

NOTICE OF FILING

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Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: VID519/2021
File Title: SENATOR REX PATRICK v AUSTRALIAN INFORMATION
COMMISSIONER
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 10/06/2022 4:12:57 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 59
Rule 29.02(1)

Affidavit

No. VID519 of 2021

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law & Human Rights

Office of Senator Rex Patrick

Applicant

Australian Information Commissioner

Respondent

Affidavit of: **Senator Rex Lyall Patrick**

Address: Level 2, 31 Ebenezer Place

Occupation: Senator

Date: 10 June 2022

On 10 June 2022, I, Rex Lyall Patrick of Adelaide say on affirmation:

1. I am the Applicant in this matter. I am a senator for South Australia in the Federal Parliament. I have been a senator for South Australia since November 2017. At the time of affirming this affidavit, I am a senator but, when election polls are declared in the Federal Election which was held in May 2022, it is likely that I will not be returned as a senator.
2. I use the system created by the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to obtain information that assists me to execute the accountability and transparency aspects of my oversight role as a senator and to assist my constituents.
3. I have read "Appendix A" to the Further Amended Originating Application filed in this proceeding on 10 December 2021 and I agree with its contents. It summarises the state of FOI applications (current at 10 December 2021) which I made and which have been referred to the Australian Information Commissioner ("**IC**") for merits review. Nine of those matters have been marked "separate question" and my application on those matters is to be heard and determined separately from any other questions arising in the proceeding. In this affidavit, I will refer to those matters as the "separate question applications".

Filed on behalf of (name & role of party) The Applicant, Senator Rex Patrick

Prepared by (name of person/lawyer) Flavio Verlato

Law firm (if applicable) Flavio Verlato, Barrister & Solicitor

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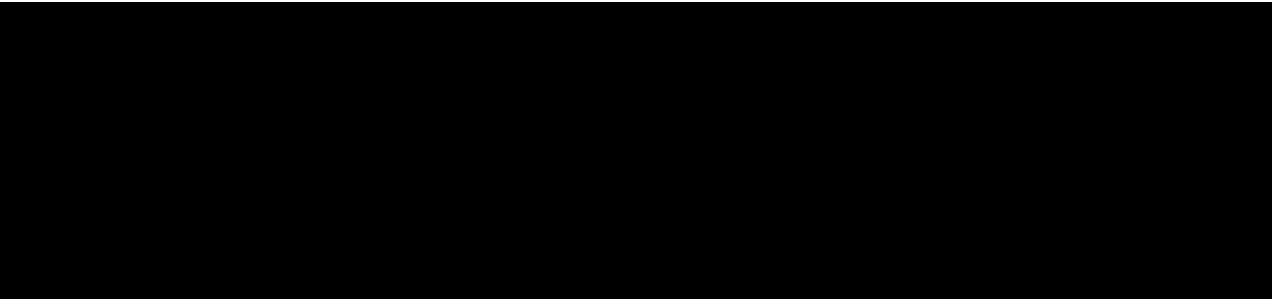
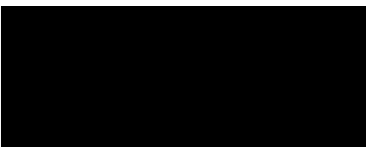
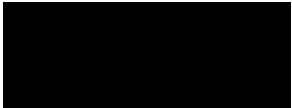
Address for service 22 Sando Avenue Tranmere SA 5073
(include state and postcode)

Purpose of the litigation

4. I filed these proceedings because I believe that the delays which I have experienced with the IC processing my applications are unreasonable and have undermined the legislative objectives for which the FOI legislation was enacted, and the purposes for which I filed each of the FOI applications. If the delays which I have experienced are delays which are not considered unreasonable, then in my opinion, the FOI system is fundamentally broken.
5. At a broad level, a decision on the separate question applications in this proceeding will help to clarify expectations as to the reasonableness of timeframes within which the IC performs his or her function.
6. A decision in this matter is likely to have broad public application given the large number of FOI reviews currently with the IC, and the purpose to which organisations and individuals put information obtained under the FOI process.

