

## NOTICE OF FILING

### Details of Filing

Document Lodged: Concise Statement  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
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File Number: VID519/2021  
File Title: REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Registrar

### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



## Second Further Amended Concise Statement

No. VID519/2021

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law & Human Rights

### **Rex Patrick**

Applicant

### **Australian Information Commissioner**

Respondent

### **Important facts giving rise to the claim**

1. ~~Since~~ From 17 November 2017 ~~and to the present day~~ 30 June 2022, the Applicant ~~has been~~ was a Senator for South Australia in the Federal Parliament. During that time the ~~The~~ Applicant makes made requests under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to obtain information which to assists him to execute the accountability and transparency aspects of his oversight role as a Senator, and to assist his constituents.
2. The FOI Act provides a process whereby a request may be made for access to certain types of government held information (see Part III of the FOI Act). Section 11 of the FOI Act provides a legally enforceable right of access to certain documents held by the Government.
3. The right of access to documents is provided to achieve the objectives set out in s 3 of the FOI Act which include:
  - a. the promotion of Australia's representative democracy through increased public participation in Government processes, better-informed decision-making, and increased scrutiny, discussion, comment and review of the Government's activities,
  - b. management of government information for public purposes and as a national resource, and
  - c. the facilitation and promotion of public access to information promptly and at the lowest reasonable cost.
4. Where a person has made a request for documents and the government entity which holds the documents:
  - a. makes a decision on the request which the person making the request is dissatisfied with,or

Filed on behalf of (name & role of party)

Rex Patrick

Prepared by (name of person/lawyer)

Flavio Verlato

Law firm (if applicable)

Tel 0417 852 676

Fax

Email fverlato@ozemail.com.au

**Address for service**

22 Sando Avenue Tranmere SA 5073

(include state and postcode)

- b. fails to make a decision within the statutory timeframe (30 days subject to certain exemptions),

the person who made the request may apply to the Respondent, the Australian Information Commissioner (IC) for review of the decision (see Part VII of the FOI Act). Time limits apply (generally 60 days) to the filing of an application for IC review. No express time limit applies to the IC to determine an application for IC review.

5. Where a relevant Department or Agency has decided a request, but a person is dissatisfied with the decision, the person may apply for an internal review (see Part IV of the FOI Act). The Department or Agency must make a decision on internal review within 30 days, unless an application for further time has been granted by the IC. It is not mandatory for a person to seek internal review prior to making an application for an IC review. If a person is dissatisfied with a decision on internal review, they may make an application for IC review.
6. At the commencement of this proceeding, ~~T~~the Applicant currently has had 232 applications under the FOI Act which were the subject of refusals or partial access decisions by the relevant government Department, and upon which the Applicant sought IC Review but has had not received a decision from the Respondent. Of those 232 applications, at 1 September 2021:
  - a. two have had been with the IC for more than two years
  - b. twelve have had been with the IC for more than a year,
  - c. a further five have had been with the IC for more than six months; and
  - d. three have had been with the IC for less than 6 months.
7. A table marked “**Appendix A**” is attached to the Second Further Amended Originating Application and sets out a summary of the 1923 applications for IC Review. At 30 September 2022, the Respondent was undertaking an IC Review pursuant to Division 6 of Part VII of the FOI Act in relation to each of the IC Review applications (except those marked “application determined”). ~~, 20 of which were have been outstanding for six months or more (at 1 September 2021). (Long Term Outstanding IC Review Applications). On 19 October 2021, the Respondent notified the Applicant that it had made a decision in relation to one of the outstanding applications (MR20/00291).~~
8. ~~On 18 August 2021, the Applicant received an email sent on behalf of the Respondent relating to an IC review sought by the Applicant on 21 June 2021 (MR21/00551). The review is of a decision of the Department of Health made on 12 May 2021. Under the heading “next steps”, the following was stated:  
  
*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.*~~

Emails containing the same statement were also received in relation to MR21/00340 and MR21/00422 on 18 August 2021.

