

Senate Inquiry into Freedom of Information

Submission to the Senate Standing Committee on
Legal and Constitutional Affairs

Monday 5 June, 2023

[Public
Interest
Journalism
Initiative]



1 Introduction

The Public Interest Journalism Initiative (PIJI) and the Centre for Advancing Journalism (CAJ), University of Melbourne, welcome the opportunity to make this joint submission to the Senate Standing Committees on Legal and Constitutional Affairs inquiry into the operation of Commonwealth Freedom of Information (FOI) laws.

As an independent think tank and a university centre, PIJI and CAJ's combined interests lie in the health – and long-term sustainability – of public interest journalism and the public benefit that it generates for all.

PIJI and CAJ are platform-neutral and size-neutral with respect to news media production and availability. With no commercial interests, PIJI'S activities focus on optimal fiscal and regulatory measures that will support a diverse news marketplace and enable news media to innovate, grow and serve in its role as a public good for the Australian community.

This submission is structured as follows:

1. Section 1 provides this brief introduction
2. Section 2 responds to inquiry terms of reference
3. Section 3 summarises PIJI and CAJ's key recommendations
4. Section 4 provides further information about PIJI
5. Section 5 provides further information about CAJ

The following comments have been prepared under PIJI's key defining principles: to act in the public interest; to ensure plurality of news production and neutrality of support; and to be independent, practical and evidence-based in consideration of any option.

2 Response to the terms of reference

PIJI and CAJ see freedom of information systems as an essential tool for public interest journalism. They provide an avenue for journalists and individuals to scrutinise and hold public institutions to account.

However, to effectively deliver these public benefits, FOI decisions should be made quickly, and with an emphasis on disclosure. Appeals processes should operate similarly.

This submission addresses these key issues as raised in the terms of reference:

- (b) delays in the review of freedom of information appeals;
- (c) resourcing for responding to freedom of information applications and reviews; and
- (d) the creation of a statutory time frame for completion of reviews.

2.1 Application and appeal delays

Public interest journalism ensures that the community is well informed, holds those in power to account and provides a public record.

PIJI and CAJ's concerns lie where barriers exist that severely limit effective, quality journalism and government accountability. Delays in the FOI application and review process can impact the reporting of matters in the public interest.¹ PIJI and CAJ support an FOI process that enables, rather than prevents, public interest reporting.

Academic research has previously cited lengthy turnaround times as one of the key weaknesses regarding the FOI process.² The Oaic reported that 30 per cent of all FOI requests were determined outside of the 30-day timeframe in the 2021-22 period.³

Under the *Freedom of Information Act 1982* (Cth), an applicant can seek a review of an FOI decision, which is conducted through internal review with the agency or minister, or a review by the Office of the Australian Information Commissioner (OAIC).⁴

The OAIC Annual Report suggests that the office is not able to meet the volume of reviews received. In the 2021-22 period, the OAIC received 63 per cent more (1,995) reviews than in 2020-21 (1,224), however it only finalised 37 per cent more (1,392) than in 2020-21 (1,018), leaving substantially more reviews pending than in previous years.⁵

Further, decisions made by the Information Commissioner can be reviewed by the Administrative Appeals Tribunal (AAT),⁶ which also experiences delays. In 2021-22, 66 FOI

¹ Senate Standing Committees on Environment and Communications. 2021. *Inquiry into Press Freedom: Final Report*. Canberra: Senate Printing Unit.
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Report> p. 26

² Lidberg J. 2016. Information access evolution: assessing Freedom of Information reforms in Australia. *Australian Journalism Review*. 38(1): 73-82.

³ Office of the Australian Information Commissioner. 2022. *Annual Report 2021-2022*. p. 146

⁴ Ibid. p. 151

⁵ Ibid. p. 17.

⁶ Ibid. p. 151

reviews were finalised by the AAT while 95 applications had not yet been finalised.⁷ This was an improvement with an 8 per cent decrease on the number of outstanding applications from the previous year 2020-21.⁸ There is a real risk that these delays will compound.

These delays become problematic when the level of public interest for information relies on the timely release of said information.

Journalists work to time-sensitive deadlines. The quality and robustness of reporting is compromised when journalists cannot access critical information due to administrative delay. As noted by Dr Rebecca Ananian-Welsh and her colleagues from the University of Queensland in their 2021 Press Freedom Inquiry submission, “for news media, where timeliness is crucial, the months it now regularly takes to process even routine requests under FOI and Right to Information (RTI) legislation can have the same effect as denying the information in the first place.”⁹

In the same inquiry, Secretary of the Department of Home Affairs Michael Pezzullo stated that over 50 per cent of his department's FOI requests were not finalised within the 30-day time limit. He said that the number was commensurate with the available resources.¹⁰

PIJI and CAJ believes that shortening delays in FOI application and review processes will enhance public interest reporting.

