

Delay and Decay: Australia's Freedom of Information Crisis

Briefing paper

August 2022

*'The advent of legislation to compel the production of government information in this country is the most concrete demonstration that democracy needs such information and will have it'*¹

Freedom of access to government information is an internationally recognised right and a vital aspect of the rule of law.² In Australia, this access is facilitated by the *Freedom of Information Act 1982* (Cth) (*FOI Act*), which was enacted in response to recognition of freedom of information's (**FOI**) crucial importance in providing access to personal information, transparency and accountability in policy making, and increasing public participation.³

These values remain codified in Australia's FOI legislative architecture. For example, section 3(2) of the *FOI Act* provides that the Parliament intends to 'promote Australia's representative democracy by ... increasing public participation in Government processes, with a view to promoting better-informed decision-making; and increasing scrutiny, discussion, comment and review of the Government's activities'.⁴ The section further requires that Government information is 'to be managed for public purposes', and acknowledges that it is a 'national resource'.⁵ Section 3(4) provides that it is Parliament's intention that the functions and powers of the Act are to be performed to facilitate and promote public access to information 'promptly and at the *lowest reasonable cost*'.⁶

Despite the Act explicitly recognising the FOI regime's aspirations, Australia's FOI regime continues to be undermined in practice by inordinate delay, under resourcing and the abuse of statutory exceptions. In light of these problems, the Centre for Public Integrity recommends:

- Ongoing training and oversight by the Office of the Australian Information Commissioner (**OAIC**) to foster a **pro-disclosure culture**;

¹ Bret Walker SC, 'The Information that Democracy Needs' (Speech, Western Sydney University Whitlam Oration, June 2018).

² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

³ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information: Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (Final Report, 6 November 1979) 21-2.

⁴ *FOI Act* s 3(2).

⁵ *Ibid* s 3(3).

⁶ *Ibid* s 3(4) (emphasis added).

- The OAIC be **appropriately resourced** to enable it to reduce current delays and better fulfil its training and oversight mandate;
- The OAIC be empowered to **set a ratio** of FOI officers to FOI applications, and mandate minimum staff numbers within departments;
- **Disciplinary sanction** be available where officers repeatedly make decisions subsequently determined to be contrary to the requirements of the *FOI Act*, as well as for persons who direct or influence them to make such decisions (with criminal sanctions also available to incentivise compliance);
- A joint cross-party **parliamentary committee** be established in order to provide ongoing oversight and accountability of the integrity of departmental FOI decision-making processes;
- The *FOI Act* be clarified to **prevent a change of Minister** or portfolio title from **invalidating existing FOI applications**;
- The *FOI Act* make clear that the **national cabinet is not captured** by the cabinet exemption.

Australia's Freedom of Information regime

Australia's FOI regime is governed by the *FOI Act*. The *FOI Act* was passed in 1982 by the Fraser Government, after being proposed by the Whitlam Government in 1974 and considered in numerous reports throughout the 1970's. The Act formed a key element of other contemporaneous public law reforms known as 'New Administrative Law'.⁷

Broadly, the *FOI Act's* two key functions can be distilled into *information publication* and *access to documents* – with the latter largely serving as an extension of the baseline disclosure in the former.

Information publication

In response to perceived secrecy in the public service prior to reforms,⁸ pt II of the Act requires most government agencies to publish accessible baseline information regarding their functions, activities, non-APS staff, organisational structure and general operational information.⁹

Access to documents

Part III of the *FOI Act* governs access to information. Section 11 of the Act grants every person '*a legally enforceable right to obtain access [...] to a document of an agency; or an official document of a Minister*'.¹⁰ Access to documentation is limited by numerous

⁷ Lynsey Blayden, 'Seeing the New Administrative Law in a "green light"', *Australian Public Law* (Web Page, 16 April 2021) <<https://www.auspublaw.org/blog/2021/04/seeing-the-new-administrative-law-in-a-green-light>>.

⁸ Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, 669.

⁹ *FOI Act* pt II.

¹⁰ *Ibid* s 11(2)(a)-(b) (emphasis added).

statutory exemptions.¹¹ At first instance, access requests are made in writing directly to the relevant agency or Minister.¹² If a request is refused, the applicant may request an internal review of the decision by an employee other than the original decision maker or appeal directly to the OAIC.¹³ Decisions not finalised within the statutory timeframe of 30 days, or decisions refused again after internal review, may also be directly appealed to the OAIC.¹⁴

The Office of the Australian Information Commissioner

Before 2010, appeals after internal review could only go the Administrative Appeals Tribunal (**AAT**) at a cost for \$639 per review. In 2010, in response to concerns about the efficiency and fairness of the AAT appeals process, the *Australian Information Commissioner Act 2010* (Cth) (*AICA Act*) was passed. The *AICA Act* established the offices of Information Commissioner and Freedom of Information Commissioner and brought the existing Australian Privacy Commissioner within the ambit of the OAIC.

Section 8 of the *AICA Act* enumerates the FOI functions of the OAIC: these include, amongst other things, helping agencies to comply with their disclosure obligations, providing advice and training, issuing FOI guidelines, and performing merits review. The latter is the OAIC's most important statutory function, with unsuccessful applicants permitted to appeal to the OAIC after failing either at first instance, or after internal review, to obtain access to documents sought. Parties dissatisfied with the merits review outcome may still apply to the AAT, and AAT decisions may be appealed to the Federal Court of Australia on matters of law.¹⁵ As Federal Court and AAT action remain open to the parties, the OAIC's review powers add an additional layer to what is already a byzantine appeals process. Figure 1 schematically represents the current process for FOI requests and their respective appeals.