## **Relief sought**

- ~~9. Pursuant to rule 40.51 of the *Federal Court Rules 2011* (Cth), an interlocutory order that the maximum costs as between party and party that may be recovered in the proceeding in relation to the trial of the applications marked “separate question” in **Appendix A to the Further Amended Originating Application** is \$10 an amount to be determined by the court.~~
1. A declaratory order pursuant to s 16(3)(b) of the *Administrative Decision (Judicial Review) Act 1977* (Cth) (**ADJR**) that in respect of each IC Review Application referred to in Appendix A to the Second Further Amended Originating Application (**Current IC Review Applications**), the Respondent has a duty, pursuant to section 55(4)(c) and s 55K(1) of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to conduct a review of each Current IC Review Application by making a decision and has failed to do so such that each decision is attended by unreasonable delay.
2. Further or alternatively to paragraph 1 herein, an order pursuant to s 16(3)(a) or 16(3)(c) of the ADJR that the Respondent make a decision in respect of each Current IC Review Application according to law and do so by a time and a date fixed by the Court.
3. Alternatively to paragraphs 1 and 2 herein, a declaration pursuant to s 16(2)(a) of the ADJR that in respect of each Current IC Review Application the Respondent has engaged and is engaging in conduct for the purpose of making a decision to which section 55K(1) of the *Freedom of Information Act 1982* (Cth) applies that is improper, in that it results in an exercise of the review powers conferred by Division 5 of Part VII of the FOI Act and an exercise of the decision power contained in section 55K(1) in a way that is uncertain.
4. Further or alternatively to paragraph 3 herein, an order pursuant to s 16(2)(b) of the ADJR that the Respondent:
  - (a) refrain from conduct in respect of the conduct of each Current IC Review Application that makes no decision with respect to any of them; and
  - (b) make a decision in respect of each application by a time and date fixed by the Court
5. Such other or further relief that this Court may consider appropriate.
6. On 16 March 2022, the Court made an order pursuant to rule 40.51 of the *Federal Court Rules 2011* (Cth), that the maximum costs as between party and party that may be recovered in the proceeding in relation to the trial of the applications marked “separate question” in **Appendix A to the Further Amended Originating Application** is \$80,000.

10. Pursuant to s 16(3)(a) of the *Administrative Decision (Judicial Review) Act 1977 (Cth)* (**ADJR**), orders that the Respondent make a decision on each of the Long Term Outstanding IC Review Applications which were lodged with the respondent 6 months or more prior to 1 September 2021 (see Appendix A to Amended Originating Application) in Appendix A to the Further Amended Originating Application which have not been decided at the date of the order within 30 days, or such alternate timeframe as the court deems appropriate.
11. Further and in the alternative, pursuant to s 16(3)(b) of the Administrative Decision (Judicial Review) Act 1977 (Cth) (ADJR), an order declaring that the delay in the Respondent processing the IC Review Applications which were lodged 6 months or more prior to 1 September 2021 (see Appendix A to Amended Originating Application) is contrary to the interests of the administration of the Freedom of Information Act 1982 (Cth). In the alternative, pursuant to s 16(3)(c) of the Administrative Decision (Judicial Review) Act 1977 (Cth) (ADJR), orders directing the Respondent to determine the IC Review Applications in Appendix A to the Further Amended Originating Application which have not been decided at the date of the order without further unreasonable delay.
12. Such further or other order as the court deems appropriate. Further, pursuant to s 16(3)(b) of the Administrative Decision (Judicial Review) Act 1977 (Cth) (ADJR), an order declaring that the delay in the Respondent considering each of the IC Review Applications which were lodged less than 6 months prior to 1 September 2021 (see Appendix A to Amended Originating Application) is contract to the interests of the administration of the Freedom of Information Act 1982 (Cth).

#### Primary legal grounds for relief sought

13. Sections 55(4)(c) and 55K(1) of the FOI Act creates a duty in the Respondent to decide an application for IC review by conducting a “timely” IC Review which culminates in a decision under s 55K(1) and absent an intervening method of disposal which permits the IC review to be discontinued prior to the making of a decision under s 55K(1) either:
- a. by exercise of the discretion in s 54W not to continue the review, or
  - b. because the applicant has withdrawn the application under s 54R, or
  - c. because the parties have reached agreement and the Respondent is satisfied that a decision may be made in accordance with s 55F(2)), .
14. Alternatively, the duty arises by implication as a consequence of the powers conferred upon the Respondent being conferred for the purpose of achieving the objectives of s 3 of the FOI Act, there being a legally enforceable right to obtain access to information in s 11(1), together with the stepped process of IC Review encompassed by Divisions 5, 6, and 7 of Part VII of the FOI Act which process assumes that, upon a decision being made to undertake an IC Review,

the application for IC review will be decided under s 55K(1), unless an intervening method of disposal which permits the IC review to be discontinued arises.

