that have taken more than 12 months? Just the outstanding ones at this point in time? The number of IC reviews that are currently on your books that have taken longer than 12 months?

Ms Falk: The statistics that I have at hand will tell me the 2018-19 financial year statistics in terms of the numbers that were more than 12 months that we finalised, which was 177 matters and 27 per cent. Senator PATRICK: I'm interested in the ones that haven't been finalised. You might recall that at one time I asked for statistics on those that were still outstanding after a year, still outstanding after two years, and I remember there was one that was really quite lengthy in that you'd had the matter for a number of years. Ms Falk: May I take the specific question on notice? I might be able to provide you with some other information that goes partway to answering that question. Senator PATRICK: Okay.

The response to the honourable senator's question is as follows:

As at 25 October 2019, there were 361 open Information Commissioner reviews under the *Freedom of Information Act 1982* that had been on hand for more than 12 months.

LCC-SBE-153 - OAIC funding

Senator Carr asked the following written question on 4 November 2019:

- 1. When was the first time the Australian Information Commissioner requested additional funding?
- 2. How much funding does the Australian Information Commissioner need to meet the additional demand on the agency?

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) understands these questions relate to the freedom of information (FOI) functions of the office, since Commissioner Falk's appointment in August 2018.

- 1. The OAIC provided a submission to government in relation to additional resourcing, including for its FOI functions in November 2018. An updated submission in relation to the OAIC's FOI function was provided to government in September 2019.
- 2. The Office of the Australian Information Commissioner has estimated that at a minimum the office requires nine (9) additional staff to undertake FOI regulatory work, including processing IC review applications. The cost would be approximately A\$1.65 million per year together with capital amount of approximately A\$0.3 million for additional accommodation.

Commissioner brief: AAT participation by the OAIC

Type: Commissioner brief

Purpose: Senate Estimates hearing, October 2018

For: The Australian Information Commissioner

Question: Why is the Commissioner a party in AAT merit review appeals in relation to Privacy Act s 52 privacy determinations but <u>not</u> in relation to appeals of FOI Act s55K IC review decisions?

Answer: This is because section 60 of the FOI Act stipulates who the parties to the AAT merit review proceeding are to be. This section does <u>not</u> include the Commissioner as a party. Further section 61A of the FOI Act modifies the AAT Act to indicate that where 'decision maker' is used in the AAT Act, for the purposes of an FOI appeal that is taken to be the agency or Minister who made the original FOI decision, not the Commissioner.

On the other hand the Privacy Act does not stipulate who the parties to an AAT merit review appeal of a s52 Determination by the Commissioner is, so that is left to the AAT Act which stipulates, at section 30, that the Commissioner is a party (as the 'decision maker' of the decision being appealed).

Rationale: The policy rationale behind this difference is because, in an FOI matter there has been an administrative decision to begin with by the agency/Minister which the OAIC then reviews as a first tier review body.

As with other decisions of review bodies and appeals of court decisions the review body or the court is usually not a party to the further review/appeal process. However, in relation to the OAIC's privacy jurisdiction the Commissioner is the primary decision maker, as privacy complaints are not about 'administrative decisions' but rather about a breach of the Privacy Act by either an agency or a business, and the Commissioner's decision is the first point an 'administrative decision' has been made which can be subject to 'review'.

Role of the Commissioner in a privacy determination appeal to the AAT:

The Commissioner will not always play an active role in an AAT review of a Privacy Act s52 determination. The occasions where the Commissioner has done so over the past few years are where there was a particular aspect of the Privacy Act that was at issue and where we thought we may be able to assist the AAT given there have been so few judicial or AAT decisions on the Privacy Act. It is likely that into the future the Commissioner will have less need to assist the AAT in this way as the body of s52 privacy determinations and AAT and Court decisions on the Privacy Act builds.

Even when taking an active role the Commissioner does not seek to assume the role of a protagonist, but rather use best endeavours to assist the AAT to make the correct or preferable decision in accordance with the obligations of the original decision maker under s 33(1AA) of the *Administrative Appeals Tribunal Act*.

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Commissioner brief: FOI Regulatory Action Policy

Type: Commissioner brief

Purpose: Senate Estimates hearing, October 2018

For: The Australian Information Commissioner

Critical facts and key dates summary:

- On 19 September 2017, the ANAO tabled and published a report on its performance audit on the administration of the *Freedom of Information Act 1982* (FOI Act).
- The ANAO observed that since 2012 the OAIC has undertaken limited FOI regulatory action and does not have a statement of its regulatory approach in relation to FOI.
- The ANAO recommended that the OAIC develop and publish a statement of its FOI regulatory approach. The OAIC agreed with this recommendation.
- The OAIC's 2017–18 Corporate Plan contained a commitment to develop an FOI regulatory action policy which outlines our regulatory approach with respect to our FOI functions.
- The OAIC has developed a policy outlining and explaining the Australian Information Commissioner's approach to using FOI regulatory powers. The policy covers all FOI powers and functions conferred on the Information Commissioner by the Australian Information Commissioner Act 2010 and the FOI Act.
- The policy should be read together with the Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of information Act 1982 (FOI guidelines). The FOI guidelines provide guidance on the operation of the FOI Act and Australian Government ministers and agencies must have regard to these guidelines when performing a function or exercising a power under the FOI Act.
- The policy documents:
 - the Commissioner's goals in taking FOI regulatory action
 - the Commissioner's regulatory action principles
 - the Commissioner's regulatory powers, which include IC review, investigating FOI complaints, issuing FOI Guidelines, extending the time to decide FOI requests, declaring a person to be a vexatious applicant, making disclosure log determinations, overseeing the Information Publication Scheme, raising awareness of FOI and educating Australians and agencies about their rights and obligations, compiling FOI data and assessing trends, and making recommendations on the operation of the FOI Act.
 - the approaches to regulatory action in relation to each power
 - how the Information Commissioner decides whether to take regulatory action.
- The policy also outlines how the Information Commissioner works with agencies, ministers and regulators to promote access to information through regulatory action and undertakes public communication as part of FOI regulatory action.

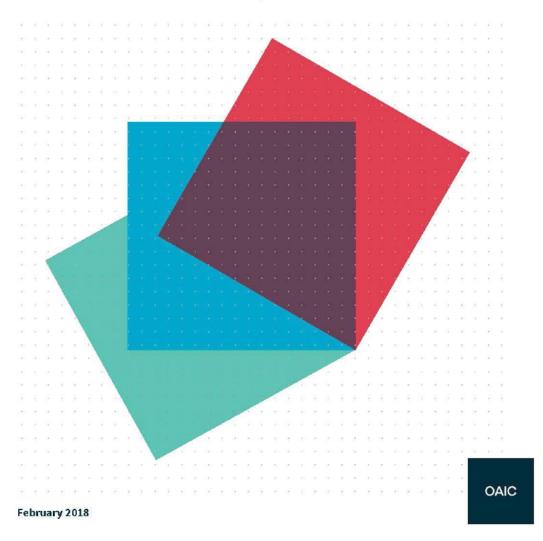
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- An exposure draft of the policy was published on the OAIC's website on 31 January 2018, with comments on readability and accessibility sought by 16 February 2018.
 No comments were received.
- The final version of the policy was published on 22 February 2018, along with updated versions of Parts 10 and 11 of the FOI Guidelines.

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Freedom of information regulatory action policy



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Freedom of information regulatory action policy February 2018

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Freedom of information regulatory action policy

Overview

- 1. The purpose of this policy is to inform the Australian community and Australian Government agencies (agencies) and ministers covered by the Freedom of Information Act 1982 (FOI Act) of the regulatory strategy and approach of the Australian Information Commissioner with respect to freedom of information (FOI) regulatory powers.
- 2. This policy provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers. The policy should be read together with the Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 19821 (which provide guidance on the operation of the FOI Act) to understand why and how the Information Commissioner elects to exercise FOI regulatory powers.

The OAIC and its jurisdiction

- 3. The Office of the Australian Information Commissioner (OAIC) is an independent statutory agency established under the Australian Information Commissioner Act 2010 (AIC Act).
- 4. The head of the agency is the Australian Information Commissioner. References to the Information Commissioner include the Office of the Australian Information Commissioner (OAIC) where the Information Commissioner has delegated powers in writing to a member of staff of the OAIC.2
- 5. The AIC Act confers on the Information Commissioner the power to perform FOI functions which includes the power to:3
 - review FOI decisions of agencies and ministers: review decisions under Part VII of the FOI Act (Information Commissioner reviews)4
 - investigate FOI complaints: undertake investigations of agency actions relating to the handling of FOI matters under Part VIIB of the FOI Act5
 - issue FOI Guidelines: issue guidelines under s 93A of the FOI Act⁶

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 $^{^{1}\,}$ Section 93A of the FOI Act requires that regard must be had to guidelines issued under s 93A for the purposes of the performance of a function or the exercise of a power under the FOI Act.

Australian Information Commissioner Act 2010 (AIC Act) s 25 and Australian Information Commissioner, Delegation of FOI powers by the Australian Information Commissioner, 14 December 2016, viewed 29 November 2017, OAIC website <https://www.oaic.gov.au/about-us/corporate-information/operational-information/delegation-of-foi-powers-by-the-</p>

³ The AIC Act confers power on each of the Information Commissioner, Freedom of Information and Privacy Commissioner to do all things necessary or convenient to perform the freedom of information (FOI) functions defined in the AIC Act, ss 8, 10(2), 11(3) and 12(3)).

⁴ See the AIC Act, ss 8(h), 10(2), 11(3) and 12(3)

⁵ See the AIC Act, ss 8(i), 10(2), 11(3) and 12(3).

 $^{^8}$ See Freedom of Information Act (the FOI Act), s 93A and the AIC Act, ss 8(e), 10(2), 11(3) and 12(3).

Freedom of information regulatory action policy

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- consider extension of time applications: consider extension of time applications by an agency or minister in relation to decisions on FOI requests?
- consider vexatious applicant declarations: consider whether to make a vexatious
 applicant declaration to restrict a person's rights to make an FOI request or application
 following an application from an agency or minister or on the Commissioner's own
 motion,⁸ and
- make disclosure log determinations: make determinations that the requirement to publish information in a disclosure log does not apply to specified information⁹
- oversee the Information publication scheme (IPS): assist agencies to publish information
 in accordance with the IPS¹⁰ and review, investigate and monitor compliance with the IPS¹¹
- raise awareness of FOI and educate Australians and agencies about their rights and
 obligations: promote awareness and understanding of the FOI Act and the objects of the
 Act¹² and provide information, advice, assistance and training on the operation of the Act¹³
- monitor agencies' compliance with the FOI Act: monitor, investigate and report on compliance by agencies with the FOI Act¹⁴
- compile FOI data and assess trends: collect information and statistics from agencies and ministers about FOI matters, ¹⁵ and
- make recommendations on the operation of the FOI Act: report and recommend to the Minister¹⁶ proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the FOI Act.¹⁷

The goals of taking FOI regulatory action

6. The goals of taking particular FOI regulatory action are to facilitate the operation of the FOI Act to uphold the community's right to access public information consistent with the objects of the FOI Act and to promote the management of Australian Government information as a national resource.

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⁷ The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

 $^{^9}$ The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

¹⁰ See the AIC Act, ss 8(b), 10(2), 11(3) and 12(3).

¹¹ See the FOI Act, s 8F and the AIC Act, ss 8(c), 10(2), 11(3) and 12(3).

 $^{^{\}rm 12}$ See the AIC Act, ss 8(a), 10(2), 11(3) and 12(3).

¹³ See the AIC Act, ss 8(d), 10(2), 11(3) and 12(3).

¹⁴ See the AIC Act, ss 8(g), 10(2), 11(3) and 12(3).

 $^{^{15}}$ See the AIC Act, ss 8(j), 10(2), 11(3) and 12(3), 30 and 31.

 $^{^{16}}$ The Commonwealth Attorney-General is the Minister responsible for the administration of the FOI Act.

¹⁷ See the AIC Act, ss 8(f), 10(2), 11(3) and 12(3).

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- Parliament intends that the functions and powers given by the FOI Act are performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.¹⁸
- 8. Regulatory action can facilitate the objects of the Act by:
 - encouraging best practice by agencies: ensuring compliance and influencing best practice
 by agencies and ministers in relation to the FOI Act and its objects
 - capacity building agencies to increase compliance: improving the capabilities of agencies and ministers to act consistently with the FOI Act and its objects
 - influencing Australian Government open access culture: influencing policy makers to
 consider access to information impacts when drafting legislation and new policy
 proposals, deterring conduct that is inconsistent with the FOI Act and its objects (both
 specifically and generally) and addressing systemic issues in relation to acting consistently
 with the FOI Act and its objects, and
 - raising public awareness and building public confidence: increasing public knowledge of
 access rights and obligations and the Information Commissioner's FOI regulatory powers,
 instilling public confidence in the Information Commissioner's role as regulator by
 appropriately addressing conduct that is inconsistent with the FOI Act and its objects and
 communication of the Information Commissioner's regulatory activities.

Regulatory action principles

- The Information Commissioner will be guided by the following principles when taking FOI regulatory action:
 - Independence the Information Commissioner will act independently and take action that is impartial and objective.
 - Accountability the Information Commissioner is accountable for its FOI regulatory action through a range of review and appeal rights, and will ensure stakeholders are aware of those rights.¹⁹
 - Proportionality the Information Commissioner's FOI regulatory action will be proportionate to the situation or conduct concerned.
 - Consistency the Information Commissioner will strive to act consistently in a manner that is guided by and reflects this policy.
 - Timeliness the Information Commissioner will strive to conduct and finalise regulatory action as promptly as practicable.
 - Transparency the Information Commissioner will be open about how FOI regulatory
 powers are used, including by publishing relevant guidance (including this policy and the

¹⁹ See the FOI Act, ss 56 and 57A. Review and appeal rights are also set out in Parts 10 and 11 of Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (the FOI Guidelines).

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¹⁸ See the FOI Act, s 4(3).

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FOI Guidelines), information about the regulatory action taken and decisions on Information Commissioner reviews.

- 10. When taking FOI regulatory action, the Information Commissioner will act consistently with general principles of good decision making, as explained in the Best Practice Guides published by the Administrative Review Council.²⁰ In particular, the Information Commissioner will act fairly and in accordance with principles of natural justice (or procedural fairness).
- 11. When dealing with conduct that may be inconsistent with the FOI Act and its objects, the Information Commissioner will consider the conduct on a case-by-case basis and have regard to all relevant circumstances.
- 12. In any litigation the Information Commissioner is a party to, the Information Commissioner will act in accordance with its obligation to act as a model litigant in accordance with the Legal Services Directions 2017.21

Regulatory powers

- 13. The Information Commissioner undertakes an assessment of the risks and impact of noncompliance by agencies or ministers with the FOI Act in determining whether to exercise the regulatory powers and which regulatory powers are appropriate to exercise in the particular circumstances.
- 14. This policy documents the Information Commissioner's approach to the exercise of the regulatory powers to:
 - · review FOI decisions of agencies and ministers
 - · investigate FOI complaints and commence Commissioner-initiated FOI investigations
 - · issue FOI Guidelines
 - perform other statutory FOI functions, in particular:
 - o consider applications for extensions of time
 - o consider vexatious applicant declarations, and
 - o make determinations that the requirement to publish information in a disclosure log does not apply to specific information
 - · oversee the Information publication scheme (IPS)
 - raise awareness of FOI and educate Australians and agencies about their rights and obligations
 - monitor agencies' compliance with the FOI Act
 - compile FOI data and assess trends, and

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²⁰ Administrative Review Council 2007, Best Practice Guides, Attorney-General's Department, viewed 19 October 2017, Administrative Review Council website < www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx>.

²¹ The obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings (Appendix B to Legal Services Directions 2017).

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· make recommendations on the operation of the FOI Act.

Review FOI decisions of agencies and ministers

- 15. The Information Commissioner has the power to review decisions under Part VII of the FOI Act (IC reviews).²² This is a mandatory power and once a valid application for IC review is received, the Information Commissioner must either exercise the discretion not to conduct the review²³ or conduct the review.²⁴
- 16. This section also sets out the Information Commissioner's enforcement powers during and after the conduct of an IC review.
- 17. During an IC review, the Information Commissioner can exercise powers to:
 - issue directions about the conduct of IC reviews generally or in relation to a specific IC review²⁵
 - expedite an IC review upon request²⁶
 - obtain information upon request²⁷
 - compel the production of information and documents²⁸
 - require a person to appear before the Information Commissioner to answer questions under oath or affirmation²⁹
 - refer a question of law to the Federal Court of Australia,30 and
 - exercise the discretion not to undertake an IC review including where it is appropriate that
 matters be referred to the Administrative Appeals Tribunal.³¹
- 18. In exercising the power to conduct review of decisions about access to documents and amendment or annotation of personal records, the Information Commissioner is guided by four key principles:
 - it is a merit review process where the Information Commissioner makes the correct or preferable decision at the time of decision by the Information Commissioner
 - · it is intended to be as informal as possible

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²² See the AIC Act, ss 8(h), 10(2), 11(3) and 12(3).

²³ See the FOI Act, s 54W.

²⁴ See the FOI Act, Part VII.

²⁵ See the FOI Act, s 55(2)(e) and the FOI Guidelines, Part 10. See for example, Australian Information Commissioner, Direction as to certain procedures to be followed in IC reviews (Practice Direction – Certain procedures in IC reviews).

²⁶ See the FOI Guidelines, Part 10.

²⁷ See the FOI Guidelines, Part 10.

²⁸ See the FOI Act, ss 55R, 55T, 55U and the FOI Guidelines, Part 10 and Practice Direction - Certain procedures in IC reviews.

²⁹ See the FOI Act, ss 55W and 55X and the FOI Guidelines Part 10 and Practice Direction – Certain procedures in IC reviews.

³⁰ See the FOI Act, s 55H and the FOI Guidelines, Part 10.

³¹ See the FOI Act, s 54W and the FOI Guidelines, Part 10.

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- · it is intended to be non-adversarial, and
- it is intended to be timely.
- 19. The factors the Information Commissioner takes into account in deciding whether or not to exercise the powers during an IC review may include:
 - · the objects of the FOI Act
 - the factors set out in Part 10 of the FOI Guidelines that the Information Commissioner
 considers in deciding whether it is appropriate to exercise the discretion not to undertake a
 review or continue a review in keeping with the objects of the FOI Act³²
 - whether a party to an IC review has requested that the matter be expedited or the IC review application or submissions by the parties reveal matters that warrant expedition of the IC review, and
 - the factors set out in Part 10 of the FOI Guidelines that the Information Commissioner
 considers in deciding which information gathering powers are most appropriate to resolve
 the IC review at hand.³³
- 20. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
 - · applications for IC review and submissions by parties to an IC review
 - relevant IC review decisions, AAT decisions, judgments of the Federal Court of Australia and the High Court of Australia, and
 - · other sources of relevant information in the circumstances.
- 21. During and after an IC review, the Information Commissioner can exercise enforcement powers to compel compliance with, or where relevant, to seek prosecution of a failure to comply with:
 - a notice to produce³⁴
 - a notice to appear³⁵
 - an oath or affirmation administered by the Information Commissioner that the answers that a person³⁶ will give will be true,³⁷ and
 - an IC review decision.³⁸
- 22. The factors the Information Commissioner takes into account in deciding whether or not to exercise the enforcement powers may include:
 - the objects of the FOI Act

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³² See the FOI Act, s 54W and the FOI Guidelines, Part 10.

³³ See the FOI Act, Part VII, Division 8 and the FOI Guidelines, Part 10.

³⁴ See the FOI Act, s 55R and the FOI Guidelines, Part 10.

³⁵ See the FOI Act, s 55W and the FOI Guidelines, Part 10.

³⁶ A person who is required to appear under a notice to appear. See the FOI Act, s 55X(1) and (2).

³⁷ See the FOI Act, s 55X and the FOI Guidelines, Part 10.

³⁸ See the FOI Act, s 55P and the FOI Guidelines, Part 10.

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- whether or not the agency, minister or individual has complied with the notice to produce, notice to appear or IC review decision
- whether or not the agency, minister or individual has attempted to comply with the notice to produce, notice to appear or IC review decision and any reasons given for noncompliance, and
- · any other factors the Information Commissioner considers relevant in the circumstances.
- 23. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
 - · submissions by parties to the IC review, and
 - · other sources of relevant information in the circumstances.

Investigate an action taken by an agency

- 24. The Information Commissioner has the power to undertake investigations under Part VIIB of the FOI Act. ³⁹ Once a valid FOI complaint is received, the Information Commissioner must either exercise the discretion not to investigate the complaint or investigate the complaint. The Information Commissioner cannot investigate a minister's handling of FOI matters.
- 25. The Information Commissioner also has the power to undertake an investigation on the Information Commissioner's own initiative, this is known as a 'Commissioner-initiated investigation' (CII). 40
- 26. In relation to FOI complaints and CIIs, the Information Commissioner can exercise powers to:
 - exercise the discretion not to investigate an FOI complaint including where it is appropriate that matters be considered within an IC review⁴¹
 - conduct preliminary inquiries in relation to FOI complaints⁴²
 - transfer the FOI complaint to the Ombudsman⁴³
 - commence a CII
 - conduct the investigation of an FOI complaint or CII
 - · expedite an investigation of an FOI complaint or CII
 - obtain information upon request⁴⁴
 - compel the production of information and documents⁴⁵

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³⁹ See the AIC Act, ss 8(i), 10(2), 11(3) and 12(3).

⁴⁰ See the FOI Act, s 69(2).

⁴¹ See the FOI Act, s 73 and the FOI Guidelines, Part 11.

 $^{^{\}rm 42}$ See the FOI Act, s 72 and the FOI Guidelines, Part 11.

⁴³ See the FOI Act, s 74 and the FOI Guidelines, Part 11.

⁴⁴ See the FOI Guidelines, Part 11.

⁴⁵ See the FOI Act, s 79 and the FOI Guidelines, Part 11.

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- authorise a person to enter premises occupied by an agency or a contracted service provider,⁴⁶ and
- require a person to appear before the Information Commissioner to answer questions under oath or affirmation.⁴⁷
- 27. In exercising the power to decline to investigate an FOI complaint, the Information Commissioner may consider the following factors:
 - the factors set out in Part 11 of the Guidelines that the Information Commissioner
 considers in deciding whether it is appropriate to exercise the discretion to not investigate
 an FOI complaint⁴⁸
 - whether the action subject to the complaint was not taken in the performance of the agency's functions under the FOI Act⁴⁹
 - whether the matter falls within the jurisdiction of the Information Commissioner and another body such as the Commonwealth Ombudsman⁵⁰
 - where the matter falls within the jurisdiction of another body, whether the Information Commissioner is the most appropriate body to investigate and resolve the complaint,⁵¹
 - where the matter falls within the jurisdiction of another body, whether the complainant made a complaint or application to the other body⁵²
 - where the complainant has made a complaint or application to another body and how the other body has dealt with or is dealing with the complaint or application⁵³
 - whether the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith⁵⁴, and
 - whether the complainant has sufficient interest in the subject matter of the complaint.
- 28. In deciding whether or not to exercise the powers to investigate a complaint, commence a CII as well as exercise powers during and following an investigation of an FOI complaint or CII, the Information Commissioner may take into account the following factors:
 - · the objects of the FOI Act
 - the risks and impact of non-compliance by agencies or ministers with the FOI Act

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⁴⁶ See the FOI Act, s 77.

⁴⁷ See the FOI Act, ss 82 and 83 and the FOI Guidelines, Part 11.

⁴⁸ See the FOI Guidelines, Part 11.

⁴⁹ See the FOI Act, ss 73(a).

⁵⁰ See the FOI Act, ss 73(c) and 74.

⁵¹ See the FOI Act, ss 73(c) and 74.

⁵² See the FOI Act, ss 73(b).

⁵³ See the FOI Act, s 73(d).

⁵⁴ See the FOI Act, ss 73(e).

⁵⁵ See the FOI Act, ss 73(f).

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- the factors set out in Part 11 of the Guidelines that the Information Commissioner
 considers in deciding whether it is appropriate to exercise the discretion to not investigate
 an FOI complaint⁵⁶
- whether a party to an investigation of an FOI complaint or CII has requested that the matter be expedited or the application or submissions by the parties reveal matters that warrant expedition of the investigation⁵⁷
- the factors set out in Part 11 of the Guidelines that the Information Commissioner considers in deciding which information gathering powers are most appropriate to the investigation at hand,⁵⁸ and
- any other factors which the Information Commissioner considers relevant in the circumstances.
- 29. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
 - · stakeholder engagement
 - · submissions by parties to the FOI complaint or CII
 - IC review decisions, AAT decisions, judgments of the Federal Court of Australia and the High Court of Australia
 - trends that emerge from applications for IC review, FOI complaints and information that is revealed during CIIs
 - · a report of FOI statistics by an agency
 - · a referral from another regulator, and
 - · other sources of relevant information in the circumstances.
- 30. During and after the investigation of a complaint or CII, the Information Commissioner can exercise enforcement powers to compel compliance with or, where relevant, to seek prosecution of a failure to comply with:
 - a notice to produce⁵⁹
 - a notice to appear⁶⁰
 - an oath or affirmation administered by the Information Commissioner that the answers that a person⁶¹ will give will be true, ⁶² and

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⁵⁶ See the FOI Guidelines, Part 11.

⁵⁷ See the FOI Guidelines, Part 11.

⁵⁸ See the FOI Guidelines, Part 11.

 $^{^{59}}$ See the FOI Act, s 79 and the FOI Guidelines, Part 11.

 $^{^{\}rm 80}$ See the FOI Act, s 82 and the FOI Guidelines, Part 11.

 $^{^{61}}$ A person who is required to appear under a notice to appear. See the FOI Act, s 83.

⁶² See the FOI Act, s 83 and the FOI Guidelines, Part 11.

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- a recommendation following the investigation of the complaint.⁶³
- 31. The factors the Information Commissioner takes into account in deciding whether or not to exercise the enforcement powers may include:
 - · the objects of the FOI Act
 - whether or not the agency, minister or individual has complied with the notice to produce, notice to appear or recommendation
 - whether or not the agency, minister or individual has attempted to comply with the notice to produce, notice to appear or recommendation and any reasons given for noncompliance, and
 - any other factors the Information Commissioner considers relevant in the circumstances.
- 32. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
 - · submissions by parties to the FOI complaint, and
 - · other sources of relevant information in the circumstances.

Issue FOI guidelines

33. The Information Commissioner has issued guidelines about the operation of the FOI Act under s 93A of that Act. ⁶⁴ Section 93A requires Australian Government ministers and agencies to have regard to these guidelines when performing a function or exercising a power under the FOI Act. The Information Commissioner may review or reissue the guidelines to reflect legislative and case law developments and this regulatory policy.

Extend the period of time to decide FOI requests

- 34. The FOI Act confers on the Information Commissioner the power to extend the period of time to decide FOI requests on application by an agency or minister.⁶⁵
- 35. The Information Commissioner may grant extensions of time in response to an application by an agency or minister under ss 15AB, 15AC, 51DA and 54D of the FOI Act.
- 36. Section 15AB allows for an extension of time to decide a complex or voluminous FOI request. When deciding an application for an extension of time under s 15AB the Information Commissioner considers factors that may include:

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⁶³ See the FOI Act, s 89 and the FOI Guidelines, Part 11.

⁸⁴ See the FOI Act, s 93A and the AIC Act, ss 8(e), 10(2), 11(3) and 12(3).

