

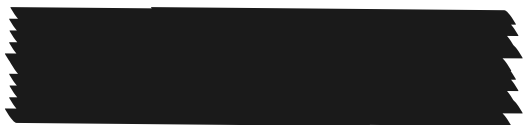


**FOI** 

**LITIGATION** 

**HIT LIST** 

**CHALLENGING  
GOVERNMENT  
SECRECY IN THE  
COURTS**



**GRATA FUND**  
AUGUST 2021

# ACKNOWLEDGEMENTS



We acknowledge the Gadigal and Bedegal people who are the Traditional Owners of the land on which we work. We pay respect to the tens of thousands of years of stories and community life that has thrived in the Eora Nation and to the Elders past, present and emerging. This always was and always will be Aboriginal land.

This publication would not have been possible without the contributions of Grata Fund's interns. We especially thank Vishal Karnamadakala, Isabella Strapp, Maricarmen Wachter and Austin Irwin, who generously provided their assistance for this report.

## IF YOU NEED FOI SUPPORT

If you are an individual, freelance journalist or a member of a not-for-profit organisation and have a current FOI that raises any of the issues identified in the litigation list in this report and you do not have the financial resources to progress your FOI, see page 25 for how to get in touch.

# ABOUT GRATA FUND



Grata Fund is a charity that supports vulnerable or marginalised people and communities to advocate for their legal rights. We do this by removing the financial barriers that prevent test cases in the public interest from going ahead, for people or organisations who do not have the resources to fund litigation themselves. Grata Fund adopts a movement lawyering approach: working with communities, legal experts and advocacy partners on integrated litigation and campaign strategies that tackle injustice while centralising the voices of affected people. Our areas of focus are democracy, human rights and climate change.

For further information about Grata Fund visit [www.gratafund.org.au](http://www.gratafund.org.au).

Grata Fund is grateful to be supported by UNSW Law



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# EXECUTIVE SUMMARY

Freedom of Information requests ('**FOIs**') are a powerful democratic accountability tool. Designed to shine a light into the darkest places of government, FOIs function to protect the most vulnerable, inform us about what is being done in our name and hold governments accountable to the people they serve. In these ways, FOIs should enable the public to participate in and scrutinise government decision-making and allow our democracy to flourish. In the past, FOIs have been used to expose government wrong-doing and protect vulnerable communities from harm, including children held in youth detention and aged and disability care.<sup>1</sup>

Despite its importance, Australia's FOI system is broken. At the federal level, government bodies routinely reject FOI requests from journalists, civil society organisations and the public on spurious grounds. FOI administration is also plagued by unreasonable and unlawful delays. These failures point to a cultural problem within government bodies in approaching FOIs and show that they fail to honour the spirit and intent of FOI laws.<sup>2</sup>

There is limited legal guidance on how to interpret FOI laws. This increases the risk of government bodies misapplying the laws in order to keep information out of the public domain.

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1. See e.g., Mark Willacy, *The Watch House Files*, ABC Investigations (online 13 May 2019) <<https://www.abc.net.au/news/2019-05-13/hold-the-watch-house-files/11046190?nw=0>>; Stephanie Dalzell and Michael McKinnon, 'Children's access to disability funding depending on where they live dubbed 'developmental apartheid'', *ABC News* (online, 13 February 2020) <<https://www.abc.net.au/news/2020-02-13/childrens-access-to-disability-funding-depends-on-their-suburbs/11917466>>.

2. This report relates to the Commonwealth FOI Act and government bodies at the federal level, but there are also laws allowing requests for information in each State and Territory: *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1982* (Vic); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1991* (SA); *Right to Information Act 2009* (Qld); *Government Information (Public Access) Act 2009* (NSW); *Information Act 2002* (NT); and *Freedom of Information Act 2016* (ACT).

Strategic litigation can tackle some of the failings of our FOI system by clarifying FOI law and holding decision-makers accountable to it.

Grata Fund has interviewed journalists, individuals and representatives of civil society organisations, to understand the Federal government's approach when processing FOI requests. We have identified a list of sections and approaches to the release of information under the *Freedom of Information Act 1982* (Cth) ('**FOI Act**') that are poised for challenge in court. These are:

- Inappropriate refusal of FOIs on the basis that the documents are subject to **cabinet confidentiality**
- Refusal of FOIs because of a **change in or resignation of a Minister**
- Unreasonable refusal of FOIs seeking **Text Messages, Whatsapp, Signal or other electronic messaging platforms**
- **Unreasonable delay by the Office of the Australian Information Commissioner (OAIC)** in decision-making on reviews of FOIs
- **Overuse of exemptions** without substantiation by government agencies or Ministers, in particular:
  - **Personal privacy (s 47F)**
  - **Certain operations of agencies (s 47E)**
  - **Enforcement of law and public safety (s 37)**
  - **Deliberative processes (s 47C)**
  - **Confidential information (s 45), and**
  - **Trade secrets and commercially valuable information (s 47).**

Clarification of these provisions of the FOI Act, through the AAT or Federal Court, would create enforceable obligations on government bodies to apply the exemptions consistently with the Court's or Tribunal's rulings. Grata Fund will therefore be seeking to support cases where these exemptions have been applied to test the government's approach in court.

