Access denied:

How Australia's freedom of information regime is failing our environment

Cover. Striped legless lizard. *Photo.* Rob Valentic

Key findings

- Australia's freedom of information (FOI) regime is dysfunctional. Information critical to environmental protection and action on climate change is often released too late to be of any use, and often heavily redacted or withheld entirely. This makes it increasingly difficult to hold governments to account for acting in the interest of people and the planet.
- While our transparency laws need to be improved, the biggest problem is in how they are applied. Deadlines are missed, grey areas and loopholes are exploited to hide documents, redactions are used excessively and fees are overestimated. These failures and tactics are particularly common at the most senior levels of government.
- Access to important communication platforms like SMS and WhatsApp is almost non-existent. Given their wide and increasing use by our elected representatives, FOI access to these platforms is critical to transparent and accountable governance in Australia.
- Our FOI system can only do its job if properly resourced and backed by a genuine commitment to open government. Australia has a long way to go to make this happen, but it is vitally important for the healthy future of our environment.

This report was prepared by the Australian Conservation Foundation's Environmental Investigations Unit. We are immensely grateful for the dedication and intellect of the volunteers who worked on the FOI project with us: D'Arcy Horam, Vishal Karnamadakala, Kate Noble and Freia Johnston.

Contents

Table of contents
Executive summary 1
Australia's FOI system 4
What is the problem? 5
Environmental requests redacted or refused 8
Case study 1 15
Case study 2 18
Documents which 'do not exist' 21
Case study 3 22
Case study 4 23
Fees for FOI requests 25
Unreasonable delays 28
Key communications inaccessible 31
Case study 5 32
Review process inconsistent 33
Recommendations 35
Appendix 37
References 39

ACF uncovered documents through FOI that **exposed a toxic leak of PFAS into Darwin Harbour** by huge gas company INPEX

Executive **summary**

To make sure the government makes decisions which are genuinely grounded in the public interest, they need to be held accountable to a well-informed public.

This means we need reliable access to information about the actions and operations of government. This idea is as foundational as it is obvious. Australia has invested a great deal over the last four decades to develop freedom of information (FOI) systems aimed at shifting from a secretive government to one that is open and accountable.[1]

But in recent years these systems have faltered, limiting Australians' access to information as well as their ability to hold our governments to account on a range of urgent social, economic and environmental issues.

In our work, Australian Conservation Foundation (ACF) has consistently highlighted the links between fighting for a healthier environment and campaigning for a better democracy. Not only is access to public information a crucial right for all of us, it is central to our work protecting the natural world against harmful decision making. The same is true for other organisations working to protect Australia's environment. Many of our most important campaigns on issues of climate change, biodiversity collapse, water security and economic sustainability have relied on access to records of government decisions, correspondence, research and briefs. But when government organisations operate in the dark, we cannot shed light on what is happening to our environment and communities, in order to better protect them.

Australia's FOI regime has been in operation for nearly 40 years. This year, 2020, marks 10 years since the Office of the Australian Information Commissioner (OAIC) was established. The legal framework is widely considered to be sound, grounded in the admirable rationale that government information is a public resource. Yet despite being structurally sound, the system is not working well in practice. One journalist with extensive experience of the law recently commented: "I can't remember the Act working as badly as it does at the moment".[2] The very purpose of the Freedom of Information Act 1982 — to 'facilitate and promote public access to information, promptly and at the lowest reasonable cost'[3] — is not being realised.

New analysis by ACF examines government FOI data over the past five years, alongside more than 100 FOI requests made by ACF over the same period. This is the first major research to look at freedom of environmental information in Australia — how the system is structured and operating and what the implications are for nature and our climate. Our findings should be a wake-up call to all parliamentarians and observers who care about the transparency of Australia's democracy.

Previous page. Darwin Harbour.
Photo. EA Given/Shutterstock.com

1 D. Stewart, 'Chapter 4: Assessing Access to Information in Australia: The Impact of Freedom of Information Laws on the Scrutiny and Operation of the Commonwealth Government', in J. Wanna, E. Linquist and P. Marshall ed., New Accountabilities, New Challenges, ANU Press, Canberra, 2015, pg 96-98 <http://dx.doi.org/10.22459/NANC.04.2015>, accessed 17 September 2020.

2 M. McKinnon, Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018. Transcript of hearings. Retrieved from: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F74733ef6-dba5-410b-b542-9a1c7e590583%2F0000%22>, pg 9 (subsequently referred to as Senate Committee Hearing Transcript 2018).

3 Freedom of Information Act 1982 (Cth), s 3(4).

ACF's research finds:

- Refusal rates and the use of exemptions to prevent information release are increasing. Over the past five years, the percentage of FOI requests refused outright by agencies within an environment-relevant portfolio[4] has increased by nearly 50%. In the same period, the percentage of requests released in full has nearly halved — meaning redactions are more frequent.
- Delays are commonplace, with more than one-third of decisions on ACF requests not meeting statutory deadlines. Of these, 60% were overdue by a month or more, and 39.5% were overdue by more than two months. This is despite a generous scheme of extensions and consultation made available to decision makers by our transparency laws.
- Charges are often significant — and environmental agencies are among those charging the most. Between 2015 and 2020, the average amount charged per request for environmental portfolios ($36.58) was double the average cost for all requests across government ($18.52). This is despite environmental agencies processing relatively few requests, in proportion to the charges they levy.
- Lengthy review processes are becoming a key tool for denying access to information, when they should be a rarely used check. Of 18 information commissioner review decisions relating to environmental information since 2015, only 39% were affirmed while 61% were amended.
- Some agencies and offices take advantage of grey areas in the legislation and guidelines to avoid releasing information. We found six instances of new ministers denying access to documents relating to a former minister, all occurring in the last two years. Meanwhile, some offices have outright refused to process relatively simple requests for emails or messaging service records.

These findings indicate serious systemic flaws in our system that are frustrating efforts to protect climate and nature in Australia. It is time for all of us to demand more transparency and accountability of decisions made on our behalf, particularly where they impact on the natural resources, we all share and have a responsibility to protect. And it is time for all Australian governments to step up to their commitments on open government, lifting the veil of secrecy over information that all Australians have a stake in.

There are many things that can, and should, be done in the short term to alleviate these issues. The OAIC should be staffed with three separate commissioners to oversee the three responsibilities of privacy, transparency and information. Existing powers to investigate agencies for continual failures in transparency should actually be exercised. Regulations and guidelines should be updated to ensure FOI decision makers are communicating clearly with applicants, new communication platforms (like Whatsapp) are being sufficiently disclosed, and there is adequate resourcing for transparency across government.

There is no doubt that, in the long term, the effectiveness of the FOI Act as a whole — including the legal, cultural, and technological constraints it is operating under — needs to be reviewed.

In addition to strengthening our democracy and decision making in general, these changes will improve our ability to connect, protect and restore nature and solve the climate crisis. Without transparency and public scrutiny, our ambitions for a better Australia will be thwarted by a decidedly 'un-free' information regime.

"This is about information the Australian public need to be able to cast [informed] votes. I can see no more important thing in a democracy than allowing the voters to know what they're voting about, know the success or failures of government policies and programs, and to know whether in fact security is being used to hide incompetence or purely politically based approaches to things."

[5] M. McKinnon, Senate Committee Hearing Transcript 2018, pg 15.

FOI documents were integral in ACF's investigation of the Victorian government's **failure to secure a reserve for critically endangered grasslands.**

Australia's **FOI system**

Australia's FOI regime has been developed progressively over the past four decades. In 1971, as part of a broader inquiry into administrative law and the accountability of government decision making, John Kerr's Administrative Review Committee made recommendations that Australia legislate a system of access to information.

In 1982, the Commonwealth Freedom of Information Act came into effect with the intent of promoting representative democracy, increasing public participation in government processes, and advancing open government. The laws strive for the timely and affordable disclosure of information wherever possible, noting that government information is a public resource.

In the two decades that followed, state and territory governments passed similar transparency laws which applied to their own operations. Some are more advanced than others. Several are overseen by an independent body similar to the OAIC, providing a mechanism for oversight and external review.

Public interest is a guiding factor of all FOI legislation. Our transparency laws recognise that where the public as a whole benefit from the release of information, that information should be made available. When information is likely to inform debate on a matter of public importance, or assist in holding the government to account, it should be released. Significant reforms to FOI laws in 2010 aimed to strengthen the public interest provisions. It is also crucial to note 'public interest' means exactly that — interests of the 'public'. Not the government, not businesses and not individual interests, but the public at large.

Previous page. Endangerd Growling Grass Frog, species local to Victorian grasslands. *Photo.* Kristian Bell/Shutterstock.com

Although the purpose of transparency laws is to unlock crucial information held by the government, it also recognises that some types of information should, for various reasons, remain confidential. These reasons might include privacy, security, and clarity of government policy, to name a few. That is why exemptions are built into the act. They cover a range of situations where decision makers can refuse to release certain types of information.

The FOI system is overseen by the Office of the Australian Information Commissioner (OAIC), established in 2010, and operating independently from government. Despite the OAIC's central role in supporting access to information, it has been under resourced since its establishment, and faced defunding and closure in 2015 under the Abbott-led Coalition government.[6] During this period, the office was closed and the Commissioner was forced to work from home.[7] While the OAIC survived its near-death experience, its funding was never fully restored. It remains stretched and under resourced.[8]

"In the era of so-called fake news, FOI allows us to report accurately and fairly on the government's own documents. Whereby politics can often be a debate between 'he said, she said' ... [FOI is] about where the ultimate truth lies."

6 Australian National Audit Office, Auditor-General Report No. 8 of 2017-18: Administration of the Freedom of Information Act 1982, 19 September 2017, para 1.18 <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>, accessed 1 October 2020.

7 L-F. Ng, Senate Committee Hearing Transcript 2018, pg 20.

8 Australian National Audit Office, op. cit., para 2.30.

9 M. McKinnon, Senate Committee Hearing Transcript 2018, pg 10.

What is the **problem?**

Healthy democracies rely on public participation, political accountability and transparency. For Australians to demand more effective and timely action — whether it be on climate change, protecting nature or on any other social issue — we need efficient access to accurate information about how and why decisions are being made.

We have seen that the system can work to provide the transparency needed to help hold government to account. Over the past five years, ACF FOI requests have uncovered (among many other things): lobbying by private interests to make rules favouring business over the environment,[10] potentially unlawful breaches of environmental assessment procedures,[11] and cynical government efforts to extend the lifespan of climate-wrecking, economically unsound coal power generators.[12]

Yet there are strong headwinds faced in uncovering this information, due to some key failings in Australia's transparency regime. Monash University's Dr Lee-Fui Ng has expressed concern we are seeing a "culture of internal secrecy ... [in] government departments and the excessive claiming of exemptions".[13] Laura Freidin from the Law Institute of Victoria stated "FOI is being used as a tool to avoid providing documents in a timely and effective manner instead of prioritising the need to release documents as is required under the Act".[14] The former auditor-general of NSW, Tony Harris, told the Senate the shortcomings in government transparency are "by design not by accident, a drift towards reducing the scrutiny of government".[15]

Nine News political editor Chris Uhlmann is more candid in his assessment, labelling Australia's FOI laws "a complete joke".[16]

Two major reviews of federal transparency laws have been completed in the past decade. The Hawke inquiry in 2013 came after major reforms in 2010, but judged it too early to effectively assess the impact of those reforms. In 2016, the Australian National Audit Office examined the Information Commissioner's operation, as well as transparency in three selected agencies — the Attorney General's Department, the Department of Social Services and the Department of Veterans' Affairs. Among the key findings were an increase in exemptions over five years prior to the report and an increase in review applications (and increased substitution of decisions) —and that was just across those three entities.

