

# Nothing to see here

## Australia's broken freedom of information system

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*FOI decisions cost twice as much as they used to, three in 10 FOI decisions are late and, when reviewed, one in two turns out to be wrong. A review of Australia's FOI system and culture is urgently needed.*

Discussion paper

**Bill Browne**

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Level 1, Endeavour House, 1 Franklin St  
Canberra, ACT 2601

Tel: (02) 61300530

Email: [mail@australiainstitute.org.au](mailto:mail@australiainstitute.org.au)

Website: [www.australiainstitute.org.au](http://www.australiainstitute.org.au)

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# Summary

Australia's freedom of information (FOI) system is dysfunctional and under-resourced. At least in part, this is likely because governments prioritise protecting themselves from embarrassment over disclosing to the public the information to which it is lawfully entitled.

Evidence that Australia's FOI system is sick is readily available. Three in 10 FOI requests are not decided within the statutory timeframe, and many of these are over three months late. Last year, there were 9,202 requests in the FOI backlog, up from 3,313 in 2017-18.

Even once a decision is made, it is not guaranteed to be correct: in recent years, the Office of the Australian Information Commissioner (OAIC) has set aside or varied the original decision in about half of all complaints.

In 2006-07, 34,000 FOI determinations were made, at a cost to government of \$25 million. In 2021-22, only 25,000 determinations were made—but they cost \$65 million. In real terms, it costs more than twice as much to resolve an FOI request today as it did 15 years ago, which suggests that ministers and agencies are devoting more resources to stymieing or evading requests than they did in the past.

The OAIC is meant to ensure the integrity of the FOI system by reviewing complaints about FOI decisions. However, it is chronically under-resourced. In 2022, there were 957 OAIC reviews that had already taken more than a year, including 60 that were four or more years old.

The resignation of FOI Commissioner Leo Hardiman after less than one year in the job on the grounds that reforms outside of his power were needed to “increase timeliness of IC reviews and access in a way which best promotes the objects of the FOI Act” underscores this problem.<sup>1</sup>

Reforms could tighten the FOI system by closing loopholes, opening more avenues for redress and requiring minimum staffing levels for FOI teams. Ultimately, however, the problems with Australia's FOI system are cultural. A review into public service culture is needed.

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<sup>1</sup> Costin (2023) *FOI commissioner quits, citing lack of power and delays*, <https://www.afr.com/politics/federal/foi-commissioner-quits-citing-lack-of-power-and-delays-20230306-p5cpwj>

# Introduction

Australians have a right to information, codified in the *Freedom of Information Act 1982*. The Parliamentary Joint Committee and Security's 2020 inquiry into the impact of law enforcement and intelligence powers on the freedom of the press noted that FOI laws are also an important democratic right, saying:

Regular, free and fair elections are fundamental to Australia's parliamentary democracy. Underpinning the concept of a free and fair election is access to information – including information from and about the government of the day. That is one of a number of reasons why schemes, such as the Public Interest Disclosure (PID) and the Freedom of Information (FOI) schemes exist.<sup>2</sup>

Freedom of information requests have made public interest journalism possible. FOI requests from recent years have revealed that:

- Australia secretly exported arms to countries “whose militaries have been consistently accused of war crimes and crimes against humanity”;<sup>3</sup>
- The Future Fund invested in an Adani company that was building a rail line for the Carmichael coal mine, a company that has been criticised by the United Nations for financially supporting the Myanmar military;<sup>4</sup>
- Energy Minister Angus Taylor was warned that his decision to “effectively rip up decades-long contracts for carbon credits” could “kill any new carbon-farming projects”, strand \$500 million in projects and “flood the market with carbon credits”;<sup>5</sup> and

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<sup>2</sup> Parliamentary Joint Committee on Intelligence and Security (2020) *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, p. 14, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/FreedomofthePress/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report)

<sup>3</sup> Doherty & Knaus (2020) *Australia urged to stop selling weapons to countries accused of war crimes*, <https://www.theguardian.com/australia-news/2020/jan/15/australia-urged-to-stop-selling-weapons-to-countries-accused-of-war-crimes>

<sup>4</sup> Slezak (2020) *Australian taxpayers “in bed with Adani” after FOI reveals \$3.2 million Future Fund investment*, <https://www.abc.net.au/news/2020-12-16/future-fund-invests-millions-in-adani-project/12984734>

<sup>5</sup> Ziffer (2022) *Coalition government's pre-election carbon credit shake-up created “sovereign risk”, department warned*, <https://www.abc.net.au/news/2022-07-25/pre-election-carbon-credit-shake-up-foi-documents/101259776>

- The Morrison Government gave Foxtel a \$10 million grant, without the company being required to submit a plan on how to spend the money until the following year.<sup>6</sup>

Other issues of public importance have been concealed by the use and abuse of the FOI system, with prominent examples including:

- The Department of Environment unlawfully withholding more than 10,000 pages of documents from the public, including records on Adani and the Angus Taylor “grasslands affair”;<sup>7</sup>
- The Department of Prime Minister & Cabinet saying it “cannot find” a key letter from Attorney-General Christian Porter to Prime Minister Scott Morrison on the “sports rorts” affair;<sup>8</sup> and
- The Australian Tax Office failing to meet its legal obligations by refusing to process some FOI requests.<sup>9</sup>

The Australia Institute has direct experience of the flawed FOI system. Three examples are particularly egregious:

- It has been two-and-a-half years since the author made an FOI request to the Department of Foreign Affairs and Trade (DFAT) regarding Prime Minister Scott Morrison’s “negative globalism” speech. It took 10 months for DFAT to release a fraction of the documents asked for. The author requested an OAIC review, which has taken 18 months and counting;
- The Australia Institute made an FOI request to the Prime Minister’s Office (PMO) for the text messages Barnaby Joyce sent as “drought envoy”, which apparently constituted his “final report” for a position he held for seven months, accruing \$675,000 in expenses. It took over two years for an OAIC review to order the text messages to be released, and the PMO delayed until the 2022 federal election. The change in ministers after the Coalition’s defeat in

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<sup>6</sup> Ziffer (2020) *Foxtel given \$10 million federal grant without plan for spending it, FOI documents reveal*, [https://www.abc.net.au/news/2020-11-13/foxtel-given-\\$10-million-without-plan-to-spend-it-foi-reveals/12868704](https://www.abc.net.au/news/2020-11-13/foxtel-given-$10-million-without-plan-to-spend-it-foi-reveals/12868704)

<sup>7</sup> Knaus (2019) *Environment department illegally withholds thousands of FOI pages*, <https://www.theguardian.com/australia-news/2019/oct/16/environment-department-illegally-withholding-thousands-of-foi-pages>

<sup>8</sup> Knaus (2021) *Prime minister’s department ‘can’t find’ sports rorts document requested by Rex Patrick under FOI*, <https://www.theguardian.com/australia-news/2021/dec/17/prime-ministers-office-cant-find-sports-rorts-document-requested-by-rex-patrick-under-foi>

<sup>9</sup> Elvery (2017) *ATO’s refusal to process information requests ruled invalid*, <https://www.abc.net.au/news/2017-05-12/atos-refusal-to-process-information-requests-ruled-invalid/8520790>

that election placed the text messages seemingly permanently beyond the reach of the FOI system;<sup>10</sup> and

- In mid-2017, The Australia Institute submitted an FOI request to DFAT for documents relating to DFAT's role (if any) in encouraging foreign governments to fund the Adani coal mine. In September 2017, after no decision had been made, the Institute requested OAIC review. This request was one of the slowest OAIC reviews on record.

