

**From:** [BROWN,Rebecca](#)  
**To:** [GHALI,Sarah](#); [DRAYTON,Melanie](#); [HAMPTON,Elizabeth](#)  
**Subject:** FW: Tabled statement from former FOI Commissioner in relation to Senate inquiry into the operation of Commonwealth FOI laws [SEC=OFFICIAL]  
**Date:** Tuesday, 29 August 2023 9:25:13 AM  
**Attachments:** [image001.gif](#)  
[Mr Hardiman opening statement 29 August 2023.pdf](#)  
**Importance:** High

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FYI

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**From:** Clements, Ash (SEN) <Ash.Clements@aph.gov.au> **On Behalf Of** Legal and Constitutional, Committee (SEN)

**Sent:** Tuesday, August 29, 2023 9:22 AM

**To:** FALK,Angelene <Angelene.Falk@oaic.gov.au>

**Cc:** BROWN,Rebecca <Rebecca.Brown@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; Legal and Constitutional, Committee (SEN) <LegCon.Sen@aph.gov.au>; Piesse, Mervyn (SEN) <Mervyn.Piesse@aph.gov.au>; OAIC - Executive Assistant <executiveassistant@oaic.gov.au>

**Subject:** Tabled statement from former FOI Commissioner in relation to Senate inquiry into the operation of Commonwealth FOI laws

**Importance:** High

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Dear Commissioner,

In advance of your appearance before the Senate Legal and Constitutional Affairs References Committee this afternoon, the Chair of the committee has requested that you be provided with a statement by the former FOI Commissioner, Mr Leo Hardiman, that was tabled this morning during the public hearing.

Mr Hardiman's statement is available [here](#) and also attached.

Sincerely,  
Ash Clements

Dr Ashley Clements | Principal Research Officer

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## STATEMENT TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE INQUIRY INTO THE OPERATION OF COMMONWEALTH FREEDOM OF INFORMATION (FOI) LAWS

I thank the Committee for the opportunity to appear before it as a witness in its inquiry into the operation of Commonwealth FOI laws and make the following statement, divided into a summary statement and a detailed statement, with respect to the inquiry's terms of reference.

### SUMMARY STATEMENT

2. **With respect to term of reference (a)**, in the statement I made on 6 March 2023 announcing my resignation, I said that the powers necessary to make further changes to ensure the timeliness of IC reviews were not within those conferred on me as FOI Commissioner. The powers I was referring to were powers relating to the resourcing of the OAIC's FOI functions and powers relating to broader agency management matters affecting the performance of those functions. Those powers were within the sole remit of the Information Commissioner (the IC).

3. Immediately upon commencing my appointment in April 2022, and in the months afterwards, I encountered a large number of significant issues concerning or affecting the performance of the FOI functions which required close consideration and attention. I set these issues out in my detailed statement. Broadly described, they included:

- serious staff and resourcing issues
- a significant lack of appropriate focus on the main problems in the performance of the FOI functions, particularly the Information Commissioner (IC) review function
- a lack of sufficient engagement with FOI technical issues, even when staff were seeking that engagement
- unproductive relationships with regulated agencies
- a diversion of staff away from core FOI work for the purpose of making constant process changes which did not in any significant sense deal with the real problems in the performance of the FOI functions, and an associated feeling of complete overwhelm amongst the more senior staff members of the OAIC's FOI Branch
- a shifting of responsibility for failures to the staff of the FOI Branch, together with a culture of the OAIC's FOI functions being of secondary importance to its privacy functions
- cycles of panic at the most senior level, particularly around Senate estimates appearances and critical stages of the Patrick unreasonable delay litigation
- a lack of commitment to the three Commissioner model established by the AIC Act, and
- a practice at the most senior level of developing 'narratives' designed to present the OAIC's performance of the FOI functions in the best possible light while distracting from engagement with important issues affecting that performance. The framing of two consistently articulated 'narratives', one around work outputs and one around resourcing, was of particular concern to me.

4. I engaged with these issues closely and was able to address a number of them. More particularly, I was able to create a much more focused and stable working environment for staff of the FOI Branch. I engaged closely with staff, particularly in their technical development and in necessary change management. I put significant effort into improving the quality of IC review decision-making and the development of technical FOI guidance through IC review decisions. I streamlined day to day work processes and, with the FOI Branch leadership team, developed significant proposed changes to the procedure for IC reviews. I worked to create more functional relationships with regulated agencies.

5. Perhaps most significantly, I reviewed the OAIC's entire approach to the conduct of IC reviews and worked to structure the limited resources of the FOI Branch in a way which allowed for the active management of a much greater number of IC review applications. This necessary change was of apparent concern to the IC who, after I first proposed it, told me that I should not be involving myself in such matters – that is, as FOI Commissioner I should not be involving myself in the approach to management of the IC review workload and backlog. I pushed on and significant structural changes, with a much greater focus on the active management of IC reviews, were implemented on 1 February 2023. As at the cessation of my appointment three or so months later, that restructure had begun resulting in increased progression of substantive IC review matters.
6. However, it was abundantly clear that in addition to these structural changes more resources were needed if the very large backlog in IC review applications was to be resolved in any satisfactory way.
7. Relevantly in that regard, I was ultimately unable to change the distracting 'narratives' developed and promulgated by the OAIC, particularly around the issue of resourcing. I was also ultimately unable to change significant cultural issues affecting the performance of the FOI functions.
8. In relation to the issue of resource allocation, it became increasingly apparent to me that the IC, following a communication with the former Government, had decided that she would never in any substantial sense allocate additional OAIC resources to the performance of the FOI functions notwithstanding the availability of at least a degree of flexibility for the IC to do so. Rather, only appropriated funds which had been formally earmarked by the Government of the day for FOI purposes would be allocated to the performance of the FOI functions. At the same time, however, the amount of OAIC resources being allocated to corporate support and discretionary privacy policy functions was far greater than the amount of resources being allocated to the OAIC's core FOI functions.
9. In relation to cultural issues, I could not change the fact that the IC was not committed to the three Commissioner model. Rather, the IC was committed to a model under which she would remain, in effect, a 'super' Privacy Commissioner with a subordinate rather than equally independent co-Commissioner for FOI. The IC had expressly said to me following the 2022 federal election that she was concerned about the possibility of, and did not want, the appointment of a separate Privacy Commissioner. It was also made abundantly clear to me that the IC was only desirous of an appointed FOI Commissioner if the IC could control that Commissioner, particularly in so far as they might say or do anything which called into question prior stewardship of the FOI functions.
10. The broader culture of the OAIC, including a cultural bent away from the FOI functions, was entirely a product of the IC's leadership. Try as I may, I simply could not change that culture and its impact on the performance of the FOI functions.
11. These issues, together with confirmation in late February 2023 that there would be no additional resources for the FOI functions through the May 2023 budget and that this position was unlikely to change in forward years, left my position untenable. I would not be able to sufficiently repair the consequences of the very substantial deficiencies which had occurred in the performance of the FOI functions.
12. Resignation was an incredibly difficult decision to contemplate. But I could not with a necessary sense of integrity play the game of maintaining the *status quo*. Change was desperately required and it was not going to occur if I continued on.

13. **With respect to terms of reference (b) and (c)**, there are many issues at the agency rather than regulator level which have led to overly complex decisions for review, overly complex review processes, and an overall crowding of the IC review workload with decisions that ought properly to have provided access to requested information at the outset. I set a number of these issues out in my detailed statement. In the main, these issues are in my view reflective of a deficiency in APS leadership and culture as they relate to the administration of the FOI Act. That deficiency also affects the capacity of agencies to attract and retain a sufficient number of appropriately skilled and experienced staff to their FOI areas. In my view, it is unlikely that these matters can be adequately addressed in the absence of a group of very senior public servants – by which I mean people at the SES Band 3 or Secretary level – who visibly champion FOI and instil across the APS a more pro-information access culture which reflects a more justifiable approach to the maintenance of confidentiality over government-held information.

14. **With respect to term of reference (d)**, I support the creation of a statutory time frame for the completion of reviews. Having regard to the complexity of many IC review matters, I consider a time frame of 6 months would be appropriate, with the possibility of an extension of up to 6 months in specified circumstances (such as genuine complexity or a genuine incapacity of a party to meet a particular timeframe). Various issues would need to be considered in the framing of a statutory time frame, including transitional issues which recognise the impossibility of compliance with respect to the current backlog of IC review matters.

15. **With respect to term of reference (e)**, there is a need for significant reform to the FOI system, and potentially also the governance arrangements for the oversight, development and management of Commonwealth information policy. Again, I discuss these issues in my detailed statement. In summary terms:

- There would be benefit in a holistic review of, and subsequent reform to, the FOI Act.
- There is a need to consider the governance arrangements for the FOI regulatory functions. In my view, consideration ought to be given to moving those functions to an agency with greater focus on government accountability and integrity.
- Consideration should be given to whether it is desirable to re-imagine the statutory office of Information Commissioner (however titled) or, alternatively, whether discrete subject matters, including privacy and foi, should be the subject of discrete governance arrangements together with an appropriate information policy liaison forum if desired.
- Consideration should be given to whether maintaining an FOI review function at the regulatory level is desirable. In my view, it would be better to have only one level of full merits review which is conducted in the AAT (or its successor review body). The regulator could be given a narrower, more manageable, focus directed to improving the administration of the FOI system. If it is to retain a decision review function, that function should be of a limited, rather than full merits, nature.
- Consideration should be given to reforming the financial signalling which is built into the FOI system. The current charges regime should be simplified and made incapable of gaming by agencies. There may also be merit in creating a new financial incentive for agencies to seek to resolve FOI disputes without the institution, or continuation of, a review process wherever that might be possible and appropriate – an incentive of that kind might, for example, take the form of a requirement to contribute to the costs incurred by a review body in the conduct of a review.

## DETAILED STATEMENT

### (a) The resignation of the Commonwealth Freedom of Information Commissioner and the resulting impacts

16. I commenced my appointment as FOI Commissioner on 19 April 2022. I stated in a LinkedIn post on 6 March 2023 that I had resigned my appointment effective 19 May 2023. In that statement I said that, while I had identified and had been leading the implementation of changes to improve the active management, and reduce the backlog, of IC reviews:

- further changes to ensure the timeliness of IC reviews were necessary, and
- the making of those changes was not within the powers conferred on me as FOI Commissioner.

17. That reference to the powers conferred on the FOI Commissioner was not a reference to FOI regulatory powers. While there is no question in my mind that the FOI Act could greatly benefit from significant review, the fundamental issues I encountered in attempting to make change related to resourcing and organisational culture. These were matters over which I had no direct control. I was ultimately unable to secure the change in those matters which I considered necessary for the improvement of FOI outcomes.

### The scope of the FOI Commissioner's powers

18. Section 11(1), read with s 8, of the *Australian Information Commissioner Act 2010* (the AIC Act) vests in the FOI Commissioner a broad range of functions (the FOI functions) related to the administration of the *Freedom of Information Act 1982* (the FOI Act). Section 11(3) of the AIC Act says that the FOI Commissioner 'has power to do all things necessary or convenient to be done for or in connection with the performance of' the FOI functions. This conferral of powers, broad in its terms, is subject only to the limited exceptions set out in s 11(4).

19. Importantly however, while the broadly-framed powers conferred by s 11(3) of the AIC Act are a necessary legal mechanism to facilitate the FOI Commissioner's performance of the FOI functions, those powers do not extend beyond performance of the enumerated statutory FOI functions to matters *practically necessary* to ensure the proper performance or execution of those functions. In particular, those powers do not extend to financial management, staffing or broader organisational matters (I refer to these as 'agency management matters'). Rather, under the three Commissioner model established by the AIC Act, the IC is constituted as the Agency Head of the OAIC for the purposes of the *Public Service Act 1999* (see s 5(3) of the AIC Act) and the accountable authority of the OAIC for the purposes of the *Public Governance, Performance and Accountability Act 2013* (see s 5(4) of the AIC Act). While the FOI Commissioner is clearly able – and in my view, duty bound – to raise with the IC issues relating to resourcing, staff and broader organisational matters, the powers needed to respond to those issues are within the sole remit of the IC.

### Issues I encountered as the FOI Commissioner

20. I became aware in the first weeks and months of my appointment that a number of significant issues relating to both the performance of the FOI functions and agency management matters (as they related to the performance of those functions) required close consideration and attention. These issues included the following:

- A significant rate of staff turnover. This resulted in a large experience deficit as there were very few long term staff remaining in the FOI Branch of the OAIC by the time my

appointment commenced. Further, the constant on-boarding and training of new staff imposed a significant barrier to the efficient functioning of the Branch, recognising that a maximum average staffing level of around 22 staff – a lack of critical mass – was allocated to the Branch within the OAIC’s broader average staffing level. Senior staff were constantly taken from their core work to engage in the on-boarding and training of new staff.