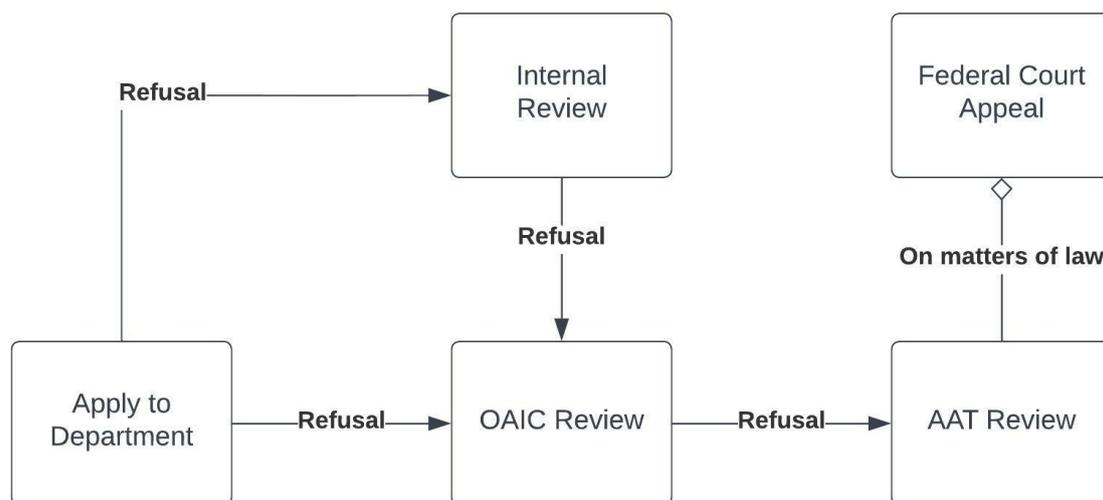


Figure 1: Appeal process of the *FOI Act*

¹¹ Ibid pt IV.

¹² Ibid s 15.

¹³ Ibid pt VI.

¹⁴ Ibid pt VII.

¹⁵ *FOI Act* div 10.

Performance of the current FOI regime

The introduction of the OAIC in 2010 was supposed to speed up and cheapen the FOI appeal process by providing a flexible clearing house antecedent to the AAT. According to Geoffrey Watson SC, it has in fact 'had the opposite effect' on cost and speed.¹⁶ This conclusion is corroborated by the OAIC's own data.

Since 1984-5 the number of FOI requests has hovered between 20,000 and 45,000 per year with no structural trend. For example, 2003-04 saw FOI applications peak at 42,627, then halve to 21,587 by 2009-10 and once again steadily increase. The median FOI requests throughout this period was 33,804 per year. These data suggest that the baseline demand from citizens for governmental information seems to have changed little since the FOI regime was introduced in 1982.

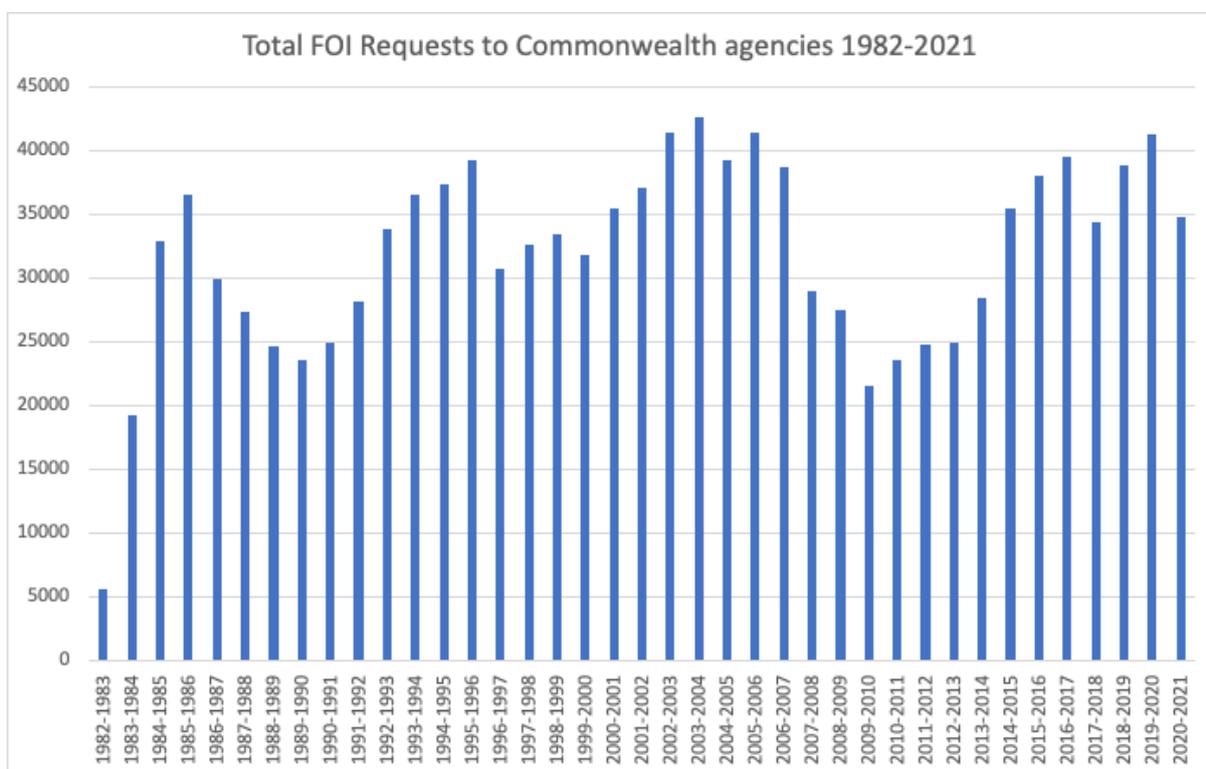


Figure 2: Total FOI Request made to Commonwealth agencies 1982-2021¹⁷

¹⁶ Geoffrey Watson SC, 'Buried at Sea: The Loss of our Freedom to Access Governmental Information, *Australian Public Law* (Web Page, 10 November 2021) < <https://www.auspublaw.org/blog/2021/11/buried-at-sea-the-loss-of-our-freedom-to-access-governmental-information/>>.

¹⁷ 'Freedom of information statistics', *data.gov.au* (Data Set, 27 October 2021) < <https://data.gov.au/dataset/ds-dga-b0771c28-09cc-4c4e-9e61-9a96f6e3d040/details>>.

