

Senate inquiry into freedom of information laws

Submission

FOI is a crucial part of the beneficial information feedback loop between the government and the people. However, our FOI system is broken and cultural and legal changes are needed to fix it.

Submission to the Senate Legal and Constitutional Affairs
References Committee

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June 2023

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Summary

The right of people to know whether a government's deeds match its words, ... [and] to know the information that underlies debate and informs decision-making, is fundamental to democracy.

– Former Senator John Faulkner.¹

This submission summarises the results of a report released earlier this year by The Australia Institute on Australia's freedom of information (FOI) system, which found that:

- There were considerable delays with the FOI system, both in the processing of requests and the review of FOI complaints.
- The cost to process FOI requests had risen dramatically over the last 15 years.
- The FOI review process is clearly under-resourced.
- The FOI system did not meet community expectations.
- Government ministers and officials were delaying and obfuscating releasing FOI information.²

This submission expands on that analysis by presenting the South Australian FOI review process as a model that could be adopted federally.

The South Australian FOI review process works much faster than the Commonwealth process, which in turn makes it more effective. As of 22 May 2023, the Commonwealth Office of the Australian Information Commissioner (OAIC) had 967 reviews that had been outstanding for more than 16 months. In 2021-22 only ten of the 423 FOI reviews that the Ombudsman SA completed took more than 180 days. In 2021-22, the average time the OAIC took to complete a review was 192 days and for the Ombudsman SA the average time a FOI review was open was 86 days.

The submission also makes a number of recommendations to improve FOI culture, resourcing and process.

¹ Holmes (2015) *John Faulkner: A rare champion of transparency*, <https://www.smh.com.au/opinion/john-faulkner-a-rare-champion-of-transparency-20150127-12yq90.html>

² Browne (2023) *Nothing to see here*, <https://australiainstitute.org.au/report/nothing-to-see-here/>

Introduction

The Australia Institute welcomes the opportunity to make a submission to the Senate inquiry into the operation of Commonwealth freedom of information (FOI) laws.

FOI improves the information flow between the people and the government. Examples of important disclosures made possible by FOI include:

- Australia secretly exported arms to countries “whose militaries have been consistently accused of war crimes and crimes against humanity”.³
- 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.⁴
- Former 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”.⁵
- 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.⁶
- The role of AUKUS adviser was created on the day Kathryn Campbell’s departure from her role as Secretary of Department of Foreign Affairs and Trade was announced; she was appointed to the new role eight days later.⁷

Other issues of public importance have been concealed by the abuse of the FOI system, although they have eventually become public. Prominent examples include:

³ 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>

⁴ 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>

⁵ 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>

⁶ 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)

⁷ Macdonald (2023) *Scamps criticises lack of transparency in Campbell’s AUKUS appointment*, <https://www.themandarin.com.au/220520-scamps-criticises-lack-of-transparency-in-campbells-aukus-appointment/>

- 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”.⁸
- 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.⁹
- The Australian Tax Office failing to meet its legal obligations by refusing to process some FOI requests.¹⁰

A robust FOI system exposes the workings of government to the scrutiny of the press and the electorate. Even the anticipation that documents could surface as a result of an FOI discourages decision makers from misrepresenting the facts or making a rushed or politicised decision. When the FOI system is bogged down, evaded or defied, the public misses out on key information it could use to assess the government’s performance and principles.

⁸ 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>

⁹ 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>

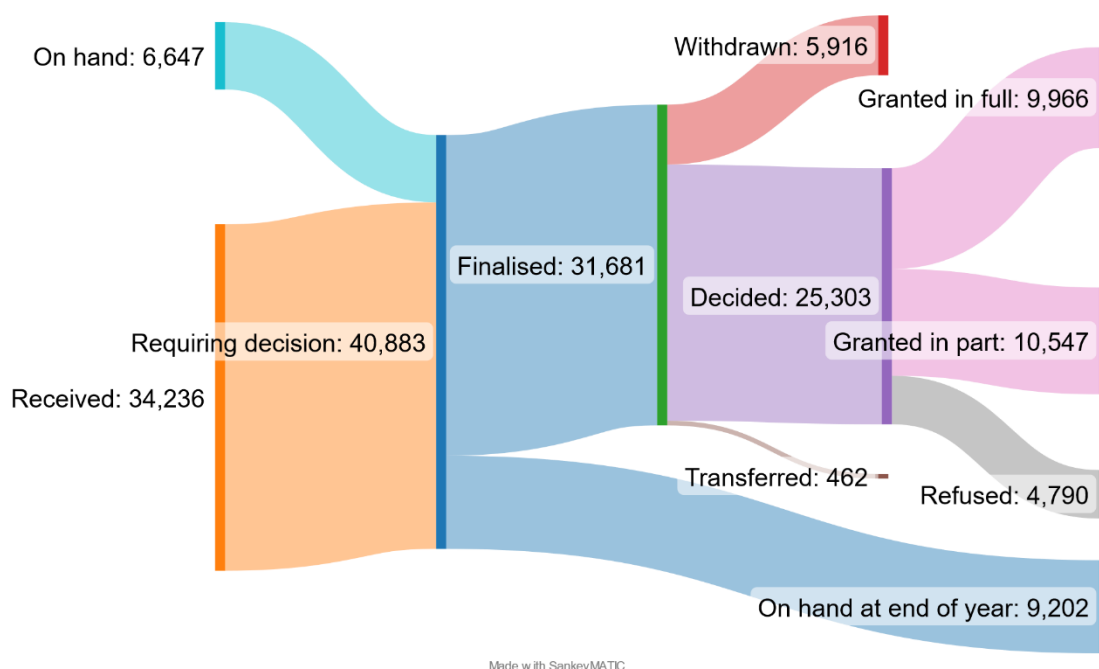
¹⁰ Elvery (2017) *ATO’s refusal to process information requests ruled invalid*, <https://www.abc.net.au/news/2017-05-12/atos-refusal-to-process-information-requests-ruled-invalid/8520790>

FOI: scale, cost and delays

SCALE

The FOI system’s flows are described in the OAIC’s most recent annual report. In 2021-22, there were 40,900 FOI requests requiring a decision. Of these requests, 10,000 were granted in full, 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