- Insufficient Commissioner-level engagement with Branch staff on technical FOI matters; a lack of commitment to the technical development of staff; and a failure to adequately listen to, and engage with, the views of staff in relation to FOI technical matters.
- An approach to IC review decisions which reflected insufficient depth of analysis and ‘cutting and pasting’ under the guise of maintaining precedent (“we’ve said it before, so we’ll just say that again”).
- Multiple levels of matter clearance and briefing processes which were overly formal, unnecessary and a barrier to efficient and timely decision-making.
- A strong sense, expressed very clearly to me by the whole Branch leadership team, that the OAIC senior leadership required the Branch to make constant process changes which diverted key Branch employees from core FOI work and which was overwhelming for them. These process changes did not in a substantial way address the real problems confronting the Branch, particularly the backlog of IC review applications. Several senior employees indicated that they had to regularly work far beyond reasonable working hours to get basic elements of their core FOI work done, and that there was insufficient time left for them to address the real problems confronting the Branch, as a result of their time being diverted to these constant process changes. There was significant resentment of this – the sense being that staff were required to engage in many of these activities for the purpose of progressing a narrative that *something* was being done while, in fact, the substantive problems were not being dealt with.
- Several Branch staff members displaying symptoms of unhealthy work stress and traumatisation. Relatedly, several Branch staff members vocalised concerns about the impact on them and others of certain very senior level workplace behaviours.
- Some process changes were not well thought through and failed to reflect an understanding of applicable administrative law requirements.
- A view that nothing could be done about the backlog of IC review applications and, consistent with this, a lack of any overall strategy for dealing with the significant delay in managing IC review applications and the associated backlog.
- Lack of a clearly articulated and understood focus for the Branch coupled with constant distraction of the Branch with non-core tasks or tasks better undertaken outside the Branch.
- Lack of a clear and effective approach to regulating agencies; dysfunctional relationships with some agencies.
- A tendency at the most senior levels of the OAIC to shift responsibility for failures in the performance of the FOI functions to staff with a corresponding absence of assumption of responsibility at those senior levels.
- A lack of genuine commitment to the three Commissioner model established by the AIC Act.
- An organisational culture of the FOI functions being secondary to, or less important than, the privacy functions.
- A culture of gaslighting as a means of distraction from responsibility for failures in the performance of the FOI functions.
- ‘Cycles of panic’ running up to points of external scrutiny, especially Senate estimates appearances and critical points in the court timetable for the Federal Court unreasonable delay proceedings brought by Mr Rex Patrick.

- A practice at the most senior levels of the OAIC of developing ‘narratives’ about the performance of the FOI functions designed to present that performance in the best light, avoiding engagement with important matters affecting the efficiency of that performance. These ‘narratives’ were tightly controlled by the IC, who was assiduous in the consistent articulation of them to external forums and stakeholders. Two ‘narratives’, from which there would be no departure, caused me significant concern.
  - The first ‘narrative’ was that the FOI Branch was achieving substantial ‘throughput’ in the sense of finalising a large number of IC reviews (‘the throughput narrative’). It is true that the raw number of IC review applications finalised in the preceding couple of years was large and increasing. However, this was due in essence to the high number of IC review applications made following deemed access refusal decisions of the Department of Home Affairs (that is, access refusal decisions deemed to have been made when the Department failed to process FOI access requests within the applicable statutory timeframe). The ‘finalisation’ of these review applications occurred through the application of a relatively simple process which in a substantial majority of cases resulted in the Department re-prioritising the relevant access requests and making decisions acceptable to the applicants, thereby removing the need for any IC review process to continue. These finalisations were what could be described in colloquial terms as ‘easy wins’: upon my inquiry, I was informed that the processing of these matters utilised approximately 2 full-time equivalent resources in total, mostly at lower levels within the Branch. The throughput narrative also appeared to be expressed in a way which was apt to create an impression that finalisation outcomes were better than they in fact were. It referred to a percentage of ‘matters finalised within 12 months’, suggesting the comparators were matters finalised and matters received in a relevant period. On any cursory examination, however, that was clearly not the case. For example, the receipt of approximately 2000 matters in a 12 month period and the finalisation of 1200 matters in that period produces a percentage of 60%. But in those circumstances the narrative referred to a percentage above 80%. As best I could determine, the percentage quoted in the narrative in fact reflected the percentage of *all matters finalised* in a relevant period (a number significantly lower than the number of matters received) which were finalised within 12 months. The throughput narrative was thus constructed in a way which distracted from engagement with the real issue of concern: that only a very small number of what I would term ‘substantive’ IC review applications were in fact being actively managed and that the backlog of those applications had grown, and continued to grow, beyond control.
  - The second ‘narrative’ was that the very apparent resourcing deficiency in the FOI Branch was solely due to the Government of the day failing to provide additional resources for the performance of the FOI functions. That is, the resourcing deficiency could only be resolved by the Government of the day providing additional OAIC funding which was *specifically identified* as being for FOI purposes (‘the resourcing narrative’). The resourcing narrative avoided engagement with the fact that:
    - appropriations of funding for the OAIC were made for departmental rather than administered purposes, and
    - there was scope to effectively allocate at least some additional resources to the performance of the FOI functions.

The resourcing narrative was vigorously promulgated while, at the same time, resources were being allocated to activities which were not essential to the

performance of the OAIC's two core regulatory function areas, of which FOI was one. More particularly, the OAIC's Corporate Branch was allocated significantly more resources than the FOI Branch (approximately 36 ASL vs 22 ASL). This included two senior executive staff (compared with one for FOI) and a communications team which seemed extraordinarily large for an organisation the size of the OAIC. A significant amount of resources was also allocated to a relatively large *privacy policy* branch which, as described to me by its head, undertook largely discretionary, policy-focussed (ie, as opposed to regulation-focussed), work. At least some of this work was of a kind which would ordinarily be undertaken by a policy department rather than a regulatory agency. I do not wish to in any way diminish the work of staff members allocated to these other branches of the OAIC. However, the number of resources allocated to those branches appeared to me to be unsustainable when the OAIC was very clearly failing in the performance of one of its two core statutory function areas, in large part due to a starvation of resources.

### **The issues I was able to address**

21. In the period May to November 2022 much of my time and effort was spent considering and addressing these issues to the extent I was able. More particularly, I was able to do the following things:

- Addressing the concerns of the Branch leadership team, I put a hold on all unnecessary process changes while I reviewed existing and proposed processes together with broader issues relating to the performance of the FOI functions.
- I created a clear focus for the Branch, having regard to the scope of the FOI functions and the limited resources of the Branch. In particular, the IC review function was prioritised and discretionary tasks reprioritised, moved outside the FOI Branch, or removed altogether.
- I developed a clearer and more fit for purpose regulatory approach recognising that the entities subject to FOI regulation were government agencies rather than private sector bodies. This included a focus on the development of a more open dialogue with agencies with a view to creating a shared sense of responsibility for improved administration of the FOI system. As an element of this I encouraged and then supported the creation of an agency led senior executive FOI leadership group.
- I developed with the FOI Branch leadership team a clear understanding of appropriate staff responsibilities and accountabilities, recognising ultimate responsibility for the performance of the FOI functions rested at the Commissioner (that is, FOI Commissioner and IC) level.
- I engaged closely with staff and placed significant focus on development of technical skills. I listened to staff and engaged them in change processes.
- I put considerable effort into improving the quality of IC review decisions and writing decisions on numerous issues where there had been long standing lacunas in appropriate guidance for Branch staff and for agencies. In doing so, I worked closely with staff mentoring them in the development of their technical knowledge and skills.
- Together with the Branch Head, I worked to create greater stability within the team, primarily through a sense of focus, purpose and collegiality.
- I streamlined work clearance processes, with a number of staff working directly to me on matters and the creation of an 'open door' for staff to talk through issues with me rather than having to write long-winded formal briefs.
- I developed and implemented a more functional and efficient structure for the FOI Branch, particularly removing barriers to the active management and progression of IC reviews.



- Together with the FOI Branch leadership team, I developed significant IC review process changes (the most significant of which were out for consultation at the time my appointment ended).

### ***Restructuring the FOI Branch***

22. The restructure of the FOI Branch was a particularly large and important task.
23. The existing structure was not suitable to the efficient performance of the IC review function in particular. In fact it was imposing a barrier to the actioning of IC review matters. The primary reason for this was the absence of a dedicated team to case manage IC review applications, with a focus on resolving issues between parties without the need for an IC review decision wherever possible and appropriate. Rather, hundreds of applications were left to grow in a queue, ostensibly for allocation to a small number of team members who were expected to case manage the applications in addition to preparing draft decisions for consideration by Commissioners.
24. Given the nature and scope of the separate case management and decision drafting tasks – both of which required quite different skill sets – the number of review applications which could reasonably be allocated to the relevant team members was, relative to the overall number of applications, very low. When combined with very high staff turnover and the age of the matters being allocated, the capacity of the Branch to progress IC review applications was severely compromised. The long history to most of the matters allocated often meant that parties had been given multiple opportunities to make submissions over a period of years, all of which needed to be properly considered and taken account of.
25. By late August 2022 it had become very clear to me that much greater numbers of matters needed to be allocated for active case management and that more effort needed to be directed to resolving matters between parties without progressing to a decision wherever that was possible and appropriate. In short, the Branch needed a relatively large team focussed on case management of IC review applications and a separate team to assist with the drafting of decisions where the issues raised by applications could not be resolved at the case management stage.
26. Around mid-September 2022 I attended the Sydney office of the OAIC for a couple of days. During my attendance I discussed the issue of the IC review applications backlog with the Information Commissioner (to the best of my recollection this discussion occurred on the evening of 14 September). I said that there was a need for a significant change in approach to the IC review work and explained both the nature of the change and why it was needed. I made clear that while the change could increase the rate of output, the backlog would still take a very long time to resolve if staffing levels remained static; we needed more human resources to resolve the backlog in as timely a manner as possible. I also said that, in my view, changes of the kind I was thinking about would ideally have been made two or three years prior (ie, when the backlog, while existent, was notably less in number). The IC did not appreciate me expressing that view. I then indicated to the IC that I may well have no option but to resign my appointment if more resources could not be found to enable the proper performance of the FOI functions. The IC both nodded and verbally expressed agreement with that proposition.
27. Very shortly after my return to Canberra, in my next discussion with the IC, she said to me that I should not be involving myself in the kinds of issues I had raised with her – that is, the approach to management of the IC review workload and backlog. I found that suggestion extraordinary given both my statutory responsibilities and my relevant experience and skills. I accordingly rejected it.

28. I proceeded to ask the FOI Branch Head to work with me on a proposed restructure of the Branch to enable IC review matters to progress more quickly. The shape of that proposed restructure was largely resolved by late October. I wrote to the IC on 1 November 2022 to set out in some detail the need for change (including the need to focus the very limited Branch resources much more towards core work), the problems with the existing structure, the suggested new structure and what might be able to be achieved with that structure in place. I noted the limits of what could possibly be achieved with existing staffing levels, what might be achieved with even a small number of additional staff, and again posed the question whether the IC could find additional staff. It was abundantly clear that, without any additional staff, progress in reducing the backlog of IC reviews would be unacceptably slow.

29. Shortly thereafter the Branch Head and I met with the IC to discuss the proposed changes. The IC did not appear to fully grasp some of the issues with the current structure and approach to IC reviews but, after explanation, indicated agreement to the changes.

30. At no stage during any of the discussions about the proposed changes did the IC indicate any preparedness to allocate further resources to the FOI Branch.

31. The Branch leadership group worked on implementation of the changes under my oversight, with a view to their commencement on 1 February 2023. That timeframe reflected the fact that the changes involved a significant re-allocation and re-focussing of the Branch's very limited resources and that this re-allocation needed to occur while maintaining existing work outputs.

32. Leading up to that implementation we also wrote to the parties in all of the oldest IC review matters to determine whether any of those could be resolved without going to decision. Some of those matters were discontinued but most parties wanted to continue to contest the issues raised in the relevant matters. Some agencies in particular seemed surprisingly entrenched in desiring that their initial access refusals be maintained all the way to IC review decisions.

33. I also worked with the Branch leadership team to review the existing IC review procedure and to develop new and more streamlined processes which, among other things, would reduce the number of submissions made in the course of an IC review and provide greater encouragement of more direct engagement by agencies with IC review applicants for the purpose of attempting to negotiate a resolution to the issues in dispute between them.

34. As at the end of April 2023, 3 months after implementation, the new structure appeared to be working as intended. More substantive IC review matters were being finalised through the case management process. This was assisting in softening to an extent the impact of the reduction in IC review applications made in relation to deemed access refusal decisions of the Department of Home Affairs (which had moved from the latter part of 2022 to increase its compliance with statutory timeframes and reduce the number of outstanding deemed access refusal decisions).

#### **The issues I was unable to address**

35. While I was able to effect quite significant change within the FOI Branch itself, I was ultimately unable to successfully negotiate the movement of a number of significant barriers to what in my mind could be considered the reasonable performance of the FOI functions and the conduct of IC reviews in particular. Those barriers concerned matters within the IC's powers and responsibilities.

#### ***The resourcing narrative and obtaining more resources***

36. Chief among these was the resourcing narrative which I have described above.

37. I first became aware of this narrative when, early after my appointment commenced, I was asked by the IC to assist her with instructing on the Federal Court unreasonable delay proceedings which Mr Rex Patrick had brought against the IC. A line of argument which the IC was at that time seeking to pursue was that the delay in actioning relevant IC review matters was caused by a lack of resources which, in turn, was due solely to Government decisions limiting the funding available for the performance of the FOI functions. I was curious about this line of argument and queried with the OAIC's CFO the nature of the appropriations made for the OAIC. The CFO confirmed that relevant appropriations were in fact 'departmental' rather than 'administered' in nature. This was important because appropriations made for departmental purposes potentially provided at least some scope for the funding of additional resources to perform departmental activities related to carrying out the FOI functions (in other words, the performance of the FOI functions clearly constituted the carrying out of departmental activities to which departmental appropriations could in a legal sense be applied). There was accordingly at least the potential for some of the OAIC's appropriated departmental funds to be spent on additional resources for the performance of the FOI functions rather than, say, non-essential corporate activities or discretionary privacy policy activities. I was concerned that the OAIC ought not to be pursuing a line of argument based on the funding narrative and that it presented the risk of Mr Patrick arguing that the OAIC was in receipt of departmental funding which could have been applied to increasing resources for the performance of the FOI functions.

38. I raised these issues in a meeting with OAIC officers working on the litigation, which included the Deputy Commissioner. This appeared to cause significant consternation among the meeting attendees, particularly the Deputy Commissioner who was asserting that we needed a 'narrative' and who indicated that an outcome which required any diversion of additional resources to the FOI functions could not be contemplated.