The Courts in our democracy have a unique accountability role and are able to force the FOI system to operate according to the law, ensuring FOIs remain a valuable tool for journalists, civil society investigators, campaigners and communities. They can then expose abuses, corruption and wrongdoing, and protect vulnerable people from harm whilst improving our democracy.

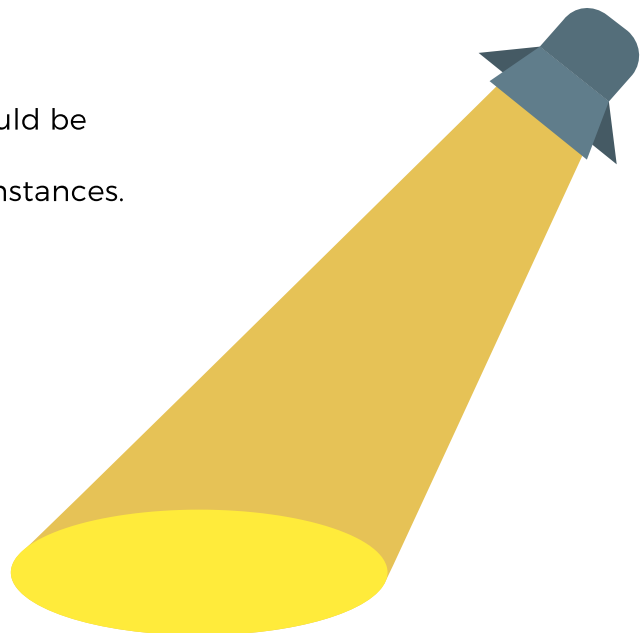


# HOW TO MAKE AN FOI REQUEST AND WHAT IS EXEMPT

FOIs are requests for documents held by government bodies. This includes government departments as well as ministers and their offices.<sup>3</sup> Any person is entitled to lodge an FOI request under the FOI Act.<sup>4</sup> A robust FOI regime plays a critical role in promoting representative democracy. FOIs are intended to be an easy and direct way for citizens to engage in, scrutinise and challenge government decision-making. For this to work, at a minimum:

- 1 FOIs should be easy to make;
- 2 Information should be provided quickly;
- 3 The cost of FOIs to the applicant should be low; and
- 4 Decisions to refuse requests should be made only in very limited circumstances.

In principle, most of these elements are prescribed in the FOI Act.



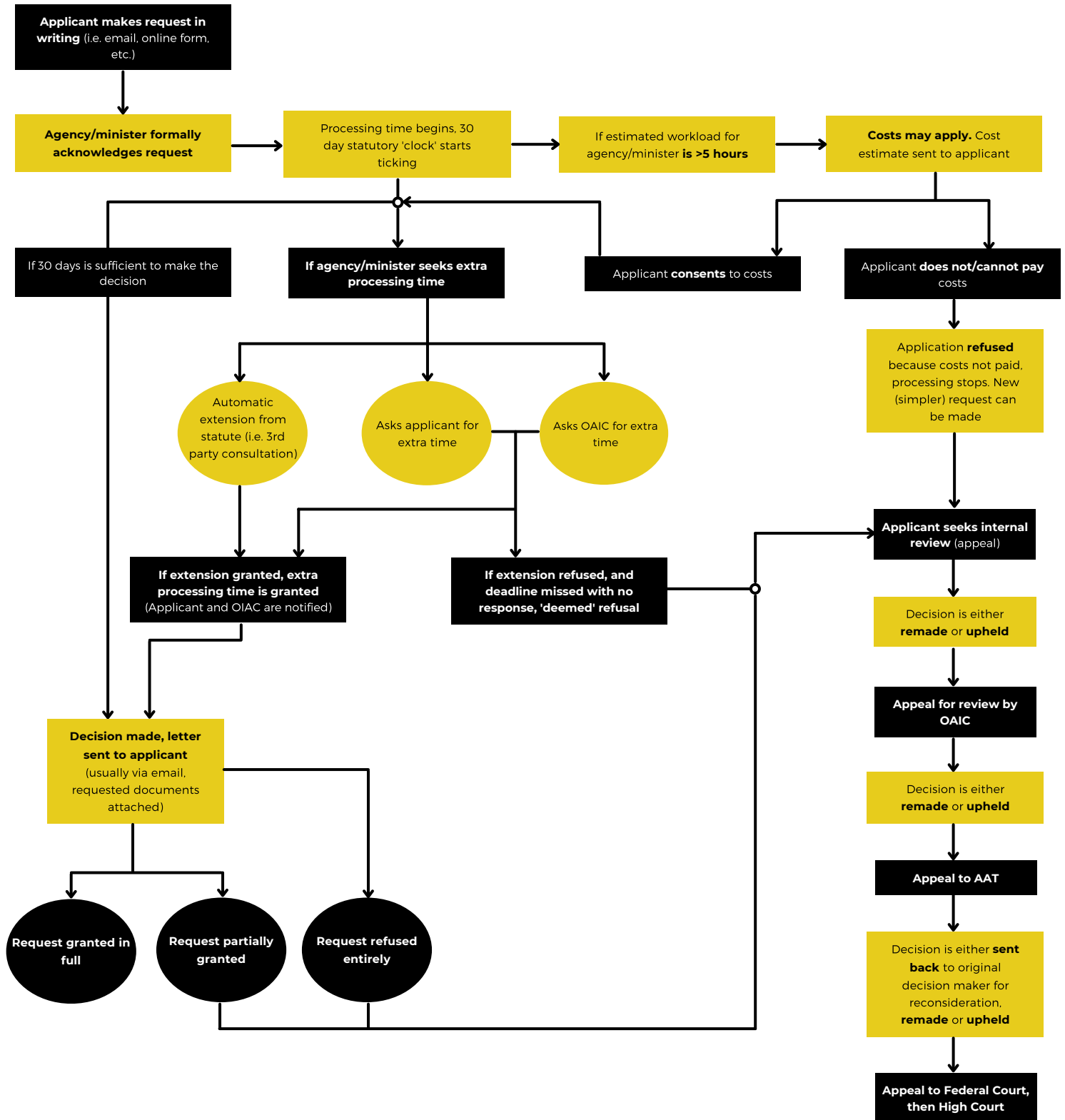
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3. The FOI Act applies to documents held by federal government departments and prescribed authorities, as well as official documents held by Ministers. In this report, we refer to these collectively as “government bodies”. Some agencies are exempt from FOIs, per s 7(1) and Sch 2 of the FOI Act including ASIO, ASIS and the Australian Signals Directorate.