Despite demand changing little, the speed with which FOI requests have been resolved has been falling. Section 15(5)(b) of the *FOI Act* requires that requests should be resolved 'as soon as practicable', but 'no later than the end of the period of 30 days after the day on which the request is received'.¹⁸ This statutory timeline has been increasingly ignored. For example, in 2011-12, 1.3 per cent of FOI requests were over 90 days late; by 2020-21, this figure ballooned to 12.4 per cent. Over this same period, the total proportion of decisions made outside the statutory period had increased from 11.5 per cent to 22.5 per cent: 2016-17 was particularly noticeable, with almost *half* of FOI requests being resolved outside of the statutory timeframe.

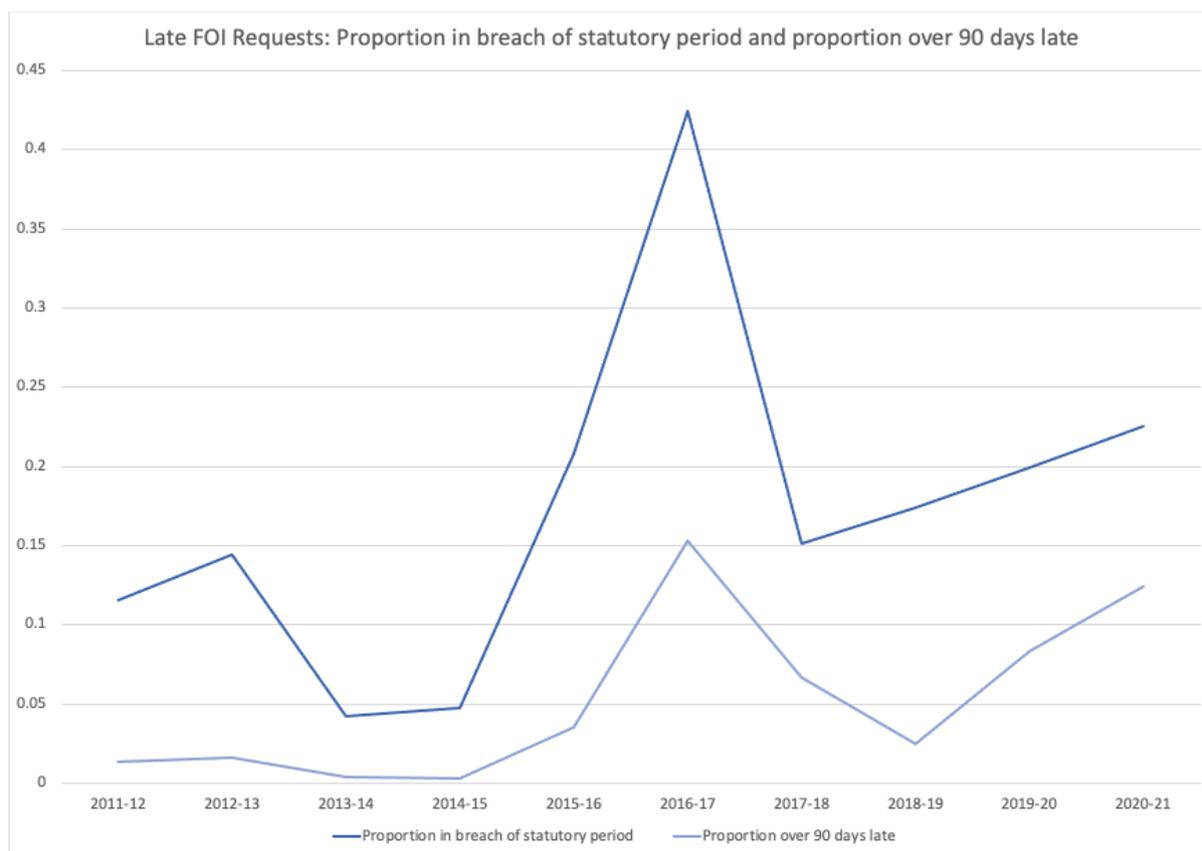


Figure 3: Late FOI Requests: Proportion in breach of statutory period and proportion over 90 days late¹⁹

Such significant statutory delays should by no means be taken lightly. Every delay is in *breach of the agency's statutory obligation*. Indeed, Senator Kim Carr has described such delays as not emanating from a 'culture of secrecy' but emblematic of a 'culture of lawlessness'.²⁰

¹⁸ *FOI Act* s 15(5)(b).

¹⁹ Office of the Australian Information Commissioner, Annual Reports 2011-12 - 2020-21.

²⁰ Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 October 2019, 114 (Senator Kim Carr).

Significant delays, as well as arguable abuse of the exemption criteria (see page 9) have, understandably, lead to a clogged and slow system littered with hurdles. There are increasing delays at first instance, internal review and OAIC review. For example, while the number of FOI requests increased 34 per cent between 2011-12 and 2020-21, the number of internal review applications increased by 128 per cent over this same period.