Successful FOI requests from The Australia Institute have underpinned its research and analysis, showing that the \$5 billion Northern Australia Infrastructure Facility had limited staffing and internal documentation, that Prime Minister Malcolm Turnbull and Environment and Energy Minister Josh Frydenberg blamed the 2016 South Australian blackout on renewables despite advice that renewables were not responsible, and that Adani "may have been negligent" by failing to disclose its CEO's links to earlier environmental offences.<sup>11</sup>

The Albanese Government has resisted prominent FOI requests. It continues to prevent the release of National Cabinet documents, despite describing the Morrison Government as being "obsessed with secrecy" for doing the same thing.<sup>12</sup> The Prime Minister's Office also refused to provide the Prime Minister's diary in response to an FOI request, despite Albanese ministers Mark Dreyfus, Jim Chalmers and Tony Burke making their diaries available after similar FOI requests.<sup>13</sup>

According to the Grata Fund, a fund that supports strategic and public interest legal challenges, several common governmental tactics to delay or refuse FOI requests may

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<sup>10</sup> Taylor (2022) *Barnaby Joyce's drought envoy texts to Scott Morrison should be released, information watchdog rules*, <https://www.theguardian.com/australia-news/2022/apr/02/barnaby-joyces-drought-envoy-texts-to-scott-morrison-should-be-released-information-watchdog-rules>; (2022) *Barnaby Joyce's drought envoy texts not 'documents of a minister', prime minister's office claims*, <https://www.theguardian.com/australia-news/2022/may/17/barnaby-joyces-drought-envoy-texts-not-documents-of-a-minister-prime-ministers-office-claims>

<sup>11</sup> Swann (2017) *Freedom of Information requests for advice about SA blackout*, <https://australiainstitute.org.au/report/freedom-of-information-requests-for-advice-about-sa-blackout/>; (2017) *Freedom of Information requests on Adani and the Northern Australia Infrastructure Facility (NAIF)*, <https://australiainstitute.org.au/report/freedom-of-information-requests-on-adani-and-the-northern-australia-infrastructure-facility-naif/>; The Australia Institute (2018) *FOI: Adani "may have been negligent,"* <https://australiainstitute.org.au/report/foi-adani-may-have-been-negligent/>

<sup>12</sup> Grattan (2022) *Anthony Albanese's commitment to transparency should apply to national cabinet*, <https://www.abc.net.au/news/2022-09-09/albanese-transparency-national-cabinet/101419570>; Karp (2022) *Anthony Albanese backflips on national cabinet secrecy and refuses to say why*, <https://www.theguardian.com/australia-news/2022/jun/17/anthony-albanese-backflips-on-national-cabinet-secrecy-and-refuses-to-say-why>

<sup>13</sup> Buckley (2023) *A Senate push could force Albanese to hand over his diary*, <https://www.crikey.com.au/2023/01/20/anthony-albanese-diary-rex-patrick/>



be illegal. The fund published a “hit list” in 2021, identifying spurious and potentially unlawful governmental approaches to FOI requests. These include inappropriate refusal on the grounds of cabinet confidentiality, overuse of exemptions without substantiation, and unreasonable refusal of FOIs seeking text messages.<sup>14</sup>

The OAIC’s annual reports contain a wealth of information on the FOI system, including the volume of requests made, how each agency performs in terms of processing FOIs on time and without going to review, and the cost of the FOI system.<sup>15</sup> However, the information raises more questions than it answers.

- If most FOI requests are processed on time, as the OAIC data suggests, then why are there so many accounts of FOI requests taking months or years to resolve, or never being resolved?
- Are there some agencies that are responsible for most of the problems with Australia’s FOI system? The top-level data suggests that some agencies are responsible for more delayed or reviewed decisions than others, but the agencies’ particular circumstances would need to be considered to determine if this deviation is unreasonable.
- If fewer FOI requests are being resolved, why does the FOI system cost more to administer than ever before (more than twice as much per decision)?

This paper identifies what we do know about Australia’s FOI system, which is that it is expensive, sluggish, obfuscatory, and undermined by poor decision-making within agencies. However, the larger question—how to fix the political culture that let the FOI system decay to this point—is left mostly unresolved. An inquiry or commission is needed to get to the heart of the problems with the public service’s culture, along with its relationship to government.

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<sup>14</sup> Grata Fund (2021) *FOI litigation hit list*, p. 5, [https://www.gratafund.org.au/litigation\\_hitlist\\_launched\\_to\\_challenge\\_the\\_government\\_s\\_foi\\_refusals](https://www.gratafund.org.au/litigation_hitlist_launched_to_challenge_the_government_s_foi_refusals)

<sup>15</sup> OAIC (2016) *Annual report 2015–16*, <https://www.oaic.gov.au/updates/news-and-media/oaic-annual-report-201516>; (2018) *Annual report 2017–18*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2017-18>; (2019) *Annual report 2018–19*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2018-19>; (2020) *Annual report 2019–20*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2019-20>; (2021) *Annual report 2020–21*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2020-21>; (2022) *Annual report 2021–22*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2021-22>

## The existing FOI system

Under the *Freedom of Information Act 1982*, the public has the right to access to information held by the Federal Government. (This report focuses on the federal FOI system, but there are similar right to information systems in place in all states and territories.)

The system has not changed substantially since it was enacted in the 1980s.<sup>16</sup> It dictates that a person making an FOI request must do so in writing to an agency or minister. A request is typically handled by an FOI officer, who is responsible for receiving, responding to and processing FOI requests. The FOI officer may get in touch with the applicant to clarify their FOI request or give them advice, after which the applicant may wish to modify their request.

The decision of whether to release documents, and which documents to release, is made by the responsible minister, the principal officer of the agency, or an officer who has been authorised to do so. This person is the “decision maker”.

The decision maker may decide to refuse a request or to allow access to some or all documents. There are a number of exemptions (for example, cabinet documents or a document that affects national security) and conditional exemptions (where interests like privacy or state–federal relations must be weighed against the public interest) to the general rule that the public has the right to access information. Decision makers can also delete exempt or irrelevant material from documents to which they allow access.

The decision maker has 30 days to process the request. Limited extensions are available.

If an applicant is unhappy with the decision about which (if any) documents to release, or if the decision maker misses their deadline to make a decision, they can typically request an internal review (which is conducted by a different decision maker within the same minister’s office or agency) or ask the OAIC to review the decision.