Since then, proposed amendments were contained in the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 introduced by Senator Rex Patrick, and examined by the Senate committee that deals with legal affairs. Most experts testifying to the committee supported elements of the bill, and all testimonies highlighted or acknowledged challenges or problems within the system. Despite this, the committee recommended the Senate not pass the bill.[17] That recommendation was supported by Coalition and Labor senators, while being opposed by Senator Patrick and the Australian Greens.

[10] Department of Environment and Energy FOI No. 190104.

[11] Department of Environment and Energy FOI No. 180713 (Regarding Adani's North Galilee Water Scheme and the 'Water Trigger').

[12] Commonwealth Treasury FOI No. 2216 (Regarding the Liddell Power Station).

[13] L-F. Ng, Senate Committee Hearing Transcript 2018, pg 18.

[14] L. Freidin, Senate Committee Hearing Transcript 2018, pg 5.

[15] K. Murphy, 'Former NSW auditor general blasts Coalition for attempting to 'reduce scrutiny of government' activities', The Guardian, 02 November 2020, <https://www.theguardian.com/australia-news/2020/nov/02/former-nsw-auditor-general-blasts-coalition-for-attempting-to-reduce-scrutiny-of-government-activities> accessed 05 November 2020.

[16] F. Hunter, '"Chilling effect": Media outlets warn legal reforms needed to inform public', The Sydney Morning Herald, 12 August 2020 , para 9, <https://www.smh.com.au/politics/federal/chilling-effect-media-outlets-warn-legal-reforms-needed-to-inform-public-20200812-p55kwk.html> accessed 2 October 2020.

[17] Senate Legal and Constitutional Affairs Legislation Committee, Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 Report, Department of the Senate, Canberra, 2018.

Researchers and campaigners have pinpointed two fundamental, high-level problems. Firstly, there is general agreement that the OAIC's resourcing is inadequate to do its job properly. Senior officials from the Attorney-General's Department have noted 'stresses in the system', including concerns with rising costs and delays.[18] The Information Commissioner, Angelene Falk, has acknowledged an 'ever-increasing workload' and ongoing resourcing challenges.[19] While top-line data shows the office is meeting the majority of its performance targets, ACF has found enquiries for even the most basic information can take up to eight weeks to be answered.

The second issue is cultural and political. Challenging an entrenched culture of secrecy in favour of open access and transparency is a complex undertaking. When Australia's FOI laws were introduced, politicians described their objectives as 'simple'. But several decades of operation and refinement have proven the endeavour was not simple, and the whole project remains a work in progress. While access to personal information has improved significantly, access to policy-related information is often time consuming, expensive and unproductive. What is also clear is that some areas of governance are more challenging than others, with environmental decision making, the influence of commercial interests, and information access considered a particular concern.

This report examines how Australia's FOI system is limiting access to environmental information. It examines data from the past five years provided by ministers and federal government agencies to the OAIC over the past five years. This data enables us to identify long-term trends and failure points within the system.

But this alone does not provide a nuanced and detailed understanding of what is working and what isn't. So for greater depth, we also analysed 109 FOI requests made by ACF over the same timeframe, including requests to state and local governments, as well as federal ministers and agencies. Through this analysis, we provide the most detailed picture yet of how Australia's FOI regime is failing our environment, and some ideas for what we can do about it.

"The system gives the veneer of transparency and the veneer of accessibility but the process itself is used as a means to block access. That's at least as bad as not having an access point at all."[20]

[18] A. Walter, Senate Committee Hearing Transcript 2018, pg 28.

[19] A. Falk, Senate Committee Hearing Transcript 2018, pg 34.

[20] K. Middleton, Senate Committee Hearing Transcript 2018, pg 11.

ACF discovered through FOI documents that a state bureaucrat held concerns **Western Australian government's decision making might lead to the regional extinction of the Greater Bilby** in the West Kimberley

Environmental requests are aggressively redacted or refused

What are the exemptions and how do they work?

Even when there is a strong public interest in the release of government information, transparency laws recognise some types of information may need to be kept from the public eye.

That is why, when someone applies for access to information, agencies and ministers can employ a wide range of exemptions to either refuse access to requested documents, or to provide partial access by redacting (blacking out) parts of these documents.

There are numerous grounds for exemptions, including to protect intergovernmental relationships and commercial interests, to protect privacy and personal information, to protect law enforcement and to prevent confusion about current government policy. They can be broken down into three categories:

- Exemptions to protect the workings of government
- Exemptions to protect third party interests (such as trade secrets)
- Exemptions to uphold other recognised legal interests (such as legal professional privilege)

But these exemptions must be applied carefully, and they are not supposed to be the norm. Agencies can only withhold information if an exemption is actually applicable. They have to identify how many documents they found in their initial search, and then explain which exemptions (if any) applied to each document. Of course, they must also explain why exemptions were applied.

Many of the key exemptions, especially at the federal level, follow a public interest test. They are known as 'conditional exemptions'.[21] Simply put, this means that if a decision maker wants to apply the exemption and withhold the information, they have to demonstrate that keeping the information under wraps has more benefits to the public than costs.[22]

And how should the decision maker assess the public interest? Our FOI laws specify that factors in favour of releasing a document include, among other things, if the document 'informs a debate of public importance', if it 'promotes oversight of public expenditure' or if it generally supports the aims of transparency.[23] Given the nature of ACF's work as a non-profit advocate for the environment and for the Australian public, our requests tend to have a strong case for all of these factors.

Importantly, there are some things a decision maker is not supposed to consider. They can't, for instance, withhold information just because they think it is embarrassing to the government. Nor can they withhold information just because the person who made the document is of high seniority (more on this later).

These exemptions have an important role to play in protecting privacy and confidentiality, but our analysis shows they are not always applied in appropriate ways. Exemption use has increased over the past five years and, on many occasions, decision makers have overzealously or incorrectly used exemptions. This can create unnecessary delays and engage burdensome review processes. And of course, the misuse of exemptions can stem the flow of information from the government to the public resulting in profound implications for transparency.

[21] See Freedom of Information Act 1982 (Cth), Part IV, Division 3.

[22] See Freedom of Information Act 1982 (Cth), s 31A.

[23] See Freedom of Information Act 1982 (Cth), s 11B.

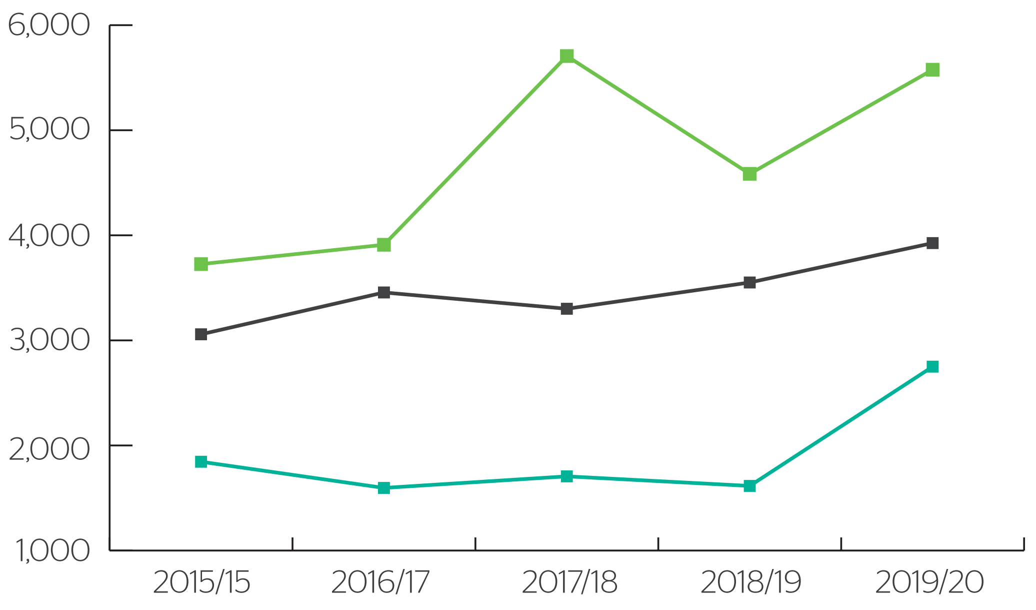
Previous page. Bilby. *Photo.* Ken Griffiths/Shutterstock.com

How exemptions are used to limit access to environmental information

The most recent analysis from the Office of the Australian Information Commissioner found the use of exemptions in 2020 had changed little compared with previous years.[24] But this analysis looks at the proportion of exemptions and whether this has changed year-on-year; it doesn't examine the volume of exemptions. It also looks at the big picture across all agencies, including personal requests (for personal information) and 'other' requests (which are more likely to be requests from organisations for policy-relevant information).

To examine trends relevant to environmental transparency and political accountability, we excluded 'personal requests' and examined 'other' requests only, which are more frequently relevant to policy issues. Looking at all agencies, we see the use of exemptions has increased, but at a slower pace compared with the rise in requests determined. The number of documents where no exemptions were claimed rose by 49.1% over the past five years, in line with the increase in the number of requests determined, which rose by 49.7%. This means there is little change in the proportion of policy-relevant documents being fully released over the five-year period, across all government agencies.

Figure one: Trends in exemption use for all agencies 2015–2020



Source: Data.gov.au freedom of information statistics, Office of the Australian Information Commissioner. This chart draws on categories of agencies, which includes but is not limited to, departmental data.