Es See Office of the Australian Information Commissioner, FOI agency resource 13: Extension of time for processing requests, Office of the Australian Information Commissioner website < https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-agency-resource-13-extension-of-time-for-processing-requests>.

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- factors set out in Part 3 of the Guidelines that are taken into account by the Information Commissioner in deciding whether to exercise the power to grant an extension of time as well as the sources of information that may be relevant to these factors.⁵⁶
- · the scope of the request and the range of documents covered
- · work already undertaken on the request
- · any consultation with the applicant concerning length of time
- whether other agencies or parties have an interest in the request, and
- measures to be taken by the agency or minister to ensure a decision is made within the extended time period and to keep the applicant informed about progress.
- 37. When deciding an application for an extension of time under ss 15AC, 51DA or 54D, the Information Commissioner considers factors that may include:
 - factors set out in Part 3 of the Guidelines that are taken into account by the Information Commissioner in deciding whether to exercise the power to grant an extension of time as well as the sources of information that may be relevant to these factors⁶⁷
 - · the scope and complexity of the request
 - · the reasons for delay in making an initial decision
 - · the period of time sought
 - · the estimated total processing time
 - whether discussions with the applicant about the delay and extension application have occurred
 - · the total elapsed processing time, and
 - the desirability of the decision being decided by the agency or minister rather than by IC review

Declare a person to be a vexatious applicant

- 38. The FOI Act confers on the Information Commissioner the power to declare a person a vexatious applicant. 68
- 39. The Information Commissioner may declare a person to be a vexatious applicant, either on the Commissioner's own motion or on the application of an agency or minister. ⁵⁹ A declaration has effect in accordance with the terms and conditions stated in the declaration. ⁷⁰
- 40. A vexatious application declaration may provide that an agency or minister may refuse to consider an FOI request, an application to amend records under the FOI Act and an application

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⁸⁶ See the FOI Guidelines, Part 3.

⁶⁷ See the FOI Guidelines, Part 3.

⁶⁸ See the FOI Act, s 89K.

⁶⁹ See the FOI Act, s 89K.

⁷⁰ See the FOI Act, s 89M.

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for internal review of an FOI decision if made without the written permission of the Information Commissioner. 21

- 41. A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act. The power to make a declaration is discretionary and will not be lightly made. This power is an important element of the balance in the FOI Act between conferring a right of access to documents while ensuring that access requests do not interfere unreasonably with agency operations. In addition to considering the grounds for a declaration specified in s 89L,⁷² the Information Commissioner may consider other relevant features of a person's access actions or the FOI administration of an agency that has applied for a declaration.
- 42. Part 12 of the Guidelines sets out the factors that are taken into account by the Information Commissioner in deciding whether to exercise the power to make a vexatious applicant declaration as well as the sources of information that may be relevant to these factors.⁷³

Make disclosure log determinations

- 43. The FOI Act confers on the Information Commissioner the power to make determinations that the requirement to publish information in a disclosure log does not apply to specified information.⁷⁴
- 44. In deciding whether to make a determination, the Information Commissioner may consider matters such as:75
 - the extent to which publication of the information in question would further the objects of the FOLAct
 - · whether there is an established and reasonable public demand for the information, and
 - the estimated resource requirement for an agency to publish the information, and whether this would require an unreasonable diversion of agency resources.
- Determinations are published on the Office of the Australian Information Commissioner website.

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⁷¹ See the FOI Act, s 89M.

The Information Commissioner may declare a person to be a vexatious applicant only if the Commissioner is satisfied that the person has repeatedly engaged in access actions that involve an abuse of process; the person is engaging in a particular access action that would involve an abuse of process; or a particular access action by the person would be manifestly unreasonable. See the FOI Act, s 89L.

⁷³ See the FOI Guidelines, Part 12.

⁷⁴ See the FOI Act, s 11C and the FOI Guidelines, Part 14.

The See Office of the Australian Information Commissioner, Information Publication Scheme (IPS) and Disclosure Log determinations policy and procedure, Office of the Australian Information Commissioner website https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-agency-resources/information-publication-scheme-ips-and-disclosure-log-determinations-policy-and-procedure.

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Oversee the Information publication scheme (IPS)

- 46. Part II of the FOI Act establishes an Information Publication Scheme (IPS) for Australian Government agencies subject to the FOI Act. 76
- 47. The Information Commissioner has the power to:
 - assist agencies to publish information in accordance with the IPS⁷⁷
 - perform functions conferred by the FOI Act on the Information Commissioner for reviewing the operation of the IPS⁷⁸
 - investigate complaints about an agency's IPS compliance, 79 and
 - undertake a CII into an agency's FOI actions.⁸⁰
- 48. The factors the Information Commissioner takes into account in deciding to exercise the power to oversee the IPS may include:
 - · the objects of the FOI Act
 - the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
 - any other factors which the Information Commissioner considers relevant in the circumstances.
- 49. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
 - the information published on the websites of agencies in accordance with IPS obligations
 - · stakeholder engagement, and
 - · other sources of relevant information in the circumstances.

Raise awareness of FOI and educate Australians and agencies about their rights and obligations

- 50. The Information Commissioner has the power to:
 - promote awareness and understanding of the FOI Act and the objects of the Act,⁸¹ and
 - provide information, advice, assistance and training on the operation of the FOI Act.
- 51. The preferred regulatory approach of the Information Commissioner, where there is a discretion, is to work with agencies and ministers to facilitate compliance and promote best

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⁷⁶ See the FOI Guidelines, Part 13.

 $^{^{\}tiny \uparrow 7}$ See the AIC Act, ss 8(b), 10(2), 11(3) and 12(3).

 $^{^{78}}$ See the FOI Act, s 8F and the AIC Act, ss 8(c), 10(2), 11(3) and 12(3).

⁷⁹ See the FOI Act, s 70.

 $^{^{\}rm 80}$ See the FOI Act, s 69(2) and the FOI Guidelines, Part 11.

 $^{^{\}rm 81}$ See the AIC Act, ss 8(a), 10(2), 11(3) and 12(3).

 $^{^{\}text{B2}}$ See the AIC Act, ss 8(d), 10(2), 11(3) and 12(3).

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practice with respect to the obligations and objects of the FOI Act. This will often be a more efficient and effective means of pursuing the objects of the FOI Act.

- 52. The range of sources the Information Commissioner may use to assess how to exercise this power include:
 - · stakeholder engagement
 - · reports of FOI statistics by agencies
 - individual applications for IC review, FOI complaints and information that is revealed during a CII
 - · trends in applications for IC review and FOI complaints
 - the nature and frequency of queries received by the OAIC's FOI enquiries telephone line,
 - · other sources of relevant information in the circumstances.
- 53. As part of this approach the Information Commissioner will continue to:
 - conduct activities to raise awareness about information access rights which may include Right to Know Day activities
 - engage with other Information Commissions to raise awareness about information access rights
 - · engage with agencies and ministers to provide guidance including by:
 - o providing policy guidance to agencies or ministers
 - directing agencies or ministers to relevant resources developed by the Information Commissioner
 - o conducting open dialogue with specific agencies or ministers
 - notifying an agency or minister of any concerns that the agency or minister may not be acting consistently with the FOI Act and its objects, and
 - o allowing the agency or minister an opportunity to respond to any concerns
 - · promote best practice compliance, and
 - · identify and address FOI concerns as they arise.
- 54. The OAIC website (www.oaic.gov.au) provides various practical resources for the public and agencies on the operation and administration of the FOI Act. These include:
 - written guidance such as the FOI Guide, FOI fact sheets and answers to frequently asked questions
 - resources for FOI decision makers (FOI agency resources) including step by step guidance, tips, checklists, and templates for notices and statements of reasons, and
 - a link to the published Information Commissioner review (IC review) decisions and vexatious applicant declaration decisions on AustLii.
- 55. The OAIC also operates an FOI enquiries line and has a dedicated enquiries email address. The OAIC responds to FOI enquiries by telephone, in writing and in person.

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Monitor agencies' compliance with the FOI Act

- 56. The Information Commissioner has the power to monitor, investigate and report on compliance by agencies with the FOI Act.⁸³
- 57. The factors the Information Commissioner takes into account in monitoring compliance with the FOI Act may include:
 - the objects of the FOI Act
 - · the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
 - any other factors which the Information Commissioner considers relevant in the circumstances.
- 58. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
 - · stakeholder engagement
 - · reports of FOI statistics by agencies
 - individual applications for IC review, FOI complaints and information that is revealed during a CII, and
 - · other sources of relevant information in the circumstances.

Compile FOI data and assess trends

- 59. Australian Government agencies and ministers must provide the Information Commissioner with information and statistics about FOI matters. ⁸⁴ The Information Commissioner is required to prepare an annual report on the operations of the Information Commissioner during the year. ⁸⁵ The report must include information about FOI administration in agencies. ⁸⁶
- 60. The FOI Act requires agencies and ministers to provide information and statistics to the Information Commissioner to enable the Commissioner to prepare a report. ⁸⁷ An agency or minister must also comply with any additional requirements in the regulations regarding the provision of information or the maintenance of records for the purposes of providing the information and statistics to the Information Commissioner. ⁸⁸

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 $^{^{83}}$ See the AIC Act, ss 8(g), 10(2), 11(3) and 12(3).

⁸⁴ See the AIC Act, ss 8(j), 10(2), 11(3) and 12(3), 30 and 31.

⁸⁵ See the AIC Act, ss 30 and the FOI Guidelines, Part 15.

 $^{^{86}}$ See the AIC Act, ss 31(1)(b), (c), (d) and (e) and 31(2).

⁸⁷ See the FOI Act, s 93 and the AIC Act, s 30.

 $^{^{\}rm 88}$ See the FOI Act, s 93(3) and Freedom of Information (Miscellaneous Provisions) Regulations 1982 reg 5.

Make recommendations on the operation of the FOI Act

- 61. The Information Commissioner has the power to report and recommend to the Minister⁸⁹ proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the operation of the FOI Act.
- 62. The factors the Information Commissioner takes into account in exercising the power to report and recommend legislative change or administrative action may include:
 - · the objects of the FOI Act
 - · the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
 - any other factors which the Information Commissioner considers relevant in the circumstances.
- 63. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
 - stakeholder engagement
 - · reports of FOI statistics by agencies
 - · trends in applications for IC review and FOI complaints, and
 - · other sources of relevant information in the circumstances.

Working with agencies, ministers and regulators

- 64. The Information Commissioner works with agencies, ministers and regulators (including other information commissioners) to promote access to information through regulatory action and participation in domestic and international networks.
- 65. The Information Commissioner will seek to work in partnership with agencies, ministers and regulators to promote access to information, recognising the practical and resource advantages in doing so.

Working with agencies and ministers to promote information access through regulatory action

- 66. The Information Commissioner will continue to engage with agencies and ministers when:
 - · reviewing FOI decisions of agencies and ministers
 - deciding whether to commence CIIs or investigate an FOI complaint
 - · deciding whether to make a vexatious applicant declaration
 - · overseeing the IPS

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 $^{^{59}}$ The Commonwealth Attorney-General is the Minister responsible for the administration of the FOI Act.

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- raising awareness of FOI and educating agencies about information access rights and obligations, and
- · reporting FOI statistics.

Working with agencies, ministers and regulators to promote information access through networks

- 67. The Information Commissioner will promote access to information though participation in domestic and international networks.
- 68. The Information Commissioner will continue to:
 - participate in the Australian Government's Open Government Forum to monitor and drive implementation of the Open Government National Action Plan 2016-2018, develop the next Open Government National Action Plan and raise awareness about access to information
 - provide information and engage with stakeholders through the Information Contact Officer Network (ICON) and OAICnet
 - regularly engage with agencies, ministers and other Information Commissioners to raise awareness about information access rights, and
 - participate in FOI networks, the Association of Information Access Commissioners and the International Conference of Information Commissioners.

Public communication as part of FOI regulatory action

- 69. Public communication of the work of the Information Commissioner is an important element in FOI regulatory action and fulfilling the objectives of the FOI Act. Public communication:
 - encourages FOI compliance by increasing awareness and knowledge of FOI rights and obligations, and deterring breaches of the FOI Act
 - promotes public confidence in the regulatory activities of the Information Commissioner, by publicising actions taken to address breaches of the FOI Act and agencies that are not complying with obligations under the FOI Act, and
 - ensures transparency and accountability around the Information Commissioner's use of the FOI regulatory powers.

Communications approach

70. A decision to publicly communicate information will be guided by the regulatory action principles in this policy (see above).

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- 71. The Information Commissioner's decision to publicly communicate information is subject to the AIC Act and FOI Act which prohibit the unauthorised disclosure or other use of information obtained in the course of performing FOI functions.⁹⁰
- 72. The Information Commissioner will not comment publicly about the commencement of or ongoing complaint investigations and CIIs as the FOI Act provides that investigations must be conducted in private.⁹¹
- 73. The Information Commissioner will generally not comment publicly about ongoing IC review applications or the exercise of investigative powers.
- 74. The FOI Act requires that the Information Commissioner publishes all IC review decisions. ⁹² Where an IC review application proceeds to a decision under s 55K by the Commissioner directly, the decision is published on the <u>AustLII AlCmr website database</u>.
- 75. When publicly communicating information about FOI regulatory action the Information Commissioner will strive to ensure that:
 - · all public statements are accurate, fair and balanced
 - a comment on a court proceeding involving an FOI Act issue, prior to the resolution of the
 proceedings, will generally be confined to the history of the proceedings and any earlier
 findings by the Information Commissioner or the Commonwealth Ombudsman, and
 - all public statements comply with the Information Commissioner's legal obligations, including privacy, confidentiality and secrecy obligations and court or tribunal orders.

Examples of communications

- 76. The Information Commissioner may publicly communicate the outcome of FOI regulatory action, in the following ways:
 - publishing IC review decisions and vexatious applicant declarations made by the Information Commissioner,³³ and
 - issuing a public report following a CII.
- 77. The Information Commissioner will publish general statistics of the OAIC and from across the Australian Government which reflect both FOI regulatory action processes and regulatory outcomes. 94 These statistics will be contained in the OAIC's annual report, and will include:
 - · the number and outcomes of FOI requests received and finalised
 - the number and outcomes of internal review applications received and finalised
 - the use of exemptions in FOI decisions

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 $^{^{\}rm 90}$ See the AIC Act, s 29 and the FOI Act, ss 55T(5) and 55U(4).

⁹¹ See the FOI Act, s 76(1).

 $^{^{92}}$ See the FOI Act, s 55K(8) which obliges the Information Commissioner to publish a decision on an IC review to members of the public generally.

 $^{^{93}}$ See the FOI Act, s 55K(8) which obliges the Information Commissioner to publish a decision on an IC review to members of the public generally.

⁹⁴ See the AIC Act, ss 30 and 31.

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- · the time taken to respond to FOI requests, and any charges collected
- · the number of determinations of FOI requests for amendment of personal records
- · the number and outcomes of requests for extension of time to process FOI requests
- · the number and outcomes of IC review applications
- · the number and outcomes of vexatious applicant declaration applications
- · the number of FOI complaints received and closed
- the number and outcomes of applications to the AAT for FOI review, and
- the comparative approximate yearly costs across the Australian Government of FOI processing and IPS activity.

Key legislation

Australian Information Commissioner Act 2010

Freedom of Information Act 1982

Freedom of Information (Charges) Regulations 1982

Freedom of Information (Miscellaneous Provisions) Regulations 1982

Glossary

AAT	Administrative Appeals Tribunal
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AIC Act Australian Information Commissioner Act 2010

CII Commissioner-initiated investigation

FOI Act Freedom of Information Act 1982

FOI regulatory action regulatory action specified in AIC Act

Information Commissioner review referred to in the FOI Act as 'IC review'; merit review

by the Information Commissioner of an agency's decision regarding access to, or annotation of, a document, carried out at the request of an applicant

or third party

IPS Information Publication Scheme (established under

Part II of the FOI Act)

OAIC Office of the Australian Information Commissioner

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Commissioner brief: Direction as to certain procedures to be followed in IC reviews

Type: Commissioner brief

Purpose: Senate Estimates hearing, October 2018

For: The Australian Information Commissioner

What is the purpose of the Direction and why was it issued?

- The 'Direction as to certain procedures to be followed in IC reviews' (the Direction) sets
 out the particular procedures that agencies and ministers must follow in respect of the
 production of documents, the provision of a statement of reasons where access has been
 deemed to be refused and the provision of submissions (including when the OAIC will
 accept submissions in confidence).
- The Direction was issued to provide agencies and ministers further information about what the Commissioner's expects and requires from agencies and ministers during the IC review process.

When and how was the Direction issued?

- On 26 February 2018, the Direction was issued under s 55(2)(e)(i) of the FOI Act which
 allows the Information Commissioner to issue written directions as to the procedures to
 be followed in relation to IC reviews generally.
- Since the Direction took effect, steps have been taken to ensure that agencies and ministers are aware of the Direction (though individual reviews, ICON newsletter, ICON information session and website).

How does the Direction operate alongside the FOI Act and Guidelines?

- The Direction must be read in light of Part VII of the FOI Act (Review by Information Commissioner) and together with Part 10 of the Guidelines (Review by the Information Commissioner) issued by the Australian Information Commissioner under s 93A of the FOI Act, to which agencies and ministers must have regard in performing a function or exercising a power under the FOI Act.
- On 26 February 2018, Part 10 of the FOI Guidelines was reissued to reflect the Direction.

Is the OAIC monitoring compliance with the Direction and if so, how are the compliance rates?

• The OAIC is actively monitoring compliance with the Direction, including monitoring whether agencies are complying with the general procedure outlined in the Direction relating to the production of documents and submissions made during an IC review. In particular, the OAIC is actively monitoring whether relevant response dates are complied with and whether reasons for extensions of time to provide relevant documentation are appropriate. The early resolution section maintains a spreadsheet that records requests for extensions of time from agencies, the reasons provided and whether the agency complied with the timeframe (found at: D2018/006344).

- The Direction has assisted in clarifying the expectations held by the OAIC in working with agencies, particularly in relation to requests for extensions of time, provision of documents and the circumstances where confidential submissions are accepted.
- Following the implementation of the Direction, agencies and ministers who required
 extensions of time have made formal requests and provided reasons that contain more
 detail. Similarly, in relation to confidential submissions and requests for inspection of
 exempted documents, agencies and ministers have provided more detailed reasons as to
 why confidential submissions should be accepted or why inspection of the exempted
 documents is necessary.

Do you think the IC review procedure direction is effective?

- The Direction has generally been effective in clarifying the expectations held by the OAIC, particularly in relation to the process for deemed access refusals, the requests for extensions of time to respond to s 54Z notice (commencement of review and request for processing documentation and submissions), providing confidential submissions, and requesting inspection of documents.
- The OAIC will be formally reviewing the effectiveness of Direction 12 months after its
 commencement and will be looking at whether the direction sufficiently covers other
 areas, including provision of responses/submissions to preliminary views (section 5 of the
 Direction).

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This direction is given under section 55(2)(e)(i) of the Freedom of Information Act 1982.

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Direction as to certain procedures to be followed in IC reviews

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About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews in respect of the production of documents, the provision of a statement of reasons where access has been deemed to be refused and the provision of submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 26 February 2018.

General principles

- 2.1 The IC review procedures are found in Part VII of the FOI Act. The process is intended to be an informal, non-adversarial and timely means of seeking external merits review of decisions by agencies and ministers on FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency's or minister's decision (s 54Z notice of IC review).
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any information from any person and to make any inquiries that the Information Commissioner considers appropriate.
- 2.4 In general IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.² Therefore, full and timely production of documents at issue, submissions and any other information that has been requested is important.

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Section 55(3) of the FOI Act.

See Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines) at [10.20] and [10.63].

- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure for production and inspection of documents

Production of documents

- 3.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act, which are outlined in the Annexure to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review.
- 3.2 Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).³ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will generally require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format, documents setting out relevant consultations and submissions to support their exemption contentions.⁴
- 3.3 In providing the Information Commissioner a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are being made under.
- 3.4 Inspection of documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the agency or minister can demonstrate that extenuating circumstances exist to warrant inspection rather than the direct production of copies of the marked up documents. See below at [3.9] [3.13] for further direction on inspections.

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See FOI Guidelines at [10.100].

See FOI Guidelines at [10.102].

- 3.5 In IC reviews where an agency or minister claims that documents cannot be located or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to locate relevant documents.5
- 3.6 In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.6
- 3.7 Agencies and ministers will have three weeks to respond to the Information Commissioner's request for documents, submissions and any other information in the notice of IC review. Agencies and ministers must provide a response within this timeframe, unless an extension of time has been sought and granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 3.8 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed in the Annexure to this Direction).

Inspection of documents

- 3.9 The inspection of documents by the Information Commissioner will only be considered where the agency or minister satisfies the Information Commissioner that there are extenuating circumstances to warrant production by this method.
- 3.10 What constitutes extenuating circumstances is not prescriptive and will be determined on a case by case basis. The onus is on the requesting agency or minister to justify that extenuating circumstances exist to warrant inspection.
- 3.11 If an agency or minister is of the view that there are extenuating circumstances to justify inspection, the Information Commissioner requires the agency or minister to provide a written request for an inspection together with supporting reasons prior to the due date in the notice of IC review.
- 3.12 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act).

See FOI Guidelines at [3.121] and the IC review decisions in Adrian Wright and Department of Human Services (Freedom of information) [2017] AICmr 127 and Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information) [2017]

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See FOI Guidelines at [10.100].

However, the requesting agency or minister must satisfy the Information Commissioner that there are extenuating circumstances to warrant inspection.⁷

3.13 If the Information Commissioner agrees to an agency or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed this will occur at the Information Commissioner's office.

4. General procedure in relation to deemed refusals

- 4.1 Where an application for IC review is made on an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Information Commissioner will undertake preliminary inquiries pursuant to s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to provide an explanation regarding the status of the FOI request and, if the request is not finalised, an estimated date for a decision on the request.
- 4.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.
- 4.3 If no response is received in that time or it appears that there may be further unreasonable delay in the processing of the FOI request, the Information Commissioner will commence IC review and require the agency or minister to provide a statement of reasons pursuant to s 55E of the FOI Act. The agency or minister will be required to provide the statement of reasons within the timeframe specified in the notice.8
- 4.4 The Information Commissioner may, as appropriate, issue a notice pursuant to s 55E of the FOI Act together with a Notice to Produce under s 55R of the FOI Act to ensure that the statement of reasons is accompanied by relevant documents.

5. General procedure in relation to submissions made during an IC review

- 5.1 All parties to an IC review will be provided with a reasonable opportunity to present their case on the IC review through written submissions.
- 5.2 The Information Commissioner will share an agency's or minister's submissions with the applicant unless there are compelling reasons not to.9
- 5.3 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made ahead of providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.

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The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

See FOI Guidelines at [10.61] - [10.62].

See FOI Guidelines at [10.104].

- 5.4 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹⁰
- 5.5 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 5.6 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agencies' and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹¹
- 5.7 The Information Commissioner may seek further submissions from an agency or minister as appropriate. However, agencies and ministers should be aware that if they do not make submissions when an opportunity to do so has been provided, the matter may proceed to a decision under s 55K of the FOI Act without any further opportunity to make submissions. It is not open to agencies and ministers to reserve their right to make submissions at a later date.

6. Non-compliance with this Direction

- 6.1 In the event of non-compliance with this Direction, the Information Commissioner may proceed to make a decision under s 55K of the FOI Act on the basis that the agency or minister has failed to discharge their onus under s 55D of the FOI Act.
- 6.2 In addition, as the model litgant obligation under the Legal Services Directions 2017 extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹²

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Australian Information Commissioner

30 January 2018

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See FOI Guidelines at [10.104].

See FOI Guidelines at [10.74].

See paragraph 3 of Appendix B to the Legal Services Directions 2017.

Annexure: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to section 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice to Produce. A Notice to Produce may also be issued in conjunction with either sections 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least two weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by section 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, section 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (sections 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under sections 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under section 33 of the FOI Act, pursuant to section 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹³

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The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

Commissioner brief: Statutory appointments

Type: Commissioner brief

Purpose: Senate Estimates hearing, October 2018

For: The Australian Information Commissioner

Key points

 Commissioner appointments are usually made by relevant ministers or heads of state, usually following consultation or on recommendation (the EU appointments are made jointly by the European Parliament and European Council).

- In an international context, there are examples of dual Commissioner appointments:
 - The UK Information Commissioner (ICO) holds both privacy and freedom of information roles simultaneously.
 - All ten Canadian provinces (British Columbia, Nova Scotia, Alberta, Ontario, Quebec, New Brunswick, Saskatchewan, Manitoba, Prince Edward Island, Newfoundland and Labrador) have a single individual holding roles relating to the protection of personal information and freedom of information.
- However, a number of jurisdictions have separate roles. These include:
 - Canada (Federal): the Privacy Commissioner of Canada is Daniel Therrien and the Information Commissioner is Caroline Maynard
 - Ireland: the Data Protection Commissioner is Helen Dixon and the Information Commissioner (who is also the Ombudsman) is Peter Tyndall
 - New Zealand: the role of Privacy Commissioner is held by John Edwards, whereas the Chief Ombudsman is Judge Peter Boshier (supported by Deputy Ombudsman Bridget Hewson).
 - The European Union: the European Ombudsman is Emily O'Reilly and the European Data Protection Supervisor is Giovanni Buttarelli.
 - The Netherlands: the Dutch Data Protection Authority (DPA) is led by a chairman and up to two other members. Aleid Wolfsen is currently the Chairman and the Vice-Chairman role (who also acts as one of the other two members) is currently vacant.

Background

 The UK Information Commissioner is appointed by the Queen, on the advice of her Majesty's government. The Commissioner has full power to appoint Deputy

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Commissioners and set terms and conditions. A previous requirement for the Secretary of State to approve such appointments was removed in 2013.

- Both the Chairman and the members of the Dutch DPA are appointed by Royal Decree upon nomination by the Minister of Security and Justice. The term of office for these positions is 5 years, which is renewable by 5 years after reappointment.¹
- The Irish Data Protection Commissioner is appointed by the Government (the Department of Justice and Equality) and the Ombudsman by the President on the nomination of the two houses of the Oireachtas (parliament).
- The Canadian Privacy Commissioner is an officer of the parliament, and is appointed by the Canadian Minister of Justice on the recommendation of the Chief Commissioner of the Canadian Human Rights Commission.
- The Canadian Information Commissioner is also an officer of the parliament, and is appointed by the Governor in Council after consultation with the leader of every recognised party in the Senate and the House of Commons.
- Both the New Zealand Privacy Commissioner and Chief Ombudsman are appointed by the Governor-General on the recommendation in the case of the Privacy Commissioner of the Minister of Justice and in the case of the Ombudsman, of a parliamentary committee of the House of Representatives.
- Both the European Ombudsman and the European Data Protection Supervisor are appointed by a joint decision of the European Parliament and European Council.

Further detail on ICO appointments

- The current UK Information Commissioner Elizabeth Denham was appointed in July 2016. Under the *Data Protection Act 1998*, the Information Commissioner must appoint at least one Deputy Commissioner.
- A new structure with two new Deputy Commissioners was introduced in June 2017: James Dipple-Johnstone, as Deputy Commissioner – Operations and Steve Wood, as Deputy Commissioner – Policy. The Deputy roles had previously been a Director of Freedom of Information and Director of Data Protection.
- The Deputy Commissioners do not have any specific function under the Data Protection Act 1998, however they are authorised to perform the Information Commissioner's functions under the Act whenever the Information Commissioner is absent, or unable to act for any reason. The Information Commissioner may also authorise any other officers to perform any of her functions under the Act.