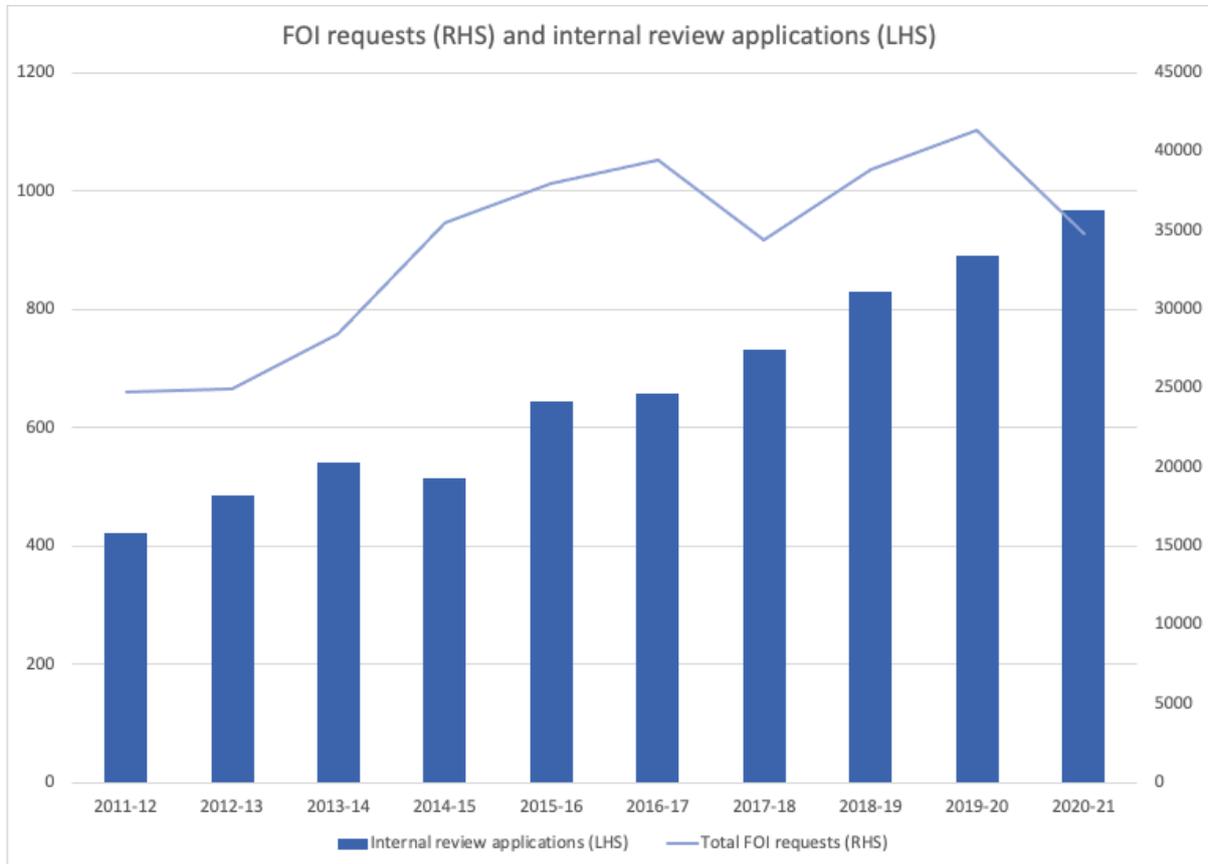


Figure 4: FOI Requests (RHS) and internal review applications (LHS)²¹

²¹ Office of the Australian Information Commissioner, Annual Reports 2011-12 - 2020-21.

OAIC appeals have steadily increased since 2012-13. However, like other elements of the system, the OAIC's review capabilities are increasingly burdened. While the OAIC managed to keep up with the volume of request received until 2014-15,²² since 2015-16 the growth in appeals to the OAIC has significantly outpaced the growth in the OAIC's ability to finalise them. This has led to a continual increase in the average time to finalise reviews over this same period.

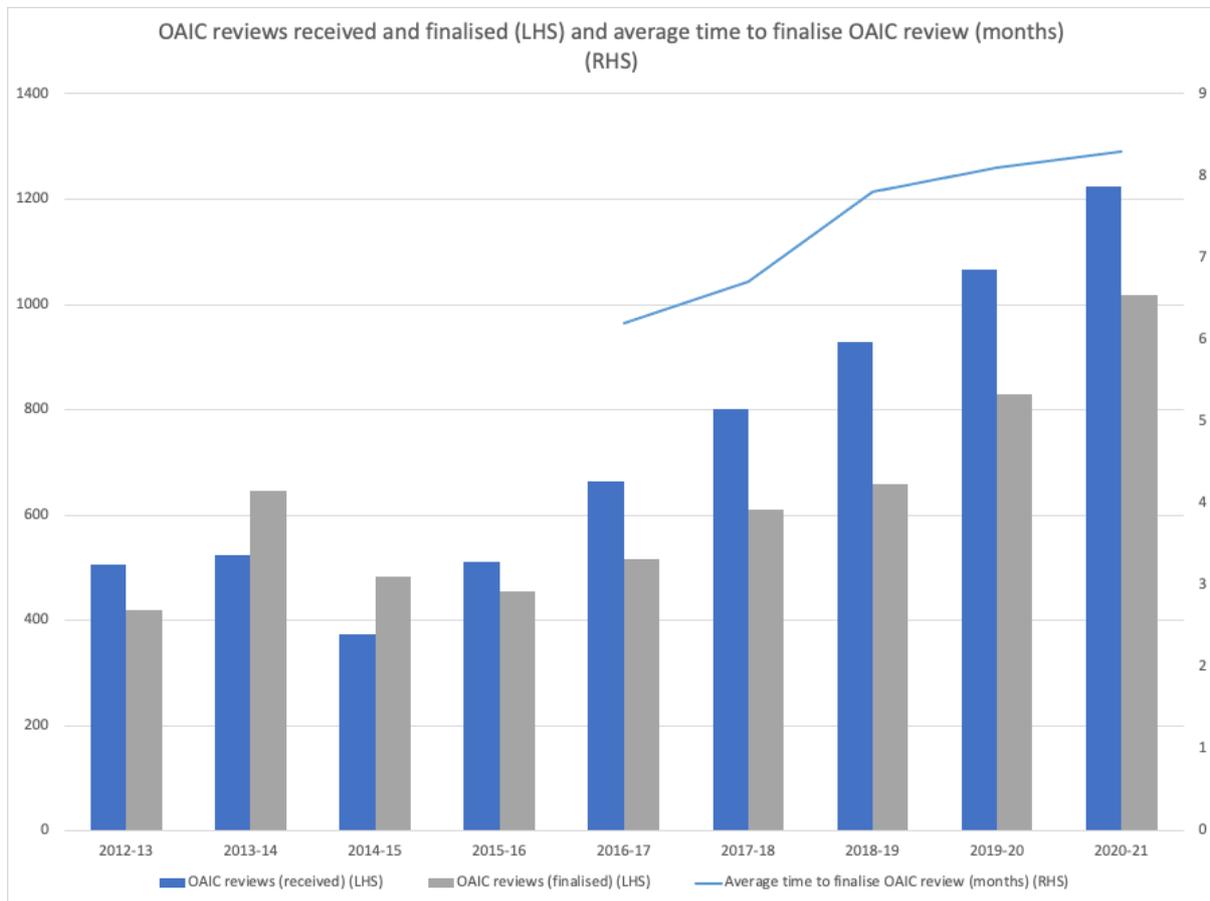


Figure 5: OAIC reviews received and finalised (LHS) and average time to finalise OAIC review (months) (RHS)²³

²² The OAIC often maintain a 'backlog' of complaints on hand. Therefore, in some years more may be completed than received, and vice-versa.