Delay and information generally

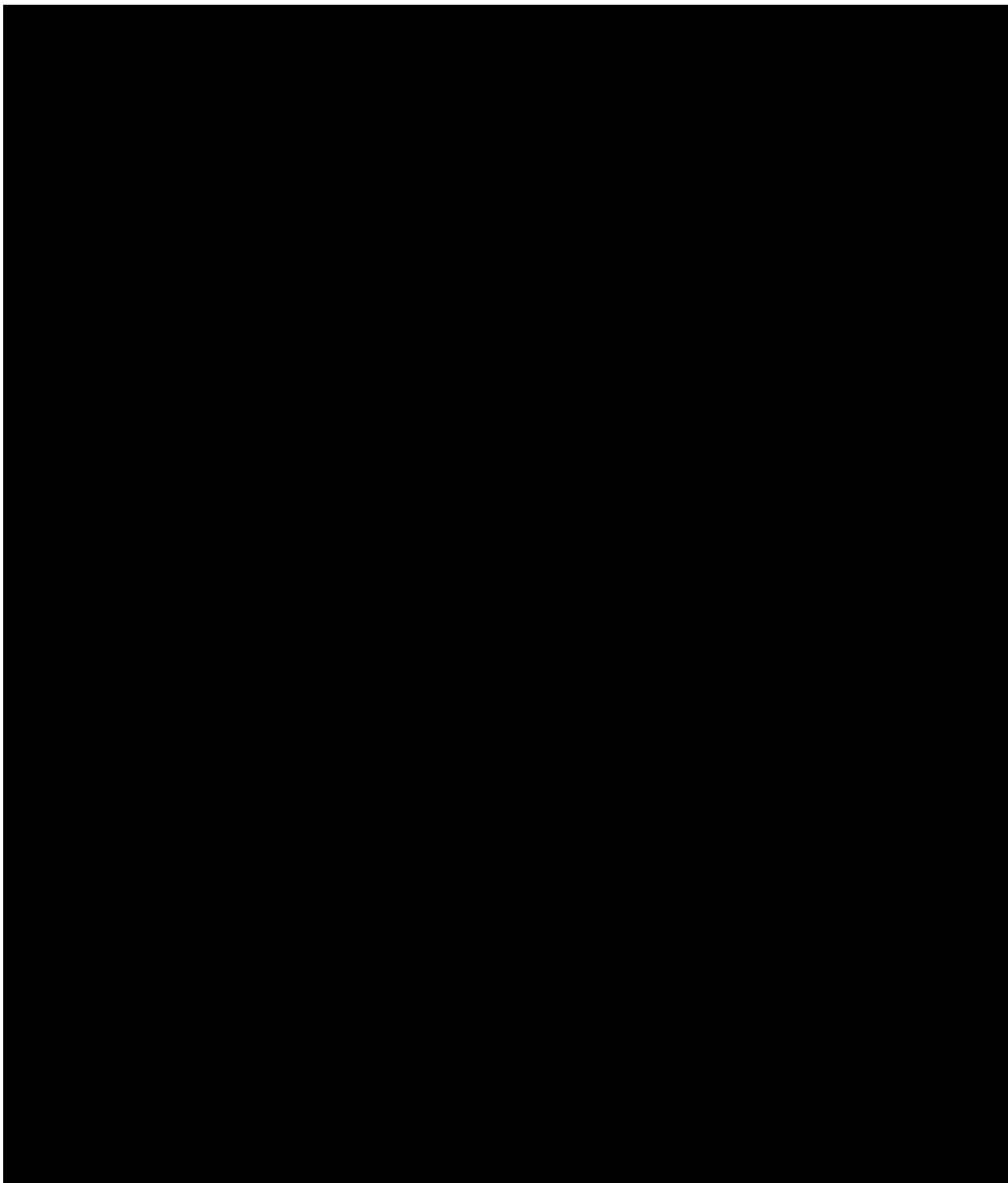
7. The length of time taken by the IC to determine the separate question applications has undermined their utility in contributing to my work and role as a senator and to the public discourse on matters of public policy and governance more generally.