4. *Freedom of Information Act 1982* (Cth) s 11, which applies to information held by Commonwealth government bodies (*‘Freedom of Information Act’*).



# HOW TO MAKE A REQUEST UNDER THE FOI ACT



# EXEMPTIONS TO DISCLOSURE UNDER THE FOI ACT

A federal government body may only refuse to release information requested under the FOI Act if an exemption applies. Some exemptions work as an absolute bar on the release of information, while others are conditional. If a conditional exemption applies, the government body who receives the FOI must still release the information, unless it is satisfied that it is not in the public interest to do so.

EXEMPT DOCUMENTS	FOI Act	CONDITIONAL EXEMPTIONS* *subject to overriding 'public interest' test for disclosure	FOI Act
Documents affecting <b>national security, defence or international relations</b>	<b>s33</b>	Documents that could prejudice <b>Commonwealth-state relations</b> , or confidential documents between governments	<b>s47B</b>
<b>Cabinet documents</b>	<b>s34</b>	Documents revealing the <b>deliberative processes</b> of an agency, Minister or government	<b>s47C</b>
Documents affecting the <b>enforcement of law and the protection of public safety</b>	<b>s37</b>	Documents that could substantially adversely affect the <b>financial or property interests</b> of the Commonwealth or of an agency	<b>s47D</b>
Documents to which <b>secrecy provisions</b> of enactments apply	<b>s38</b>	Documents that could substantially adversely affect the <b>proper and efficient conduct of the operations</b> of an agency	<b>s47E</b>

Documents subject to <b>legal professional privilege</b>	<b>s42</b>	If disclosure of documents would involve the <b>unreasonable disclosure of personal information</b> about a person	<b>s47F</b>
Documents containing material <b>obtained in confidence</b>	<b>s45</b>	Documents containing information about a person's <b>business or professional affairs, or the financial affairs of an organisation</b>	<b>s47G</b>
Parliamentary Budget Office documents	<b>s45A</b>	Current or proposed <b>research</b> conducted by an agency if release would unreasonably expose that agency to disadvantage	<b>s47H</b>
Documents that, if disclosed, would be <b>contempt</b> of Parliament or contempt of court	<b>s46</b>		
Documents <b>disclosing trade secrets</b> or <b>commercially valuable</b> information	<b>s47</b>		
Electoral rolls	<b>s47A</b>		

# SYSTEMIC ISSUES IN FOI ADMINISTRATION

The way that the FOI system operates in practice points to systemic failures in the administration of FOIs by federal government bodies.

## OVERUSE AND UNDER JUSTIFICATION OF EXEMPTIONS

Government bodies' over-reliance on the narrow exemptions in the FOI Act is substantially disrupting the free flow of information about government decision-making. In 2019-2020 government bodies only granted about a quarter (26%) of FOIs in full, granted 34% of FOIs in part and refused 41%.<sup>5</sup> The OAIC recently reported that the most used exemptions are:<sup>6</sup>

EXEMPTION	SECTION	% CLAIMED (WHERE EXEMPTION APPLIED)
Personal Privacy	47F	38%
Certain operations of agencies	47E	20%
Enforcement of law and public safety	37	10%
Deliberative processes	47C	8%

5. Office of the Australian Information Commissioner, *Annual Report 2019-20* (Report, 15 October 2020) 144, table E.4 ('*Annual Report 2019-20*'), excluding FOIs for personal information.

6. Ibid 146.

One indicator that exemptions are being overused is the rate at which access refusal decisions are set aside or varied on review by independent bodies: the OAIC or the Administrative Appeals Tribunal (AAT). In 2019-2020, the OAIC reviewed 50 decisions. It dismissed or varied 52% of decisions (26) and affirmed 48% (24).<sup>7</sup> In 2018-2019, the OAIC Commissioner affirmed 32% of decisions, set aside 62% and varied 7%.<sup>8</sup> Of the 30 reviews finalised by the AAT in 2019-2020, the AAT only affirmed the government body's decision 30% of the time.<sup>9</sup>