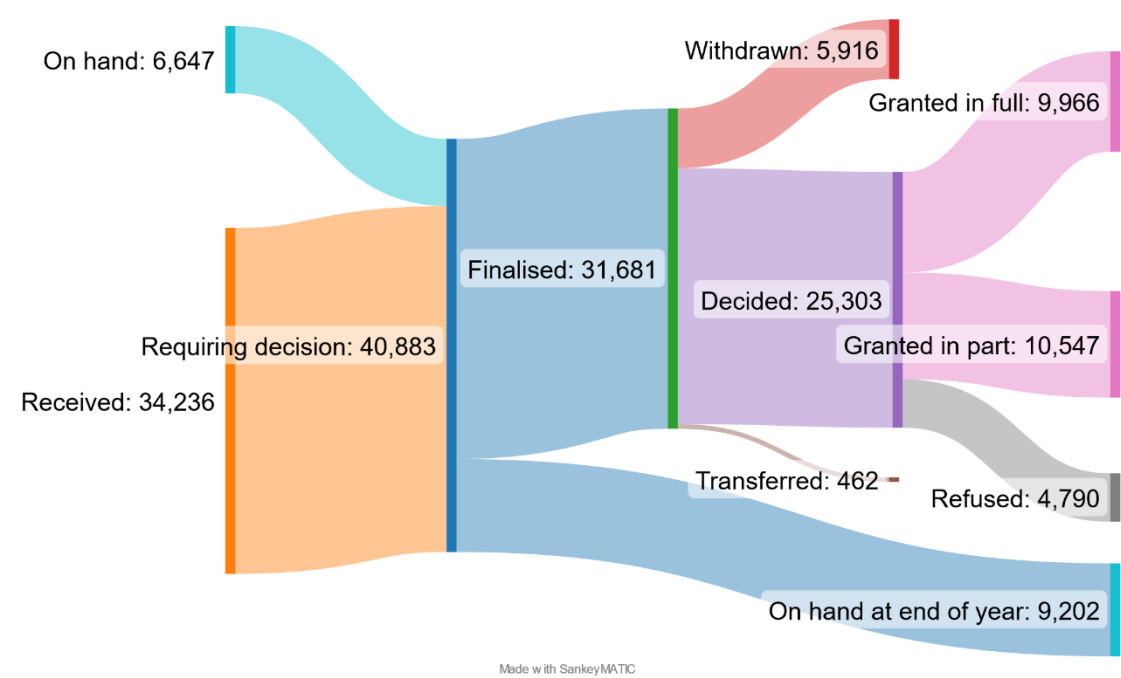
The OAIC can vary (amend) the decision maker’s original adjudication, or set it aside entirely. In the latter case, the OAIC can replace the decision with a new one or remit it (return it to the original decision maker to make a new decision). An applicant can also apply to the Administrative Appeals Tribunal (AAT) to review the OAIC’s decision, or to review the original decision if the OAIC decides not to do so.

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<sup>16</sup> Australian Government (2016) *Australia National Action Plan 2016-2018*, pp. 36–37, <https://www.opengovpartnership.org/documents/australia-national-action-plan-2016-2018/>

The OAIC’s most recent annual report gives a picture of the FOI system’s flows. Of the 40,900 FOI requests requiring decision in 2021-22, 10,000 were granted in full and 10,500 were granted in part. 5,900 were withdrawn and 4,800 were refused. Fully 9,200 were not finalised by the end of the year, an increase of 2,600 on the previous year’s backlog.

**Figure 1: Sankey diagram of FOI requests in 2021-22**



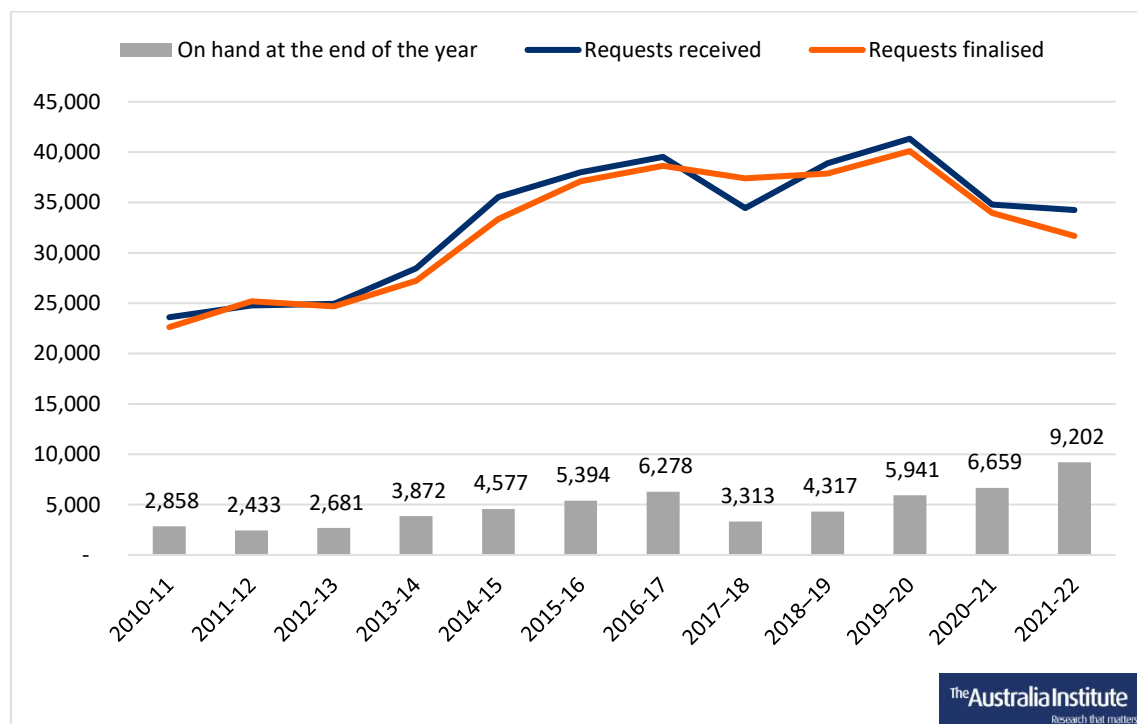
Source: OAIC (2022) *Annual report 2021-22*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2021-22>

# Scale and cost of the FOI system

Over the past 12 years, Australians have made between 23,000 and 41,000 FOI requests per year, with between 20,000 and 34,000 determinations (decisions) per year over the same period. Anywhere between 2,000 and 11,000 requests are finalised in other ways (withdrawn by the applicant or transferred).

The number of FOI requests received has exceeded the number finalised since 2017-18, meaning that the backlog of FOI requests has been growing since then – from 3,313 to 9,202 in 2021-22.