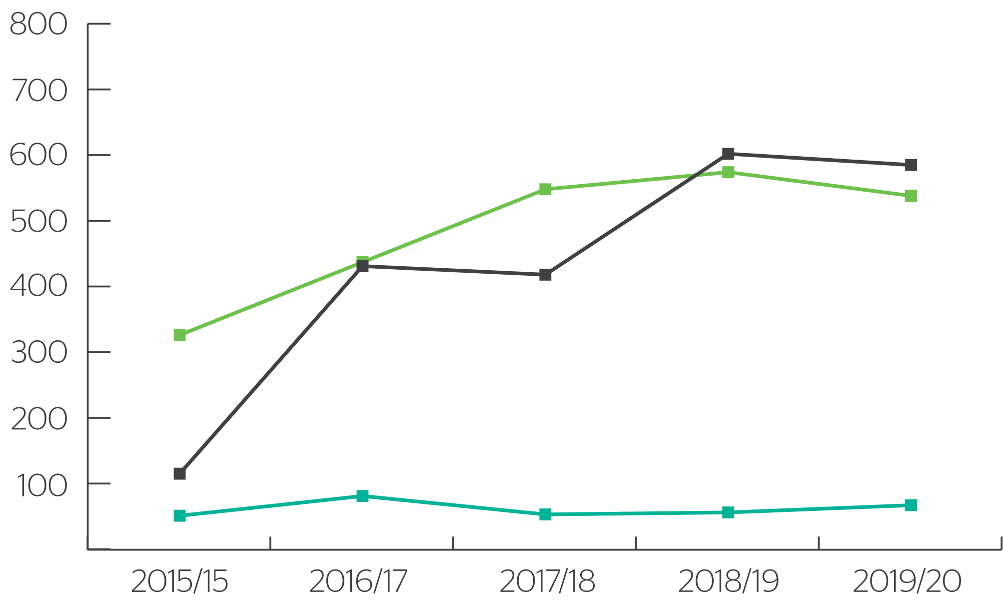
[24] Office of the Australian Information Commissioner Annual Report 2019/20.

But there are some very different trends emerging when it comes to release of environmental information. Figure two shows that while the number of requests determined by environment-relevant portfolios has increased steadily over the period and dropped slightly in 2019–2020, the number of exemptions has risen sharply. Meanwhile, the number of documents where no exemptions were claimed has remained fairly flat. This means these agencies are applying more exemptions to more documents, resulting in less information being released.

Increasing use of exemptions does not necessarily mean more documents are refused, because multiple exemptions are routinely applied to a single document. In many cases, it could mean documents are more heavily redacted. Redaction and exemption use can be just as damaging to transparency as full refusal. Exemptions are often applied illogically, aggressively, carelessly or with little regard for the public interest.

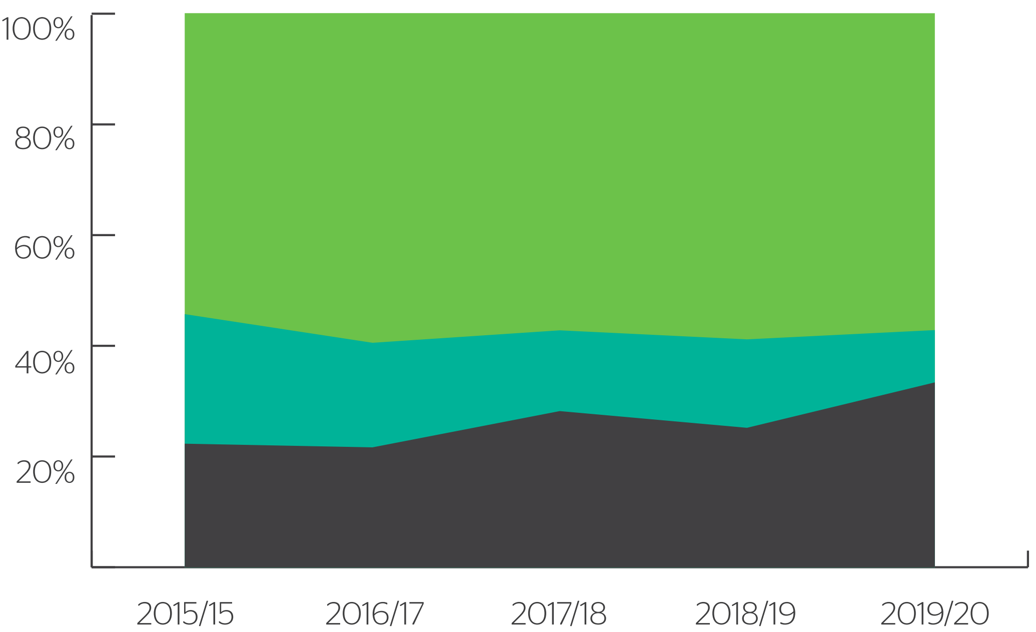
Figure three shows the proportion of requests refused outright, granted in part and granted in full by these agencies. This shows a trend of increasing refusal and relatively steady rates of partial release by environment-relevant portfolios over the past five years. This has created a 'pincer effect', reducing the number of documents being fully released. In 2015–2016, 23.4% of requests to environmental agencies were released in full. By 2019–2020 that number had dropped to just 9.5%. In the same period, the proportion of requests which were refused outright increased by half (from 22% to 33%). The green area in the chart, representing full release and full transparency, is rapidly disappearing.

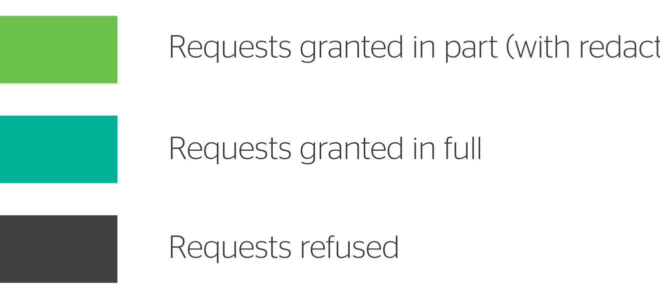
Figure two: Trends in exemption use for environment-relevant portfolios 2015–2020



Source: Data.gov.au freedom of information statistics, Office of the Australian Information Commissioner. This chart draws on categories of agencies, which includes but is not limited to, departmental data.

Figure three: Outcomes of FOI requests to environment-relevant portfolios 2015–2020





Source: ACF analysis of data.gov.au FOI statistics, compiled by Office of the Australian Information Commissioner (n = 2338).

Environment ministers are particularly likely to refuse requests compared with environmental agencies. While they receive few requests (up to 11 per year) the past two years have seen a notable shift away from full release, with more than half of requests being refused outright in 2018–2019.[25] In 2019–2020 a staggering 39 requests were refused outright by the Minister for the Environment, while one was granted in full, and three were granted in part.[26]

[25] ACF analysis of data.gov.au freedom of information statistics, Office of the Australian Information Commissioner.

[26] Ibid.

How exemptions were used against ACF's requests

Across the federal-level requests which ACF filed, 4.6% were granted in full, 71.6% were granted in part and 23.9% were refused.

It is not possible to compare year-on-year trends within ACF data to averages across all agencies and environment-relevant portfolios due to the small sample size of the ACF data, and the fact outcomes have fluctuated across all agencies over that period, rather than shown a clear trend.

Decisions on whether to refuse or grant information requests provide part of the picture, but we can examine exemption use further by looking in more detail at the documents that were actually provided. ACF requests to federal agencies resulted in identification of 3,339 relevant documents. Of these documents, 23.7% were released in full, while 61.2% were released with redactions and 15% were refused entirely.

Note this breakdown does not include or account for requests which were refused without identifying or producing any documents. This is particularly true for ministerial offices — they are displayed as having a relatively low refusal rate despite some shocking examples of mismanaging requests. As discussed later in this report, such requests can be hugely problematic, despite their lack of a statistical impact on overall refusal rates.

Table one: Decision outcomes for ACF requests 2015–2020 (federal level)

Government authority	% documents released	% documents partially released	% documents refused
Agriculture, Water and the Environment	20.71%	62.64%	16.65%
Clean Energy Regulator	7.58%	61.12%	31.30%
Ministerial offices	12.50%	75.00%	12.50%
Other federal agencies[27]	32.79%	63.95%	3.26%
Other federal departments[28]	8.64%	22.84%	68.52%
Prime Minister and Cabinet / PMO	0.00%	69.77%	30.23%
Total (Across All Requests)	24%	61%	15%

[27] Includes ARENA, the CSIRO, Geoscience Australia, the MDBA, the Productivity Commission and the Commonwealth Grants Commission

[28] Includes DISER, Treasury, Infrastructure, Education and Home Affairs

Table three: Exemptions applied to ACF requests 2015–2020

Government authority	% documents released	% documents partially released	% documents refused
State level agencies	67.48%	9.60%	22.83

We can also see differences between federal-level requests and state-level requests. Even though our requests to state agencies are more infrequent, our dataset shows a greater willingness on the part of state governments to release documents in full. States have their own transparency laws and administer them independent of the federal government. Some provisions in these state laws would greatly benefit the federal system if adopted by our national government.

Full document refusals can certainly be frustrating and limit transparency, and they can severely hamper efforts to understand government actions. But the aggressive use of partial exemptions, through redactions, can be just as big a problem.

Sometimes redactions are used for relatively minor edits such as removing the personal information of staffers and employees. Other times redactions can black out the majority of a document. In both instances the documents are classified as 'released in part' but there is clearly a massive difference in terms of how much has actually been revealed. This is why partial exemptions are particularly powerful — and dangerous — for the transparency regime. The use of exemptions to redact documents can result in only a small amount of information being released, with almost no context to make sense of it.

Since ACF deals heavily with complex matters of environmental, scientific and social policy, the devil is often in the detail. Redactions applied to our requests can fundamentally transform the quality of the information we receive. They can mean the difference between understanding a government decision or being left entirely in the dark.

Analysing the specific application of exemptions adds texture and detail to the data, detail which is not apparent in the overall refusal rates data (discussed above in table one).

Across our federal requests, significant exemptions were applied 2,433 times. Overall, that is a ratio of one exemption for every 1.4 documents.

But, as table three shows, different government authorities applied the exemptions in significantly different ways. For instance, the Department of Agriculture, Water and the Environment (DAWE) — formerly the Department of Environment and Energy — applied roughly one exemption for every two documents it identified. But other federal departments applied exemptions far more aggressively. They applied around 1.6 exemptions for every one document they identified. The Clean Energy Regulator (CER) — a key regulatory body in Australia's fight against greenhouse emissions — applied exemptions at a similarly aggressive rate.

We can also see that ministerial offices are applying exemptions at a particularly high rate, as are other federal departments. So even though, on the face of things, they don't appear to refuse documents outright as frequently (see Table one), they still rely on an aggressive use of redactions and exemptions.

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[18] M. G. Trefry, 14 November 2008. Ranger Tailings Storage Facility: Review of hydrogeological issues for a wall lift to RL+54m. Report to Energy Resources of Australia Ltd, CSIRO, Canberra.

[19] https://www.smh.com.au/national/polluted-water-leaking-into-kakadu-from-uranium-mine-20090312-8whw.html

Table three: Exemptions applied to ACF requests 2015–2020[30]

Government authority	Documents identified	Exemptions applied*	Exemptions as % of documents
Other federal agencies	1534	897	58%
Agriculture, Water and the Environment	1183	575	49%
Clean Energy Regulator	409	652	159%
Other federal departments	162	259	160%
Prime Minister and Cabinet / PMO	43	37	86%
Ministerial offices	8	13	163%
Total	3339	2433	72%

*Does not include use of s 22 exemption

Use of the public interest 'conditional' exemptions

When it comes to the sheer number of exemptions applied per request, why is there such a disparity between an agency like the CER and the DAWE? The disparity is not because the CER was forced to apply more mandatory exemptions.

