

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID519/2021
File Title:	SENATOR REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 29/08/2022 11:49:20 AM AEST

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.

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No.

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law & Human Rights

**Senator Rex Patrick**

Applicant

**Australian Information Commissioner**

Respondent

### **Applicant's Outline of Submissions**

1. During nearly five years as a Senator, the Applicant served the Australian public, and more specifically his constituents in South Australia, by participating in the functions of the Senate, a Parliamentary body established under Part II of the Australian Constitution. In this role, he participated in the discussion of matters of national and international importance, debate and voting on Parliamentary bills, and scrutiny of the work of government. The Applicant also served the country in the Royal Australian Navy for 11 years.
2. Since leaving the Senate on 30 June 2022, the Applicant continues to contribute and participate in public life and has a particular interest in the proper operation of the FOI Act and its function in providing appropriate access to the Australian community of information held by the Australian government.
3. The Respondent is the statutory office of the Australian Information Commissioner established by s 5 of the *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**). The AIC Act was passed by the Parliament as a package of legislation to amend the *Freedom of Information Act 1982* (Cth) (**FOI Act**) with the primary purpose "to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government."<sup>1</sup>
4. The Respondent performs FOI functions set out in the AIC Act which are described as being "about giving the Australian community access to information held by the Government in accordance with the FOI Act."<sup>2</sup> In passing the legislative package, it was the intention of Parliament that the Respondent, supported by the FOI Commissioner, would "act as an independent monitor for FOI and will be entrusted with a range of functions designed to make the Office of the information Commissioner both a clearing house for FOI matters and a centre for the promotion of the objects of the FOI Act."<sup>3</sup>

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<sup>1</sup> Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009 (Cth), 1.

<sup>2</sup> Explanatory Memorandum, Information Commissioner Bill 2009 (Cth), 1.

<sup>3</sup> Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009 (Cth), 1.

5. In exercising the statutory function of the Information Commissioner, the Respondent is required to have regard to the objectives of the FOI Act.
6. It is the Applicant's position that IC Review applications made by him to the Respondent under the FOI Act have been unreasonably delayed in reaching resolution and this has not resulted in increased efficiency, reduced costs or timely resolution of his applications for access to information.

## **Background**

7. This outline of submission is filed on behalf of the Applicant in his application for judicial review in relation to the items marked "separate question" in Appendix A to the Further Amended Originating Application.
8. The Further Amended Originating Application relates to 23 IC review applications<sup>4</sup> made to the Respondent under s 54N of the FOI Act for merits review of Federal Government Department decisions made on requests for access to documents under s 15 of the FOI Act.
9. On 8 December 2021, the Court made orders by consent which provided that the application for relief in relation to nine applications marked "separate question" in Appendix A to the Further Amended Originating Application is to be heard and determined separately from any other question arising in the proceeding. Since the proceeding was filed on 9 September 2021, two of the 23 applications have been finalised by the Respondent: MR19/00010 (a "separate question" application) and MR20/00291.
10. The Applicant asserts that there has been, or will be, an unreasonable delay in the respondent determining each of the remaining applications for review, and that, by reason of s 7(1) of the *Administrative Decision (Judicial Review) Act 1977* (Cth) (**ADJR Act**) this delay grounds relief under s 16(3)(a) or alternatively s 16(3)(c) of the ADJR Act.
11. The Applicant is a person who is aggrieved by the failure of the Respondent to make a decision on the "separate question" IC review applications.<sup>5</sup>
12. It appears not to be in dispute that the Respondent has not made a decision in relation to the eight remaining "separate question" applications.

## **The Respondent has a duty to make a decision on the separate question applications**

13. The AIC Act establishes the Office of the Information Commissioner<sup>6</sup> and confers functions, including freedom of information functions as defined in the AIC Act, upon the Respondent.<sup>7</sup> The freedom of information functions include reviewing decisions under Part VII of the FOI Act.<sup>8</sup> Part VII of the FOI Act creates a mechanism for Review by the Respondent of an "access grant

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<sup>4</sup> An IC review is a review of an IC reviewable decision (a decision to grant or refuse a request for access to documents made under s 15 of the FOI Act) undertaken by the Respondent under Part VII of the FOI Act: FOI Act, s 54G. An IC review application is an application made under Division 4 of Part VII of the FOI Act: FOI Act, s 54H.

