

12 November 2021

Hon. Anthony Albanese
Leader of the Opposition
334A Marrickville Road
Marrickville 2204 NSW

Via email: A.Albanese.MP@aph.gov.au

Re: Support for Senator Rex Patrick's challenge to FOI laws

Dear Hon. Anthony Albanese,

Freedom of Information laws are crucial to ensuring transparency and accountability with respect to policy and government decision making. Such laws are essential to give Australians access to the information they need to participate fully in democratic processes. However, systemic deficiencies in the federal freedom of information (FOI) regime, including the existence of broad exceptions under the *Freedom of Information Act 1982* (Cth) (FOI Act) and persistent underfunding of the Office of the Australian Information Commissioner (OAIC), have eroded the effectiveness of the FOI regime, shielding politicians from public scrutiny and undermining public confidence in the integrity of government and public institutions.

Recent developments surrounding the deletion of FOI requests relating to Christian Porter's 'blind trust' by the Department of Industry, Science, Energy and Resources have highlighted important gaps in the existing FOI regime. Further, the existing FOI regime has been plagued by unreasonable delays, rendering information provided pursuant to legitimate FOI requests irrelevant or obsolete due to the passage of significant time (i.e. often years later). These issues have resulted in a significant deterioration of the utility of the FOI regime over the past few years, and, subsequently, diminished the accountability of our public institutions and those who serve them, resulting in the erosion of Australians' confidence in the integrity of public institutions, politicians and government.¹

The New South Wales Council of Civil Liberties (NSWCCL) considers that urgent reform to the existing FOI regime, and in particular the way the FOI Act is applied by Government agencies, is required to ensure public confidence in the integrity of public institutions and government decision makers is maintained in accordance with the principles of open government, transparency and accountability.

In particular, NSWCCL considers that the current application of the FOI Act to deny access to information in circumstances whereby an applicant requests the documents of a former Minister is inconsistent with the aim of open government, which the FOI Act is intended to facilitate. To this end, NSWCCL supports efforts by Senator Rex Patrick to challenge the relevant sections of the FOI Act in court and, if unsuccessful, by seeking to move amendments to the FOI Act in Parliament.

¹ For example, in 2020-21, the proportion of FOI requests granted in full was 41%, down from 47% in the previous year (Source: OAIC Annual Reports).

More broadly, NSWCCCL urges that:

- OAIIC be empowered to initiate further investigations into the handling of FOI matters by government agencies and where relevant impose sanctions (in order to address systemic issues relating to the application of the FOI Act by Government agencies resulting in unreasonable delays in the handling of FOI requests); and,
- OAIIC be provided with increased funding in order to properly manage its FOI reviews and thereby increase the efficiency and transparency of Australia's FOI system.

Access to documents of a former Minister is consistent with the objectives of the FOI Act

NSWCCCL considers that the current interpretation and application of the FOI Act to deny an FOI applicant access to the documents of a former Minister is inconsistent with the objectives of open government, which the FOI Act is intended to facilitate.

Section 15 of the FOI Act provides that a person who wishes to obtain access to an '*official document of a Minister*' may request access to that document.² An '*official document of a Minister*' is defined in section 4(1) of the FOI Act as a document that is '*in possession of the Minister... in his or her capacity as a Minister*'.³

However, the narrow interpretation of these sections of the FOI Act by the Information Commissioner has allowed government agencies to delete pending FOI requests once a Minister leaves their office. In this regard, we note the Information Commissioner has, in two instances, considered the application of s 4(1) of the FOI Act in circumstances in which an applicant has sought access to the documents of a former Minister.⁴ In both instances, the Information Commissioners' narrow interpretation of s 4(1) meant that the documents of the former Minister were not accessible and, in fact, the Information Commissioner considered that the FOI Act no longer applied to those documents.

NSWCCCL notes that the decisions of the Information Commissioner have not been subject to review by the AAT or the Federal Court. As such, the effect of the Information Commissioner's decisions is that an applicant is in effect precluded from accessing the documents of a former Minister, except to the extent that: (a) the Minister makes the documents accessible to their successor (which they are neither incentivised nor required to do); or (b) the applicant makes an access request to the National Archives of Australia, which will not release the documents for 20 to 30 years.