39. I was subsequently informed that the issues I had raised would not be pursued further in the context of the litigation.

40. I separately raised the issues with the IC. The IC said that she did not understand that appropriations for departmental (as opposed to administered) purposes could be applied for any activity properly characterised as 'departmental' (which in the OAIC's context clearly included any activity properly undertaken for the purpose of carrying out the FOI functions). The IC said she would need to learn more about the workings of appropriations.

41. A short time later, in a further conversation with the IC, the IC disclosed to me a communication she had had with the former Government at a time I understood to have been long before the commencement of my appointment. Without going into the detail of that communication here, I note that what the IC disclosed to me suggested that the IC:

- clearly understood that appropriations made for departmental purposes could be applied to activities for carrying out the FOI functions even if those appropriations were not specifically earmarked or identified by the Government of the day as being for FOI purposes, and
- had apparently decided, among the various options available to the IC, that funds appropriated for departmental purposes would not to any substantive extent be applied for FOI purposes unless the Government of the day had specifically earmarked or identified the funds as being for FOI purposes.

42. Numerous subsequent discussions with the IC about funding for the FOI functions indicated that the position the IC had apparently reached was one from which the IC intended never to depart.

43. In late January or early February 2023, in the context of a cycle of panic approaching the February Senate estimates hearings, the IC suddenly announced to me the possibility of an additional \$650,000 in funding for the remainder of the 2022/23 financial year and the further possibility of an additional \$650,000 in funding in the 2023/24 financial year. This funding would not involve any long-term reallocation of the OAIC's appropriated departmental funding. Rather, it reflected an apparent 'underspend' of the OAIC's FOI funding in earlier years which the OAIC might be able to access. The IC appeared to indicate that even this funding, if made available, might be reduced in amount if some of it needed to be spent for particular activities related to the OAIC's privacy functions.

44. The IC expressed to me a view that this additional funding would be sufficient to fully resolve the IC reviews backlog. I was surprised by that suggestion given (1) the amounts in question clearly would not be sufficient for that purpose and (2) that the Information Commissioner should have fully understood that to be the case given everything previously discussed with her. I made clear to the IC that while the additional funding would be helpful, a significant backlog would remain once the funding ceased.

45. The IC was insistent that the first tranche of \$650,000 (which had not yet been confirmed) would have to be spent in what remained of the 2022/23 financial year. In essentially demanding terms, the IC contemplated that the FOI Branch Head and I would, within two weeks, use the funding to on-board external legal resources to work on IC reviews. I had to explain that this was unrealistic given (1) the kind of skill set we would be looking to obtain to ensure we achieved value for money and (2) that it was very unlikely appropriately skilled lawyers of the kind needed would be able to simply drop their existing practices at incredibly short notice to take on the OAIC's IC review work. I suggested at least a month, possibly longer, would be needed to on-board appropriate resources, assuming we could find any.

46. I proceeded, with assistance from the OAIC's legal area, to inquire as to the availability of suitable external resources. At that time law firms were themselves experiencing significant human resource constraints and we did not identify any clearly suitable resources. In any case, the IC became concerned about a possible statutory barrier to the use of external resources for the conduct of IC reviews. The search for external resources was accordingly stopped. The FOI Branch Head had additionally been unable to confirm that the funding would be available. A decision was made that, if and when the funding became available, the Branch Head would proceed to bring on additional employees (noting that the longer-term staffing profile of the Branch would remain limited to approximately 22 ASL). So far as I am aware, no additional employees were brought on in reliance on any additional funding prior to the cessation of my appointment on 19 May 2023.

47. Separately in relation to funding, the IC and I met with the Secretary and a Deputy Secretary of the Attorney-General's Department in late February 2023 (the precise date of the meeting was, to the best of my recollection, Thursday 23 February). In that meeting the Secretary conveyed in absolute terms that there would be no additional funding for the FOI functions in the May 2023 budget. The Secretary also made very clear that, given the Commonwealth budgetary position in the forward years, it was unlikely that additional funding would be made available in subsequent budgets. In other words, in the absence of some re-allocation of resources within the OAIC, there was simply no possibility of additional staff and no way forward in satisfactorily or sufficiently resolving the IC reviews backlog and increasing timeliness of IC review decisions in future.

### ***The shifting of responsibility***

48. While I made clear to my Branch leadership team that ultimate responsibility for failures in the performance of the FOI functions rested at the Commissioner level (that is, with the FOI Commissioner and the IC), at no stage in the duration of my appointment did I hear the IC accept any degree of personal responsibility for the failures which had occurred. Rather, in addition to the resourcing narrative, I heard that other people – the IC’s employees – had advised her in particular ways, had not done things as she had thought, and could not deal with the ‘pace’ necessary to perform the FOI functions properly. This was concerning to me, particularly given the very large growth in the IC review backlog was to a significant extent coextensive with the IC’s terms of appointment. No one would deny that the IC had faced a difficult situation, but resolution of the backlog failure required as a starting point an appropriate degree of personal acceptance of responsibility for it. Without that as a starting point, functional decisions to resolve the problem going forward seemed very unlikely.

### ***Lack of commitment to the three Commissioner model and the lesser importance of FOI***

49. It became clear to me over the duration of my appointment that the IC was not truly committed to the three Commissioner model. Rather, she was desirous of having sole control over the privacy functions and promoting those as the pre-eminent functions of the OAIC. The separate and broader purposes of the office of Information Commissioner had largely given way to a ‘super’ Privacy Commissioner role. Further, the IC’s apparent support for an FOI Commissioner was qualified by the capacity to control that Commissioner, particularly in so far as they might say or do anything which called into question the IC’s prior stewardship of the FOI functions. Relevantly in relation to these matters:

- Shortly after the 2022 federal election, the IC expressed to me that she was very concerned the new Attorney-General would want to appoint a Privacy Commissioner as he was a strong supporter, if not architect, of the three Commissioner model. The IC expressed that she did not want this outcome. That is, the IC wanted to exclusively retain control over the privacy functions. The IC also expressed concerns which suggested to me that the IC was attempting to garner my support in the maintenance of the IC’s control of the privacy functions even if a new Privacy Commissioner was appointed.
- Up until I announced my resignation, the IC was assiduous in ensuring that we had a weekly ‘catch up’. While this was a useful opportunity for information sharing in the very early part of my appointment, it quickly devolved into a regular series of one-way commands together with demands from the IC for information which resulted in a significant distraction of my time and that of the Branch employees to whom I devolved relevant requests. Little, if any, of this was of any real assistance in furthering the performance of the FOI functions. Rather, in the main this conduct appeared to be directed to tightly controlling both me as the FOI Commissioner and the ‘narratives’ the IC had adopted in relation to the FOI functions.
- The IC’s need to control narratives around FOI was particularly strong around external scrutiny points, particularly Senate estimates processes. The IC utilised the head of her communications team to assist in preparation for estimates and tried to engage me in that process – something which I felt very uncomfortable with and declined to engage in in the run-up to the November 2022 estimates hearings. In preparing for the February 2023 estimates hearings I proposed to say something about the changes made to the FOI Branch and in particular their purpose of enabling more active case management of a much larger number of IC review applications. This, by clear implication at least, would have disclosed that earlier action to undertake this more active case management could and/or should have

been taken. I also proposed to say that IC reviews related to deemed access refusal decisions of the Department of Home Affairs were starting to decline and that the output statistics (that is, the number of IC review applications finalised within a period) would likely decline despite the fact that we would now be actively managing a larger number of substantive IC review matters. This would have diminished the ‘throughput narrative’ I have described. The IC was aware that I proposed to say these things. On the day of the OAIC’s estimates appearance the IC asked me to join a discussion which she was having with the head of her communications team. In fact, that ‘discussion’, so far as I participated in it, was an attempt to coach me in what I would say, including words or phrasing I should use to place the OAIC in the best light. I made it clear that I would speak in my own terms. In the hearing late that evening, the IC chose to answer a question which denied me the opportunity of saying what I had proposed to say; the answer the IC provided avoided any perceived negative take-outs. It was the culmination of my neutering as an independent Freedom of Information Commissioner.

- Consistent with what I have said to this point, it was clear to me, and to many others in the OAIC, that the FOI functions of the OAIC were in a day to day sense treated as secondary functions, of lesser importance than the Privacy functions. The significant importance of the Privacy functions is not to be denied. But they form one of only *two* sets of functions to be performed by the OAIC, the other being the FOI functions. This would not have been apparent from the OAIC’s Executive meetings which were closely controlled by the IC and heavily weighted to the Privacy functions with relatively little space provided to the FOI functions. In fact, on occasion, there was notable indifference to FOI issues when they were discussed. Indifference was also apparent on many occasions in relation to requests for corporate assistance – so much so that I both experienced difficulty in getting responses to requests for assistance myself and also witnessed the reluctance of FOI Branch staff to even request assistance because they knew their requests would not be prioritised. The Corporate Branch and its staff clearly understood that FOI matters were a second priority to privacy matters. Any attempt to draw attention to the cultural bent away from the agency’s FOI functions was met with gaslighting rather than engagement: a common response was a statement to the effect of “I’m really concerned *you feel* that way”. This cultural bent also engendered an apparent freedom in others to effectively dump a countless myriad of tasks on the FOI Branch with no regard for its limited resources or enormous core workload.
- Through the latter part of 2022 and into this year, the IC was agitating for me to agree to dealing with the IC review backlog in ways which I considered would not reflect a proper performance of the IC review function and which did not demonstrate a commitment to the function’s importance. For example, the IC suggested that we (that is, the IC and I) should ‘take more risk’ with finalising IC review decisions meaning, in essence, that we should ‘tick and flick’ draft decisions prepared by staff members rather than make decisions which were genuinely, and in their entirety, decisions reflecting the full application of our own minds. On any properly educated understanding of the general quality of the draft decisions being produced, this was simply an untenable proposition and one likely to create more work in other parts of the review system. Not to mention an inappropriate abdication of decision-making responsibility. Another suggestion the IC made was that we should exercise our discretionary power not to undertake, or not to continue, an IC review in relation to a large bulk load of backlogged IC review applications so as to effectively force them into the AAT for review. As I pointed out to the IC, the discretionary power to decide not to review, or continue to review, a matter had to be exercised in relation to each individual matter. We could certainly give greater consideration to the exercise of the power in individual matters

where appropriate, but a large bulk load decision appeared inconsistent with the scheme of the FOI Act and ran the risk of simply engendering a successful legal challenge. It also would obviously have suggested that we considered there was no purpose in the IC review function sitting with the OAIC – a bizarre suggestion for the IC or FOI Commissioner to be seen to be making and one which would have communicated a lack of commitment to the performance of the IC review function which I in no way felt or supported.

### **My decision to resign my appointment**

50. I ultimately came to the view that my continuation in the FOI Commissioner role was untenable. I could not continue to accept significant remuneration from the public purse when, in effect, I was prevented from performing the FOI functions in a way which I considered would properly give effect to the objects of the FOI Act and further the accountability of government in the way the Parliament had intended.

51. The IC was never going to depart from the resourcing narrative and consider a different approach to the allocation of OAIC resources so as to better assist the performance of the FOI functions. This, combined with the Government's budgetary position, made clear that there was no hope of ongoing additional resources needed for the proper performance of the FOI functions. I was not otherwise able to change the resourcing or throughput narratives, as I have described them, neither of which I agreed or felt comfortable with.

52. My working environment was that of an autocracy affected by cycles of panic and chaotic demands.

53. The decision to resign my appointment was one of the most difficult of my professional life. I was conscious of letting down the staff of the FOI Branch, the longer serving of whom had not in my view been appropriately valued or supported. Weighed against that, however, was the essential need for real and effective change – something which was not going to occur if I played the game of others and maintained the *status quo*. Continuing on would have demonstrated, even if only to myself, a serious lack of integrity – a position contrary to my own principles and one I simply could not sustain.

#### **(b) Delays in the review of FOI appeals**

##### **(c) Resourcing for responding to FOI applications and reviews**

54. I have outlined in relation to my resignation what were, within the OAIC, significant contributors to the delays in the conduct of IC reviews including insufficient resources.

55. A number of factors on the agency side of the equation also contribute to delays in the conduct of IC reviews. To a large extent these factors are in my view symptoms of a deficiency in APS leadership and culture as they relate to the administration of the FOI Act. They do not apply in relation to all agencies but are nevertheless disappointingly common across the Commonwealth. The relevant factors include:

- An access refusal bias contrary to the apparent purpose and objects of the FOI Act. Some agencies appeared to administer the Act on the basis that access refusal was the default outcome; access would only be granted if it was not possible to identify an applicable exemption or exemptions. The Act of course contemplates something akin to the reverse of that: a right of access unless an exemption applies and it is appropriate having regard to the nature of the information in the particular case to apply that exemption.
- A tendency in many agencies to claim multiple exemptions to shore up access refusal decisions so far as they possibly could.

- Refusing access on the (often incorrect) basis that an exemption applied without considering whether the nature of the information was such that refusal of access was the justifiable outcome. That is, exemptions were applied even where there was no obvious reason why the information at issue needed to remain confidential to government.
- A failure to engage with applicants to try and resolve a request. In some cases I reviewed, for example, an applicant may have been happy to receive information which was somewhat different to that they had initially requested but no attempt had been made by the relevant agency to negotiate that outcome with the applicant (indeed, in those cases it appeared that the possibility of doing so was not even contemplated).
- A strong desire to raise new issues and/or exemptions as an IC review application progressed.
- A slowness, sometimes chronic, in responding to the OAIC in the IC review process coupled in some cases with unhelpful defensiveness.