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9. Many different organisations and individual members of the public make applications under the FOI system for a range of different reasons. Information obtained through the FOI process is integral to informed and effective public participation in Government processes, and proper discussion and scrutiny of Government policy and decision making.
 10. For members of the public to participate in Government processes they need to engage in the process in an informed manner from an early point in time, preferably before a course of action is locked in and certainly before any decision is actually made. Engagement can occur in a number of ways, through direct consultation, an organisation/association, lobbyists, a Member of Parliament or the media. A similar situation occurs in relation to scrutiny, discussion, comment and review of Government activities.
 11. The utility and value of information available through the FOI system declines as a function of time, with the decay rapid and complete in some circumstances.
 12. Politics and policy development are dynamic. Information is the currency of power in these domains. Lengthy delay in the granting of access to information serves to undermine the objectives of the FOI Act. Delay is the enemy of access to information, and its effective use and value.
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Effect of delay in deciding my applications to the IC

13. In the absence of any review decision or determination by the IC, I am unable to benefit from a decision to grant further access to documents requested (if such a decision were the outcome of review), or otherwise progress my FOI application through the review processes of the Administrative Appeals Tribunal (**AAT**).
14. IC review is one part of an already lengthy process to obtain information which begins with the lodging of an FOI application, and can end in appeal in the court by either the applicant or the government body which holds the information.
15. If the IC were to make an adverse finding on one of my review applications and I was dissatisfied with that finding, I could apply to the AAT for review of that determination. Alternatively, if the IC were to make a finding under s 54W(b) of the FOI Act that the administration of the FOI Act made it desirable that my FOI application be considered by the AAT, I could proceed to file in the AAT.
16. The applications I have made which are currently with the IC, including the separate question applications, are effectively in limbo because the IC has not made any determination on them. This state of limbo will continue until the IC makes a decision. I can do nothing within the FOI framework to advance or resolve the applications until a decision has been made.
17. Delay within the office of the IC can lead to adverse impacts on the public debate regardless of whether I am ultimately successful in obtaining information under an application. If I am successful in obtaining documents as a result of an IC decision, the delay created by assessment times within the office of the IC results in a delay in me receiving documents to which I am entitled under the FOI legislation. Where an application for review to the IC is unsuccessful, the delay in obtaining a decision from the IC factors into my own decision-making on how and when to engage in some aspects of the public debate.
18. An applicant for review is entitled to a timely outcome, adverse or otherwise.
19. Delays in the IC making a determination or decision on my applications has negative effects on the potential for early public engagement in Government decision making processes.
20. Some of the applications currently with the IC are situations where I sought documents at an early stage in the Government decision-making process, but the Government decision to which the documents were relevant was made by the Government while my FOI application was stalled with the IC. This has resulted in the Government making the decision without the opportunity for properly informed public engagement in the process.
21. In some instances, the delay has extended beyond a timeframe where scrutiny, discussion, comment and review have any real meaning, even if a Government decision has not been made or announced. The public discourse has moved on and other issues and discussions dominate, or officials have moved on to other roles, or Ministers have changed (sometimes more than once) or an election has occurred.
22. The impact of delays in determining my applications to the IC in relation to the continued utility of the information I may be provided and my ability to use the information, and the effect of the delay on the public discourse can be illustrated by reference to the separate question applications.

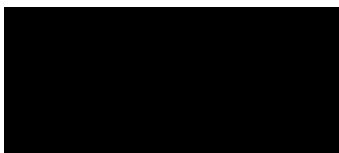
MR19/00010



MR20/00054

31. Matter MR20/00054 is an application made to the IC on 22 January 2020 and relates to an initial FOI application made on 11 September 2019.