In fact, as a proportion of all the exemptions they used against ACF requests, both bodies applied 'public interest conditional exemptions' at roughly the same rate (79% and 84% respectively). It is important to remember that these 'public interest' exemptions are discretionary.

Therefore, it seems that the CER is more frequently using its discretion to decide that 'conditionally exempt' information is not in the public interest — and thus applying the exemptions more often. DAWE, on the other hand, was more willing to let information be released, and its overall exemption rate was lower. This is despite both agencies dealing with similar types of environmental information — data about adherence to regulations, briefs about environmental approvals and correspondence with business. It is possible that differences in guidelines or cultural understandings of the 'public interest' are fuelling these differences.

The amount of detail provided in decisions varied greatly, and there are some problems here. While some agencies gave detailed explanations of why a particular exemption applied, many just relied on boilerplate language, often with baffling results.

And even though DAWE performed somewhat better than other agencies, it was not immune to the problem of dubious public-interest exemptions.

[30] Data for exemptions is every instance in which a specific exemption or redaction was applied to a document.

Case study: Climate is not in the public interest?

In 2019, ACF requested records of the following from the Department of Environment and Energy (now DAWE):[31]

- Correspondence (including letters, records of conversations, records of meetings, consultation and submissions made) between Sunset Power International Pty Ltd (or representatives) and the Department of the Environment and Energy in relation to the Facilities methodology (draft or final) under the Carbon Credits (Carbon Farming Initiative) Act 2011.
- Correspondence and / or briefing material between the Department's Energy and Climate Change Divisions and the Ministers' Offices (past and present) or any other parliamentarians in relation to Vales Point Power Station between January 2014 to present.

In simple terms, we were trying to get information on the government's proposed plan to give carbon-reduction credits to coal fired power plants. The government wanted to give taxpayer dollars — which were supposed to go towards reducing emissions and fighting climate change — to big polluting facilities and coal companies.

The decision maker used the s 47C (deliberative matter) exemption to refuse access to some documents and extensively redact others. Of course, this exemption is not automatic. The information can only be withheld if releasing the information would do more harm to the public than good.

The decision maker claimed the information did not inform a debate of 'public importance'. Nor did they agree the information could help oversee public expenditure. This conclusion was farcical for many reasons. The records we requested were at the heart of a regulatory plan — not ordinarily subject to direct parliamentary scrutiny — which would put taxpayer money in the pockets of polluters. It is difficult to see how such information was not part of an important public debate. Climate change was, and is, clearly a matter of public importance. Our request was sent at a time when school children were marching in the streets demanding good climate policy, and when our Prime Minister had just been deposed on the basis of climate and energy policy.

While we understand some areas of transparency law exemptions can be vague or disputed, this case was an unambiguously poor decision. The public-interest case for releasing this information was as strong as it conceivably could be, and yet the Department failed to account for it properly. This results in time wasted on reviews that should not be necessary, time lost in campaigns and, ultimately, a loss of confidence in decision makers.

Because if transparency-law decision makers don't have a clue about the public-interest debates in Australia today, what else are they getting wrong?

This decision was referred to the Office of the Australian Information Commissioner in March 2019 and, while the Office agreed to commence a review, it has not been allocated to a case officer 21 months later.

The government wanted to **give taxpayer dollars —** which were supposed to go towards reducing emissions & fighting climate change — **to big polluting facilities & coal companies**

[31] DoEE FOI Request No. 190104.

However, not all exemptions are created equal. Some public interest exemptions are less likely to result in big swathes of information being withheld. In our research, the difference can be observed between the two most commonly used exemptions: s 47F (personal privacy) and s 47C (deliberative processes). We found a statistically significant negative correlation between the use of s 47F exemptions and the 'release rate' of documents ($p<0.01$, $n=45$). Put simply, when decision makers were primarily applying s 47F exemptions, they were far less likely to refuse entire documents.

The opposite was true for s 47C exemptions (used to exclude 'deliberative matter' such as briefs prepared before a government decision). There was a statistically significant positive correlation between the use of s 47C (as a % of docs identified) and the refusal rate of such documents ($p<0.03$, $n=38$). In other words, as decision makers applied s 47C more often, they were much more likely to flatly refuse entire documents.

This is concerning given the nature of the 47C exemption. Our transparency laws say that 'deliberative matter' — the opinions, recommendations and correspondence received by authorities to help them make a decision — does not include purely factual material. Nor does it include reports of 'scientific or technical experts' or reports prepared by constituent agencies of the department.

The fact that 47C correlates with higher full refusal rates may suggest some information is being wrongly withheld. Within the deliberative documents that are so frequently refused, there is likely to be a lot of 'factual' material and technical data — especially since our requests pertain to complex matters of environmental regulation. If this data is held back along with the entire document (instead of being partly released through the use of redactions), our insight into government decision making is much poorer.

Are the 'public interest' exemptions being used consistently?

The personal privacy (s 47F) and deliberative matter (s 47C) exemptions used commonly against ACF's requests were also among the top four exemptions applied to all policy-related requests to environment-relevant portfolios.

The other top two are 47E (certain operation of agencies) and 47G (business). These exemptions aim to protect the workings of government and third-party (including commercial) interests.

While the use of 47G (business) has reduced over the past five years, the use of deliberative processes, certain operation of agencies, cabinet documents and personal privacy exemptions have all increased significantly, and at a faster rate than the increase in FOI requests. Table four shows that while total requests determined increased by 65% between 2015¬–2020 (up from 326 to 538), the number of exemptions almost doubled over the same period (up from 306 to 593).

[33] https://www.dmp.wa.gov.au/Documents/Environment/Framework_developing_mine-site_completion_criteria_WA.pdf

[34] ibid

Table four: Exemptions where application by environment-relevant portfolios has more than doubled over the period 2015–2020[32]

Exemption	2015-16	2016-17	2017-18	2018-19	2019-2020
S47F personal privacy	66	139	163	189	164
S47C deliberative processes	25	52	54	86	79
S47E certain operation of agencies	12	32	17	63	48
S34 cabinet documents	5	9	6	13	26
Total exemptions applied	306	431	418	602	593
Total requests determined by environment-relevant portfolios	326	437	548	574	538

Source: ACF analysis of data.gov.au freedom of information statistics, Office of the Australian Information Commissioner.

Use of these exemptions is not inherently concerning, but when their use increases at a disproportionate rate, red flags should be raised. It is difficult to know how often exemptions are unreasonably restricting the availability of information, as few cases are formally reviewed.

The aggressive use of other exemptions

Even outside the 'public interest conditional' exemptions, ACF found some concerning examples of exemptions being applied in an aggressive and ill-considered way.

Entire documents are being refused because small portions of the information they contain are unable to be released, even when simple redactions would be more appropriate. One such example is section 33, used to exclude documents which are 'damaging' to Australia's international relations.[33]

[32] Data for exemptions is every instance in which a specific exemption or redaction was applied to a document.

[33] Freedom of Information Act 1982 (Cth) s 33(a)(iii).

Case study: Facts about emissions 'damaging' to our international relations?

In January 2020, ACF made a request to the Department of Industry, Science, Energy and Resources for the following:

"Briefs or reports written by the Department about National Inventory Reporting by other countries that mention changes to historical data or Japan/ Canada".[34]

After 55 days, DISER notified us that they identified 15 documents, but refused access to all of them in full.

The reason given was that parts of the document contained 'opinions' and 'confidential information' about Australia's analysis of other countries' climate change commitments. As such, DISER applied s 33 to exclude all the information.

As ACF noted in its request for an internal review, it is unlikely that the entirety of the 15 documents identified could reasonably be expected to cause damage to Australia's international relations. It would be possible to release information about the general discussion in the briefs (i.e. methodology or data), using redactions to remove any particularly sensitive opinions and to de-identify specific countries being discussed.

Historical emissions data is a clear and scientifically credited indicator of the relative ambition required from countries under international climate treaties. It is uncontroversial for countries to frankly consider these matters, and most countries would have their own briefs discussing these issues. Other countries would not be surprised by the fact the Commonwealth is considering this well-known science.

The only basis for refusing all documents would be if the mere existence of the documents was somehow controversial, and thus should be kept secret. Not only is this highly unlikely, it is also logically inconsistent because the department has identified the documents in the decision letter, and thus accepted this risk. Otherwise it would have used its power under section 25 of the FOI Act and neither confirmed nor denied the existence of the documents.

In cases such as these, it is unclear whether decision makers feel obliged to overzealously apply the exemptions, or whether they are deliberately attempting to obfuscate matters of national importance.

Regardless, the end result is an inability to see information which is scientific, uncontroversial, deserving of public scrutiny and crucial in holding our national environmental governance to account.

ACF applied for a review of this decision by the Office of the Australian Information Commissioner in April 2020. The Office has commenced a review however 8 months later, the matter has not been allocated to a case officer.

In cases such as these, it is unclear whether decision makers feel obliged to overzealously apply the exemptions, or whether **they are deliberately attempting to obfuscate matters of national importance**

[34] DISER FOI Request No. 65374.

The use of 'practical' refusals

Practical refusals, where the scope is deemed too broad, or the amount of work would compromise the capacity of the agency responding, are common.

Section 24AA(1) of the Freedom of Information Act 1982 provides that a 'practical refusal' can occur when processing a request that would 'substantially and unreasonably' divert the resources of an agency from its normal operations. It is important to note the two terms require separate tests — sometimes the burden of a request will be substantial but in the public interest and therefore entirely reasonable.

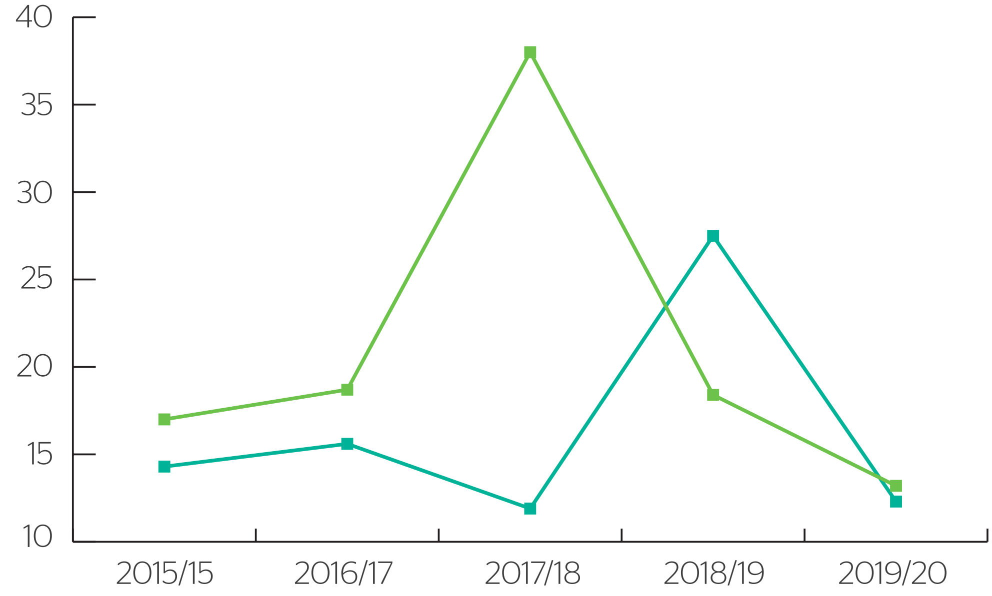
Practical refusals are a multi-step process, designed to maximise the potential for relevant information to be disclosed, while balancing demands on agencies' time and capacity. When an intention notice is provided, it is standard practice for agencies to ask an applicant to revise and narrow the scope of the request, and they often suggest how a request can be made manageable.