Accordingly, NSWCCCL considers that the present drafting of the FOI Act, given the Information Commissioner's narrow interpretation of how it should be applied, is an enfeebled mechanism for ensuring political accountability given access to the documents of a former Minister is so narrowly circumscribed.

The resignation of a Minister is invariably significant, particularly when there is a suggestion of impropriety. It is therefore NSWCCCL's strong view that the public should have an available avenue to access information about a former Minister's affairs, provided a request pertains to information in connection with the exercise of his or her functions as a Minister. Ministers routinely resign or switch portfolios in the current political climate and former Ministers are not incentivised to make documents available to their successors, which is only exacerbated by the increasing culture of secrecy pervading the federal political landscape. As the GRATA Fund has noted, this means that the current FOI regime leaves a '*significant gap in accountability for acts of a sitting government*'.⁵

NSWCCCL considers government information should be accessible by the public on whose behalf it is created. In the absence of a federal independent corruption commission, the FOI Act is one of few mechanisms the Australian public have to hold politicians to account. To this end, NSWCCCL supports the efforts of Senator Rex Patrick to challenge s 4(1) of the FOI Act in Court and, if unsuccessful, via an amendment in Parliament. To the extent that legislative reform of the FOI Act is not possible, NSWCCCL supports reform of paragraph 2.52 of the OAIIC Guidelines.

² Section 15(1) of the FOI Act.

³ Section 4(1) of the FOI Act.

⁴ See: [Philip Morris Ltd and Treasurer \[2013\] AICmr 88](#); [Thomas and Prime Minister \[2014\] AICmr 18](#) and in the [OAIIC Guidelines \(para 2.52\)](#)

⁵ Grata Fund August 2021, FOI Litigation Hit List: Challenging Government Secrecy in the Courts, p.20 accessible at: https://d3n8a8pro7vymx.cloudfront.net/gratafund/pages/664/attachments/original/1629265812/Grata_Fund_-_FOI_Hit_List_report_-_FINAL.pdf?1629265812

Urgent reform of these provisions of the FOI Act is crucial to ensuring the objectives of political accountability and open government are maintained.

Unreasonable delay in the application of FOI laws must be addressed

More broadly, NSWCCCL considers that there are unreasonable delays associated with processing FOI requests under the FOI Act, which undermine the efficacy, and the very objectives, of the FOI regime, which are underpinned by the public interest in accountability, transparency and open government. The nature of FOI laws demand that FOI requests are dealt with in a timely manner because information that is the subject of an FOI request often relates to current or proposed government policies, or the conduct of Ministers, and therefore its production, if it be ordered, is particularly time sensitive to allow civil society to participate in our democratic system of government.⁶

However, despite a statutory obligation on Government agencies to process FOI requests within 30 days,⁷ substantial delays are routinely reported. For example, in 2020-2021, 12% of FOI requests were decided more than 90 days over the statutory time frame⁸ (a significant increase given only 2% of FOI requests in 2018-19 were subject to such delay).

Further delays are also common with respect to applications for review of FOI requests by the OAIC, in part because there is no prescribed timeframe within which the OAIC must issue a decision,⁹ and in part because the OAIC's FOI review functions are inadequately funded (as discussed in further detail below). For example, in 2020-21, 27% of FOI reviews were not finalised within 12 months,¹⁰ and the average time to finalise a review was 8.3 months.¹¹ Delays at the review stage undermine the efficacy of the appeals mechanism and ultimately frustrate civil society's ability to hold government decision makers to account.

NSWCCCL recommends that in order to address unreasonable delay, OAIC should be empowered to initiate further investigations into the handling of FOI matters by Government agencies. In aid of this, measures must be taken to ensure OAIC has access to adequate funding and resources to carry out its FOI review functions, as well as to conduct further Information Commissioner initiated investigations, as discussed below.

OAIC needs adequate funding to undertake its FOI functions in a timely manner

As has been noted generally by a number of practitioners and interested parties who have engaged with the FOI regime,¹² the underfunding of the OAIC's FOI functions creates further barriers to an efficient and transparent FOI regime. Given the limited recourse to government information under the existing FOI regime, NSWCCCL considers the adequate funding of OAIC's FOI functions is a matter of substantial public interest and importance.