¹ https://autoriteitpersoonsgegevens.nl/en/about-dutch-dpa/commissioners-dutch-dpa

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 While the Information Commissioner's Deputies still do not have full delegated powers, the previous Commissioner had called for the support of a Deputy Commissioner with full delegated authority in 2015.²

Further detail on Data Protection Commissioner appointments (Ireland)

- The independent role and powers of the Data Protection Commissioner are as set out in legislation in the Data Protection Act 1988 and Data Protection Act 2003. These Acts transpose the Council of Europe 1981 <u>Data Protection Convention</u> (Convention 108) and the 1995 EU Data Protection Directive (Directive 95/46/EC).³
- The Data Protection Commissioner is responsible for upholding the rights of individuals as set out in the Acts, and enforcing the obligations upon data controllers.
 The Commissioner is appointed by Government and is independent in the exercise of his or her functions.

The Australian position

- ACT
 - Currently, the ACT Information Privacy Commissioner position is vacant. The Australian Information Commissioner exercises some of the functions of the ACT Information Privacy Commissioner under an MOU with the ACT Government.
 - The <u>ACT Human Rights Commission</u> handles public sector health record privacy complaints.
 - The ACT Ombudsman (within the Commonwealth Ombudsman's office) is responsible for regulating FOI in relation to ACT public sector agencies.

NSW

- FOI and privacy both administered by the Information and Privacy Commission, with an Information Commissioner and Privacy Commissioner, and no FOI Commissioner.
- The Information Commissioner, Ms Elizabeth Tydd, was appointed in December 2013 under the *Government Information (Information Commissioner) Act 2009*. The Governor of NSW appoints the Information Commissioner. The Information Commissioner does not have a privacy function. (s 34(4) of *Privacy and Personal Information Protection Act 1998* A person is not eligible to be appointed as Privacy Commissioner or to act in that office if the person is the Information Commissioner).

³ https://www.dataprotection.ie/docs/Mission-Statement/a/7.htm

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² https://iconewsblog.org.uk/2015/10/19/collective-leadership-at-the-ico/. It is unclear whether the Information Commissioner's review powers may be delegated to Deputy Commissioners.

- Privacy Commissioner, Ms Samantha Gavel was appointed in September 2017 under the *Privacy and Personal Information Protection Act 1998* (PPIP Act); the Governor of NSW appoints the Privacy Commissioner. The Privacy Commissioner administers the PPIP Act and the *Health Records and Information Privacy Act* 2002 (HRIP Act).
- These appointments are made on the advice of the Attorney General. There are a number of Directors, however there are no Deputy Commissioners.

Northern Territory

- The Information Commissioner, Mr Peter Shoyer, holds roles for both FOI and Privacy. The appointment is made under section 85 of the Northern Territory Information Act 2003 by the Administrator of the Northern Territory.
- It would appear that, according to the Gazette, the appointment is on the advice of the Attorney-General.
- The Information Commissioner is supported by a Deputy Commissioner.
- In August 2018, the Freedom of Information and Privacy functions of the Office of the Information Commissioner were transferred to the Office of the Ombudsman NT. Mr Peter Shoyer is also the Ombudsman for NT.

Queensland

- Information Commissioner (IC), Ms Rachael Rangihaeata; appointed under section 134 of the Right to Information Act 2009 by the Governor.
- Right to Information Commissioner, Louisa Lynch; appointed under section 150 of the Right to Information Act 2009 (RTI Act) by the Governor in Council. The Right to Information Commissioner reports to the IC under s 148 of the RTI Act. Under the RTI Act, the IC can delegate powers to the Right to Information Commissioner.
- Privacy Commissioner, Mr Philip Green; appointed under section 144 of the Information Privacy Act 2009 by the Governor in Council. The Privacy Commissioner reports to the IC under s 142 of the same Act. The IC delegates powers to the Privacy Commissioner.
- The appointments are made on the advice of the Attorney-General.
- There are three Assistant Information Commissioners, but no Deputy Commissioners.

South Australia

 The South Australian Ombudsman, Mr Wayne Lines, is responsible for reviews of FOI decisions; appointed under section 6 of the Ombudsman Act 1972, by the

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Governor on recommendation made by resolution of both Houses of South Australian Parliament.

- Mr Lines is assisted by a Deputy Ombudsman.
- South Australia uses a Privacy Committee of six members instead of appointing a specific Commissioner for either privacy or FOI purposes
- The Privacy Committee reports directly to the Minister for Privacy, Deputy Premier the Hon Vickie Chapman.
- The Privacy Minister is responsible for appointing the six members. The Privacy Minister chooses three members, the other members are recommended one each by the Attorney-General; the Minister responsible for the administration of the Health Care Act 2008 and the Commissioner for Public Employment.
- Currently the Presiding Member is Simon Froude, and the non-public sector employee member is Deslie Billich. The other members are Nathan Morelli, Lucinda Byers, Krystyna Slowinski and Kathy Ahwan.

Tasmania

- The Tasmanian Ombudsman, Mr Richard Connock, is responsible for privacy and freedom of information matters; appointed under section 5 of the *Ombudsman* Act 1978 by the Governor.
- The Attorney-General announced the appointment, suggesting they advised the Governor.
- o There does not appear to be any Deputy Ombudsman.

Victoria

- In September 2017, the former Office of the Commissioner for Privacy and Data Protection (CPDP) and the Office of the Freedom of Information Commissioner were combined, creating the new Office of the Victorian Information Commissioner (OVIC).
- O Under OVIC, the functions and powers of the former CPDP remain largely the same and the Act makes no amendments to the Information Privacy Principles (IPPs) or the Victorian Protective Data Security Standards (VPDSS) under the *Privacy and Data Protection Act 2014* (PDPA).
- The Information Commissioner is a statutory appointment and can be removed only by both houses of parliament. The Deputy Commissioners are statutory appointments appointed by the Governor in Council.
- In August 2017, Sven Bluemmel was appointed as the Information
 Commissioner. In November 2017 Rachel Dixon was appointed as Privacy and

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Data Protection Deputy Commissioner. Joanne Kummrow is currently Acting Public Access Deputy Commissioner.

- The Information Commissioner's functions are detailed under the Freedom of Information Act 1982 and the Privacy and Data Protection Act 2014.
- The Deputy Commissioners' functions are set out under the FOI Amendment (OVIC) Act 2017, and the Privacy and Data Protection Act 2014. The functions of the Information Commissioner and each Deputy Commissioner overlap, however the functions of the Public Access Deputy Commissioner and Privacy and Data Protection Deputy Commissioner do not. Each Deputy holds the functions in their own right under their respective statues. There is no ability to appeal a deputy decision to the Information Commissioner.
- Former Victorian Privacy Commissioner David Watts has criticised the merging of the privacy and FOI functions, arguing that the model has caused 'dysfunction' in other jurisdictions and was lacking any substantial policy basis. He argued that:
 - In NSW the structure had led to conflict and intractable disputes, in Queensland the Privacy Commissioner position was not permanently filled for years, and that similar issues with Commonwealth legislation had led to significant turnover in the roles, with two of the three Commissioner roles not currently filled, and Information Commissioner currently the subject of an acting appointment.
 - The model may embed a conflict of interest into the administrative structure by combining privacy and data protection with FOI functions.
 - Victoria's information management framework is substantially different to those in other jurisdictions, as the *Privacy and Data Protection Act 2014* extends to all government information, not just personal information.⁴
 - As the Deputy Commissioners are administrative rather than statutory appointments, this would enable the Minister to easily suspend or remove the Deputies by a meeting of the Executive, which would undermine their independence. Similar concerns were raised in an article in the Mandarin.

Western Australia

There is currently still no legislative privacy regime in Western Australia.
 However the WA Attorney-General advised in late 2017 that the state was

⁶ https://www.themandarin.com.au/69088-privacy-commissioner-blasts-government-reform-proposal/

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⁴ https://www.cpdp.vic.gov.au/images/content/pdf/FOIB160816 1.pdf

⁵ https://www.cpdp.vic.gov.au/images/content/pdf/FOIB160816 1.pdf

planning to develop privacy legislation and 'actively talking to stakeholder groups'. He noted that because WA had no privacy legislation, other states were reluctant to grant WA access to their databases.⁷

The acting Information Commissioner is Catherine Fletcher, appointed under section 56 of the *Freedom of Information Act 1992* by the Governor. She has responsibility for freedom of information complaints and guidance. There is no Deputy or Assistant Commissioner role. We cannot find any information on who advises the Governor on the appointment.

⁷ https://thewest.com.au/news/wa/wa-moves-to-protect-data-ng-b88589690z

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Commissioner brief: FOI Bill report

Key messages

- On 22 August 2018, Senator Rex Patrick introduced the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 to the Senate.
- The Bill proposes a number of amendments to the FOI Act, including requiring the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner to be filled, allowing applicants to bypass the OAIC and go to the AAT if their review will take more than 120 days to finalise, preventing agencies from changing exemptions during IC review and requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter.
- The Bill was referred to a Senate Committee. The OAIC made a written submission to the Committee and I appeared at a hearing before the Committee to provide further evidence.
- On 30 November 2018, the Committee published its report recommending that the Senate not pass the Bill.

TRIM link for reference: Executive Brief on FOI Bill - D2018/015033

See also Com brief - FOI - IC review: <u>D2019/000843</u>

Critical facts

- On 22 August 2018, Senator Rex Patrick introduced the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 to the Senate. The Bill seeks to improve the effectiveness of FOI laws 'to address the considerable dysfunction that has development in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.'1
- The Bill proposes changes to the FOI Act, AIC Act and the Archives Act including:
 - requiring the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner to be filled. Preventing the IC from making FOI decisions if s/he does not hold legal qualifications.
 - preventing agencies publishing documents on their disclosure log until at least 10 days after the documents are released to the FOI applicant.
 - allowing applicants to bypass the OAIC and go to the AAT, or if the IC review will take more than 120 days, allowing the applicant to go to the AAT without paying the AAT application fee.
 - preventing agencies from changing exemptions during IC review.
 - requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter.
- On 23 August 2018, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry. The Committee received nine submissions, including one from the OAIC.
- At a public hearing on 16 November 2018, the Committee heard from the Law Institute of Victoria,
 Accountability Round Table, Transparency International, AGD, the OAIC, academics, and journalists
 from the ABC, The Saturday Paper and Buzzfeed Australia. The evidence (in submissions and at
 hearing) referred to lengthy delays in IC reviews. More sympathetic commentators saw this as a
 result of insufficient funding, however Michael McKinnon (ABC) and Senator Patrick were both critical
 of the way the OAIC deals with IC reviews.
- On 30 November 2018, the Committee published its report recommending that the Senate not pass the Bill. Senator Patrick and the Australian Greens presented dissenting reports.
- There has been criticism of the OAIC since the Bill's introduction, including in an article in The Australian on 7 January 2019 (Attachment 1), which notes comments made by Senator Patrick and

Explanatory Memorandum:

information about unallocated reviews and timeframes for finalising IC reviews, including that 'about 500 matters for review had not been allocated a case officer'. The article incorrectly refers to these reviews as 'sit[ting] idle'.

The OAIC employs an early resolution model in which it explores alternative resolutions with applicants and agencies. During the early resolution process the OAIC also requests copies of exempt documents and submissions. It is only if these early attempts to resolve reviews are not successful that cases are referred for allocation to a case officer. As mentioned in the article, only 284 of the 500 reviews were awaiting allocation to a case officer; the remainder were being progressed by the OAIC's early resolution team.

Possible questions

Many of the witnesses at the Senate Committee hearing spoke of a poor FOI culture among Australian Government agencies. Does the OAIC agree there is a poor culture and, if so, what is the OAIC doing to address this? The OAIC exercises its functions and powers to promote the objectives of the FOI Act and guides agencies in the discharge of their functions under the FOI Act by publishing agency resources, issuing FOI guidelines and making IC review decisions. The OAIC holds twice yearly Information Contact Officer Network information sessions at which we reinforce the value of providing access to government held information and the OAIC holds regular meetings with agencies. Through our enquiries line and at officer level the OAIC provides guidance to FOI staff in Australian Government agencies.

Key dates

- On 22 August 2018, the *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018* was introduced into the Senate.
- On 23 August 2018, the Senate referred the *Freedom of Information Legislation Amendment* (*Improving Access and Transparency*) *Bill 2018* to the Legal and Constitutional Affairs Legislation Committee for inquiry.
- On 16 November 2018, the Commissioner gave evidence to the Committee at a public hearing.
- The Committee published its report on 30 November 2018 recommending that the Senate not pass the Bill.
- On 7 January 2019, The Australian published an article 'Backlog of cases leaves senator livid at 'dysfunctional' OAIC', which notes comments by Senator Rex Patrick and data relating to unallocated matter and timeframes for finalisation of IC reviews. (Attachment 1)

Document history

Updated by	Reason	Approved by	Date
Raewyn Harlock	April 2019 Senate Estimates	n/a	01/02/2019

MEDIA ARTICLE:

Backlog of cases leaves senator livid at 'dysfunctional' OAIC

Senator Rex Patrick said correspondence from the OIAC late last month revealed about 500 matters for review had not been allocated a case officer. Picture: Gary Ramage Exclusive: Luke Griffiths Journalist @_LukeGriffiths 12:00AM January 7, 2019

Several hundred cases sit idle within the office tasked with adjudicating Freedom of Information disputes, raising the ire of a key crossbench senator who claims a lack of resources is stifling political debate.

Centre Alliance senator Rex Patrick said correspondence from the Office of the Australian Information Commissioner late last month revealed about 500 matters for review had not been allocated a case officer.

He said the lack of action was symptomatic of a dysfunctional system characterised by bureaucratic delays, obstruction and unacceptably long review processes.

The Coalition government has failed to appoint a FOI commissioner since 2014, when it moved to abolish the OAIC.

It has since cut the office's funding by \$1.6 million a year.

"Of what value is information if it is only made available well after the debate has passed," Senator Patrick said. "Perhaps it suits the government to have a clogged FoI system for now, but that may not be the case after the election when they may find themselves in opposition."

Excluding the 500 unallocated matters, the OAIC, which upon request reviews decisions made by government departments under the Freedom of Information Act, finalised 610 of the 801 applications it received last financial year.

Of those completed, almost 100 took longer than 12 months.

On average, it took 6.7 months to complete a review, up from 6.2 months in the previous period.

An OAIC spokeswoman said some matters had not been allocated a case officer because alternative resolutions were first being explored. "Of those IC review matters needing further detailed consideration, 284 are currently awaiting allocation to a case officer," she said. OAIC boss Angelene Falk last year said managing an increasing workload with fewer resource was "challenging".

Senator Patrick — dubbed "Inspector Rex" by Nick Xenophon because of his fondness for investigating issues via FoI — introduced a private member's bill in August aimed at making government more transparent and accountable.

During a recent Senate inquiry, Andrew Walter from the Attorney-General's Department conceded that there were "undoubtedly stresses" within the system.

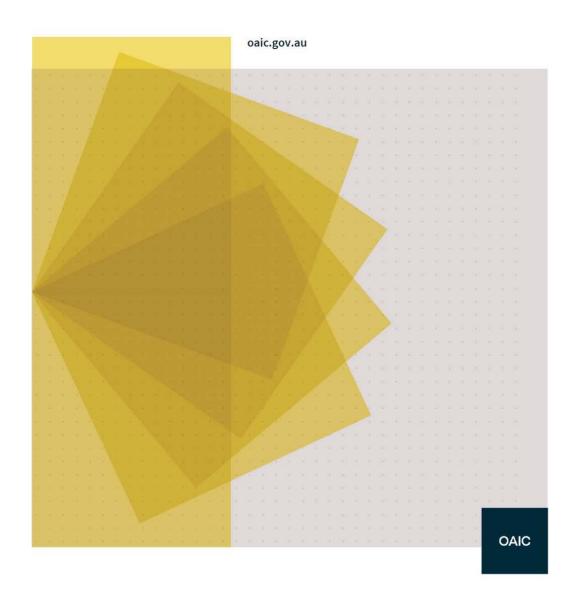
"The OAIC has coped well with an increased workload," he said. "However, of course, it's not clear that that will be sustainable in the long run."

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OAIC Submission

To the Senate Legal and Constitutional Affairs Legislation Committee – Inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018



Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 Submission 6

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OAIC Submission

Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to provide information to assist the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the Bill).

The Bill proposes a number of amendments to the *Archives Act 1983*, the *Australian Information Commissioner Act 2010* (AIC Act), and the *Freedom of Information Act 1982* (FOI Act).

The OAIC's role is to uphold the enforceable right of access to documents held by government agencies and ministers and the legislatively required proactive release of information by government agencies.

Through the development of resources, submissions, instruments, regulatory activities, education and engagement the OAIC supports the management of information held by the Government as a national resource. This objective is pursued through the exercise of the legislated functions in relation to FOI, privacy and information policy.

The OAIC's 2018-2019 Corporate Plan sets out how we promote and uphold information access rights under the FOI Act through promoting awareness and understanding in the community, developing the FOI capabilities of Australian Government agencies and ministers, promoting best practice, conducting Information Commissioner (IC) reviews, investigating FOI complaints and conducting Commissioner initiated FOI investigations.

This submission provides general information, to assist the Committee, in relation to the OAIC's regulatory role and functions, particularly in the context of its merits review function (IC reviews).

Further information about the way the OAIC discharges its regulatory functions under the FOI Act can be found in the OAIC's Freedom of Information Regulatory Action Policy¹, in the Guidelines issued by the Australian Information Commissioner under s 93A² (the FOI Guidelines), in particular Parts 10 (Review by the Information Commissioner)³ and 11 (Complaints and investigations)⁴ and in its Annual Reports.⁵

 $^{^{1}\,}https://www.oaic.gov.au/about-us/our-regulatory-approach/freedom-of-information-regulatory-action-policy/properties of the properties of the properti$

² All legislative references in this submission are to the FOI Act unless otherwise stated,

 $^{^3\,}https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner.$

 $^{^4\,}https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-11-complaints-and-investigations.$

⁵ https://www.oaic.gov.au/about-us/corporate-information/annual-reports/all/

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The OAIC's regulatory role

The OAIC is an independent statutory agency established under the AIC Act.

The OAIC has three functions:

- freedom of information functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the FOI Act
- privacy functions, conferred by the Privacy Act 1988 (Privacy Act) and other laws
- government information policy functions, conferred under the AIC Act.

The Australian Information Commissioner (Commissioner) has the power to perform all FOI regulatory functions. Under section 10 of the AIC Act, the Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

The FOI regulatory functions include to:7

- review FOI decisions of agencies and ministers (IC review) (Part VII)
- investigate complaints about agency actions relating to the handling of FOI matters (Part VIIB)
- issue guidelines under s 93A
- decide on extension of time applications by an agency or minister in relation to decisions on FOI
 requests
- decide on whether to make a vexatious applicant declaration to restrict a person's rights to make an FOI request or application following an application from an agency or minister or on the Commissioner's own motion
- determine that the requirement to publish information in a disclosure log does not apply to specified information
- oversee the Information publication scheme (IPS)
- raise awareness of FOI and educate Australians and agencies about their rights and obligations
- monitor agencies' compliance with the FOI Act
- · compile FOI data and assess trends,
- report and recommend to the Minister proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the FOI Act.

The OAIC has published a 'Freedom of information regulatory action policy'. This policy provides the Australian community and agencies and ministers with guidance on the approach of the OAIC to the exercise of FOI regulatory powers.

Agencies and ministers must also have regard to the Guidelines issued under s 93A (<u>FOI Guidelines</u>) in performing a function or exercising a power under the FOI Act.

In relation to the IC review function, agencies must comply with the 'Direction as to certain procedures to be followed in IC reviews', issued under s 55(2)(e)(i) (Procedure Direction).

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⁶ The AIC Act confers power on each of the three statutory positions, the Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner to do all things necessary or convenient to perform the freedom of information (FOI) functions defined in the AIC Act, ss 8, 10(2), 11(3) and 12(3)).

⁷ See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

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All IC review decisions made under s 55K are published. These are available through the <u>OAIC</u> <u>website</u> (as part of the Australian Information Commissioner (<u>AICmr</u>) series on the AustLII website).

The OAIC has published a range of other guidance materials to assist agencies and ministers in exercising their functions under the FOI Act. The OAIC has also published resources and other general information to assist members of the public to understand and promote their right to access information under the FOI Act. These documents are all available on the OAIC's website and include fact sheets that provide a general overview about particular topics of relevance to members of the public, and animated videos about access rights under the FOI Act.

The IC review function

A number of the proposed amendments in the Bill relate to the IC review function of the OAIC. The following information is intended to provide the Committee with information about this function, including statistical information.

IC reviewable decisions

A person (including a natural person, body politic or corporation) who disagrees with an agency or minister's decision received on a request for access to a document or for amendment or annotation of personal records may apply to the Commissioner for review of that decision under Part VII of the FOI Act. A person does not have to apply for internal review with the agency before seeking IC review. However, the Commissioner considers that it is usually better for a person to seek internal review of an agency decision before applying for IC review.8

The Commissioner can review the following decisions by an agency or minister:

- an 'access refusal decision' (s 54L(2)(a))
- an 'access grant decision' (s 54M(2)(a))
- a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
- an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b))
- a decision that is deemed to have been made by an agency or minister where the statutory timeframe was not met.⁹

Principles of the IC review process

Review by the Commissioner of decisions about access to government documents is designed around four key principles:¹⁰

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.

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⁸ FOI Guidelines [10.2].

⁹ FOI Guidelines [10.3]-[10.4].

¹⁰ FOI Guidelines [10.15].

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Merit review

Review by the Commissioner is a merit review process. The Commissioner does not simply review the reasons given by the agency or minister, but determines the correct or preferable decision in the circumstances. The Commissioner can access all relevant material, including material that the agency or minister claims is exempt.

The Commissioner can also consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. For example, for the purpose of deciding whether a document requested by an applicant is conditionally exempt, the Commissioner can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest.¹¹

If the Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the Commissioner may decide that a document is not an exempt document under the FOI Act or that an access charge was not correctly applied.¹²

An informal process

IC reviews are intended to be a simple, practical and cost-efficient method of external merit review. This is consistent with the objects of the FOI Act, which provides that functions and powers are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4) of the FOI Act). ¹³

Consistent with the object of prompt and cost-effective access to information, most matters will be reviewed on the papers rather than through formal hearings. The Commissioner has formal information gathering powers (see Division 8 of Part VII), however documents are usually requested from agencies without the need to invoke those provisions. Where required, the OAIC can use powers to compel agencies that do not cooperate with requests by the OAIC.

Non-adversarial

Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Commissioner to make the correct or preferable decision in relation to access to information held by the Government. The OAIC also encourages all parties to minimise their use of legal representation in IC review proceedings, to reduce formality and costs.¹⁵

Timely

The IC review process is intended to be efficient and lead to resolution as quickly as possible.

In order to facilitate the efficient and timely resolution of IC reviews, a case officer may provide the parties with a preliminary view on the merits of the application after review of the documents at issue and conduct conferences between the parties.¹⁶

¹¹ FOI Guidelines [10.16].

¹² FOI Guidelines [10.17].

¹³ FOI Guidelines [10.18].

¹⁴ FOI Guidelines [10.20].

¹⁵ FOI Guidelines [10.21]-[10.22].

¹⁶ FOI Guidelines [10.21]-[10.23].

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The Commissioner may also decide to expedite the conduct of an IC review application in response to a request from the IC review applicant or as a result of identifying individual applications that involve factors that warrant expedition.¹⁷

Onus

In an IC review of an access refusal decision, the agency or minister has the onus of establishing that the decision is justified or that the Commissioner should give a decision adverse to the IC review applicant (s 55D(1)).

In an IC review of an access grant decision, the affected third party has the onus of establishing that a decision refusing the request is justified or that the Commissioner should give a decision adverse to the person who made the request (s 55D(2)).¹⁸

How the Commissioner may finalise an IC review

The Commissioner may finalise an IC review by:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake a IC review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).

Reviewing an IC reviewable decision

IC review officers manage the application for review, including undertaking the preliminary assessment of the merits of the decision after reviewing the documents in dispute.

At any stage during an IC review, an agency or minister may revoke or vary an access refusal decision to favour the applicant.¹⁹ Where an agency or minister no longer contends that material is exempt or has identified further material within the scope of a request during an IC review, a revised decision under s 55G facilitates the prompt release of further material to the applicant.²⁰ A revised decision does not automatically conclude the IC review and the revised decision will be the decision under review. The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.²¹

At any stage during an IC review, the Commissioner (or delegate) may also resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Before making the decision, the Commissioner (or delegate) must be satisfied that the terms of the written agreement would be within the powers of the Commissioner and that all parties have agreed to the terms.²²

If the parties do not reach agreement, and unless the IC review applicant withdraws their application under s 54R, the Commissioner must make a decision after conducting a merit review

¹⁷ FOI Guidelines [10.24].

¹⁸ FOI Guidelines [10.13]-[10.14].

¹⁹ FOI Guidelines [10.67].

²⁰ FOI Guidelines [10.68].

²¹ FOI Guidelines [10.70]

²² FOI Guidelines [10.123].

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of the matter under s 55K. The Commissioner has the power to affirm vary or set aside the decision of the agency or minister.²³ The final decision on a review under s 55K is non delegable.²⁴

An agency or minister must comply with an IC review decision (s 55N). If an agency or minister fails to comply, the Commissioner or the review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)).25

Deciding not to review an IC reviewable decision

The Commissioner (or delegate) has the discretion not to undertake an IC review, or not to continue an IC review if:

- the applicant fails to comply with a direction by the Commissioner (s 54W(c)), or
- the Commissioner is satisfied that: a) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; (b) the review applicant has failed to cooperate in progressing the application or review without reasonable excuse; or (c) the Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a)).
- the Commissioner is satisfied the decision should be considered by the AAT (s 54W(b).

Under s 54W(b), the Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application.

Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.

The OAIC consults the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.26

Statistics

The OAIC has experienced an increase in the numbers of IC review applications received from 2015-

The OAIC has met its key performance indicator of finalising 80% of IC reviews within 12 months of receipt since 2015-16.27 This is in part due to the implementation of early resolution processes which seek to resolve IC review applications or narrow the issues in contention at an early stage of

²³ FOI Guidelines [10.124].

²⁴ FOI Guidelines [10.83].

²⁵ FOI Guidelines [10.132].

²⁶ FOI Guidelines [10.88].

²⁷ The target timeframe for completion of IC reviews changed from 80% completed within 6 months to 80% completed within 12 months in 2013-14.

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the case management process. The tables below indicate how and in what timeframes IC reviews have been finalised since 2011-12.

In 2018-19 the OAIC will continue to develop and implement refinements to its early resolution and case management processes, to meet the objectives of providing an informal, non-adversarial and timely review process. ²⁸ The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently.

The following tables provide a statistical overview of IC review applications received, finalised and the outcome of applications for 2011-17.

