A. Introduction

A1. Introductory statement

[1] These submissions are made in respect of the Legal and Constitutional Affairs Committee's (**Committee**) consideration of the Government's Freedom of Information Amendment Bill 2025 (**Bill**).

[2] The Bill was referred to the Committee for consideration on 4 September 2025.

[3] But for item 2 in Schedule 8 of the Bill, Electronic Frontiers Australia (**EFA**) opposes each and every one of the proposals for amendment to the *Freedom of Information Act 1982* (Cth) (**FOI Act**) set out in the Bill.

[4] EFA will not address every issue in the Bill in depth. Such a course has not been feasible in the light of:

> a) the relatively short timeframe provided in respect of making submissions to the Committee; and
>
> b) the relative complexity of the issues underlying the Government's proposals for amendments to the FOI Act.

[5] Nonetheless, EFA will, in these submissions, carefully address select issues in the Bill.

A2. A summary of the layout and content of these submissions

[6] In part B of these submissions, the Government's proposal for charging fees to submit access and review requests shall be scrutinised. A detailed proposal for reform in respect of vexatious requests is set out at the end of part B.

[7] In part C of these submissions, the Government's proposal in respect of transferring access requests shall be scrutinised. In the light of what is noted in part C of these submissions, a modest proposal for legislative amendment is set out part C.4.

[8] In part D of these submissions, the Government's proposal relating to access requests made by anonymous or pseudonymous access applicants shall be scrutinised.

[9] In part E of these submissions, the Government's proposal to grant public servants the right to issue decisions anonymously shall be scrutinised.

[10] In part F of these submissions, the Government's proposal to grant Ministers and principal officers of agencies the power to, effectively, issue edicts on how access requests are to be communicated electronically shall be scrutinised. Part F also addresses how the Government's proposal may detrimentally affect civil society organisations and productivity.

[11] In part G of these submissions, the Government's proposal to introduce a public interest factor against access to documents containing deliberative matter shall be scrutinised. The fallacies that are at the heart of the proposal to introduce a public interest factor against access to documents containing deliberative matter shall be identified and criticised.

[12] In part H of these submissions, a modest proposal for reform shall be advanced to better ensure

that access applicants submit access requests that are not abusive, vulgar or denigratory in substance.

[13] In part I of these submissions, comments about the Government's narrative in respect of the Bill shall be noted.

B. Fees to submit an access request and to apply for review of a decision made under the FOI Act

B1. The current state of the law

[14] As the law stands, *submitting* an access request to an agency or a Minister under the FOI Act does not attract a fee. That is not to say that officials in an agency, or Ministers, are not permitted to charge an access applicant for *processing* an access request: FOI Act, s 29; *Freedom of Information (Charges) Regulations 2019* (Cth).

[15] Moreover, as the law stands, submitting requests for internal review of a decision made in respect of an access request, or review, by the Information Commissioner, of a decision made in respect of an access request do not attract fees.

B2. The Government's proposed amendments

[16] The Government proposes to empower the Governor-General to, on the "advice" of her Ministers,[1] make provision for the payment of a fee, on the part of an access applicant, when:

> a) making a request under section 15 of the FOI Act (request for access): Bill, Schedule 6, item 6; and
>
> b) making a request under section 54B of the FOI Act (internal review application): Bill, Schedule 6, item 6; and
>
> c) making a request under section 54N of the FOI Act (IC review application): Bill, Schedule 6, item 6.

B3. Why the Government's proposal is objectionable – conflicts of interest

[17] Access applicants may make access requests to Ministers, and to the Departments and agencies administered by Ministers, under the FOI Act.

[18] Ministers are directly impacted by requests for access.

[19] The Parliament should not empower those who have obligations, under the FOI Act, to *process* access requests with the legal levers to effectively undermine those obligations by imposing fees on those who merely *submit* access requests.[2]

B4. Why the Government's proposal is objectionable – fallacious justification for the imposition of fees (equivocation)

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1 Australians are serious about their phantasms. While regulations made by the Governor-General are enacted "by Her Excellency's Command", the reality is that the Ministers command (obsequiously), and the Governor-General complies (cheerfully).

2 Parliament might as well let the foxes loose in the hen house.

B4.1. The justification proffered

[20] The justification proffered by the Attorney-General, Ms Michelle Rowland MP, for the imposition of charges to *submit* access requests is as follows:[3]

> The government has carefully considered options on how to deter frivolous and vexatious requests, while maximising accessibility of the system for genuine applicants.
>
> All other Australian jurisdictions, apart from the Australian Capital Territory, have initial application fees for freedom-of-information requests.
>
> This measure will aid in deterring frivolous requests, and ensure agency resources are not unduly diverted from processing genuine requests, particularly requests for personal information which account for the vast majority of overall requests …
>
> The government recognises the primacy of Australians having access to their personal information held by government. For this reason, an application fee would not apply to requests by an applicant for access to their own personal information, or an individual acting on behalf, and with the authority of, another individual for access to their personal information. FOI requests for personal information comprised 72 per cent of overall FOI requests in 2023-24. On these figures, up to three in four freedom-of-information requests would be exempt from any application fee. There will be an ability to waive fees in certain circumstances, including in cases of financial hardship.

B.4.2. Vexatious requests – the fallacy of equivocation

[21] The Attorney-General claims that the fees for *submitting* access requests are aimed at deterring frivolous or vexatious requests.

[22] *Vexatious* is a contestable term.

[23] *Vexatious* is also a term that has several senses.

[24] The term *vexatious*, in ordinary parlance, could mean annoying, something apt to cause embarrassment, or a nuisance.

[25] The term *vexatious*, ***for the purposes of the FOI Act***, is used in a particular sense.

[26] The term *vexatious*, as applied to an access applicant for the purposes of the FOI Act, refers to:

> a) repeatedly making access actions, such that the repeated engagement involves an *abuse of process* for that access action: FOI Act, s 89L(1)(a); or
>
> b) a particular access action engaged in involves, or would involve, an *abuse of process* for that access action: FOI Act, s 89L(1)(b); or
>
> c) a particular access action would be *manifestly unreasonable*: FOI Act, s 89L(1)(c).

[27] An *abuse of process* for an access action includes, but is not limited to:

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3 *Hansard*, Michelle Rowland MP, House of Representative, 3 September 2025, p 10 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0016%22 >.

a) harassing or intimidating an individual or an employee of an agency: FOI Act, s 89L(4)(a); or

b) unreasonably interfering with the operations of an agency; FOI Act, s 89L(4)(b); or

c) seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court: FOI Act, s 89L(4)(c).

[28] The *sense* in which the Attorney-General has deployed the term *vexatious* in her second reading speech is not clear.

[29] If the sense in which the Attorney-General has deployed the term *vexatious* in her second reading speech is not the sense in which that term is used in the FOI Act, the Attorney-General's justifications are fallacious because they are example of the fallacy of equivocation.

B5. Why the Government's proposal is objectionable – fallacious justification for the imposition of fees (faulty generalisation)

B5.1. The justification proffered

[30] A second justification proffered by the Attorney-General, Ms Michelle Rowland MP, for the imposition of charges to *submit* access requests is as follows:[4]

> I thank the member for his question. Today the Albanese government introduced new legislation to reform the Freedom of Information Act 1982. Freedom of information is a vital feature of our democracy. It provides transparency and accountability of government and enables Australians to access their personal information …
>
> That is why the legislation introduced today seeks to ban anonymous requests, stop abuses of the framework by vexatious and frivolous requests, make the law clearer when it comes to cabinet and deliberative material exemptions, and establish procedures for the handling of the records of former ministers.
>
> Let me give you an example of why the current system is broken. In one instance, a small agency received nearly 600 FOI requests, in a short period of time, from an automated generator. This resulted in the diversion of an entire Public Service team from their work for more than three months. Mr Speaker, you may ask which agency that was. That agency was eSafety, whose core mission is to keep Australian children safe online. Hardworking taxpayers, who already fund over a million hours of FOI processing a year, would expect eSafety to be focused on their task of protecting children rather than processing a mountain of frivolous FOI requests from online trolls.
>
> The Albanese government will also not continue to tolerate a framework which allows offshore actors whose capabilities are enhanced with artificial intelligence to anonymously lodge FOI requests seeking information held by the Australian government. The idea that our laws could permit a foreign state to anonymously seek access to information about recent government decisions without us even knowing it is simply untenable.