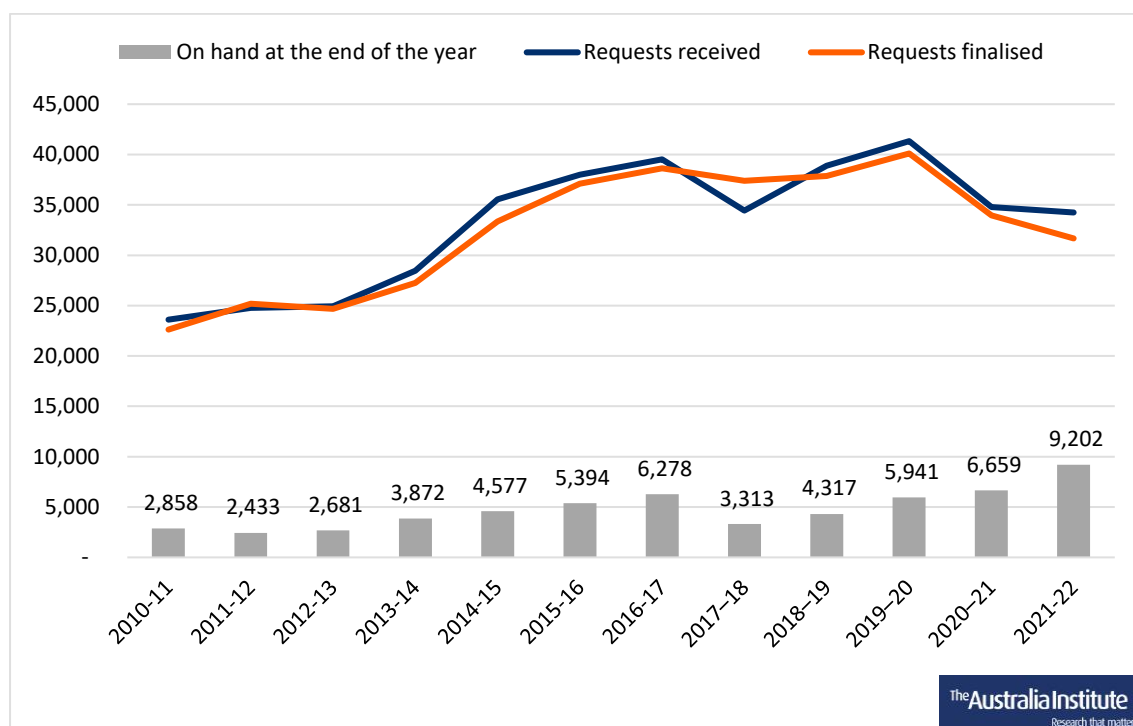


Source: OAIC (2022) *Annual report 2021-22*, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2021-22>

Over the past 12 years, Australians have made between 23,000 and 41,000 FOI requests per year. Over the same period, anywhere between 20,000 and 34,000 determinations have been made in a given year. Between 2,000 and 11,000 requests per year are finalised in other ways (for example, withdrawn by the applicant or transferred).

The number of FOI requests received has exceeded the number finalised in every year 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 Administrative Appeals Tribunal (AAT) and the Australian Taxation Office.¹¹ This gives an idea of what kinds of personal information applicants are seeking.

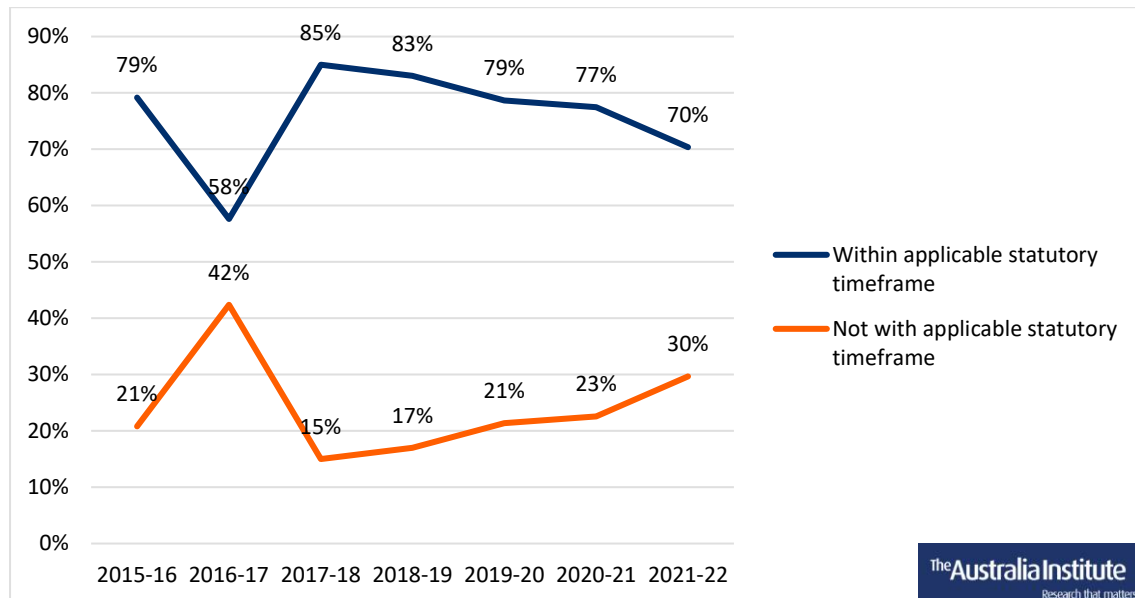
DELAYS

Agencies are required by statute to resolve a FOI request within 30 days of it being lodged (unless the request is subject to an extension). Figure 3 shows the actual share of FOI requests resolved within the statutory timeframe 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). The resolution to many of these delayed requests arrives more than three months late (4,824 in 2021-22).

¹¹ Oaic (2022) *Annual report 2021-22*, p. 137, <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports/annual-report-202122>

The Department of Home Affairs is the subject of a large share of FOI requests (43% of all FOI requests in 2021-22). That Department is also chronically late in responding to FOI requests: 4,701 out of the 11,203 requests (42%) on which it decided in 2021-22 were decided more than 90 days after the statutory 30 days had expired.¹² These accounted for 97% of all Commonwealth FOI decisions that were more than 90 days late in 2021-22.