56. The behaviours reflected in these factors have led to overly complex decisions for review, overly complex review processes, and an overall crowding of the IC review workload with decisions that ought properly to have provided access at the outset. I note that a separate systemic issue which weighs the IC review process down is the number of access refusal decisions which relate to the personal information of an FOI applicant. In my view, there is a serious question whether the FOI Act is an appropriate first port of call for access to certain kinds of personal information. There may, for example, be merit in considering whether access to certain kinds of personal information – such as that related to migration or social security matters – would be better dealt with, at least in the first instance, through discrete and bespoke access regimes administered by the responsible agency or through applicable litigation processes where the information is being sought for litigation purposes.

57. Some might say that the OAIC effectively facilitated some of the behaviours reflected in the factors I have outlined. I would agree, although in my observation this was not intentional on the part of the staff in the FOI Branch. Rather, it was largely due to the lack of resources and excessive age of matters together with a lack of sufficient top level oversight of, and change to, the IC review process. The proposed changes to the IC review process which I developed with the Branch leadership team in the latter part of my appointment were designed to address most of the issues outlined above so far as it was possible for the OAIC to do so.

58. On the agency side, changing the relevant behaviours requires in my view a reset of APS leadership and culture as it relates to the administration of the Commonwealth's FOI obligations. Principally, there is a need for a group of very senior public servants – at the SES Band 3 or possibly even Secretary level – to visibly champion FOI and to instil across the APS a more pro-information access culture which reflects a more justifiable approach to the maintenance of confidentiality of government-held information (that is, an approach which limits access refusal to circumstances where there is a genuine justification for maintaining confidentiality over government-held information). I had raised the idea of such a leadership group while I was FOI Commissioner but the best I was able to achieve was a lower level (SES Band 1) leadership group – a worthwhile initiative but not sufficient to provide the kind of leadership, and engender the kind of cultural change, which is necessary.

59. The resourcing of FOI functions within agencies is in my view an aspect of the issues I have outlined here rather than a separate and discrete matter. A common theme in round table discussions I held with agencies was the difficulty they encountered in resourcing their FOI functions. In some, but not all, cases, this was in part a factor of the size of the team; however, a number of agencies appeared to be sufficiently resourced in terms of the overall number of employees made



available for FOI purposes. The greater issue was the capacity to attract and retain experienced and/or sufficiently skilled staff. In my view, the question the Commonwealth needs to ask itself is this: why would someone want to work, and stay working, in an agency FOI team? There is no identified career stream for FOI within the APS. It is a job which requires a particular set of communication skills and a capacity to deal with people who may be upset or angry. It requires the navigation of internal politics and the possibility of making decisions which will upset one or more people up the line. To function effectively, the workforce requires appropriate skill, experience, professionalisation and support. It requires longevity. It appears to me, however, that far too few people see FOI as a long-term career experience or pathway. That needs to change. But it is difficult to see how that change will occur without the change in leadership and culture I have mentioned.

**(d) The creation of a statutory time frame for completion of reviews**

60. A default statutory timeframe for the completion of reviews would in my view be appropriate if the OAIC is to retain the IC review function. Given the complexity of many IC review matters, that timeframe could not be too short. Six months would likely be reasonable. It would also in my view be prudent to provide for some exceptions to the default timeframe – for example, based on genuine complexity or issues affecting one or both parties – up to a specified time limit. In that way, the default timeframe might be extended for an additional period of up to say a further six months, where genuinely appropriate. In framing any statutory timeframe, it would be necessary to consider:

- mechanisms to prevent gaming of the timeframe
- appropriate arrangements for transition to the timeframe given that the current backlog would essentially prevent compliance with it, and
- the burden imposed on the next level of review (currently the Administrative Appeals Tribunal) as a result of failure by the OAIC to comply with it so as to ensure the issue of delay is not simply transferred to that forum.

**(e) Other related matters**

61. In my experience, it is not the FOI Act itself which is the main or direct cause of the current problems besetting the Commonwealth FOI system. Rather, the principal issue is one of leadership and culture affecting the whole FOI system, including within the OAIC. That is not to say, however, that there is no need for legislative reform. The Act is now relatively old. It was enacted in the context of a paper-based rather than digital world where the volume of government-held information, and the capacity to manage and manipulate data digitally, were far less. The Act is arguably overly complex and the exemptions regime would benefit from review. In my view, a holistic review of the Act, with input from stakeholders and subsequent reform, would be beneficial. I have previously delivered a speech outlining in broad terms various matters which might be considered in a review process. I do not repeat those matters here but would be happy to provide a relevant speech extract to the Committee should it wish.

62. There is also, in my view, a need to consider the governance arrangements for the FOI regulatory functions and potentially, more broadly, Commonwealth information policy.

- The three Commissioner model is an oddity in so far as it makes one Commissioner the sole repository of the statutory executive functions and powers which are necessary for the Privacy and Freedom of Information Commissioners to properly perform their functions. Further, in my observation, there is very little practical synergy between the administration

of the *Privacy Act 1988* and the FOI Act. The Privacy Act is now heavily focussed on private sector regulation and is, by its very nature, concerned with the maintenance of rights to personal privacy. The FOI Act remains focussed on the regulation of government in relation to the information it holds and is focussed on government accountability. In my view, there is no longer any significant utility in the privacy and FOI regulatory functions being combined under a single governance arrangement. Rather, consideration ought to be given to movement of the FOI functions to an agency with greater focus on government accountability and integrity.

- More broadly, in my view there may be merit in a holistic review of Commonwealth information policy and the governance arrangements needed for its oversight, development and management. Information policy increasingly extends far beyond privacy and FOI matters. An office or position which is understood within government to have genuine overarching responsibility for Commonwealth information policy – whether a reinvigorated office of Information Commissioner or a new office or position – is perhaps needed. If not, there would seem little utility in retaining the current office of Information Commissioner. Rather, discrete subject matters, including privacy and FOI, could be the subject of discrete governance arrangements together with an information policy liaison forum if desired.

63. Serious consideration ought also be given to whether maintaining a review function at the FOI regulatory level (that is, within the OAIC or a successor agency) is desirable. As currently constructed, the IC review function is a full merits review function, essentially similar to that vested in the AAT. Whatever narratives others may wish to put around it, the current full merits review function is not a simple or quick function. It requires the affording of procedural fairness, a proper consideration of all submissions made by parties and all legal issues, and the drafting of appropriately framed decisions demonstrating those activities of consideration and the outcomes of them. It requires particular legal skill and experience if it is to be performed well. And a high volume case load requires a critical mass of that skill and experience, far greater than the current resource allocation in the OAIC. It is a matter of fact that the IC review experiment has not been a success to date. There may well be merit in appropriately resourcing a single point of full merits review at the level of the review body which is to replace the AAT. The regulator could be freed up to focus on more traditional regulatory functions – for example with a focus on guidance and education, a much more timely and simpler complaints handling process with associated powers, and possibly also a power to make generally applicable rulings (rather than just guidelines) about the interpretation of the FOI Act and which are to be applied by agencies. Alternatively or additionally, consideration might be given to whether the regulator could conduct a limited review function with full merits review reserved to the AAT replacement body.

64. Lastly, there would be merit in considering the inclusion of more functional financial signalling within the FOI regime. At present there is a discretionary charging regime which applies at the FOI request stage. That charging regime is overly complex and a number of agencies choose not to apply it. In practice it has almost no effect in defraying the costs of administering the FOI system. Rather, it leads to dysfunctional outcomes: some larger agencies indicated to me that they used the charging regime to ‘test the mettle’ of applicants and that they wanted to do so even if the cost to the Commonwealth (and so to the taxpayer) of administering a charge was greater than the amount of the charge which might be recovered. If a regime for charging FOI applicants is to be retained, it should be a simpler and fairer regime which is not open to gaming by agencies – for example, a small flat application fee with appropriate exemptions or remittal powers (to reflect applicant hardship and the like) may be appropriate. Separately and additionally, there may be utility in the enactment of financial provisions which ensure that agencies have more ‘skin’ in the administration of any FOI

review function. There does not currently appear to be a sufficient incentive for agencies to resolve FOI disputes without the institution, or continuation of, a review process wherever that might be possible and appropriate. A sufficient incentive might be created if, for example, agencies were required to make a significant contribution to the cost incurred by a review body in the conduct of a review.

### **Closing**

65. In closing, FOI may not be considered a sexy subject matter or as being of life changing importance. As I said in announcing my resignation, however, the FOI system is an important adjunct to the doctrine of responsible government inherent in our Westminster system of government, providing a check on the integrity and apolitical nature of the APS. Much more needs to be done to ensure that the FOI system functions effectively to achieve that purpose. That requires real leadership and genuine cultural change across the APS. It also requires a meeting of minds across political lines and between government and the public it serves. As someone who, like so many others, has devoted a lifetime to furthering good government, it is my sincere hope that stakeholders can work together in a spirit of cooperation to improve the FOI system, its administration, and outcomes for members of the citizenry engaging with the Government of the day.

**OAIC - FOI**

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**From:** OAIC - Media  
**Sent:** Tuesday, 29 August 2023 6:12 PM  
**To:** DRAYTON,Melanie; FALK,Angelene; HAMPTON,Elizabeth; PIRANI,Toni; AGO,Rocelle; HARLOCK,Raewyn  
**Cc:** CROXALL,Sarah; GHALI,Sarah; ATTARD,Brenton; OAIC - Media  
**Subject:** Guardian evening coverage

Good evening

As far as I can see, the Guardian is the only coverage of this afternoon's session, from their rolling coverage.

The Guardian

Sarah Basford Canales

**Information commissioner tells senators she needs time to respond to criticisms**

The Office of Australian Information Commissioner, **Angelene Falk**, is up now at the parliamentary hearing into the country's FoI regime.

Earlier today, the [former FoI commissioner Leo Hardiman](#) made a series of allegations against Falk's leadership and character, which he said contributed to his decision to resign in March this year.

Hardiman also alleged the cultural problems at the OAIC were "entirely a product" of Falk's leadership.

Falk said on Tuesday afternoon she took issue with a number of Hardiman's comments but said she had "very limited opportunity to consider the matters" heard this morning and needed a "reasonable opportunity to respond".

**Information commissioner denies telling former FoI commissioner not to raise staffing levels with her**

One of the allegations the former FoI commissioner **Leo Hardiman** made to senators this morning is that the information commissioner, **Angelene Falk**, told him to not raise issues of staffing levels with her.

Here's what Hardiman said in his opening statement:

*[Falk] said to me that I should not be involving myself in the kinds of issues I had raised with her – that is, the approach to management of the IC review workload and backlog. I found that suggestion extraordinary given both my statutory responsibilities and my relevant experience and skills. I accordingly rejected it.*

However, Falk has refuted that happening in her afternoon appearance at the Senate inquiry into the FoI regime.

*I did not say anything to that effect. I'm very confident of that and the reason why I'm so confident is that matters of the most efficient structure of the organisation, and of the FoI branch, in particular, were the subject of discussions. I put forward a number of suggestions for his consideration.*

Falk told the Greens senator David Shoebridge she had, however, recalled "one passing remark" from Hardiman but said there wasn't anything further than that.

**Former FOI watchdog flagged possible resignation 6 months prior, OAIC reveals**

Information commissioner Angelene Falk said former FOI commissioner Leo Hardiman flagged his potential resignation six months prior to him publicly releasing a statement.

During the Senate inquiry into the FOI regime, Falk conceded Hardiman had made a remark in late September or October 2022 about needing to reconsider his position if the government did not provide additional funding and resourcing for his FOI team in the May 2023 federal budget.

Liberal senator Paul Scarr and Greens senator David Shoebridge questioned why Falk hadn't previously revealed this comment under questioning during earlier Senate estimates hearings.

Falk said Hardiman's claims this morning had jolted her memory:


*It's really after hearing the evidence this morning that that has come back into my mind with more force. I must say that I probably didn't attach a lot of weight to the remark that he made at the time. It seemed to be a passing remark in the context of talking about the budget.*

The information commissioner said she had been advocating for more FOI resources for years, insisting she could not recall Hardiman asking specifically for "more human resources" and in "as timely a manner as possible".

Falk said:

*I have been acutely aware of the resources issue. I have made eight budget bids in the five years I have been in this role, and met with ministers and written numerous letters in relation to this issue.*

Kind regards



**Andrew Stokes** (he/him)  
Director, Strategic Communications  
Office of the Australian Information Commissioner  
Sydney  
P 0407 663 968 E [media@oaic.gov.au](mailto:media@oaic.gov.au)

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*The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.*

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FOIREQ23/00022

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www.theguardian.com

s47E(c)

Tuesday 4:16 pm

s47E(c)  
)

Far out

[Former information commissioner claims in Senate inquiry he was 'manhandled' and 'gaslighted' by leadership | Freedom of information | The Guardian](#)

**Former information commissioner claims i...** ✕

Leo Hardiman has spoken at length to a Senate inquiry about how his complaints about a massive freedom of...

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Tuesday

s47E(c)

Tuesday 3:05 pm

FOIREQ23/00024

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[Former information commissioner claims in Senate inquiry he was 'manhandled' and 'gaslighted' by leadership | Freedom of information | The Guardian](#)

**Former information commissioner claims in Sen...**

Leo Hardiman has spoken at length to a Senate inquiry about how his complaints about a massive freedom of...

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Just saw this!

Wednesday



FOIREQ23/00023

s22 [Redacted]

Chat Files Organisation Activity +



Tuesday

s22 [Redacted]

Tuesday 9:28 am

nah

what's on?

s22 [Redacted]

Tuesday 9:29 am

oh really!

s22 [Redacted]

Tuesday 9:29 am

omg

where are you listening to this?

s22 [Redacted]

Type a new message



Corporate Network s47E(c)

Chat Files Details Recap Meeting Whiteboard Q&A + Join Close

This meeting chat is muted. Settings

22/08 10:45 am Meeting ended: 45m 15s

Tuesday

s47E(c) Tuesday 9:48 am  
anyone ele watching Hardiman give evidence right now??  
🤔 1

s47E(c) Tuesday 9:48 am  
link

s47E(c) Tuesday 9:48 am  
Do you have the link?

s47E(c) Tuesday 9:48 am  
s22  
sent on Tuesday, 29 August 2023 9:32 am

Tuesday 9:48 am  
🤔  
🤔 1

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Help

Corporate Network s47E(c)

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s47E(c) Tuesday 9:49 am

said AF was treating him like a junior officer, said OAC misled court in patrick matter about not having spare resources to allocate to FOI matters.