4 *Hansard*, Michelle Rowland MP, House of Representatives, 3 September 2025, p 52 - https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/28849/&sid=0000

B5.2. Salient facts

[31] In her response to the Member for McEwen, on 3 September 2025, the Attorney-General stated that the eSafety Commissioner had "received nearly 600 FOI requests, in a short period of time, from an automated generator."

[32] It is public information that the Free Speech Union of Australia (**FSU**) set up a website from which access requests under the FOI Act could be lodged by members of the Australian or international community: https://endesafety.au/ask

[33] The FSU identified itself as the organisation that set up the website: https://endesafety.au/ask

[34] A generic form of request was prepared by the FSU. The form of request was capable of being edited. The generic request was as follows:

> I ask for copies of all documentation containing my 'X' handle, or my name. I also ask for all records of eSafety Commissioner staff reviewing this documentation such as browser logs. In the interests of transparency, this should identify the name and role of the officer who was involved (if recorded).

[35] The tool was ***not*** an automated generator in the sense that it functioned without human inputs or intervention. It was automated in the sense that a template form of request was available to people to submit their access requests.

[36] Given the context in which the statement was made, to the extent that the Attorney-General is suggesting that FSU's campaign "permit[s] a foreign state to anonymously seek access to information about recent government decisions without us even knowing", the Attorney-General's statement is misguided.

[37] The FSU is an Australian organisation. It is not a foreign state. Moreover, the FSU's campaign had nothing to do with "recent government decisions".

[38] In the context of her response to the Member for McEwen, the fallacious appeal to fear in the Attorney-General's statement is regrettable.

B5.3. Faulty generalisation

[39] The Attorney-General has used the example of an extreme case to justify the general imposition of fees to *submit* access requests.

[40] An isolated and extreme case does not justify a general imposition of fees to *submit* access requests.

[41] If the example highlighted by the Attorney-General was systemic, then that might be cause for consideration of the imposition of a fees (though not necessarily to submit a request) and other legislative interventions. No evidence has been provided to demonstrate that the extreme example provided is a general problem.

B6. Why the Government's proposal is objectionable – fallacious justification for the imposition of fees (cost recovery)

B6.1. The justification proffered

[42] According to Chris Johnson, the public sector editor for Region,[5] a justification proffered by the Minister for Health, Mr Mark Butler MP, for the imposition of charges to *submit* access requests is as follows:[6]

> We're frankly being inundated by anonymous requests as a government for Freedom of Information, and we don't know where those requests come from … Many of them, we're sure, are AI or bot-generated requests. They may be linked to foreign actors, foreign powers. We've taken the view, as state governments have, that a modest charging environment is consistent with usual cost-recovery principles.

B6.2. Potential incoherence in the justification proffered

[43] To the extent that the word "where" in the statement " we don't know *where* those requests come from" is used in the sense of "the party sending the request" rather than the geographical location from which the request was sent, it is not possible to at once claim that the Government "does not know where [anonymous access] requests come from" and that the Government, or Mr Butler, is "sure" that the the anonymous requests "are AI or bot-generated requests."

B6.3. Speculation on the source of the access requests

[44] Mr Butler claimed that the anonymous requests that had "inundated" the Government are "bot-generated requests [that] *may* be linked to foreign actors [or] foreign powers."

[45] In response to order for production No 155 of 2025, Senator Don Farrell purported to produce evidence, from the Attorney-General to the Senate, in support of Mr Butler's claims.[7] Nowhere in the document produced is there evidence that supports the propositions that:

a) the Government is being "inundated" with access requests; and

b) the access requests are "linked to foreign actors [or] foreign powers."

[46] At its highest, on the materials provided to the Senate, one may say that unnamed and unknown persons in a "domestic agency" have relayed to somebody, presumably in the Attorney-General's Department, that examples of "AI generated" requests exist.

[47] What is meant by "AI generated" is unclear, although the context seems to suggest that AI was used to craft the access requests. Putting to one side that the claims of the officials in the domestic agency have not been independently tested or scrutinised, and that the Government would have the Senate and the Australian people accept the hearsay statements as gospel truth, the "evidence" does not support the claim that access requests are being generated, automatically and without human input, by "bots … linked to foreign actors [or] foreign powers", as Mr Butler has claimed.

[48] In using the modal verb *may* in respect of the link between anonymous requests "inundating" the Government and "foreign actors [or] foreign powers", to the extent that Mr Butler is suggesting that all or some of the anonymous requests that had "inundated" the Government are *likely* "linked to foreign actors [or] foreign powers", no evidence has been provided to support his contention.

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5 https://psnews.com.au/author/cjohnson/

6 Chris Johnson, Outrage over Labor's plan to start charging for FoI requests, *Region* (3 September 2025), < https://region.com.au/outrage-over-labors-plan-to-start-charging-for-foi-requests/901086/ >

7 Order for Production No 155 of 2025, *Order of 3 September 2025 (155) relating to freedom of information* (tabled in the Senate on 17 September 2025) - https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/12606

[49] In using the modal verb *may* in respect of the link between anonymous requests "inundating" the Government and "foreign actors [or] foreign powers", to the extent that Mr Butler is suggesting that all or some of the anonymous requests that had "inundated" the Government could, as a matter of logical possibility, be "linked to foreign actors [or] foreign powers", the statement is worthless in justifying the general imposition of a fee to submit access requests under the FOI Act because it does not address meaningful likelihoods.

B6.4. The fallacy of cost recovery

[50] Mr Butler has stated that the general imposition of a fee to *submit* access requests to Ministers or agencies, under the FOI Act, is justified because "a modest charging environment is consistent with usual cost-recovery principles."

[51] The statement is both fallacious and misguided.

[52] The statement is fallacious because it does not cost the Commonwealth a cent for a person to *submit* an access request under the FOI Act. Therefore, there is no cost to the Commonwealth to recover.

[53] The cost to the Commonwealth lies in *processing* an access request, but that is conceptually and legally distinct to submitting an access request.

[54] As it stands, the Commonwealth is able to recover some of the cost of processing an access request where the person dealing with the request has spent more than five hours processing the request: *Freedom of Information (Charges) Regulation 2019* (Cth), Schedule 1, Part 1, item 4.

[55] Nothing would prevent the Government from amending the regulations to make cost recovery, in appropriate circumstances, for *processing* an access request permissible from the moment it is considered.

[56] The statement is misguided because, according to the Attorney-General and the recent data she relies on, "FOI requests for personal information comprised 72 per cent of overall FOI requests in 2023-2024" and that "[o]n these figures, up to three in four freedom-of-information requests would be exempt from any application fee."[8]

[57] Aside from the fact that the Commonwealth is not recovering any costs from members of the community submitting access requests, access applicants who submit requests for non-personal documents (e.g. the kinds of documents that contain deliberative content on government policy, or materials about government expenditure etc.), would bear the burden of the "costs recovery" exercise.

[58] A cynic would point out that "costs recovery" was being saddled on those access applicants seeking non-personal documents from Ministers or agencies, which are, in the main, just those kinds of documents that tend to contain content that might embarrass Ministers or agencies.

B7. Consideration of the evidence in support of the Government's proposal to introduce fees for submitting access requests to "deter frivolous and vexatious requests, while maximising accessibility of the system for genuine applicants"

8 *Hansard*, Michelle Rowland MP, House of Representative, 3 September 2025, p 10 - https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/28849/&sid=0000

B7.1. How prevalent are vexatious requests?

[59] At the moment, there are only two vexatious applicant declarations in effect: https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/vexatious-applicant-declarations

[60] The fact that there are only two vexatious applicant declarations in effect would suggest any one or a combination of the following things:

1. The "*large volumes* of vexatious, abusive and frivolous requests", referred to by the Attorney-General in her second reading speech,[9] are, in reality, non-existent because the *large volumes* of requests that the Attorney-General has characterised as vexatious or abusive (or frivolous) are not vexatious or abusive in the sense required by the FOI Act.