Table 1: Overview of IC review applications received and finalised

2011-12 456	2012-13 507	2013-14 524	2014-15 373	2015-16 510	2016-17
456	507	524	373	510	632
253	419	646	482	454	515
25	89	98	128	80	104
238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)
	238	238 330	238 330 548	238 330 548 354	238 330 548 354 374

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
within 120 days	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)
within 6 months	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)
within 9 months	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)
within 12 months	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)
over 12 months	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)
Total	253	419	646	482	454	515

²⁸ See the OAIC's 2018-19 Corporate Plan page 30. Available at <u>www.oaic.gov.au</u>

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Table 3: Overview of IC review outcomes

IC Review Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34
s 54R – withdrawn	108	95	111	59	81	115
s 54R – withdrawn / conciliated	н	13	71	51	78	93
s 54W(a) – deemed acceptance of PV / appraisal	×	2	27	26	7	0
s 54W(a)(i) – lacking in substance, misconceived etc	42	86	170	87	94	66
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57
s 54W(a)(iii) – lost contact	9	9	0	5	5	3
s 54W(b) – refer AAT	22	17	41	61	32	15
s 54(c) – failure to comply	8	2	0	0	0	0
s 55F – set aside by agreement	일	0	1	0	2	7
s 55F – varied by agreement	2	0	1	2	7	5
s 55F – affirmed by agreement	¥	0	1	2	1	1
s 55 G – substituted	н	7	6	5	16	15
s 55K – affirmed by IC	17	58	32	48	28	48
s 55K – affirmed by IC following revised decision	8	œ	8	5	11	17
s 55K – set aside by IC	8	28	53	52	22	23
s 55K – varied by IC	0	3	5	23	19	16
	253	419	646	482	454	515

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The proposed amendments

Below is information to assist the Committee in relation to particular aspects of the Bill's proposed amendments to the AIC Act and the FOI Act. The items are found in Schedule 1 of the Bill.

Items 2 and 3: Qualification of Commissioners

In relation to Schedule 1; Items 2 and 3 of the Bill, the AIC Act provides that the Information Commissioner and the Privacy Commissioner, as well as the Freedom of Information Commissioner, have the freedom of information functions which are set out in section 8 of the AIC Act and include reviewing decisions under Part VII of the FOI Act. However certain functions and powers of the FOI Commissioner may only be undertaken with the approval of the Information Commissioner, such as the issuing, variation or revocation of the FOI Guidelines.²⁹

Under the AIC Act there is no requirement for the Information Commissioner or Privacy Commissioner to have legal qualifications. Since 2010 the Information Commissioner and the Privacy Commissioner have exercised the FOI functions including making IC review decisions.

Item 4: Appointment of Commissioners

Schedule 1; Item 4 of the Bill provides that all three statutory Commissioner roles are filled separately.

Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Australian Information Commissioner and Privacy Commissioner for a three year term.

Under section 10 of the AIC Act, the Information Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

As the Australian Information Commissioner Ms Falk performs the freedom of information functions

Item 8: Preventing agencies from publishing information released under FOI for at least 10 days

In relation to Schedule 1; Item 8 of the Bill, under the FOI Act agencies and ministers must publish information that has been released in response to each FOI access request, subject to certain exceptions (s 11C). This publication is known as a 'disclosure log'.³⁰

The FOI Act requires agencies and ministers publish this information within ten working days of giving the FOI applicant access to the information (s 11C(6)).³¹

Item 8 of the Bill would require information to be published on a disclosure log to occur within the window of 10-14 working days from the date access is provided to the FOI applicant. This is a narrower period of time in which to comply.

²⁹ See section 11(4) AIC Act

³⁰ FOI Guidelines [14.1].

³¹ FOI Guidelines [14.6].

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The issue of the timing of publication of documents on a disclosure log was considered by the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke Report).³² The Hawke Report recommended that there should be a period of five working days before documents released to an applicant are published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.

The FOI Guidelines provide guidance which seeks to appropriately achieve the balance between the pro-disclosure and equal public access objects of the FOI Act and individual circumstances.³³

Item 10: Entitling Senators and Members access to documents without charge unless the charge exceeds \$1000

In relation to Schedule 1; Item 10 of the Bill, information about the FOI Charges framework is set out in s 29 of the FOI Act and in the Freedom of Information (Charges) Regulations 1982 (Charges Regulations).³⁴

The OAIC considers that the proposal risks a fragmented approach to the application of charges, absent a fuller consideration. In 2011 the inaugural Australian Information Commissioner, Professor John McMillan, undertook a substantial review of the charges under the FOI Act and a report was published in February 2012.³⁵

The OAIC's guidance on the exercise of the discretion to impose a charge is set out in Part 4 of the FOI Guidelines and summarised below. The FOI Guidelines also contains guidance on matters to be taken into account in determining whether or not to reduce or waive a charge, including whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.²⁶

Guiding principles from the FOI guidelines:

An agency or minister's decision to impose or not impose a charge, or to impose a charge that is lower than the applicable charge is discretionary. The FOI Guidelines advise agencies and ministers that in exercising that discretion, the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects of the FOI Act (s 3(4)).³⁷

Agencies and ministers should interpret the 'lowest reasonable cost' objective broadly in imposing any charges under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency to process the request, it would generally be more appropriate not to impose a charge. In assessing the costs of calculating and collecting a charge, agencies should also take into account the likely

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³² The Hawke Report published in July 2013 is available at:

³³ FOI Guidelines [14.27]

³⁴ FOI Guidelines [4.1].

³⁵ Review of charges under the Freedom of Information Act 1982: Report to the Attorney-General February 2012 available at https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982

³⁶ Section 29(5)(b) FOI Act and FOI Guidelines [4.79-4.87]

³⁷ FOI Guidelines [4.3].

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costs that may be incurred by the agency, as well as other review bodies, if the applicant decides to seek further review.³⁸

The objects of the FOI Act guide the following principles relevant to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.
- Charges should fairly reflect the work involved in providing access to documents on request.
- Charges are discretionary and should be justified on a case by case basis.
- Agencies should encourage administrative access at no charge, where appropriate.
- Agencies should assist applicants to frame FOI requests.
- Agencies should draw an applicant's attention to opportunities available to the applicant
 outside the FOI Act to obtain free access to a document or information (s 3A(2)(b)).
- A decision to impose a charge should be transparent.³⁹

Item 11: Preventing agencies from making additional exemption claims during the course of IC reviews

Schedule 1; Item 11 of the Bill would prevent further exemptions being raised during the course of an IC review. The Commissioner undertakes merits review of agency FOI decisions. During the review process, agencies may make submissions about any relevant exemption claimed over particular material subject to the FOI request, including any exemption not originally put forward in the initial decision.⁴⁰ The Commissioner will take the submissions of both parties into account and afford both parties procedural fairness when making a decision, which must be the correct or preferable decision at the time of the Commissioner's decision.

In an IC review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.

When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted.

³⁸ FOI Guidelines [4.4].

³⁹ FOI Guidelines [4.5]

⁴⁰ The IC review process is a full merits review process and the Commissioner may affirm, vary or set aside and substitute a decision (s 55K(1) however the Commissioner cannot decide to provide access to a document that it is established in the IC review proceeding is exempt (s 55L)).

Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 Submission 6

OAIC Submission

Item 12: Allowing applicants to seek AAT review during the course of an IC review

Schedule 1; Item 12 of the Bill provides for matters to be transferred from the OAIC to the AAT where the OAIC notifies the review applicant that it will take longer than 120 days to decide the matter or more than 120 days has passed since the application was made.

In general IC review applications are finalised 'on the papers', without the need for a formal hearing. The Commissioner has broad powers to finalise IC review applications in a number of ways. These include by agreement with the applicant (s 55F) in addition to an IC review decision under s 55K. Agencies also have the discretion to make a revised decision that is more favourable to the applicant during the IC review process (s 55G).

The number of IC reviews finalised within 120 days by the OAIC as a percentage of all IC reviews finalised was 39% in 2011-2012 (100 IC reviews), and 38% in 2016-17 (198 IC reviews). As set out above, the OAIC has met its key performance indicator of finalising 80% of IC review applications within 12 months since 2015-16. The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently. The OAIC considers that s 54W(b) of the FOI Act provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 13: Allowing applicants to appeal directly to the AAT

Schedule 1; Item 13 of the Bill provides that applicants can elect to have their matter bypass the Commissioner to go directly to the Administrative Appeals Tribunal (AAT).

Under the FOI Act an application can be made to the AAT for 2nd tier merit review if the Commissioner makes a decision under s 55K or if a decision is made under s 54W(b) to enable the applicant to go direct to the AAT (ie, if it is in the interests of the administration of the FOI Act).

Table 3 sets out the number of referrals made to the AAT under s 54W(b) by the OAIC. The OAIC considers that this provision provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 16: Publication of external legal expenses for FOI reviews

In relation to Schedule 1; Item 16 of the Bill, section 93 of the FOI Act requires agencies to provide the Commissioner with information on 'freedom of information matters' for inclusion in the OAIC's annual report.

Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed.

Summary details of these costs are published in the OAIC annual reports.

The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: www.data.gov.au.

14 oaic.gov.au Legal and Constitutional Affairs
Legislation Committee

Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

November 2018

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Recommendations

Recommendation 1

2.91 The committee recommends that the Senate not pass the bill.

Chapter 1

Introduction

1.1 On 23 August 2018, the Senate referred the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 30 November 2018.¹

Purpose of the bill

1.2 The bill was introduced in the Senate by Senator Rex Patrick, who explained that the primary purpose of the bill 'is to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law.' Senator Patrick outlined the issues within the Freedom of Information (FOI) system, which the bill aims to resolve:

These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.³

1.3 Additionally, Senator Patrick notes that the bill 'seeks to restore the Office of the Australian Information Commissioner (OAIC) with the appointment of three independent Commissioners as was the intention of the Parliament.¹⁴

Office of the Australian Information Commissioner

1.4 The OAIC is an independent statutory agency established under the *Australian Information Commissioner Act 2010* (AIC Act). It is headed by the Australian Information Commissioner (Information Commissioner) and is supported by the Privacy Commissioner and FOI Commissioner.

Functions

- 1.5 The OAIC has three functions:
- FOI functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the *Freedom of Information Act 1982* (FOI Act);
- Privacy functions, conferred by the *Privacy Act 1988* to ensure the proper handling of personal information in accordance with the Privacy Act and other legislation; and

¹ Journals of the Senate, No. 113, 23 August 2018, p. 3606.

² Senator Rex Patrick, Senate Hansard, 22 August 2018, p. 5572.

³ Senator Rex Patrick, Senate Hansard, 22 August 2018, p. 5572.

⁴ Senator Rex Patrick, Senate Hansard, 22 August 2018, p. 5572.

 Information Commissioner functions, conferred under the AIC Act relating to information policy and practice in the Australian Government.⁵

Background of the Office of the Australian Information Commissioner

- 1.6 The OAIC commenced operations on 1 November 2010. At the same time, the former Office of the Privacy Commissioner was integrated into the OAIC.
- 1.7 While the AIC Act allows for the appointment of three statutory office holders for each of its functions, it also allows for the Privacy Commissioner to perform the functions of the FOI Commissioner, and vice versa. Additionally, the Information Commissioner can also perform the functions of the FOI Commissioner and the Privacy Commissioner.
- 1.8 When the OAIC first commenced operations, separate Commissioners were appointed for each of its functions.⁹
- 1.9 On 13 May 2014, the government announced that it would disband the OAIC by 1 January 2015. The Freedom of Information Amendment (New Arrangements) Bill 2014, was introduced in the House of Representatives on 2 October 2014, which sought to:
 - · repeal the AIC Act, including abolition of the OAIC; and
 - amend the FOI Act and Privacy Act and related laws. ¹¹
- 1.10 The 2014 bill was not passed by the Senate, and subsequently lapsed at prorogation of the 44th Parliament, on 17 April 2016. ¹² However, in anticipation of the abolition of OAIC, its funding was reduced. According to the Accountability Round Table, 'the OAIC's FOI function was halved.' ¹³
- 1.11 Following the Government's announcement to disband the OAIC, the former FOI Commissioner, Dr James Popple, resigned in December 2014, followed by the resignation of the former Information Commissioner, Professor John McMillan, in

⁵ Office of the Australian Information Commissioner, Annual Report 2010–11, p. 5.

⁶ Office of the Australian Information Commissioner, Annual Report 2010-11, p. v.

⁷ Office of the Australian Information Commissioner, Annual Report 2010–11, p. v.

⁸ Office of the Australian Information Commissioner, Submission 6, pp. 3-4.

⁹ Office of the Australian Information Commissioner, Annual Report 2010–11, p. 5

¹⁰ www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic (accessed 12 November 2018).

¹¹ www.aph.gov.au/Parliamentary Business/Bills LEGislation/Bills Search Results/ Result?bId=r5350 (accessed 12 November 2018).

¹² www.aph.gov.au/Parliamentary Business/Bills LEGislation/Bills Search Results/ Result?bId=r5350 (accessed 12 November 2018).

¹³ Accountability Round Table, Submission 2, p. 2.

June 2015. 14 The former Privacy Commissioner, Mr Timothy Pilgrim, was subsequently appointed to the role of Information Commissioner. He continued in his roles as Information Commissioner and Privacy Commissioner, while also performing the function of FOI Commissioner, until his retirement in March 2018. 15

1.12 Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Information Commissioner and Privacy Commissioner for a three year term. Currently, the functions of the FOI Commissioner are being performed by Ms Falk as the Information Commissioner and the Privacy Commissioner.

Reviewing FOI decisions

- 1.13 Applicants who disagree with an agency or minister's decision relating to an FOI request for information, may apply to the Information Commissioner for review of that decision under Part VII of the FOI Act. ¹⁶ The OAIC noted that while an FOI applicant does not have to apply for an internal review before applying for a review by the Information Commissioner, it considers it best practice for an applicant to to so. ¹⁷
- 1.14 The OAIC explained that Information Commissioner reviews are based on four key principles:
 - it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
 - it is intended to be as informal as possible
 - · it is intended to be non-adversarial, and
 - it is intended to be timely.¹⁸
- 1.15 The OAIC outlined the ways in which an Information Commissioner review may be finalised:
 - accepting a written agreement between the parties (s 55F),
 - making a written decision under s 55K,
 - deciding not to undertake an [Information Commissioner] review if satisfied that certain grounds exist (s 54W), or
 - receiving a written notice from the applicant withdrawing the application for review (s 54R). 19

¹⁴ Mr Richard Mulligan, The slow death of the Office of the Australian Information Commissioner, Sydney Morning Herald, 26 August 2015, https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html (accessed 12 November 2018).

¹⁵ Attorney-General's Department, Submission 3, p. 2.

¹⁶ Office of the Australian Information Commissioner, Submission 6, p. 5.

¹⁷ Office of the Australian Information Commissioner, Submission 6, p. 5.

¹⁸ Office of the Australian Information Commissioner, Submission 6, p. 5.

¹⁹ Office of the Australian Information Commissioner, Submission 6, p. 6.

1.16 Additionally, the Information Commissioner, or their delegate, may exercise discretion to not undertake an Information Commissioner reivew pursuant to one of the grounds outlined in section 54W of the FOI Act.²⁰ One of the discretionary grounds is where the Information Commissioner is satisfied that the decision should be considered by the Administrative Appeals Tribunal (AAT).²¹

Key provisions of the bill

1.17 As outlined in the Explanatory Memorandum, the provisions of the bill would amend the AIC Act, the FOI Act, and the *Archives Act 1983* (Archives Act). The key provisions of the bill are summarised below.

Australian Information Commissioner Act 2010

Legal qualifications

1.18 New subsections 10(3) and 12(2) would prohibit the Information Commissioner and Privacy Commissioner, respectively, from reviewing decisions under Part VII of the FOI Act, unless they hold legal qualifications.

Appointment of three separate Commissioners

1.19 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the AIC Act, while item 6 of the bill clarifies that 'the same person must not simultaneously hold more than one appointment (including an acting appointment).' Additionally new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

Freedom of Information Act 1982

Requirement to publishing information between 10 to 14 days

1.20 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 and 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public.

Charges

1.21 Charges related to FOI requests are covered in changes to paragraph 29(1)(d) and a new subsection 29(5A). Of particular note, new subsection 29(5A) would exempt Senators and Members of the House of Representatives from charges unless the work generated totals more than \$1000. The proposed exemption for Senators and Members is designed to support greater parliamentary scrutiny of public administration.

²⁰ Office of the Australian Information Commissioner, Submission 6, p. 8.

²¹ Subsection 54W(b) of the FOI Act, Office of the Australian Information Commissioner, Submission 6, p. 8.

Consistent application of exemptions

1.22 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review.

Referral to the AAT

- 1.23 Item 12 of the bill deals with referrals to the AAT where an Information Commissioner review has taken, or is likely to take, 120 days or longer to finalise. New sections 55JA require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to tranfer their review to the AAT at no charge to the applicant.
- 1.24 Separately, item 13 of the bill would allow an applicant to apply to the AAT for review of any Information Commissioner review, without first having the matter reviewed by the Information Commissioner. The Explanatory Memorandum states that 'an applicant taking this option would pay the usual fee for an application to the AAT.'²²

Reporting of external legal expenses

1.25 New section 93AA covers the reporting of legal fees in agencies' annual reports, including listing each request made under section 15 of the FOI Act.

Transitional rules

1.26 Subitem 17(1) would allow the Attorney-General to make disallowable legislative instruments (transitional rules) for current applications. Subitem 17(2) confirms that certain significant matters (such as the creation of an offence or civil penalty) may not be included in the transitional rules. ²³

Archives Act 1983

- 1.27 The bill proposes to amend the *Archives Act* to require the reporting of external legal expenses incurred by the National Archives of Australia. Under new section 55B, expenses published must include external legal expenses incurred:
 - in making an initial decision in relation to an application for access to a record;
 - as part of an internal reconsideration of a decision under section 42 of the Archives Act;
 - as part of a review by the AAT of a decision by the Archives; and

²² Explanatory Memorandum, p. 6.

²³ Explanatory Memorandum, p. 7.

as part of an appeal to the Federal Court of Australia from a decision of the AAT.²⁴

Consideration by other Parliamentary committees

- 1.28 The Senate Standing Committee for the Scrutiny of Bills provided no comment on the bill. 25
- 1.29 The Parliamentary Joint Committee on Human Rights stated that the bill does not raise human rights concerns. ²⁶

Conduct of this inquiry

- 1.30 In accordance with usual practice, the committee advertised the inquiry on its webpage and also wrote to various organisation and individuals inviting written submissions by 24 September 2018.²⁷ The committee received nine submissions, as listed at Appendix 1, and which are available on the committee's webpage.
- 1.31 The committee held a public hearing in Canberra on 16 November 2018. Details of the public hearing are provided at Appendix 2. Questions on notice and other material received by the committee are listed at Appendix 1.

Structure of this report

- 1.32 This report consists of two chapters:
- This chapter provides an overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters and witnesses, as well as providing the committee's views and recommendation.

Acknowledgements

1.33 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

²⁴ Explanatory Memorandum, pp. 2–3.

²⁵ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 10 of 2018, 12 September 2018, p. 10.

²⁶ Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report 9 of 2018, 11 September 2018, p. 22.

²⁷ The committee's website can be found at www.aph.gov.au/Parliamentary Business/Committees/Senate/Legal and Constitutional Affairs.

Chapter 2

Key issues

- 2.1 A number of key issues were raised by submitters and witnesses concerning the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill). These issues included:
- Australian Information Commissioner Act 2010 (AIC Act)
 - the resourcing of the Office of the Australian Information Commissioner (OAIC)
 - the requirement to appoint three separate Commissioners
 - · the requirement that Commissioners have legal qualifications
- Freedom of Information Act 1982 (FOI Act)
 - encouraging a pro-disclosure culture
 - the requirement that information be published within 10 to 14 working days
 - preventing agencies from relying on additional exemption grounds during the course of Information Commissioner reviews
 - allowing for referrals to the Administrative Appeals Tribunal (AAT)
 - exempting Senators and Members from charges under \$1000, and
- the reporting of external legal expenses under the FOI Act and the Archives Act 1983 (Archives Act).
- 2.2 This chapter will outline the above issues and provide the committee's views and recommendation on the bill.

Australian Information Commissioner Act 2010

Resourcing of the OAIC

2.3 A number of submitters suggested that the reduction of funding to OAIC in 2014–15, in anticipation of its closure, was an area of concern. Witnesses echoed this concern at the hearing, and concluded that the reduced funding had resulted in delays in the FOI system. For example, the Law Institute of Victoria stated:

The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage. The

¹ Accountability Round Table, Submission 2, pp. 2–4; Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, Submission 4, p. 4-6, Mr Peter Timmins, Submission 7, p. 2, Transparency International Australia, Submission 8, p. 3.

Law Institute of Victoria is also concerned that the government sought to abolish the Office of the Australian Information Commissioner in 2014, and, since that time, has failed to restore the funding levels to the previous levels experienced.²

2.4 While the Attorney-General's Department (the department), acknowledged that funding to the OAIC was reduced, it also explained that the OAIC's funding has since been largely restored:

As part of the 2014–15 Budget measure there were expected to be savings of \$3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of \$2m per year was returned to the OAIC budget from those \$3.6m of savings. The \$1.6m which was not returned reflected streamlined arrangements that had been put in place by the OAIC to manage its workload, particularly in the area of FOI.³

- 2.5 However, the department recognised that the OAIC experiences 'ongoing stresses' due to an increase in the number of applications made to the OAIC.⁴
- 2.6 The Information Commissioner and Privacy Commissioner, Ms Angelene Falk, tabled the following statistics:

Table 1: Overview of IC review applications received and finalised

Туре	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews received	456	507	524	373	510	632	801
IC reviews finalised	253	419	646	482	454	515	610
IC reviews where s 55K decision made	25	89	98	128	80	104	123
IC reviews finalised without s 55K decision being made	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)	487 (79.84%)

2.7 Ms Falk confirmed that in 2017–18, the OAIC received 801 applications for Information Commissioner reviews, which is a 27 per cent increase from the previous financial year. ⁵ Furthermore, the OAIC had experienced similar increases of requests

² Ms Fiona McLeod SC, Chair, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 1.

³ Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

⁴ Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, Committee Hansard (Proof), 16 November 2018, p. 29.

⁵ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 34

for Information Commissioner reviews in the last three years. ⁶ These figures appear to support the department's view that the OAIC experiences 'ongoing stresses' due to the number of applications it receives.

- 2.8 However, Ms Falk also noted that the number of Information Commissioner reviews finalised in 2017–18, also increased by 18 per cent. Additionally, the table shows that the total number of Information Commissioner reviews finalised in 2017-18 was the second highest, and that only in 2013–14 were more reviews finalised.
- 2.9 When asked whether there needed to be more resources at both the early resolution stage, as well as at a later stage, to enable more Information Commissioner reviews to be finalised earlier, Ms Falk stated:

At this point in time, that's not what I'm seeing. I'm seeing that where I need to focus is on working with government to increase the offices resources to increase the capacity at the case-officer level and potentially, the executive level. If that were to be increased and then have a flow-on effect to more Information Commissioner reviews being required of the commissioner and that being something that's not manageable within other functions then that would be something that I would bring to the attention of government.⁸

2.10 Ms Falk went on to say:

...at this time, I consider that it's working in a way that's effective and, should that change, then that would be something that I would bring to the attention of government. The increased work of the OAIC right across all our functions is something that, as I say, we're very closely monitoring. In the three months since my appointment to the commission it has been a key focus of my tenure.⁹

Requiring the appointment of three separate Commissioners

- 2.11 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the Act, while new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.
- 2.12 The Explanatory Memorandum provides a rationale for the proposed change:

While on its face section 14 of the AIC Act makes it clear that there should be three separate commissioners, the functions of the Freedom of Information Commissioner are currently being performed by the Australian Information Commissioner and Privacy Commissioner. Subsection 14(5) removes any doubt and clarifies that there is to be a

⁶ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 34.

⁷ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 34.

⁸ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 40.

⁹ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 40.

separate Australian Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner.¹⁰

2.13 A number of witnesses agreed that the AIC Act already requires three separate appointments as this was the intention of the Parliament of the day. ¹¹ However, according to the department, 'there is no legal impediment to the appointment of a single person' to the three Commissioner roles. ¹² The department went on to explain:

...the department's view is that it is open to the government to appoint only one commissioner. We think that the organisation can't effectively function without an information commissioner, so that one has to be in place. However, we think it would be perfectly open on the construction of the legislation to not have those other two positions filled. The government has decided to fill the privacy commissioner role. I might just contrast that with some other legislative schemes. I mentioned in my opening statement, for example, the Administrative Review Council. Once it falls below a certain number of appointments, it can no longer function. The parliament clearly didn't contemplate that. It contemplated a scheme where it could function with only one, even if it did provide for the establishment of the three. ¹³

- 2.14 A number of submitters were supportive of the proposed amendment, suggesting that the appointment of three separate Commissioners had worked successfully in the past, and noting that a similar model is adopted in state governments as well as overseas jurisdictions. ¹⁴ Transparency International Australia stated that it supported this measure, provided the three Commissioners 'are also individually adequately resourced so that they can effectively perform their separate functions. ¹⁵
- 2.15 Dr David Solomon AM, Director of the Accountability Round Table, argued that having one person perform three roles was placing too much burden on that individual:

The functions that each of the three have are different. They are complex. The Information Commissioner has additional functions outside or on top of FOI in terms of general information policy and so on, and particularly additional functions under the national action plan and so on. There is more than enough work to have three people separately perform these functions,

¹⁰ Explanatory Memorandum, p. 3.

¹¹ Ms Lara Freidin, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria, Committee Hansard (Proof), 16 November 2018, p. 6.

¹² Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, Committee Hansard (Proof), 16 November 2018, p. 28.

¹³ Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, Committee Hansard (Proof), 16 November 2018, p. 31.

¹⁴ Accountability Round Table, Submission 2, p. 6 and Transparency International Australia, Submission 8, p. 3.

¹⁵ Transparency International Australia, Submission 8, p. 4.

and requiring one person to do all three is putting a burden on them which really is absolutely unrealistic. 16

2.16 In contrast, the OAIC and the department did not consider this amendment necessary, noting that 'the OAIC has been operating efficiently with a single person ... since July 2015.¹⁷ Ms Falk reiterated this view at the hearing:

I consider that, from the perspective of the one-commissioner model, that's functioning effectively at this time, and that's something that I will continue to review and, if necessary, advise government on. ¹⁸

2.17 In support of her view that one individual could effectively perform the functions of three Commissioners, are the figures provided at table 1, and particularly, row 3 of the table (the full table is available above).

Row 3 of table 1: Overview of IC review applications received and finalised

Туре	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews where s 55K decision made	25	89	98	128	80	104	123

- 2.18 Ms Falk explained that a 's 55K' decision is a final decision that is made if the alternative dispute resolution or other mechanisms has not resolved the review. ¹⁹ Section 55K decisions are decisions that are made by the Information Commissioner and are non-delegable, and therefore must be made by Ms Falk. ²⁰
- 2.19 As noted in chapter 1, Dr James Popple resigned as FOI Commissioner in December 2014 and Professor John McMillan resigned as Information Commissioner in June 2015. Since this time, the OAIC has operated with one individual performing the functions of all three Commissioners. According to the table, the three periods which recorded the highest number of section 55K decisions being completed, were in 2014–15 (128 decisions), 2017–18 (123 decisions) and 2016–17 (104 decisions).
- 2.20 The committee notes that during all three periods, the OAIC was operating with less than three Commissioners. Based on the figures provided at row 3 of table 1, it is difficult to conclude that the effective operation of OAIC has suffered, due to having one individual performing the roles of three Commissioners.

¹⁶ Dr David Solomon AM, Director, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 5.

¹⁷ Attorney-General's Department, Submission 3, p. 3. See also Office of the Australian Information Commissioner, Submission 6, p. 11.