[https://www.apf.gov.au/News\\_and\\_Events/Watch\\_Read\\_Listen](https://www.apf.gov.au/News_and_Events/Watch_Read_Listen)

**Watch, Read, Listen**  
Watch Read Listen  
www.apf.gov.au

Tuesday 9:50 am

even ripped into Corporate and legal teams. Hopefully DR remains unscathed

s47E(c) Tuesday 9:50 am

yep

I think its totally appropriate to have data people

s47E(c) Tuesday 9:53 am

😬

s47E(c) Tuesday 9:54 am

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Help

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**s47E(c)** Tuesday 9:54 am  
he said it was ridiculous that we have 11 in house lawyers, which I really don't agree with

**s47E(c)** Tuesday 9:54 am  
Yikes.

**s47E(c)** Tuesday 9:55 am  
missed his opening statement unfortunately, apparently quite juicy

**s47E(c)** Tuesday 9:56 am  
Spicy  
👍 1

**s47E(c)** Tuesday 9:56 am  
guess the next estimates will be all about FOI

**s47E(c)** Tuesday 9:59 am  
#tellall  
Kind of reminds me of this ... Just without a Meghan.  


Type a new message

Help


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Corporate Network s47E(c)

Activity Chat Files Details Recap Meeting Whiteboard Q&A + Join Close

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Kind of reminds me of this ... Just without a Meghan.



👍 2

Tuesday 10:00 am Meeting started

s47E(c) Tuesday 10:00 am

shall we delay or cancel our meeting?

s47E(c) Tuesday 10:00 am

hes on til 10:20 apparently

s47E(c) Tuesday 10:01 am

I'd like to keep watching

Tuesday 10:01 am Meeting ended: **1m 6s**

Type a new message

Help

Corporate Network s47E(c)

Activity Chat Files Details Recap Meeting Whiteboard Q&A + Join Close

This meeting chat is muted. [Settings](#)

Tuesday 10:01 am Meeting ended: 1m 6s

s47E(c) Tuesday 10:01 am  
me too

Tuesday 10:01 am Meeting started

s47E(c) Tuesday 10:01 am  
agree

s47E(c) Tuesday 10:01 am  
definitely

s47E(c) Tuesday 10:19 am  
do we have a date for AF's next appearance?

s47E(c) Tuesday 10:19 am  
she's on at 4pm today  
👍 1

s47E(c) Tuesday 10:19 am  
wow, i missed that!

s47E(c) Tuesday 10:19 am

Type a new message

Help

The screenshot shows a Microsoft Teams chat window. At the top, there is a search bar and a window title bar with "Corporate Network" and a redacted name "s47E(c)". Below the title bar, there are tabs for "Chat", "Files", "Details", "Recap", "Meeting Whiteboard", "Q&A", and "+". A "Join" button and a "Close" button are visible on the right. A notification bar at the top of the chat area states "This meeting chat is muted. Settings".

The chat history includes the following messages:

- s47E(c)** Tuesday 10:19 am: "so maybe at 6" (with 3 reactions)
- s47E(c)** Tuesday 10:20 am: "do you get articles of note s47" (with 1 reaction)
- s47E(c)** Tuesday 10:20 am: "email from the media team"
- s47E(c)** Tuesday 10:20 am: "i do! i havent opened today's" (with 1 reaction)
- s47E(c)** Tuesday 10:20 am: "ahh and i just saw yesterdays (i had yesterday off!)"
- s47E(c)** Tuesday 10:22 am: "this stuff about AF not wanting three commissioner model is news...."
- s47E(c)** Tuesday 10:25 am: "I can't deal"
- s47E(c)** Tuesday 10:25 am: "did i hear what I just heard?"
- s47E(c)** Tuesday 10:25 am: (Redacted)

At the bottom, there is a text input field "Type a new message" and a toolbar with icons for editing, emojis, GIFs, and other chat functions.

The screenshot shows a Microsoft Teams chat window. At the top, there is a search bar and a window title bar with the text "s47E(c)". Below the search bar, there are tabs for "Chat", "Files", "Details", "Recap", "Meeting Whiteboard", "Q&A", and "+". On the right side of the chat header, there are "Join" and "Close" buttons. A notification bar at the top of the chat area states "This meeting chat is muted. Settings". The chat history includes several messages from a user whose name is redacted as "s47E(c)":

- Tuesday 10:25 am: vicarious cringe
- Tuesday 10:25 am: yep
- Tuesday 10:25 am: i did right?
- goodness
- Tuesday 10:25 am: 😐
- Tuesday 10:26 am: he's really doing his best to isolate FOI branch right now
- Tuesday 10:34 am: I'm blown away
- Tuesday 10:39 am: its a bit martyrish to be refusing to fly but also the bus from canberra to syd isnt that bad

At the bottom of the chat, there is a text input field with the placeholder "Type a new message" and a toolbar with various icons for editing, deleting, reacting, and sending.



Corporate Network s47E(c)


s47E(c) Chat Files Details Recap Meeting Whiteboard Q&A + Join Close

This meeting chat is muted. [Settings](#)

s47E(c) Tuesday 10:39 am  
Oh the memes that the Media will come up with.

s47E(c) Tuesday 10:39 am  
so much content  
the team chat is going off....

s47E(c) Tuesday 10:40 am



👍 1

Type a new message

Activity Chat Teams Calendar Files Service Des... Apps Help

Microsoft Teams Meeting Chat Interface

Corporate Network

Search

Chat Files Details Recap Meeting Whiteboard Q&A +

Join Close

This meeting chat is muted. [Settings](#)

👤 1

there's a lot to unpack, that's for sure

s47E(c) Tuesday 10:53 am

Have people got time to jump on?

👍 1

s47E(c) Tuesday 10:53 am

Yes

s47E(c) Tuesday 10:53 am

yes

s47E(c) Tuesday 10:53 am

yep

s47E(c) Tuesday 10:54 am

yep

s47E(c) Tuesday 10:54 am

just need to pick my jaw up off the floor

s47E(c) Tuesday 11:00 am

Type a new message

Help

Activity

Chat Files Details Recap Meeting Whiteboard Q&A +

Join Close

This meeting chat is muted. [Settings](#)

yep

s47E(c) Tuesday 10:54 am

yep

s47E(c) Tuesday 10:54 am

just need to pick my jaw up off the floor

s47E(c) Tuesday 11:00 am

I have to jump into another meeting!

Tuesday 11:29 am Meeting ended: **1h 28m 35s**

s47E(c) Tuesday 11:39 am

[Former FOI Commissioner Leo Hardiman blames Information Commissioner Angelene Falk for poor culture | The Canberra Times | Canberra, ACT](#)

'Cycles of panic': Former FOI boss blames poor ...  
Leo Hardiman details 'feeling of complete overwhelm' at OAIC.  
[www.canberratimes.com.au](http://www.canberratimes.com.au)

s47E(c) Tuesday 11:41 am

mcmillan's on now if anyone is interested

Type a new message

Help

s47E(c) Wednesday 8:02 am

s47E(c) my goodness, just reading some headlines from yesterday's hearings... You'll have to fill me in if you watched it live!

More specifically, the my goodness was around Leo Hardiman's appearance... not sure if you watched that one?

---

Wednesday 8:40 am

I watched this morning

I'll fill you in

s47E(c)

Tuesday 5:10 pm

FOIREQ23/00037

s47E(c) can assist and me / s47E(c) will also probably need to be across what goes out. Tsy should already have it

Tuesday 5:10 pm

Ok. I'll email

s47E(c)

I'm listening to this mornings senate inquiry.

s47E(c)

Tuesday 5:11 pm

s47E(c)

the Commissioner appeared at 4pm in reply

Tuesday 5:12 pm

I caught the second half. I will listen to the rest later.

Wednesday

s47E(c) Tuesday 9:11 am

s47E(c) i was hoping the statement would be about changes to the laws. it appears not.

unsure how the agency will respond to this evidence. we may have lots of FOI requests following. Let's wait and see.

Tuesday 9:13 am

Yes I think so

...

s47E(c) Tuesday 9:17 am

s47E(c) I've IM'd s47E(c) to ask her if we could discuss how to support staff through this inquiry.

Tuesday 9:17 am

I think that is a good idea.

**s 22(1)(a)(ii)**

Tuesday 9:21 am

I agree with the 6 month timeframe for IC reviews. I think that's a wonderful idea.

s47E(c) Tuesday 9:23 am

s47E(c) not a new idea. Patrick had a Bill that went to committee then died with a 90 day timeframe. if it's not decided in that time then it is automatically referred to the AAT.

s47E(c) Tuesday 9:23 am

s47E(c) not a new idea. Patrick had a Bill that went to committee then died with a 90 day timeframe. if it's not decided in that time then it is automatically referred to the AAT.

interesting times s47E(c)

Tuesday 9:23 am

yes but Leo was the former FOI Commissioner having considered some of the IC reviews


if it is his view complex IC reviews should be able to be resolved in 6 months, it carries more weight

s47E(c) Tuesday 9:24 am

s47E(c) sure. sounds good

s47E(c) Tuesday 9:31 am

s47E(c) r u listending?

 1

Tuesday 9:35 am

.....

...

Tuesday 10:07 am

Who was preparing the FOI stats for EBs for the AIC re IC reviews?

Not the AIC herself surely

s47E(c) Tuesday 10:09 am

s47E(c) he also appeared and gave evidence at estimates

i was interested to know the technical changes and proposed changes to the law. i'm still interested in these.

Tuesday 10:10 am

me too

s47E(c) Tuesday 4:39 pm

s47E(c) - the opening statemetn is published on the inquiry website now

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal and Constitutional Affairs/CommonwealthFOI2023/Additional Documents?docType=Tabled%20Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CommonwealthFOI2023/Additional_Documents?docType=Tabled%20Documents)



**Additional Documents**

Additional Documents

www.aph.gov.au

Tuesday 4:40 pm

OK thank you.

s47E(c) Tuesday 4:40 pm

s47E(c) we may get foi requests relating to this statement - FYI

Tuesday 4:44 pm

yes of course



FOI Inquiry – Day 2 – Tuesday 29.8.2023

Senator Scarr (Chair), Shoebridge, Nita Green (Deputy Chair) (by video), Senators Antic and McLaughlin may join later by video.

1. Leo Hardiman

Statement to be provided to committee. Shoebridge - receive and publish and given oral opening. Detailed opening statement. Will assist committee.

**Summary**

6.3.2023 announcing resignation. Said powers to make changes not within those conferred within me as FOI commissioner. Relates to resourcing and broader agency management matters affecting management of functions (not legislative reform). On commencing in April 2022 encountered large number of issues. Issues identified in statement. Include serious staff and resourcing issues, significant lack of focus on lack of performance on IC review function, lack of engagement within engagement.

Unproductive relationships with regulated agencies, diversion of staff from FOI work, shifting of responsibility of failure to FOI staff, FOI secondary to privacy. Panic at senate estimates and Patrick. Lack of commitment to 3 commissioner level. Development of narrative distracting from engagement with important issues re: resourcing and staffing.

Engaged with staff in technical development and change management. Improved guidance. Streamlined day to day work processes. Developed significant changes to processes.

Reviewed OAIC's approach to conduct of IC reviews and structure reviews . Of concern to IC, told me he should not be involving himself in such matters.

Restructure resulted in increase in productivity. More resources were needed to resolve IC review backlog. Unable to change distracting narratives re: resourcing. Unable to change significant cultural issues affecting performance of FOI functions. IC following communication with former government would never allocate additional resources to FOI. Only formally appropriated funds would go to FOI. IC not committed to FOI commissioner. She was concerned about the possibility of a separate privacy commissioner following

Broader culture of the OAIC – away from FOI – product of IC's leadership. Unable to change it.

Issues – no additional resources for FOI confirmed in February 2023 left his position untenable. Could not repair deficiencies in performance of FOI functions.

Terms of reference B and C. Overly complex decisions, overall complex IC review. In detailed statement. Reflective of deficiency of APS leadership and culture. Affects ability to attract staff. Unlikely to be adequately addressed unless senior staff get behind FOI.

Term D – support timeframe from IC reviews. Complexity – 6 months with 6 months extension in genuine complexity or party to meet timeframes.

Term E – significant reform to FOI system. Oversight of commonwealth information management – FOI Act, governance for FOI regulatory function s- agency with greater focus on greater accountability and transparency. Reimagine office of Information Commissioner. Discrete governance arrangements. Full review with AAT – 1 tier only.

Limited rather than full review. Financial signalling – charges simplified. New financial incentive without review. For example, a requirement to contribute to conduct of the review.

Shoebridge: 3 Commissioner model – cause of significant dispute/dysfunction. How should it work? Expected 3 commissioners – 2 Co-commissioners defined responsibilities, should work recognise independence and work together. Matters would think IC should be involved in – respect each other’s independence.

Conversations with IC. Weekly catch-ups. Mid Sept 2022 – attended Syd office – discussed restructuring. End of day – evening. Met with IC in office – felt treading on eggshells – pointing out fairly obvious deficiencies in management of FOI functions. Explain in some detail deficiencies and what needed to be done. Backlog issues + structure of team no fit for purpose – creating barriers to movement of IC reviews, not enough staff to get through the work (esp with backlog). Needed to be significantly larger team. Not well received. Visible shock in IC. Silence. Concluded the conversation by saying if not possible to get more resources I would likely have to resign appointment just not able to fulfil statutory obligations.