Figure 3: Freedom of information request response times



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

The FOI processes of the Department of Home Affairs (and its predecessor, the Department of Immigration) have been reviewed several times. A 2020 investigation found 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. The investigation made several recommendations, which the Department undertook to implement.¹³

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).¹⁴

It is also important to note that the OAI’s annual reporting does not capture the number of FOI requests on which no decision is made. In 2021-22, there were 9,202 such requests. Because these requests have not been resolved, they do not show up as having been

¹² OAI (2022) *Annual report 2021-22*, pp. 148, 152

¹³ 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>

¹⁴ OAI (2022) *Annual report 2021-22*, p. 147

resolved late. However, based on the gap between FOI requests per year and FOI finalisations per year, they are likely to represent hundreds or thousands of requests.¹⁵

If an FOI applicant is unhappy with the relevant Department's decision on their request, they can request that the decision be reviewed by the OAI. Many FOI review applications to the OAI are likely to be the result of unacceptable delays, including cases where no decision is made. Decisions made by the Department of Home Affairs account for the majority of review requests: of the 1,932 reviews requested in 2021-22, 1,022 related to Home Affairs decisions.

However, this figure is consistent with the large number of FOI requests received by Home Affairs. Across all departments, the number of review requests is 6% of the total number of FOI requests received, and Home Affairs' 1,022 review requests represents 7% of the total number of FOI requests it received. In other words, poor and delayed decision making is not limited to a single offending agency or minister.

FLAWED DECISION-MAKING

A measure of the efficacy of original decision-making is the percentage of cases in which a decision is altered on review. In roughly half of all cases for which a review is requested, the original decision is either altered or set aside entirely. In the latter case, the OAI either makes a new ruling or returns the case to the original decision-maker to make a new decision (based on the OAI's advice or ruling).

In 2020-21, the OAI affirmed 46% of decisions under review, setting aside 41% and varying 13%. In 2021-22, the OAI affirmed 55% of decisions under review, setting aside 35% and varying 10%.¹⁶

The Grata Fund, a fund that supports strategic and public interest legal challenges, notes that delaying or refusing FOI requests—a common governmental tactic—may be illegal. The fund published a “hit list” in 2021, identifying spurious and potentially unlawful governmental approaches to FOI requests. These included inappropriate refusal on the grounds of cabinet confidentiality, overuse of exemptions without substantiation, and unreasonable refusal of FOI requests seeking text messages.¹⁷

¹⁵ 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.

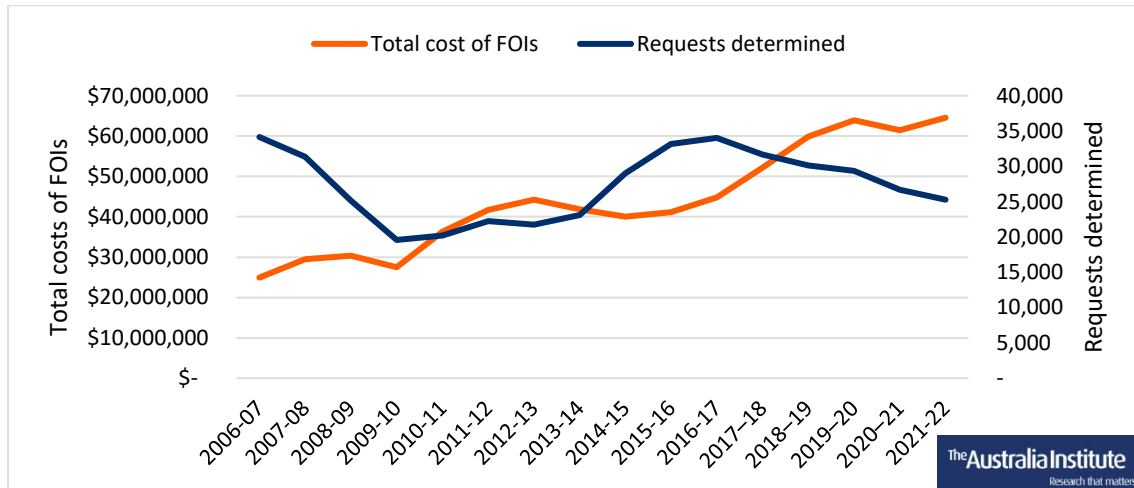
¹⁶ OAI (2021) *Annual report 2020-21*, p. 43, <https://www.oaic.gov.au/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2020-21>; (2022) *Annual report 2021-22*, pp. 43–44

¹⁷ Grata Fund (2021) *FOI litigation hit list*, p. 5, https://www.gratafund.org.au/litigation_hitlist_launched_to_challenge_the_government_s_foi_refusals

COSTS

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.

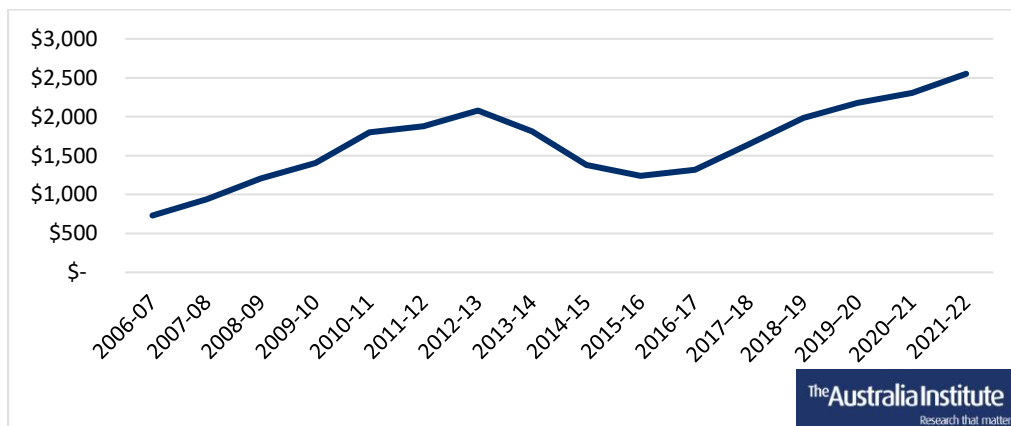
Figure 4: Total costs of FOIs and requests determined (2006–2022)



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. Even accounting for inflation, this is still more than a twofold increase in costs.

