



Australian Government

Office of the Australian Information Commissioner

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Legal and Constitutional Affairs References Committee
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Inquiry into the operation of Commonwealth Freedom of Information (FOI) laws

Dear Committee

I refer to my response to questions taken on notice during the public hearing of the *Inquiry into the operation of Commonwealth FOI laws* on 29 August 2023 provided to the Committee on 10 October 2023 ('my response').¹ That document included a response to the issues raised by Mr Leo Hardiman PSM KC in his written statement tabled on 29 August 2023 and oral evidence provided to the Committee on the same date.

I also refer to a supplementary statement prepared by Mr Hardiman, which I note was received by the Committee on 15 September 2023.² I was not aware of this supplementary statement when preparing my response provided on 10 October 2023. I became aware of Mr Hardiman's supplementary statement following its recent publication on the Committee's website.

As with Mr Hardiman's written statement and oral evidence of 29 August 2023, his supplementary statement contains further inaccuracies and other matters that I reject entirely. It also includes evidence that reflects adversely on me and others responsible for the performance of the Office of the Australian Information Commissioner's (OAIC's) functions and the OAIC's administration. While I have already addressed these matters in detail in my response of 10 October 2023, Mr

¹ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*.

² 'Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,' (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*.

Hardiman's ongoing pursuit of these claims and allegations warrants a further response. Below I draw to the attention of the Committee the relevant parts of my response.

The 'resourcing narrative'

Mr Hardiman continues to allege in his supplementary statement that I disclosed to him a communication that I had with the former Government about internal funding allocation.³ Mr Hardiman also claimed that 'the IC had apparently decided to give effect to a purported direction from a member of Government which the IC knew was not binding on her.'⁴

As stated in my response at paragraph 21, I did not have a conversation with the former Government about internal funding allocation.⁵ It remains unclear to me what the basis is for Mr Hardiman's stated recollection that I disclosed to him information to that effect. I confirm that such a conversation with any member of the former Government never occurred. I made my decisions about allocation of funding within the OAIC as stated in my response.

The manner in which OAIC funding is apportioned is set out in detail in my response at paragraphs 16-51. This includes the actions I took to internally allocate additional funds to the FOI function beyond what was specifically appropriated or allocated by government for FOI to the extent that internal re-allocations were possible in the circumstances.⁶

As noted in my response, during his tenure at the OAIC Mr Hardiman did not raise with me issues or concerns about how funding was allocated across the OAIC's functions.⁷ The first time these were raised, as far as I am aware, was during this

³ 'Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,' (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 2.

⁴ 'Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,' (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 2.

⁵ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 6.

⁶ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, pp 5-12.

⁷ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no.

inquiry in his statement tabled on 29 August 2023, and oral evidence during the public hearing on the same date.

Further, I continue to dispute Mr Hardiman's portrayal of his level of involvement in the Patrick matter, which is addressed in further detail in paragraphs 134-147 of my response.⁸ As the respondent, I was ultimately responsible for the conduct of the matter. However, Mr Hardiman was actively involved for a period that commenced in April 2022 and ceased in March 2023, including instructing during this period. It was appropriate for Mr Hardiman as the then Freedom of Information Commissioner to have such involvement as the proceedings concerned the exercise and proper interpretation of the FOI statutory functions.

In his supplementary statement, Mr Hardiman again wrongly claims that, on my 'request', he agreed to assist with instructing during the proceedings, which 'were already well progressed' at the time of his appointment. Mr Hardiman was instructing for a substantive part of the proceedings. In the course of instructing, Mr Hardiman reviewed and had appropriate input on key documents including affidavit evidence, notice of objection to competency, submissions and supplementary submissions.