Under the 2021-22 budget, the OAIC will receive an additional \$1.454 million a year over the next two years to support the expansion of the Consumer Data Right, and an additional almost \$1 million a year over the next four years to assist with FOI functions within the OAIC, including the appointment of an FOI Commissioner.¹³ While NSWCCCL welcomes this additional funding for the OAIC, we consider the OAIC remains grossly under resourced to perform its FOI functions with appropriate timeliness and efficiency given:

- the significant increase in recent years of FOI decisions being referred to the Information Commissioner for review; and
- funding provided by the Government in the 2019-20 and 2020-21 financial years was provided only to assist with the OAIC's privacy functions and new responsibilities under the Consumer Data Right (and not its FOI functions).

⁶ Grata Fund, 12.

⁷ FOI Act s 15(5); OAIC's Guidelines, para 3.139.

⁸ [OAIC Annual Report 20-21](#) p. 140.

⁹ Grata, 13.

¹⁰ OAIC Annual Report, p 13.

¹¹ Ibid.

¹² e.g. in previous Senate Committee submissions and Senate Committee public hearings - see submissions and public hearing transcripts accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FreedomofInformation.

¹³ See Budget Report 2 pg 63 accessible at: https://budget.gov.au/2021-22/content/bp2/download/bp2_2021-22.pdf; OAIC media release 'OAIC welcomes additional funding for data protection and FOI' 12 May 2021, accessible at: <https://www.oaic.gov.au/updates/news-and-media/oaic-welcomes-additional-funding-for-data-protection-and-foi>.

When this is taken into account along with inflation, funding for the OAIC's existing functions, including FOI review, has actually decreased from 2018 onwards,¹⁴ despite an increasing FOI workload (particularly with respect to the volume of Information Commissioner reviews).

At the same time, the OAIC forecasted, in October 2020, that the number of reviews requested per year would increase by almost 600 in the 2022-2023 financial year, but that their capacity to complete reviews in each year will remain the same.¹⁵ The OAIC has suggested it would be unable to increase the number of completed reviews per year beyond the level achieved in FY 2019-2020 as it *'has implemented a range of initiatives to maximise the efficiency and output of the office and anticipates that further substantial efficiencies are unlikely to be realised over the forward estimates.'*¹⁶ As such, the OAIC has consistently required a larger amount of resourcing than it has been allocated each year.

The OAIC finalised 1018 applications against its forecasted 829,¹⁷ but this still leaves a large backlog. Indeed, in October 2020 the OAIC suggested average staffing levels in FY 2020-21 and 2021-22 would need to be at 35, compared to their then current average staffing level of 18, in order to manage the backlog of reviews.¹⁸ In its FY 2020-21 Annual report the OAIC again noted that, despite the improvement in finalisation rates, *'resourcing issues means a gap between incoming FOI work and finalisation rates remains'*. In such circumstances, it is difficult to see how the appointment of a new FOI Commissioner, without increasing other staffing levels and resources will allow the OAIC to not only finalise a larger number of matters, but do so in a timely manner consistent with the intention of the FOI Act – namely ensuring transparency and accountability in accordance with the principle of open government.

In November 2019, the OAIC estimated that they would need to increase the number of staff who conduct FOI reviews by nine in order to meet the additional demand on the agency, at a total cost of almost \$2 million in the first year, which is double the amount of increased funding it has actually received for FOI functions.¹⁹ NSWCCCL considers that OAIC must be provided with additional funding in order to properly manage its FOI review functions and thereby increase the efficiency and transparency of Australia's FOI regime.

Measures to address a culture of non-disclosure are required

NSWCCCL also notes that systemic delays in response to FOI requests (as discussed above), and the increasing number of refusals by Government agencies to provide information, or the provision of partial responses with heavy redactions, suggest that there may be systemic cultural issues in the way government bodies carry out their obligations under the FOI Act, which undermine the regime's statutory objects.