Figure 5: Average cost per request determined (2006–2022)



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

The OAIC

It appears that the general position is that IC [Information Commissioner] reviews take a course that involves very significant delays where IC reviews may lie dormant for long periods and take years to complete ... the causes of the lengthy delays were common and the combined force of the evidence pointed to an unquestionable shortage of resources.

– Justice Michael Wheelahan on delays in FOI reviews by the OAIC¹⁸

One role of the OAIC is to review complaints about FOI requests. If the OAIC is acting effectively, it deters public servants and the government from unnecessarily refusing, delaying and avoiding FOI requests. By contrast, if the OAIC is working poorly and slowly, it makes sense to avoid releasing information because an OAIC process will be time consuming and by the time it finishes, a lot of “heat” will have gone from the issue and/or the public servant or minister will have moved on.

Unfortunately, the OAIC is working poorly and slowly. This is, in part, a consequence of it having been inadequately resourced from soon after it was established.

The Abbott Government attempted to shut down the OAIC completely. 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 failing to allocate the OAIC the funds it needed to do its job.¹⁹ It took seven years for the Freedom of Information Commissioner position to finally be filled in March 2022 by Leo Hardiman.²⁰ Mr Hardiman has since resigned, expressing “serious concerns about chronic delays in the FOI system, the consequences for government transparency, and the lack of power he held to bring about change.”²¹

In an article in February 2023, former Senator Rex Patrick highlighted some of the cases that have been under review by the OAIC since 2018, that is, over four years ago:

¹⁸ *Patrick v Australian Information Commissioner: No 2* (2023), para. 6, <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/530.html>

¹⁹ 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>

²⁰ 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/>

²¹ Knaus (2023) *FOI commissioner complained of being ignored and ‘limited’ staff before resigning, tense emails reveal*, <https://www.theguardian.com/australia-news/2023/may/12/foi-commissioner-complained-of-being-ignored-and-limited-staff-before-resigning-tense-emails-reveal>

- A request for plans for Australia’s response to the death of Queen Elizabeth II. By the time Mr Patrick wrote his article, the Queen had passed away and ceremonies had been held, but the FOI review was still under way. The initial request is likely to have been made by a journalist after the UK government’s plans had been made public.
- A request to the Department of Veteran Affairs (presumably from a veteran) for documents related to correspondence sent to the applicant.
- A request to the ATO for documents relating to actions taken by the ATO against the applicant in relation to their own tax affairs.²²

In 2021, Mr Patrick commenced proceedings against the OAIC in the Federal Court over unreasonable delays in dealing with FOI reviews.²³ When he was Shadow Attorney-General, Mark Dreyfus—now Attorney-General in the Albanese Government—assisted the case by providing an affidavit with details of delays he had experienced. The judge presiding over the case, Justice Michael Wheelahan, described the delays in OAIC reviews as “striking, striking—they really are.”²⁴

Nevertheless, Justice Wheelahan ultimately ruled against Patrick, explaining that the delays were not “legally unreasonable” because the evidence pointed to the OAIC “having an unquestionable shortage of resources”.²⁵ The OAIC incurred \$780,000 in legal costs fighting Rex Patrick’s case, not including internal costs.²⁶

Evidence in the Patrick case detailed OAIC’s lack of resourcing. In an affidavit to the court, Elizabeth Hampton, a Deputy Commissioner of the OAIC, calculated that the FOI branch of OAIC would require 35 full-time equivalent (FTE) staff in the 2021-22 financial year to manage the existing caseload of reviews on hand based on a 15% increase in caseload in 2021-22. The actual caseload increase was 60%, and the FOI branch only had 19 FTE staff in 2021-22.²⁷

The court also heard there is high staff turnover in the OAIC, which further increases delays processing reviews. The Significant and Systemic Review Team in the OAIC managed complex reviews and reviews that raised systemic issues, and normally employed three or

²² Patrick (2023) *A Royal Dud: Queen’s death FOI debacle shows Australia’s transparency system is bust*, <https://michaelwest.com.au/we-still-dont-know-the-plans-for-the-queens-death/>

²³ 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>

²⁴ Meehan (2023) *Freedom of information request delays 'striking': Judge*, <https://www.perthnow.com.au/news/crime/freedom-of-information-request-delays-striking-judge-c-10105792>

²⁵ *Patrick v Australian Information Commissioner: No 2* (2023), para. 6

²⁶ Senate estimates – Legal and Constitutional Affairs Legislation Committee (23 May 2023) *Testimony from Office of the Australian Information Commissioner*, p. 125, https://www.aph.gov.au/Parliamentary_Business/Hansard/Estimates_Transcript_Schedule

²⁷ *Patrick v Australian Information Commissioner: No 2* (2023), para. 66, 91

four full-time staff. Between 1 January 2020 and 5 September 2022, six staff left the team.²⁸ Given the large caseload and lack of resources, such high turnover is not surprising.

²⁸ *Patrick v Australian Information Commissioner: No 2 (2023)*, para. 73, 79

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, transferred to the National Archives, or destroyed. 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.²⁹

This concept is inherently flawed, but 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 markedly.

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.³⁰

The Grata Fund has identified this practice as open to legal challenge.³¹

²⁹ 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>

³⁰ 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>

³¹ Grata Fund (2021) *FOI litigation hit list*, p. 20

South Australian FOI reviews are done much faster

In considering how the federal FOI system might be reformed, it makes sense to look at state and territory FOI systems. The Australia Institute has highlighted how Australia's federal system allows for natural experiments in "laboratories of democracy".³²

There is a dramatic contrast between the OAIC FOI review process and the external review process in South Australia. In SA, reviews are generally carried out by the Ombudsman SA, and are handled much faster than at the federal level.

How the South Australian FOI review system works

Someone who is unhappy with how a South Australian agency (or local council) has handled their request must first apply for an internal review. If the applicant disagrees with the internal review, they may ask the Ombudsman SA for an external review or go straight to the South Australian Civil and Administrative Tribunal (SACAT); most external reviews are done by the Ombudsman SA.³³

In conducting an external review, the Ombudsman SA notifies the relevant agency, and asks them to provide (a) a report explaining their FOI decision and (b) copies of the relevant documents.³⁴

The Ombudsman SA may then try to settle the matter between the parties and/or investigate the actions of the agency. Their powers to investigate include inspecting the premises, interviewing staff and examining additional documents and records.³⁵

The Ombudsman SA then usually makes a provisional determination, which the parties can comment on, ahead of their final determination.