## UNREASONABLE DELAY

FOIs ought to be processed within 30 days (FOI Act s 15(5)) but delays commonly plague the FOI process. In 2019-2020, over 10% of FOIs were decided more than 90 days late - a jump of five times the figure from the previous year.<sup>10</sup> The FOI Act does allow for extensions of time in some circumstances, for example for complex requests or when a recipient government body needs to consult third parties.<sup>11</sup> However, despite their intended limited application, some government bodies seem to apply extensions as a matter of course.<sup>12</sup> The government bodies with the highest rates of delay include the Minister for the Environment, the Australian Federal Police, the Minister for Infrastructure, Transport and Regional Development and the Prime Minister. These bodies decided less than 50% of FOI requests within the statutory timeframe in 2019-2020.<sup>13</sup> While resourcing may be an issue contributing to delay, in circumstances where the information sought is time sensitive and relates to current or proposed government policies or the conduct of sitting Ministers, it is also possible that delays are deliberate attempts to stymie efforts to hold decision-makers accountable.

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7. Ibid 155

8. Ibid.

9. Ibid 158.

10. Ibid 149.

11. *Freedom of Information Act* (n 4) ss 15(6) - 15(8), 15AA, 15AB.

12. Although the OAIC reported that in 2019-2020 79% of FOIs were processed within the statutory timeframe, the figure is misleading because the OAIC included FOIs where the government body had obtained an extension of time. That approach fails to adequately address the intention of the FOI Act, which is that requests be processed within 30 days: *Annual Report 2019-20* (n 5) 148; *Freedom of Information Act* (n 4) s 15(5)(b).

13. *Annual Report 2019-20* (n 5) 148.

Grata Fund itself experienced significant delays in the FOIs it submitted. Grata Fund submitted requests to a number of government bodies seeking information about how they processed FOIs. Despite the fact that the information sought was not politically contentious, no third party consultation was required, the requests were limited in scope and no exemptions were applied, none of the requests were returned within the 30 day statutory time limit. The Department of Environment and Energy took **44 days** to provide the information, the Department of Human Services took **45 days**, the Department of the Prime Minister and Cabinet took **59 days** and the Department of Home Affairs (Home Affairs) took **90 days**. Home Affairs did not acknowledge receipt of the FOI nor respond at all within the 30 day timeframe, but did subsequently.

Another issue with delay is the operation of deemed refusals - where a government body fails to respond to an FOI request within the 30 day initial decision period.<sup>14</sup>

Although this means that the applicant can apply for internal review, or apply for review by the OAI, failing to respond at all is a breach of the government body's obligations under the FOI Act<sup>15</sup> and causes unnecessary delay. Liberty Victoria recently commented on this issue in its report on bridging visas. Liberty Victoria submitted FOIs seeking departmental Ministerial briefings and submissions on behalf of people seeking asylum. It received no response at all to some of these requests - constituting a deemed refusal. Liberty Victoria said the consequence of this was that "as a practical matter our efforts to use FOI to understand Departmental processes were stymied".<sup>16</sup>

Further delays are common in applications for review of FOIs by the OAI. This is partly because there is no prescribed timeframe within which the OAI must issue a decision on a review. In 2019-2020, 28% of OAI reviews were not finalised within 12 months.<sup>17</sup> That is an unacceptably long delay. Senator Rex Patrick has said of delays at the OAI that "[t]he loss of an efficient and timely appeals mechanism would allow government departments to deny documents on spurious grounds".<sup>18</sup>

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14. *Freedom of Information Act* (n 4) s 15AC(3)(a)-(b).

15. *Ibid* s 26.

16. Liberty Victoria Rights Advocacy Project, *Bridging the Department's Visa Blindspot* (Report, December 2020) 3.

17. *Annual Report 2019-20* (n 5) 44.

18. Christopher Knaus, 'Australia's freedom of information regime heading for a 'train smash', senator says', *The Guardian* (online, 8 January 2021) <<https://www.theguardian.com/australia-news/2021/jan/08/australias-freedom-of-information-regime-heading-for-a-train-smash-senator-says>>.

Delays in processing FOIs undermine the efficacy of the system. If government decision-making is to be scrutinised and decision-makers are to be held accountable, information must be provided quickly.

## UNREASONABLE EXPENSE

The cost of processing an FOI can prevent an applicant from pursuing the request. At present, processing an FOI request incurs costs, unless the request is for the applicant's personal information. The amount payable for processing an FOI application is calculated by the recipient government body, based on figures set out in regulations.<sup>19</sup> The government body may also require an applicant to pay a 25% deposit of the total estimate prior to processing the request. The costs associated with seeking an FOI can therefore act as a financial barrier, hindering government transparency and accountability.

In 2012, the Office of the Australian Information Commissioner conducted a review of charges under the FOI Act and provided a report with reform recommendations to the Attorney-General.<sup>20</sup> The report recommended that a new charges framework for FOIs should be underpinned by the following principles:<sup>21</sup>

- **Support of a democratic right:** FOI supports transparent, accountable and responsive government. A substantial part of the cost should be borne by the government.
- **Lowest reasonable cost:** No one should be deterred from requesting government information because of costs, particularly personal information that should be provided free of charge. The scale of charges should be directed more at moderating unmanageable requests.
- **Uncomplicated administration:** The charges framework should be clear and easy for agencies to administer and applicants to understand. The options open to an applicant to reduce the charges payable should be readily apparent.
- **Free informal access as a primary avenue:** The legal right of access to documents is important, but should supplement other measures adopted by agencies to publish information and make it available upon request.