Reality would spend another 4.5 years of appointment still would be confronting enormous aged backlog. Could not conceive of me being associated with that professional outcome.

Later IC had further conversation – next weekly catch-up – IC said he should not be involved in these matters – in restructure of team – how to management workload – increase workflows with IC review caseload. Flabbergasted. Can’t recall his response. Complete panic heading in direction suggesting better way to do things and should have been done earlier.

Last federal election IC expressed concern about possibility of appointment of privacy commissioner. Concern about who new PC would be, or how to interact. Tenor was I’m the IC and want to be PC don’t want to have to navigate/interact with PC. Indicator of relationship with FOIC. Demands I would tell IC everything – would not make decisions without discussing with her. IC wanted weekly catch-ups – one way conversation – lists of demands for information about FOI function. Didn’t want to disrespect IC or cause confrontation – wanted to try and get on with performing new function. Hindsight – regrets not being assertive enough in relationship at outset. Had not encountered person like IC or her approach to relationships. Often felt he was being treated like a junior officer – attempts to suggest that he wasn’t as good a lawyer as the IC. Difficult to know how to react and deal with that kind of insecurity. I feel proud of effort I put into decisions. Keen to give agencies direct messages in decisions.

2 dominant narratives being promulgated from IC downwards. Through-put and resourcing narrative. Resourcing - solely a matter for government, nothing done at agency level. Presented to Fed Crt in Patrick litigation. Assist in instructing in Patrick matter – IC should have instructed not him. What was being articulated in litigation - heavy focus on resourcing narrative. In part false narrative – capacity within office to divert more resources to FOI than were currently being devoted. Raised the issue of funding available to OAIC and nature of funding. Expected that any

public servant engaged with funding can be spent on any departmental activity. Narrative to Court not corrected. He disengaged before hearing. Set cat amongst the pigeons. Deputy Commissioner taken aback at suggestion. Indicated that we needed a narrative for the court. Could not have a situation in which additional funding diverted from other functions to FOI.

IC always knew this but made conscious decision not to redirect funding. First raised by him directly. IC said she disputed that appropriations could be allocated to FOI functions. Then said she didn't understand how appropriations work. Would need to educate herself more. In my mind why is Mr Patrick not going to look up appropriation acts and argue this. Subsequent conversation in which IC said she had a communication with former government and the takeout for him was she did understand departmental appropriations could be allocated to FOI. IC not only aware of that and made a decision she would never depart from. Only allocate formally allocated funding to FOI.

Pressed issue with legal officers and deputy commissioner. Was discussed with counsel. Message was not a risk and won't be raised – not worried about this issue. Disparity between corporate and FOI branch funding. 36 ASL in corporate - 22 in FOI. Legal, HR, communications had about 7 ASL, 2-3 data people brought on, 11 in internal legal area. Tried to offer his expertise in management of legal work/team. But person offered it to did not take up offer. People within group who had responsibility for FOI to OAIC. FOI decision makers. Litigation. Provide internal advice. A large privacy policy branch – not directed to IC policy work.

Scarr: documents – schedule of proposed changes to FOI Act. OAIC's list of amendments. Hansard from estimates on 23.5.2023. Involved in preparation of list? A running list of potential amendments – as things arose – good to make this amendment – add it to list. Much longer list than this maintained – asked by AGD to assist minor amendments to act to be more efficient. He vetted the list but not generated by him.

Para 26 of opening statement – meeting with IC September 2022. Pressed for more resources. Mid-Sept 2022 foreshadowed resignation. IC understood what was said – nodded – said yes. Should not be involved in issues he'd raised. Rejected this – can't recall I actually said I don't agree or whether I would push on because I directed the branch head to work with him in creating a new structure. Couldn't believe it. Para 3 – no preparedness to allocate resources to FOI.

Email 1.11.2022 setting out proposed restructure – guestimates of numbers – see if he could get IC over the line for 2-3 staff. Stonewalled. Hansard – p 123 – Ms Falk 23.5.2023. Not foreshadowed? No Senator. Answer is around actual decision to resign, which was not flagged, not to earlier mention of resignation.

Page 124 – discussion about resourcing requirements – IC said about through put narrative. In recent years DHA had 5000 deemed access refusal decision on its books. When it failed to meet timeframes – IC review application. Flowed thorough in large numbers – 1000-11000 – 87% were deemed. Numbers increased enormously – simple process with DHA – reprioritising for department. Would elevate – give decision acceptable to applicant and would close IC review.

Those applications were easy wins – not difficult – didn't involve substantive IC review – just sent back to department for decision. Makes it appear finalising enormous numbers of reviews –

substance of the issue is in the backlog in growing number. Finalising 80% in 12 months – not right. Finalised within 12 months – not decided in 12 months.

Feb 2023 estimates appearance. Output stats would decline when DHA backlog cleared – so through put narrative destroyed. Communications team – attempt to coach me in what I would see in how to speak to put OAIC in best light. IC chose to answer question that I had proposed to answer. Neutered as independent FOI commissioner. Difference – IC referred to me engaging in restructure – avoided detail – no explanation of thinking gone into restructure or why necessary, no reference to what was likely to happen with look of workload. Appeared that DHA was being true to its word that it was resolving backlog of deemed decisions.

LinkedIn statement – IC statement – not aware of changes suggested but not implemented. Technical changes – by time of statement – by time appointment ceased I would have at least set the team on course I wanted to – to manage IC review workload. Also focused on IC review procedure. Broader cultural issues couldn't get any traction with these. Resourcing and broader cultural issues are what he had no control over.

Green:

Had COVID in week leading to announcement. On 6.3.2023. Couldn't get to Sydney. Needed to support team. To save funding for FOI – caught bus to Sydney. Had teams meeting with leadership meeting – individual meetings. Unwell – needed sleep - caught bus got there about midday. Wanted to show support for team sat at workstation with team. 7.3.2023 in evening – IC had been trying to meet with him. She came to workstation about 5-6 pm. I person sitting next to me. Declined meeting. Insistent. Okay. Motioned to direct me to her office. We can go in to his office. Attempt to spill the beans about the resignation. Literally just glared at me – would not take her eyes off me. Tried to gaslighting – put words in mouth. Very unfortunate we find ourselves in this position – unfortunate I find myself in this position. Ridiculous. Really off putting interaction. If someone else – more junior – would have been intimidating.

Scarr - late Feb 2023 - Secretary – no more funding for FOI or additional funding in subsequent budget. In absence of reallocation within office – no progress to be made. 2023 budget situation had already been conveyed – not surprised. But forward situation was a surprise. Budget not looking good in out years Unlikely funding available in future years. Message: resolution of FOI is to be dealt with in the office. No discussion of reallocation within the office. Discussed other ways of funding – secondments etc.

Shoebridge:

s22

[REDACTED]



















s47E(c)

Tuesday 9:41 am

s47E(c)

Are you watching?

FOIREQ23/00053

Tuesday 9:41 am

Yep. ??????

s47E(c)

Tuesday 9:42 am

s47E(c)

can we have a chat when this ends please.

Tuesday 9:43 am

Yes

Tuesday 10:05 am

You have been thrown under

FOIREQ23/00054

s47E(c) Tuesday 10:05 am

s47E(c) Just heard. Sigh.

Tuesday 10:06 am

Did say I was understaffed 😊

s47E(c) Tuesday 10:06 am

s47E(c) Whereas my team was "extraordinary" in terms of its size.

Tuesday 10:15 am

I always say your team is extraordinary. I guess it is all in the emphasis.



1

Wednesday

s47E(c) Wednesday 10:44 am

s47E(c) Does this sound a fair summation to you: "A line of argument which the IC was at that time seeking to pursue was that the delay in actioning relevant IC review matters was caused by a lack of resources which, in turn, was due solely to Government decisions limiting the funding available for the performance of the FOI functions. I was curious about this line of argument and queried with the OAI's CFO the nature of the appropriations made for the OAI. The CFO confirmed that relevant appropriations were in fact 'departmental' rather than 'administered' in nature."

sorry if that is a prying question

Wednesday 11:25 am

In the audit committee. Can I call you after 12?

s47E(c) Wednesday 11:28 am

s47E(c) no dramas. I remember it was the audit stuff. fun. Grab me at 1215 if you can. Not urgent.



1

Wednesday 12:15 pm

Give me a shout when you are free

Monday

s22

FOIREQ23/00055

Wednesday

Wednesday 2:30 pm

Hi s47 E(c) just wanted to check in and make sure you are OK after yesterday.

Wednesday 8:09 pm

Hi s47 E(c) thanks for that, its lovely of you to check in. I'm fine , but thank you

Thursday

Thursday 9:00 am

Good to hear 😊

**OAIC - FOI**

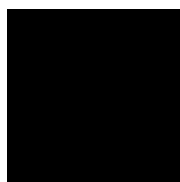
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**From:** STOKES,Andrew  
**Sent:** Tuesday, 29 August 2023 1:25 PM  
**To:** GHALI,Sarah; CROXALL,Sarah; BROWN,Rebecca; Timothy O'Halloran  
**Subject:** Opening draft for review  
**Attachments:** Draft - Opening statement for FOI inquiry v2.docx  
  
**Importance:** High

**OFFICIAL: Sensitive**

Hello all  
I have highlighted a section that addresses the morning's testimony. Tim, particularly interested in your comments on that section.

Regards  
Andrew



**Andrew Stokes** (he/him)  
Director, Strategic Communications  
Office of the Australian Information Commissioner  
Sydney  
**P** +61 2 9942 4127 **E** [andrew.stokes@oaic.gov.au](mailto:andrew.stokes@oaic.gov.au)

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*The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.*

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**OFFICIAL: Sensitive**



## FOI INQUIRY – OPENING REMARKS – draft 1pm

Good afternoon

Thank you for the opportunity to provide a brief opening statement. This afternoon I am joined by Acting FOI Commissioner Ms Toni Pirani.

This morning you have heard testimony by a former Commissioner. I take issue with many of the points made and claims about the OAIC's culture, and I look forward to answering your questions about the issues raised. I will say that in my time at the OAIC I have always sought to maintain a culture of collaboration, ethics and integrity. And that is that approach I bring today.

The purpose of the Office of the Australian Information Commissioner is to promote and uphold the rights to access government-held information and to privacy.

In an environment of rapid change, the OAIC continually challenges itself to be as effective as possible in delivering for the Australian people within our resources. It is this focus that informs our key activities and priorities across our functions.

As the OAIC says in its submission, an effective and efficient FOI system is fundamentally in the public interest.

The OAIC focuses on the dual features of our FOI Act: proactive publication of information, and the right to access documents subject to the provisions of the Act. We have undertaken numerous reviews, process and structural changes in an effort to manage an increased and complex case load. We also handle complaints, conduct investigations and provide guidance and resources to support good decision making.

At the outset I say that for the system to function effectively it requires a multi-faceted approach.

It is dependent on the OAIC and agencies having the necessary resourcing, the expertise of FOI practitioners, and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.

We aim to provide a fair, efficient and effective FOI review process, but as I have regularly reported at Senate Estimates, our ability to meet the efficiency benchmark is significantly affected by resources.

While we finalise many incoming applications through our triage and early resolution process, the historical backlog that has persisted since the OAIC commenced, coupled with year on year increases in applications for IC review is an ongoing challenge for the OAIC.

Last financial year the OAIC received 1,647 IC applications and finalised 1,519. Compare this to 2015-16 where we received 510 and finalised 454.

The community has growing expectations for release of government-held information and proactive disclosure. This focus on greater access is not an issue unique to Australia.

[Include some commentary about challenges faced in comparable overseas jurisdictions if possible, otherwise delete the above para].

There are two other points I would like to highlight.

The first is that our IC review function includes complex matters. In conducting a review, the Commissioner must balance timely decision-making with the importance of ensuring an accurate and appropriate outcome for each matter.

The Act requires merits review... include text from sub. Serving to protect valid public interests.

The information involved may be sensitive, there may be multiple and overlapping claims for exemption, there may be certain requirements under the FOI Act that we must consider, such as documents involving national security or Cabinet documents.

The second is the importance that pro-active disclosure plays in the FOI system. The proactive disclosure of government information can play a significant role in reducing pressure on the FOI system and in reducing FOI requests for personal information.

A pro-release approach builds public trust and the OAIC has been vocal in joining with other information access commissioner in supporting this culture through the Open by Design principles.

We will continue to make the best use of our resources, sustain and develop our people, and take regulatory action that creates the most value for the

Australian community. However, the need for appropriate government resourcing for the FOI function remains critical.

This year, for the first time since 2014, the OAIC will have 3 statutory office holders: the Australian Information Commissioner (as agency head), a Privacy Commissioner and a Freedom of Information (FOI) Commissioner.

The statutory office-holders of the OAIC are concurrently regulator, champion and educator spanning the breadth of responsibilities and requires dedicated focus.

This will strengthen our ability to carry out our important statutory functions and provide welcome specialisation and capacity to address our sustained, increasing and highly complex workload.

It is also timely to reflect on the observations provided during this hearing, emerging challenges and our regulatory posture as we embed the 3 Commissioner model in its contemporary form.

The OAIC is undergoing a Strategic Assessment in 2023 alongside our considerable business-as-usual activities. This process is to ensure the OAIC is appropriately positioned to meet the challenges of the future.

Thank you.

ENDS

## Hardiman points

Powers I was referring to were the powers relating to powers came to Information Commissioner.

- **Serious staff of resources and staffing**
- **Serious lack of interest in FOI functions**
- **A lack of serious engagement with foi technical matte3rs**
- **A diversion of staff away from core foi functions to process matters**
- **A shifting of blame to staff**

Cyclical panic particularly about Senate Estimates aiming to make our performance as best as possible.