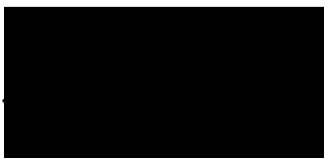
32. This matter relates to a request to the Department of Foreign Affairs and Trade for documents (briefs/cablegrams/correspondence) relating to oil/gas processing options for the Greater Sunrise oil and gas fields that lie between Australia and Timor-Leste.



33. The upstream options for Greater Sunrise include processing in Australia, processing in Timor-Leste and offshore processing. Each option will offer different benefits/costs for the citizens of Timor-Leste and Australia, and the many companies intending to participate in the project. Timely access to these documents would have provided for more informed public debate of these issues.
34. On 19 November 2020 the IC advised me that the Department was intending to make a revised decision. On 7 October 2021 the IC advised me that the Department is yet to provide a revised decision as promised because they were affected by COVID lockdowns in the ACT.
35. On 14 January 2022 the Department revised its decision granting access to a lot of previously redacted information. Frustratingly the information that was no longer considered exempt were documents which were originally prepared for media or media questioning and was therefore information that the Department had been prepared to share with the media, or were documents that were available publicly on the internet which, in my view, the IC could have encouraged the release of much earlier in the matter.
36. The delay in me obtaining a decision on this application from the IC has resulted in me not being able to either obtain documents or consider whether to appeal to the AAT. In the meantime, deliberations on the Greater Sunrise project continue with the public having been shut out of informed discussion on the issue.
37. Because of the manner in which these sorts of negotiations are carried out I am of the view that, if I get access to the information now, because it will be two years late it will not reflect current circumstances and will only be of historical value. I will have to start again, knowing that the same delays may occur with a new request.

MR20/00424

38. MR20/00424 relates to a request to the Department of Industry for the decision brief around the selection of the site for the National Radioactive Waste Management Facility (**NRWMF**), a facility to permanently dispose of low level radioactive waste and temporarily store intermediate level radioactive waste. My initial request for information was made to the Department on 4 February 2020.
39. The selection of Napandee, located in the district Council of Kimba in South Australia, as the site for Australia's NRWMF has been a matter of considerable public controversy and, understandably, of strong interest to a number of my constituents in Kimba and its surrounds.
40. On 13 February 2020, the Government introduced a *National Radioactive Waste Management Amendment (Site Selection, Community Fund and Other Measures) Bill 2020* into the Parliament. The Bill was intended, in part, to specify Napandee as the site of the NRWMF and to enable the acquisition of additional land for the facility.
41. On 21 April 2020, I made an application to the IC for review of a deemed refusal by the Department of my FOI request. The deemed refusal was the result of the Department not making a decision within the timeframe specified in the FOI Act, despite a number of extensions of time.



42. The Bill was debated in the House of Representatives on 11 June 2020 and in the Senate around a year later, on 21 June 2021. I participated in the Senate debate and during the third reading stage moved amendments to the Bill.
43. On passing the Bill, the Senate removed the site selection schedule to the Bill, and the amendment was accepted by the House of Representatives. It therefore became necessary once again for the Minister to make a statutory decision on site selection.
44. The Bill was finally passed in both houses on 22 June 2021 and received assent on 29 June 2021 to become Act No. 59 of 2021.
45. On 11 August 2021, the Minister announced that he had made a decision to issue notices of intention to declare Napandee as the proposed site for the NRWFMF and then on 29 November 2021 the Minister declared part of the land at Napandee as the site.
46. The delay in resolution of my application to the IC has denied me, my constituents and the public more generally (whether in support or in opposition of the Minister's decision) the opportunity to engage in fully informed debate on the appropriateness of locating the NRWFMF at Napandee. Further, I was not in a position to consider information which may yet be obtained through the FOI process throughout the passage of the Bill through the Parliament.
47. On 12 January 2021 I received correspondence from the IC stating that I would be contacted in relation to next steps in the matter.
48. Despite around 18 months passing since the IC advised me that I would be contacted in relation to next steps, I am yet to be informed as to what those steps are and have not received any further communication about my application or resolution of it.