**Figure 2: FOI requests received and finalised (2010–2022)**



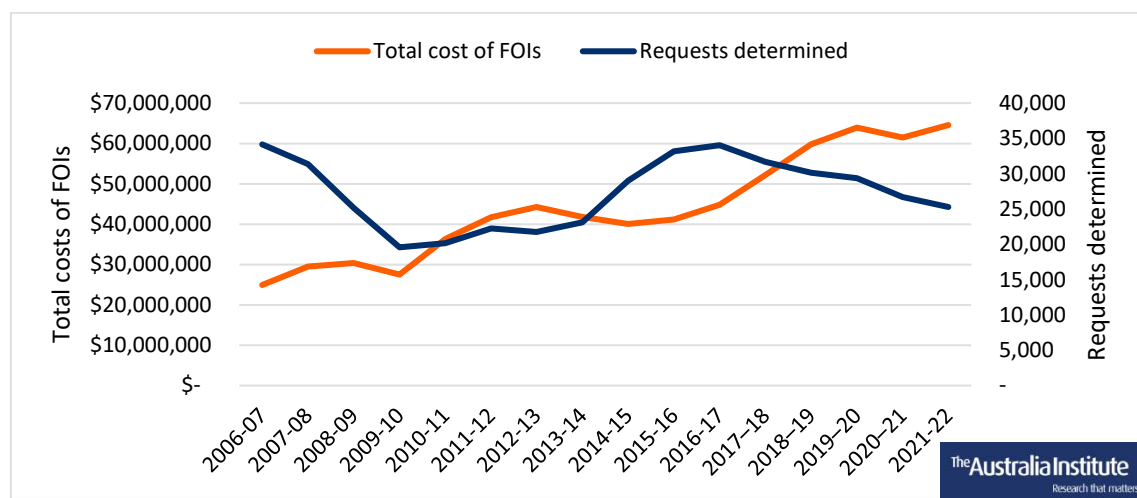
Source: OAIC annual reports, 2015-16 to 2021-22

Most FOI requests (25,173 of 34,236 in 2021-22, or 74%) are personal, meaning that the applicant is seeking the release of information about themselves or another person on whose behalf they have the authority to act. Six of the top seven agencies for number of FOI requests received get more personal FOI requests than non-personal (“other”) requests: the Department of Home Affairs, Services Australia, the National Disability Insurance Agency, the Department of Veterans’ Affairs, the AAT and the

Australian Taxation Office.<sup>17</sup> This gives an idea of what kinds of personal information applicants are seeking.

While the number of FOI requests on which decisions have been made has fallen over the years, the cost of running Australia's FOI system is greater than ever. In 2006-07, 34,200 FOI requests were determined at a cost of \$25 million. By 2021-22, only 25,300 requests were determined but at a cost of \$65 million. Accounting for inflation, this is an increase of about 85% in costs.

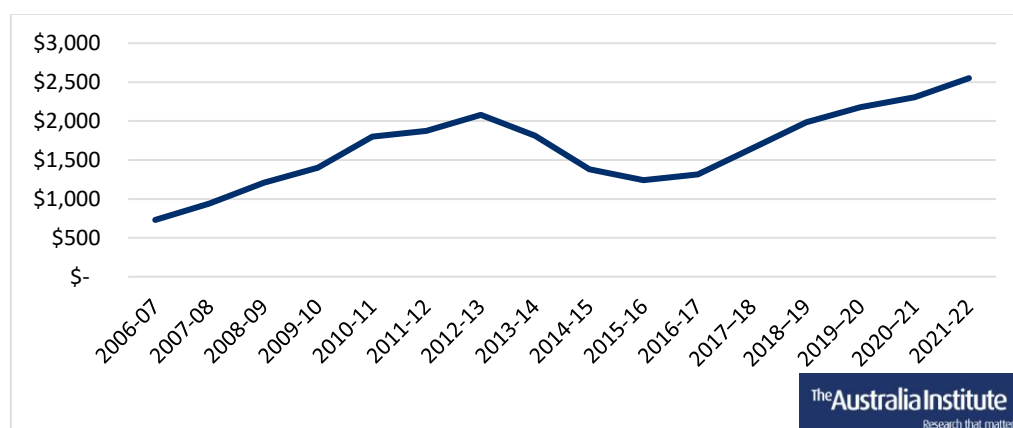
**Figure 3: Total costs of FOIs and requests determined (2006–2022)**



Source: OAIC annual reports, 2015-16 to 2021-22

In 2006-07 the cost per FOI request determined was \$730, compared to \$2,551 in 2021-22. Accounting for inflation, this is a more than twofold increase in costs.

**Figure 4: Average cost per request determined (2006–2022)**



Source: OAIC annual reports, 2015-16 to 2021-22

<sup>17</sup> OAIC (2022) *Annual report 2021-22*, p. 137

# Problems with the FOI system

## FOI delays (agencies)

Agencies are required to resolve FOI requests within 30 days of being lodged, unless they receive an extension. However, the actual share of FOI requests resolved within the statutory time frame has fallen from 85% in 2017-18 to 70% in 2021-22. In 2016-17, just 58% of FOI requests were resolved within 30 days. This represents thousands of FOI requests each year that are resolved outside the statutory timeframe (7,505 in 2021-22), many of which are more than three months late (4,824 in 2021-22).

The Department of Home Affairs is the subject of a large share of FOI requests (43% of all FOI requests in 2021-22). Home Affairs is also chronically late, with 4,701 out of 11,203 FOI requests (42%) decided in 2021-22 being decided more than 90 days after the statutory 30 days had expired.<sup>18</sup> These accounted for 97% of all decisions that were more than 90 days late in 2021-22.

The FOI processes of Home Affairs (and its predecessor, the Department of Immigration) have been reviewed several times, with a 2020 investigation finding problems with the Department's governance, systems of accountability, policies and processes. The investigation also noted that (at the time of the review) Home Affairs' responsibilities had expanded to include areas with a high volume of FOI requests and that an unusually high number of non-personal FOI requests required consultation with a third party or third parties. The investigation made several recommendations, which the Department undertook to implement.<sup>19</sup>

In most years, personal requests are more likely to miss the statutory timeframe than other requests, although in each year there are still hundreds of other requests that are decided late (1,032 in 2021-22).<sup>20</sup>

It is also important to note that the OAIC's annual reporting does not capture the number of FOI requests on which no decision is made. In 2021-22, this was 9,202 requests. Because these requests have not been resolved, they do not show up as having been resolved late. However, based on the gap between FOI requests per year

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<sup>18</sup> OAIC (2022) *Annual report 2021-22*, pp. 148, 152