19. *Freedom of Information Act* (n 4) s 29.

20. Office of the Australian Information Commissioner, *Review Of Charges Under The Freedom Of Information Act 1982 – Report To The Attorney-General* (Report, 20 April 2012).

21. *Ibid.*

Despite this, charges remain prohibitive for individuals, such as academics and freelance journalists, not-for-profits and under-resourced organisations. High fees may be imposed regardless of the quality or quantity of the documents to which access is successfully granted. For example, the Australian Conservation Foundation ('ACF') was asked to pay \$500 for documents relating to climate change and the government's 2015 intergenerational report. The ACF paid the amount and out of 243 requested pages, it received only two. These pages were partially redacted and mostly irrelevant.<sup>22</sup>

## CULTURE

The issues in FOI administration point to an overarching cultural problem in the way that federal government bodies approach their duties to disclose information. Unfortunately, the practices adopted by some government bodies in responding to FOIs are inconsistent with their obligations under the FOI Act.<sup>23</sup> Rather than assisting the public to obtain information, it appears that some government bodies are actively seeking to resist applications. Speaking to *The Guardian* in 2019, an anonymous whistleblower and former FOI officer in the Department of the Prime Minister and Cabinet reported a "culture of disdain for the rule of law" and suggested that the Department breached FOI laws 50% of the time.<sup>24</sup> An internal investigation upheld the complaint in 5 out of 25 instances.<sup>25</sup> Journalist John Pesutto has said, "There is some irony in this. Freedom of information has become an area where it is [the] Government that can be accused of gaming the system, rather than any member of the public".<sup>26</sup>

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22. Christopher Knaus and Jessica Bassano, 'How a flawed freedom-of-information regime keeps Australians in the dark', *The Guardian* (online, 2 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>>.

23. *Freedom of Information Act* (n 4) s 15.

24. Christopher Knaus, 'Whistleblower hits out at PM's department over 'pervasive and toxic' disregard for law', *The Guardian* (online, 26 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law>>.

25. *Ibid*.

26. John Pesutto, 'FOI: a right to know or just to ask?', *The Age* (online, 27 October 2019) <<https://www.theage.com.au/national/victoria/foi-a-right-to-know-or-just-to-ask-20191025-p534as.html>>.



Another FOI expert, Peter Timmins, has said:

*There's a culture of guardians standing at the gate repelling barbarians who are lined up seeking access to government information ... Champions of open government are few and far between at the political level and in the senior public service ... that permeates down.*<sup>27</sup>

Adding to these concerns, Senator Rex Patrick recently remarked that the Government “tacitly approves, and perhaps even encourages, officials taking a cavalier approach to denying access to information, which then overloads an underfunded information commissioner”.<sup>28</sup>

Given these pervasive and systemic issues, strategic litigation may be the required circuit-breaker to open up the system and allow access to information in the public interest by enforcing the law and holding decision-makers accountable to it.



27. Nigel Gladstone, 'Your Right To Know: Freedom Of Information Costs Blow Out To \$60M', *The Sydney Morning Herald* (online, 25 October 2019) <<https://www.smh.com.au/national/your-right-to-know-freedom-of-information-costs-blow-out-to-60m-20191022-p5333n.html>>.

28. Knaus (n 17).

# STRATEGIC LITIGATION PATHWAYS TO ENSURE FOI COMPLIANCE BY GOVERNMENT

There are a number of strategic litigation pathways that could open up public access to information under the FOI Act. Many of the practices currently applied by government bodies have not been tested by either the AAT or the Federal Court, and the approaches to FOI administration are arguably inconsistent with the objects of the FOI Act. Through legal research and consultation with civil society organisations who regularly make FOIs, Grata Fund has identified a list of sections and approaches to the release of information under the **FOI Act** that are poised for challenge in court. These are:

- 1 Inappropriate refusal of FOIs on the basis that the documents are subject to **cabinet confidentiality**
- 2 Refusal of FOIs because of a **change in or resignation of a Minister**
- 3 Unreasonable refusal of FOIs seeking **Text Messages, Whatsapp, Signal or other electronic messaging platforms**
- 4 **Unreasonable delay by the OAIC** in decision-making on reviews of FOIs
- 5 **Overuse of exemptions** without substantiation by government agencies or Ministers, in particular:
  - Personal privacy (s 47F)
  - Certain operations of agencies (s 47E)
  - Enforcement of law and public safety (s 37)
  - Deliberative processes (s 47C)
  - Confidential information (s 45), and
  - Trade secrets and commercially valuable information (s 47).

# CABINET EXEMPTIONS

Cabinet documents (those created for the dominant purpose of submission to/consideration by Cabinet) are exempt from disclosure under section 34 of the FOI Act (**'Cabinet Exemption'**). While this is, on its face, a relatively confined exemption, its application has been extended in practice, in part because "Cabinet" is not defined in the FOI Act.

One example of this expansion is the application of the Cabinet Exemption by government bodies to documents created for submission to or consideration by the 'National Cabinet'. The National Cabinet was established on 16 March 2020, initially to lead the national response to the COVID-19 pandemic. On 29 May 2020, Prime Minister Scott Morrison announced that the National Cabinet would replace the Council of Australian Governments (**'COAG'**), on a permanent basis. COAG documents were previously subject to FOIs. Under this new formulation, documents relating to ostensibly the same group of decision-makers and deliberations are no longer subject to FOIs.