Recommendation

1. That the necessary resources are provided to the Office of the Australian Information Commissioner to enable timely resolution of applications and appeals.

2.1.1 Statutory time limit

The introduction of a statutory time limit could be productive guidance, but it should be noted that delays in FOI application and review processes occur even where a statutory time limit governs the resolution of requests. The Victorian State government has a statutory time limitation of 30 days on FOI reviews made to the Office of the Victorian Information Commissioner (OVIC). According to their 2021-22 annual report, OVIC completed only 60 per cent of reviews within the 30 days.¹¹ The average time to complete a review was 110 days.

PIJI and CAJ submit that a statutory timeframe alone is unlikely to lead to more efficient outcomes. Instead, it would need to be paired with more efficient review processes, increased OAIC resourcing, and a significant change in the culture of the Australian Public Service (APS) that enshrines FOI as a central component of transparency and accountability.

⁷ Ibid. p. 155

⁸ Ibid. p. 155.

⁹ Senate Standing Committees on Environment and Communications. 2021. p. 26.

¹⁰ Ibid. p. 29.

¹¹ Office of the Victorian Information Commissioner. 2022. *Annual Report 2021-2022*. p.60.

Recommendation

2. Introduce a statutory timeframe but do so alongside more efficient review processes, more resourcing to the Office of the Australia Information Commissioner, and improved FOI culture within the APS.

2.2 Resourcing

The delay and backlog of FOI applications and reviews suggests that FOI teams are under-resourced. PIJI and CAJ note that without properly resourced FOI teams, the release of information in the public interest is substantially reduced.

In their 2021-22 annual report, OVIC outlined six reasons affecting the timeliness of their review process; many of which relate to the available resources:

1. the operating environment of Victorian public sector agencies due to the COVID-19 pandemic and challenges to workforce resources;
2. applicants not responding to, or refusing requests from, OVIC for extensions of time to complete a review;
3. an increase in the number of complaints received by OVIC;
4. where a review application also involves a complaint made under the FOI Act and it is necessary to resolve an associated complaint prior to finalising the review;
5. the complexity and volume of documents subject to review; and
6. the time required to conduct a thorough review and assessment of documents subject to review and to prepare comprehensive reasons for decision.¹²

PIJI and CAJ acknowledge the difficulty in standardising the resourcing of FOI officers and departments across government agencies due to differences in the volume of applications received; the complexity of material for review; and the nuances of engaging with third parties. However, PIJI and CAJ submit that a lack or reduced resources is a trend within FOI units across agencies and departments.

Along with OVIC, the Western Australia's Office of the Information Commissioner's Annual Report for 2021-22 expressed resourcing concerns, with the Commissioner stating that "without an urgent increase in resources for this work those delays cannot be effectively addressed which, in turn, could impact upon the morale and status of my office, support for the oversight functions of Parliament and public confidence in the FOI system."¹³

Similarly, the OAIC noted a sharp increase in reviews of FOI decisions made by agencies and ministers from prior years, with the Commissioner in its 2021-22 Annual Report warning that without additional resources, their office would "continue to face significant delays" in processing review applications.¹⁴

¹² Office of the Victorian Information Commissioner. 2022. *Annual Report 2021-2022*. p. 77.

¹³ Western Australia Office of the Information Commissioner. 2022. *Annual Report 2021-22*. p. 5.

¹⁴ OAIC. 2022. p. 8.

Recommendation

3. That additional resources be committed to FOI agencies and the Information Commissioner.

2.3 Culture

PIJI and CAJ believe that a significant change in the culture of the APS will be required alongside any legislative changes if those reforms are to be effective. Freedom of information is too often seen as an extra task on an already over-loaded to-do list, rather than as a central aspect of accountability. A positive FOI culture within agencies, across FOI teams, as well as within agency leadership can lead to more efficient use of existing resources.

PIJI and CAJ takes this opportunity to draw attention to relevant recommendations made from previous inquiries. The Senate's Inquiry into Press Freedom Final Report recommended that "the Australian Government work with the Office of the Australian Information Commissioner to identify opportunities to promote a culture of transparency consistent with the objectives of the *Freedom of Information Act 1982* among Ministers, Senior Executive Service and other Freedom of Information decision-makers".¹⁵

In a study for OVIC, Associate Professor Johan Lidberg and Dr Erin Bradshaw found that where FOI officers work within agencies with cultures that champion the release of information to the public, less of their time will be spent on internal processes or with staff that aim to restrict information release.¹⁶

In interviews with FOI management and officers,¹⁷ Lidberg found that there was unanimous agreement among interviewees that the role of senior management was "crucial" in creating a "user friendly" and "information access facilitation" FOI culture in government agencies. He identified this as more significant than the political leadership in agencies facilitating such a culture.¹⁸ This is important due to the nature of change of political leaders within agencies and the persistence of best FOI practices.