The Federal Court has made it clear agencies have to satisfy quite a high threshold to prove that a request would 'substantially and unreasonably' divert resources. Agencies should not simply throw their hands up and claim an unreasonable burden whenever facing a complex request, especially given the public interest considerations.

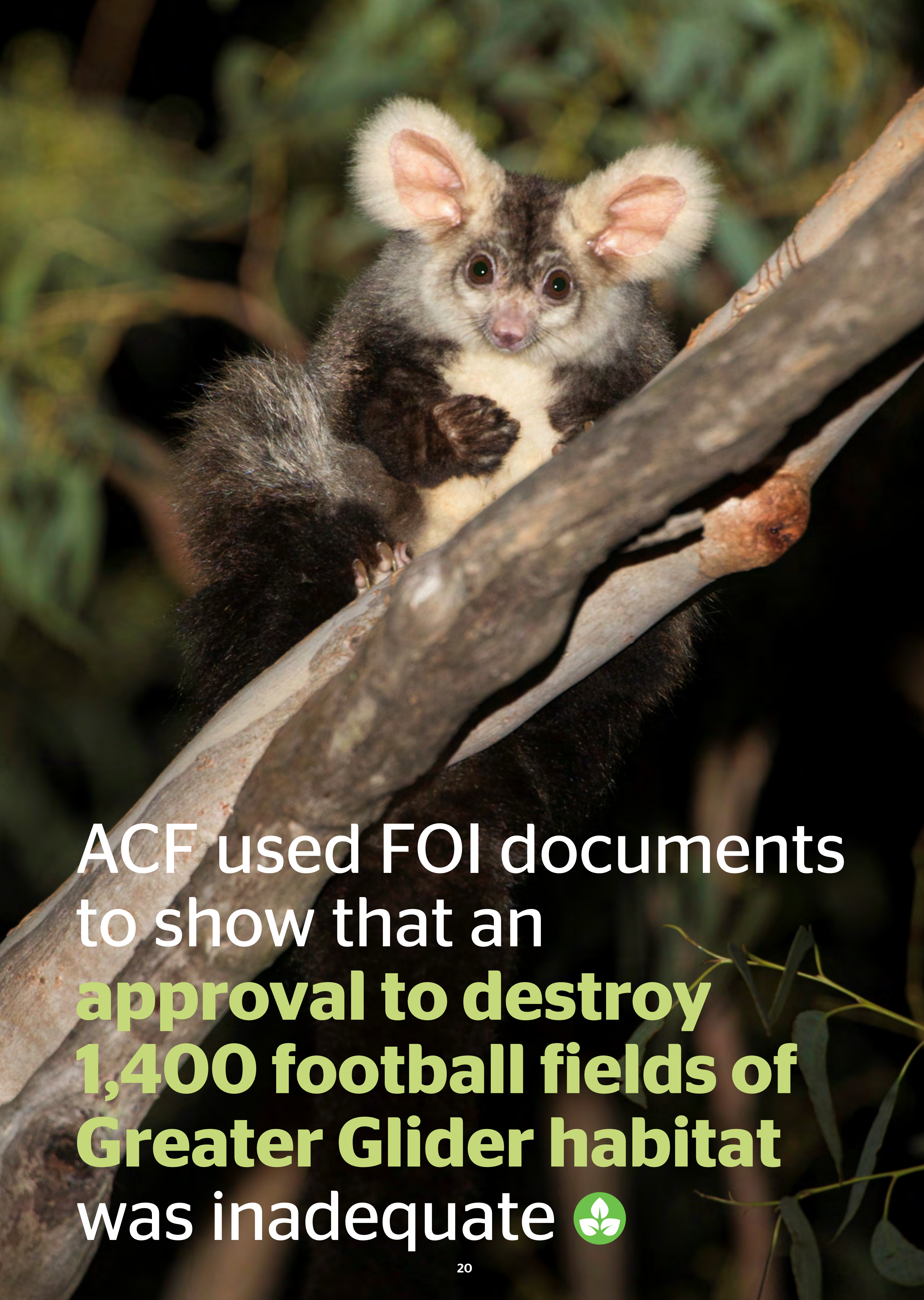
However, it seems that decision makers are still relying on this ground quite frequently, which raises concerns about whether they are evading their responsibility to process requests.

Figure five shows that across all government agencies, practical notification refusal rates have fluctuated between 13% and 38%. Practical refusal notification rates for environment-relevant portfolios have also fluctuated (between 12% and 28%), and have tended to issue practical refusal notices to fewer requests (proportionately) compared with all agencies.

Figure five: Practical refusals by environment-relevant portfolios



Source: Data.gov.au freedom of information statistics, Office of the Australian Information Commissioner. Note that some of these requests were subsequently processed following renegotiation of scope, some will have been actually refused, and some withdrawn by applicants.



ACF used FOI documents to show that an **approval to destroy 1,400 football fields of Greater Glider habitat** was inadequate

Ministers, Morrison and the documents which "do not exist"

Refusal on the basis that documents "do not exist" or are "not in the possession of" the government authority is common. There are situations where such a response is obvious (such as where a request is misguided or sent to the wrong agency). However, this particular category of refusal is murky and fraught.

A claim that documents do not exist releases a decision maker from obligations to process and release information; all they need to do is write one or two sentences in a letter and dust their hands of the matter. Currently, decision makers at a federal level (and most state levels) are not even obliged to reveal exactly how they searched for documents. This can create some dangers for transparency, and there are indications this response is being exploited.

For example, in April 2019 a request was lodged by ACF for a list of meetings (plus the agenda, minutes and any additional documents produced) between the prime minister/his advisors and any persons regarding the Adani mine.[36] The request was targeted and specific, and limited to a period of five days. Broader and more complicated requests have been sent to other departments, and have resulted in access to documents. As the request passed its deadline ACF followed up numerous times seeking an update, with no response from the Prime Minister's Office. Two months after the deadline, the Prime Minister's Office issued a notice of intention to refuse on the grounds the request was too onerous to process. As per standard practice, ACF narrowed the scope of the request on two separate occasions.

Ultimately, 118 days after the statutory deadline, the request was refused on the basis that the requested documents did not exist. So having stated that our initial request was too broad, and having forced us to whittle the request down twice, the request was suddenly so narrow as to turn up no documents at all. This shows a lack of good faith engagement with the FOI Act and its principles.

Previous page. Greater glider. *Photo.* Matt Wright

This is not an isolated incident either. Several ACF requests have sought records of correspondence and phone calls between ministers and their departments over the course of several weeks or months, on high profile issues. The response that "no documents exist" is possible but implausible. It is more likely certain types of communication (phone calls, digital messages other than email) are being excluded from searches.

Unfortunately, it is also not uncommon for the Prime Minister's Office to evade transparency obligations. In fact, under Scott Morrison it has reached a shocking new low in transparency.

In 2018–2019, out of 63 requests received by Scott Morrison's office, 61 were refused in full. In 2019–2020 out of 67 requests, 65 were refused. In both years the refusal rate by the Prime Minister was 97%, more than double the refusal rate for other requests across all agencies. It seems the nation's leading officeholder also leads the highest refusal rate out of any government agency/body. While the Prime Minister's Office receives requests on a range of matters, many of them have been on environmental matters, including several which we sent.

The rates of refusal by environment ministers over the past five years are particularly high. The number of applications processed by ministers is relatively small — typically less than 10 per year, with a spike up to 43 in 2019–2020, of which 39 were refused outright. But the rates of refusal are very high, ranging from 30% to 100%. Several refusals to ACF requests have been based on OAIC guidance that where a portfolio is handed over, documents in the possession of a former minister may not be considered in possession of the new minister.

This is a major problem for transparency, particularly given that since 2015, the environment and energy portfolios have been transferred between five ministers, as well as major changes to the portfolios dealing with the environment, energy and emissions.

[36] PMC FOI Request No. 2019/014: The request sought "List of meetings and attendees between the Prime Minister or his advisers and any persons (e.g. Adani representatives or Senators/MPs) concerning Adani's Carmichael coal mine or mining in the Galilee Basin," between "1 April 2019 – 5 April 2019", as well as any minutes, agendas, documents produced or notes from these meetings.

Case study: Use of guidelines to permit refusals

In 2019, ACF made eight FOI requests to the Minister for the Environment and the Minister for Energy and Emissions Reductions. The requests were for documents relating to decisions and operations of Australian Renewable Energy Agency, the Clean Energy Regulator, the Emissions Reduction Fund, and companies funded through these schemes.

Seven of the eight requests were refused, and all decisions were delayed over a period of several months. All of the decisions were late by at least 19 days, and five were more than 50 days late. Three refusals relied on a problematic loophole in the FOI Guidelines that enables new ministers to refuse access to documents simply because they are new to the job.

The guidelines state that where documents were requested from a previous minister, and there is a new minister, the new minister is considered not to be in possession of the documents, and the FOI Act doesn't apply. This is despite the fact documents can normally be considered 'in possession of a minister' if they are held by ministerial staff, or readily available to a minister in performance of their duties.

It is common practice for documents to be filed by an outgoing minister with the National Archives, where they cannot be obtained for 20 years. However, National Archives has confirmed it has not received any documents from Minister Price relating to her time as Environment Minister. ACF has been seeking a response on whether the FOI Act still applies to the documents. Neither National Archives nor the OAIC state they are looking into this issue, but these investigations have now been 'in progress' for more than a year.

ACF's requests were made during the lead-up to a federal election in which accurate information on environmental issues was vital to Australians' ability to make informed voting choices, ultimately determining Australia's future government and with it, climate and environmental policy for years to come. Timely responses could have made a difference.

Instead, the existence and content of those documents remains unclear. It is equally unclear how anyone might go about obtaining those documents, as the FOI process has been exhausted, and National Archives confirm they have not received them. This case points to a significant grey area created by the FOI guidelines, and evidence that it is being exploited by ministers to prevent public access to government information that is in the public interest, and should be released.

This case points to a significant grey area created by the FOI guidelines, and **evidence that it is being exploited by ministers to prevent public access**

Case study: Don't want to release documents? Just resign!