2. Ministers or officials in agencies have not been able to convince the Information Commissioner that applications being made reach the statutory threshold for making a vexatious applicant declaration. It is important to note that vexatious applicant declarations will not be made lightly.[10] That is because there are various statutory levers available, under the FOI Act, to public officials and Ministers to limit the administrative cost or burden of access requests, including by imposing *access* charges once a decision is made to grant access to document: FOI Act, s 11A(1)(b); also refer to *Department of Defence and W* [2013] AICmr 2, [18].

3. Ministers or officials in agencies are not, in appropriate circumstances, applying to the Information Commissioner with a view to the Information Commissioner making vexatious applicant declarations.

4. The Information Commissioner is not effectively exercising her powers when it comes to making vexatious applicant declarations

5. The law in respect of vexatious applicant declarations is deficient.

6. Something else.

B7.2. What does the evidence establish in respect of vexatious access requests?

[61] Without evidence, what has been noted above merely sets out *possibilities*.

[62] Without evidence of *actualities*, law reform is not good policy.

[63] Sadly, very little evidence has been offered by the Government about the "*large volumes* of vexatious, abusive and frivolous requests", referred to by the Attorney-General in her second reading speech, as being a systemic problem.

[64] The one example of evidence provided by the Government, which was that FSU had engaged

9 *Hansard*, Michelle Rowland MP, House of Representative, 3 September 2025, p 8. Specifically, Ms Rowland MP stated that "public servants spent more than one million hours *processing* freedom-of-information requests" because of "in part … technology enabling large volumes of vexatious, abusive and frivolous requests ..." < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0016%22 >.

10 *Freedom of Information Guidelines*, [12.7] - https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines

in a campaign to "end eSafety",[11] was an extreme example.

B7.3. Is there a lacuna in the law in respect of vexatious access requests?

[65] In the light of the example provided by the Attorney-General, being the campaign by FSU to use the freedom of information process to unreasonably interfere with the operations of an agency, EFA is of the view that there is a lacuna in the law in respect of vexatious access requests.

[66] That said, EFA does not believe that the most appropriate policy for "deterring frivolous or vexatious requests" is to impose fees on access applicants for submitting access requests. EFA believes a more measured proposal for reform would arrest frivolous or vexatious requests.

[67] Specifically, EFA notes that while the Information Commissioner and the Administrative Review Tribunal have powers to declare that *access applicants* are vexatious, neither the Information Commissioner nor the Administrative Review Tribunal has powers to relieve a Minister or an agency from dealing with access applications, which are vexatious, pertaining to identified *subject matter*.

B8. Proposal for reform

[68] In the light of what has been noted in part B7.3 of these submissions, EFA proposes the following amendments to the FOI Act:

Part VIII – Miscellaneous

Division 1A – Dispensatory declarations

89NA Applications

(1) The Information Commissioner may, on the application of a Minister or the principal officer of an agency for a final dispensatory declaration on access actions pertaining to certain subject matter, issue, in a written instrument, an interim dispensatory declaration.

(2) Notwithstanding any other law of the Commonwealth, neither a Minister nor the principal officer of an agency may delegate the function of applying to the Information Commissioner for a final dispensatory declaration.

(3) An application for a final dispensatory declaration must be set out in a statutory declaration under, and made in accordance with, the *Statutory Declarations Act 1959*.

(4) A Minister or the principal officer of an agency may apply to the Information Commissioner for a final dispensatory declaration on an *ex parte* basis.

(5) The application for a final dispensatory declaration must be appended to any interim dispensatory declaration issued by the Information Commissioner.

(6) A final dispensatory declaration shall not be issued by the Information Commissioner unless an interim dispensatory declaration is issued.

89NB Interim dispensatory declarations – effect

11 https://endesafety.au/ask

(1) An interim dispensatory declaration issued by the Information Commissioner authorises a Minister or the principal officer of an agency to deal with access actions pertaining to certain subject matter pursuant to the terms and conditions, which must not be contrary to this Act, stated in an interim dispensatory declaration.

(2) The Information Commissioner may not make an interim dispensatory declaration in respect of access actions pertaining to certain subject matter for a Minister or agency other than for the Minister or for the agency identified in the application for a final dispensatory declaration.

(3) The terms and conditions of an interim dispensatory declaration come to an end 60 days from the date of the declaration.

(4) An interim dispensatory declaration may be made in respect of:

a) one; or
b) more than one; or
c) all,

access actions, made to a Minister or an agency, pertaining to a certain subject matter.

(5) An interim dispensatory declaration does not come into effect until the day it is conspicuously published on the website maintained for the Office of the Australian Information Commissioner.

(6) A Minister or the principal officer of an agency must, within 3 business days of an interim dispensatory declaration coming into effect, publish an interim dispensatory declaration issued by the Information Commissioner about access actions pertaining to certain subject matter in a conspicuous place on the main website maintained for the Minister or the agency.

(7) For the avoidance of doubt, the Information Commissioner may set terms or conditions, in an interim dispensatory declaration, with the effect that a Minister or the principal officer of an agency need not process any or all access actions pertaining to certain subject matter covered by the interim dispensatory declaration received prior to or during the term of the interim dispensatory declaration.

(8) For the avoidance of doubt, the Information Commissioner may set terms or conditions, in an interim dispensatory declaration, with the effect that, during the term of an interim dispensatory declaration, any or all access actions pertaining to certain subject matter may be made to a Minister or an agency only with the leave of the Information Commissioner.

89NC Grounds for issuing interim dispensatory declarations

(1) Upon receipt of the application of a Minister or the principal officer of an agency for a final dispensatory declaration on access actions pertaining to certain subject matter, the Information Commissioner may only issue, in a written instrument, an interim dispensatory declaration if satisfied that the application for a final dispensatory declaration on access actions pertaining to certain subject matter shows, *prima facie*:

a) that the access actions pertaining to certain subject matter are frivolous in nature; and

b) either one of the following applies:

i) processing the access actions will unreasonably interfere with the operations of the Minister in question; or
ii) processing the access actions will unreasonably interfere with the operations of the whole of the agency in question.

(2) For the purposes of subsection (1):

a) without limiting the meaning of frivolous, access actions pertaining to certain subject matter are frivolous if the documents requested are unlikely to advance scrutiny or meaningful consideration of policies or decisions that the relevant Minister or the relevant agency's officials are responsible for; and

b) the fact that policies or decisions affect the interests of only:

i) one person; or
ii) one company; or
iii) a small group of persons; or
iv) a small segment of society,

does not mean that access actions pertaining to certain subject matter are frivolous.

(3) The Information Commissioner may, in the light of the circumstances, take into account such factors that he or she thinks are relevant to determining whether or not access actions pertaining to certain subject matter are frivolous.

89ND Interim dispensatory declarations – submissions

(1) An interim dispensatory declaration must, on the first page of the instrument issued, contain a notice, directed to:

a) journalists and media organisations; and
b) persons who have engaged in access actions the subject of an application for a final dispensatory declaration,

inviting submissions in response to a Minister's or a principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter.

(2) The Information Commissioner may, in an interim dispensatory declaration, limit the number of words for submissions made in response to a Minister's or a principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, but may not limit the submissions to fewer than 2,500 words.

(3) Submissions by:

a) journalists or media organisations; or
b) persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
c) Australian legal representatives, on behalf of persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
d) a member of the Commonwealth's House of Representatives or a Senator,

must be made to the Information Commissioner within 30 days of an interim dispensatory declaration coming into effect.

(4) Where a journalist makes submissions on a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, the Information Commissioner must not consider the submissions unless the submissions made by the journalist:

a) are made in the form of a statutory declaration and in accordance with the *Statutory Declarations Act 1959*; and
b) include the full name and work address of the journalist.

(5) Where a media organisation makes submissions on a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, the Information Commissioner must not consider the submissions unless the submissions made by the media organisation:

a) are made in the form of a statutory declaration and in accordance with the *Statutory Declarations Act 1959*; and
b) include the full name and work address of at least one journalist involved in preparing the submissions made by the media organisation.