Senator Rex Patrick has noted that *'The government is secretly undermining the entire FOI regime... It tacitly approves, and perhaps even encourages, officials taking a cavalier approach to denying access to information, which then overloads an underfunded information commissioner.'*²⁰ Speaking to the Guardian in 2019, an anonymous whistle-blower and former FOI officer of the Department of the Prime Minister and Cabinet reported a *'culture of disdain for the rule of law'* and suggested that the Department was in breach of FOI laws around 50% of the time.²¹

Statistics collected by the OAIC support the view that there may be a culture amongst some government agencies of seeking to circumvent FOI laws. For example, over the last five years there has been a trend of increased refusals, increased partial information responses, and a corresponding decrease in full disclosure. In 2020-21 the proportion of FOI requests granted in full was 41% (down from 55% in 2016-17); while the proportion of FOI requests partially granted increased to 41 (up from 34% in 2016-17); and the number of refusals increased to 18%, up from 10% in 2016-17.²² Separately, while the FOI Act provides for time extensions in certain limited circumstances, such as in cases

¹⁴ Govt appropriation data from agency resourcing and budget measures (Papers 2 & 4) in budget papers from 2016 – 2021 accessible at:

https://budget.gov.au/2021-22/content/bp4/download/bp4_05_agency_resourcing.pdf; <https://archive.budget.gov.au/2019-20/>; <https://archive.budget.gov.au/2018-19/index.htm>; <https://archive.budget.gov.au/2017-18/index.htm>; <https://archive.budget.gov.au/2016-17/index.htm>

¹⁵ Data from the response to Senator Rex Patrick's question on 22 October 2020 in the Senate standing committee on legal and constitutional affairs, attorney-general's portfolio; budget estimates 2020-21 (LCC-BE20-71 IC Reviews and Resourcing levels).

¹⁶ Ibid.

¹⁷ See footnote 22; OAIC 2021 Annual report.

¹⁸ See footnote 15.

¹⁹ Response to Senator Kim Carr's question on 4 November 2019 in the Senate Standing Committee on Legal and Constitutional Affairs, Attorney-General's Portfolio Supplementary Budget Estimates 2019-20 Pa-Office of the Australian Information Commissioner LCC-SBE19-153 - OAIC funding.

²⁰ The Guardian, 'Australia's freedom of information regime heading for a 'train smash', senator says' 8 January 2021, accessible at: <https://www.theguardian.com/australia-news/2021/jan/08/australias-freedom-of-information-regime-heading-for-a-train-smash-senator-says>.

²¹ See The Guardian, 'Whistleblower hits out at PM's department over 'pervasive and toxic' disregard for law' 26 June 2019, accessible at: <https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law>.

²² OAIC annual reports 2017-18 to 2020-21, Appendix E.

involving complex requests or requiring third party consultation,²³ some government agencies appear to apply such time extensions as part of standard practice.²⁴

In circumstances where Government agencies appear to be increasingly restricting or delaying the provision of information pursuant to FOI requests, the OAIC's FOI review function has become increasingly critical to ensuring government transparency and accountability. However, there are both systemic and structural issues under the existing FOI regime that present significant challenges in effecting cultural change. In addition to supporting calls for OAIC's FOI review function to be adequately funded (as outlined above), NSWCCCL considers OAIC should also be statutorily empowered to:

- conduct investigations into government departments that fail to meet their disclosure duties under the FOI Act; and
- where relevant, impose sanctions on persons found to have contravened the FOI Act.

Federal legislators can find guidance in this regard with respect to the offence provisions under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**), which have application in securing cultural change amongst NSW government agencies that handle FOI requests under the GIPA Act by ensuring systems, policies and practices operate effectively under contemporary public sector structures and arrangements to safeguard against vulnerabilities that may arise under devolved decision making models. For instance, the GIPA Act creates five offences (sections 116-120), which in summary serve two regulatory purposes: (a) an enforcement function to impose penalties upon persons committing the most serious contraventions of that Act; and (b) a persuasive / educative function to deter persons from committing contraventions.

NSWCCCL considers the creation of similar regulatory offences in the FOI Act will not only empower the OAIC to reinforce the statutory responsibilities that Government departments, agencies, and their personnel are already subject to, but also reinforce the importance of the FOI Act for the proper functioning of our democratic system of government.

We would welcome the opportunity to meet with you to discuss or engage in consultation in relation to any of the matters raised in this letter.

Yours sincerely,



Pauline Wright
President
NSW Council for Civil Liberties

Copy to:
Senator Rex Patrick
Level 2, 31 Ebenezer Place
Adelaide, SA, 5000
via email: senator.patrick@aph.gov.au

²³ FOI Act ss 15(6) - 15(8), 15AA, 15AB.

²⁴ Grata Fund, ['FOI Litigation Hit List'](#) (August 2021).