In November 2019, ACF made a request to the Office of the Minister for Resources and Northern Australia (who was Matthew Canavan at the time). We asked for access to "a record of any meetings or phone calls held between the Resources Minister or his advisers and representatives of New Hope Coal (including its lobbyists) between 1 September and 1 November 2019."[37]

ACF was aware that New Hope Coal was instigating a government backlash against 'secondary boycotts' of climate-wrecking projects.[38] New Hope Coal was upset that activists and concerned citizens were using their power as consumers to take meaningful, market-based climate action. In fact the Prime Minister made a speech against the boycotts shortly after New Hope's complaint.

A week later, the office advised us that six documents were identified in the request, and third-party consultation was required for at least one of these documents. This meant they would be given an extra 30 days to process the request. The office also charged us for the request, which we paid.

By February of 2020 we had received no word on the request. During that time, on 3 February, Canavan resigned from the portfolio.

As it turns out, the documents were sitting with Canavan's chief of staff, who was the decision maker. We were then informed by the Department of Industry that the request could no longer be finalised because of Canavan's resignation.

This reasoning is ridiculous for several reasons. The 60-day extended timeframe to make the decision — which only included six documents — was due to end on 6 February 2020, three days before Canavan's resignation. They would likely have completed the majority of the work required to release the documents. By this logic, any minister can simply wait out the clock until they change portfolios, facing no repercussions for withholding documents.

This reasoning provides an easy method for senior members of the government to escape scrutiny of their actions — even on matters of crucial and contemporary public importance. There is no good reason for our request to have been refused on these grounds. Such conduct blatantly disrespects the objectives of our transparency laws.

Any minister can simply wait out the clock until they change portfolios, **facing no repercussions for withholding documents**

[37] Minister for Resources and Northern Australia FOI Request No. 63772.

[38] B Thomson, 'New Hope blasts green groups' loophole on secondary boycotts', Australian Financial Review, 23 September 2019 <https://www.afr.com/companies/mining/new-hope-blasts-green-groups-loophole-on-secondary-boycotts-20190922-p52toq>, accessed 04 October 2020.

ACF discovered a series of **faulty federal government approvals** that were knowingly against policy and **failed to adequately protect koala habitat**

Previous page. Koala. *Photo.* Annette Ruzicka/MAPgroup

Fees not always 'low and reasonable'

How charges for information requests work

Our FOI laws aim 'to facilitate and promote public access to information, promptly and at the lowest reasonable cost'.[39] Charges are regulated by the Freedom of Information (Charges) Regulations 2019. Personal information is not subject to charges, but policy-related information often is.

When a request is made, the responding agency is required to estimate the amount of work and fees to be charged (if any), consider whether these should be waived and, if not, notify the applicant of the estimated fee. The estimated fee can be reduced or waived once the work has been completed based on actual time taken. The applicant can choose to withdraw a request once they have received notice of the estimated charges.

How fees are levied against requests for environmental information

There are a number of ways to look at fees data to determine whether and why problems exist in relation to charging. We can look at the agencies that charge the most, which is reported annually by the Office of the Australian Information Commissioner. We can examine average costs per request, and we can look at the discrepancy between the estimated amount (notified to applicants) and the final amount.

In 2019–2020, seven out of the top 20 agencies ranked by the amount of charges collected were from environment-relevant portfolios.[40] These included the Department for Industry, Science, Energy and Resources in fourth place, and the Department of Agriculture, Water and the Environment in eighth place.[41] The Department of the Environment and Energy (subsequently DAWE) has ranked among the top 10 agencies for fees collected in four out of the last five years.

The Department of Industry, Innovation and Science (now DISER) has ranked in the top 20 charging agencies every year for the past five years. While both departments are also among the agencies receiving the most requests,[42] they consistently rank higher in terms of charges compared with their ranking for requests received.

Looking at the top charging agencies compared with agencies that receive the most requests is an interesting exercise, but only tells part of the story. Charges can be more fully explored by looking at average cost per request, and looking at the difference between estimated and final charges.

Between 2015 and 2020, the average cost per request — across all areas of government — was $18.52.[43] However, the cost average for environment-related portfolios (Agriculture, Industry and Environment) was almost double this amount at $36.58. The disparity is also there when we exclude requests where the charge was waived entirely. When including only the requests where a charge was levied, the average cost for environmental agencies was $212.29, compared to a government-wide average of $120.41. While further research would be needed to understand whether higher fees are correlated with more complex requests to different agencies, these figures highlight a potentially serious problem at the very least.

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[39] Freedom of Information Act 1982 (Cth), s 3(4).

[40] A total of 297 government agencies provide FOI data to the OAIC, however, in 2018/19 only 82 of these received more than 50 FOI requests. OAIC Annual Report 2019/20, Australian Government. Retrieved from: https://www.oaic.gov.au/assets/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2019-20/OAIC-Annual-Report-2019-20.pdf>

[41] The Department of Agriculture (now part of DAWE) came in ninth place. If the figures for DAWE and the Department of Agriculture were combined, these agencies would be the third of all government agencies by charges collected.

[42] Relating to policy-relevant 'other' requests only, not including 'personal'.

[43] Again, this statistic excludes requests for 'personal information', which are generally cheaper and more frequent.

Finally, data reported by agencies to the OAIC show some large discrepancies between the amounts initially estimated by agencies to process requests (charges notified) and the amount actually charged. For example, in 2019–2020 the Great Barrier Reef Marine Park Authority received seven requests and notified charges for all of them, with $10,050 notified but only $2,207 charged. For the same timeframe, the Department of Industry, Science, Energy & Resources charged $5,064 for two requests (the amount notified was $12,211). In 2018–2019, the Clean Energy Regulator notified $23,422 in charges for 11 requests, but only collected a total of $3,426.[44]

Some might wonder — what's the problem here? Isn't it good that the final costs were lower than initially notified?

The problem is, when initial charges notified by government authorities are so high in proportion to the true cost, it can have an unnecessary and harmful deterrent effect. Consistently overestimating charges can "discourage the pursuit of information in the public interest".[45] Applicants may choose to withdraw a request after receiving the initial charge notice, out of fear they will have to pay more than they can afford. At ACF, for instance, the initial charge notices can force us to make difficult decisions about how to distribute budgetary resources, and force us to back away from important requests or narrow their scope significantly. This can all happen despite the actual scope of the request not justifying such a high cost.

Again, further research examining the nature of requests and the process for estimating and charging would be needed to explore this. Some of this work would be possible using information that is already in the public domain, but not all relevant information is published. A review of charges would more sensibly be undertaken by the Information Commissioner's office.

Charges levied against ACF requests

In our data we surveyed the amount initially estimated by each request and compared it to the final charge. Immediately, we could see a problem. Over the 109 requests surveyed, we were initially notified of charges totalling $22,536. This came out to an average initial estimated charge of $204.88 per request. However, after each request was finalised and processed, the amount we were actually charged was $14,446 in total. This came out to an average of only $131.33 per request. Note also that many requests had charges waived entirely because of the public interest nature of our work or due to agencies not meeting their statutory deadlines.

As reflected in the OAIC analysis above, overcharging was also an issue. Of course, estimating costs is not an exact science. But that does not mean common sense should be ignored. We encountered some egregious examples of over-estimating the hours required to process requests.

In one request we sent, the Department of Industry, Science, Energy and Resources claimed it needed five hours to retrieve four emails. Anyone who has ever used an email address in the last two decades will know that searching for emails does not take anywhere near this amount of time.[46]

Of course, these problems are even more concerning for smaller organisations or advocates, who are entitled to a more accurate account of FOI charges so they can more freely seek the information they require.

In the requests we filed, the Clean Energy Regulator was the most prolific over charger. The total difference (across all CER requests) between their initial estimated charges and the final charges they levied was $4,571. This is broadly reflected in the OAIC data too.

[44] A number of these estimated charges were for ACF requests, with charges subsequently waived due to the Regulator not meeting their statutory timeframes to release documents.

[45] D Stewart (2015), 'Assessing Access to Information in Australia: The impact of freedom of information laws on the scrutiny and operation of the Commonwealth government', in J Wanna et. al (eds) New Accountabilities, New Challenges (ANU Press, 2015), page 150.

[46] DISER FOI Request No. 2020/66858. The decision is currently under review by the OAIC however has not been allocated to a case officer.

Importantly, this does not mean the final charges were always reasonable either. One request made to the CER in 2019 cost $457.25 for the release of only three documents and the refusal of three others. The processing time was four months. By way of comparison, we made a request to the then Department of Environment and Energy two months later which turned up 47 documents within a processing time of less than two months, and which cost only $231.

Other individual requests filed were noteworthy as well. One request we filed to the CSIRO was, stunningly, overestimated by $2,264 — the final cost was zero.

Since the attempted gutting of the OAIC in 2015, the transparency regime in Australia has been steadily whittled away through a lack of staff and funding. When government offices have fewer staff available to deal with requests, it results in requests outpacing the resources available and presents inefficiencies in the management of requests. This means FOI requests face longer processing times (see below), which in turn imposes more costs on the requesting parties — not just in terms of time, but in terms of increased charges on the requests.

So although the FOI Act is supposed to be a frontline responsibility of governments, delivered at the lowest reasonable cost, the system in place is shifting the cost burden onto applicants.

Above. Dugong. *Photo.* Nikki Michail

Unreasonable delays are a serious obstacle

When it comes to protecting our climate and nature, time is of the essence. Without timely access to information, environmental advocacy can be severely hampered. Government decisions are made before the consequences of these choices can be made clear to the public, leaving our natural world at greater risk of mismanagement and poor, secretive planning.

Our analysis shows that while some environment-relevant portfolios process most requests within specified time frames, others are consistently late.

According to OAIC trends, over the past five years the proportion of requests processed within the statutory timeframe (within deadlines, factoring in legitimate extensions) has moved from 73.2% (in 2019–2020) to 86.3% (in 2017–2018).

Environment and agriculture agencies are among the more timely government agencies, processing between 93% and 100% of requests on time. Industry, innovation and science is a different matter entirely — across the portfolio, the percentage of requests determined on time has dropped from 90%–100% from 2014–2016 to 81%–82% in 2018–2020.

Delays in processing ACF's requests

But in our analysis of ACF's requests, a far higher proportion of requests were overdue. ACF dealt frequently with some of the less timely government agencies. These include the Minister for the Environment and the Prime Minister, both of whom decided less than 50% of requests in the statutory time frame in 2019–2020.[47] Looking more closely at ACF's FOI data doesn't tell us everything about why we experience longer-than-average delays, but it does provide some useful insights.

ACF has always aimed to foster good working relationships with government departments and agencies, providing extensions to statutory deadlines whenever decision makers are managing competing priorities and significant workloads. ACF understands that processing documents can be time consuming, and we work to alleviate those pressures as best we can.

Despite this, more than one-third of the 109 requests we analysed were significantly overdue, even when extensions were provided and factored in.[48] Of these overdue requests, 60% were overdue by a month or more, and 39.5% were overdue by more than eight weeks. Considering the standard deadline for a Commonwealth FOI request is 30 days, and up to 45 days for state-level requests, these delays are especially egregious. Delays in deciding ACF requests are significantly higher than the average delays reported to the Information Commissioner.