(6) Subject to subsections (7), (8) and (9), unless submissions made by a person who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration:

a) are made in the form of a statutory declaration and in accordance with the *Statutory Declarations Act 1959*; and
b) include, in the statutory declaration, a declaration that the person has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration; and
c) include, in the statutory declaration, a statement or statements identifying each and every access action, being the subject of an application for a final dispensatory declaration, the person is responsible for engaging in; and
d) have appended to the submissions each and every access action, being the subject of an application for a final dispensatory declaration, the person is responsible for engaging in; and
e) include the full name and residential address of the person making the submissions; and
f) are accompanied by scans of identificatory documents, prescribed in the regulations for the purposes of this section, that have been certified by a justice of the peace, a notary public, or a commissioner for oaths based in Australia;

the Information Commissioner must not take the submissions into consideration.

(7) An Australian legal practitioner may make submissions of behalf a person who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration.

(8) Unless submissions made by an Australian legal practitioner, on behalf of a person who has engaged in an access action, or in access actions, the subject of an application for a final

dispensatory declaration:

a) are made in the form of a statutory declaration and in accordance with the *Statutory Declarations Act 1959*; and
b) include, in the statutory declaration, a declaration that the person represented has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration; and
c) include, in the statutory declaration, a statement or statements identifying each and every access action, being the subject of an application for a final dispensatory declaration, the person person represented is responsible for engaging in; and
d) have appended to the submissions each and every access action, being the subject of an application for a final dispensatory declaration, the person represented is responsible for engaging in; and
e) include the full name and business address of the Australian legal practitioner making the submissions on behalf of the person represented; and

the Information Commissioner must not take the submissions into consideration.

(9) An Australian legal practitioner need not, in the submissions prepared for the Information Commissioner pursuant to subsection (8), identify the person represented who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration.

(10) A member of the Commonwealth's House of Representatives or the Senate may make a submission on a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, but, unless the submission made by the member of the Australian community:

a) is made in the form of a statutory declaration and in accordance with the *Statutory Declarations Act 1959*; and
b) includes the full name and electoral office address of the member of the House of Representatives or the Senator,

the Information Commissioner must not take the submissions into consideration.

(11) The Information Commissioner must, in a conspicuous place on the website maintained for the Office of the Information Commissioner, publish submissions received, in respect of Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, from:

a) journalists or media organisations; or
b) members of the House of Representatives of a Senator; or
c) an Australian legal representative of a person who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration.

(12) The Information Commissioner must, in a conspicuous place on the website maintained for the Office of the Information Commissioner, publish submissions received, in respect of Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter, from an Australian legal representative of a person who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration, unless the Information Commissioner is satisfied that the submissions contain content that:

a) is defamatory; or
b) is contrary to the public interest to publish.

(13) In respect of submissions published on the website maintained for the Office of the Information Commissioner, the Information Commissioner must redact:

a) the residential address; and
b) scans of identificatory documents, prescribed in the regulations for the purposes of this section, that have been certified by a justice of the peace, a notary public, or a commissioner for oaths based in Australia,

of a person who has engaged in an access action, or in access actions, the subject of an application for a final dispensatory declaration from submissions made by that person.

(14) Submissions must be published on the website maintained for the Office of the Information Commissioner no later than 60 days after an interim dispensatory declaration has come into effect in respect of a Minister's or principal officer's application for a final dispensatory declaration.

89NE Interim dispensatory declarations – considering submissions made on an application for a final dispensatory declaration

(1) After 30 days from the date an interim dispensatory declaration comes into effect, the Information Commissioner must consider any and all valid submissions made by:

a) journalists or media organisations; or
b) persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
c) Australian legal representatives, on behalf of persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
d) a member of the Commonwealth's House of Representatives or a Senator,

on a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter.

(2) The Information Commissioner must not consider any submissions provided to the Information Commissioner, after the 30 days from the date an interim dispensatory declaration comes into effect, by:

a) journalists or media organisations; or
b) persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
c) Australian legal representatives, on behalf of persons who have engaged in access actions the subject of an application for a final dispensatory declaration; or
d) a member of the Commonwealth's House of Representatives or a Senator,

on a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter.

(3) Unless the timeframe for an interim dispensatory declaration is extended, the Information Commissioner must make a decision in respect of a Minister's or principal

officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter by the time the interim dispensatory declaration ceases to have effect.

(4) If the Information Commissioner is of the view that it is, in the light of all the circumstances, unfeasible to consider the submissions made in respect of a Minister's or principal officer's application for a final dispensatory declaration on access actions pertaining to certain subject matter by the time the interim dispensatory declaration ceases to have effect, the Information Commissioner may, by written instrument conspicuously published on the website maintained for the Office of the Australian Information Commissioner, extend the application of an interim dispensatory declaration by no more than 21 days after the interim dispensatory declaration comes to an end.

(5) The Information Commissioner is not permitted to extend the application of an interim dispensatory declaration more than once.

(6) The Information Commissioner is not permitted to extend the application of an interim dispensatory declaration if the interim dispensatory declaration comes to an end.

(7) A Minister or the principal officer of an agency must, within 3 business days of an extension to an interim dispensatory declaration coming into effect, publish the written instrument setting out the extension to an interim dispensatory declaration issued by the Information Commissioner about access actions pertaining to certain subject matter in a conspicuous place on the main website maintained for the Minister or the agency.

89NF Final dispensatory declarations

(1) The Information Commissioner may, on the application of a Minister or the principal officer of an agency for a final dispensatory declaration on access actions pertaining to certain subject matter, issue, in a written instrument, a final dispensatory declaration.

89NG Final dispensatory declarations – effect

(1) A final dispensatory declaration issued by the Information Commissioner authorises a Minister or the principal officer of an agency to deal with access actions pertaining to certain subject matter subject to the terms and conditions, which must not be contrary to this Act, stated in a final dispensatory declaration.

(2) The terms and conditions of a final dispensatory declaration may come to an end within 12 months from the date of the declaration, and, irrespective of what is noted in the final dispensatory order, come to an end 12 months from the date the final dispensatory declaration came into effect.

(3) The Information Commissioner may not make a final dispensatory declaration in respect of access actions pertaining to certain subject matter for a Minister or agency other than for the Minister or for the agency identified in the application for a final dispensatory declaration.

(4) A final dispensatory declaration may be made in respect of:

a) one; or
b) more than one; or
c) all,

access actions, made to a Minister or an agency, pertaining to a certain subject matter.

(5) For the avoidance of doubt, the Information Commissioner may, in a final dispensatory declaration, declare that a Minister or a principal officer of an agency shall not deal with access actions pertaining to certain subject matter covered by the final dispensatory declaration.

(6) A final dispensatory declaration does not come into effect until it is conspicuously published on the website maintained for the Office of the Australian Information Commissioner.

(7) A Minister or the principal officer of an agency must, within 3 business days of a final dispensatory declaration coming into effect, publish the final dispensatory declaration issued by the Information Commissioner about access actions pertaining to certain subject matter in a conspicuous place on the main website maintained for the Minister or the agency.

89NH Onus of establishing that a final dispensatory declaration should be made

(1) If a Minister or the principal officer of an agency has applied for a final dispensatory declaration, the Minister or principal officer has the onus of establishing that the Information Commissioner should issue an interim dispensatory declaration.

89NJ Grounds for issuing final dispensatory declarations

(1) The Information Commissioner may only issue, in a written instrument, a final dispensatory declaration if satisfied, on the totality of the evidence presented to the Information Commissioner by the applicant and any other parties making valid submissions, that the application for a final dispensatory declaration on access actions pertaining to certain subject matter demonstrates that:

a) that the access actions pertaining to certain subject matter are frivolous in nature; and
b) either one of the following applies:

i) processing the access actions will unreasonably interfere with the operations of the Minister in question; or
ii) processing the access actions will unreasonably interfere with the operations of the whole of the agency in question.

(2) For the purposes of subsection (1):

a) without limiting the meaning of frivolous, access actions pertaining to certain subject matter are frivolous if the documents requested are unlikely to advance scrutiny or meaningful consideration of policies or decisions that the relevant Minister or the relevant agency's officials are responsible for;
b) the fact that policies or decisions affect the interests of only:

i) one person; or
ii) one company; or
iii) a small group of persons; or
iv) a small segment of society,

does not mean that access actions pertaining to certain subject matter are frivolous.