¹⁸ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 34.

¹⁹ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 35.

²⁰ Office of the Australian Information Commissioner, Submission 6, p. 13.

Legal qualifications

2.21 Most submissions were supportive of the requirement for the Privacy Commissioner and Information Commissioner to hold appropriate legal qualifications when reviewing FOI decisions, and raised concerns that the previous Information Commissioner did not hold such qualifications. ²¹ For example, the Law Institute of Victoria stated:

The [Law Institute of Victoria] believes that the FOI Commissioner should always have the appropriate legal qualifications to engage in the complex legal decision-making required to perform the functions of the FOI Commissioner. The functions of the FOI Commissioner should not be performed by another statutory officer in order to avoid the requirement that the FOI Commissioner must have appropriate legal qualifications.

The [Law Institute of Victoria] is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications. ²²

2.22 Ms McLeod provided some background as to why it was considered necessary for the FOI Commissioner to hold legal qualifications:

I understand the intention in introducing those qualification requirements was to assist in the review process for claims of exemption, so that there was a person with understanding, or the qualifications to understand, the law and its application. So let's just take an area where there are frequent claims of exemptions, like national security, or perhaps public interest immunity, legal professional privilege: they're things that require the person viewing the exemptions to understand how the law works, what the law is and how the law is applied in practice, and to be abreast of developments and authority on those matters. It would appear logical that, even with a very experienced public servant acting in the role, you would need to have that capacity and that ability. ²³

2.23 However, the department did not support this view noting that '[t]here is no evidence that a lack of legal qualifications hindered Mr Pilgrim's effectiveness in making these decisions.'²⁴ The department explained why it considered the need for the FOI Commissioner to hold legal qualifications unnecessary:

[Information Commissioner] reviews are intended to be a 'simple, practical and cost efficient method of external merit review'. This is consistent with the objects of the FOI Act which is to facilitate public access to information promptly and at the lowest reasonable cost. Requiring the reviewer to have legal qualifications does not align with the informality intended in the

²¹ Law Institute of Victoria, Submission 1, p. 2; Accountability Round Table, Submission 2, p. 6 and Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, Submission 4, p. 9.

²² Law Institute of Victoria, Submission 1, p. 2.

²³ Ms Fiona McLeod SC, Chair, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 6.

²⁴ Attorney-General's Department, Submission 3, p. 2.

review process. Furthermore, the effective operation of the OAIC should not be dependent on a statutory officer holding legal qualifications, as that capability should be resident within the staff of that office as it is with every other agency.²⁵

2.24 At the hearing, the department expanded on this point, noting that it is common practice for statutory office holders to draw on the expertise of its staff:

We have statutory office holders all around the Commonwealth who aren't lawyers making decisions that have legal impacts. They do so on the basis that they get advice from their own staff or, if necessary, they get legal advice to support those decisions. In general, that doesn't pose any particular problems. Naturally, we put lawyers in charge of courts because they're making final determinations of the legal rights as between various parties, and that's entirely appropriate. But, in terms of general administration of government, it's rare that you absolutely need a lawyer to make a decision. You just need somebody who is capable of taking into account all the relevant factors, which may include legal factors. ²⁶

Freedom of Information Act 1982

Encouraging a culture of pro-disclosure

- 2.25 At the hearing, witnesses expressed concern that the current culture within agencies and government does not encourage the disclosure of information, which was the intention of the FOI Act.
- 2.26 The Explanatory Memorandum outlines the purpose of the bill:

These amendments are designed to significantly improve the effectiveness of Australia's freedom of information (FOI) laws. Freedom of information provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.

These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.²⁷

2.27 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan commented that the purpose of the FOI legislation is to 'encourage transparency and accountability in government' through the right of citizens to access government documents.²⁸ Ms Karen Middleton, Reporter for the Saturday Paper explained:

²⁵ Attorney-General's Department, Submission 3, p. 2.

²⁶ Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, Committee Hansard (Proof), 16 November 2018, p. 31.

²⁷ Explanatory Memorandum, p. 1

²⁸ Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, Submission 4, p. 2.

The FOI system is one commitment to the public's right to know. It is a concern if the system gives the veneer of transparency and the veneer of accessibility but the process itself is used as a means to block access.²⁹

2.28 In relation to the need for a change in culture, Dr Maria O'Sullivan stated:

I feel that, although this has been done in the legislation, there hasn't been sufficient change in the culture of decision-making, particularly in certain agencies... [T]here really needs to be more of an emphasis on open government, and disclosure of information absolutely has to be the starting point of any FOI decision.³⁰

2.29 Mr Michael McKinnon, Journalist and FOI Editor for the Australian Broadcasting Corporation stated:

I can't remember the act working as badly as it does at the moment. Delays, wilful and wrongful exemption claims and a flawed appeals process mean that it's very difficult for journalists to do our job, which is to inform the Australian public accurately and fairly on what governments are doing.³¹

2.30 Mr McKinnon explained the importance of FOI for journalism and accurate reporting:

In the era of so-called fake news, FOI allows us to report accurately and fairly on the government's own documents. Whereby politics can often be a debate between 'he said, she said', it's about where the ultimate truth lies. We can publish documents that are the government's. ... FOI is crucial to what journalists do, because, rather than appealing to the bias or slant on any given issue because of any take or how the reporting occurs, we can simply report accurately and fairly on what the government's own documents say, and the public are in the delightful position of seeing the truth. ³²

- 2.31 Ms McLeod argued for the need for a 'push scheme' that is 'weighted in favour of disclosure and not endlessly chasing departments to disclose information'. 33
- 2.32 Ms Falk explained the action that the OAIC is taking to promote a 'push scheme' model:

We've also been focusing on the proactive 'push' model of releasing information that is fundamental to the reforms to the FOI Act that occurred in 2010—that is, there is an obligation on government agencies to be proactively publishing information, where that's appropriate. To that end,

²⁹ Ms Karen Middleton, Reporter, The Saturday Paper, Committee Hansard (Proof), 16 November 2018, p. 11.

³⁰ Dr Maria O'Sullivan, Committee Hansard (Proof), 16 November 2018, p. 18.

³¹ Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, p. 9.

³² Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, p. 10.

³³ Ms Fiona McLeod SC, Chair, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 5.

we've undertaken a survey of the Information Publication Scheme, which is a proactive release model, and the results of that will be provided shortly. We've also worked to provide additional guidance to agencies in terms of facilitating administrative access outside of the FOI Act. And other activities that we have planned in our corporate plan include reviewing the application, or the administration, of the disclosure log provisions, whereby agencies and ministers are required to publish information that they have provided under FOI on their websites within 10 days of providing the information to the applicant. So it is a multifaceted approach to dealing with what is an ever-increasing workload.³⁴

Publishing information within 10 to 14 days

2.33 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 to 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public:

This provision addresses the frequent practice of agencies discouraging journalists from using freedom of information by denying any measure of exclusivity to information that may have been only released after long delays and payment of substantial fees. This subsection will give applicants the opportunity to examine released information before it is released to the public in general.³⁵

2.34 At the hearing, the committee heard from journalists, who expressed their support for this provision. Mr McKinnon explained the importance of this provision, particularly to journalists:

The reason we need 10 days is we get large lumps of information that are released only because they're in the public interest. You've won the public interest battle as soon as those documents have been released, because that's why they're released. What we would like to do, as journalists, is then research the documents appropriately, contact experts in the field, look for other documentation, even talk to politicians about it, and then produce a well-researched, concise, accurate and fair publication. We don't get that opportunity, because there are agencies that will release on the same day. I have had FOI documents coming back to me, and they have been given to other journalists by politicians in order to discourage us from doing FOIs. ³⁶

³⁴ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 34.

³⁵ Explanatory Memorandum, p. 4.

³⁶ Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, p. 12.

- 2.35 Ms Middleton agreed, suggesting that 'the 10 days should be a minimum.... It disadvantages anyone doing longer term investigative work to have a short time frame.¹³⁷
- 2.36 However, the department confirmed that the FOI Guidelines³⁸ issued by the Information Commissioner already acknowledges how same day publication may adversely affect journalists.³⁹ Relevantly, the FOI Guidelines state:

A contested issue in the operation of the FOI Act is that of 'same day publication (that is, publication of information on the disclosure log within 24 hours of when it is provided to the FOI applicant). With an eye to lessening dispute about this issue, an agency or minister may consider the following issues when choosing the date of publication in an individual case:

...

- A practice of same day publication, if widely adopted or practised across government, may discourage journalists from using the FOI Act. This may work against the objects of the FOI Act by discouraging FOI requests from a particular section of the community who are experienced in accessing government information and making it available to the community.⁴⁰
- 2.37 The department explained why it was preferable that this issue be dealt with in the Guidelines rather than through legislation:

The department considers that dealing with these matters through the FOI Guidelines provides the appropriate degree of flexibility to ensure agencies and Ministers can consider disclosure log publication timing on a case-by-case basis. This will ensure that disclosure log publication timing decisions strike the right balance between the objectives of the FOI Act in promoting access to Government information with the particular interests of journalists or others in receiving exclusive access to documents.⁴¹

2.38 The OAIC noted that the issue of the timing of the publication of documents was considered by the Hawke Report. ⁴² The Hawke Report recommended that 'there should be a period of five working days before documents released to an applicant are

³⁷ Ms Karen Middleton, Reporter, The Saturday Paper, Committee Hansard (Proof), 16 November 2018, p. 13.

³⁸ Office of the Australian Information Commissioner, FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982, May 2018.

³⁹ Attorney-General's Department, Submission 3, p. 4.

⁴⁰ Office of the Australian Information Commissioner, FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982, May 2018, para 14.27.

⁴¹ Attorney-General's Department, Submission 3, p. 4.

⁴² Dr Allan Hawke, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010, 2013.

published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.' 43

2.39 More broadly, the department noted that the proposed provision, as currently drafted, would apply to all applicants and not merely journalists. Consequently, the department argued that the provision could 'frustrate the policy objective of the FOI Act's disclosure log provisions of facilitating broader release of information released to FOI applicants,' as it could result in the slower release of information. 44

Consistent application of exemptions

2.40 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews, by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review. The Explantory Memorandum explains the basis for the proposed amendment:

This section seeks to prevent agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision making, so that they can't change the basis for exemptions half way through a review. In effect, this frequent practice allows agencies and ministers to remake decisions half way through a review, something not normally permitted in merits review processes run in superior jurisdictions and never intended under the FOI Act. 45

2.41 Most submissions opposed the bill's proposed requirement of requiring a consistent application of exemptions during Information Commissioner reviews. The OAIC explained that the current review process conducted by the Information Commissioner supports its merits review function:

In an [Information Commissioner] review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.

When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or

⁴³ Office of the Australian Information Commissioner, Submission 6, p. 12.

⁴⁴ Attorney-General's Department, Submission 3, p. 3.

⁴⁵ Explanatory Memorandum, p. 5.

preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted. 46

2.42 Similarily, the department, Transparency International Australia and the Law Institute of Victoria agreed that the ability to raise additional exemptions ensures the FOI system remains, as the Law Institute of Victoria states, a 'pure form of merits review'. Additionally, Ms Elisa Hesling, representative of the Law Institute of Victoria, raised the following issue with the proposed provision:

There is the potential for locking someone into claiming an exemption—that then may require an organisation, an agency, to only consider that particular point and therefore not look further outside the field, which would be disadvantageous to justice in any event.⁴⁸

- 2.43 The Department of Home Affairs also raised concerns that to limit agencies' use of exemptions during an Information Commissioner review would 'diminish the quality of the review process and limit the development of case law.'⁴⁹
- 2.44 In expressing its opposition to the proposed provision, the Law Institute of Victoria provided the following explanation:
 - Not permitting agencies to raise additional exemptions may be contrary to their statutory and ethical duty to properly and fully assist the Information Commissioner during IC reviews.
 - If additional exemptions are raised by agencies, that does not mean
 that the Information Commissioner necessarily needs to agree that
 they apply; it just means that they ought to properly be considered if
 they have been appropriately raised.
 - If additional exemptions were properly available and agencies were precluded from raising them at IC review just because they were not originally raised by the decision-making agency at first instance, that may have the unintended consequences of more agencies seeking review of Information Commissioner decisions from the AAT – a pure merits review body.
 - The effectiveness of the FOI process is enhanced by promoting good communication between agencies and applicants, and formality and technicality in clarifying the documents sought in the FOI request and other aspects of the FOI process. Proposed section 55EA may result in a heightened risk that agencies would take a more rigid approach to drafting statements of reasons by looking for any conceivable exemption claim and including it at the outset, giving the perception that agencies may be seeking to obstruct access to information.

⁴⁶ Office of the Australian Information Commissioner, Submission 6, p. 13.

⁴⁷ Law Institute of Victoria, Submission 1, p. 3. See also Attorney-General's Department, Submission 3, pp. 4–5 and Transparency International Australia, Submission 8, p. 4.

⁴⁸ Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, Committee Hansard (Proof), 16 November 2018, p. 3.

⁴⁹ Department of Home Affairs, Submission 5, p. 3.

- If additional exemptions continue to be permitted to be raised by agencies, and if the 120 day time limit for IC reviews is put in place as proposed, the Information Commissioner may be more likely to make an assessment that consideration of the matter, including the additional exemptions, will take the matter beyond 120 days. This will increase the ability of FOI applicants to request that the matter be transferred to the AAT free of charge.
- 2.45 At the hearing, the Law Institute of Victoria elaborated that by allowing agencies to reconsider exemptions, there may be situations where 'a government body decides that, no, the exemptions don't apply at all and decides to disclose the documents.' ⁵¹
- 2.46 As an alternative to the proposed amendment, Ms McLeod and Mr Peter Timmins provided the following drafting alternative, with suggested timeframes:

Where an application for review is lodged:

- a) the OAIC is required to notify the agency or minister within (10) days;
- the agency is required to respond in writing to provide the OAIC within (14) days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant; and
- c) the OAIC review function is to affirm, vary or set aside the decision based on material provided to the applicant in the notice of decision and to the OAIC within 14 days of lodgement of the application.⁵²

Referral to the Administrative Appeals Tribunal

Referral where review will take more than 120 days to finalise

- 2.47 New sections 55JA would require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to transfer their Information Commissioner review to the Administrative Appeals Tribunal (AAT), at no charge to the applicant.
- 2.48 The OAIC explained that the current process provides sufficient flexibility to allow matters to proceed to the AAT prior to an Information Commissioner review decision being made.⁵³ Under section 54W(b) of the FOI Act, the Information Commissioner can decline to undertake a review if they believe that the AAT is better placed to consider the review.⁵⁴ The OAIC provided the following

51 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, Committee Hansard (Proof), 16 November 2018, p. 3.

Law Institute of Victoria, Submission 1, p. 3.

⁵² Ms Fiona McLeod, answers to questions on notice, 16 November 2018 (received 22 November 2018).

⁵³ Office of the Australian Information Commissioner, Submission 6, p. 14.

⁵⁴ Office of the Australian Information Commissioner, Submission 6, p. 8.

examples of when the Information Commissioner may determine that it is desirable for the AAT to consider a matter instead of the Information Commissioner:

- the [Information Commissioner] review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier [Information Commissioner] review decisions and AAT decisions
- [Information Commissioner] review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the [Information Commissioner] review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.⁵⁵
- 2.49 Regarding the application of section 54W(b) of the FOI Act, Mr McKinnon raised concerns that he has sought to have his matter heard by the AAT under section 54 of the FOI Act, but was not able to:

I've attempted to go to the AAT any number of times, via the Information Commissioner, because I argue, quite simply, that it would be so much quicker, and I'm not allowed to go to the AAT via the Information Commissioner, under section 54. I don't know what the reasons are for not allowing me to go, but I want access to a fair means of appeal on FOI. 56

- 2.50 Submitters and witnesses were generally supportive of this provision. The Law Institute of Victoria expressed its support for 'measures which will contribute to addressing substantial delays in the [Information Commissioner] review process for FOI decisions.' 57
- 2.51 The Accountability Round Table agreed that applicants' should be informed if their Information Commissioner reivew would take in excess of 120 days for a decision. However, it also noted that applicants 'would be wise to determine whether the [AAT] is likely to hear an application for documentary access more quickly.'58
- 2.52 OpenAustralia Foundation stated that it did not support the provision as it considered the timeframe too long:

The applicant has probably gone through a 30 day initial, 30 day internal review, maybe some consultation, even where the authority is straightforward in their dealings. It's possible for the request to be outstanding for 60+ days when the matter gets to the Information Commissioner (IC)—The IC should be sufficiently funded to be able to

⁵⁵ Office of the Australian Information Commissioner, Submission 6, p. 8.

⁵⁶ Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, p. 12.

⁵⁷ Law Institute of Victoria, Submission 1, p. 2.

⁵⁸ Accountability Round Table, Submission 2, p. 7.

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make decisions in the normal course of events within 30 days and allow them to be referred to the AAT. 59

2.53 A number of witnesses were asked what timeframe they considered reasonable to complete an Information Commissioner review. Generally, those witnesses expressed the view that 120 days 'seems a more than adequate time' to complete an Information Commissioner review. ⁶⁰ As a comparison, Ms Hesling noted that the Victorian legislation requires the Victorian Information Commissioner to make a decision on an FOI review within 30 days of receiving the application. ⁶¹ Ms Hesling explained:

That time can be extended by agreement between the FOI applicant and the commissioner as long as that extension is sought within the initial 30 days of the review. At the end of that time, the commissioner is taken to have made a decision whether or not a decision has actually been made, and that then gives the right to refuse to the Victorian Civil and Administrative Tribunal. 62

2.54 In answers to questions on notice, Dr Solomon provided the following figures in relation to FOI reviews conducted by the Queensland Information Commissioner: ⁶³

Table 2: Time taken for Queensland Information Commissioner to finalise an FOI review:

Year	Median days to finalise review	Number of reviews finalised
2015–16	98	407
2016–17	86	413
2017–8	102	595

2.55 In contrast, Ms Falk tabled the following statistics in relation to the time taken for Information Commissioner reviews to be finalised:

⁵⁹ OpenAustralian Foundation, Submission 9, p. 6.

⁶⁰ Dr David Solomon AM, Director, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 7. See also Dr Maria O'Sullivan, Committee Hansard (Proof), 16 November 2018, p. 18.

⁶¹ Ms Fiona McLeod SC, Chair, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 8.

⁶² Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, Committee Hansard (Proof), 16 November 2018, p. 8.

⁶³ Dr David Solomon AM, Accountability Round Table, answers to questions on notice, 16 February 2018, (received 16 November 2018).

Table 3: Overview of IC review finalisation times

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
Number finalised within 120 days (percentage of all IC reviews finalised)	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)	235 (39%)
Number finalised within 6 months (percentage of all IC reviews finalised)	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)	285 (47%)
Number finalised within 9 months (percentage of all IC reviews finalised)	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)	418 (69%)
Number finalised within 12 months (percentage of all IC reviews finalised)	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)	513 (84%)
Number finalised over 12 months (percentage of all IC reviews finalised)	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)	97 (16%)
TOTAL Finalised	253	419	646	482	454	515	610

- 2.56 As indicated in table 1, the OAIC received 801 Information Commissioner review applications in 2017–18. The above table shows that, during this period, the OAIC finalised 235 reviews within 120 days. Under the proposed amendment the reviews not finalised by the OAIC within 120 days would be transferred to the AAT (566 reviews).
- 2.57 The AAT's 2017–18 Annual Report shows that it received 47 lodgements in its FOI division during this period.⁶⁴ Based on the 2017–18 figures, if item 12 of the bill was enacted, the AAT's workload within its FOI division would increase from 47 lodgements to 566 lodgements—a 12-fold increase.
- 2.58 Ms Falk noted her concerns that the provision would 'transfer the issue from one jurisdiction to the other.' On this point, Ms McLeod stated:

The AAT is another body that is also facing a burgeoning workload and would probably need additional resources to be allocated to take on that extra jurisdiction. 66

⁶⁴ Administrative Appeals Tribunal, Annual Report 2017–18, p. 28.

⁶⁵ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 36.

2.59 In answers to questions on notice, the OAIC explained that '[t]he time to progress each IC review and the time it is formally allocated to a case officer varies from case to case depending on the complexity of the matters involved and the outcome sought by the IC review applicant.' Prior to an application for a review being allocated to a case officer, the OAIC will generally conduct preliminary inquiries with an agency or minister, issue a notice to the agency or minister that an IC review has been commenced and request submissions and key documents. The OAIC confirmed that:

At 31 October 2018, the time from receipt to formal allocation for those matters not resolved in the early stages is approximately eight and a half months, noting, as set out above, there are many case management activities undertaken prior to formal allocation and the timeframe between the last case management event to allocation to case officer varies. ⁶⁹

Automatic referral to the AAT

- 2.60 The bill would also allow the applicant (at the normal cost), to by-pass a review by the Information Commissioner and apply to the AAT to review an FOI decision. Witnesses generally did not support this provision, noting that it would 'significantly increase the workload of the AAT.'⁷⁰
- 2.61 The department made the following observation:

Any significant workload increase for the AAT resulting from the proposed amendments would adversely affect the AAT's ability to finalise matters. This in turn is likely to lead to longer finalisation timeframes and increased backlogs. ⁷¹

2.62 The department also commented that by-passing the Information Commissioner is 'a very big system change' and that it would want to understand the flow-on effects:

We'd want to think through what that looks like in terms of the AAT load, what it means in terms of potentially decreasing the OAIC's load and what flow-on effects that has in terms of that kind of informal merits-based decision-making.⁷²

- 66 Ms Fiona McLeod SC, Chair, Accountability Round Table, Committee Hansard (Proof), 16 November 2018, p. 5.
- 67 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.
- 68 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.
- 69 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.
- 70 Mr Russell Wilson, Non-Executive Director, Transparency International Australia, Committee Hansard (Proof), 16 November 2018, p. 24.
- 71 Attorney-General's Department, Submission 3, p.5.
- 72 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, Committee Hansard (Proof), 16 November 2018, p. 32.

2.63 Additionally, Ms Falk noted that in 2017–18, the AAT's FOI division finalised 65 per cent of matters within 12 months. The committee notes that if the purpose of the provision is to provide the applicant with early resolution of their matter, it is questionable whether the proposed amendment would achieve this objective, particularly if the AAT received a significant increase in the number of lodgements in its FOI division.

Exempting Senators and Members from charges

- 2.64 Submitters expressed mixed views with respect to the proposal to not impose a charge on Senators and Members where the work generated was under \$1000.
- 2.65 As background, the department explained that agencies and ministers should interpret the 'lowest reasonable cost' objective broadly, in imposing any charges under the FOI Act. Additionally, the department observed that the FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest.
- 2.66 The OAIC explained that the following principles apply to charges under the FOI Act:
 - A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act
 - Charges should fairly reflect the work involved in providing access to documents on request
 - Charges are discretionary and should be justified on a case by case basis
 - Agencies should encourage administrative access at no charge, where appropriate
 - Agencies should assist applicants to frame FOI requests
 - Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information
 - A decision to impose a charge should be transparent.⁷⁶
- 2.67 Regarding the specific provision that Senators and Members be exempt from charges where the work generated totals less than \$1000, Ms Middleton made the following observation:

...senators and members also have other mechanisms to use to access information, like orders of the Senate, asking for questions on notice and

⁷³ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 36.

⁷⁴ Office of the Australian Information Commissioner, Submission 6, p. 12.

⁷⁵ Attorney-General's Department, Submission 3, p. 4.

⁷⁶ Office of the Australian Information Commissioner, Submission 6, p. 13.

compelling witnesses to public inquiries. Journalists have fewer avenues, so I would say that, if there's going to be an exemption for members and senators, maybe think about an exemption for media as well because we're, in the end, representing the public.⁷⁷

2.68 Dr O'Sullivan noted that exempting certain people from charges could be 'a slippery slope': ⁷⁸

I was listening to the previous sessions where there was discussion about giving exemptions about payments to journalists, and then of course you run into the problem of: what about individual citizens, and what about civil society? I haven't really turned my mind extensively to this, but I think you need to bear in mind that if you make it free for certain people then you'll have to expand that circle of people. So I would give a note of caution about doing that. ⁷⁹

2.69 Mr Wilson made the following observation:

So the issue to us is more one of looking at the principle of the cost of allowing access to government information and tackling that issue rather than necessarily simply giving this exemption, as it were, for senators and members. 80

External legal expenses

- 2.70 The bill proposes to amend the FOI Act to require external legal fees to be reported in agencies' annual reports. Additionally, the bill also proposes to amend the Archives Act to require the National Archives of Australia to include in its annual report the number of applications made to it for access to records in which external legal expenses have been incurred, and provide the particulars of those expenses.
- 2.71 The OAIC explained that agencies already report their external legal expenses related to FOI, and this data is available online:

Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed.

Summary details of these costs are published in the OAIC annual reports.

⁷⁷ Ms Karen Middleton, Reporter, The Saturday Paper, Committee Hansard (Proof), 16 November 2018, p. 14.

⁷⁸ Dr Maria O'Sullivan, Committee Hansard (Proof), 16 November 2018, p. 20.

⁷⁹ Dr Maria O'Sullivan, Committee Hansard (Proof), 16 November 2018, p. 20.

⁸⁰ Mr Russell Wilson, Non-Executive Director, Transparency International Australia, Committee Hansard (Proof), 16 November 2018, p. 23.

The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: www.data.gov.au.⁸¹

2.72 Similarly, the department argued that the provision 'would unnecessary duplicate existing practices around FOI reporting', while also adding an additional regulatory burden on agencies and ministers.⁸²

The department considers that these arrangements, along with additional reporting obligations under the [Legal Services Directions], already achieve the transparency in relation to government activities intended to be achieved through this provision. This proposal would simply create additional regulatory burdens on agencies and Ministers to achieve ends which are already achieved through current reporting arrangements. 83

2.73 In relation to the proposed amendments to the Archives Act, the department explained that the National Archives of Australia's external legal expenditure is already reported publicly on the Archives' website in an aggregated form. ⁸⁴ Furthermore, the department raised concerns 'about imposing a new reporting obligation applying specifically to the Archives that is inconsistent with whole-of-government arrangements that apply under the [Legal Services Directions]. ⁸⁵

Committee view

- 2.74 The committee is supportive of the broad intent of the bill. That is, 'to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law'⁸⁶ and 'to significantly improve the effectiveness of Australia's [FOI] laws.'⁸⁷
- 2.75 However, underpinning the proposed amendments in the bill, is the contention that the FOI system is experiencing 'chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.' The committee does not agree with this underlying contention.
- 2.76 Similarly, the committee is of the view that the provisions in the bill do not achieve their stated objectives. The committee's views on the bill's key provisions are set out below.

⁸¹ Office of the Australian Information Commissioner, Submission 6, p. 14.

⁸² Attorney-General's Department, Submission 3, p. 6.

⁸³ Attorney-General's Department, Submission 3, p. 6.

⁸⁴ Attorney-General's Department, Submission 3, p. 1.

⁸⁵ Attorney-General's Department, Submission 3, p. 2.

⁸⁶ Explanatory Memorandum, p. 1.

⁸⁷ Explanatory Memorandum, p. 1.

⁸⁸ Explanatory Memorandum, p. 1.