²³ Office of the Australian Information Commissioner, Annual Reports 2011-12-2020-21.

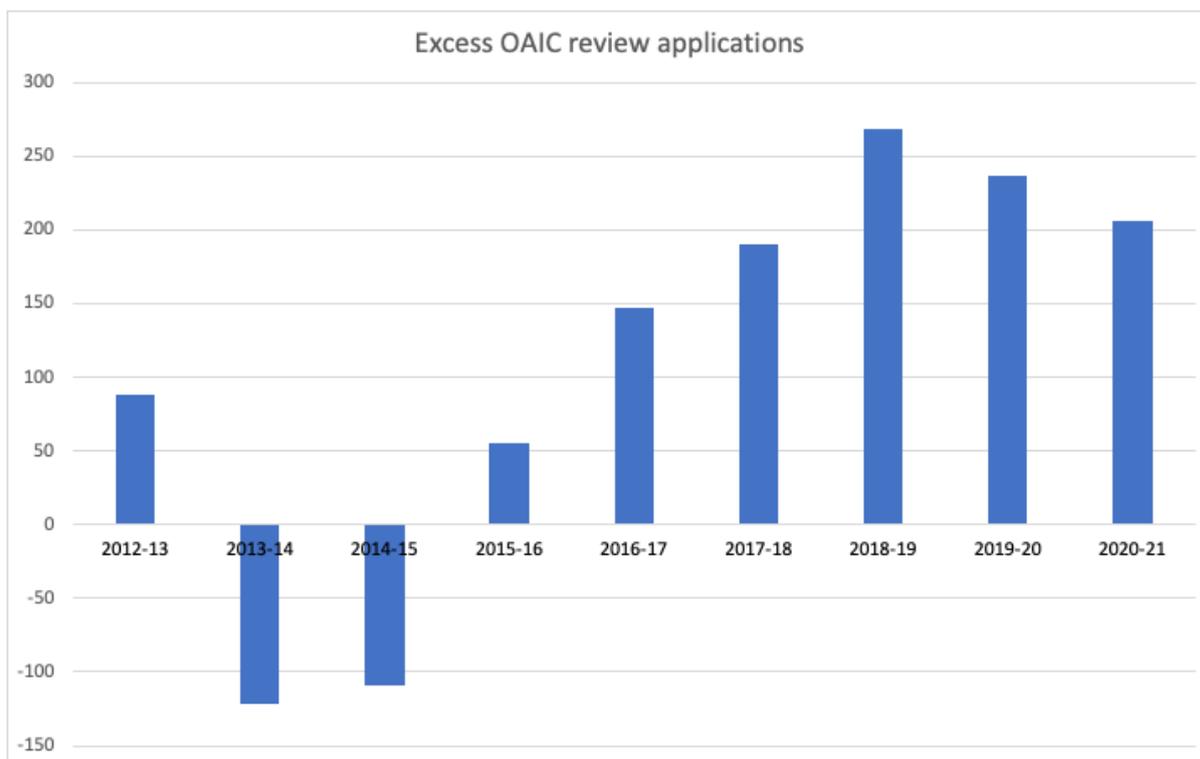


Figure 6: Excess Information Commissioner review applications²⁴

The significant delays and inability to complete OIAC merits reviews is partly attributable to the lack of sufficient staff to manage the increasing number of claims. Since 2011-12, the number of FTE staff per OIAC review request received has fallen by 50 per cent. Indeed, these concerns have been expressed by the OIAC itself. Before the Senate Legal and Constitutional Affairs Legislation Committee in 2019, Information Commissioner Angelene Falk revealed that a 'gap remains between the volume of work coming into the office and the staff that's needed in order to process those matters'.²⁵ She specifically requested that the OIAC be allocated funding for *50 per cent more staff* to manage with the volume of OIAC review requests.²⁶

Notwithstanding the vast increase in the number of internal reviews and OIAC reviews, the number of appeals to the AAT has also drastically increased. Between 2011-12 and 2020-21 the number of appeals increased 260 per cent from 20 to 72, despite minimal increase in the number of FOI requests at first instance.

²⁴ Office of the Australian Information Commissioner, Annual Reports 2011-12 - 2020-21.

²⁵ Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 October 2019, 126 (Angelene Falk).

²⁶ *Ibid* 107.