(3) The Information Commissioner may, in the light of the circumstances, take into account such factors that he or she thinks are relevant to determining whether or not access actions in pertaining to certain subject matter are frivolous.

89NK Publishing reasons in support of a final dispensatory declaration

(1) Within 10 business days of publishing a final dispensatory declaration on the website maintained for the Office of the Australian Information Commissioner, the Information Commissioner must publish his or her reasons in support of the final dispensatory declaration.

89NL Definitions for the purposes of this Division

(1) For the purposes of this Division, a person engages in an ***access action*** if the person does any of the following:

a) makes a request; or
b) makes an application under section 48; or
c) makes an application for internal review; or
d) makes an IC review application.

(2) For the purposes of this Division, a person is an ***Australian legal practitioner*** if that person has been issued with a practising certificate, by the relevant authority in a State or Territory of Australia, to work as a solicitor or a barrister.

89NM No right of administrative review

(1) Notwithstanding anything in this Act or another enactment of the Commonwealth, an application may not be made to the Administrative Review Tribunal for a review of any decision made by the Information Commissioner under this Division.

89NN Right of judicial review

(1) Notwithstanding anything in this Act or another enactment of the Commonwealth, a person who is aggrieved by a decision made by the Information Commissioner under this Division may, pursuant to the *Administration Decisions (Judicial Review) Act 1977*, apply to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) for an order for review.

[69] The proposal for reform set out above adequately deals with the problem of frivolous or vexatious access actions made in respect of a particular subject matter by access applicants, without lumbering *all* access applicants with fees for simply *submitting* an access request under the FOI Act.

[70] The proposal for reform set out in part B8 is both defensible and measured.

C. Transferring requests for access to documents made under the FOI Act

C1. The current state of the law

[71] As the law stands, when a person submits a request for documents to a Minister or an agency, the Minister or the agency's officials are obligated to take "whatever reasonable steps [are] necessary to ascertain whether they themselves [have] documents answering the description in the respective requests" before attempting to transfer the request to another agency: *Bienstein v Attorney-General* [2007] FCA 1174, [38].

C2. The Government's proposed amendment

[72] The Government intends to legislate away the Federal Court's judgment on transferring access requests by including the following provision into the FOI Act:

> It is not necessary for the agency to which the request is made to conduct any search for the document if it is apparent from the nature of the document as described in the request that it would not be in the possession of that agency: Bill, Schedule 2, Part 6, item 62.

[73] The meaning of "agency" includes a "Minister" for the relevant proposed provision.

C3. An example of a consequence of the Government's proposed amendment

[74] If the Government's proposed amendment is carried, it would not be necessary for a Minister to conduct any searches for a document that *appeared*, from the nature of the document requested, *would* not be in the possession of the Minister.

[75] Suppose it became public knowledge that officials in an agency had prepared a briefing that contained content that tended to demonstrate unlawful conduct was engaged in by officials in the agency (think Robodebt).

[76] As the law stands, if a journalist were to submit an access request, to the Minister, for certain briefing documents that tend to demonstrate unlawful conduct in the agency for which the Minister is responsible, the Minister must first conduct searches for the requested document before attempting to transfer the request to the agency whence the briefing came.

[77] Being able to determine *who* has access to documents can be just as important, if not more so, than the *what* in the document.

[78] It's one thing to know that the briefing contained content that tended to demonstrate unlawful conduct was engaged in by officials in the agency. It's another to know that the Minister had access to that briefing.

[79] By proposing to amend the FOI Act so that a longstanding Federal Court judgment on transferring access requests is nullified, the Government is providing a legislative mechanism through which Ministers, amongst others, will be able to escape accountability.

C4. Proposal for law reform

[80] EFA finds the Government's proposed reform disheartening because it nullifies an important judgment of the Federal Court of Australia.

[81] EFA believes that the judgment in *Bienstein v Attorney-General* [2007] FCA 1174 should be explicitly enshrined in the FOI Act.

[82] Accordingly, EFA proposes the following amendment to the FOI Act:

16 Transfer of requests

…

(1A) Notwithstanding anything in subsection (1), where a request is made to an agency for access to a document, agency officials must take reasonable steps to ascertain whether or not the agency has the documents answering the description in the request for access before attempting to transfer the request to another agency.

D. Shifting the focus from documents to people requesting documents

D1. The current law

[83] Under the law, a person submitting an access request does not need to provide their name when requesting a document.

[84] The rationale is simple – the focus of the request is the document requested, not the person who requests the document.

[85] It makes no difference who is asking for the document because, unless exempted from release under the law (on the basis of a statutory exemption or a public interest test), any and every person has a right to access documents held by the Commonwealth Government on account of the documents being "national resources": FOI Act, s 3(3).

D2. The proposed amendment

[86] Under the Bill, the Government intends to make it compulsory for a person to identify himself or herself in order to make a valid access request: Bill, Schedule 2, Part 5.

D3. Justification proffered for the amendment

[87] According to the Attorney-General:[12]

> The ability for freedom-of-information requests to be lodged anonymously also risks undermining the integrity of the framework, and, in combination with new technology, creates risk vectors that could be exploited by offshore actors seeking government-held information for potentially nefarious purposes.

D4. An assessment of the proposed amendments and the justifications proffered

[88] As the law stands, the focus of the law is on the *documents* requested.

[89] If the documents contain content that is *exempt content* or *against the public interest to disclose to an access applicant*, the documents (or relevant parts of the documents) will not be made available to an access applicant.

[90] Under the law, exempt content does not change its stripes because the decision maker knows who has asked for the document containing the exempt content.

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12 *Hansard*, Michelle Rowland MP, House of Representatives, 3 September 2025, p 8 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0016%22 >.

[91] Similarly, the public interest is most unlikely to morph because the decision maker considering the access request knows who has requested the documents.

[92] Therefore, knowing the name of the person who has requested the document will not, in any appreciable way, advance the lawful consideration of the access request.

[93] Importantly, no "offshore actor", named or unnamed, would be able to get their hands on, amongst other things,:

> a) documents affecting national security or international relations: *Freedom of Information Act 1982* (Cth), s 33; or
>
> b) cabinet documents: *Freedom of Information Act 1982* (Cth), s 34; or,
>
> c) documents affecting law enforcement or the protection of public safety: *Freedom of Information Act 1982* (Cth), s 37; or
>
> d) documents to which certain secrecy provisions apply: *Freedom of Information Act 1982* (Cth), s 38; or
>
> e) documents subject to legal professional privilege: *Freedom of Information Act 1982* (Cth), s 42; or
>
> f) documents containing material obtained in confidence: *Freedom of Information Act 1982* (Cth), s 45; or
>
> g) documents disclosing trade secrets or commercially valuable information: *Freedom of Information Act 1982* (Cth), s 47,

by submitting an access request.

[94] That is because, no person in Australia or anywhere in the world, named or unnamed, is entitled to access documents that are classed as exempt documents.[13]

[95] Similarly, in the very few scenarios where knowing a person's identity is the sole factor that affects the public interest in granting access to a conditionally exempt document,[14] not knowing the identity of a person *a fortiori* guarantees that an unnamed person, Australian or alien, is denied access to a document of the Government.

[96] Again, it is worth noting that there is no cost to the Commonwealth or Australian taxpayers for

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13 According to an article published on the website of the Australian Broadcasting Corporation (Tom Crowley, Labor proposes blanket refusal of freedom of information requests in overhaul of transparency laws, *ABC* (3 September 2025), < https://www.abc.net.au/news/2025-09-03/labor-to-water-down-information-laws/105729886 >) Prime Minister Albanese is quoted as saying:

> I think most people … would find it surprising that people can put in anonymous FOI requests. What that means is that there's no way to determine whether a foreign agent or actor is putting in requests about information that are sensitive.

What of it? Just because a foreign agent or actor submits an access request does not mean that he or she will be given access to documents containing that information. The Prime Minister's comments are irrelevant and do not justify the purported "need" to know the identities of those making access requests under the FOI Act.