Resourcing of the OAIC

- 2.77 A central claim made during this inquiry was that the OAIC has been under-resourced and consequently overburdened since the government's decision in 2014 to disband the OAIC. The underlying assumption was that this resulted in considerable delays in finalising Information Commissioner reviews.
- 2.78 The committee acknowledges that funding to the OAIC was reduced in 2014. However, the committee received evidence that the OAIC's funding was largely restored in 2016, with a portion of funding not returned to reflect the streamlined arrangements that had been put in place by the OAIC. ⁸⁹ Furthermore, the committee notes that when the Information Commissioner and Privacy Commissioner, Ms Angelene Falk, was specifically asked whether additional resourcing would help expedite Information Commissioner reviews, she responded that the OAIC was working effectively, but 'should that change, then that would be something that [she] would bring to the attention of government. ⁹⁰
- 2.79 The committee notes that the number of Information Commissioner review applications received has increased in the last three financial years. However, the number of Information Commissioner reviews finalised has also increased in this period. According to table 1, in 2017–18, the OAIC finalised 610 Information Commissioner reviews—the second highest number of reviews finalised in a financial year since the OAIC commenced operations. Based on the evidence provided, the committee considers it difficult to conclude that the OAIC is under-resourced.

Requiring the appointment of three separate Commissioners

2.80 In relation to the requirement that three separate Commissioners be appointed, the committee is satisfied that the one-commissioner model is functioning effectively. Additionally, the committee is persuaded by the evidence tabled by Ms Falk, which shows that the three periods which recorded the highest number of section 55K decisions⁹¹ being completed, were during periods when the OAIC was operating with less than three Commissioners. Accordingly, the committee does not consider this provision necessary.

Requiring that Commissioners have legal qualifications

2.81 The committee does not agree that it should be a requirement that Commissioners who review decisions under Part VII of the FOI Act have legal qualifications. The committee shares the view of the department, that it is often not essential for people in senior positions who make decisions that have legal impact to hold legal qualifications, and instead it is common practise for senior officials to draw on the expertise of their staff.

⁸⁹ Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

⁹⁰ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, Committee Hansard (Proof), 16 November 2018, p. 40.

⁹¹ Section 55K are non-delegable decisions made by the Information Commissioner.

Publication of information within 10 to 14 working days

- 2.82 The committee notes that the current drafting of this provision would apply to all FOI applicants and not merely journalists. Therefore, the committee is mindful that this provision would result in information being released at a slower rate, which would appear to frustrate the objective of the FOI Act and the disclosure log.
- 2.83 A number of journalists submitted that the government's publication of information released under FOI sooner than 10 days after its release may be detrimental to public interest journalism. The committee acknowledges these concerns. The committee notes that the issue of early release of information provided to a journalist is considered in the FOI Guidelines, which the Hawke review considered to be the preferable way to deal with this issue. The committee agrees that this issue is best dealt with in FOI Guidelines. Nevertheless, the committee is of the view that there may be an opportunity to consider whether the guidance provided could be clarified and strengthened so that the general release of information does not unduly affect journalists who have received information pursuant to the FOI Act.

Consistent application of exemptions

2.84 Most submitters did not support the proposed amendment to prevent agencies from making additional exemption claims during the course of Information Commissioner reviews. The committee is persuaded by the evidence provided by submitters and witnesses that to do so would diminish the quality of the review process, would not align with a pure form of merits review, and would prevent an agency or minister from making a fresh decision that could otherwise be in favour of releasing of information to the applicant. Consequently, the committee does not support this provision.

Referrals to the AAT

- 2.85 The committee is sympathetic to the intent of this provision—that is, to provide a mechanism for a review of an FOI decision to be finalised in a shorter timeframe. Based on the figures provided by the OAIC, in 2017–18, it received 801 Information Commissioner review applications, finalised 235 reviews (39 per cent) within 120 days, which would result in at least 566 reviews to be transferred to the AAT, pursuant to item 12 of the bill. Noting that the AAT's FOI division received 47 lodgements in 2017–18, the committee shares the concerns of submitters and witnesses that item 12 of the bill may be transferring an issue to a different jurisdiction.
- 2.86 The committee is concerned that item 13 of the bill, which would allow applicants to by-pass an Information Commissioner review and apply to have their matter heard in the AAT, would only exacerbate the issue of managing a significant increase in workload. In light of the AAT's recent finalisation rates of 65 per cent of FOI matters finalised within 12 months, and particularly given the likely increase of FOI matters to be considered by the AAT, it appears questionable whether items 12 and 13 of the bill would result in matters being resolved at a faster rate than is currently the case.

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Exempting Senators and Members from charges

2.87 The committee agrees with the views expressed by witnesses, that to exempt Senators and Members of charges where the work generated is under \$1000, is a 'slippery slope' whereby other groups may equally claim a public interest to also be exempt from these charges. The FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest. The committee considers that the FOI Act and FOI Guidelines adequately and appropriately deal with charges, including advice that, where appropriate, agencies should encourage access to information at no charge. Consequently, the committee does not support this provision of the bill.

Reporting of external legal expenses

- 2.88 Having regard to the additional administrative burden placed on agencies, and the evidence that much of the requirement would duplicate existing reporting mechanisms, the committee does not support item 16 of the bill.
- 2.89 Similarly, the committee considers that item 1 of the bill largely duplicates existing reporting arrangements with respect to legal expenses incurred by the National Archives of Australia, while also creating a reporting obligation that would be inconsistent with whole of government arrangements that apply under the Legal Services Directions.
- 2.90 For the reasons outlined above, the committee recommends that the Senate not pass the bill.

Recommendation 1

2.91 The committee recommends that the Senate not pass the bill.

Senator the Hon Ian Macdonald Chair

92 Dr Maria O'Sullivan, Committee Hansard (Proof), 16 November 2018, p. 20.

Dissenting Report by Senator Rex Patrick

Freedom of information, but only after the Information Commissioner finally gets around to making a review decision

The work of the Committee and its conclusions

- 1.1 I thank the committee for its efforts in relation to this very important Bill to improve Freedom of Information (FOI) in the federal sphere. I also thank the secretariat for their behind the scenes efforts.
- 1.2 I dissent from the majority report of Government senators which not only opposes all the reforms proposed in the legislation, but makes absolutely no alternative suggestions as to how Australia's freedom of information laws might be improved.
- 1.3 The negative approach taken by Government Senators is disappointing but unsurprising. They express support for the 'broad intent' of the Bill while categorically rejecting all reforms. Their stance clearly demonstrates the extent to which the Coalition Government remains opposed to any reform designed to improve public, media and parliamentary scrutiny of public administration.
- 1.4 Since its early effort to abolish the Office of the Australian Information Commissioner (OAIC), the Government has demonstrated no enthusiasm and indeed outright hostility to scrutiny through FOI.
- 1.5 It may be that the attitude of these Government senators on the Committee, and indeed their colleagues, will change in the event that following the forthcoming Federal Election they find themselves in Opposition and again wish to apply a measure of scrutiny to executive government. It may be the case that they will then become interested in increased openness and transparency.

Freedom of information

- 1.6 FOI provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.
- 1.7 Knowledge will always govern ignorance. FOI is a crucial tool in ensuring those that are governed are indeed properly armed.

A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly time information, is the currency of power.¹

1.8 How can there be debate on important public issues without information? Of what value is information if is it only made available well after debate has passed?

¹ Ralph Nadar, Freedom of Information: the Act and the Agencies.

A system in crisis

- 1.9 The Federal FOI regime is in crisis.
- 1.10 As a member of this Parliament who has made the frequent recourse to FOI applications in efforts to obtain valuable information about government administration—from exposing deficiencies in major defence contracting involving expenditure of billions of dollars of taxpayers' funds to revealing the flawed nature of the site selection process for Australia's national radioactive waste repository—I have experienced first-hand the chronic bureaucratic delay and obstruction that now characterises Australia's FOI system.
- 1.11 The witnesses who appeared at the hearing shared my view.
- 1.12 Ms Hesling of the Law Institute of Victoria and someone with experience and expertise in FOI law said:

The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage.²

1.13 Mr McKinnon of the ABC was blunter in his consideration:

At the ABC, I'm responsible for not only lodging my own FOIs but also coordinating and advising all journalists at the ABC on FOIs. We're talking about hundreds of applications a year. My experience is that the act is getting progressively worse, and it is substantially worse than in 2010, when, with great hope and glee-not glee, but great hope and optimismthe reforms occurred. But one of the major problems was agencies quickly worked out that the Office of the Australian Information Commissioner was very slow on appeals, and, in fact, does not operate a fair process. It's as simple as that. I had gone to the AAT numerous times prior to 2010. I'm appearing in the tribunal in New South Wales next week. I've done over a hundred appeals to courts and tribunals. The great thing about that is that you get a fair hearing; you can cross-examine witnesses that are making claims in relation to documents. This does not occur with the Office of the Australian Information Commissioner. So you have a toothless tiger trying to control agencies whose view is that the government's political interests are the same as theirs. They will not release documents—the more damning a document is of a government policy, the more embarrassing, the harder they will fight to have a document not released, because they see their job as being synonymous with the government's political interests. It's very sad to say that, but that's the case. So FOI has got progressively worse ... I'm at the coalface probably more than most—I suspect more than any other

² Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, Committee Hansard (Proof), 16 November 2018, p. 1.

- journalist in Australia—and I can see at the coalface how badly FOI is working.³
- 1.14 Karen Middleton of the Saturday Paper succinctly observed that:
 - It is a concern the system gives the veneer of transparency and the veneer of accessibility, but the process is used as a means to block access.⁴
- 1.15 The statistics back up the witnesses' experiences. Table 2 (time taken for Queensland Information Commissioner to finalise an FOI review) of the Committee report and Table 3 (Overview of IC review finalisation) show a stark contrast in performance between the Queensland and federal jurisdictions.
- 1.16 Since 2012 there has been an average of more than 110 reviews that took more than 365 days to complete. No doubt these FOI's were complex to a degree, but likely pretty important from a public debate perspective. In my own experience of FOI, the more embarrassing the information sought, the greater resistance offered by Government to its access.
- 1.17 It is further noted that there appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.
- 1.18 Sunlight is said to be the best disinfectant, but the poor FOI culture mentioned at 2.25 of the Committee's report acts as a superbug.

Purpose of the bill

- 1.19 The purpose of the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 is to introduce measures that address current problems in the regime to make government more transparent and accountable, and assist citizens and the media to access information under the law.
- 1.20 Reforms proposed in the Bill include:
 - (a) Requiring the government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.
 - (b) Allowing FOI review applicants to elect to have their matter bypass the Information Commissioner, who can take more than a year to make a decision on controversial issues, to the Administrative Appeals Tribunal.
 - (c) Granting an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.
 - (d) Preventing agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision

³ Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, p. 11.

⁴ Ms Karen Middleton, Reporter, The Saturday Paper, Committee Hansard (Proof), 16 November 2018, p. 11.

- making, so that they can't switch exemptions half way through a review as often happens now. This would prevent a current practice that, in effect, allows an agency to remake decision half way through a review; something not normally permitted in merits reviews being run in superior jurisdictions.
- (e) Preventing the Information Commissioner from making FOI decisions if he or she does not hold the legal qualifications required of the FOI Commissioner (as happens now).
- (f) Preventing agencies from publishing information released under FOI until at least 10 days after the applicant has received his or her copy of the information.
- (g) Requiring an agency to publish its external legal expenses for each Information Commission or AAT FOI matter that has concluded. This would apply in relation to agency FOI legal expenses and to expenses incurred by the National Archives in respect of applications made for access to information under the Archives Act 1983.
- 1.21 This comprehensive array of reforms reflects the practical experience of constituents, journalists, researchers and members of Parliament seeking information under FOI.

Improvements drawn from the committee process

- 1.22 The benefits of the proposed changes to the law in the Bill are spelt out in my second reading speech. The submissions and testimony from FOI observers and customers give support to most of the changes.
- 1.23 There were exception to the above statements and I address these now.

Improvements – consistent applications of exemptions by decision maker

- 1.24 There was almost unanimous opposition to the new Section 55EA that required, in law, the agency or Minister must not seek to rely on any exemptions in a review that were not relied upon in making the IC reviewable decision. On the arguments presented, it is accepted that this provision is not consistent with general principles of review in administrative law, that a merit review is *de novo*.
- 1.25 Most agreed that a new exemption advanced late in a review is not helpful.

Recommendation 1

1.26 Section 55EA should be removed from the bill.

1.27 Most, however, agreed that a new exemption advanced late in a review is not helpful. Ms McLeod and Mr Peter Timmins of the Accountability Round Table provided, by way of a response to a question on notice, an alternate remedy to the problem. This alternate approach should be adopted with a slight variation in time to afford a Minister or Agency fairness.

Recommendation 2

- 1.28 The Information Commissioner should incorporate in a practice direction the following:
 - Where an application for review is lodged:
 - The Information Commissioner is required to notify the agency or minister within ten days;
 - The agency is required to respond in writing to provide the OAIC within 21 days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant.

Improvements – Exempting Senators and Members from Charges

- 1.29 The Committee is correct in stating that there were mixed views in relation to the proposal not to charge Senators and Members where work generated was under \$1000.
- 1.30 This provision was based on Regulation 6 the South Australian Freedom of Information (Fees and Charges) Regulations 2003 which allows for a Member of Parliament to apply for access without charge if the fees and charges for the work generated are less than \$1000.
- 1.31 This provision will support greater transparency of public administration through parliamentary scrutiny of agencies and provide the public with information that is published following the release of information to Senators and MPs.
- 1.32 However, I was drawn to the comments of Mr McKinnon on this matter when he said at hearing:

It seems to me that any document being released under the act is being released because it's in the public interest to release it. It also says, then, that the government, by keeping it secret up until it is released, has failed in its duty to inform the public. Why any applicant should then have to pay because the government hasn't discharged its duty to inform the public is beyond me. But, certainly, I think politicians have other avenues. In this era of journalism, where budgets are very tight and where there is incredible pressure, because of the internet, on traditional forms of media—which, to my mind, still do the bulk of investigative journalism—there is a very good argument that if we get documents released to us, then there should be no fees or charges. That's because we've actually done a job for the Australian public by taking the time to lodge, find and reveal information that's in the public interest and that would inform the voters of Australia. I come back to the same thing. I think our job is to inform the public so that, when they go

- to the ballot box, they can cast an informed vote about which political party and/or politicians can best serve their interests as Australians.⁵
- 1.33 Noting Mr McKinnon's role and 'FOI stature' within the ABC, great weight must be given to his remarks.
- 1.34 I further note that on 30 July 2018 the Hon. Kelly O'Dwyer, the then Minister for Revenue and Financial Services, and Senator Cormann, the Minister for Finance, issued a joint media release announcing a fee exemption for journalists associated with ASIC search fees. 6 Minster O'Dwyer and Minister Cormann stated that 'expanding the group of journalists that will benefit from the exemption from fees will aid public discussion. 17
- 1.35 Exempting journalists, whose role in informing public debate is integral, makes sense in light of the exemption that the Government announced for ASIC search fees. While there were some concerns that this may lead to a 'slippery slope', it is clear that a policy to exempt a class of professionals with a clear justification, as the Government did with ASIC search fees, will not lead to a slippery slope and should be encouraged.

Recommendation 3

1.36 Section 29(5A) should be amended so that journalists are entitled to access to the documents without charge unless the work generated by the application involves charges totalling more than \$1,000.

Additional OAIC resourcing

- 1.37 Whilst not within the scope of the Bill under review, it was clear from the submissions and oral evidence taken that the OAIC is underfunded and that this was having an adverse effect on the ability of Information Commissioner to assist in achieving the objectives of the FOI act, particularly in reference to facilitating and promoting prompt public access to information.
- 1.38 The Attorney General's Department offered the following explanation:

As part of the 2014–15 Budget measure there were expected to be savings of \$3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of \$2m per year was returned to the OAIC budget from those \$3.6m of savings. The \$1.6m which was not returned reflected streamlined arrangements that had been

⁵ Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, Committee Hansard (Proof), 16 November 2018, pp. 16–17.

Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, http://kmo.ministers.treasury.gov.au/media-release/091-2018/ (Accessed 30 November 2018).

Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, http://kmo.ministers.treasury.gov.au/media-release/091-2018/ (Accessed 30 November 2018).

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put in place by the OAIC to manage its workload, particularly in the area of $FOI.^{8}$ [Emphasis added]

1.39 Sir Humphrey Appleby would be proud.

Recommendation 4

1.40 That the OAIC Commission funding be increased substantially.

The Customer is Always Right

1.41 It is clear that there is dissatisfaction amongst users of the federal FOI scheme. The providers of the service seem to disagree. Unfortunately for the providers of the FOI product, and the Government that acts as the board, the customer is always right.

Recommendation 5

1.42 The bill as amended by recommendations 1 and 3 should be passed by the Senate.

Senator Rex Patrick Senator for South Australia

Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

Australian Greens dissenting report

- 1.1 The Greens acknowledge the extensive work of the Committee in this inquiry, and thanks everyone who made a public submission, or gave evidence at a public hearing.
- 1.2 Peter Timmins, Interim Convener of the Australian Open Government Partnership Network, noted in his submission to the inquiry (in a private capacity) that there has been no comprehensive review of the *Freedom of Information Act 1982* (FOI Act) since the Australian Law Reform Commission and Administrative Review Council joint reference review in 1994, which tabled its report in ALRC Report 77, in January 1996. ¹
- 1.3 This is despite hopes that comprehensive review and reform would result from the Government's commitment to the National Action Plan for Open Government, adopted in December 2016, and again in its second National Action Plan for 2018-20.
- 1.4 Mr Timmins also further noted these failures to review and reform came:
 - ...despite the fact that a comprehensive review, reform and a complete rewrite of the legislation in plain English, as recommended by Dr Alan Hawke in the 2012-2013 statutory review report, is long overdue and to be preferred to piecemeal changes. Dr Hawke said changes over the years had been "largely developed and inserted into the form and structure of the FOI Act as it was in 1982".²
- 1.5 Instead, amendments to the FOI Act have been ad-hoc over time, including a suite of reforms resulting from the Freedom of Information Amendment (Reform) Act 2010, legislated under Labor Governments, which included the establishment of the Office of the Australian Information Commissioner.
- 1.6 A subsequent Abbott Liberal Government announced the abolition of the OAIC in the 2014–15 Budget. However, the Freedom of Information Amendment (New Arrangements) Bill 2014 that would facilitate this abolition of the office failed to gain support of the Senate, and ultimately lapsed on prorogation on 17 April 2016. But regardless of the bill's failure, with reduced funding, operations were reduced, and the Canberra office was closed in December 2014.

¹ Mr Peter Timmins, Submission 7, p. 1.

² Mr Peter Timmins, Submission 7, p. 1.

1.7 Since 2014, due to reductions in funding, the Accountability Roundtable noted in its submission to the inquiry that:

...the OAIC has been unable to discharge most of its significant statutory functions and responsibilities – including the operation of the proactive information disclosure system.³

Recommendation 1

- 1.8 That Freedom of Information funding is restored to at least 2013–14 Budget levels plus CPI, along with the additional resources needed to enable the OAIC to discharge its obligations under National Action Plans 1 and 2 (NAP1 and NAP2).
- 1.9 As noted by the Accountability Roundtable, the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 makes recommendations for amendments to the *Archives Act 1983* (Archives Act) and FOI Act in five distinct areas:
 - Overlaps in the functions undertaken by OAIC Commissioners;
 - The qualifications required for appointment as Freedom of Information Commissioner;
 - Fees and Charges;
 - Delays in the completion of FOI reviews by the Information Commissioner;
 - Matters having to do with the application of FOI fees and charges.⁴
- 1.10 Regarding overlaps in the functions undertaken by OAIC Commissioners, the bill would instil three separate Commissioners, as was the original intent of Parliament in 2010, which are:
 - 1. Information Commissioner (lead commissioner)
 - 2. Freedom of Information Commissioner
 - 3. Privacy Commissioner
- 1.11 Transparency International Australia concluded in its submission to the inquiry that:

TIA is broadly supportive of the measures in the Bill to the extent that they aim to improve the effectiveness of Australia's FOI laws and ensure open government, transparency and accountability. This support is premised on

³ Accountability Round Table, Submission 2, p. 2.

⁴ Accountability Round Table, Submission 2, p. 5.

the expectation that the OAIC three independent statutory offices are adequately resourced to undertake their full mandate and respective range of powers.⁵

- 1.12 In its submission to the inquiry, the Law Institute of Victoria, while raising concerns about possible negative unintended consequences resulting from the bills limiting agencies' ability to rely on exemptions in the Information Commissioner review (IC review) process that were not relied on in the decision, concluded that it is:
 - ...broadly supportive of measures which aim to improve the effectiveness of Australia's freedom of information (FOI) laws and ensure open government and transparency. The LIV supports the measures in the Bill that seek to ensure that there are three independent statutory officers with appropriate legal qualifications, and measures that seek to respond to delays in the IC review process. ⁶
- 1.13 On the matter of appropriate legal qualifications, the Law Institute of Victoria submitted:

The LIV is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications ... [and that it] supports the proposed measures which require the Information Commissioner and the Privacy Commissioner to have appropriate legal qualifications when reviewing FOI decisions.⁷

1.14 Regarding Fees and Charges, the bill provides a schedule, and provides that Senators and Members Parliament should be free from fees and charges unless the cost of meeting an FOI request exceeds \$1000. The Accountability Roundtable submitted:

In the interests of governmental openness and transparency, and strengthening the capacity of MPs to obtain access to material relevant to their parliamentary work, the ART supports such a recommendation.⁸

1.15 The Bill also grants an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.

⁵ Transparency International Australia, Submission 8, p. 5.

⁶ Law Institute of Australia, Submission 1, p. 1.

⁷ Law Institute of Australia, Submission 1, p. 2.

⁸ Accountability Round Table, Submission 2, p. 6.

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1.16 On this matter of delays in Information Commissioner reviews, the Law Institute of Victoria submitted it:

...supports measures which will contribute to addressing substantial delays in the IC [Information Commissioner] review process for FOI decisions. 9

1.17 Echoing the conclusion of OpenAustralia Foundation, who submitted it 'broadly support[s] the intentions of these amendments, as laid out in the explanatory memorandum', ¹⁰ the Australian Greens share the views of this and other expert information stakeholders in broadly supporting this bill.

Recommendation 2

1.18 The Australian Greens recommend that the Senate pass this bill.

Senator Nick McKim Senator for Tasmania

⁹ Law Institute of Australia, Submission 1, p. 2.

¹⁰ OpenAustralia Foundation, Submission 9, p. 1.

Appendix 1

Submissions

- 1 Law Institute of Victoria
- 2 Accountability Round Table
- 3 Attorney-General's Department
- 4 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan
- 5 Department of Home Affairs
- 6 Office of the Australian Information Commissioner
- 7 Mr Peter Timmins
- 8 Transparency International Australia
- 9 OpenAustralia Foundation

Answers to questions on notice

- Accountability Round Table answers to questions taken on notice at the public hearing on 16 November 2018 (received 16 November 2018).
- 2 Law Institute of Victoria answers to questions taken on notice at the public hearing on 16 November 2018 (received 26 November 2018).
- Office of the Australian Information Commissioner answers to questions taken on notice at the public hearing on 16 November 2018 (received 29 November 2018).
- 4 Accountability Round Table answers to questions taken on notice at the public hearing on 16 November 2018 (received 22 November 2018)

Additional information

- Additional information provided by the Office of the Australian Information Commissioner at the Canberra hearing of 16 November 2018.
- Additional information provided by the Attorney-General's Department correcting evidence in Hansard (received 26 November 2018).

Appendix 2

Public hearing and witnesses

Friday, 16 November 2018 - Canberra

FALK, Ms Angelene, Australian Information Commissioner and Privacy Commissioner, Office of the Australian Information Commissioner

FREIDIN, Ms Lara, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria

HESLING, Ms Elisa, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria

McKINNON, Mr Michael, Journalist and FOI Editor, Australian Broadcasting Corporation

McLEOD, Ms Fiona, SC, Chair, Accountability Round Table

MIDDLETON, Ms Karen, Reporter, The Saturday Paper

MINIHAN, Mr Colin, Director, Information Law Unit, Attorney-General's Department

NG, Dr Yee-Fui, Private capacity

O'SULLIVAN, Dr Maria, Private capacity

SOLOMON, Dr David, AM, Director, Accountability Round Table

TAYLOR, Mr Josh, Senior Reporter, Buzzfeed Australia

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WILSON, Mr Russell, Non-Executive Director, Transparency International Australia

FOI Statistics from FOI Bill submission – updated 2017-18

The following tables provide a statistical overview of IC review applications received, finalised and the outcome of applications for 2011-18.

Table 1: Overview of IC review applications received and finalised

Туре	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews received	456	507	524	373	510	632	801
IC reviews finalised	253	419	646	482	454	515	610
IC reviews where s 55K decision made	25	89	98	128	80	104	123
IC reviews finalised without s 55K decision being made	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)	487 (79.84%)

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
Number finalised within 120 days	100	124	191	165	196	198	235
(percentage of all IC reviews finalised)	(39%)	(30%)	(30%)	(34%)	(43%)	(38%)	(39%)
Number finalised within 6 months	145	167	270	247	274	291	285
(percentage of all IC reviews finalised)	(57%)	(40%)	(42%)	(51%)	(60%)	(57%)	(47%)
Number finalised within 9 months	203	242	359	301	347	392	418
(percentage of all IC reviews finalised)	(80%)	(58%)	(56%)	(62%)	(76%)	(76%)	(69%)
Number finalised within 12 months	232	289	462	343	395	445	513
(percentage of all IC reviews finalised)	(92%)	(69%)	(72%)	(71%)	(87%)	(86%)	(84%)
Number finalised over	21	130	184	139	59	70	97
(percentage of all IC reviews finalised)	(8%)	(31%)	(28%)	(29%)	(13%)	(14%)	(16%)
TOTAL Finalised	253	419	646	482	454	515	610

Table 3: Overview of IC review outcomes

IC Review Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34	81
s 54R – withdrawn	108	95	111	59	81	115	131
s 54R – withdrawn/conciliated	N/A	20	69	51	78	93	64
s 54W(a) – deemed acceptance of PV/appraisal	N/A	2	27	26	7	0	0
s 54W(a)(i) – misconceived, lacking in substance etc	42	86	170	87	94	66	79
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57	59
s 54W(a)(iii) – lost contact	9	9	0	5	5	3	10
s 54W(b) – refer AAT	22	17	41	61	32	15	16
s 54(c) – failure to comply	N/A	2	0	0	0	0	0
s 55F – set aside by agreement	N/A	0	1	0	2	7	15

s 55F – varied by	2	0	1	2	7	5	27
agreement	2	Ů	•		,		
s 55F – affirmed by agreement	N/A	0	1	2	1	1	0
s 55G – substituted	N/A	7	6	5	16	15	5
s 55K – affirmed by IC	17	58	40	53	39	48	68
s 55K – affirmed by IC following revised decision during IC review	N/A	N/A	8	5	11	17	9
s 55K – set aside by IC	8	28	53	52	22	23	45
s 55K – varied by IC	0	3	5	23	19	16	10
Total	253	419	646	482	454	515	61

Commissioner brief: FOI Bill report – additional statistics

Key messages

- The OAIC continues to review the way it progresses IC reviews to ensure all reviews are finalised in an efficient and timely way.
- The OAIC has met its key performance indicators of finalising 80% of IC reviews within 12 months of receipt in 2015–16 (87%), 2016–17 (86%) and 2017–18 (84%).
- The OAIC has experienced a 24.45% increase in IC review applications in the first three quarters of 2018–19 and this has resulted in a decrease in timeliness, with 76% of reviews finalised in the first three quarters of the year finalised within 12 months of receipt.