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[47] Office of the Australian Information Commissioner Annual Report 2019/20.

[48] We defined a 'significantly overdue' request as one delivered more than 7 days after the statutory deadline, after factoring in extensions which were granted to the decision maker.

Figure six: Number of days overdue by agency

Source: ACF FOI requests 2015–2020

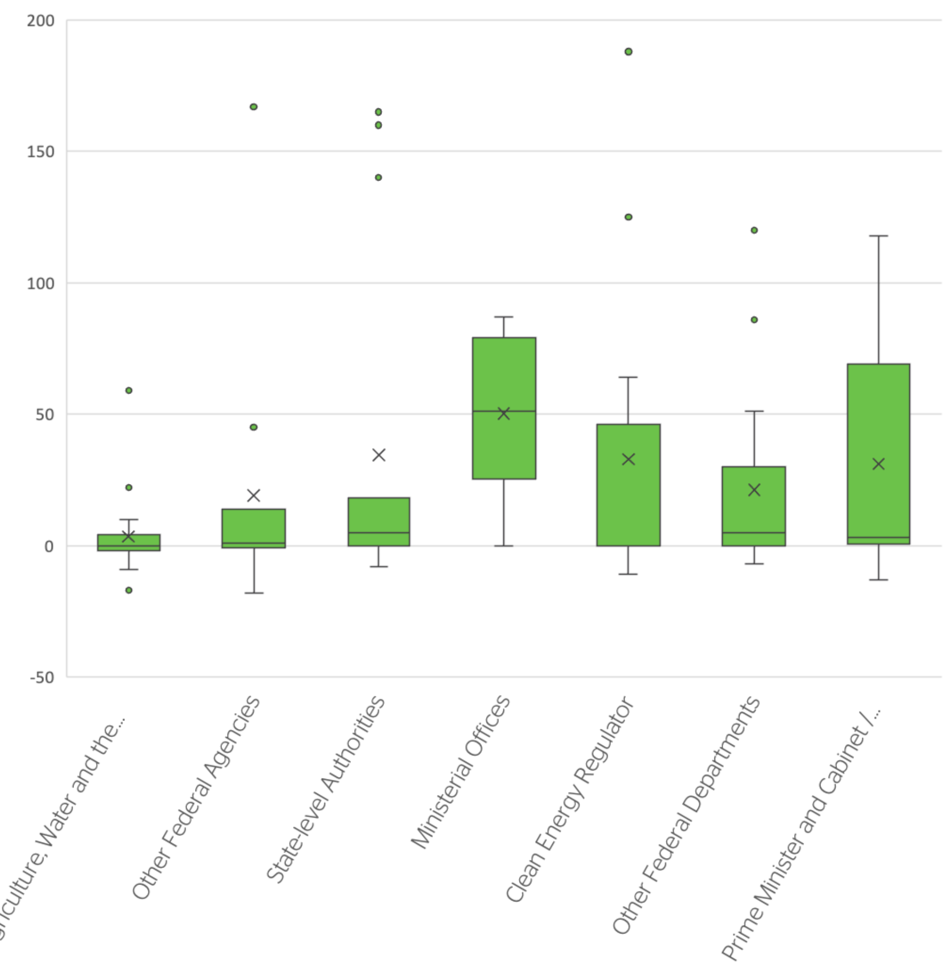

Figure six: Average lateness, processing time and documents identified by authority

Source: ACF analysis of ACF FOI requests 2015–2020

Government authority	Avg. days overdue	Average total processing time	Average # of documents identified
Agriculture, Water and the Environment	3.43	53.97	31.97
Clean Energy Regulator	32.85	146.54	31.46
Ministerial offices	50.33	87.00	0.89
Other federal agencies	23.11	64.45	139.45
Other federal departments	19.09	73.73	10.80
Prime Minister and Cabinet / PMO	31.00	92.22	4.78
State-level authorities	34.40	113.27	84.79

As seen in the data, some government agencies and offices performed better than others when it came to processing our requests. The Department of Agriculture, Water and the Environment was far more consistent and timely compared with other agencies.

In contrast, six out of the 13 requests (46%) we sent to the Clean Energy Regulator were overdue. Three were overdue by more than two months, and one by six months — despite numerous extensions agreed to by ACF. The average processing time for all requests sent to the Regulator was 147 days. Yet the average number of documents they identified per request was equal to that of Agriculture, Water and the Environment. This is almost double the average processing time for all other ACF requests (76 days), and far longer than the timeframe targeted by the FOI framework.

Delays may be partly explained by staffing shortages and potentially a lack of preparedness for requests. Despite increases in the number of staff working on FOI at the Regulator, OAIC data shows that the staff-days-per-request has increased dramatically in recent years, from 1.729 staff days per request in 2015–2016 to 6.62 staff days per request in 2018–2019. Staffing practices are clearly not keeping up with the demand for information.

Delays without documents

Delays are not always due to the complexity of locating, reviewing and redacting documents. Some of the worst cases of delay arose in requests which turned up no documents at all. As seen in figure six, for example, requests sent to the ministerial offices were the most overdue despite identifying, on average, almost no documents at all.

In 18 of the requests which ACF made, the receiving agency or department claimed to identify no documents relevant to the request in their initial search. Of these requests, the average processing time was 73 days, and half of the decisions were overdue. Inexplicably, one-third of the requests were overdue by more than 10 weeks.

Given the availability of email search functions and the use of sophisticated digital filing systems in government departments and offices, there is no clear reason why these document searches take so long. A search which returns no documents should never exhaust the 30-day statutory timeframe, let alone consume an extra 10 weeks of time beyond the deadline.

Key communications platforms **not accessible**

The use of apps and text messaging is a key information channel for elected representatives to request and share information, particularly where communication is time critical, and for sensitive issues.

Much of the attention on decision-makers' use of these platforms have focused on accessibility from an information security perspective.

The issue of access for the purposes of transparency and accountability has received much less attention, partly because these communications are largely ignored by current FOI practices, despite falling squarely within the remit of the Act.

The OAIC's FOI Guidelines state a document 'can ... include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices'.[49] Information transmitted between mobile phones, via SMS, WhatsApp or other applications clearly falls within this definition. The 'reasonable steps' checklist issued by the OAIC to assist agencies in processing requests specifically refers to smartphones as devices that may be searched, and text messages as documents.

There are exclusions; documents that are personal, party political or relate to an MP's role as a local representative are not covered by FOI. This appears to be a murky area, and there is clearly a possibility that MPs might consider their personal devices not accessible, even if they are used for official business. For example, a refusal to an FOI application for Minister Dutton's messages stated the rationale as 'the Minister does not have WhatsApp installed on his Department-issued phone'.

Ireland has provided a precedent for the release of WhatsApp messages under FOI laws, when a FOI request was made to the Department of Taoiseach (Department of Prime Minister), resulting in the release of transcripts of a group conversation discussing Brexit and media responses to the referendum result.[50]

Recent events in Australia have also demonstrated that information contained within messaging apps and SMS are capable of being caught by FOI laws, when documents obtained by the Guardian from Angus Taylor included a series of WhatsApp messages.[51]

But while information transmitted via these channels is subject to FOI in law, it is rare for these documents to be provided in response to an FOI request. Environmental agencies granted 43 FOI requests in the first half of 2020.[52] Of these, five specifically requested access to information contained in SMS and/or WhatsApp messages. No messages of this kind were included in the documents provided; some were said not to exist within the scope of the request, and others deemed an unreasonable workload (refused on practical grounds).

One issue precluding the effective searchability and access to the newest communication platforms is the ability to file information in a way that can be readily searched and retrieved.[53] At least one piece of software exists solely to file and enable retrieval of WhatsApp messages, and was designed with government agencies as a key target user. But even with the most effective filing mechanisms, access can always be limited where the will to prevent access exists.

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[49] Freedom of Information Guidelines, Office of the Australian Information Commissioner, Part 8.

[50] M. Burgess, 'Brexit WhatsApp messages released under FOI', FOI Directory <http://www.foi.directory/brexit-whatsapp-messages-released-under-foi/>, accessed 6 November 2020.

[51] A. Davies, 'Angus Taylor v Clover Moore: WhatsApp messages reveal panic as Minister's staff realised figures were wrong', The Guardian (2 November 2020), <https://www.theguardian.com/australia-news/2020/nov/02/angus-taylor-v-clover-moore-whatsapp-messages-reveal-panic-as-ministers-staff-realised-figures-were-wrong?CMP=share_btn_tw>, accessed 6 November 2020.

[52] Department of Agriculture, Water and the Environment FOI Disclosure Log

[53] M. Paterson, 'Yes, a WhatsApp message could be subject to FOI, but you'd have to find it first', The Conversation, 15 November 2018, <https://theconversation.com/yes-a-whatsapp-message-could-be-subject-to-foi-but-youd-have-to-find-it-first-106923>, accessed 30 November 2020.

Case study: Text messages are an unspoken exemption?

In September 2019, ACF made separate FOI applications to Ministers Dutton, Taylor and Canavan, and Assistant Minister Seselja, for records of any inbound communications between 6–24 August 2018 from telephone, SMS, WhatsApp and Signal services. Only the records of communication having occurred were requested, not the content of the conversations.

None of the requests were granted. Minister Dutton's office responded that none of the applications were installed on his Department-issued phone, and no documents could be found. Minister Taylor's response came via the Department for Home Affairs and stated that no documents could be found and that billing records showed no calls or messages were made from either Minister Dutton or Taylor over the 18-day period.

In July 2019, The Guardian and others made several requests for correspondence between Barnaby Joyce MP and the Prime Minister, after he stated reports on his role as drought envoy had been submitted to the Prime Minister via SMS. Although a number of documents were released, the package did not include a single text message. This is despite Barnaby Joyce stating the SMS reports existed, and he was happy for them to be made public.

In all of these examples, it is clear that the requested scope should have yielded a number of messages transmitted by phone, but none were provided. Decision makers often referred to the 'difficulty' of retrieving such messages in their reasons for refusal. However, the FOI Act clearly indicates the seniority of the author of a particular document (whether they be a staffer or a minister) is not to be taken into account when refusing access.[54] In other words, decision makers cannot rely on the fact that Joyce, Morrison, Canavan, Dutton or Taylor are senior figures in order to justify the difficulty of retrieving the documents.

The ambiguity surrounding SMS and WhatsApp messages is concerning and must be addressed, as they are clearly critical in the day-to-day operations of government ministers and release of such information is in the public interest.

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[54] Freedom of Information Act 1982 (Cth), s 11B(4)(c).

Review process and questions about consistency

The OAIC review process is focused on an informal resolution at the lowest reasonable cost. The majority of review requests are resolved this way, for example, by agencies reviewing their decision and providing additional documentation, and applicants accepting the new outcome.