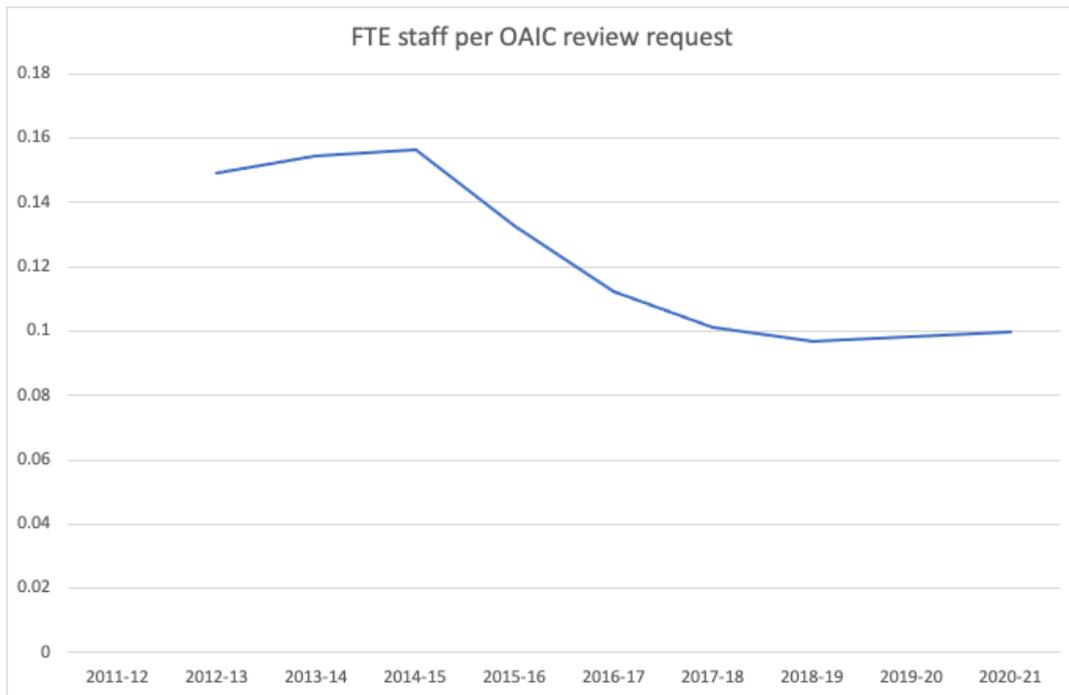


Figure 7: FTE staff per review request²⁷

A culture of secrecy

The *FOI Act* is clear that Australians have a right to information, but this is qualified by the numerous statutory exceptions which often stand in the way of meritorious claims.

Part IV of the *FOI Act* details the statutory exceptions to access to freedom of information.²⁸ It is upon these exceptions that claims are refused either in full or in part at both first instance and appeal. A handful of agencies are completely exempt from FOI requests.²⁹ Exceptions to request from non-exempt agencies are either outright or are public interest conditional exemptions. Outright FOI exemptions include:

- Documents affecting national security, defence or international relations;
- Cabinet documents;
- Documents affecting enforcement of law and protection of public safety; and
- Documents to which secrecy provisions of enactment apply

²⁷ Office of the Australian Information Commissioner, Annual Reports 2011-12-2020-21.

²⁸ *FOI Act* pt IV.

²⁹ *Ibid* sch 2.

Public interest conditional exemptions are governed by s 11A(5) of the *FOI Act*, and s 11B provides the 'public interest calculus' according to which determinations are made. The section requires that access must be given to all conditionally exempt documents unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. Division 3 outlines the public interest conditional exemptions as, among others:

- Documents affecting Commonwealth-State relations;
- Documents relating to the deliberative processes of the Commonwealth government;
- Documents relating to procedures and operations of agencies; and
- Documents which may have a substantial adverse effect on Australia's economy.

Each exception appears, *prima facie*, to be reasonable. The processes by which they are applied, however, are prone to abuse. Sections 11A(3)-(5) of the Act provide that access is to be granted or refused by the '*agency or Minister*'.³⁰ Indeed, internal reviews, while conducted by a different individual, are still conducted by the original agency.

While refusals at first instance must be supported by reasons in writing, the internal nature of exemption determinations allows documents to be refused on fabricated grounds with no repercussions.³¹ Internally embarrassing or politically sensitive documents may be refused by the relevant agency at least twice for periods frequently outside of the statutory 30-day window, before reaching the OAIC, where applicants face another delay of up to eight months. Such delays serve to dissuade prospective applicants. Moreover, the salience of a given issue has usually drastically decreased by the time it reaches the OAIC for review.

This emergent 'culture of secrecy' is perhaps more worrying than the incessant clogging in the appeals system of the FOI regime. This is most clearly seen by the change in accepted claims at first instance by the relevant department. Since 2011-12 the proportion of claims granted in full has fallen by over 30 per cent. This has been accompanied by a 50 per cent increase in the proportion of claims refused in full.

³⁰ *Ibid* ss 11A(3)-(5).

³¹ *FOI Act* s 26A.