³² Browne (2019) *Canberra: Laboratory of democracy*, <https://australiainstitute.org.au/report/canberra-laboratory-of-democracy/>

³³ For the six months ended June 2022, SACAT received 12 freedom of information applications and finalised 16: SACAT (n.d.) *Our service data*, <https://www.sacat.sa.gov.au/about-sacat/publications-and-resources/our-service-data>.

³⁴ Ombudsman SA (n.d.) *Freedom of Information*, <https://www.ombudsman.sa.gov.au/freedom-of-information>

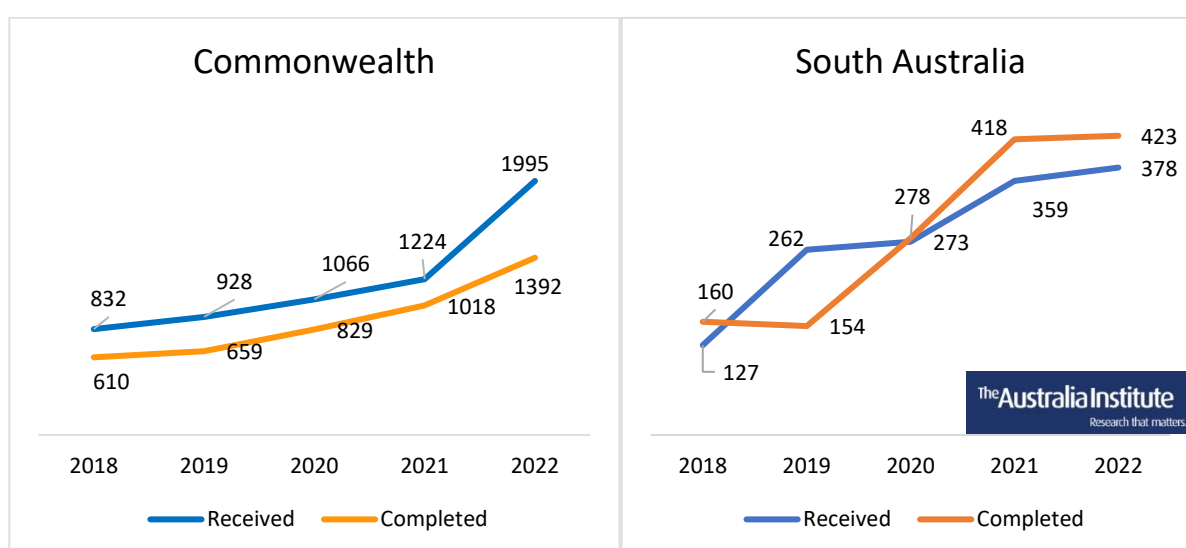
³⁵ Ombudsman SA (n.d.) *Freedom of Information*

Comparison of FOI review systems

While the number of requests for FOI reviews received by the OAIC has more than doubled over the last five years, the number of requests received by the Ombudsman SA has tripled. However, as Figure 6 shows, in four of the last five years the Ombudsman SA completed more FOI reviews than it has received—something the OAIC did not manage in any of those years.

As a result, in 2021-22, the average length of time it took to complete a FOI review was 192 days for the OAIC and the average time a FOI review was open was 86 days for the Ombudsman SA.³⁶

Figure 6: FOI reviews: received and completed



Note: Year is the financial year ended.

Sources: OAIC (various) *Annual reports* <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports>; Ombudsman SA (various) *Annual reports*, <https://www.ombudsman.sa.gov.au/publications/annual-reports>

The contrast between the Commonwealth and South Australia is even more dramatic when population is considered. In 2021-22, Ombudsman SA received three times more FOI review requests per capita than the OAIC: Ombudsman SA received 232 requests per one million people in the state, while the OAIC received only 76 requests per million people.³⁷

³⁶ OAIC (2022) *2021-22 Annual report*, p.43. <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports>; Ombudsman SA (2022) *2021-22 Annual report*, p 43, <https://www.ombudsman.sa.gov.au/publications/annual-reports>.

³⁷ OAIC (various) *Annual reports*; Ombudsman SA (various) *Annual reports*; ABS (2023) *National, state and territory population*, <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>

Table 1 shows that Ombudsman SA does FOI reviews considerably faster than the OAIC.

Table 1: OAIC and Ombudsman SA FOI review turnaround times

Year	Commonwealth	South Australia
	Average days to finalise review	Average days reviews are open
2017-18	not available	125
2018-19	not available	86
2019-20	246	194
2020-21	253	153
2021-22	192	86

Sources: OAIC (various) *Annual reports*, <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports>; Ombudsman SA (various) *Annual reports*, <https://www.ombudsman.sa.gov.au/publications/annual-reports>

Angelina Falk, the Australian Information Commissioner, recently detailed the OAIC’s outstanding reviews. As at 22 May 2023, there was one OAIC review that was received on 19 February 2018, meaning the request had been pending for over five years. In addition to this venerable request, there “were 34 matters where the review was lodged with the OAIC in 2018; 172 matters from 2019; 310 matters from 2020; 451 matters from 2021; 702 matters from 2022; and 391 matters from 2023”.³⁸ That amounts to 967 reviews from 2021 or earlier, that is, they were over 16 months old.