TRIM link for reference: Executive Brief on FOI Bill - D2018/015033

See also Com brief - FOI - IC review: <u>D2019/000843</u>

Critical facts

- On 22 August 2018, Senator Rex Patrick introduced the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 to the Senate. The Bill seeks to improve the effectiveness of FOI laws 'to address the considerable dysfunction that has development in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.'1
- The Bill proposes changes to the FOI Act, AIC Act and the Archives Act including:
 - requiring the positions of Information Commissioner, FOI Commissioner and Privacy Commissioner to be filled. Preventing the IC from making FOI decisions if s/he does not hold legal qualifications.
 - preventing agencies publishing documents on their disclosure log until at least 10 days after the documents are released to the FOI applicant.
 - allowing applicants to bypass the OAIC and go to the AAT, or if the IC review will take more than 120 days, allowing the applicant to go to the AAT without paying the AAT application fee.
 - preventing agencies from changing exemptions during IC review.
 - requiring agencies to publish their external legal expenses for each IC review/AAT FOI matter.
- On 23 August 2018, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry. The Committee received nine submissions, including one from the OAIC.
- At a public hearing on 16 November 2018, the Committee heard from the Law Institute of Victoria, Accountability Round Table, Transparency International, AGD, the OAIC, academics, and journalists from the ABC, The Saturday Paper and Buzzfeed Australia. The evidence (in submissions and at hearing) referred to lengthy delays in

Explanatory Memorandum: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1142.

IC reviews. More sympathetic commentators saw this as a result of insufficient funding, however Michael McKinnon (ABC) and Senator Patrick were both critical of the way the OAIC deals with IC reviews.

- On 30 November 2018, the Committee published its report recommending that the Senate not pass the Bill. Senator Patrick and the Australian Greens presented dissenting reports.
- There has been criticism of the OAIC since the Bill's introduction including in an article in The Australian on 7 January 2019 (Attachment 1), which notes comments made by Senator Patrick and information about unallocated reviews and timeframes for finalising IC reviews, including that 'about 500 matters for review had not been allocated a case officer'.

Possible questions

What is the average time to finalise IC reviews? In 2016–17 it was 190 days (6.3 months), in 2017–18 it was 204 days (6.8 months) and in the first three quarters of 2018–19 it has been 219.41 days (7.3 months).

Why does the Australian Information Commissioner take so long to make IC review decisions - other jurisdictions have a 30 day time limit? To afford procedural fairness the OAIC needs to ensure parties have an adequate opportunity to consider all information (including the submissions of other parties) and to make their own submissions. Further, the OAIC encourages informal resolution of reviews, which includes the ability of the agency to make a revised decision under s 55G of the FOI Act giving more access. Sometimes informal resolution does not result in the matter settling and a formal decision is required.

What is the OAIC doing to improve the timeliness of IC reviews? The OAIC engages with parties early in the IC review process and encourages resolution of IC reviews by agreement between the parties where possible. In 2017-18, 487 IC reviews were finalised without a formal decision being made (80% of all IC reviews finalised). In the first three quarters of 2018–19, 94% were finalised without a formal decision being made. The OAIC continues to review its processes and procedures to increase timeliness and effectiveness.

In 2017–18 there were 123 IC review decisions under s 55K of the FOI Act, but only 27 formal decisions were made in the first three quarters of this year. Why has the number of formal decisions declined? The OAIC seeks to resolve matters informally, without the need for a formal decision by the Information Commissioner. This is consistent with the lowest reasonable cost objective of the FOI Act. We have devoted additional resources to our early resolution team. Further, there is now a significant body of IC review decisions which provide guidance to Australian Government agencies in making FOI decisions.

Many of the witnesses at the Senate Committee hearing spoke of a poor FOI culture among Australian Government agencies. Does the OAIC agree there is a poor culture and, if so, what is the OAIC doing to address this? The OAIC exercises its functions and powers promote the objectives of the FOI Act and guides agencies in the discharge of their functions under the FOI Act by publishing agency resources, issuing FOI guidelines and making IC review decisions. The OAIC holds twice yearly Information Contact Officer Network information sessions at which we reinforce the value of providing access to government held information and the OAIC holds regular meetings with agencies. Through our enquiries

line and at officer level the OAIC provides guidance to FOI staff in Australian Government agencies.

Key dates

- On 22 August 2018, the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 was introduced into the Senate.
- On 23 August 2018, the Senate referred the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 to the Legal and Constitutional Affairs Legislation Committee for inquiry.
- On 16 November 2018, the Commissioner gave evidence to the Committee at a public hearing.
- The Committee published its report on 30 November 2018 recommending that the Senate not pass the Bill.
- On 7 January 2019, The Australian published an article 'Backlog of cases leaves senator livid at 'dysfunctional' OAIC', which notes comments by Senator Rex Patrick and data relating to unallocated matter and timeframes for finalisation of IC reviews. (Attachment 1)

Document history

Updated by	Reason	Approved by	Date
Raewyn Harlock	April 2019 Senate Estimates	n/a	02/04/2019

Attachment 1

MEDIA ARTICLE:

Backlog of cases leaves senator livid at 'dysfunctional' OAIC

Senator Rex Patrick said correspondence from the OIAC late last month revealed about 500 matters for review had not been allocated a case officer. Picture: Gary Ramage Exclusive: Luke Griffiths Journalist @_LukeGriffiths 12:00AM January 7, 2019

Several hundred cases sit idle within the office tasked with adjudicating Freedom of Information disputes, raising the ire of a key crossbench senator who claims a lack of resources is stifling political debate.

Centre Alliance senator Rex Patrick said correspondence from the Office of the Australian Information Commissioner late last month revealed about 500 matters for review had not been allocated a case officer.

He said the lack of action was symptomatic of a dysfunctional system characterised by bureaucratic delays, obstruction and unacceptably long review processes.

The Coalition government has failed to appoint a FOI commissioner since 2014, when it moved to abolish the OAIC.

It has since cut the office's funding by \$1.6 million a year.

"Of what value is information if it is only made available well after the debate has passed," Senator Patrick said. "Perhaps it suits the government to have a clogged FoI system for now, but that may not be the case after the election when they may find themselves in opposition."

Excluding the 500 unallocated matters, the OAIC, which upon request reviews decisions made by government departments under the Freedom of Information Act, finalised 610 of the 801 applications it received last financial year.

Of those completed, almost 100 took longer than 12 months.

On average, it took 6.7 months to complete a review, up from 6.2 months in the previous period.

An OAIC spokeswoman said some matters had not been allocated a case officer because alternative resolutions were first being explored. "Of those IC review matters needing further detailed consideration, 284 are currently awaiting allocation to a case officer," she said. OAIC boss Angelene Falk last year said managing an increasing workload with fewer resource was "challenging".

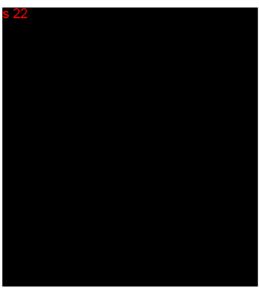
Senator Patrick — dubbed "Inspector Rex" by Nick Xenophon because of his fondness for investigating issues via FoI — introduced a private member's bill in August aimed at making government more transparent and accountable.

During a recent Senate inquiry, Andrew Walter from the Attorney-General's Department conceded that there were "undoubtedly stresses" within the system.

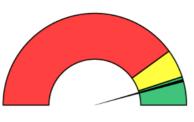
"The OAIC has coped well with an increased workload," he said. "However, of course, it's not clear that that will be sustainable in the long run."

Enquiries

Monthly Summary 2019-20



FOI Written enquiries closed within 14 days of receipt year to date



Target: 90% **YTD:** 91%





FOI

IC Reviews closed within 12 months of receipt year to date

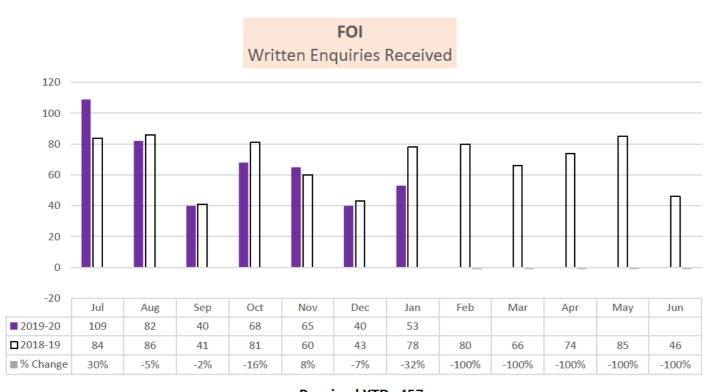


Target: 80% YTD: 69%

FOI Complaints closed within 12 months of receipt year to date



Target: 80% **YTD:** 30%



Received YTD: 457

Total received in same period last year: 473

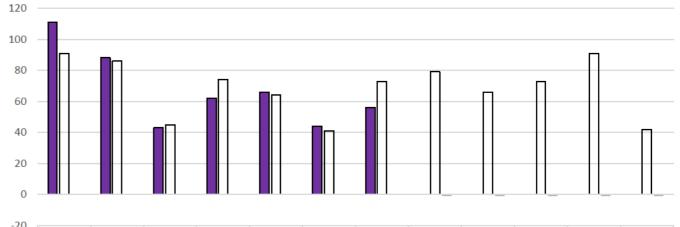
% Change: -3%

FOI Phone Enquiries Received



Received YTD: 1067
Total received in same period last year: 1172
% Change: -9%

FOI Written Enquiries Closed



-20												
-20	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
■ 2019-20	111	88	43	62	66	44	56					
□ 2018-19	91	86	45	74	64	41	73	79	66	73	91	42
■% Change	22%	2%	-4%	-16%	3%	7%	-23%	-100%	-100%	-100%	-100%	-100%

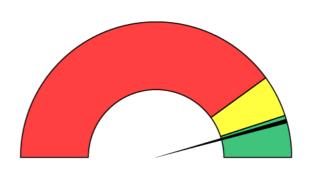
Closed YTD: 470

Total closed in same period last year: 474

% Change: -1%

KPI

FOI Written enquiries closed within 10 working days of receipt year to date



Target: 90% **YTD:** 91%

Age	Closed
<= 14	427
> 14	43
Total	470

2018-19

■% Change

0

0%

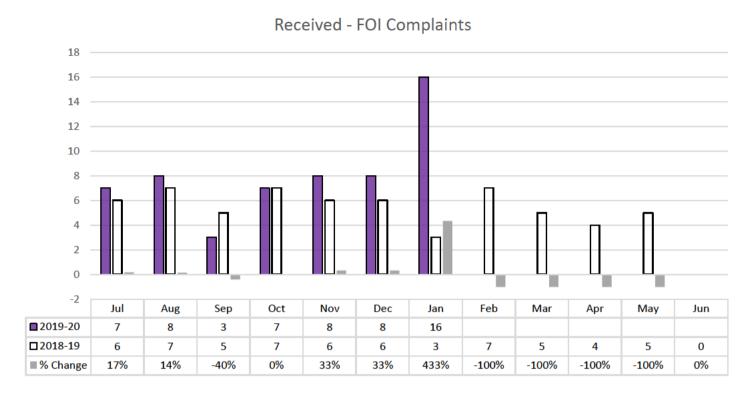
6

-100%

1

-100%

May



Received YTD: 57

Total received in same period last year: 40

% Change: 43%

Age of open FOI complaints (in days) 0-30 16 12% 31-60 8 6% 366+ 58 45% 61-150 18 14% 151-365 29 23%

Total cases on hand:

Age of oldest unallocated case (days):

129

Completed - FOI Complaints Jul Aug Sep Oct Nov Dec Jan Feb Mar May Apr Jun 2019-20 0 5

2

300%

2

200%

1

-100%

0

0%

1

-100%

3

-100%

1

-100%

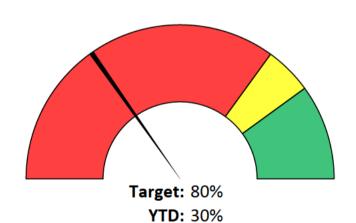
Completed YTD: 20
Total closed in same period last year: 16
% Change: 0%

0%

KPIFOI complaints closed within 12 months of receipt year to date

4

25%



Age Closed <= 365 6 > 365 14

20

Total

Received - IC Reviews

120

100

80

40

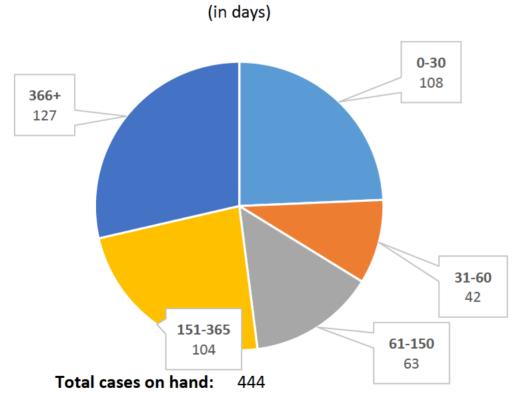
20

-20												
20	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
■2019-20	71	78	61	86	94	74	87					
□ 2018-19	97	85	104	105	75	57	60	93	59	55	67	68
■ % Change	-27%	-8%	-41%	-18%	25%	30%	45%	-100%	-100%	-100%	-100%	-100%

Received YTD: 551
Total received in same period last year: 583

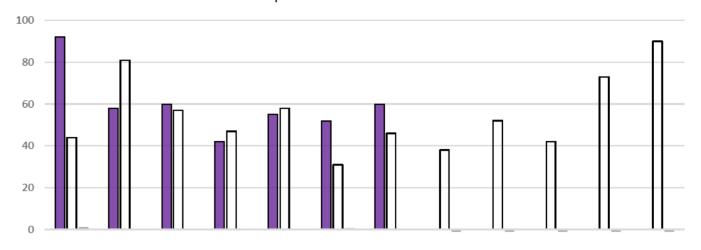
% Change: -5%

Age of open IC Reviews



Age of oldest unallocated case (days): 135

Completed - IC Reviews



-20	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
■2019-20	92	58	60	42	55	52	60					
□2018-19	44	81	57	47	58	31	46	38	52	42	73	90
■% Change	109%	-28%	5%	-11%	-5%	68%	30%	-100%	-100%	-100%	-100%	-100%

Completed YTD: 419

Total closed in same period last year: 364

% Change: 15%

KPIIC Reviews closed within 12 months of receipt year to date



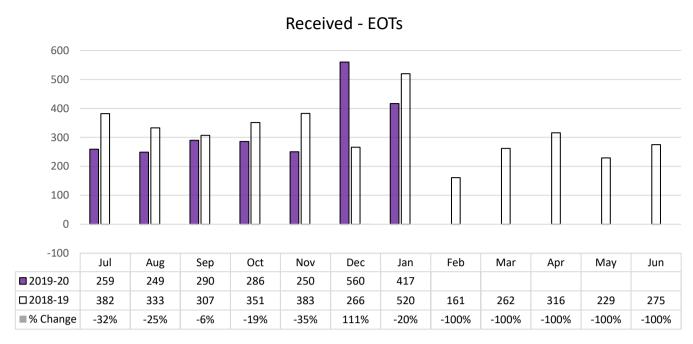
YTD: 69%

Age	Closed
<= 365	289
> 365	130
Total	419

Monthly Summary 2019-20

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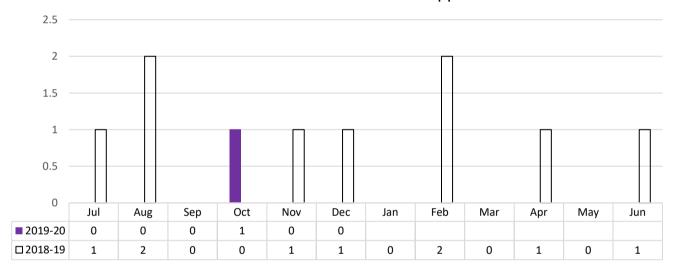
May



Received YTD: 2311

Total received in same period last year: 2542 % Change: -9%

Received - FOI Vexatious Declaration Applications

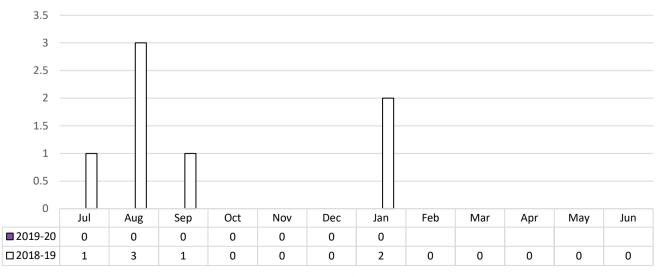


Received YTD: 1

Total received in same period last year: 5

% Change: -80%

Received - FOI Requests from Vexatious Applicants

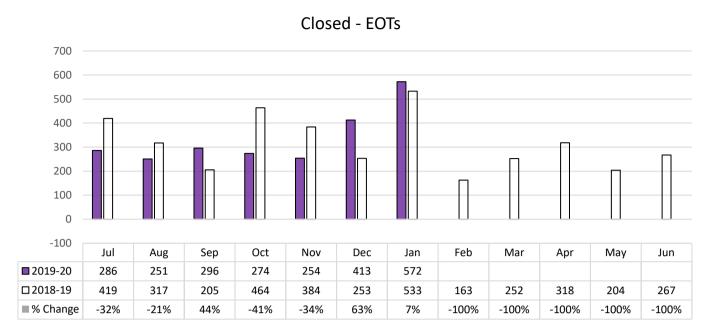


Received YTD: 0

Total received in same period last year: 7

% Change: -100%

KPI Snapshot FOIREQ20/00115 174

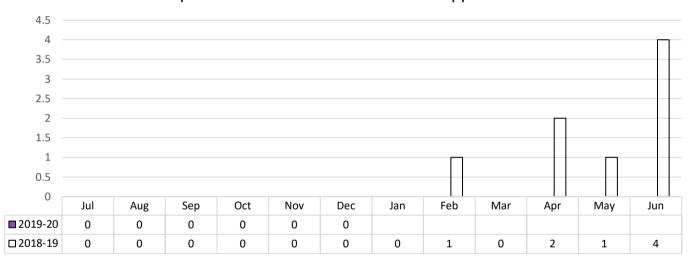


Closed YTD: 2346

Total closed in same period last year: 2575

% Change: -9%

Completed - FOI Vexatious Declaration Applications

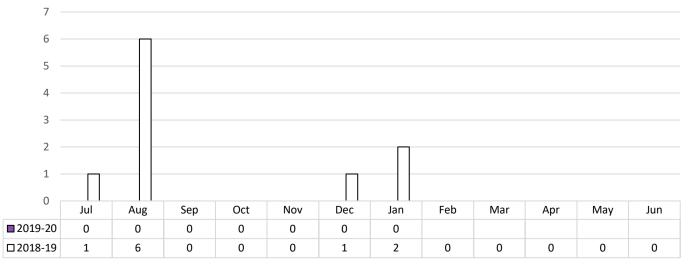


Closed YTD: 0

Total closed in same period last year: 0

% Change: #DIV/0!

Completed - FOI Requests from Vexatious Applicants

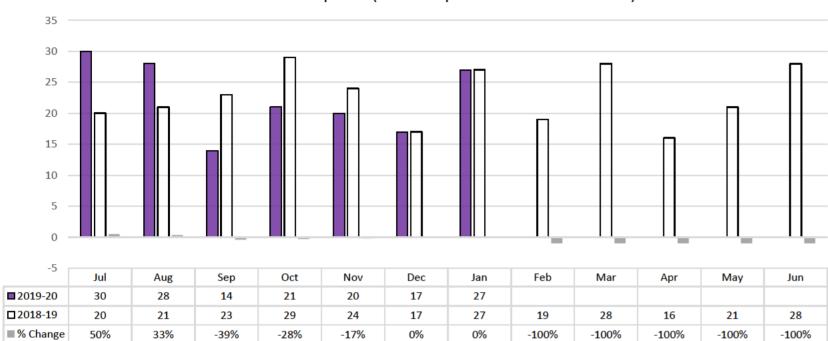


Closed YTD: 0

Total closed in same period last year: 10

% Change: -100%

Received - FOI Requests (initial requests & internal reviews)

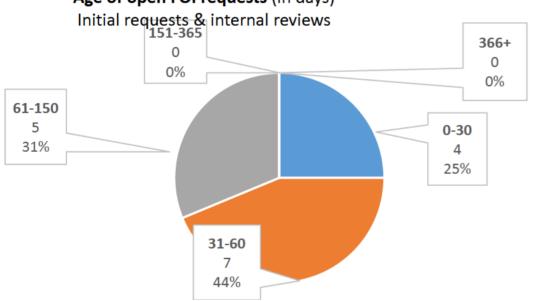


Received YTD: 157

Total received in same period last year: 161

% Change: -2%

Age of open FOI requests (in days)

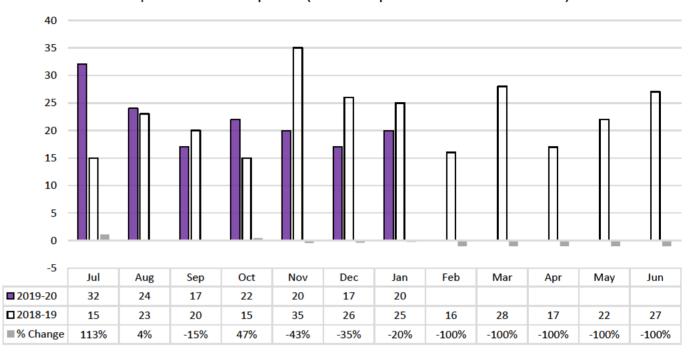


Total cases on hand: 16

Types of FOI request received YTD

Received	Initial Requests	Internal Reviews	IC Reviews	Consultations
2017-18	146	11	4	12
2016-17	252	21	3	11

Completed - FOI Requests (initial requests & internal reviews)



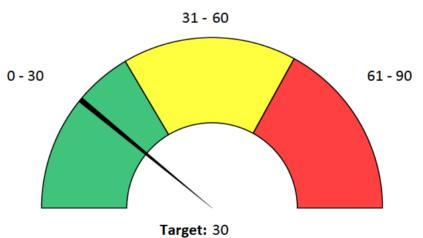
Completed YTD: 152

Total closed in same period last year: 159

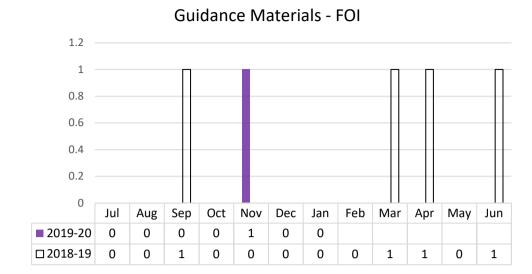
% Change: -4%

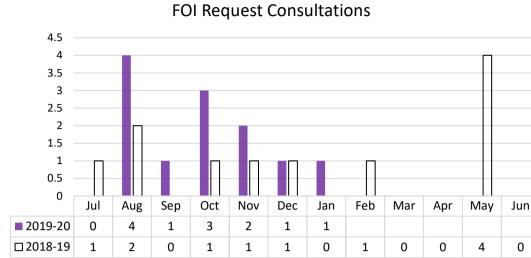
FOI Requests - Average Handling Time (in days)

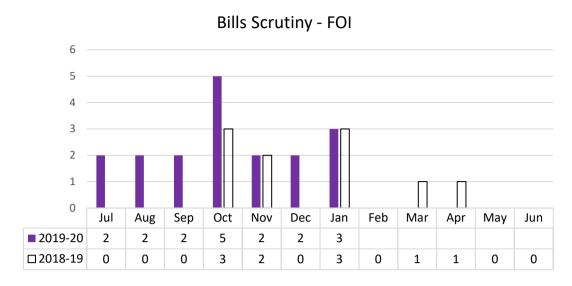
Initial requests & internal reviews



YTD Average: 21







Completed YTD: 1 Total completed in same period last year: 1 % Change: 0%

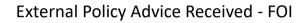
Completed YTD: 12

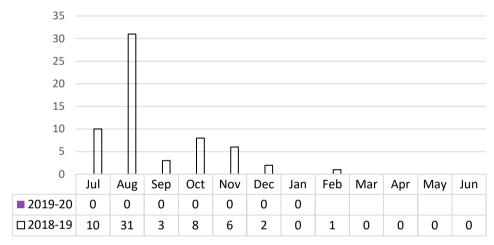
Total completed in same period last year: 6
% Change: 100%

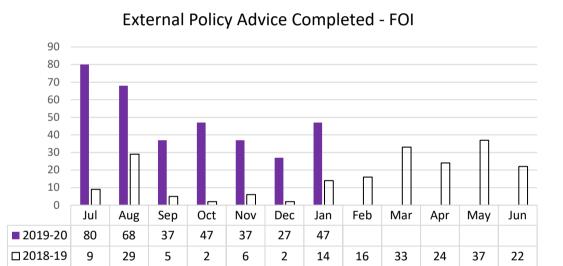
Completed YTD: 18

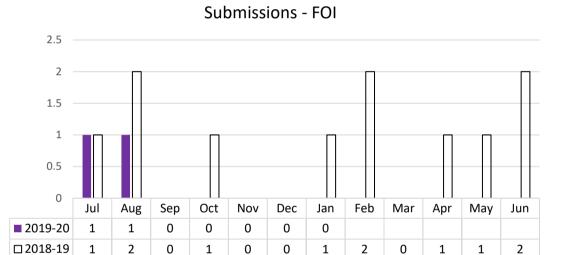
Total completed in same period last year: 8

% Change: 125%









Received YTD: 0 Total received in same period last year: 60 % Change: -100%

Completed YTD: 343

Total completed in same period last year: 67

% Change: 412%

Completed YTD: 2

Total completed in same period last year: 5

% Change: -60%

Year to date summary

Subject	* Guidance Materials	** FOI Request Consultations	** External Policy Advice Received	** External Policy Advice Completed	Bills Scrutiny	Submissions
FOI Tasks Total	1	12	0	343	18	2

^{*}Guidance materials issued to date include the FOI guidelines, IC review procedure direction and FOI Regulatory Action Policy

^{**}A more comprehensive review of all consultations and advices for the last financial years will be conducted

156

148

136

193

188

150

201

184

176

168

201

150

2051

1172

2019-20

198

106

123

146

181

131

182

1067

% Change

27%

-28%

-10%

-24%

-4%

-13%

-9%

-100%

-100% -100%

-100% -100%

Phone - FOI (FOI; FOI - out of jurisdiction & IPS) *Create separate reports by issue? Resolve Report BS-EN-1 *Include RCVD month in each report - streamline YTD check Received Mor 2015-16 2016-17 2017-18 2018-19 153 165 121 139 134 117 166 114 105 Oct 156 102 111 144 119 108 100 Dec 78 66 146 107 Jan 148 Feb 176 153 107 Mar 168 101 148 Apr 154 69 140 May 173 132 99 179

1854

YTD

139

1454

Total in same period last year

111

1340

Written - FOI

Received (FOI; FOI - out of jurisdiction & IPS)

Resolve Report BS-EN-2

Received Month	2019-20	2018-19	% Change
Jul	109	84	30%
Aug	82	86	-5%
Sep	40	41	-2%
Oct	68	81	-16%
Nov	65	60	8%
Dec	40	43	-7%
Jan	53	78	-32%
Feb		80	-100%
Mar		66	-100%
Apr		74	-100%
May		85	-100%
Jun		46	-100%
YTD	457	824	
Total in same period las	t year	473	