Significant effort into improving things and stability. Streamlined IC reviews. Worked to build relations with agencies. These necessary changes were of concern, that he should not be involving himself in the management of IC reviews.

I was unable to change the distracting narratives. Resource – never in any substantial way allocate more funds to the FOI functions. More money was going to

The IC was not committed to the three commissioner model. Super commissioner – 2022 – the possibility of and did not want the appointment of a separate privacy commissioner. The bent away from FOI was due to the work of the Privacy Commissioner.

No additional resource, left my position untenable. Resignation was an incredibly hard thing to do.

A deficiency in APS culture.

6 months for statutory timeframe. Need for improvement in and to send to an agency with greater advocacy.

Regulator could be given a narrower function as a review.

Foi might not be a sexy subject, but is an important adjunct to responsible government. Much more needs to be done to achieve that purpose. That requires real leadership across the APS.

**Shoebridge** – Three commissioner model. Had “disturbing” conversations. So-called weekly catchups. Mid September conversation. That I was “treading on eggshells.” [And not inclined to hold back.

Efficiency and not enough staff. I think it caused “visible shock” . I would likely have to resign my appointment as I could not carry out my statutory function. She told me I should not be involved in the management. I was “flabbergasted”.

Concern about a privacy commissioner – concern about working with a new privacy commissioner. I want to be the privacy commissioner and I don’t want to deal with other people. Attempts to ‘manhandle me’. Catch-ups devolved into a one-way conversations, list for demands about the FOI function. I didn’t want to disrespect the IC, I didn’t want confrontation. With hindsight I regret I

wasn't assertive enough with the relationship in the beginning. I have never encountered anyone like the IC in my 30 years of public service.

I often felt I could laugh about it, that I was being treated like a junior office, that I wasn't as good a lawyer. It's hard to deal with the kind of insecurity. (Shoebridge 'nothing but respect for your decision'). I felt proud of the information I put into decision. Increase the jurisprudence for agencies.

Nothing could be done at agency level. Resourcing was false, that more funds could be diverted to FOI. **[That was my concern and information – 'nothing naïve about misleading the federal court' Shoebridge. ] "I wouldn't put it quite like that." } It was the IC's to deal with.**

He raised the issue of allocation and set 'the cat amongst the pigeons'. Deputy Commissioner said 'we needed a narrative for the court, and funds couldn't be diverted to FOI'. IC disputed that funds could be diverted, didn't understand how appropriations work. Raised the issue about departmental funding.

She spoke to the former govt "she did in fact fully understand departmental allocations". Shoebridge deeply disturbed about a 'false narrative being given to the Federal Court'.

Funding about corporate branch (36 ASL) and 22 for FOI. Human resources, communications team which extraordinarily had 7 ASL devoted to it. Data people. 11 people in an internal legal area. "much moaning for FOI request coming to OAIC."

It does seem extraordinary that. Large policy branch was not devoted to Information Commissioner function. Big comms team.

**The IC agreed with the proposition that he could resign. That he had conveyed it. Yes she clearly understood.**

"I couldn't believe it." Had put in structure and proposal on addition of 2-3 additional staff. "It was stonewalled."

23 May – Hansard. End of page 123 – any wording that he had foreshadowed this. "Falk said no' wording". – He reckons that she was answering in response of the immediate review.

Home Affairs had 5000 matters. 1100 working on Home Affairs. Resolving more than 1300 (in a way, those applications were easy wins, didn't involve a substantial IC review process).

Hardiman appearance at Estimates – on the day of estimates – an attempt to coach me in terms of phrasing. An IC review, a combination of my neutering. 'I didn't pick it up'. The Commissioner answered the question different to me. It would have downplayed the throughput narrative.

[ What changes did he propose in his resignation statement]. Not that I am aware of.

**WE met only once after an unfortunate meeting.** The cultural changes, allocation of resources and broader cultural issues. Statutory office has the capacity to allocate your resources to fulfil your functions, then your option is to resign.

Deputy chair Nita Green – followed provision of Act when resigning. **[never would allocate more to the FOI function without flexibility]**. She had some capacity at least to allocate more to the FOI function. He was not quick enough on the uptake, that it was never going to happen.

Additional run-up to February estimates – even some of FOI funding might be taken back for privacy purposes.

Could not change the fact that the IC was not committed to the three-commissioner model. “I’m not in the head of the IC. Where I got to was that the IC wanted to be the privacy commissioner but also wanted to be called the IC. (FOI). I don’t want to be unkind but she didn’t have the wherewithal or inclination to support FOI. **(She was concerned about AG Dreyfus appointing a privacy commissioner and did not want that outcome).**”

**Relationship with the deputy commissioner** – did you relay your concerns? I found the DC quite a difficult person to engage with and interact with. Because of issues in first week. Best to separate the FOI Branch and the deputy Commissioner to separate as much as I could do so. I had very little to do with the DC. Quite shocked by how the branch leadership people were talking to me – they were very overwhelmed, that they didn’t feel heard. An initial meeting with the branch leadership team. I will never forget that because of the way the DC spoke, building up one person, “the diminishment of people in the team I have never encountered.” Felt it necessary to provide some separation.

#### **Attitudes to staff Catching the bus**

The IC has an inner circle, DC is chief among those, perpetuate the culture of the OAIC. I think that was relevant. I didn’t have any confrontational dispute. I had a working relationship until I announced my resignation, ‘and then I was frozen out’.

Some people like to interpret things narrowly. Bullying and harassment. People were not concerned to make formal claims in the way they were treated. “I am a lone voice in the woods. I have a great deal of sympathy for the staff who were not able to voice their claims.”

Nita Green – was he ever told he could not go to the AG? I was wishing with all my might that the AG would reach out to me. **Interactions with the AGO were tightly controlled – that it was just the deputy commissioner.**

**Unfortunate incident occurred on resignation. I had covid. Used to catch the bus to help the funding for the OAIC.**

**Scarr – I can’t emphasise how much that impresses me.**

Got there. Most of the time I would sit with my team. The IC wanted to meet with me, I didn’t feel like it. “Her behaviour to me was about intimidating me into spilling the beans, tried to gaslight me, put words in my mouth. It’s very unfortunate that we find ourselves in this position.” Quite intimidating.

23 February – No additional funding for FOI in the next budget. Was surprised by the strength of what the Secretary conveyed. Nothing untoward in what the secretary was saying. {did they talk about reallocation in FOI}. There was no talk about reallocation.

**Secretary said no funding. He didn’t tell the secretary. I was fairly clear in what I was doing. I thought the secretary was friendly with the IC.**

To be fair to the IC when I was insistent she would give way on them. 6 months before I had foreshadowed resignation. [I can within my control, are unfortunate].

Shoebridge – is there a compelling argument to give it structural independence. I agree. “This is a few million bucks”. “This is ridiculous”.

**OAIC - FOI**

---

**From:** OAIC - Media  
**Sent:** Wednesday, 30 August 2023 4:50 PM  
**To:** PIRANI,Toni; FALK,Angelene; HAMPTON,Elizabeth  
**Cc:** WHIP,Caren  
**Subject:** RE: ABC Radio Naitonal interview request [SEC=OFFICIAL]

Thank you all

Given the time I am not going to drop this with RN this afternoon but will have ready for use in future days. I will consult if parts need to be amended given the question.

Kind regards  
Andrew

---

**From:** PIRANI,Toni <Toni.Pirani@oaic.gov.au>  
**Sent:** Wednesday, August 30, 2023 4:31 PM  
**To:** FALK,Angelene <Angelene.Falk@oaic.gov.au>; OAIC - Media <media@oaic.gov.au>; HAMPTON,Elizabeth <Elizabeth.Hampton@oaic.gov.au>  
**Cc:** WHIP,Caren <Caren.Whip@oaic.gov.au>  
**Subject:** RE: ABC Radio Naitonal interview request [SEC=OFFICIAL]

Thanks Angelene – yes I prefer the decision making reference.

Regards

Toni

---

**From:** FALK,Angelene <[Angelene.Falk@oaic.gov.au](mailto:Angelene.Falk@oaic.gov.au)>  
**Sent:** Wednesday, August 30, 2023 4:28 PM  
**To:** PIRANI,Toni <[Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)>; OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>; HAMPTON,Elizabeth <[Elizabeth.Hampton@oaic.gov.au](mailto:Elizabeth.Hampton@oaic.gov.au)>  
**Cc:** WHIP,Caren <[Caren.Whip@oaic.gov.au](mailto:Caren.Whip@oaic.gov.au)>  
**Subject:** RE: ABC Radio Naitonal interview request [SEC=OFFICIAL]

Thank you Toni I think that works well. I have one suggestion in the second para on reflection, that focuses on decision making for consideration.

Andrew at this stage I'm not inclined to say anything regarding the statements and claims. Please hold the information Toni has put in brackets and advise me before using.

Regards  
Angelene

---

**From:** PIRANI,Toni <[Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)>  
**Sent:** Wednesday, August 30, 2023 3:10 PM  
**To:** OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>; FALK,Angelene <[Angelene.Falk@oaic.gov.au](mailto:Angelene.Falk@oaic.gov.au)>; HAMPTON,Elizabeth <[Elizabeth.Hampton@oaic.gov.au](mailto:Elizabeth.Hampton@oaic.gov.au)>  
**Subject:** RE: ABC Radio Naitonal interview request [SEC=OFFICIAL]

Hi Andrew



Thanks for drafting this up. I'd suggest the following noting the bracketed paragraph is only included should the Information Commissioner wish to say anything at all on this point:

### Holding statement

It's appropriate that given **the** Senate's inquiry into Freedom of Information Laws is ongoing, that responses to the substance of the matters raised should be dealt with through the processes of the Senate Committee.

An effective and efficient FOI system is fundamentally in the public interest. The OAIC welcomes the Senate Committee's examination of ways to improve the operation of the FOI system. For the system to function effectively, it requires a multi-faceted approach. It is dependent on the OAIC and agencies having the necessary resourcing, *good decision making* ~~the expertise of FOI practitioners~~, and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.

s47C

Regards

Toni

---

**From:** OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>

**Sent:** Wednesday, August 30, 2023 1:30 PM

**To:** PIRANI,Toni <[Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)>; FALK,Angelene <[Angelene.Falk@oaic.gov.au](mailto:Angelene.Falk@oaic.gov.au)>; HAMPTON,Elizabeth <[Elizabeth.Hampton@oaic.gov.au](mailto:Elizabeth.Hampton@oaic.gov.au)>

**Subject:** RE: ABC Radio National interview request [SEC=OFFICIAL]

Thank you Toni

I am presenting this as a holding statement. The part in square brackets is sensitive and would need the right legal oversight.

Thank you for your query

### Holding statement

It's appropriate that given the matters raised in this week's Senate inquiry into Freedom of Information Laws, that we respond to the substance of those matters through a further submission to the inquiry.

As was said in opening remarks on Wednesday, the OAIC takes issue with many of the statements and claims made about the OAIC's culture and practices, and will respond in detail. s47C

An effective and efficient FOI system is fundamentally in the public interest. For the system to function effectively, it requires a multi-faceted approach. It is dependent on the OAIC and agencies having the necessary resourcing, the expertise of FOI practitioners, and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.

Regards

Andrew

---

**From:** PIRANI,Toni <[Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)>

**Sent:** Wednesday, August 30, 2023 1:14 PM

**To:** OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>; FALK,Angelene <[Angelene.Falk@oaic.gov.au](mailto:Angelene.Falk@oaic.gov.au)>; HAMPTON,Elizabeth <[Elizabeth.Hampton@oaic.gov.au](mailto:Elizabeth.Hampton@oaic.gov.au)>

**Subject:** RE: ABC Radio National interview request [SEC=OFFICIAL]

Thanks Andrew

That seems like a sensible approach to me.

Regards

Toni

---

**From:** OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>

**Sent:** Wednesday, August 30, 2023 12:36 PM

**To:** FALK, Angelene <[Angelene.Falk@oaic.gov.au](mailto:Angelene.Falk@oaic.gov.au)>; PIRANI, Toni <[Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)>; HAMPTON, Elizabeth <[Elizabeth.Hampton@oaic.gov.au](mailto:Elizabeth.Hampton@oaic.gov.au)>

**Subject:** FW: ABC Radio Naitonal interview request

Commissioners

We have this request from Radio National for an interview this afternoon.

Our recommendation is to decline. We do think there is merit in putting together a short holding statement to deal with this and other media queries.

The statement would be along the lines:

- Our response to the inquiry will be the appropriate mechanism to deal with a number of the claims yesterday.
- Any key point that we would like to emphasise about matters raised
- The need for a multi-faceted approach

Kind regards

Andrew

---

**From:** Grace Stranger <[Stranger.Grace@abc.net.au](mailto:Stranger.Grace@abc.net.au)>

**Sent:** Wednesday, August 30, 2023 11:42 AM

**To:** OAIC - Media <[media@oaic.gov.au](mailto:media@oaic.gov.au)>

**Subject:** ABC Radio Naitonal interview request

**CAUTION:** This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good morning,

I hope your team is well.

We're looking at doing a segment on RN Drive this afternoon Australia's FOI laws and an overview of how the Senate inquiry has played out.


I was wondering if Angelene Falk, Toni Pirani or Elizabeth Hampton might be available to join our program from an interview at 4:40pm AEST? We can also offer a pre-record if a live interview isn't an option.

The interview would run for around 6-9 minutes, and we can do it over the phone.

If you'd like to have a chat about the interview, please feel free to give me a call on 0434277342 or if you'd like some talking points sent through just let me know and I can flick those across.

I understand this is a very busy time for your team, so I appreciate your assistance looking into this.