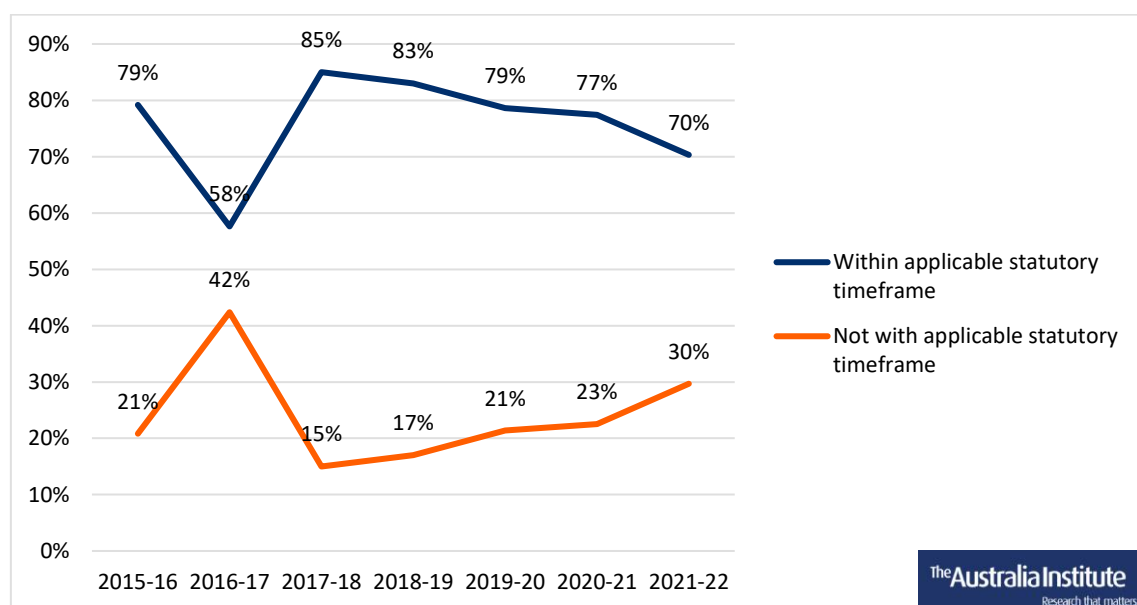
<sup>19</sup> Falk (2021) *Commissioner-initiated investigation into the Department of Home Affairs*, pp. 22-37, 58, <https://www.oaic.gov.au/freedom-of-information/foi-reports/commissioner-initiated-investigation-into-the-department-of-home-affairs>

<sup>20</sup> OAIC (2022) *Annual report 2021-22*, p. 147

and FOI finalisations per year, they are likely to represent hundreds or thousands of requests.<sup>21</sup>

Many FOI review applications to the OAIC are likely to be the result of unacceptable delays, including cases where no decision is made. Requests for reviews of applications to the Department of Home Affairs still account for the majority of these cases: in 2021-22 Home Affairs was the subject of 1,022 FOI review requests out of 1,932 reviews requested in total. That amounts to 7% of Home Affairs FOI requests leading to a request for review, compared to 6% of all FOI requests. In other words, poor and delayed decision making is not limited to a single offending agency or minister.

**Figure 5: Freedom of Information request response times**



Source: OAIC annual reports, 2015-16 to 2021-22

## Review delays (OAIC)

The OAIC is required to conduct reviews in a timely manner, but because of poor resourcing it has fallen behind.

The Abbott Government attempted to shut down the OAIC, the statutory body responsible for reviewing FOI decisions, and divide its functions among other bodies. When that push was defeated in the Senate, the Abbott Government instead “emasculated” the OAIC—in the words of former Liberal attorney general John Dowd—by leaving the position of Freedom of Information Commissioner unfilled and

<sup>21</sup> Some FOI requests that remain on hand at the end of the year may be recent requests, so it is not possible to calculate how many FOI requests have passed their statutory timeframe without a decision.

failing to allocate the OAIC the funds it needed to do its job.<sup>22</sup> Some funds were restored in later budgets, and in March 2022—seven years after the Abbott Government’s attempt to abolish the OAIC—the Morrison Government appointed a Freedom of Information Commissioner, Leo Hardiman.<sup>23</sup>

In March 2023, Hardiman announced his resignation, saying that, while he had made changes to improve the timeliness of FOI reviews,

Further changes are, however, necessary in my view to ensure that the timeliness of IC (Information Commissioner) reviews and, consequently, access to government-held information, is increased.

The making of those changes is not within the powers conferred on me as FOI commissioner.

I have come to the view that I will not be able, in the absence of those changes, to increase timeliness of IC reviews and access in a way which best promotes the objects of the FOI Act.

I have accordingly decided the most appropriate course is to resign my appointment.<sup>24</sup>

In 2021, the Australia Institute warned that the Budget had failed to fund the OAIC sufficiently to address the growing number of applications for OAIC review of FOI decisions. At the time, requests were projected to reach 1,622 per year by 2023.<sup>25</sup>

Requests have overshot projections, reaching 1,995 per year by 2021-22.<sup>26</sup> Despite this, the Albanese Government’s October 2022 Budget projects a funding cut of nearly half the OAIC’s budget, from \$27 million in the current year to \$14 million by 2025-26.<sup>27</sup>

The consequences of the under-resourcing of the OAIC is that reviews take excessive periods of time. As shown in Figure 6, in 2017-18 there were 81 reviews that had been

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<sup>22</sup> Hurst (2015) *George Brandis urged to respect rule of law by former Liberal attorney general*, <https://www.theguardian.com/australia-news/2015/aug/17/george-brandis-urged-to-respect-rule-of-law-by-former-liberal-attorney-general>

<sup>23</sup> Sadler (2022) *Appointment of FOI commissioner was a Coalition captain’s call*, <https://www.crikey.com.au/2022/11/18/freedom-of-information-commissioner-coalition/>

<sup>24</sup> Costin (2023) *FOI commissioner quits, citing lack of power and delays*

<sup>25</sup> Browne (2021) *Freedom of information gets more attention*, <https://australiainstitute.org.au/post/freedom-of-information-gets-more-attention/>

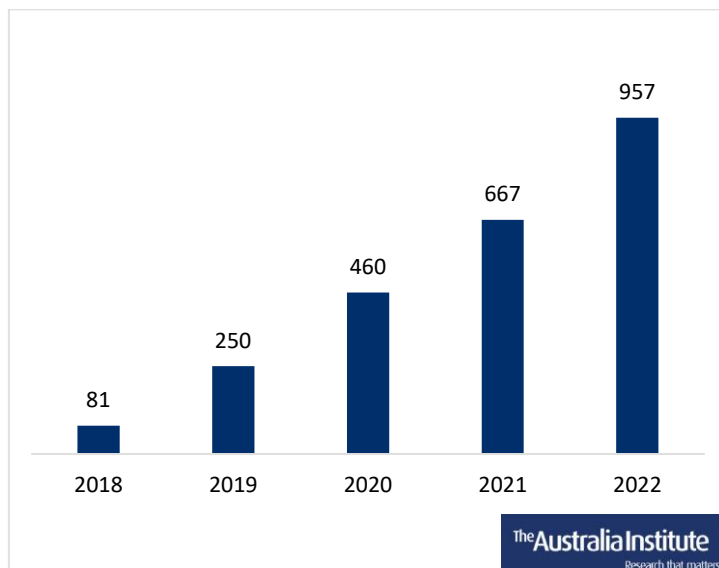
<sup>26</sup> OAIC (2022) *Annual report 2021-22*, p. 14