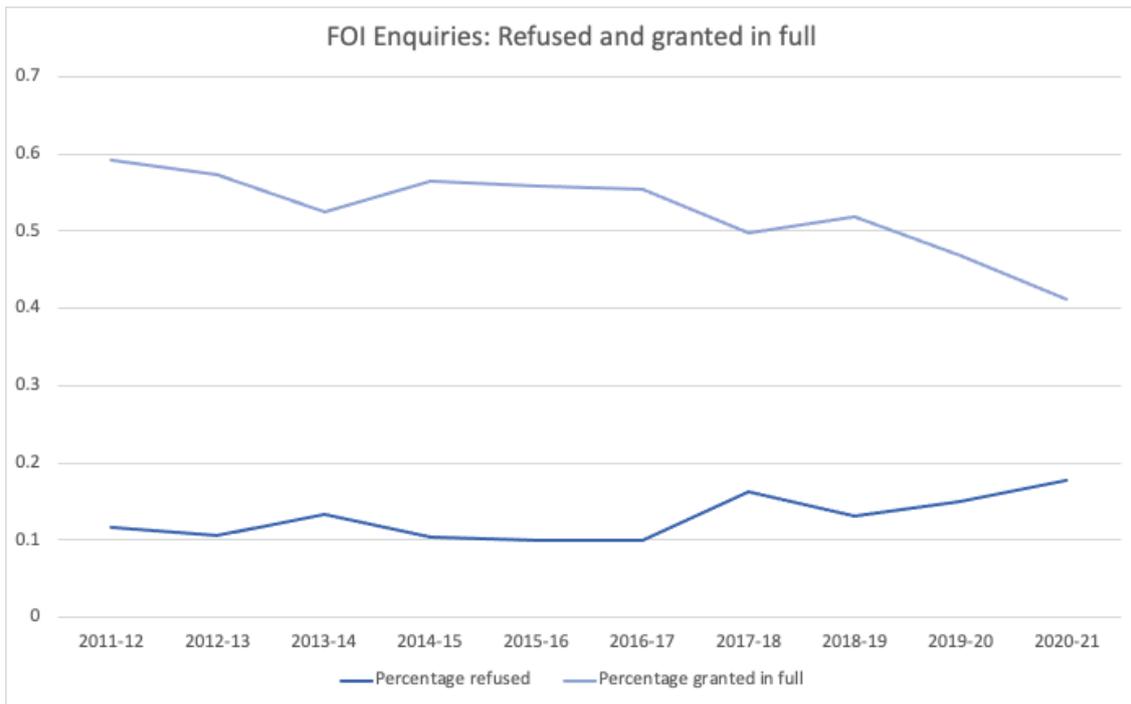


Figure 8: FOI enquiries: Refused and granted in full³²

These figures are most troubling. For example, in 2020-21 almost 35,000 FOI requests were made. In that same year there were 968 internal review requests, 1224 requests made for OAIC review and 72 appeals to the AAT. Most refusals were never appealed, despite the potential (yet ultimately unknown) merits of the claims.

With 41 per cent of the OAIC's discretionary reviews setting aside the original decision,³³ and *over 40 per cent* of internal reviews granting access at least in part to the originally refused decision, many meritorious claims are unduly refused and delayed by the current FOI system.³⁴ The relatively low proportion of claims appealed either to internal review or the OAIC directly further demonstrates that the substantial issues with the system are coming to fruition at first instance.

There are several recent conspicuous and publicly available examples of AAT and OAIC decisions which demonstrate some of the (potentially many) abuses of the exemption system:

- In *Patrick v Secretary, Department of PMC* [2021] the AAT overturned a decision to withhold Auditor-General report on national security grounds which found that Commonwealth had not achieved value for money in defence procurement;³⁵
- In *Patrick v Secretary, Department of PMC* [2020] the AAT overturned a decision to exempt National Cabinet documents under 'Cabinet' exception contained in s 23 of the *FOI Act*;³⁶

³² See *ibid.*

³³ Office of the Australian Information Commissioner, *Annual Report 2020-21* (Report, 23 September 2021) 43.

³⁴ *Ibid.* 56.

³⁵ *Patrick v Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719.

³⁶ *Patrick v Secretary, Department of Prime Minister and Cabinet* [2020] AATA 4964.

- In August 2022, after three years of delay, the OAIC ruled that an Australian Federal Police letter detailing potential 'improper conduct overseas' by former MP George Christensen was *not* exempt on national security grounds.³⁷

Indeed, in 2017, the Commonwealth Auditor-General noted that the number of exemptions being claimed by all entities across the Commonwealth had increased by 68.4 per cent between 2012 and 2017, with the use of the 'National Security' exemption³⁸ under climbing by almost 250 per cent, and the use of the 'Certain Operations' exemption³⁹ climbing by almost 320 per cent.⁴⁰

A study in systemic failure – the Department of Home Affairs

While the Department of Home Affairs was created in 2017-18, it is a case study in the failure of Australia's FOI regime both in terms of resourcing and disclosure. Despite finalising more requests than it received in 2017-20, it has since consistently been unable to meet its caseload.

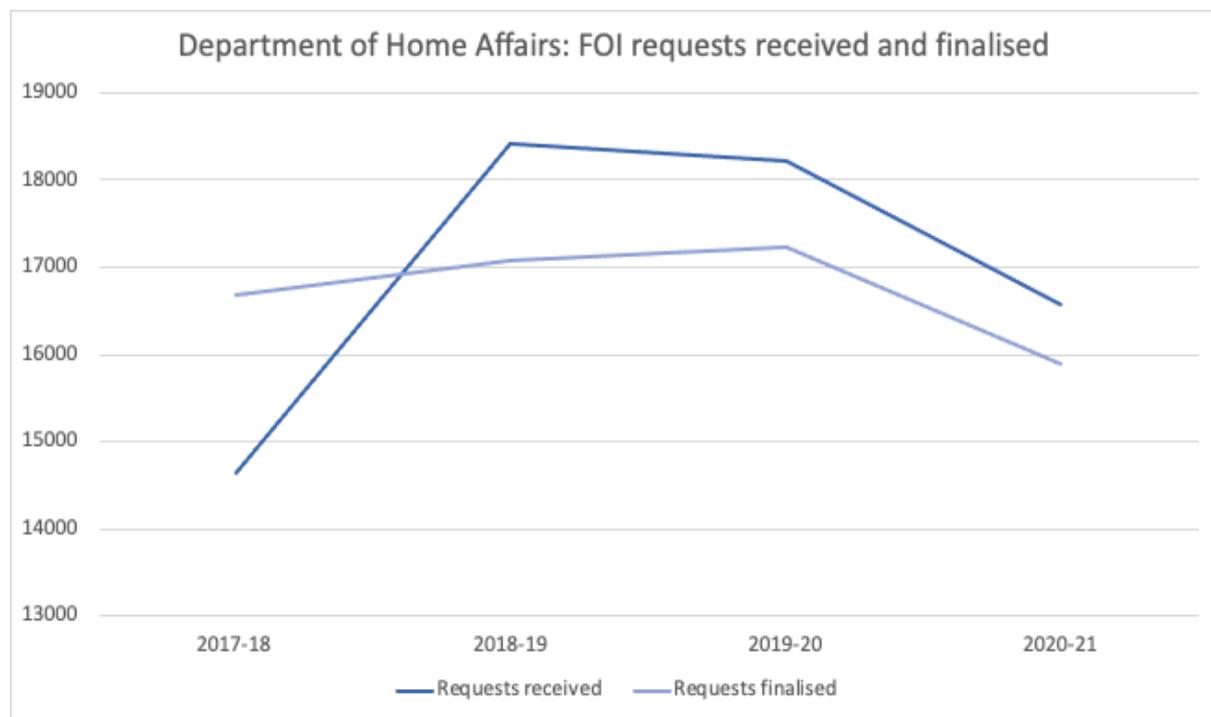


Figure 9: Department of Home Affairs: FOI requests received and finalised⁴¹

While the Department's inability to meet its load may appear innocuous, this fed into a backlog of over 4300 uncompleted requests by 2020-21 and an increasing inability to meet the obligatory statutory timeframe.