The Ombudsman SA does not publish similar figures, but in 2021-22 only ten of the 423 reviews it completed took more than 180 days to complete and only one took more than a year. This was a considerable improvement in performance over 2020-21 when 128 took more than 180 days and 39 took more than a year.³⁹

Table 2: Ombudsman SA: FOI reviews completed within time periods

	<30 days	<120 days	<180 days	<270 days	<365 days	>365 days	Total
2020-21	63	161	66	61	28	39	418
2021-22	75	271	67	8	1	1	423

Sources: Ombudsman SA (2022) *Annual report 2021-22*, p. 41, <https://www.ombudsman.sa.gov.au/publications/annual-reports>

The Ombudsman SA has consistently completed most of its reviews in less than 12 months. Over the five years to 2021-22, Ombudsman SA completed 1,433 reviews and only 81 took more than 12 months to finalise (6%).⁴⁰

³⁸ Senate estimates – Legal and Constitutional Affairs Legislation Committee (23 May 2023) *Testimony from Office of the Australian Information Commissioner*, p. 120

³⁹ Ombudsman SA (2022) *Annual report 2021-22*, p. 41, <https://www.ombudsman.sa.gov.au/publications/annual-reports>

⁴⁰ Ombudsman SA (various) *Annual reports*

Table 3: Ombudsman SA: Reviews that took more than 12 months to complete

Year	Reviews that took more than 12 months to complete	Total reviews completed
2017-18	3	160
2018-19	1	154
2019-20	37	278
2020-21	39	418
2021-22	1	423
Total	81	1,433

Sources: Ombudsman SA (various) *Annual reports*,
<https://www.ombudsman.sa.gov.au/publications/annual-reports>

The Ombudsman SA's quick turnaround of FOI reviews has not seemed to come at a cost to accuracy: to date, The Australia Institute has not found media reports of any criticism of Ombudsman SA decisions on freedom of information issues.

Lessons for the federal system

The contrast between the speed of the external review process undertaken by the OAIC and the Ombudsman SA is stark.

Some elements of the South Australian system that may contribute to the fast turnaround are:

- The option for an applicant to go straight to administrative review (SACAT for South Australia, the AAT federally) rather than going through the OAIC/Ombudsman SA first.
- The Ombudsman SA's stated aim of completing determinations within four months of receiving a request, which is an achievable time frame but not one that is so long that most FOI requests would lose saliency by the time it has elapsed.
- The use of an ombudsman, rather than a commissioner. The Ombudsman SA would already be used to providing quick reviews of government decisions in other areas.
- The Ombudsman SA's requirement that copies of the relevant documents be provided by the agency as part of the external review process. While the OAIC reviews all relevant documents, it is not clear that it requires all documents as a matter of course. Possession of the documents guarantees that they will not be lost.
- The Ombudsman SA proactively asks the agency to provide a report explaining their FOI decision.
- The issuing of a provisional determination, which presumably formalises but also limits the scope of the consultation process and makes it clearer to the parties where they stand ahead of the final determination.

- The Ombudsman SA’s decision to publish many FOI determinations,⁴¹ which helps hold agencies to account (the quality of their FOI handling is revealed) and may do the same for the Ombudsman SA (since the quality and timeliness of their decision making is publicly visible).

There may also be differences in the culture of the SA Government versus that of the Commonwealth Government; the culture of the Ombudsman SA versus that of the OAIC; the state’s freedom of information laws relative to federal laws; and the resources of the Ombudsman SA versus those of the OAIC (the different responsibilities of each makes it difficult to compare directly).

The Australia Institute recommends that the committee further examine the Ombudsman SA with an eye to lessons for the federal FOI review process.

⁴¹ Ombudsman SA (2023) *FOI determinations*, <https://www.ombudsman.sa.gov.au/publications/foi-determinations>

Public opinion

In November 2022, The Australia Institute polled Australians on the FOI system.⁴² 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%) were very confident that Australia’s FOI system gives Australians access to all the government information to which they are entitled.

Opinions on delays in processing FOI requests

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.

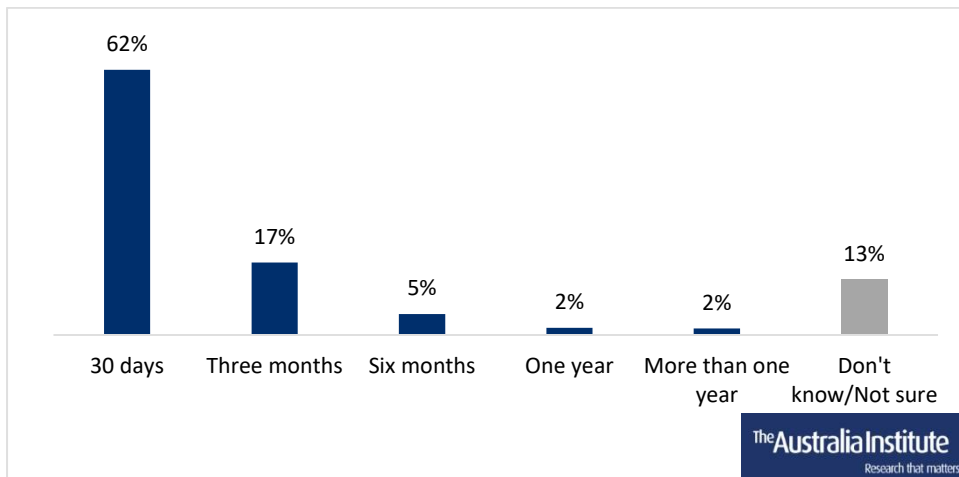
How long is the maximum anyone should have to wait before their freedom of information request is decided?

Four in five Australians (79%) said that 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 said three or six months should be the maximum time anyone should have to wait before their FOI request is decided.
- Only 4% said that the maximum time should be one year or more than one year.
- There was little variation across voting intentions.

⁴² Browne (2022) *Nothing to see here*

Figure 7: Nominated maximum waiting period for FOI decision



Most Australians feel that 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 is unacceptable.

FOI culture

The growing and significant delays in FOI requests and FOI reviews reflect not only a lack of resources but a culture of secrecy. When Cabinet considered the initial FOI Bill in 1980, senior public servants were not keen supporters.⁴³ Given the problems with FOI, this attitude does not appear to have changed.

While there is an under-appreciation of the importance of FOI to our democracy, there are likely to be other factors contributing to this culture, some of which feature regularly when public service culture is discussed:

- Increasing pressure on senior public servants by Ministers and a corresponding prioritising of protecting Ministers' interests rather than the public interest.⁴⁴
- An increasing lack of accountability by Ministers and public servants for their actions.⁴⁵
- Job turnover (including moving to other positions in the public service) increasing the incentive to delay the release of information, because the public servant may have moved on when the information is released.
- A culture of poor FOI disclosure by senior public servants being transmitted to lower level public servants (discussed below in the context of the states).

States' FOI system and culture

The Office of Victorian Information Commissioner (OVIC) has undertaken research into Victoria's FOI system and culture. This research is likely to be relevant to the Commonwealth FOI system.