The assertion by the federal government that Cabinet confidentiality applies to this new 'National Cabinet' inappropriately extends the Cabinet Exemption beyond its ordinary application to the federal Cabinet and its subcommittees. Unlike the new 'National Cabinet', the federal Cabinet is comprised of federal government ministers who are responsible to the Commonwealth Parliament. While decisions are protected by confidentiality, federal Cabinet ministers share collective responsibility before the Commonwealth Parliament. The new 'National Cabinet' includes all state premiers and chief ministers, who are members of nine different parliaments and are not responsible to the Prime Minister. Legal experts have expressed the view publicly that it is wrong to say the 'National Cabinet' is a committee of the Cabinet and disputed the application of the Cabinet Exemption to 'National Cabinet' documents.<sup>29</sup> This view was recently affirmed by the AAT in *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, but the Department may yet lodge an appeal. A similar challenge was filed by the ACF with the assistance of the Grata FOI Project, and is currently before the AAT.<sup>30</sup>

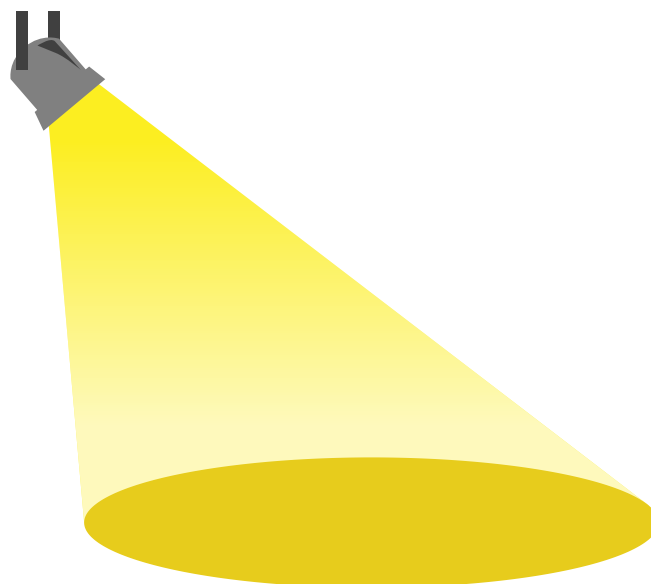
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29. Karen Middleton, 'Challenging the Secrecy of National Cabinet', *The Saturday Paper* (online, October 17-23 2020) <<https://www.thesaturdaypaper.com.au/news/politics/2020/10/17/challenging-the-secrecy-national-cabinet/160285320010576#hrd>>.

30. Amy Remeikis, 'Freedom of information: Coalition's Refusal to Reveal National Cabinet Discussions Challenged' *The Guardian* (online, 9 March 2021)

This issue is important because of the breadth of matters that fall under the National Cabinet's purview. Excluding National Cabinet information from public scrutiny is worrying. National Cabinet's proposed outline and structure includes task forces on Indigenous Affairs and Women's Safety. It also contains reform committees on Health, Housing, and Population and Migration,<sup>31</sup> and the COAG Regulatory Council on Disability has been flagged as an area for consolidation/ reset. If government bodies seek to assert that confidentiality attaches to these organisations as well, that would have a profound effect on the ability of persons directly affected by them to scrutinise decision-making.

Other examples of the overuse of Cabinet confidentiality under the FOI Act include its application to documents submitted to bodies that report to committees that report to Cabinet, and the failure by government to demonstrate that documents were created for the dominant purpose of submission to, or consideration by, Cabinet.



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31. Cheryl Saunders, 'A New Federalism? The Role and Future of the National Cabinet' (Policy Brief No 2, Melbourne School of Government, 1 July 2020).

# CHANGE OR RESIGNATION OF A MINISTER

The Information Commissioner has stated in two decisions<sup>32</sup> and in the OAIC Guidelines<sup>33</sup> that official documents of a former minister are not FOI-able once the minister resigns, even if there is no change in government. This is based on a restrictive reading of s 4(1) of the FOI Act, which defines an official document of a minister to mean “a document that is in the possession of the Minister ... in his or her capacity as a Minister”. That provision has been interpreted as ceasing to apply to an ex-minister, or to one who changes portfolios.<sup>34</sup> This decision leads to the absurd consequence that a minister can escape scrutiny simply by resigning or being shuffled around to a new position. If the Information Commissioner’s decisions are correct, this would mean that the public can only access documents of a minister who resigns or changes portfolios:

- 1 If the outgoing minister makes the documents available to her or his replacement; or
- 2 Through the National Archives, which - unless an outgoing minister agrees otherwise - excludes access for 20-30 years.<sup>35</sup>

This approach creates a significant gap in accountability for acts of a sitting government. It is especially problematic given ministerial reshuffles are increasingly common in contemporary Australian politics. Since the May 2019 federal election, there have been 17 changes in ministers and an additional 8 changes in portfolios.<sup>36</sup> The most recent Cabinet reshuffle in April 2021 implemented changes to the Attorney-General, Minister for Home Affairs, Immigration Minister, Industrial Relations Minister and Minister for Employment - potentially affecting all pending FOIs filed with those offices.