MR20/00544



MR20/00613

60. Matter MR20/00613 is an application made to the IC on 26 June 2020 and relates to an initial FOI application made on 23 May 2020.

61. The application was made to the Treasury and sought access to 11 modelling assessments on the economic impact of COVID-19 over a series of dates ranging from February 2020 to April 2020. The modelling was prepared by the Treasury.

62. I sought access to the modelling to assist me as a Senator in voting on legislated response packages to deal with the pandemic and to assist in the conduct of oversight of the Government in respect of its pandemic response.

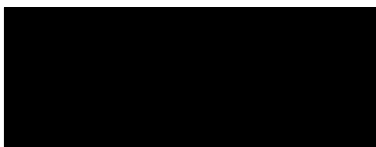

63. Submissions were completed in mid-2020 and the last communication from the IC in relation to this review was in January 2021 wherein I was advised the IC would contact me in relation to the next steps in the matter.

64. If my application to the IC had been resolved in a timely manner, the information would have remained of some utility but it is of little use now. The pandemic response is for all intents and purposes over and there has been a change of Government. As such the release of these documents now will not fulfil the intended purpose for which they were requested.

MR20/00760

65. Matter MR20/00760 is an application made to the IC on 6 August 2020 and relates to an initial FOI application made on 24 April 2020.
66. The application sought access to Snowy Hydro 2.0 Australian Industry Participation Plans and all associated Australian Industry Participation Plan reports, the project master schedule as at contract execution, the current project master schedule, and the milestone payment plan.
67. The sole purpose of the requested information was to assist me as a Senator to understand what Australian Industry involvement there would be in Snowy Hydro 2.0 and to enable me to monitor the progression of the project by way of reference to the original schedule and milestone payment plan.
68. As a result of the IC review delays, the release of this information will have little use to me now that it is unlikely I will be returned to the Senate. Even if I am returned to the Senate, the delay in the provision of the requested information will have less utility noting the age of the information and the projected completion of the project in 2025.
69. The last communication from the IC in relation to this review was in January 2021 where I was advised the IC would contact me in relation to the next steps in the matter.

MR20/00863

70. Matter MR20/00863 is an application made to the IC on 14 September 2020 and relates to an initial FOI application made on 02 July 2020. The application was in relation to a deemed refusal. From material filed by the IC in this proceeding, I understand that the Department provided its decision on my application on 28 September 2020.
71. The application relates to the National Radioactive Waste Management Facility mentioned in matter MR20/00424 above. After the Government introduced a *National Radioactive Waste Management Amendment (Site Selection, Community Fund and Other Measures) Bill 2020* into the Parliament on 13 February 2020 the Senate conducted an inquiry into the Bill, as the Senate often does when there is some controversy or complexity attached to proposed legislation.
72. My request sought access to NRWMF related documents within a relevant date range that were in the possession of the NRWMF Taskforce that made mention of the words "Judicial review", "ADJR", "AD(JR)" or "Administrative Decisions (Judicial Review) Act 1977". The request was to assist me and my Parliamentary colleagues confirm or reject our motive suspicions.
73. I made my request on this basis because I suspected that the motive for the Bill was to deny parties unhappy with the site selection the opportunity to seek judicial review of the Minister's site selection decision. A site selection made by the Parliament is not subject to judicial review other than for constitutionality.
74. When the Senate debated the Bill on 21 June 2021 it removed the site selection schedule to the Bill. It therefore became necessary once again for the Minister to make a statutory decision on site selection.
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75. The delay caused by the IC in the time taken to process my application denied me access to information relevant to my legislative role. It has also denied my Kimba and Eyre Peninsula constituents access to information that might otherwise have informed them on the conduct of their national Government.
76. As recently as the 08 June 2022 the respondent in the IC review revised the decision under review and made available to me a substantially un-redacted version of 104 pages of document 2 in the schedule of documents. Prior to that point only one page of document 2 had been released to me.