⁴³ Stewart (2015) *Assessing Access to Information in Australia: The impact of freedom of information laws on the scrutiny and operation of the Commonwealth government*, in Wanna and Evert (2015) *New Accountabilities, New Challenges*, <https://press.anu.edu.au/publications/series/anzsog/new-accountabilities-new-challenges>

⁴⁴ Sydney Morning Herald (2023) *Restoration of independence is essential to public service*, <https://www.smh.com.au/business/workplace/restoration-of-independence-is-essential-to-public-service-20230519-p5d9q4.html>; Burton (2022) *Public servants face pressure over 'frank and fearless' advice*, <https://www.afr.com/politics/federal/public-servants-face-pressure-over-frank-and-fearless-advice-20220624-p5aw9w>

⁴⁵ The Age (2023) *Will anyone be held accountable for the robo-debt disgrace?* <https://www.theage.com.au/politics/federal/will-anyone-be-held-accountable-for-the-robo-debt-disgrace-20230312-p5cref.html>; Feik (2021) *The scandals he walks past*, <https://www.themonthly.com.au/issue/2021/february/1612098000/nick-feik/scandals-he-walks-past>

OVIC found that agency-level FOI officers were supportive of FOI disclosure but were not so certain about support at the senior levels of their organisations.⁴⁶ The South Australian Ombudsman Wayne Lines bluntly describes a related perceived problem with senior interference in FOI processes:

Freedom of Information officers are meant to be independent, meant to be trained and have the competency to make the determinations. They should be able to make the determination and then, perhaps, advise the CEO and the minister after the fact, not to wait for them to have a look at it.

It creates the impression that maybe the chief executive and the minister are holding things up, or maybe subtly influencing the determination, which should not be happening.⁴⁷

OVIC has taken various steps to develop a positive FOI culture. These include the Victorian Information Commissioner and Public Access Deputy Commissioner meeting with heads of agencies, and OVIC's Public Access Branch meeting with FOI practitioners.

OVIC notes that:

Executive and senior level agency buy-in and leadership in FOI culture is critical to adopting and promoting proactive and informal release. This leadership can help to develop a positive FOI culture in an agency by reinforcing the importance of information release which can help to make FOI practitioners and other agency staff feel more confident in providing access to information outside of the Act.⁴⁸

Proactive disclosure

New South Wales and Queensland have both enacted “push” models of access legislation. Such models place “a greater emphasis on, and require, proactive and informal release, [aim] to make formal access requests a last resort, and [elevate] the importance of proactive and informal release to provide greater access to information.”⁴⁹

The New South Wales *Government Information (Public Access) Act 2009 Act* states:

⁴⁶ Lidberg and Bradshaw (2021) *The Culture of Administering Access to Government Information and Freedom of Information Part II Final Report*, <https://ovic.vic.gov.au/about-us/documents-and-publications-we-produce/research-and-reports/enhancing-victorias-foi-culture-to-be-open-by-design/>

⁴⁷ Jenkins (2019) *SA ombudsman wants bureaucrats to let FOI officers do their job*, <https://www.themandarin.com.au/116511-sa-ombudsman-wants-bureaucrats-to-let-foi-officers-do-their-job/>

⁴⁸ OVIC (n.d.) *Enhancing Victoria's FOI culture to be open by design*, <https://ovic.vic.gov.au/about-us/documents-and-publications-we-produce/research-and-reports/enhancing-victorias-foi-culture-to-be-open-by-design/>

⁴⁹ OVIC (2021) *Enhancing Victoria's FOI culture to be open by design*

There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure ... An agency must make the government information that is its open access information publicly available unless there is an overriding public interest against disclosure of the information.⁵⁰

The Queensland *Right to Information Act 2009* states:

The Government is proposing a new approach to access to information. Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.⁵¹

The federal *Freedom of Information Act 1982* also encourages proactive release of government information.⁵²

Examples of categories of documents that could be made public automatically—with appropriate safeguards—are Ministers' diaries, Cabinet documents (on matters not involving national security), and documents presented to government as part of representations from interest groups on key government policies.

Ministers in both Queensland and NSW are required to publish their diaries, containing all portfolio-related meetings and activities.⁵³

It is possible to keep Cabinet confidentiality while radically increasing public access to Cabinet documents. In New Zealand, the proactive release of Cabinet material means most Cabinet papers and minutes recording the decision are published within 30 business days of a final Cabinet decision being taken.⁵⁴ This has not appeared to interfere with the ability of NZ Cabinet ministers to robustly debate policy ahead of a decision being made.

Documents made as part of representations to government should be disclosed automatically. This would help ensure that what interest groups say to governments is consistent with what they say publicly, and would also strengthen the ability of government

⁵⁰ *Government Information (Public Access) Act 2009 Act*, Part 2: Division 1, <https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#pt.2>

⁵¹ *Right to Information Act 2009 (Queensland)*, Preamble

⁵² *Freedom of Information Act 1982 (Cth)*; OAIC (n.d.) *Part 1: Introduction to the Freedom of Information Act 1982*, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-1-introduction-to-the-freedom-of-information-act-1982>

⁵³ Keane (2021) *Transparency, accountability and regulation: corruption body pushes for massive overhaul in lobbying*, <https://www.crikey.com.au/2021/06/23/transparency-accountability-regulation-corruption-body-overhaul-lobbying/>; Queensland Department of the Premier and Cabinet (2021) *The Queensland ministerial handbook*, p. 40, <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/ministerial-handbook.aspx>

⁵⁴ NZ Department of the Prime Minister and Cabinet (2018) *Proactive release of Cabinet material*, <https://dpmc.govt.nz/publications/proactive-release-cabinet-material>

to act on behalf of the public rather than at the behest of the powerful. For example, a recent report by climate and sustainability think tank InfluenceMap depended on multiple FOI requests to reveal that the Federal Chamber of Automotive Industries has been lobbying for weaker pollution rules for Australian cars while publicly advocating for an orderly transition from petrol to electric vehicles.⁵⁵ Information like this should be available in a timely manner as a matter of course.

⁵⁵ InfluenceMap (2023) *The FCAI and Australian Climate Policy*, <https://influencemap.org/briefing/The-FCAI-and-Australian-Climate-Policy-22253>; Cubby (2023) *Inside the car industry's climate lobbying push*, <https://www.smh.com.au/national/inside-the-car-industry-s-climate-lobbying-push-20230522-p5da61.html>

Recommendations

The delays and level of obfuscation in both FOI requests and reviews of FOI requests indicate that major changes are needed in FOI culture, resourcing and processes.