The Information Commissioner’s decision has not been reviewed by the AAT or the Federal Court and could be open to challenge as a misreading of s 4(1) of the FOI Act.

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32. *Philip Morris Ltd and Treasurer* [2013] AICmr 88 ('Phillip'); *Thomas and Prime Minister* [2014] AICmr 18 ('Thomas').

33. Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines Issued By The Australian Information Commissioner under s 93A of The Freedom of Information Act 1982* (2020) 2.52 ('FOI Guidelines').

34. *Philip; Thomas* (n 31).

35. *Archives Act 1983* (Cth) s 3(7).

36. See Annexure A.

# ELECTRONIC COMMUNICATIONS

The prevalence of new forms of electronic communication gives rise to questions about the nature and extent of the duties of government agencies and ministers to facilitate access to information on these channels. The definition of document in section 4 of the FOI Act extends to electronic communications and the OAIC guidelines are clear: “[t]he definition of ‘document’ is broadly stated and is not exhaustive. It includes ... information held on or transmitted between ... mobile phones”.<sup>37</sup> While this ought to remove any doubt that such communications are caught by the FOI Act, it has proved notoriously difficult for applicants to obtain access to messages.

For example, the ACF reported that despite five FOIs being granted in 2020 that sought SMS and or Whatsapp messages, no such messages were provided. They were either deemed not to exist, to be outside the scope of the request, or the government body said the request involved an unreasonable amount of work.<sup>38</sup>

Given the widespread use of Whatsapp, Signal, SMS and other similar platforms by the government,<sup>39</sup> it is likely that important communications are made on them. Depending on why such communications are not provided, this raises several, not yet untested, legal issues:

## **No documents exist - but have they been automatically deleted?**

Platforms like Whatsapp include functions where communications are automatically deleted after a period of time. If communications have been deleted, Ministers may have breached their statutory record-keeping duties.<sup>40</sup>

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37. FOI Guidelines (n 32) 2.30.

38. Australian Conservation Foundation, *Access Denied: How Australia's Freedom of Information Regime is Failing our Environment* (Report, 15 January 21) 31.

39. See, eg, James Massola, 'Malcolm Turnbull and Senior Cabinet Ministers Using Whatsapp could Pose Security Risk: Experts', *The Sydney Morning Herald* (online, 12 October 2016) <<https://www.smh.com.au/politics/federal/malcolm-turnbull-and-senior-cabinet-ministers-using-whatsapp-could-pose-security-risk-experts-20161012-gs0cuj.html>>.

40. Pursuant to the *Archives Act 1983* (Cth) and National Archives General Records Authority No. 38. 2018/00273960.

### Too much work to dig up messages

FOIs can be refused if the work involved in processing the request would substantially and unreasonably divert the resources of the government body, or substantially and unreasonably interfere with the performance of a Minister's functions (section 24AA). This was one reason given by Prime Minister Scott Morrison in refusing to provide access to SMS messages between himself and (then) Drought Envoy Barnaby Joyce, which were alleged to contain Mr Joyce's official reports as Envoy to the Prime Minister.<sup>41</sup> Again, this approach may fall foul of statutory record-keeping obligations. Ministers are required to appropriately store, manage and preserve records to ensure they remain authentic and accessible.<sup>42</sup> Given SMS messages, Whatsapp messages and the like are capable of constituting records subject to archiving requirements, the failure to file and store them appropriately should not be a reason to refuse disclosure under FOI laws.

### Personal electronic devices

Government officials may use personal devices for official communications. The ACF requested Whatsapp messages from Minister Dutton. The response it received was that the Minister did not have Whatsapp installed on his department-issued phone.<sup>43</sup>

The FOI Act applies to the official documents of a Minister, being those in the possession of a Minister that relate to the affairs of an agency or department (s 4). While 'personal' documents are excluded from FOIs, that should not exclude access to communications on personal devices.



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41. Amy Remeikis and Sarah Martin, "PM's office refuses to release drought reports Barnaby Joyce says he sent via text", *The Guardian* (online, 27 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/27/pms-office-refuses-to-release-drought-reports-barnaby-joyce-says-he-sent-via-text>>.

42. National Archives General Records Authority No. 38. 2018/00273960.

43. *Access Denied: How Australia's Freedom of Information Regime is Failing our Environment* (n 37) 31.



# DELAY IN DECISION-MAKING BY THE OAIC

One of the core functions of the OAIC is the capacity for independent review of government decisions to refuse access to information, pursuant to section 54L of the FOI Act. As with all aspects of the FOI regime, speed is critical to the efficacy of this review mechanism. Unfortunately, decision-making by the OAIC is slow. Senator Rex Patrick has noted that as of April 2021 at least 300 applicants to the OAIC for review had waited more than a year for decisions to be made.<sup>44</sup> Such delay could be challenged in the Federal Court as legally unreasonable with regard to the OAIC's statutory functions.

The failure to fund the OAIC adequately in order for it to perform its statutory function of independent review of FOI decisions is also problematic. Three former judges have publicly expressed the view that this failure may be unconstitutional,<sup>45</sup> a proposition which has not been tested.



44. Shannon Jenkins, 'Rex Patrick Threatens to take Information Commissioner to Court Over FOI Speed', *The Mandarin* (online, 26 April 2021) <<https://www.themandarin.com.au/154857-rex-patrick-threatens-to-take-information-commissioner-to-court-over-foi-speed/>>.