<sup>5</sup> ADJR Act, s 3(4)(b).

<sup>6</sup> AIC Act, s 5.

<sup>7</sup> AIC Act, s 10(1)(b).

<sup>8</sup> AIC Act, s8(h).

decision”<sup>9</sup> and “access refusal decision”.<sup>10</sup> All of the applications for access to documents made by the Applicant which are now the subject of the separate question applications fall within Part VII of the FOI Act.

14. The Respondent’s function under Part VII of the FOI Act in relation to an application for IC review made under s54N is not discretionary, a decision must be made on each application which comes before the Respondent.
15. The Respondent has a discretion as to whether or not to undertake an IC review and whether or not to continue an IC review, however if the Respondent makes a decision on that question in the negative, the Respondent “must, as soon as practicable, notify the review parties of the decision in writing”, including the reasons for it.<sup>11</sup>
16. If the Respondent decides to undertake a review, after undertaking the review in accordance with the procedures in Division 6 of Part VII, the Respondent “must make a decision in writing” affirming, varying or setting aside and substituting the decision under review and that decision must be conveyed to the parties.<sup>12</sup> The use of the imperative “must” prima facie imposes an obligation to exercise the function conferred.<sup>13</sup> Thus, the Respondent has a relevant duty for the purposes of s 7(1) of the ADJR Act.
17. The Respondent’s Concise Statement in response to the further amended concise statement dated 20 December 2021 does not take issue with the question of whether s 7 of the ADJR Act imposes a duty on the Respondent. The Applicant proceeds on the basis that this is not in contention, and the question of whether s 7(1) of the ADJR applies to the IC Review applications is not in contention.

### **Unreasonable delay**

18. No time period is imposed on the Respondent to make a decision on whether to carry out a review, nor to carry out the review or to make a decision after carrying out a review. Consequently, the question for determination on this hearing is whether the Respondent’s delay in making decisions on the remaining eight “separate question” applications for IC review is unreasonable within the meaning of s7(1) of the ADJR Act.
19. No Australian case law has considered “unreasonable delay” in the context of the FOI Act.
20. “Unreasonable delay” within the meaning of s 7(1) of the ADJR Act was considered by Bromberg J in *BMF16 v Minister for Immigration and Border Protection*.<sup>14</sup> Following a review of the authorities, his Honour identified two guiding principles which must be borne in mind when considering the question of unreasonable delay.<sup>15</sup> First, what is a reasonable time will depend upon all of the facts

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<sup>9</sup> Defined in s 3 of the FOI Act as a decision under s 53B of the FOI Act

<sup>10</sup> Defined in s 3 of the FOI Act as a decision under s 53A of the FOI Act

<sup>11</sup> FOI Act, s 54X.

<sup>12</sup> FOI Act, s 55K.

<sup>13</sup> *Grunwick Processing Laboratories Ltd v Advisory Conciliation and Arbitration Service* [1978] AC 655 at 690 per Lord Diplock and 698 per Lord Salmon at 698

<sup>14</sup> [2016] FCA 1530 (“*BMF16*”).

<sup>15</sup> *BMF16*, [22].

and circumstances. Secondly, the scheme of the legislation within which the decision making power is found is important. On this point, his Honour observed,<sup>16</sup>

... an important consideration in determining whether “there has been unreasonable delay in making the decision” is the scheme of the legislation within which the relevant decision making power is found. The word “unreasonable”, is a broadly-expressed standard and particularly when faced with the interpretation of a broadly-expressed standard, the task of statutory construction must give effect to the evident purpose of the legislation and be consistent with its terms ...