15. By implication, the Respondent must exercise ~~that the~~ duty within a reasonable time. In failing to make a decision on the ~~Long Term Outstanding~~ Current IC Review Applications, the Respondent has failed to decide the applications within a reasonable time.
16. Section 7(1) of the ADJR provides for a person aggrieved by a failure to make a decision to apply to the court for review in respect of such a failure on grounds that there has been an unreasonable delay in making the decision. The Applicant is a person aggrieved for the purposes of s 7(1), and there has been an unreasonable delay by the Respondent in deciding each of the ~~Long Term Outstanding~~ Current IC Review Applications ~~in Appendix A to the Further Amended Originating Application.~~
17. ~~Paragraph 15 not used. Further and in the alternative, the failure of the Respondent to provide a decision on each of the Long Term Outstanding IC Review Applications is contrary to the interests of the administration of the FOI Act and it is open for the Respondent to exercise its discretion under s 54W of the FOI Act. Within the meaning of s 6(1) of the ADJR,~~
  - a. the Applicant is a person aggrieved and
  - b. the Respondent has engaged and is engaging in conduct for the purpose of making a decision to which section 55K(1) of the FOI Act applies in relation to each of the Current IC Review Applications.
18. Pursuant to s 6(1)(e) and 6(2)(h) the conduct of the Respondent is improper because the exercise of the review powers conferred by Division 5 of Part VII of the FOI Act and the exercise of the decision power contained in section 55K(1) is uncertain in that, having determined to conduct an IC Review on each of the applications, the point in time at which the IC Review will have been undertaken for the purposes of s 55K(1) is vague and indeterminate and, further, may never eventuate.
- ~~16. Paragraph 16 not used. Further, the delay in considering each of the three IC Review Applications which were lodged less than 6 months prior to 1 September 2021 is contrary to the interests of the administration of the FOI Act and it is open for the Respondent to exercise its discretion under s 54W of the FOI Act.~~
19. Each of the ~~Long Term Outstanding~~ Current IC Review Applications ~~in Appendix A to the Second Further Amended Originating Application~~ relate to FOI requests made by the Applicant in his capacity as a Senator for South Australia, and in the interests of his constituents. They are not made for any private purpose.
20. There is a public interest in the objectives of the FOI Act being achieved. This requires that information which can be provided in accordance with the Act is provided in a timely manner.

21. The utility and value of information sought under an FOI request generally declines over time, with the decay being rapid in some circumstances. Participation in Government decision-making processes is most effective at an early stage in the process when issues can be raised and discussed prior to the Government making its decision on a matter.

#### Harm suffered

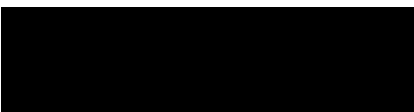
22. As a result of the Respondent's failure to decide the ~~Long Term Outstanding~~ Current IC Review Applications, or in the alternative, the Respondent's improper exercise of the powers conferred upon it, or exercise its discretion pursuant to s 54W(b) of the FOI Act within a reasonable time, the Applicant:

- a. has been prevented from appropriately engaging in scrutiny, discussion, comment and review of the Government's activities relating to the various requests for information, and
- b. is unable to progress each FOI request because, in the absence of a decision by the Respondent pursuant to s 55K(1) or s 54W(b), he is unable to either obtain ~~the relevant~~ documents which he has a legally enforceable right to access, or lodge an application for merits review by the Administrative Appeals Tribunal under paragraph s57A(1)(a) of the FOI Act.