The 'throughput narrative'

I have addressed Mr Hardiman's claims about a 'throughput narrative' in my response at paragraphs 214-221.⁹ In his supplementary statement, Mr Hardiman states that:

'The Committee may also be interested to note that 1145 divided by 1956 produces a percentage of approximately 58.4%. By contrast, 1145 divided by 1377 produces a percentage of approximately 83.15%. It was the latter percentage figure (or an approximation of it) which was used in the articulation of the throughput narrative.'¹⁰

14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 6.

⁸ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 30-32.

⁹ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 45-46.

¹⁰ 'Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,' (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 2.

The suggestion here is that the OAIC has selected a more favourable figure to promulgate the purported ‘throughput narrative.’ This is incorrect.

As noted in my response at paragraph 215, from 2010-11 to 2012-13, the OAIC’s measure or KPI for Information Commissioner (IC) reviews was that 80% of IC reviews are finalised within 6 months. From 2013-14 to the present, the OAIC’s KPI is that 80% of IC reviews are finalised in 12 months.¹¹

As set out in the OAIC’s Annual Reports since its inception, the IC review performance measure has always been calculated with reference to the number of IC reviews finalised within 12 months expressed as a proportion of all IC reviews finalised in the relevant year.¹²

It would not be appropriate to calculate the performance measure with reference to the number of IC review matters finalised against the number of IC review matters received in the reporting period as:

- the matters closed in a given reporting period include matters that were received in prior reporting periods, and
- matters that remain open at the end of a reporting period may still be closed within 12 months in a subsequent reporting period depending on the timing of receipt of the application for IC review.

The KPI for IC reviews enables useful yearly comparisons to be drawn but it is not the only method used by the OAIC to report on our performance. The OAIC utilises other mechanisms such as its Annual Report to provide a more detailed picture of the workload across our functions. For example, in the 2022-23 Annual Report, we reported that:

- the OAIC received 1,647 IC reviews in 2022-23, a 16% decrease compared to 1,955 IC reviews received in 2021-22

¹¹ ‘Office of the Australian Information Commissioner’s responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)’, [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 45.

¹² The OAIC’s Annual Reports are available on its website at <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports>. OAIC Annual Reports prior to 2018-19 are available on [Trove](#).

- the number of IC reviews on hand increased from 1,878 in 2021-22 to 2,004 in 2022-23.¹³

As noted in my response at paragraph 220, the OAIC also includes detailed information on how IC review matters are finalised in its Annual Reports.¹⁴ For example, the 2022-23 Annual Report states that:

Of the 1,519 IC reviews finalised in 2022–23, a number (282 or 19%) were closed under s54N as invalid (out of jurisdiction, misdirected, out of time, copy of decision not provided, or not an IC-reviewable decision). As a proportion, this is fewer than the number of matters (313 or 23%) closed as invalid under s 54N in 2021–22.

Under s 55G of the FOI Act, at any time during an IC review, an agency or minister may revoke or vary an access refusal decision to favour the applicant. This can be done by giving access to a document, relieving the applicant from liability to pay a charge, or requiring a record of personal information to be amended or annotated in accordance with the application.

In total, 879 IC reviews were closed under s 54R as withdrawn, an increase from 684 in the previous reporting period. Of these, 516 were finalised following a revised decision to provide access being made under s 55G. This is an increase from 2021–22, when 479 IC reviews were finalised under s 54R following a revised decision. Of the 516 IC reviews finalised under s 54R following a revised decision, 456 involved a review of a deemed access refusal decision.¹⁵

Similar information about how IC review matters are finalised are also available in previous Annual Reports published on the OAIC’s website.¹⁶

Work health and safety issues

Mr Hardiman has claimed in his supplementary statement that he ‘attempted at some length’ to raise work health and safety issues with me in two conversations.¹⁷

¹³ OAIC, [Annual Report 2022-23](#), OAIC, 19 October 2023, p 34. See also OAIC, [Annual Report 2021-22](#), OAIC, 19 October 2022, p 44, which stated that the number of IC reviews on hand increased from approximately 1,316 in 2020-21 to around 1,874 in 2021-22.