21. In the context of the particular legislative scheme, the time period which may be considered reasonable will be informed by the subject matter of the power, its statutory purpose, the importance of its exercise to the public and to the interests of the individual, the nature of those interests and the likely prejudicial effect of delay on those interests. Practical limitations on the exercise of the power by the decision-maker are also relevant.<sup>17</sup>
22. In *BMF16*, his Honour concluded that the underlying rationale of the authorities is that a delay which has not been justified or satisfactorily explained is to be regarded as unreasonable.<sup>18</sup>
23. Unreasonable delay is a question of fact. Once the Applicant has established that there has been delay, the practical onus of establishing by evidence that there is a reasonable explanation for the delay falls on the Respondent. Lengthy periods of inactivity in the decision-making process call for a meaningful explanation as to why that inactivity occurred and why the delay ought not be considered unreasonable.<sup>19</sup> Long periods of inactivity where an application “simply sits around waiting to be processed or waiting for some particular step in the process to be taken” provide a more compelling basis for establishing unreasonable delay than periods of active consideration of an application.<sup>20</sup>
24. In exercising a power which is required to be carried out within a reasonable time, it is for the holder of that power to bear in mind the temporal constraint imposed by the reasonableness requirement, and to conduct itself accordingly. Where the statutory purpose of the power to be exercised is for “prophylactic” protection of the public, “there should be as little delay as possible.”<sup>21</sup>
25. The question of delay was considered by Moshinsky J in *AQM18 v Minister for Immigration and Border Protection*.<sup>22</sup> There, the applicant asserted that a power purportedly exercised by the relevant Minister under the *Migration Act 1958* (Cth) was without jurisdiction because it was not exercised within a reasonable time.

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<sup>16</sup> *BMF16*, [23]

<sup>17</sup> *BMF16*, [25].

<sup>18</sup> *BMF16*, [27].

<sup>19</sup> *BMF16*, [28]. See also, *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424; [2019] FCAFC 27, [59] (“*AQM18 appeal*”).

<sup>20</sup> *BMF16*, [29].

<sup>21</sup> *Kardas v Australian Securities Commission* (1998) 53 ALD 303, 313-314 (“*Kardas*”).

<sup>22</sup> (2018) 162 ALD 449; [2018] FCA 944, [57] - [70] “*AQM18 first instance*”. The “unreasonable delay” issue was upheld on appeal in *AQM18 appeal* (2019) 268 FCR 424; [2019] FCAFC 27.

26. His Honour accepted that, as a matter of statutory construction, where a provision prescribes no time limit for the doing of a particular act, a court may imply that the act must be done within a reasonable time.<sup>23</sup> Further, his Honour accepted that the test for determining whether a reasonable time limit has been exceeded is

*... whether there are circumstances which a reasonable man might consider render this delay justified and not capricious. In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity.*<sup>24</sup>

27. In considering whether a requirement to make a decision “within a reasonable time” imposed the same timeframe as a requirement that there not be “an unreasonable delay” in the making of a decision, the court in *Bindjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation and anor*<sup>25</sup> accepted that reasonableness is to be objectively determined in the factual legislative context.

28. Lack of resourcing is not a whole answer to an asserted unreasonable delay. As Neaves J observed in *Wei v Minister for Immigration, Local Government and Ethnic Affairs*<sup>26</sup>

*Clearly it is not for the Court to dictate to the Parliament or the Executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the Parliament is negated, or its value set at nought, by a failure to provide the resources necessary to make the right effective.*

29. In summary, the question of whether a delay is unreasonable is a question of fact which must be determined objectively, having regard to the specific legislative scheme under which the duty to decide arises, including the objects of that scheme.