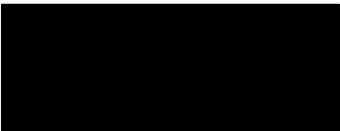
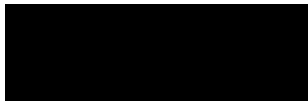
MR20/00922

77. Matter MR20/00922 is an application made to the IC on 24 September 2020 and relates to an initial FOI application made on 25 August 2020.
78. The application was made to the Department of Health seeking access to all inputs and/or records of deliberations of the meetings of the Australian Health Protection Principal Committee since the 29 May 2020 that went to the topic of State border closures.
79. The request for access was relevant to public debate over border closures that was taking place in the early stages of the COVID-19 pandemic. Whilst the release of the requested documents may fulfil some academic or historical interest, the IC's delay in dealing with the review have rendered the utility of the documents useless for the purpose they were sought.
80. I have received no communication from the IC in relation to this application since an email received by my office on 26 October 2020 wherein I was advised the following:

The next steps

At this stage, your matter is awaiting further consideration by a review officer. Due to the number of IC review applications on hand, this may take up to 12 months. Once allocated, the review officer will review any documentation or submissions provided by the Department in support of its decision of 22 September 2020. The review officer will then contact you to advise you of their view on the next appropriate steps in the matter.