Where no satisfactory conclusion can be reached, applicants may proceed with a formal review by the Information Commissioner. This happens in around one-fifth of cases where a review is initiated.[55]

Of the 20 most recent decisions on any issue by the Information Commissioner, 10 decisions were affirmed (50%), two were partly affirmed (varied) (10%), and eight were substituted (40%). Of 18 decisions relating to environmental information since 2015, seven decisions (39%) were affirmed and 11 decisions (61%) were substituted. The majority of substitutions resulted in the Information Commissioner requiring agencies to review and release more information, with some finding that exemptions claimed did not actually exist. Out of the decisions pertaining to environmental information, over 50% were handed down over a year from the date the review was requested.[56] This highlights the problematic nature of having an OAIC that is underfunded and not staffed properly — it results in delays on decisions that can be very time-sensitive, as many environmental matters are. The extensive delays can also act to deter applicants from seeking a formal review from the Information Commissioner, as the lengthy process may mean the information that is sought may not be relevant by the time the decision is made.

These findings are consistent with longer term trends over the past five years, as reported by agencies to the OAIC. Between 2016–2019, data from the OAIC's annual reports shows the percentage of decisions affirmed reduced between 2016–2017 and 2018–2019 (63% to 31.7%), and the percentage of decisions set aside and substituted has increased (22% to 61.7%).[57]

The rate of substitutions appears high, but it is difficult to assess what levels of affirmation and substitution might indicate a well-functioning system, and at what point questions should be raised regarding the quality of decision making across the system. One option is to look to similar regimes elsewhere. In the UK, for example, a major review in 2016 found decisions were affirmed in 66%–83% of cases from 2012–2016 and substituted in 10%–29% of cases (UN Independent Commission on Freedom of Information, 2016).

It is important to note very few decisions make it to formal review, and high rates of decision substitution through formal reviews might indicate a broader problem. Of those that are not reviewed, it is not known what proportion may have received an inadequate response, resulting in a refusal or unreasonable limitations on information that was released.

[55] A. Falk, Senate Committee Hearing Transcript 2018, pg 35.

[56] ACF analysis of decisions by the Information Commissioner, AUSTLii.

[57] OAIC Annual Report 2018/19 and OAIC Annual Report 2016/17. 6.7% of decisions were varied in 2018/19 and 15% were varied in 2016/17. These figures are based on requests for personal and other information.

FOI documents obtained by ACF exposed a toxic PFAS leak into Darwin Harbour, **with potential risks to dugongs and dolphins**

Previous page. Dugong.
Photo. Shandarov Arkadii/Shutterstock.com

Recommendations

While the theoretical structure of Australia's FOI regime is sound, it continues to be used in a way that promotes and protects secrecy, when it should be supporting transparency and accountability. The ethical basis of the regime and political commitments to open government are being undermined by the process of assessing requests and releasing information. Laws and guidelines are "being used as a tool to avoid providing documents in a timely and effective manner instead of prioritising the need to release documents as is required under the Act".[58]

FOI should act as a reliable and affordable mechanism for obtaining information to support those goals, and hold governments accountable for its policies and decisions. This can only happen if our system is genuinely geared towards open access. A number of reforms are needed to create a fair and more effective system that works for all.

Immediate recommendations

1. The Morrison government should ensure the OAIC is staffed with three separate officers to perform the three separate functions: an information commissioner, a 'freedom of information' (or 'transparency') commissioner, and a privacy commissioner. Having one person undertake all three roles is unrealistic and arguably unconstitutional, and reduces the effectiveness of all three functions (Senate Committee, 2018). The separation of roles must be made clear and unambiguous.

2. The OAIC should investigate negative trends in the outcome of requests for environmental information, or at least into particular agencies like ministerial offices or the Prime Minister's Office. The Information Commissioner is already empowered to launch commissioner-initiated investigations (CIIs) to investigate agencies for their handling of FOI requests. However, between 2018–2020 the OAIC has only opened two investigations related to FOI, in comparison with 34 privacy-related CIIs (OAIC annual reports 2018–2019 and 2019–2020). They should exercise their power under the FOI Act more consistently to enforce adherence to the statute's function. Their responsibilities do not begin and end with the Privacy Act alone.

3. The Attorney General should amend the FOI regulations to increase the amount of 'complementary hours' for the purposes of determining charges, so as to compensate for staffing difficulties and prevent unreasonable financial deterrent effect against applicants.

[58] L. Freidin, Senate Committee Hearing Transcript 2018, pg 5.

4. The Attorney General should also amend the FOI regulations to mandate that decision makers must specify what search terms they entered into their digital systems (including Boolean operators) and which systems were searched to retrieve documents. This is a relatively straightforward obligation that has already been recommended at a state-level and is currently practiced by the West Australian Government. It can ensure that, if an office has not released any documents because they claim no relevant documents exist, the applicant can check the search terms to ensure an appropriate and reasonable search was actually conducted.

5. The Information Commissioner, in consultation with departments and other stakeholders, should develop stronger guidance on the recording of official information held in non-official systems, email accounts and devices. This is particularly important amid increasing use of WhatsApp and other mobile devices by Ministers to conduct the business of state.

6. Resourcing and budget decisions across all sectors of government must be designed to ensure current FOI KPIs are actually being met. Federal government should use its executive authority to boost resourcing (funding and staff) for the transparency wings of its offices and agencies as required.

7. All agency heads should make AGS training compulsory in order to receive delegate status to process FOI requests. Without mandatory training, there is no cohesive culture of transparency and no standardised approach to implementing transparency laws.

Long-term recommendations

8. Parliament should conduct, in consultation with interested organisations or parties, an inquiry into transparency law. The terms of reference should include, but not be limited to:

    - Changing nature of information (need a legislative review process and a flexible regime)
    - WhatsApp/phone use
    - Examining compliance options, for example, by looking at provisions in other foundational legislation for public service decision making to strengthen provisions and accountability in the FOI Act[59]
    - Content of the AGS training on FOI delegation should be reviewed and updated
    - Giving OAIC standing to engage parties above its own jurisdiction

9. The inquiry's final recommendations should be legislated as efficiently as possible.

10. The states and territories should adopt a uniform transparency regime, similar to the Uniform Evidence Acts, which standardises FOI procedures and obligations. This should also take into account the inquiry findings and any other expert reviews into transparency law.

[59] For example, whether the FOI Act should contain provisions which allow for the Information Commissioner to formally issue a breach notice for examples of egregious and continual breaches of obligations by delegates. And, whether agencies' delegation instrument should make the valid exercise of the power contingent on not being in breach.

Technical appendix

Methodology

We wanted to examine overall trends in FOI, across all agencies, and with a specific focus on environmental information. As well as uncovering high-level trends, we wanted to examine how the process works, and what the implications are for environmental advocacy. In order to do this, we drew on several datasets and sources:

- Annual statistical returns provided to the OAIC by all agencies subject to the FOI Act. The full data set is available at www.data.gov.au.
- 109 FOI requests made by ACF between 1 June 2015 and 4 May 2020. These include requests made to Commonwealth, state/territory, local governments and agencies, and ministers' offices.
- FOI disclosure logs published by Department for Agriculture, Water and the Environment; the Department of Industry, Science, Energy and Resources; and the Department of the Prime Minister and Cabinet.
- Information Commissioner review decisions database, available at http://www.austlii.edu.au/
- OAIC annual reports from 2015–2016 through 2019–2020.

All analysis of agency data reported to the OAIC examines the total number of FOI requests — it does not disaggregate personal requests and organisational requests. Personal requests are made by individuals or their representatives for documents about the applicant. Non-personal requests are made by organisations, the media, members of Parliament, etc. for documents relating to the functions of government or a government agency.

Out of the 109 ACF requests analysed, 94 were sent to federal agencies. While some were processed by state governments and councils, due to the vast majority being processed by federal agencies, analysis of ACF requests is primarily on Commonwealth transparency laws.

Limitations

In its 2016 report, the Auditor-General noted 'very limited quality assurance or verification of the reliability of FOI data reported to the OAIC by entities'. It found errors in the reported information, such as inconsistencies between statistical breakdowns and totals. The OAIC advised in response that it attempts to manage the risk of inaccurate data reporting, but some errors are inevitable due to its inability to check every single data point. While agency reporting is likely to contain some errors, it remains useful for identifying long-term trends and issues.

Analysis of refusals is limited by the nature of data available to the ACF and the public. Refusals are not published in departmental disclosure logs, and only top-level data on refusals is included in the OAIC's annual report. Publicly available data enables analysis of the incidence of refusals, across different agencies and over time, but we have drawn on the ACF's own FOI data to examine the process leading up to refusals, as well as follow-up to clarify guidelines and limitations on refusals.

Changes to the machinery of government (MOG) impact on the calculation and comparison of data across portfolios and ministers. In December 2019 Prime Minister Scott Morrison announced a reduction of the number of government departments from 18 to 14, including the following changes with direct relevance to environmental governance:

- The Department of Agriculture, Water and the Environment (DAWE) was created to consolidate the current Department of Agriculture; and environment functions from the current Department of the Environment and Energy.
- The Department of Industry, Science, Energy and Resources (DISER) was created to bring together the Department of Industry, Innovation and Science; and energy functions from the current Department of the Environment and Energy.

All analysis in this report uses the classifications employed by the OAIC's FOI annual reporting. These include 'agriculture', 'environment and energy' and 'industry, innovation and science'. The categories include relevant departments, agencies administered by those departments, and ministers. Where sample sizes for these agency groupings were small, we combined these to examine trends across 'environment-related portfolios'.

Where we could disaggregate data taking into account sample size, or where there were key findings in relation to environmental agencies, we undertook analysis on 'environmental agencies', which includes the categories 'environment' (pre-2018) and 'environment and energy' from. In 2018–19, environment and energy agencies included:

- Australian Heritage Council
- Australian Renewable Energy Agency
- Bureau of Meteorology
- Clean Energy Finance Corporation
- Clean Energy Regulator
- Climate Change Authority
- Commonwealth Environmental Water Holder
- Department of the Environment and Energy
- Director of National Parks
- Great Barrier Reef Marine Park Authority
- Minister for Energy and Emissions Reduction (new in 2018–19)
- Minister for the Environment (previously Minister for Environment and Energy and prior to that (2015–16) the Minister for the Environment, and Minister for Cities and the Built Environment)
- Minister for the Environment and Energy
- Sydney Harbour Federation Trust

All other agency groupings referred to in this report (Agriculture; Industry, Innovation and Science; and Prime Minister and Cabinet) can be found in the FOI dataset at www.data.gov.au

Calculating the use of exemptions

Our analysis does not include the use of s 22 exemptions. We did not count this section because of how commonly it is used — it was engaged in almost every request, most often for very minor redactions. It is used to remove material that is 'irrelevant' — such as phone numbers and email addresses. However, there are a few occasions where it was used inappropriately and needed to be challenged via review.

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We need a freedom of information system **genuinely geared towards open access**

Australian Conservation Foundation
Level 1, 60 Leicester Street
Carlton VIC 3053
ABN 22 007 498 482

Telephone 1800 223 669
Website acf.org.au
Email acf@acf.org.au
Twitter @AusConservation