Completed

Resolve Report BS-EN-2

Closed Month	2019-20	2018-19	% Change
Jul	111	91	22%
Aug	88	86	2%
Sep	43	45	-4%
Oct	62	74	-16%
Nov	66	64	3%
Dec	44	41	7%
Jan	56	73	-23%
Feb		79	-100%
Mar		66	-100%
Apr		73	-100%
May		91	-100%
Jun		42	-100%
YTD	470	825	
Total in same period last yea	r	474	

Resolve Report EN - 1A

Age Range 0-30 31-60 61-150 151-365 366+ Total

Time taken to close YTD Resolve Report EN - 1A Closed <= 14

Closed > 14

Total

Count		Range %	1	Veedle
7			80	90.85
1			10	
0			10	108.1
1			100	
1		YTD		
10		Target		
	•			

427

43 470

KPI (do not edit)

IC Reviews

Received Resolve Report MR - 1

Received Month	2019-20	2018-19	% Change
Jul	71	97	-27%
Aug	78	85	-8%
Sep	61	104	-41%
Oct	86	105	-18%
Nov	94	75	25%
Dec	74	57	30%
Jan	87	60	45%
Feb		93	-100%
Mar		59	-100%
Apr		55	-100%
May		67	-100%
Jun		68	-100%
YTD	551	925	-40%

Completed

Resolve Report MR - 1

Closed Month	2019-20	2018-19	% Chang
ul	92	44	1099
∖ug	58	81	-289
бер	60	57	59
Oct	42	47	-119
Nov	55	58	-59
Dec	52	31	689
an	60	46	309
eb		38	-1009
Иar		52	-1009
\pr		42	-1009
Лау		73	-1009
un		90	-1009
/TD	419	659	-369

Resolve Report MR - Open

Age	Count	
0-30		108
31-60		42
61-150		63
151-365		104
366+		127
Total		444

KPI (do not edit) Range % Needle 70 68.97374702 10 20 130.026253 100 Target: 80%

Time taken to close YTD

Resolve Report MR - AHT		
Age	Count	
Closed <= 365		289
Closed > 365		130
Total		419

Age of oldest unallocated (days) Resolve Report MR-Unallo

Total in same period last year

EOT Requests

Received Resolve Report RQ - 2

Received Month	2019-20	2018-19	% Change
Jul	259	382	-32%
Aug	249	333	-25%
Sep	290	307	-6%
Oct	286	351	-19%
Nov	250	383	-35%
Dec	560	266	111%
Jan	417	520	-20%
Feb		161	-100%
Mar		262	-100%
Apr		316	-100%
May		229	-100%
Jun		275	-100%
YTD	2311	3785	-39%

Completed

Resolve Report RQ - 2

Total in same period last year

Closed Month	2019-20	2018-19	% Change
Jul	286	419	-32%
Aug	251	317	-21%
Sep	296	205	44%
Oct	274	464	-41%
Nov	254	384	-34%
Dec	413	253	63%
Jan	572	533	7%
Feb		163	-100%
Mar		252	-100%
Apr		318	-100%
May		204	-100%
Jun		267	-100%
YTD	2346	3779	

No reportable KPI in PBS

Total in same period last year

Total in same period last year

FOI Vexatious Declaration Applications (s89K)

Received

Resolve Report VEX - 1A

Received Month	2019-20	2018-19	% Change
Jul	0	1	-100%
Aug	0	2	-100%
Sep	0	0	#DIV/0!
Oct	1	0	#DIV/0!
Nov	0	1	-100%
Dec	0	1	-100%
Jan		0	#DIV/0!
Feb		2	-100%
Mar		0	#DIV/0!
Apr		1	-100%
May		0	#DIV/0!
Jun		1	-100%
YTD	1	9	

Completed

Resolve Report VEX - 1A

Closed Month	2019-20	2018-19	% Change
Jul	0	0	#DIV/0!
Aug	0	0	#DIV/0!
Sep	0	0	#DIV/0!
Oct	0	0	#DIV/0!
Nov	0	0	#DIV/0!
Dec	0	0	#DIV/0!
Jan		0	#DIV/0!
Feb		1	-100%
Mar		0	#DIV/0!
Apr		2	-100%
May		1	-100%
Jun		4	-100%
YTD	0	8	
_	_		_

No reportable KPI in PBS

No reportable KPI in PBS

Total in same period last year

FOI Requests from Vexatious Applicants (s89M(2))

Received Resolve Report VEX - 1A

Total in same period last year

Resolve Report VEX			
Received Month	2019-20	2018-19	% Change
Jul	0	1	-100%
Aug	0	3	-100%
Sep	0	1	-100%
Oct	0	0	#DIV/0!
Nov	0	0	#DIV/0!
Dec	0	0	#DIV/0!
Jan	0	2	-100%
Feb		0	#DIV/0!
Mar		0	#DIV/0!
Apr		0	#DIV/0!
May		0	#DIV/0!
Jun		0	#DIV/0!
YTD	0	7	

Completed

Resolve Report VEX - 1A

Total in same period last year

Closed Month	2019-20	2018-19	% Change
Jul	0	1	-100%
Aug	0	6	-100%
Sep	0	0	#DIV/0!
Oct	0	0	#DIV/0!
Nov	0	0	#DIV/0!
Dec	0	1	-100%
Jan	0	2	-100%
Feb		0	#DIV/0!
Mar		0	#DIV/0!
Apr		0	#DIV/0!
May		0	#DIV/0!
Jun		0	#DIV/0!
YTD	0	10	

65 112 112 155 198 242 263 163.8571429

Total in same period last year

Monthly Summary 2019-20

FOI Requests

Received Resolve Report FOIREQ-1

Received Month	2019-20	2018-19	% Change
Jul	30	20	50%
Aug	28	21	33%
Sep	14	23	-39%
Oct	21	29	-28%
Nov	20	24	-17%
Dec	17	17	0%
Jan	27	27	0%
Feb		19	-100%
Mar		28	-100%
Apr		16	-100%
May		21	-100%
Jun		28	-100%
YTD	157	273	

Total in same period last year

Resolve Report	FOIReq 1/4		
Initial Requests	2019-20	2018-19	% Change
Jul	28	19	47%
Aug	26	18	44%
Sep	13	21	-38%
Oct	19	26	-27%
Nov	20	23	-13%
Dec	15	15	0%
Jan	25	25	0%
Feb		18	-100%
Mar		27	-100%
Apr		16	-100%
May		18	-100%
Jun		26	-100%
YTD	146	252	

Completed Resolve Report FOIREQ-1

2019-20	2018-19	% Change
32	15	113%
24	23	4%
17	20	-15%
22	15	47%
20	35	-43%
17	26	-35%
20	25	-20%
	16	-100%
	28	-100%
	17	-100%
	22	-100%
	27	-100%
152	269	
	32 24 17 22 20 17 20	32 15 24 23 17 20 22 15 20 35 17 26 20 25 16 28 17 22 27

Total in same period last year

Average Handling Time (AHT) of requests closed YTD

Resolve Report FOIREQ-2

Cases closed		Total elapsed day
	152	3258
		21

Age of Open

Resolve Report FOIREQ-2A

Age	Count
0-30	4
31-60	7
61-150	5
151-365	0
366+	0
Total	16

Range Needle 33 21.43421053 33 34 177.5657895 100 Target: 30 Average: 21

Breakup of FOI request types received

Resolve Report I	FOIReq 1/4		
Internal Reviews	2019-20	2018-19	% Change
Jul	2	1	100%
Aug	2	3	-33%
Sep	1	2	-50%
Oct	2	3	-33%
Nov	0	1	-100%
Dec	2	2	0%
Jan	2	2	0%
Feb		1	-100%
Mar		1	-100%
Apr		0	#DIV/0!
May		3	-100%
Jun		2	-100%
YTD	11	21	

Resolve Report	MR-OAIC		
IC Reviews	2019-20	2018-19	% Change
Jul	0	0	#DIV/0!
Aug	1	0	#DIV/0!
Sep	0	0	#DIV/0!
Oct	1	2	-50%
Nov	1	0	#DIV/0!
Dec	0	0	#DIV/0!
Jan	1	0	#DIV/0!
Feb		1	-100%
Mar		0	#DIV/0!
Apr		0	#DIV/0!
May		0	#DIV/0!
Jun		0	#DIV/0!
YTD	4	3	

Resolve Report	FOI-Consul		
Consultations	2019-20	2018-19	% Change
Jul	0	1	-100%
Aug	4	2	100%
Sep	1	0	#DIV/0!
Oct	3	1	200%
Nov	2	1	100%
Dec	1	1	0%
Jan	1	0	#DIV/0!
Feb		1	-100%
Mar		0	#DIV/0!
Apr		0	#DIV/0!
May		4	-100%
Jun		0	#DIV/0!
YTD	12	11	

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EOLDD Boliev Tooks

Guidance Materials - FOI

Data provided by FOI DR			
Completed	2019-20	2018-19	% Change
Jul	0	0	#DIV/0!
Aug	0	0	#DIV/0!
Sep	0	1	-100%
Oct	0	0	#DIV/0!
Nov	1	0	#DIV/0!
Dec	0	0	#DIV/0!
Jan	0	0	#DIV/0!
Feb		0	#DIV/0!
Mar		1	-100%
Apr		1	-100%
May		0	#DIV/0!
Jun		1	-100%
YTD	1	4	

Total in same period last year

Bills Scrutiny

Data provided by FOI DR			
Completed	2019-20	2018-19	% Change
Jul	2	0	#DIV/0!
Aug	2	0	#DIV/0!
Sep	2	0	#DIV/0!
Oct	5	3	67%
Nov	2	2	0%
Dec	2	0	#DIV/0!
Jan	3	3	0%
Feb		0	#DIV/0!
Mar		1	-100%
Apr		1	-100%
May		0	#DIV/0!
Jun		0	#DIV/0!
YTD	18	10	

Total in same period last year

Ol Poguest Consultations

FOI Request Consultation	ons		
Resolve Report FOI-Con	sul		
Completed	2019-20	2018-19	% Chang
ul	0	1	-1009
Aug	4	2	1009
Бер	1	0	#DIV/0!
Oct	3	1	2009
Nov	2	1	1009
Dec	1	1	09
an	1	0	#DIV/0!
eb		1	-1009
Mar		0	#DIV/0!
Apr		0	#DIV/0!
Vlay		4	-1009
un		0	#DIV/0!
/TD	12	11	

Total in same period last year 6

Submissions

Data provided by FOI DR			
Completed	2019-20	2018-19	% Change
Jul	1	1	0%
Aug	1	2	-50%
Sep	0	0	#DIV/0!
Oct	0	1	-100%
Nov	0	0	#DIV/0!
Dec	0	0	#DIV/0!
Jan	0	1	-100%
Feb		2	-100%
Mar		0	#DIV/0!
Apr		1	-100%
May		1	-100%
Jun		2	-100%
YTD	2	11	

External Policy Advice Received

Received	2019-20	2018-19	% Change
Jul	0	10	-100%
Aug	0	31	-100%
Sep	0	3	-100%
Oct	0	8	-100%
Nov	0	6	-100%
Dec	0	2	-100%
Jan	0	0	#DIV/0!
Feb		1	-100%
Mar		0	#DIV/0!
Apr		0	#DIV/0!
May		0	#DIV/0!
Jun		0	#DIV/0!
YTD	0	61	

Total in same period last year

Executive Briefs

Data provided by FOI DR			
Completed	2019-20	2018-19	% Change
Jul	3	0	#DIV/0!
Aug	7	0	#DIV/0!
Sep	0	0	#DIV/0!
Oct	17	0	#DIV/0!
Nov	5	0	#DIV/0!
Dec	3	0	#DIV/0!
Jan	3	0	#DIV/0!
Feb		17	-100%
Mar		10	-100%
Apr		13	-100%
May		4	-100%
Jun		6	-100%
YTD	38	50	

External Policy Advice Completed

Data provided by FOI DR

Completed	2019-20	2018-19	% Change
Jul	80	9	789%
Aug	68	29	134%
Sep	37	5	640%
Oct	47	2	2250%
Nov	37	6	517%
Dec	27	2	1250%
Jan	47	14	236%
Feb		16	-100%
Mar		33	-100%
Apr		24	-100%
May		37	-100%
Jun		22	-100%
YTD	343	199	

Total in same period last year

Draft Decisions to Exec

Data provided by FOI DR			
Completed	2019-20	2018-19	% Change
Jul	5	0	#DIV/0!
Aug	11	0	#DIV/0!
Sep	0	0	#DIV/0!
Oct	7	0	#DIV/0!
Nov	7	0	#DIV/0!
Dec	2	0	#DIV/0!
Jan	3	0	#DIV/0!
Feb		0	#DIV/0!
Mar		0	#DIV/0!
Apr		16	-100%
May		12	-100%
Jun		7	-100%
YTD	35	35	

Resubmitted Executive Briefs

Nesubilitted Executive Difers									
Data provided by FOI DR									
Completed	2019-20	2018-19	% Change						
Jul	0	0	#DIV/0!						
Aug	0	0	#DIV/0!						
Sep	0	0	#DIV/0!						
Oct	8	0	#DIV/0!						
Nov	1	0	#DIV/0!						
Dec	0	0	#DIV/0!						
Jan		0	#DIV/0!						
Feb		0	#DIV/0!						
Mar		0	#DIV/0!						
Apr		2	-100%						
May		1	-100%						
Jun		1	-100%						
YTD	9	4							

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Total in same period last year

FOI DR - Matters Awaiting Allocation

Resolve Report - Alloc Bask

Triage - FOI

Matters in Triage-I	Matters in Triage-FOI								
As at end of	Total Cases	Average Age	Age of oldest						
Jul	39		04/01/19						
Aug									
Sep	23	66.7	204						
Oct	29	34	141						
Nov	298	10.63	170						
Dec	25	70.7	201						
Jan	39	54.33	232						
Feb									
Mar									
Apr									
May									

Allocation Deemed Decisions - FOI

Total in same period last year

Anocación Deem	led Decisions - I Oi		
Matters in Deem	ed Decisions - FOI A	Allocation Baske	et
As at end of	Total Cases	Average Age	Age of oldest
Jul	31		04/10/18
Aug			
Sep	47	73	353
Oct	62	63.5	374
Nov	143	61.26	277
Dec	63	74.6	308
Jan	57	74.26	339
Feb			
Mar			
Apr			
May			
l			

Mail Assessor - FOI

Total in same period last year

Matters in Mail	Assessor - FOI Allo	cation Basket		
As at end of	Total Cases	Average Age		Age of oldest
Jul	113	3		14/09/1
Aug				
Sep	79	9	171	61
Oct	67	7	35.5	13
Nov	15:	1 4	1.18	36
Dec	4(5	29.2	31
Jan	7:	1 4	3.33	114
Feb				
Mar				
Apr				
May				
Jun				

Post Triage - FOI

Total in same period last year

Matters in Post Triage - FOI Allocation Basket

As at end of	Total Cases	Average Age	Age of oldest
Jul	4		25/06/18
Aug			
Sep	48	105.8	473
Oct	21	157.8	494
Nov	62	91.6	218
Dec	112	78.4	161
Jan	91	106.16	345
Feb			
Mar			
Apr			
May			
Jun			

November = run 6 December December = run 2 January 2020 by KS January = run 3 February 2020 by BA

Allocation - IC Reviews Early Res

Matters in Allocation - IC Reviews Early Res Basket

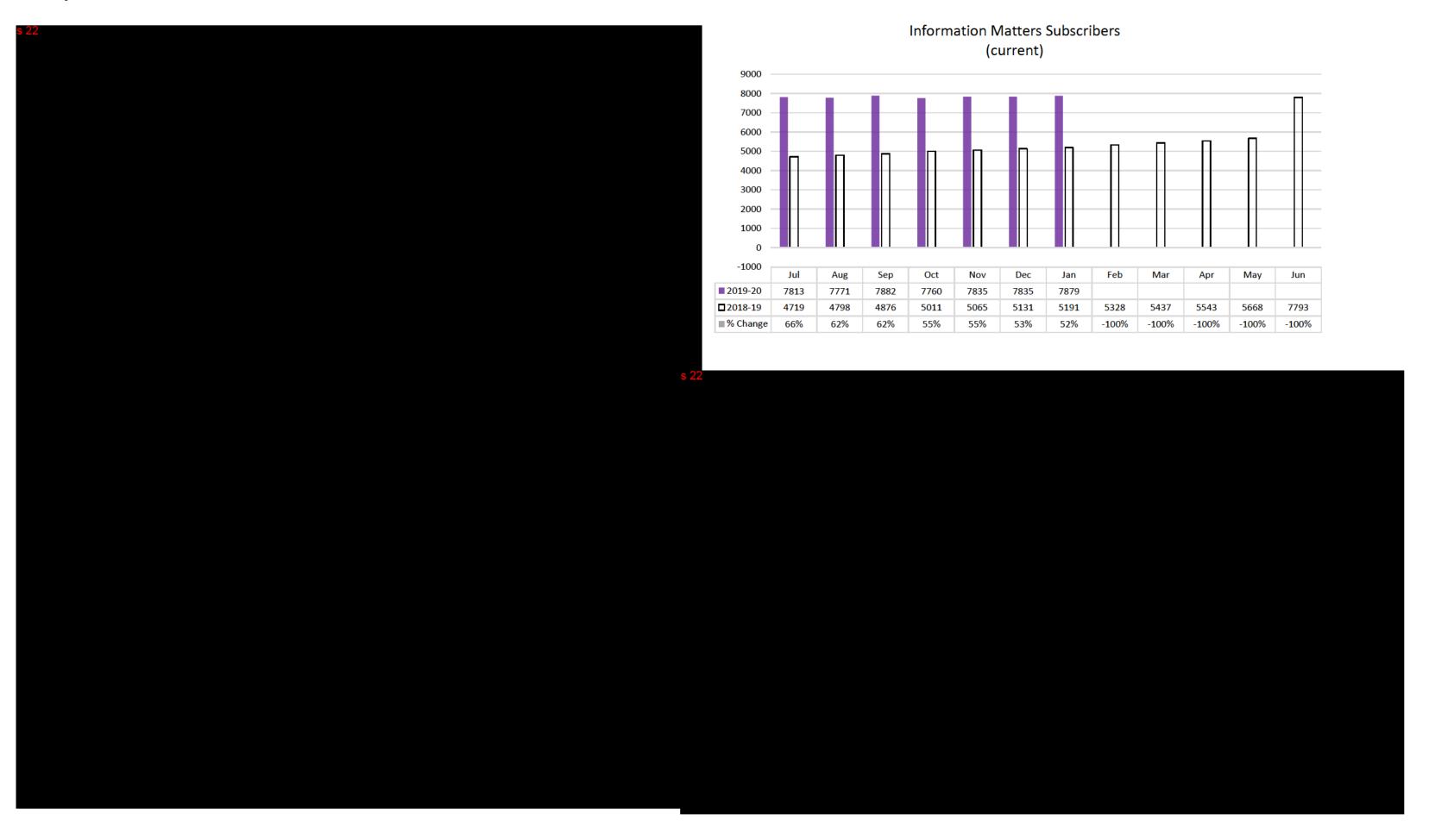
Matters in Allocation - IC Reviews Early Res Basket								
As at end of	Total Cases	Average Age	Age of oldest					
Jul	78		13/08/18					
Aug								
Sep	103	152	424					
Oct	119	150.6	445					
Nov	61	159.73	422					
Dec	108	247.6	588					
Jan	132	232.06	619					
Feb								
Mar								
Apr								
May								
Jun								

Allocation - IC Reviews Matters in FOL - IC reviews - review

Matters in FOI - I	C reviews - reviews	5	
As at end of	Total Cases	Average Age	Age of oldest
Jul	302		11/04/18
Aug			
Sep	330	326	548
Oct	335	342.2	569
Nov	427	336.27	590
Dec	223	375.2	608
Jan	225	400.92	s
Feb			
Mar			
Apr			
May			
Jun			

Allocation - FOI Complaints Matters in Allocation - FOI Complaints

As at end of	Total Cases	Average Age	Age of oldest
Jul	24		10/04/17
Aug			
Sep	8	489.2	5 676
Oct	65	286.1	3 697
Nov	72	305.5	5 726
Dec	82	283.0	4 757
Jan	91	286.8	8 788
Feb			
Mar			
Apr			
May			
Jun			

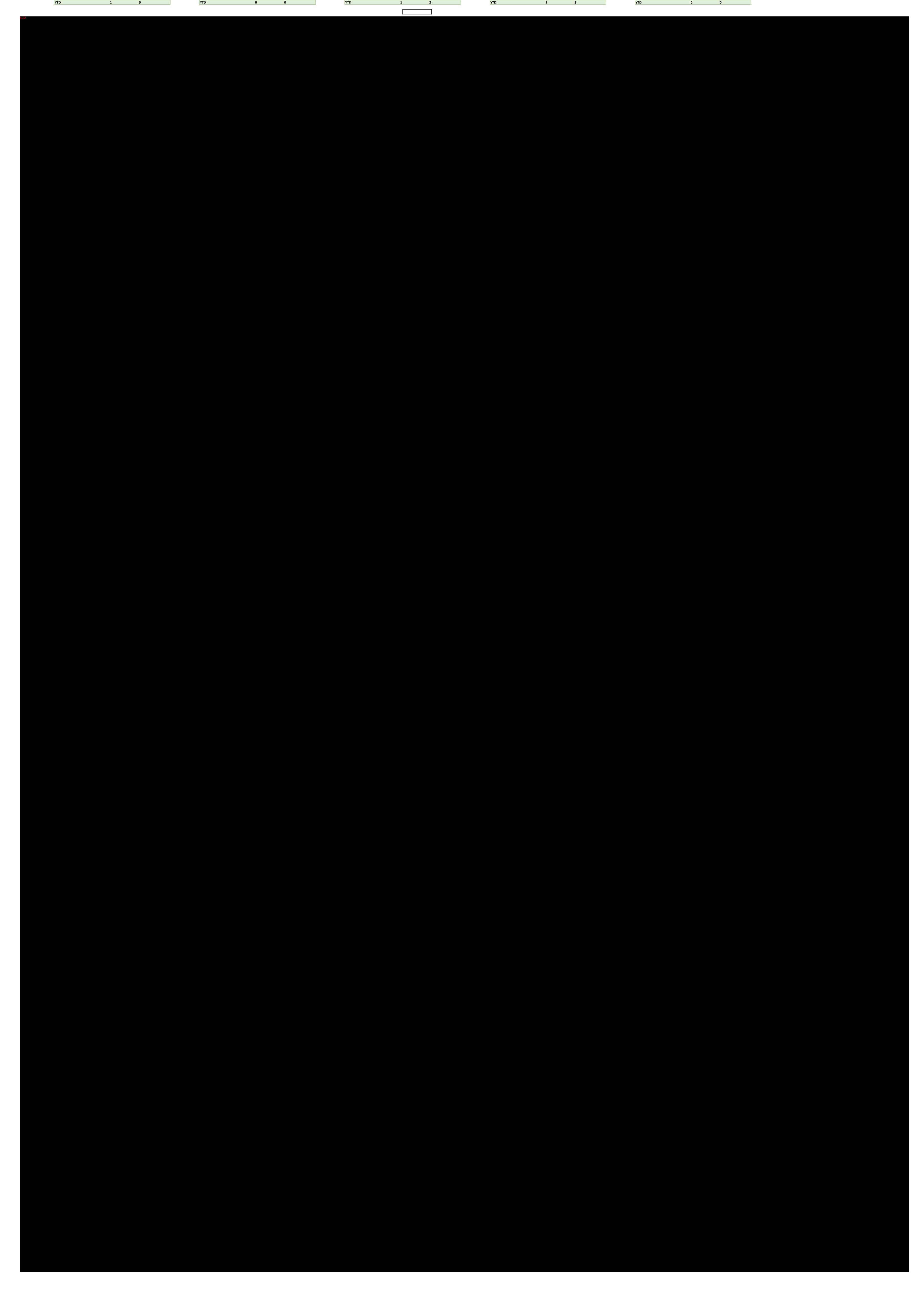


Monthly Summary 2019-20

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s 22		

Information Po	licy			Information Po	licy			Information Po	olicy			Information Po	olicy			Information Po	licy		
Guidance Materials	S			Consultations				External Policy Ad	vice Received			External Policy Ad	lvice Completed			Submissions			
Access report - Fund	ction Summary - All Te	ams		Access report - Fund	ction Summary - All Ted	ams		Access report - Fui	nction Summary - All Te	ams		Access report - Ext	ternal Policy Advice Con	npleted - All Teams		Access report - Fun	ction Summary - All Tea	ams	
Completed	2019-20	2018-19	% Change	Completed	2019-20	2018-19	% Change	Received	2019-20	2018-19	% Change	Completed	2019-20	2018-19	% Change	Completed	2019-20	2018-19	% Change
Jul	0	0	#DIV/0!	Jul	0	0	#DIV/0!	Jul	0	0	#DIV/0!	Jul	0	1	-100%	Jul	0	0	#DIV/0!
Aug	0	0	#DIV/0!	Aug	0	0	#DIV/0!	Aug	0	0	#DIV/0!	Aug	0	0	#DIV/0!	Aug	0	0	#DIV/0!
Sep	0	0	#DIV/0!	Sep	0	0	#DIV/0!	Sep	0	0	#DIV/0!	Sep	0	0	#DIV/0!	Sep	0	0	#DIV/0!
Oct	1	0	#DIV/0!	Oct	0	0	#DIV/0!	Oct	1	0	#DIV/0!	Oct	1	0	#DIV/0!	Oct	0	0	#DIV/0!
Nov	0	0	#DIV/0!	Nov	0	0	#DIV/0!	Nov	0	2	-100%	Nov	0	1	-100%	Nov	0	0	#DIV/0!
Dec	0	0	#DIV/0!	Dec	0	0	#DIV/0!	Dec	0	1	-100%	Dec	0	1	-100%	Dec	0	0	#DIV/0!
Jan	0	0	#DIV/0!	Jan	0	0	#DIV/0!	Jan	0	1	-100%	Jan	0	2	-100%	Jan		0	#DIV/0!
Feb		0	#DIV/0!	Feb		0	#DIV/0!	Feb		0	#DIV/0!	Feb		0	#DIV/0!	Feb		0	#DIV/0!
Mar			#DIV/0!	Mar		0	#DIV/0!	Mar		0	#DIV/0!	Mar			#DIV/0!	Mar		0	#DIV/0!
Apr			#DIV/0!	Apr		0	#DIV/0!	Apr		1	-100%	Apr		1	-100%	Apr			#DIV/0!
May		0	#DIV/0!	May		0	#DIV/0!	May		0	#DIV/0!	May		0	#DIV/0!	May			#DIV/0!
Jun			#DIV/0!	Jun		0	#DIV/0!	Jun		0	#DIV/0!	Jun			#DIV/0!	Jun		0	#DIV/0!
	_		·				•		_		·		_	_					



Data - RS



Information Matters List Subscribers

Data provided by SCaC

Data provided t	by Seuc		
Completed	2019-20	2018-19	% Change
Jul	7813	4719	66%
Aug	7771	4798	62%
Sep	7882	4876	62%
Oct	7760	5011	55%
Nov	7835	5065	55%
Dec	7835	5131	53%
Jan	7879	5191	52%
Feb		5328	-100%
Mar		5437	-100%
Apr		5543	-100%
May		5668	-100%
Jun		7793	-100%