MR20/01189

81. Matter MR20/01189 is an application made to the IC on 30 November 2020 and relates to an initial FOI application made on 21 October 2020.
82. The application was made to the Department of Prime Minister and Cabinet seeking access to current official directions, guidelines, advice or templates used or relied upon by officers of the Department of Prime Minister and Cabinet engaged in drafting submissions, memoranda and/or other papers for Cabinet.
83. The request was initiated to assist me in understanding Cabinet processes noting I make FOI requests for documents which are often refused access on the basis that they are Cabinet documents for the purposes of s34 of the FOI Act. Section 34(1)(a)(ii) provides an exemption where a document was brought into existence for the dominant purpose of submission for consideration by the Cabinet. An understanding of the commissioning process, and when, how and where dominant purpose was recorded in the process is relevant to an understanding of the exemption.
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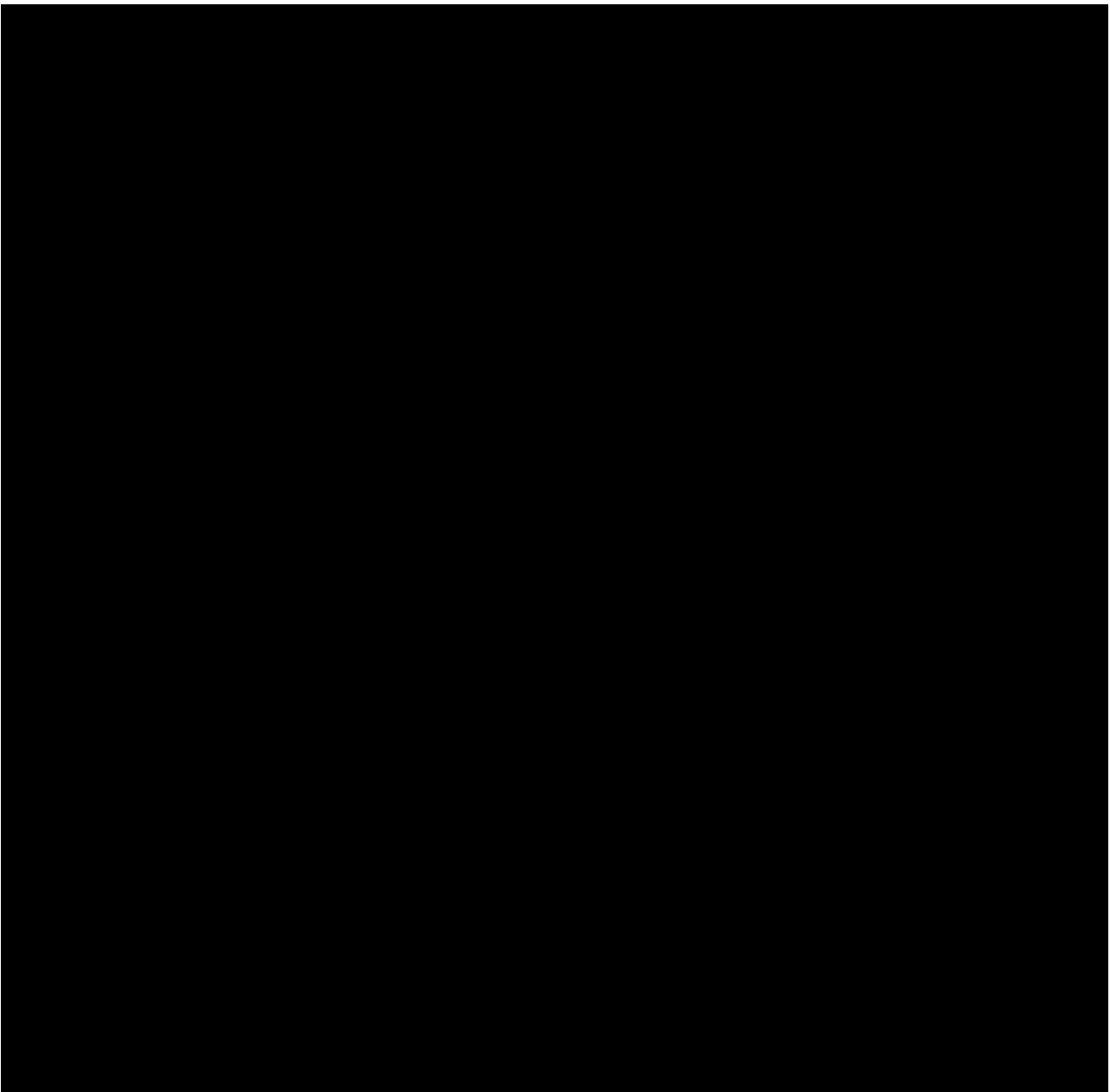
84. The failure of the IC to advance this review in a timely manner has potentially left me less informed in relation to existing reviews and future requests for access to Cabinet related documents. If ultimately an adverse decision is made, I will have been delayed in commencing proceedings for review in the AAT.

85. I have received no communication from the IC in relation to this application since an email received by my office on 3 May 2021 wherein I was advised the following:

The next steps

At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by the Department in support of its decision of 27 November 2020. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.

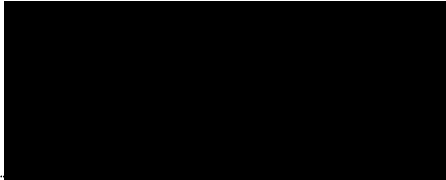
Experience with the SA Ombudsman



Summary

91. I believe that the proper functioning of the FOI system is important to the promotion of Australia's representative democracy. The delays experienced by applicants for IC review in obtaining resolution of their applications adversely affects public participation in Government processes, and is contrary to principles of increased scrutiny, discussion, comment and review of Government activities which is an objective of the FOI system.

Sworn / Affirmed by the deponent)
at Mount Gambier)
in SA)
on 10 June 2022)
Before me:)



Signature of deponent



Signature of witness

MAX JOHN WILSON

MAX JOHN WILSON
A Commissioner for taking Affidavits
in the Supreme Court of State of South Australia P14256