### **The legislative scheme**

30. Section 3 of the FOI Act sets out the objects of the Act. By its very nature, FOI legislation is concerned with matters of public interest and, in the sense of it being facilitative of public benefit and protective of democratic processes, it may be likened with the “prophylactic” purpose of the powers considered in *Kardas*.<sup>27</sup>
31. Information held by the Government is a national resource to be managed for public purposes.<sup>28</sup> The FOI Act seeks to achieve an appropriate level of public access to government information to promote Australia’s representative democracy.<sup>29</sup> The Parliament intends that the functions and powers given by the FOI Act, including the Respondent’s duties and functions under Part VII of the

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<sup>23</sup> *AQM18 first instance*, [61].

<sup>24</sup> *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 292 in *AQM18 first instance*, [61] – [62].

<sup>25</sup> (2001) 106 FCR 203; [2001] FCA 138, [28].

<sup>26</sup> (1991) 29 FCR 455, 477.

<sup>27</sup> (1998) 53 ALD 303, 313.

<sup>28</sup> FOI Act, s 3(3).

<sup>29</sup> FOI Act, s 3(2).

- FOI Act, are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>30</sup>
32. The objectives in s 3 of the FOI Act were inserted by the *Freedom of Information Amendment (Reform) Act 2010* (No 51 of 2010) which formed a package of legislation together with the AIC Act (No 52 of 2010) which established the Office of the Australian Information Commissioner and provided for the appointment of an Australian Information Commissioner, the statutory office of the Respondent.
  33. Parliament's intention for this legislative scheme was to "usher in a new regime for access to government information" and to "deliver more effective and efficient access to government information and promote a culture of disclosure across government."<sup>31</sup>
  34. By s 11 of the FOI Act, the Applicant has a legally enforceable right to obtain access to documents in accordance with the FOI Act. That right is not affected by any reasons the Applicant gives, or which the relevant holder of the document believes are his reasons, for seeking the document.
  35. Lengthy and unreasonable delays in processing IC review applications undermines the objectives of both the FOI Act, the legal right to access to information created by s 11 of the FOI Act, and the freedom of information functions set out in s 8 of the AIC Act, in particular sub-paragraphs (a) and (h) of s 8.
  36. Division 5 of Part VII of the FOI Act provides the Respondent's source of power to decide whether to proceed with an IC Review. The Respondent may make preliminary enquiries to determine whether or not to undertake an IC review,<sup>32</sup> and has a discretion to decide not to undertake a review where there has been a failure on the part of the IC review applicant, or the application is defective.<sup>33</sup> The Respondent may also exercise the discretion not to undertake a review if satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal.<sup>34</sup>
  37. Division 6 sets out a procedure for IC review. Section 55 provides an overview of the procedure. Sub-section (4) stipulates conduct which the Respondent "must" engage in during that procedure. This includes conducting the process in "as timely a manner as is possible" given the requirement to conduct the process with as little formality and as little technicality as possible in light of the requirements of the Act or any other law, and a proper consideration of the matters before the Respondent.
  38. By s 55DA of Division 6, the relevant agency or Minister must use their best endeavours to assist the Respondent to make a decision on an IC Review. Section 55E of Division 6 provides the

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<sup>30</sup> FOI Act, s 3(4).

<sup>31</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, Hansard 12971 (The Hon. Anthony Byrne, MP, Second Reading Speech). See also, Explanatory Memoranda for the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009.

<sup>32</sup> FOI Act, s 54V.

<sup>33</sup> FOI Act, s 54W(a) and (c).

<sup>34</sup> FOI Act, s 54W(b).

Respondent with a power to issue a notice requiring the relevant agency or Minister to provide adequate reasons for a decision to refuse access to a document if adequate reasons have not been given. The relevant agency or Minister must with the notice.

39. Division 7 provides that, after undertaking an IC Review, the Respondent must make a decision in writing and sets out matters generally relating to the form and effect of such a decision.
40. Division 8 confers upon the Respondent powers to gather information. These powers include:
  - (a) obliging a person to give information or documents which are not exempt documents (s 55R),
  - (b) to take possession of, copy and hold those documents (s 55S),
  - (c) to produce documents for which an exemption is claimed for the purpose of the Respondent determining whether the document is an exempt document (s 55T for exempt documents generally, and s 55U for documents claimed to be exempt on the basis that they are national security, Cabinet or Parliamentary Budget Office documents), and
  - (d) to conduct further searches for a document (s55V).
41. In summary, the Respondent has broad-ranging powers, or to put it another way a well-equipped kit bag, to carry out an IC Review, or to discontinue an IC Review if it is appropriate to do so. These powers are discretionary and conferred in the context of the FOI functions under the AIC Act, and to achieve the objectives of the FOI Act.