45. Richard Mulgan, 'The slow death of the Office of the Australian Information Commissioner', *The Sydney Morning Herald* (online, 26 August 2015) <<https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>>.



# OVERUSE OF EXEMPTIONS

The exemptions that are most frequently applied are personal privacy (s 47F), revealing certain operations of agencies (s 47E), revealing deliberative processes (s 47C) and law enforcement or public safety (s 37).<sup>46</sup> While not applied as frequently, Grata Fund was told by FOI users that the exemptions for confidential information (s 45) or trade secrets and commercially valuable information (s 47) are also being applied to block access to things such as government contracts with private parties, tender processes and details of defence spending.<sup>47</sup>

There is little judicial guidance on the application of these exemptions and the AAT or Federal Court may take a narrower view of their availability than is currently being applied by government agencies, in line with the objects of the FOI Act. It is also possible that the public interest test is not being applied adequately to conditional exemptions. It may also be arguable that agencies are breaching their obligations under the FOI Act in failing to substantiate how or why the exemptions apply.

The application of the above exemptions to particular FOIs is also an area ripe for challenge in the appropriate case.

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46. *Freedom of Information Act* (n 4) ss 37, 47C, 47E-47F.

47. See e.g., Ben Doherty and Christopher Knaus, 'Australia urged to stop selling weapons to countries accused of war crimes', *The Guardian* (online, 15 January 2020) <<https://www.theguardian.com/australia-news/2020/jan/15/australia-urged-to-stop-selling-weapons-to-countries-accused-of-war-crimes>>; Ben Doherty and Christopher Knaus, 'Blanket secrecy' surrounds Australian weapons sales to countries accused of war crimes' *The Guardian* (online, 14 January 2020) <<https://www.theguardian.com/world/2020/jan/14/blanket-secrecy-surrounds-australian-weapons-sales-to-countries-accused-of-war-crimes>>.

# SUPPORT FOR GETTING CASES HEARD

Litigation is expensive. FOI applicants may face an adverse cost risk if they wish to pursue an FOI appeal to the Federal Court. This is the risk that, if they lose, they will have to pay the government's legal fees.

Grata Fund is a charity that supports people and communities to advocate for their legal rights. We do this by removing the financial barriers that prevent test cases in the public interest from going ahead.

If you or your organisation has lodged an FOI that raises one of the issues identified as suitable to be tested by litigation, please [lodge an application for support here](#).

Before you submit your inquiry, please check that it matches the required criteria for consideration of support by Grata Fund.

- Are you an individual, member of a not-for-profit organisation, freelance journalist or journalist working for a small, independent media organisation?
- Does the information you are seeking impact vulnerable or marginalised groups of people (for example refugees and people seeking asylum, people from the LGBTIQ community, people living with disability, women in all their diversity, First Nations communities, culturally and linguistically diverse communities, elderly people or other vulnerable groups)?
- Has your FOI been refused on one of the bases listed on page 17 of this document?
- Has your FOI already been through internal departmental/ ministerial review, or review by the Office of the Information Commissioner?
- Do you have, or have you made serious attempts to get, legal representation?
- How much were you charged by the government body to process your FOI?

# ANNEXURE A

## Changes in Ministers since December 2019

DATE	MINISTRY	REMOVED FROM:	GIVEN TO:
December 2019	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	David Coleman	Alan Tudge
02 February 2020	Minister for Agriculture	Bridget McKenzie	Michael McCormack (Acting)
03 February 2020	Minister for Resources and Northern Australia	Matt Canavan	David Littleproud (Acting)
06 February 2020	Minister for Agriculture	Bridget McKenzie	David Littleproud
	Assistant Trade and Investment Minister	Mark Coulton	Andrew Gee
	Assistant Minister to the Deputy Prime Minister	Andrew Gee	Kevin Hogan
October 2020	Leader of the Government in the Senate and Minister for Finance	Mathias Cormann	Simon Birmingham
	Deputy Leader of the Government in the Senate	Simon Birmingham	Michaelia Cash
December 2020	Trade Minister	Paul Fletcher	Simon Birmingham
Early March 2021	Defence Minister	Linda Reynolds	Marise Payne (Acting)

30 March  
2021

Attorney-General	Christian Porter	Michaelia Cash
Industrial Relations Minister	Christian Porter	Michaelia Cash
Leader of the House	Christian Porter	Peter Dutton
Defence Minister	Linda Reynolds	Peter Dutton
Minister for Home Affairs	Peter Dutton	Karen Andrews
Employment Minister	Michaelia Cash	Stuart Robert
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	Alan Tudge (acting)	Alex Hawke

## Portfolio Changes

DATE	PORTFOLIO	REMOVED FROM	GIVEN TO
06 February 2020	Water Resources	David Littleproud	Keith Pitt
	Agriculture Portfolio	Bridget McKenzie	David Littleproud
	Resources and Northern Australia	Matt Canavan	Keith Pitt
	Regional Health and Regional Communications	*Regional Services portfolio split into Regional Health, Regional Communications, and Regional Education.	Mark Coulton
	Regional Education & Decentralisation	Mark Coulton	Andrew Gee
December 2020	Aged Care	Richard Colbeck	Greg Hunt
	Youth	Richard Colbeck	Alan Tudge
	Urban Infrastructure	Alan Tudge	Paul Fletcher



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