¹⁴ ‘Office of the Australian Information Commissioner’s responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)’, [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 46.

¹⁵ OAIC, [Annual Report 2022-23](#), OAIC, 19 October 2023, p 34.

¹⁶ See for example, OAIC, [Annual Report 2021-22](#), OAIC, 19 October 2023, p 44, 154 and OAIC, [Annual Report 2020-21](#), OAIC, 21 October 2021, p 154.

¹⁷ ‘Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,’ (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 3.

As I noted in my oral evidence to the Committee on 29 August 2023, I did discuss a workplace matter with Mr Hardiman.¹⁸ During that discussion, Mr Hardiman stated that he did not want any action to be taken. Nevertheless, I took steps to satisfy myself that no further action was required. As noted during my oral evidence, I raised the issue with Mr Hardiman again on at least one additional occasion to check if there was anything further that was required from his perspective.¹⁹ Mr Hardiman made it clear that he did not wish for the matter to be pursued further.

Mr Hardiman's supplementary statement indicates that any further public statements on alleged work health and safety issues may be unfair to an unnamed senior officer and invites the Committee to take further detailed oral evidence at an *in camera* hearing.²⁰ The relevant evidence summarised in my response from paragraphs 155 to 175, in particular the information obtained in anonymous staff surveys, and the OAIC's existing mechanisms for dealing with these matters outlined further below, demonstrates that further consideration by this Committee of Mr Hardiman's claims is not warranted.²¹

As set out in my response at paragraphs 169-172, the OAIC has a *Harassment Policy* and both formal and informal processes for making a complaint about discrimination, harassment or bullying.²² Staff may make use of the OAIC's existing mechanisms and the other support processes available to them should they wish to do so in light of Mr Hardiman's allegations. Former staff are also able to contact our People and Culture team.

Should the Committee take any further evidence, I request that any affected persons are provided with a reasonable opportunity to formally respond to any further adverse evidence, including any such evidence given at an *in camera* hearing, in

¹⁸ Proof Committee Hansard, Senate Legal and Constitutional Affairs References Committee, 'The operation of Commonwealth Freedom of Information (FOI) Laws', Parliament of Australia, Canberra, 29 August 2023, p 66 (Ms Angelene Falk).

¹⁹ Proof Committee Hansard, Senate Legal and Constitutional Affairs References Committee, 'The operation of Commonwealth Freedom of Information (FOI) Laws', Parliament of Australia, Canberra, 29 August 2023, p 66 (Ms Angelene Falk).

²⁰ 'Supplementary Statement made by Mr Leo Hardiman PSM KC, received 15 September 2023,' (document no. 9), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 3.

²¹ 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into the operation of Commonwealth FOI laws*, p 33-38.

²² 'Office of the Australian Information Commissioner's responses to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023)', [Answers to Questions on Notice](#) (document no. 14), Senate Legal and Constitutional Affairs References Committee, *Inquiry into other the operation of Commonwealth FOI laws*, p 36-37.

accordance with its *Procedures to be observed by Senate Committees for the protection of witnesses*.

Other comments

For the record, I note that Mr Hardiman's written statement tabled on 29 August 2023 was, in substance, a detailed 18-page submission, not a brief opening statement of the kind appropriately made at the commencement of oral evidence. As such, it would have been fairer and more efficient if Mr Hardiman lodged that statement with the Committee as a submission prior to the public hearing on 29 August 2023. If Mr Hardiman had done so, I would have had an opportunity to consider Mr Hardiman's submission or statement before giving oral evidence on the same day and would have been able to better assist the Committee's inquiry when giving my oral evidence.

Should the Committee be considering making any adverse observations about me in reliance on any material or information provided by Mr Hardiman, I request the opportunity to provide further written submissions prior to the finalisation of the Committee's report.

Yours sincerely

Angelene Falk
Australian Information Commissioner
Privacy Commissioner

8 November 2023