#### Certificate of lawyer

I ~~Stella Majury~~ Flavio Verlato certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~9 September 2021~~ ~~11 October 2021~~ ~~10 December 2021~~ 30 September 2022



Signed by ~~Stella Majury~~ Flavio Verlato

Lawyer for the Applicant

**APPENDIX A to Second Further Amended Originating Application**

Rex Patrick v Australian Information Commissioner

VID519/2021

Matters not highlighted in grey are those marked "separate question"  
(refer to orders of Wheelahan J made 8 December 2021)

No.	Request no.	Request date	Request to	Request description	Decision	IC review application	Days since application (to 30/9/2022)	Weeks since application (to 30/9/2022)	Days to a 55K decision	
1	MR19/00010	22/10/2018	Department of Defence	Future Submarine Project Integrated Master Schedule and Project Earned Value Management Reports	21/12/2018	21/12/2018			1099	separate question
2	MR19/00437	19/05/2019	Department of Defence	Incoming Government briefs related to the naval shipbuilding and naval sustainment program	21/06/2019	28/09/2019			1007	
3	MR20/00054	11/09/2019	Department of Foreign Affairs and Trade	Oil and gas processing options for the Greater Sunrise oil and gas fields	18/12/2019	22/01/2020	982	140		separate question
4	MR20/00176	19/11/2019	Australian War Memorial	Changes to the official history of Australia's East Timor Operations	19/02/2020	21/02/2020	852	138		
5	MR20/00208	3/02/2020	Department of Prime Minister and Cabinet	A report relating to the Community Sports Infrastructure Grants program	4/03/2020	4/03/2020	940	134		
6	MR20/00281	11/11/2019	Department of Agriculture	Draft report relating to the Adelaide Desalination Plant	3/02/2020	19/03/2020			575	
7	MR20/00424	4/02/2020	Department of Industry	Briefing re. selection of the National Radioactive Waste Management Facility site.	16/04/2020	21/04/2020	892	127		separate question
8	MR20/00544	11/03/2020	Attorney-General's Department	Advice relating to the Community Sports Infrastructure Grants program	3/06/2020	4/06/2020	848	121		separate question
9	MR20/00604	14/02/2020	Department of Industry	Joint Authority's Suspension and Extension decisions for Bight Petroleum Pty Ltd's exploration licences	11/05/2020	24/06/2020			542	
10	MR20/00610	23/05/2020	The Treasury	China Mengniu Dairy Foreign Investment Review Board decision	24/06/2020	25/06/2020	827	119		
11	MR20/00612	30/03/2020	The Treasury	COVID-19 briefs	24/06/2020	26/06/2020	828	118		
12	MR20/00616	22/05/2020	The Treasury	COVID-19 submissions made to the Treasurer	22/06/2020	26/06/2020	826	118		
13	MR20/00613	23/05/2020	The Treasury	COVID-19 modelling	22/06/2020	26/06/2020	826	118		separate question
14	MR20/00760	24/04/2020	Department of Industry	Snoywy Hydro Australian Industry Capability Plans	4/08/2020	6/08/2020	785	112		separate question
15	MR20/00963	2/07/2020	Department of Industry	Judicial review briefs related to the national Radioactive Waste Management Facility	14/09/2020	14/09/2020	746	107		separate question
16	MR20/00922	25/08/2020	Department of Health	Documents of AHPPC relating to border closures	24/09/2020	24/09/2020	736	105		separate question
17	MR20/00923	6/08/2020	Department of Industry, Science, Energy and Resources	Documents related to National Radioactive Waste Management Facility	24/09/2020	25/09/2020	735	105		
18	MR20/01189	21/10/2020	Department of Prime Minister and Cabinet	Directions, guidelines, advice or templates for drafting Cabinet documents.	27/11/2020	30/11/2020	659	95		separate question
19	MR21/00059	10/11/2020	Department of Prime Minister and Cabinet	Sports Rorts documents.	13/01/2021	21/01/2021			434	
20	MR21/00144	21/12/2021	Department of Defence	FGD location advice.	4/02/2021	15/02/2021	582	85		
21	MR21/00340	12/03/2021	Department of Prime Minister and Cabinet	Documents related to Prime Minister's visit to Whynalla 10 December 2018.	14/04/2021	13/04/2021	536	78		
22	MR21/00422	13/01/2021	Department of Health	ATAGI meeting minutes.	16/03/2021	7/05/2021	511	73		
23	MR21/00551	12/04/2021	Department of Health	University of Queensland COVID Grant documents.	17/05/2021	21/06/2021	466	67		

Days/weeks calculated to 30/09/2022