<sup>27</sup> Morrison (2022) *Underfunded accountability institutions*, <https://australiainstitute.org.au/post/underfunded-accountability-institutions/>



with the OAIC for over 12 months. By September 2022, that figure had grown twelvefold to 957 reviews over 12 months old. Of those, 567 were more than two years old, and 60 dated from 2018, making them four or more years old.<sup>28</sup>

**Figure 6: Reviews over 12 months old**



Source: Patrick (2022) *Office of the Australian Information Commissioner (15 February 2022)*, [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=committees/estimate/25616/&sid=0007](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/25616/&sid=0007); Shoebridge (2022) *Estimates - Office of the Australian Information Commissioner*, [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=committees/estimate/26251/&sid=0007](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/26251/&sid=0007)

Concerns over how long OAIC decision-making takes have led to legal action. In 2021, Rex Patrick commenced proceedings against the OAIC in the Federal Court over what he describes as unreasonable delays in dealing with FOI reviews.<sup>29</sup> When he was Shadow Attorney-General, Mark Dreyfus assisted the case by providing an affidavit with details of delays he had experienced. The Australia Institute also provided an affidavit with details of delays the Institute had experienced. Patrick has an order that limits his costs, and the Grata Fund and Australia Institute have indemnified him against those costs.

<sup>28</sup> Shoebridge (2022) *Estimates - Office of the Australian Information Commissioner*, [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=committees/estimate/26251/&sid=0007](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/26251/&sid=0007)

<sup>29</sup> Mizen (2021) *Senator on the hook for \$150,000 in government legal fees*, <https://www.afr.com/policy/economy/senator-on-the-hook-for-150-000-in-government-legal-fees-20211125-p59bzu>

As of November 2022, the OAIC expected to pay about \$700,000 in legal costs fighting Rex Patrick's case, not including internal costs.<sup>30</sup> The case is expected to be heard in March 2023.

## Ministers' documents not retained

Under current laws, when a new minister enters office, official documents belonging to the previous minister are either transferred to the new minister, destroyed or transferred to the National Archives. In the latter two cases, the document is no longer "in the possession of a minister" and therefore cannot be accessed through an FOI request—even if the request was made before the previous minister left office.<sup>31</sup>

While this concept is flawed even on its own merits, it is particularly problematic when it coincides with a slow and obfuscated FOI process. When an FOI request takes months to be processed, or an FOI review request takes years to be decided, the odds of the relevant minister having changed increase.

In January 2023, journalist Liam Walsh described how an *Australian Financial Review* FOI request about fake testing of coal quality was rendered moot:

The glacial pace of FOI reviews meant that despite an appeal being lodged in August 2020, no decision had been made about releasing the documents as of midway through last year when the Coalition was voted out. That then triggered another incredible bureaucratic rule: because the incoming resources minister—from the ALP—did not receive those documents, the Office of the Australian Information Commissioner flagged last week it was now legally barred from releasing the documents under FOI laws.<sup>32</sup>

The Grata Fund has identified this practice as open to legal challenge.<sup>33</sup>

## Flawed decision-making

If the FOI system was managed properly, then few OAIC reviews would identify problems with FOI decisions. Instead, the OAIC's review decisions have only affirmed (decided not to change) the decision under review about half of the time. In the

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<sup>30</sup> Shoebridge (2022) *Estimates - Office of the Australian Information Commissioner*

<sup>31</sup> OAIC (n.d.) *Requesting official documents held by a minister*, <https://www.oaic.gov.au/freedom-of-information/your-foi-rights/requesting-official-documents-held-by-a-minister>

<sup>32</sup> Walsh (2023) *'Fake coal' test: how to get away with manipulating data*, <https://www.afr.com/companies/mining/fake-coal-test-how-to-get-away-with-manipulating-data-20230113-p5ccd0>

<sup>33</sup> Grata Fund (2021) *FOI litigation hit list*, p. 20

remaining cases, the OAIC has either altered the original decision or set it aside entirely. In the latter case, the OAIC has either made a new ruling or returned the case to the original decision maker to make a new decision (based on the OAIC's advice or ruling).

In 2020-21, the OAIC affirmed 46% of decisions under review, setting aside 41% and varying 13%. In 2021-22, the OAIC affirmed 55% of decisions under review, setting aside 35% and varying 10%.<sup>34</sup>

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<sup>34</sup> OAIC (2021) *Annual report 2020-21*, p. 43; (2022) *Annual report 2021-22*, pp. 43–44

# Public opinion

In November 2022, The Australia Institute polled Australians on the FOI system. (The methodology is outlined in Appendix A.) The results reveal that few Australians are very confident in the FOI system, and most think that delays of more than a month in FOI processing are unacceptable.

## Confidence in the FOI system

Respondents were asked:

How confident are you in the following statement?

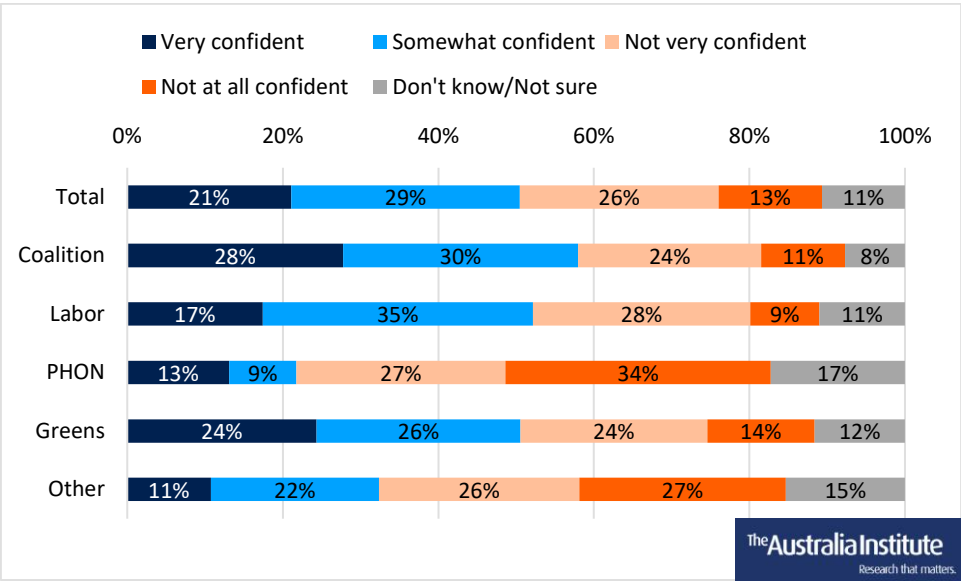
“Australia’s freedom of information system gives Australians access to all the government information they are entitled to.”

Only one in five Australians (21%) are very confident that Australia’s FOI system gives Australians access to all the government information to which they are entitled. Half of Australians (50%) are very or somewhat confident.

Two in five Australians (39%) are either not very confident or not at all confident that Australia’s FOI system gives Australians access to all the government information to which they are entitled.