### **Type and length of delay**

42. The evidence filed on behalf of the Respondent reveals a number of types of delay, and various lengths of delay. The length and type of delay are both factors relevant to an assessment of whether a particular delay is objectively unreasonable in the context of the legislative scheme.
43. Time is of the essence in applications for access to information under the FOI Act. This is for the simple reason that, to the extent that the information requested concerns matters of present political controversy, any substantial delay is likely to result in the information becoming less useful, and less relevant, the longer it is withheld. If an applicant does not obtain timely access to information which they have a right to under s 11, not only are their immediate purposes for seeking the information thwarted, any secondary purposes to which the information may be put are also at risk of being negated. Consequently, the temporal aspect of an IC Review application is important to an assessment of whether a particular delay is unreasonable.
44. Types of delay which appear to be revealed in the Respondent's evidence include:
  - (a) long periods of inactivity involving applications waiting for allocation to an assessing officer
  - (b) changes in personnel assessing an application



- (c) repeated extensions of time granted to the relevant agency
- (d) failure to adequately follow up on previous requests or notices issued to the relevant agency, or on due dates previously granted by extension
- (e) a decision not to use particular powers, or a failure to consider whether those powers ought to be utilised
- (f) a decision to use particular powers, followed by a failure to actually use those powers
- (g) a decision to consider whether to use particular powers, followed by a failure to actually consider that issue.

### **The practical implications of delay on the Applicant's rights**

45. The essence of the Applicant's position is that the delays in processing his applications for IC review mean his legally enforceable right to obtain information under s 11 of the FOI Act is effectively "stalled" with the Respondent. He is unable to either obtain documents, accept the merits review decision of the Respondent, or progress to a further merit review of that decision by the Administrative Appeals Tribunal.
46. The applications for access to documents were brought by the Applicant for the purposes of obtaining information to assist him in executing the accountability and transparency aspects of his former role as a Senator for South Australia and to assist his constituents. In his role as Senator, the Applicant appropriately engaged in and facilitated scrutiny, discussion, comment and review of Government activities.
47. The passage of time in waiting for the Respondent to make a decision on the "separate question" applications has resulted in a loss of currency of the information – many of the issues the subject of public debate have moved on or been decided. The delay has also resulted in such a long period of the applications "stalling" within the jurisdiction of the Respondent that there has been a change of government. Consequently, in many instances the primary purpose of seeking the information, to hold the Government of the day to account, has been thwarted.
48. The IC Review process is a merits review procedure which is intended to increase efficiency, reduce costs and provide for timely resolution of applications for access to information. That has not been the Applicant's experience. By imposing a layer of merits review which precedes the exercise of any right to merit review by the Administrative Appeals Tribunal, the IC Review process has merely served as a means to extend the period of time between the lodging of a request for information with the relevant agency and the time at which the Applicant can properly exercise his right to a formal merit review process.

### **Summary**

49. This proceeding seeks to obtain decisions on the "separate question" applications for the purposes of informing how the remaining IC review applications which are the subject of the proceeding ought to be approached. As a collateral matter, the proceeding seeks to establish precedent in

relation to the boundaries of reasonable delay in the context of IC review applications. Establishing such boundaries is not only in the Applicant's interests but also the interests of the broader public for whom government information is to be managed as a national resource and, it is submitted, the interests of the Respondent in obtaining clarity around the proper discharge of the duties conferred under the FOI Act and the functions set out in the AIC Act.

**TIPHANIE ACREMAN**

**Greens List  
Owen Dixon Chambers**

**28 August 2022**