



30 November 2021

Angelene Falk
Australian Information Commissioner and Privacy Commissioner
175 Pitt Street
Sydney NSW 2000

By email to: executiveassistant@oaic.gov.au
cc Senator Rex Patrick: senator.patrick@aph.gov.au

Dear Commissioner Falk,

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

Freedom of Information laws are crucial to ensuring the transparency and accountability of policy and government decision making by giving Australians access to the information they need to participate fully in democratic processes. To this end, the New South Wales Council for Civil Liberties (**NSWCCL**) recognises and supports the integral functions that the Office of the Australian Information Commissioner (**OAIC**) carries out under the federal freedom of information (**FOI**) regime in Australia.

The purpose of this letter is to initiate a dialogue as to how NSWCCL could support the OAIC in achieving a more robust and accessible FOI regime in Australia. Presently, NSWCCL considers that systemic deficiencies in the federal FOI regime, including the existence of broad exceptions under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and persistent underfunding of the OAIC (despite the broadening of OAIC's role and various functions), 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 in the processing of FOI requests, 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

Accordingly, NSWCCL would support the OAIC taking a leading role as part of necessary and urgent reform to the existing FOI regime, and in particular the way the FOI Act is applied by Government agencies. This is urgently 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.

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).

In particular, NSWCCCL 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, NSWCCCL 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. We have also written to the Attorney General (the Hon. Michaelia Cash) and the leader of the Opposition (the Hon. Anthony Albanese) to express our support of Senator Rex Patrick's efforts and call for urgent reform of the existing FOI regime.

More broadly, NSWCCCL urges that:

- OAIC review and reconsider its current interpretation of s 4(1) of the FOI Act (as provided for in paragraph 2.52 of the OAIC Guidelines) in order to facilitate access to the documents of a former Minister;
- OAIC initiate further investigations into the handling of FOI matters by government agencies and where relevant propose recommendations (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,
- OAIC be provided with increased funding in order to properly manage its FOI functions (including reviews), thereby increasing the efficiency and transparency of Australia's FOI system.

We would welcome the opportunity to meet with you to discuss the matters we raise in this letter, noting we would be particularly keen to discuss how NSWCCCL can support you and the OAIC in furthering the critical FOI functions that OAIC is empowered to perform.

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

The FOI Guidelines published by the OAIC are a critical resource for the Australian public in seeking to understand the application of the FOI Act. However, 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 under the OAIC Guidelines 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

NSWCCCL considers that these sections of the FOI Act have been given an unduly restrictive interpretation in decisions prior to your tenure as Information Commissioner. The effect of the narrow interpretation of these sections of the FOI Act has allowed government agencies to delete pending FOI requests once a Minister leaves their office. In this regard, we note the then Information Commissioner, Dr Popple, 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 former Information Commissioner's narrow interpretation of s 4(1) meant that the documents of the former Minister were not accessible and, in fact, the former Information Commissioner considered that the FOI Act no longer applied to those documents.

NSWCCCL notes that these decisions of the former Information Commissioner have not been subject to review by the AAT or the Federal Court. As such, the current effect of the former Information Commissioner's decisions is that an applicant is in effect precluded from accessing the documents of a former Minister, except to the extent

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 the [OAIC Guidelines \(para 2.52\)](#).

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. Neither of these outcomes are consistent with the objectives of open government, which the FOI Act is intended to facilitate.

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 a readily 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

NSWCCL 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 challenges 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 suggests that paragraph 2.52 of the OAIC Guidelines could be reformed to broaden this interpretation and better align the OAIC's current practice with the objectives of the FOI Act. There is nothing intrinsic in the FOI Act which necessitates the former Information Commissioner's narrow interpretation of s4(1) of the FOI Act; indeed, it is contrary to the objectives of the FOI Act itself which enshrine the principle of open government by providing the Australian community a right of access to government information to review, scrutinise and discuss Government activities.