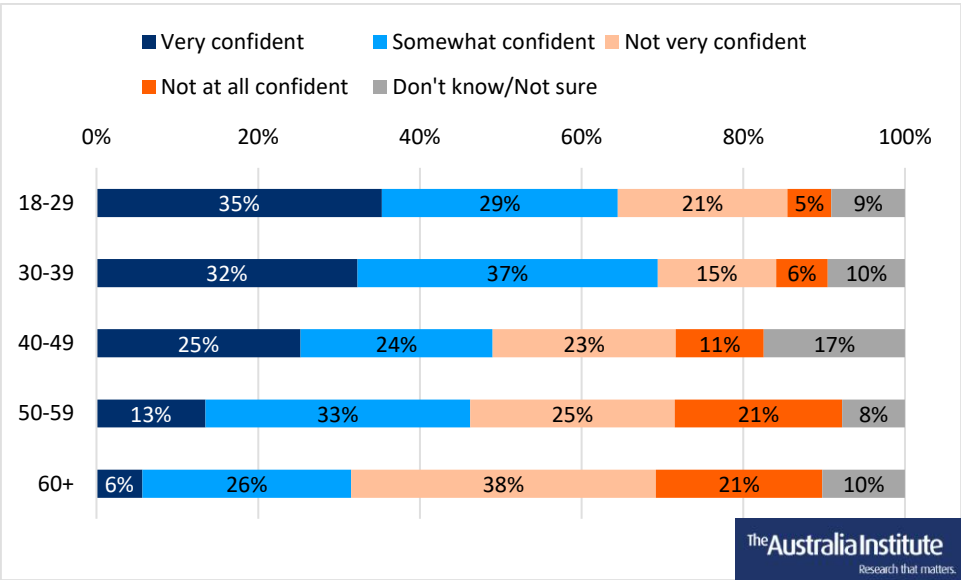
- By voting intention, Coalition and Greens voters are most likely to say that they are very confident that Australia’s FOI system gives Australians access to all the government information to which they are entitled (28% and 24% respectively).
- One Nation and Independent/Other voters were most likely to say that they were not at all confident that Australia’s FOI system gives Australians access to all the government information to which they are entitled (34% and 27% respectively).

Figure 7: Confidence in FOI access by voting intention



Confidence in Australia’s FOI system declines with age, with 35% of those aged 18–29 saying they are very confident, falling to 6% of those aged 60 or older.

Figure 8: Confidence in FOI access by age group



## Reasonable time for an FOI decision to be made

Respondents were presented with the following text:

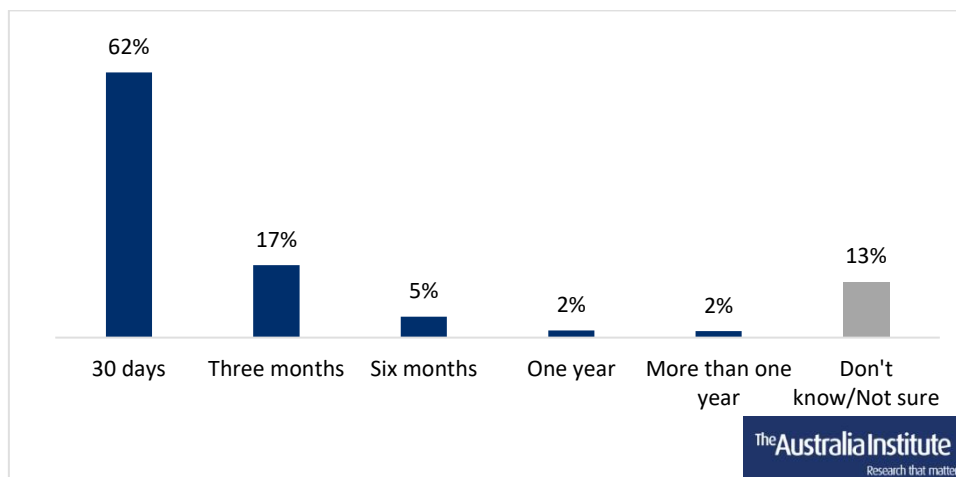
Agencies and ministers are meant to make a decision within 30 days of receiving a freedom of information request, although extensions are available in some circumstances.

How long is the maximum anyone should have to wait before their freedom of information request is decided?

Four in five Australians (79%) say three months is the maximum time someone should have to wait for a decision. This includes the 62% who say 30 days should be the maximum.

- One in five (22%) Australians say three or six months should be the maximum time anyone should have to wait before their FOI request is decided.
- Only 4% say the maximum time should be one year or more than one year.
- There is little variation across voting intentions, with about three in five Australians nominating 30 days as the maximum waiting time (59–65%, depending on voting intention).

**Figure 9: Nominated maximum waiting period for FOI decision**



Most Australians say all FOI requests should be the subject of a decision within the statutory timeframe of 30 days. For 30% of requests to miss this deadline, including 19% that take 90 days or more, is unacceptable.

# Opportunities for FOI reform

## Rex Patrick's FOI amendments

In 2018, Rex Patrick (then a senator) tabled the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018. Some of the proposals in the bill should be considered, including:

- Requiring the positions of Information Commissioner, Privacy Commissioner and FOI Commissioner to be filled;<sup>35</sup>
- Allowing FOI review applicants to elect to bypass the OAIC and go to straight the AAT (or its replacement), either at the start of the process or if the OAIC takes—or expects to take—more than 120 days;
- Providing a period of 10 days where only the FOI applicant receives the contents of the FOI. This would give applicants (such as journalists) the option to publish an exclusive story on the results of the FOI request as compensation for the work and money involved in making the application; and
- Requiring agencies to publish external legal expenses accrued for OAIC and AAT matters.<sup>36</sup>

## Centre for Public Integrity

In its August 2022 briefing paper *Delay and decay: Australia's freedom of information crisis*, the Centre for Public Integrity makes a number of recommendations:

- Providing ongoing training and oversight to foster a pro-disclosure culture within the OAIC;
- Ensuring that the OAIC is appropriately resourced to enable it to reduce current delays and better fulfil its training and oversight mandate;
- Empowering the OAIC to set a ratio of FOI officers to FOI applications, and mandating minimum staff numbers within departments;
- Allowing disciplinary sanction be available where officers repeatedly make decisions subsequently determined to be contrary to the requirements of the

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<sup>35</sup> There is currently an Information Commissioner and an FOI Commissioner, with Information Commissioner Angelene Falk also serving as Privacy Commissioner.

<sup>36</sup> *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018: Explanatory memorandum* (Patrick), [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bld=s1142](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1142)

- FOI Act, as well as for persons who direct or influence them to make such decisions (with criminal sanctions also available to incentivise compliance);
- Establishing a joint cross-party parliamentary committee in order to provide ongoing oversight and accountability of the integrity of departmental FOI decision-making processes;
  - Clarifying the FOI Act to prevent a change of minister or portfolio title from invalidating existing FOI applications; and
  - Amending the FOI Act to make clear that the national cabinet is not captured by the cabinet exemption.<sup>37</sup>

## Australia's Right to Know Coalition

In 2019, major Australian news organisations—including AAP, the ABC and SBS, The Guardian, Free TV Australia and News Corp Australia—warned that the government can use the FOI process to shut down news reporting. They recommended:

FOI laws require meaningful attention and improvement in all aspects. A review of FOI laws must include a panel of FOI 'user' experts and this must include specialist journalist representatives.<sup>38</sup>

## The Australia Institute

The OAIC demonstrably needs more funding to work through FOI review requests in a reasonable timeframe, a fact that was flagged in The Australia Institute's recent Budget reviews.