14 Please refer to Part IV Division 3 of the FOI Act on conditionally exempt documents.

anybody, named or unnamed, Australian or alien, to *submit* an access request under the FOI Act. The cost to the Commonwealth and, by extension, the taxpayer lies in *processing* the access request.

[97] As has already been noted in these submissions, there are already laws in place to recover the cost of processing an access request under the FOI Act, and it is within the power of the Government, under the FOI Act, to "advise" the Governor-General to reissue regulations on charges for *processing* access requests to recover the costs of processing an access request from the very moment an valid access request is processed.

[98] In the light of the assessment set out, the justification proffered by the Attorney-General for the proposed reforms in Schedule 2, Part V of the Bill are irrelevant and fallacious.

E. Granting public officials anonymity while demanding the identifies of private citizens

E1. The current law

E1.1 Decision notices under the FOI Act

[99] Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision maker shall cause the applicant to be given notice in writing of the decision, and the notice shall state the name and designation of the person giving the decision: FOI Act, s 26(1)(b).

[100] In other words, where reasons for decision are necessary, the notice of the reasons for decision shall contain the *public* official's name and designation.

E1.2. Charge decisions under the FOI Act

[101] Where written notice is provided to an access applicant that contentions, made by the access applicant, about charges for processing an access request are rejected, the decision maker must provide his or her name on the notice of reasons rejecting the contentions: FOI Act, ss 29(8) and 29(9).

E1.3. Request consultation

[102] Where officials in an agency intend, or a Minister intends, to refuse to process an access application because they believe a practical refusal reasons exists, an official or Minister must, in a written notice, state, amongst other things, the practical refusal reason and the name of an officer of the agency or member of staff of the Minister with whom the applicant may consult during a consultation period: FOI Act, s 24AB(2).

E2. The proposed amendment

[103] Under the Bill, a *public* official who issues a decision in respect of access, or a decision in respect of charging a person for processing an access request, or a practical refusal notice, shall not be required to provide his or her name in the decision notice: Bill, Schedule 2, Part 2, items 21, 22 and 23.

E3. Comment on the Government's proposed reform

[104] There is an acute perversity in the Government legislating that no *private* citizen or member of the community is entitled to submit an access request to an agency or Minister without

identifying himself or herself, but that *public* officers of the Commonwealth, who make decisions affecting the rights of *private* members of the community, shall not be required to identify themselves when making relevant decision under the FOI Act.

F. Technology specific edicts in respect of digital communication

F1. The current law

[105] As the law stands, an access request made, by electronic communication, to a Minister or an agency must be sent "to an electronic address specified by the agency or Minister": FOI Act, s 15(2A)(c).

F2. The proposed amendment

[106] The Government intends to amend the law so that an access request made, by electronic communication, to a Minister or an agency must be sent "*in a manner* specified by the agency or Minister": Bill, Schedule 2, Part 1, item 4.

F3. An assessment of the proposed amendments

F3.1. General statements about the proposed amendments

[107] If the proposed amendment is effected, the Parliament will empower the principal officers of agencies and Ministers to dictate the mode by which access applications may be sent by electronic communication.

[108] There are no limits, in the Bill, on a Minister's or principal officer's powers in respect of the mode or the manner in which electronic communication are to be made when submitting access requests.

[109] Under the proposed reform, a Minister or a principal officer of an agency may, for example:

> a) dictate that an access application may only be made using a digital form on the Minister's or agency's website, or by logging into a dedicated portal; or
>
> b) make the provision of photographic identification an essential prerequisite to submitting a request through a digital form or a dedicated portal.

F3.2. How the proposed amendments affect civil society and productivity

F3.2.1. Preliminary disclosures

[110] Two things are clearly and explicitly noted at the outset of this part of the submissions.

[111] ***First***, this part of the submissions is informed by an insightful article published in the Canberra CityNews by the noted former barrister, Mr Hugh Selby.[15]

[112] ***Second***, EFA supports the mission of the Open Australian Foundation and, in particular, the *Right to Know* platform operated by the Open Australia Foundation.

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15 Hugh Selby, Freedom goes missing in planned FOI reforms, *Canberra CityNews* (18 September 2025), < https://citynews.com.au/2025/freedom-goes-missing-in-planned-foi-reforms/ >

F3.2.2. The Open Australia Foundation's Right to Know platform

[113] Those who are familiar with the freedom of information process would be aware of the Open Australia Foundation's *Right to Know* platform: www.righttoknow.org.au. The platform is based on a model used throughout the Europe and North America: https://alaveteli.org/

[114] The platform allows any person, Australian or alien, to *publicly* lodge a freedom of information request with a Minister of the Commonwealth or a Commonwealth agency.

[115] Documents, and any notices of reasons is support, that are provided to access applicants are stored on the platform and made accessible to all people with an internet connection.

[116] The *Right to Know* website serves an *accountability* function by providing members of the community with a means through which to easily access documents held by the Commonwealth government (as well as State and Territory governments).

[117] The website serves a *productivity* function in that members of the community are able to access documents, as well as reasons, released to others in the community, thus obviating the need to apply to agencies or Ministers for access to the same documents. Naturally, time and energy saved not dealing with requests for access to documents that are in the public domain means that public officials are able to devote their scarce energies and resources to other matters.

[118] *Right to Know* and platforms like it are magnificent examples of civil society holding governments to account in an efficient manner. Sadly, the Government's reforms have the potential to undermine civil society organisations, such as the Open Australia Foundation, and the good that they do for the Australian community.

[119] Should the Bill pass, Ministers and principal officers of agencies would be entitled to undermine the open society philosophy under-girding platforms like *Right to Know* by limiting the right of access applicants to make electronic access applications using electronic modes authorised by Ministers or principal officers.

[120] Still worse, the Parliament would permit Ministers and principal officers to undermine the productivity gains associated with the publication of documents, and any notices of reasons in support, released under the FOI Act to the public-at-large.

[121] Rather than alleviate the problems of the broken freedom of information system, the Government's reforms, which will empower Ministers and principal officers to issue ukases on the manner in which digital communications may be made for the purposes of access requests, will, at best, not advance productivity in respect of access requests and, most likely, retard productivity because access applicants, unable to access documents and, in particular, notices of reasons already published on websites like *Right to Know*, will apply for access to documents that have already been considered, for the purposes of the FOI Act, by public officials or Ministers.

[122] Chances are that the Government's proposed reforms will succeed in duplicating processes for public officials for no net gain, and, thus, retard the net wealth of Australians.

G. Documents setting out deliberative processes and the Government's proposal to introduce a public interest factor against access to such documents

G1. The current law

[123] As the law stands, when considering the public interest in granting access to a document containing deliberative matter,[16] there are no legislated factors against giving access to a document containing deliberative matter.

G2. The proposed amendment

[124] The Government intends to introduce factors against giving access to a document: Bill, Schedule 7, Part 3, item 14.

[125] Specifically, the Government intends to introduce the following provisions in section 11B of the FOI Act:

> If the document is conditionally exempt under section 47C (deliberative processes), factors that are against giving access to the document in the public interest include whether giving access to the document would, or could reasonably be expected to, have any of the following effects (whether in a particular case or generally):
>
> > a) prejudice the frank or timely discussion of matters or exchange of opinions between participants in deliberative processes of government for the purposes of consultation or deliberation in the course of, or for the purposes of, those processes;
> >
> > b) prejudice the frank or timely provision of advice to or by an agency or Minister, or the consideration of that advice after it is provided;
> >
> > c) prejudice the orderly and effective conduct of a government decision-making process.

G3. Relevant background

[126] In 2009 and 2010, the Rudd Labor Government delivered on its promise on "driving a cultural shift across the bureaucracy to promote a pro-disclosure culture."[17] The Rudd Government's proposals for reform to the FOI Act were "designed to restore trust and integrity in the handling of government information."[18]

[127] The Rudd Government's reforms to the FOI Act were " the product of a participatory process."[19] The Rudd Government "consulted a number of stakeholders and then released exposure drafts of [the FOI amendment] bill for public comment in March [2009]."[20]

[128] The Rudd Government's "[p]roposals in the Freedom of Information Amendment (Reform) Bill [were] also drawn in part from the key findings of the 1995 joint Australian Law Reform

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16 As to deliberative matter, please refer to section 47C of the *Freedom of Information Act 1982* (Cth).