³⁷ Anthony Galloway, Jonathan Kearsley and Rob Harris, 'AFP warned George Christensen's Philippines 'activities' put him at risk of compromise', *The Sydney Morning Herald* (online 2 August 2022) <<https://www.smh.com.au/politics/federal/afp-warned-george-christensen-s-philippines-activities-put-him-at-risk-of-compromise-20220802-p5b6kv.html>>.

³⁸ *FOI Act* s 33.

³⁹ *FOI Act* s 47E.

⁴⁰ Australian National Audit Office, *Administration of the Freedom of Information Act 1982* (Report, 19 September 2017) 7.

⁴¹ Department of Home Affairs, Annual Reports 2017-18 – 2021-21.

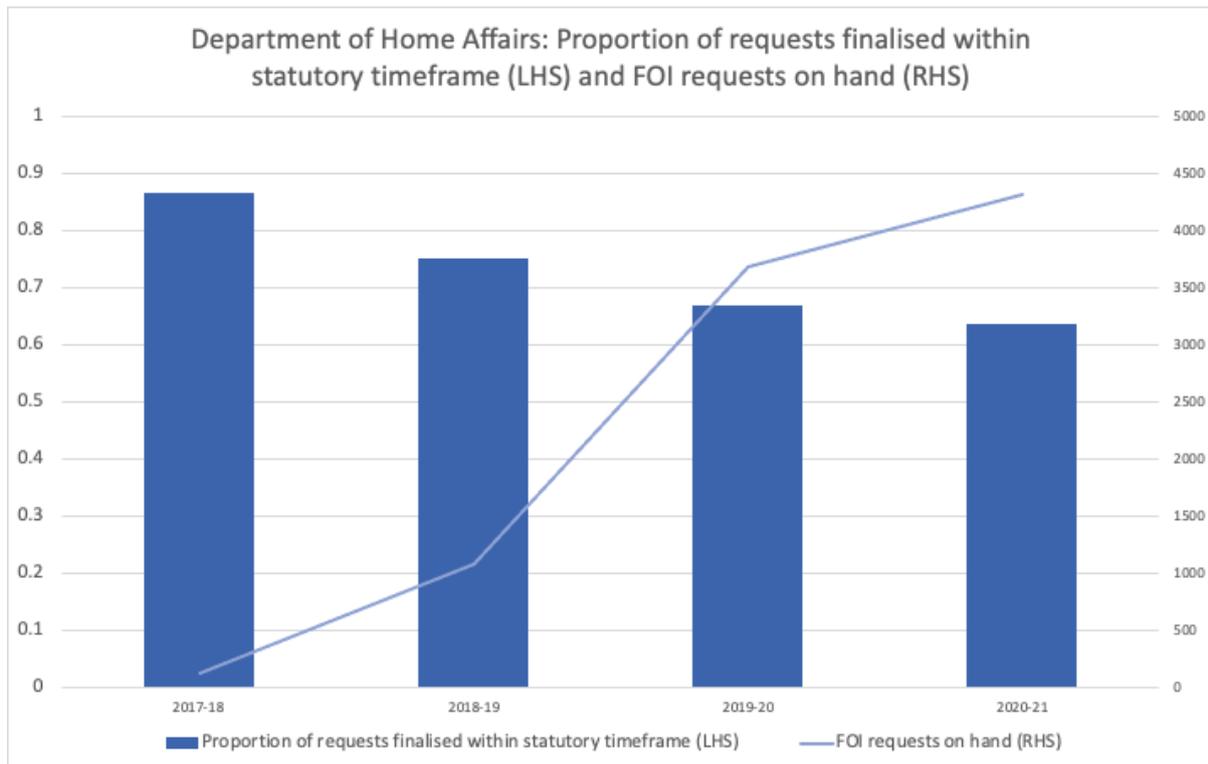


Figure 10: Department of Home Affairs: Proportion of requests finalised within statutory timeframe (LHS) and FOI requests on hand (RHS)⁴²

Throughout this same period, the proportion of claims granted full access fell from 50.7 per cent to 42 per cent, and the proportion outright refused grew from 5.8 per cent to 9.8 per cent.

Indeed, the Department's performance with respect to FOI was so poor that throughout 2020-21 the OAIC conducted a 'Commissioner-initiated investigation', finding that the Department did not have appropriate measures in place to ensure compliance due to 'absence of adequate governance and systems of accountability'.⁴³

Recommendations

The Centre for Public Integrity recommends that reform to the FOI system be pursued as a matter of urgency. We recommend that:

- Ongoing training and oversight by the Office of the Australian Information Commissioner (OAIC) to foster a **pro-disclosure culture**;
- The OAIC be **appropriately resourced** to enable it to reduce current delays and better fulfil its training and oversight mandate;
- The OAIC be empowered to **set a ratio** of FOI officers to FOI applications, and mandate minimum staff numbers within departments;
- **Disciplinary sanction** be available where officers repeatedly make decisions subsequently determined to be contrary to the requirements of the *FOI Act*, as

⁴² See *ibid.*

⁴³ Office of the Australian Information Commissioner, *Annual Report 2020-21* (Report, 23 September 2021) 41.

well as for persons who direct or influence them to make such decisions (with criminal sanctions also available to incentivise compliance);

- A joint cross-party **parliamentary committee** be established in order to provide ongoing oversight and accountability of the integrity of departmental FOI decision-making processes;
- The *FOI Act* be clarified to **prevent a change of Minister** or portfolio title from **invalidating existing FOI applications**;
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About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. Former board members include the Hon Tony Fitzgerald AC QC and the Hon David Ipp AO QC. More information at www.publicintegrity.org.au.