More generally, a review of FOI culture is needed. This should include a survey of public servants to discover the prevalence of public servants avoiding creating FOI-able documents (for example by making a call instead of sending an email), and whether FOI officers engage in deliberate delays and evasions.

The Australia Institute's *Democracy Agenda for the 47<sup>th</sup> Parliament* made two recommendations in relation to FOI laws:

- Departments should be given a quota of how many pages of documents targeted by FOI requests can be subject to exceptions before an external

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<sup>37</sup> Centre for Public Integrity (2022) *Delay and decay: Australia's freedom of information crisis*, pp. 13–14, [https://publicintegrity.org.au/research\\_papers/delay-and-decay-australias-freedom-of-information-crisis/](https://publicintegrity.org.au/research_papers/delay-and-decay-australias-freedom-of-information-crisis/)

<sup>38</sup> Right to Know Coalition (2019) *Australia's Right to Know calls for law reform*, p. 2, <https://yourrighttoknow.com.au/media-freedom/previous-submissions/>



review of the decision is triggered. This would incentivise ministers and agencies to be circumspect with their use of exceptions;

- When a minister is replaced, their documents should be required to be retained within the reach of FOI law where possible.<sup>39</sup>

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<sup>39</sup> Browne (2022) *Democracy Agenda for the 47th Parliament of Australia*, pp. 23–25, <https://australiainstitute.org.au/report/democracy-agenda-for-the-47th-parliament-of-australia/>

# Conclusion

Australia's FOI system is broken. Agencies obfuscate and delay instead of making information readily available, and the watchdog responsible—the OAIC—is terminally under-funded. To make things worse, a loophole in the FOI law means that documents can be destroyed when ministers are no longer in office.

When he was a senator, Rex Patrick introduced a private senator's bill that would address some of these issues. Further funding for the OAIC would also help.

More deeply, however, there is a cultural issue. Too often, public servants see their role as serving the government of the day rather than the people who chose that government. A review of Australia's FOI system—and/or of public service culture more generally—is needed to address this fundamental problem.

# Appendix A: Polling

## Method

Between 1 and 4 November 2022, The Australia Institute surveyed 1,001 adults living in Australia, online through Dynata's panel, with nationally representative samples by gender, age group and state/territory.

Voting crosstabs show voting intentions for the House of Representatives. Those who were undecided were asked which way they were leaning; these leanings are included in voting intention crosstabs.

The research is compliant with the Australian Polling Council Quality Mark standards. The long methodology disclosure statement follows.

### Long disclosure statement

The results were weighted by three variables (gender, age group and state or territory) based on Australian Bureau of Statistics "National, state and territory population" data, using the raking method. This resulted in an effective sample size of 944.

The margin of error (95% confidence level) for the national results is  $\pm 3\%$ .

Results are shown only for larger states.

Voting intention questions appeared just after the initial demographic questions, before policy questions. Respondents who answered "Don't know / Not sure" for voting intention were then asked a leaning question; these leanings are included in voting intention crosstabs. "Coalition" includes separate responses for Liberal and National. "Other" refers to Independent/Other, and minor parties in cases where they were included in the voting intention but represent too small a sample to be reported separately in the crosstabs.



## Detailed results

No preceding questions in the poll are expected to have influenced the results of the questions published here.

**Agencies and ministers are meant to make a decision within 30 days of receiving a freedom of information request, although extensions are available in some circumstances.**

**How long is the maximum anyone should have to wait before their freedom of information request is decided?**

	<i>Total</i>	Male	Female	NSW	VIC	QLD	WA
<b>30 days</b>	62%	59%	65%	62%	61%	63%	63%
<b>Three months</b>	17%	22%	12%	18%	17%	13%	20%
<b>Six months</b>	5%	6%	4%	4%	7%	6%	0%
<b>One year</b>	2%	1%	2%	1%	2%	3%	2%
<b>More than one year</b>	2%	2%	1%	1%	1%	1%	3%
<b>Don't know/Not sure</b>	13%	9%	17%	13%	12%	14%	12%

	<i>Total</i>	18-29	30-39	40-49	50-59	60+
<b>30 days</b>	62%	48%	53%	58%	73%	74%
<b>Three months</b>	17%	28%	20%	15%	13%	11%
<b>Six months</b>	5%	6%	11%	6%	1%	1%
<b>One year</b>	2%	3%	1%	1%	0%	3%
<b>More than one year</b>	2%	2%	0%	3%	2%	1%
<b>Don't know/Not sure</b>	13%	13%	14%	19%	12%	10%

	<i>Total</i>	Coalition	Labor	PHON	Greens	Other
<b>30 days</b>	62%	62%	63%	65%	60%	59%
<b>Three months</b>	17%	19%	17%	9%	19%	11%
<b>Six months</b>	5%	5%	3%	6%	7%	8%
<b>One year</b>	2%	1%	2%	0%	1%	2%
<b>More than one year</b>	2%	2%	1%	0%	1%	2%
<b>Don't know/Not sure</b>	13%	10%	14%	20%	12%	18%

How confident are you in the following statement?

**“Australia’s freedom of information system gives Australians access to all the government information they are entitled to.”**

	Total	Male	Female	NSW	VIC	QLD	WA
<b>Very confident</b>	21%	25%	18%	26%	19%	17%	25%
<b>Somewhat confident</b>	29%	31%	28%	28%	31%	26%	28%
<b>Not very confident</b>	26%	24%	27%	22%	27%	29%	28%
<b>Not at all confident</b>	13%	14%	13%	11%	15%	19%	9%
<b>Don't know/Not sure</b>	11%	7%	14%	13%	9%	8%	10%

	Total	18-29	30-39	40-49	50-59	60+
<b>Very confident</b>	21%	35%	32%	25%	13%	6%
<b>Somewhat confident</b>	29%	29%	37%	24%	33%	26%
<b>Not very confident</b>	26%	21%	15%	23%	25%	38%
<b>Not at all confident</b>	13%	5%	6%	11%	21%	21%
<b>Don't know/Not sure</b>	11%	9%	10%	17%	8%	10%

	Total	Coalition	Labor	PHON	Greens	Other
<b>Very confident</b>	21%	28%	17%	13%	24%	11%
<b>Somewhat confident</b>	29%	30%	35%	9%	26%	22%
<b>Not very confident</b>	26%	24%	28%	27%	24%	26%
<b>Not at all confident</b>	13%	11%	9%	34%	14%	27%
<b>Don't know/Not sure</b>	11%	8%	11%	17%	12%	15%