17 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12971 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

18 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12971 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

19 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12971 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

20 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12971 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

Commission and Administrative Review Council Open government report."[21]

[129] As part of the Rudd Labor Government's reforms to the FOI Act, the member for Holt, Mr Anthony Byrne MP, stated the following in his second reading speech on the Rudd Government's Freedom of Information Amendment (Reform) Bill 2009:[22]

> Certain factors which are not conducive to open and accountable government, including arguments solely concerned with political sensitivity, will not be able to be argued as factors supporting non-disclosure of documents. This extends to arguments ordinarily associated with the deliberative documents exemption—for example, that disclosure would cause a loss of confidence in the government or cause embarrassment to the government. In keeping with the intention of the reforms to promote disclosure, the bill lists some pro-disclosure factors but does not list factors against disclosure.

G4. Justifications proffered for the introduction of public interest factors against the release of documents containing deliberative matter

[130] According to the Attorney-General, Ms Michelle Rowland MP:[23]

> On introducing the Freedom of Information Act in 1981 under the Fraser government, Senator Durack told the parliament that 'the general right of access' to information 'must, of course, be limited' for the 'protection of essential public interests'.
>
> Schedule 7 of the bill clarifies the operation of important exemptions in the act consistent with the original policy intent to promote efficient handling of requests, including by … amending the public interest test as it relates to the deliberative-processes exemption—to provide greater clarity around public interest considerations.

[131] Moreover, tying her justifications for the introduction of public interest factors against the release of documents containing deliberative matter into the overall scheme of the Bill, the Attorney-General claimed:[24]

> The bill implements a number of recommendations of the 2013 Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010 (also known as the 2013 Hawke review), which concerned, among other things, how to make the system more effective.

G5. An assessment of the proposed amendments, and the justifications proffered

[132] Ever since the FOI Act was enacted in 1982, public officials have kvetched that the FOI Act undermines the willingness of Australian public servants to record frank assessments or advice about policy or issues pertaining to government.

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21 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12971 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

22 *Hansard*, Anthony Byrne MP, House of Representatives, 26 November 2009, p 12972 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-26%2F0021%22 > .

23 *Hansard*, Michelle Rowland MP, House of Representatives, 3 September 2025, p 11 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0016%22 >.

24 *Hansard*, Michelle Rowland MP, House of Representatives, 3 September 2025, p 9 - < https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F28849%2F0016%22 >.

[133] Sadly, such views are still held at the highest level of the Australian Public Service.

[134] In a public address on 22 February 2024, the Australian Public Service Commissioner, Dr Gordon de Brouwer PSM, drew a causal relationship between the effects of Robodebt and "how public servants avoided putting their advice in writing out of concern that it would be public."[25]

[135] During his public address, the Australian Public Service Commissioner stated:[26]

> It is no use just to tell everyone to change. We need to discuss whether the way FoI law has been operating for the past decade and half, when conclusive certificates were discontinued, is counterproductive to the Parliament's intent. When it comes to deliberative material, FoI does not ensure transparency (because advice is not being written) and it undermines integrity (because advice is not being written). The question is whether those exemptions to ensure that public servants provide sensitive deliberative advice in writing should be strengthened, perhaps with delayed public release of deliberative briefings after, say, 5 or 10 years.

[136] The author of the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010*, the lamented Dr Allan Hawke AC, addressed the thrust of Dr de Brouwer's views.

[137] In his review,[27] Dr Hawke noted the "frank and fearless advice issue and the implication that the possibility of public disclosure limits the capacity of officials to provide comprehensive advice to ministers."[28]

[138] Dr Hawke was pellucid in his view, when he stated:[29]

> This Review inclines to John Wood's view that officials should be happy to publicly defend any advice given to a minister and if they are not happy to do so then they should rethink the advice. This is consistent with the view expressed by Senator Faulkner in launching the reforms; that the tradition of frank and fearless advice is more robust, and that public servants would be able to work professionally within the new FOI framework as they do within other accountability mechanisms.

[139] More to the point, Dr de Brouwer's views, which are that "[w]hen it comes to deliberative material, FoI does not ensure transparency (because advice is not being written) and it undermines integrity (because advice is not being written)," are misguided for the following reasons.[30]

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25 Dr Gordon de Brouwer, APS Commissioner, *Speech at The Mandarin's - Rebuilding Trust and Integrity in the Australian Public Service*, 22 February 2024 - < https://www.apsc.gov.au/news-and-events/media-centre/speeches/aps-commissioner-dr-gordon-de-brouwer-speech-mandarins-rebuilding-trust-and-integrity-australian-public-service >.

26 Dr Gordon de Brouwer, APS Commissioner, *Speech at The Mandarin's - Rebuilding Trust and Integrity in the Australian Public Service*, 22 February 2024 - < https://www.apsc.gov.au/news-and-events/media-centre/speeches/aps-commissioner-dr-gordon-de-brouwer-speech-mandarins-rebuilding-trust-and-integrity-australian-public-service >.

27 Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (1 July 2013) - < https://www.ag.gov.au/sites/default/files/2020-03/FOI%20report.pdf >

28 Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (1 July 2013), p 48 - < https://www.ag.gov.au/sites/default/files/2020-03/FOI%20report.pdf >

29 Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (1 July 2013), p 48 - < https://www.ag.gov.au/sites/default/files/2020-03/FOI%20report.pdf >

30 Dr Gordon de Brouwer, APS Commissioner, *Speech at The Mandarin's - Rebuilding Trust and Integrity in the Australian Public Service*, 22 February 2024 - < https://www.apsc.gov.au/news-and-events/media-centre/speeches/aps-commissioner-dr-gordon-de-brouwer-speech-mandarins-rebuilding-trust-and-integrity-

[140] All employees in the Australian public service have compulsory obligations under the *Public Service Act 1999* (Cth) and the *Australia Public Service Commissioner's Directions 2022* (Cth). All employees in the Australian public service must comply with the statutory obligations under which they operate.

[141] The Australian Public Service "is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility."[31] That statement is the fourth of the six APS Values.

[142] All APS employees "must at all times behave in a way that upholds the APS Values."[32]

[143] The Australian Public Service Commissioner has, pursuant to subsection 11(1) of the *Public Service Act 1999* (Cth), issued directions in relation to any of the APS Values for the purpose of:

> a) ensuring that the APS incorporates and upholds the APS Values; and
>
> b) determining where necessary the scope or application of the APS Values.

[144] The directions are set out in the *Australian Public Service Commissioner's Directions 2022* (Cth).

[145] In respect of the fourth of the six APS Values, the Australian Public Service Commissioner has, in the *Australian Public Service Commissioner's Directions 2022* (Cth), directed:[33]

> Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(4) of the Act requires the following:
>
> > a) being answerable to Ministers for the exercise of delegated authority, and, through them, to Parliament;
> >
> > b) being open to scrutiny and being transparent in decision making;
> >
> > c) being able to demonstrate that actions and decisions have been made with appropriate consideration;
> >
> > d) being able to explain actions and decisions to the people affected by them;
> >
> > e) being accountable for actions and decisions through statutory and administrative reporting systems;
> >
> > f) being able to demonstrate clearly that resources have been used efficiently, effectively, economically and ethically;
> >
> > g) being answerable for individual performance.

[146] "Advice is not being written down" because employees in the Australian public service are failing to comply with their statutory obligations under the *Public Service Act 1999* (Cth) and the

australian-public-service >.

31 *Public Service Act 1999* (Cth), s 10(4).

32 *Public Service Act 1999* (Cth), s 13(11)(a).

33 *Australian Public Service Commissioner's Directions 2022* (Cth), s 16.

Australia Public Service Commissioner's Directions 2022 (Cth).

[147] The FOI Act contains nothing that permits public servants to derogate from the compulsory obligations under the *Public Service Act 1999* (Cth) and the *Australia Public Service Commissioner's Directions 2022* (Cth).

[148] "FoI" has nothing to do with public servants complying with their statutory obligations under the *Public Service Act 1999* (Cth) and the *Australia Public Service Commissioner's Directions 2022* (Cth).