With respect,  
Grace



Grace Stranger (She/Her)  
Producer  
Radio National

M: 0434277342

---

We acknowledge Aboriginal and Torres Strait Islander peoples as the First Australians and Traditional Custodians of the lands where we live, learn and work.

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**OAIC - FOI**

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**From:** OAIC - Media  
**Sent:** Tuesday, 29 August 2023 2:06 PM  
**To:** Sarah Basford Canales  
**Cc:** OAIC - Media  
**Subject:** RE: Falk opening statement

Hello Sarah

A fun day! Unfortunately I can't promise anything but will what I can do.

Kind regards  
Andrew

---

**From:** Sarah Basford Canales <sarah.basford-canales@theguardian.com>  
**Sent:** Tuesday, August 29, 2023 12:49 PM  
**To:** OAIC - Media <media@oaic.gov.au>  
**Subject:** Falk opening statement

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Hi there,

I'm taking over the FOI inquiry hearing from my colleague, Chris, and wanted to check in to see if we could get Angelene Falk's speech ahead of time strictly under embargo?

Additionally, we would be keen on any response to the former FOI commissioner's comments this morning.

Thanks,  
Sarah

-----  
**Sarah Basford Canales**  
Political reporter  
The Guardian | Australia  
-----  
+61 439 402 466  
[sarah.basford-canales@theguardian.com](mailto:sarah.basford-canales@theguardian.com)  
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**OAIC - FOI**

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**From:** STOKES,Andrew  
**Sent:** Tuesday, 29 August 2023 2:04 PM  
**To:** GHALI,Sarah; CROXALL,Sarah; BROWN,Rebecca  
**Subject:** RE: Opening draft for review [SEC=OFFICIAL:Sensitive]  
**Attachments:** Opening statement for FOI inquiry v3.docx

**OFFICIAL: Sensitive**

Hello  
The changed sections are in yellow.

Ready to go from my perspective.  
Andrew

**OFFICIAL: Sensitive**

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**From:** GHALI,Sarah <Sarah.Ghali@oaic.gov.au>  
**Sent:** Tuesday, August 29, 2023 1:47 PM  
**To:** STOKES,Andrew <Andrew.Stokes@oaic.gov.au>; CROXALL,Sarah <Sarah.Croxall@oaic.gov.au>; BROWN,Rebecca <Rebecca.Brown@oaic.gov.au>; Timothy O'Halloran <tim@theshapeagency.com.au>  
**Subject:** RE: Opening draft for review [SEC=OFFICIAL:Sensitive]

**OFFICIAL: Sensitive**

Hi Andrew

Please see an updated version – apologies I had managed to send you one with a few gaps. I also made a small suggestion to your opening text.

Thanks

Sarah

**OFFICIAL: Sensitive**

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**From:** STOKES,Andrew <[Andrew.Stokes@oaic.gov.au](mailto:Andrew.Stokes@oaic.gov.au)>  
**Sent:** Tuesday, August 29, 2023 1:25 PM  
**To:** GHALI,Sarah <[Sarah.Ghali@oaic.gov.au](mailto:Sarah.Ghali@oaic.gov.au)>; CROXALL,Sarah <[Sarah.Croxall@oaic.gov.au](mailto:Sarah.Croxall@oaic.gov.au)>; BROWN,Rebecca <[Rebecca.Brown@oaic.gov.au](mailto:Rebecca.Brown@oaic.gov.au)>; Timothy O'Halloran <[tim@theshapeagency.com.au](mailto:tim@theshapeagency.com.au)>  
**Subject:** Opening draft for review [SEC=OFFICIAL:Sensitive]  
**Importance:** High

**OFFICIAL: Sensitive**

Hello all  
I have highlighted a section that addresses the morning's testimony. Tim, particularly interested in your comments on that section.

Regards  
Andrew



**Andrew Stokes** (he/him)  
Director, Strategic Communications  
Office of the Australian Information Commissioner  
Sydney  
**P** +61 2 9942 4127 **E** [andrew.stokes@oaic.gov.au](mailto:andrew.stokes@oaic.gov.au)

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**OFFICIAL: Sensitive**

## FOI INQUIRY – OPENING REMARKS – draft

Good afternoon

Thank you for the opportunity to provide a brief opening statement. This afternoon I am joined by Acting FOI Commissioner Ms Toni Pirani.

This morning you have heard testimony by a former Commissioner. I take issue with many of the statements and points made and claims about the OAIC's culture. I look forward to answering your questions about the issues raised. I will say that in my time at the OAIC I have always sought to maintain a culture of collaboration, ethics and integrity. And that is that approach I bring today.

The purpose of the Office of the Australian Information Commissioner is to promote and uphold the rights to access government-held information and to privacy.

In an environment of rapid change, the OAIC continually challenges itself to be as effective as possible in delivering for the Australian people within our resources. It is this focus that informs our key activities and priorities across our functions.

As the OAIC says in its submission, an effective and efficient FOI system is fundamentally in the public interest. The OAIC focuses on the dual features of our FOI Act: proactive publication of information, and the right to access documents subject to the provisions of the Act. We have undertaken numerous reviews, process and structural changes in an effort to manage an increased and complex case load. We also handle complaints, conduct investigations and provide guidance and resources to support good decision making.

At the outset I say that for the system to function effectively it requires a multi-faceted approach.

It is dependent on the OAIC and agencies having the necessary resourcing, the expertise of FOI practitioners, and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.

We aim to provide a fair, efficient and effective FOI review process, but as I have regularly reported at Senate Estimates, our ability to meet the efficiency benchmark is significantly affected by resources. While we finalise many incoming applications through our triage and early resolution process, the



historical backlog that has persisted since the OAIC commenced, coupled with year on year increases in applications for IC review is an ongoing challenge for the OAIC.

Last financial year the OAIC received 1,647 IC applications and finalised 1,519. Compare this to 2015-16 where we received 510 and finalised 454.

There are two other points I would like to highlight.

The first is that our IC review function includes complex matters. In conducting a review, the Commissioner must balance timely decision-making with the importance of ensuring an accurate and appropriate outcome for each matter.

The Act requires merits review. The OAIC does not simply review the reasons given by the agency or minister in a particular matter. The role, as required by the framework, is to determine the correct or preferable decision in the circumstances. Serving to protect valid public interests.

The information involved may be sensitive, there may be multiple and overlapping claims for exemption, there may be certain requirements under the FOI Act that we must consider, such as documents involving national security or Cabinet documents.

The second is the importance that pro-active disclosure plays in the FOI system. The proactive disclosure of government information can play a significant role in reducing pressure on the FOI system and in reducing FOI requests for personal information.

A pro-release approach builds public trust and the OAIC has been vocal in joining with other information access commissioner in supporting this culture through the Open by Design principles.

We will continue to make the best use of our resources, sustain and develop our people, and take regulatory action that creates the most value for the Australian community. However, the need for appropriate government resourcing for the FOI function remains critical.

This year, for the first time since 2014, the OAIC will have 3 statutory office holders: the Australian Information Commissioner (as agency head), a Privacy Commissioner and a Freedom of Information (FOI) Commissioner.

The statutory office-holders of the OAIC are concurrently regulator, champion and educator spanning the breadth of responsibilities and requires dedicated focus. **Our staff now number approximately 190.**

This will strengthen our ability to carry out our important statutory functions and provide welcome specialisation and capacity to address our sustained, increasing and highly complex workload.

It is also timely to reflect on the observations provided during this hearing, emerging challenges and our regulatory posture as we embed the 3 Commissioner model in its contemporary form. The OAIC is undergoing a Strategic Assessment in 2023 alongside our considerable business-as-usual activities. This process is to ensure the OAIC is appropriately positioned to meet the challenges of the future.

Thank you.

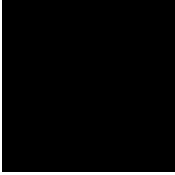
ENDS

CONFIDENTIAL

**OAIC - FOI**

---

**From:** STOKES,Andrew  
**Sent:** Tuesday, 29 August 2023 12:42 PM  
**To:** Timothy O'Halloran  
**Subject:** statement  
**Attachments:** Mr Hardiman opening statement 29 August 2023.pdf



**Andrew Stokes** (he/him)  
Director, Strategic Communications  
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TEAM MESSAGES – CREATED BY [REDACTED]

To [REDACTED]

[Tuesday 1:19 pm] [REDACTED]

hi trying to find him. This is what I have so far Thank you for the opportunity to provide a brief opening statement. This afternoon I am joined by Acting FOI Commissioner Ms Toni Pirani.

This morning you have heard testimony by a former Commissioner. I take issue with many of the points made and claims about the OAIC's culture, and I look forward to answering your questions about the issues raised. I will say that in my time at the OAIC I have always sought to maintain a culture of collaboration, ethics and integrity. And that is that approach I bring today.

The purpose of the Office of the Australian Information Commissioner is to promote and uphold the rights to access government-held information and to privacy.

like 1

[Tuesday 1:57 pm] [REDACTED]

I think I need to send to the Commissioner at 2pm.

[Tuesday 1:57 pm] [REDACTED]

just now speaking to Tim. give me 2 mins. removing repeating of misallocation.

like 1

To [REDACTED]

[Tuesday 9:08 am] [REDACTED]

he's dropping the bomb

[Tuesday 9:10 am] [REDACTED]

I have a fear comms will be mentioned

[Tuesday 9:46 am] [REDACTED]

We did get mentioned.

[Tuesday 9:46 am] [REDACTED]

I am not sure how we respond to this

[Tuesday 11:04 am] s47E(c)

The head of comms was referred to. with my "coaching"

[Tuesday 11:04 am] s47E(c)

Sad morning

[Tuesday 11:08 am] s47E(c)

No, I am sorry. We are all aware that our leadership is not perfect. But his take is ridiculous.

emo 1

[Tuesday 1:45 pm] s47E(c)

send crikey article to s47E(c)

[Tuesday 2:25 pm] s47E(c)

I wonder if s47E is booking in media interviews

[Tuesday 2:39 pm] s47E(c)

Note from s47E – extract from Hardiman submission sent in Teams message: "On the day of the OAIC's estimates appearance the IC asked me to join a discussion which she was having with the head of her communications team. In fact, that 'discussion', so far as I participated in it, was an attempt to coach me in what I would say, including words or phrasing I should use to place the OAIC in the best light. I made it clear that I would speak in my own terms. In the hearing late that evening, the IC chose to answer a question which denied me the opportunity of saying what I had proposed to say; the answer the IC provided avoided any perceived negative take-outs."

[Tuesday 2:39 pm] s47E(c)

again I would disagree with this recollection

angryface 1

[Wednesday 7:56 am] s47E(c)



Road warrior Leo Hardiman had to take the bus to Canberra. SHAKESPEARE

**S4**  
**ZE** Note: in response to this cartoon.

Yes, he "had" to. Emails make it clear that him taking the bus or not wasnt making any difference.

**Teams Message to** **s47E(c)**

**[Wednesday 10:44 am]** **s47E(c)**

Does this sound a fair summation to you: "A line of argument which the IC was at that time seeking to pursue was that the delay in actioning relevant IC review matters was caused by a lack of resources which, in turn, was due solely to Government decisions limiting the funding available for the performance of the FOI functions. I was curious about this line of argument and queried with the OAIC's CFO the nature of the appropriations made for the OAIC. The CFO confirmed that relevant appropriations were in fact 'departmental' rather than 'administered' in nature."

**[Wednesday 10:45 am]** **s47E(c)**

sorry if that is a prying question

Tuesday 3:02 pm

FOIREQ23/00079

[Former information commissioner claims in Senate inquiry he was 'manhandled' and 'gaslighted' by leadership | Freedom of information | The Guardian](#)



**Former information commissioner claims i...** ✕

Leo Hardiman has spoken at length to a Senate inquiry about how his complaints about a massive freedom of...

[www.theguardian.com](http://www.theguardian.com)

Wow

Thursday

FOIREQ23/00080



[Former information commissioner claims in Senate inquiry he was 'manhandled' and 'gaslighted' by leadership | Freedom of information | The Guardian](#)



**Former information commissioner claims i...** ✕

Leo Hardiman has spoken at length to a Senate inquiry about how his complaints about a massive freedom of...

[www.theguardian.com](http://www.theguardian.com)

Just saw this!

Wednesday









**MOFFAT, Laura**

---

**From:** GIBSON, Isla on behalf of FALK, Angelene  
**Sent:** Wednesday, 30 August 2023 9:48 AM  
**To:** OAIC - Office Aus Information Commissioner  
**Subject:** Message from the Commissioners - Public hearings for the inquiry into the operation of Commonwealth Freedom of Information laws [SEC=OFFICIAL]

**Importance:** High



## Message from the Commissioners



Dear colleagues

Many of you would be aware that public hearings for the Legal and Constitutional Affairs Reference Committee's inquiry into the operation of Commonwealth Freedom of Information laws occurred over the last couple of days. The Committee heard from a range of witnesses, including those from Government, the media and the legal sector. The OAIC appeared yesterday and there has been some media coverage of this.

Committee members and witnesses covered a wide range of issues, including funding allocation within the OAIC, and ways to improve the FOI system in line with the objects of the FOI Act.

We would like to take the opportunity to acknowledge the important work of every team within the OAIC. Together, we do excellent work and make invaluable contributions to ensuring that the OAIC meets its statutory functions and strategic goals. As we made clear to the Committee - our FOI role is important and fundamental to Australia's democracy.

We want to particularly thank everyone who worked so hard to prepare the OAIC's submission to the Committee and the very detailed briefings provided to us in preparation for the hearing. The FOI Branch and the Regulation and Strategy Branch deserve particular recognition in this regard.

It can be very challenging for all of us to hear robust debate about our work in a public forum. If you have any concerns about the issues raised during the hearing or if you are experiencing any uneasiness or distress, please reach out to your manager or our [EAP provider](#) for support.

Regards