Lidberg's research also suggests¹⁹ that both FOI and agency staff need additional training and professional development on the FOI Act and best practices. PIJI and CAJ believe that better education on the FOI Act across agencies will also help to promote culture change among staff. FOI officers who are better trained in the FOI Act are more able to challenge the decisions of senior staff members, as well as to respond to FOI requests.

¹⁵ Senate Standing Committees on Environment and Communications. 2021. p. ix.

¹⁶ Lidberg J. 2019. *The culture of administering access to government information and freedom of information in Victoria, part I: pilot study*. <<https://ovic.vic.gov.au/wp-content/uploads/2019/09/Monash-report-FOI-and-Information-Access-Culture-in-Victoria-pilot-study-2019.pdf>>; Lidberg J. and Bradshaw E. 2021. *The culture of administering access to government information and freedom of information in Victoria, part II: final report*. <<https://ovic.vic.gov.au/wp-content/uploads/2021/09/The-Culture-of-Administering-Access-to-Government-Information-and-FOI-in-Victoria-Part-II-Monash-University.pdf>>

¹⁷ Lidberg J. 2019. p. 5.

¹⁸ Lidberg J. and Bradshaw E. 2021. p. 50

¹⁹ Ibid. p. 19

A lack of education among agency staff on the FOI Act meant that members of the public who were seeking information were often unnecessarily referred to FOI officers, even when that information was available publicly, or had been released informally (i.e., outside of the FOI Act).²⁰

Agency staff therefore need to be informed on when information can be released without the involvement of FOI staff resources. This also highlights the importance of streamlining disclosure practices across government agencies and departments.

Where possible, proactive disclosures of information should be made by agencies and departments outside of the FOI Act, freeing up the resources of FOI officers to respond to requests that fall within it. Where pro-disclosure practices are already in place at an agency, staff and FOI officers need to be aware of what information has been released, so that FOI resources are not consumed by pointing to that information.

The storing and presentation of this information should be easily accessible by those seeking it, as additional FOI staff resources are consumed when that information is not publicly discoverable or difficult to find. The public should also be informed about how proactive release of information works, as well as the options available to them apart from FOI requests.

Recommendation

4. Efforts should be taken to provide education and training opportunities for FOI staff, as well as those in government agency management and leadership positions, to promote awareness of the Freedom of Information Act 1982 and proactively foster a positive FOI culture.

²⁰ Lidberg J. 2019. *The Culture of Administering Access To Government Information And Freedom Of Information In Victoria, Pilot Study*. P.14 <<https://ovic.vic.gov.au/wp-content/uploads/2019/09/Monash-report-FOI-and-Information-Access-Culture-in-Victoria-pilot-study-2019.pdf>> p. 14

3 Summary of recommendations

1. That the necessary resources are provided to the Office of the Australian Information Commissioner to enable timely resolution of applications and appeals.
2. Introduce a statutory timeframe but do so alongside more efficient review processes, more resourcing to the Office of the Australia Information Commissioner, and improved FOI culture within the APS.
3. That additional resources be committed to FOI agencies and the Information Commissioner.
4. Efforts should be taken to provide education and training opportunities for FOI staff, as well as those in government agency management and leadership positions, to promote awareness of the Freedom of Information Act 1982 and proactively foster a positive FOI culture.

4 About the Public Interest Journalism Initiative

The Public Interest Journalism Initiative (PIJI) is a specialist think tank advancing a sustainable future for public interest journalism in Australia. Through our research and advocacy, we seek to stimulate public discussion and establish optimal market pre-conditions in investment and regulation that will sustain media diversity and plurality in the long term.

PIJI is a registered charity with the ACNC under the charitable category of ‘advancing education’ (ABN 69 630 740 153). It is a philanthropically funded, non-profit company limited by guarantee governed by a Board of independent directors, advised by an Expert Research Panel and Policy Working Group and regulated by the ACNC, ATO and ASIC.

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5 About the Centre for Advancing Journalism

The Centre for Advancing Journalism at the University of Melbourne exists to foster and encourage journalism that is useful to people in being informed and engaged citizens. We advance journalism through our innovation in teaching, research and engagement. We see opportunities in the power of the new tools for informing and being informed. We are a hub of thinking, conversation and creativity. We embrace the opportunities in change, even as we heed the threats. We will harness the unprecedented potential for a more engaged citizenry.

Our fundamental aim is to advance the practice of journalism at a time of great change. Through the triple helix of teaching, research and engagement, we seek to play a constructive role in the future of news media.

The Centre for Advancing Journalism (CAJ) was established in 2009 within the Faculty of Arts at the University of Melbourne. In 2015, the Centre joined the School of Culture and Communication (SCC).

[Public Interest Journalism Initiative]


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