Improve FOI culture

The OVIC plans to meet senior public servants to increase agency buy-in and change culture. There is value in OAIC doing this if it is not doing it already.

FOI culture is likely to have been weakened by increased pressure on senior public servants by Ministers, a culture of decreased accountability and turnover of public servants (including moving elsewhere in the public service). Improvements in these factors will improve FOI culture, as will clear statements from Ministers and senior public servants on the value of FOI.

Better resourcing for FOI reviews

The OAIC needs more resources to fairly and quickly process FOI review requests. Evidence deposited in the *Patrick v Australian Information Commissioner* case suggests that the FOI division requires at least twice as many FTE roles to carry out its work.⁵⁶

Proactive disclosure

Proactive disclosure of government documents, where feasible, would increase transparency and reduce the need for FOI requests. It would also set a cultural expectation that government information should be publicly available where possible.

Examples of categories of documents potentially suitable for proactive disclosure are Ministerial diaries, documents prepared for Cabinet, and documents made as part of representations to government.

⁵⁶ *Patrick v Australian Information Commissioner: No 2* (2023), para. 66, 91

Make a quick turnaround a focus of the FOI external review process

The South Australian FOI review process shows that Commonwealth FOI reviews could be completed much more quickly than they are today. The Commonwealth FOI review process could be modelled on, or at least take lessons from, the SA model.

A head start on public disclosure for applicants

In 2013, former Departmental Secretary, Allan Hawke, completed a review of freedom of information for the Attorney-General. The review considered whether, as a reward for going to the effort and expense of making an FOI request, applicants (and particularly journalists, who get considerable kudos for breaking a story) should be allowed a time period before the documents are then made public. The review recommended a period of five working days.⁵⁷ Senator Rex Patrick suggested 10 days when he tabled the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018.⁵⁸

No exemptions due to departing Minister

When a Minister is replaced, their documents should be required to be retained within the reach of FOI law where possible.⁵⁹

Quota for unreviewed freedom of information exceptions

Departments should be given a quota of how many pages of documents targeted by FOI requests can be subject to exceptions before an external review of the decision is triggered. This would incentivise Ministers and agencies to be circumspect with their use of exemptions.⁶⁰

Hawke review recommendations

The Hawke review made 40 recommendations for improving FOI, including a more thorough review focused on a comprehensive rewriting of the FOI Act in plain language, in order to

⁵⁷ Hawke (2013) *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, p. 101, <https://www.ag.gov.au/rights-and-protections/publications/review-freedom-information-act-1982-and-australian-information-commissioner-act-2010-report>

⁵⁸ *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018: Explanatory memorandum*, https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1142

⁵⁹ Browne (2022) *Democracy Agenda for the 47th Parliament*, p. 24, <https://australiainstitute.org.au/report/democracy-agenda-for-the-47th-parliament-of-australia/>

⁶⁰ Browne (2022) *Democracy Agenda for the 47th Parliament*, p. 23

“streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies and the OAIC”.⁶¹

The Australia Institute recommends the committee consider the following recommendations from the Hawke review:

- The OAIC consider establishing an online system to allow agencies and applicants to monitor the progress of their review.
- Delegating the power to decide FOI review changes to staff other than the Information Commissioner, the FOI Commissioner and the Privacy Commissioner.
- Giving the power to the Information Commissioner to remit a matter for further consideration by the original decision-maker.
- Changes to the processes for extensions of time.
- Allowing agencies to decline repeat or vexatious FOI requests, though this could be appealed to the OAIC.

⁶¹ Hawke (2013) *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*

Conclusion

Systems analyst Donella Meadows wrote of democracy:

This great system was invented to put self-correcting feedback between the people and their government. The people, informed about what their elected representatives do, respond by voting those representatives in or out of office. The process depends on the free, full, unbiased flow of information back and forth between electorate and leaders. Billions of dollars are spent to limit and bias and dominate that flow of clear information.⁶²

While Meadows focuses on the “ultimate” accountability that politicians face every election, accountability occurs every day as governments receive approval and criticism for their actions and decisions. Freedom of information law is designed to improve the feedback loop of “free, full, unbiased flow of information back and forth between electorate and leaders”, thus improving that accountability.

However, the evidence is that Australia’s FOI system has been run down. Australians cannot depend on FOI requests being processed in a timely manner, and the FOI review process that should guarantee integrity is logjammed. Sometimes, delays allow public officials to escape accountability for their actions.

While the Morrison Government was a low point for transparency and open government, several issues relating to FOI have already emerged under the Albanese Government:

- The Office of Australian Information Commissioner’s funding has been increased from \$29.6 million in 2022-23 to \$46.5 million in 2023-24 but none of the additional funding will go to FOI.⁶³ Funding will fall to \$24.7 million in 2026-27, even lower than last year.⁶⁴
- In March 2023, FOI Commissioner Leo Hardiman resigned after less than one year in the job, stating 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”.⁶⁵

⁶² Meadows (2008) *Thinking in Systems: A Primer*, Chelsea Green Publishing, p. 154

⁶³ Senate estimates – Legal and Constitutional Affairs Legislation Committee (23 May 2023) *Testimony from Office of the Australian Information Commissioner*, p. 125, https://www.aph.gov.au/Parliamentary_Business/Hansard/Estimates_Transcript_Schedule

⁶⁴ Morison (2023) *Underfunded accountability institutions*, <https://australiainstitute.org.au/post/underfunded-accountability-institutions-budget-2023/>

⁶⁵ 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>

- Rex Patrick has detailed two refused FOI requests that were about to be heard by the AAT, only for the relevant departmental Secretary to release the documents the day before the AAT hearing.⁶⁶

Restoring Australia's FOI system requires improvements to FOI processes. The success of the Ombudsman SA's FOI reviews suggests it could be a working model federally. Regardless, the OAIC requires significantly more resources. The culture of the public service must also be addressed.

⁶⁶ Patrick (2023) *Playing chicken to the detriment of democracy and cost to the taxpayer*, <https://michaelwest.com.au/playing-chicken-to-the-detriment-of-democracy-and-cost-to-the-taxpayer/>