[149] "FoI" is not at fault for Australian public servants failing to comply with the law. The public servants are at fault for failing to comply with the law. "FoI" is plainly a scapegoat.

[150] The question the Government should be asking is "who is responsible for ensuring that high standards of integrity and conduct in the APS are upheld?"

[151] That would be the Australian Public Service Commissioner.

[152] Parliament has explicitly reposed in the Australian Public Service Commissioner, under paragraph 41(1)(b) of the *Public Service Act 1999* (Cth), the responsibility "to uphold high standards of integrity and conduct in the APS."

[153] Indeed, the Parliament has explicitly reposed the following functions and powers in the Australian Public Service Commissioner:

> a) promoting the APS Values, the APS Employment Principles and the Code of Conduct: *Public Service Act 1999* (Cth), s 41(2)(e); and
>
> b) evaluating the extent to which Agencies incorporate and uphold the APS Values and the APS Employment Principles: *Public Service Act 1999* (Cth), s 41(2)(f).

[154] Rather than do what he is responsible for doing, the Australian Public Service Commissioner has used his soapbox to, fallaciously, claim that "[w]hen it comes to deliberative material, FoI does not ensure transparency (because advice is not being written) and it undermines integrity (because advice is not being written)."[34]

[155] Still worse, rather than question the Australian Public Service Commissioner about what he is doing to:

> a) evaluate the extent to which Agencies incorporate and uphold the APS Values and the APS Employment Principles; and
>
> b) promote the APS Values; and
>
> c) uphold high standards of integrity and conduct in the Australian Public Service,

the Government has decided to give Dr de Brouwer a free pass in respect of the acknowledged failures in the Australian Public Service when it comes to officials complying with their obligations

34 Dr Gordon de Brouwer, APS Commissioner, *Speech at The Mandarin's - Rebuilding Trust and Integrity in the Australian Public Service*, 22 February 2024 - < https://www.apsc.gov.au/news-and-events/media-centre/speeches/aps-commissioner-dr-gordon-de-brouwer-speech-mandarins-rebuilding-trust-and-integrity-australian-public-service >.

under the APS Value of being accountable for actions and decisions through statutory and administrative reporting systems, and, instead, has decided it is good policy to undermine the rights of those who are interested in determining whether Ministers and public servants are doing a proper job of governing in the name of the Australian people.

[156] Dr de Brouwer's fallacious reasoning is at the heart of the justification advanced by the Attorney-General for the introduction Schedule 7, Part 3 of the Bill. That is unacceptable because good policy, and not sophistry and misdirection, should be at the heart of the Government's reforms set out in Schedule 7, Part 3 of the Bill.

[157] The Attorney-General has advanced the claim that the Bill implements a number of recommendations in Dr Hawke's review into the FOI Act. Nowhere in his review did Dr Hawke advance the view that the Attorney-General has advanced to justify the amendment proposed in Schedule 7, Part 3 of the Bill. To the extent that the Attorney-General is suggesting that Dr Hawke's views on the amendments proposed in Schedule 7, Part 3 of the Bill are in line with the views of the Government, that is regrettable because it is demonstrably not the case.

[158] And suppose Schedule 7, Part 3 of the Bill is enacted. Will "FoI … ensure transparency (because advice is … being written) and ... integrity (because advice is ... being written)?" Members of the community are unlikely to ever know because the guarantees they once had of knowing, through the FOI Act, will be undermined by public servants and Ministers invoking the legislated factors against giving access to a document containing deliberative matter to deny access to documents containing that frank and robust advice.[35]

H. Further proposals for reform – amendment to subsection 15(2) of the FOI Act

[159] EFA believes in robust discourse, which is not to say that EFA believes that discourse be vulgar.

[160] Public servants are entitled to expect access applicants to submit access requests that contain neither abusive statements nor vulgarities.

[161] To this end, EFA proposes that a modest reform is made to subsection 15(2) of the FOI Act, which provides, in addition to what is already required under the FOI Act (currently in force), that an access request must not contain abusive, vulgar or denigratory statements or comments.

[162] If EFA's proposal is accepted and adopted, when an access request is submitted, and it contains abusive, vulgar or denigratory statements or comments, the access request would not meet the requirements of a valid request. That would mean that the agency or Minister to which the access request was sent would have to take reasonable steps to assist the person who made the access request to make the request in a manner that complies with section 15 of the FOI Act,[36] but, beyond taking those reasonable steps, a Minister or officials in an agency would not need to deal with such access requests.

I. Correcting the Government's narrative

[163] While not entirely explicit, the discourse that has accompanied the Government's push to enact this Bill has, in the main, been framed by reference to the potential actions or intentions of undesirable access applicants.

35 Somewhere, Yossarian is having a laugh.
36 *Freedom of Information Act 1982* (Cth), s 15(3).

[164] “Foreigners” have been cast in the light of “potential” threats.

[165] The “artificial intelligence” and “bot” bogies have been advanced by Ministers as a threat to Australia and Australian taxpayers.

[166] Interestingly, nothing has been advanced about public servants behaving inappropriately though, given what is noted in part G5 of these submissions, that is unsurprising.

[167] It would do Parliamentarians well to remember that Australia's public servants are drawn from members of the Australian community, and just like the community, which has its share of good and honest people, and less savoury characters, the Australian public service also has its share of good and honest people, and less savoury characters.

[168] Parliamentarians would also do well to remind themselves that Ministers and public servants are just as adept at abusing statutory processes as the less savoury characters in our community.

[169] Some may recall that the Hon Mark Dreyfus KC MP, the former Attorney-General of the Commonwealth, had applied for access to the Hon George Brandis QC's (the Attorney-General in 2013 and 2014) diary in a “weekly agenda” format for the period 18 September 2013 to 12 May 2014.[37]

[170] The then Attorney-General's chief of staff claimed that a practical refusal reason existed, under section 24 of the FOI Act, in respect of the access request submitted by Mr Dreyfus.[38]

[171] Mr Dreyfus challenged the practical refusal decision in the Administrative Appeals Tribunal.[39]

[172] Mr Brandis' chief of staff, Mr Paul O'Sullivan, gave affidavit evidence that it would take 228 – 630 hours to process Mr Dreyfus' access application,[40] and, although Mr Dreyfus clarified his request,[41] Mr O'Sullivan maintained it would take 228 – 630 hours to process Mr Dreyfus' access application.[42]

[173] Justice Jagot, sitting as a Presidential Member of the Administrative Appeals Tribunal, was unimpressed with Mr O'Sullivan's contentions about the time needed to process the request.[43]

[174] Despite all the taxpayer resources expended calling public servants as witnesses, and filing affidavits, and marshalling submissions, and organising a proverbial picnic for lawyers, Justice Jagot found that Mr O'Sullivan's estimates were overblown and that, in reality, no practical refusal reason existed.[44]

[175] Sadly, this sorry tale of the purported existence of practical refusal reasons is rehearsed regularly by public servants. A casual perusal of the *Right to Know* platform should convince Parliamentarians that these old problems are still alive.

[176] The point of drawing Justice Jagot's decision in *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 is correct the

37 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [2].
38 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995.
39 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [1].
40 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [25]-[26].
41 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [28]-[29].
42 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [31].
43 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, [31].
44 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995.

Government's narrative, in which the skulduggery of Ministers and public servants has been excised when it comes to the way that they deal with their obligations under the law, and to remind Parliamentarians that Ministers and public servants are just as adept as abusing statutory processes as the less savoury characters in our community (with the grotesque spectres of these unsavoury characters looming menacingly large in the Government's justifications about the righteousness and desirability of the reforms proposed in the Bill).

[177] I would also encourage parliamentarians to consider Schedule 3, Part 2 of the Bill in the light of *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995, and the knowledge that Ministers and agencies are able to recover some of the cost of processing an access request pursuant to the FOI Act and the *Freedom of Information (Charges) Regulations 2019* (Cth).

J. Conclusion

[178] For the reasons set out in these submissions, but for item 2 in Schedule 8 of the Bill, EFA opposes the proposals for amendment to the FOI Act set out in the Bill.