In our view, reform of the OAIC guidelines is a readily available means by which access to the documents of a former Minister could be achieved, bolstering the accountability of public decision makers in Australia. Urgent reform of these sections of the FOI Act is crucial to ensuring the objectives of political accountability and open government are maintained. In this regard, we note NSWCCCL would welcome the opportunity to work with the OAIC to determine how best to broaden OAIC's FOI Guidelines to better reflect the objects of the FOI Act and promote government transparency.

Unreasonable delay in the application of FOI laws must be addressed

More broadly, NSWCCCL considers that there are currently 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 the Australian community to participate in our democratic system of government.⁶

⁵ Grata Fund August 2021, FOI Litigation Hit List: Challenging Government Secrecy in the Courts, p.20 accessible at: https://d3n8a8pro7vhmx.cloudfront.net/gratafund/pages/664/attachments/original/1629265812/Grata_Fund_-_FOI_Hit_List_report_-_FINAL.pdf?1629265812

⁶ Grata Fund, 12.

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 but we consider this delay may largely be due to the fact the OAIC's FOI review functions are inadequately funded. 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 While we understand that OAIC is managing a significant workload with limited resources, particularly with respect to its FOI functions, 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.

As you know, 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.¹² While NSWCCCL welcomes this additional funding for the OAIC, we consider the OAIC remains 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;
- in October 2020, you forecast that: (a) the number of reviews requested per year would increase substantially over time in the 2022-2023 financial years; and (b) OAIC staffing levels would need to almost double to manage the backlog reviewable decisions;¹³ and
- critically, increases to funding provided by the Government in the 2019-20 and 2020-21 financial years were provided only to assist with the OAIC's privacy functions and new responsibilities under the Consumer Data Right (and not the OAIC's existing FOI functions).

In such circumstances, NSWCCCL considers that in addition to the appointment of a new FOI Commissioner, other staffing levels and resources must also be increased to allow the OAIC to not only finalise a larger number of matters, but to do so in a timely manner that is consistent with the intention of the FOI Act – namely ensuring transparency and accountability in accordance with the principle of open government.

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 and would support OAIC in lobbying for an expansion to its powers and duties. In aid of this, measures must also 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.

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 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>.

¹³ 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).

Measures to address a culture of non-disclosure within Government agencies are required

NSWCCL 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 objectives.

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.'*¹⁴ 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.¹⁵ Statistics collected by the OAIC also support the view that there may be a culture amongst some Government agencies of seeking to circumvent FOI laws.¹⁶ Separately, while the FOI Act provides for time extensions in certain limited circumstances, such as in cases involving complex requests or requiring third party consultation,¹⁷ some Government agencies appear to apply such time extensions as part of standard practice.¹⁸

In circumstances where Government agencies appear to be increasingly restricting or delaying the provision of information pursuant to FOI requests, the OAIC has an increasingly critical role as the federal independent regulator in changing Government agency behaviour by promoting an open and proactive culture in respect of FOI laws. In this regard, the OAIC's FOI review function has become increasingly important to ensuring Government agencies respond to FOI requests efficiently and transparently. NSWCCL considers that the increased use of this review power, as per the OAIC's investigation into the Department of Home Affairs, would encourage a shift towards a culture of compliance with FOI legislation.

Notwithstanding, NSWCCL considers that there are 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), NSWCCL considers OAIC should also be:

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

¹⁴ 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>.

¹⁵ 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>.

¹⁶ OAIC annual reports 2017-18 to 2020-21, Appendix E. 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.

¹⁷ FOI Act ss 15(6) - 15(8), 15AA, 15AB.

¹⁸ Grata Fund, '[FOI Litigation Hit List](#)' (August 2021).

Guidance in this regard can be found in 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.

NSWCCL considers the creation of similar regulatory offences under 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.

NSWCCL recognises and supports the integral function OAIC carries out under the FOI regime, and appreciates that your Office does so under increasing scrutiny and resourcing constraints. Again, we would welcome the opportunity to meet with you to discuss or engage in consultation in relation to how NSWCCL can support you in furthering the work of the OAIC, as well as any of the matters raised in this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Pauline Wright', with a stylized, cursive script.

Pauline Wright
President
NSW Council for Civil Liberties