

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/11/2021 5:18:46 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



Dated: 22/11/2021 5:18:49 PM AEDT

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

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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No. VID519/2021

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law & Human Rights

Senator Rex Patrick

Applicant

Australian Information Commissioner

Respondent

Applicant's Outline of Submissions

1. This outline of submission is filed on behalf of the Applicant in his application for maximum costs order pursuant to rule 40.51 of the *Federal Court Rules 2011*.

The substantive proceeding

2. The Applicant brings this case for the purpose of resolving 23 applications for review of decisions made on applications under the *Freedom of Information Act 1982 (FOI Act)*. The applications for review were lodged with the Respondent but remain outstanding for the periods of time described in Appendix A to the Amended Originating Application.
3. The Applicant asserts that there has been, or will be, an unreasonable delay in the respondent determining each of the applications for review, and that this delay grounds relief under s 16(3) of the *Administrative Decision (Judicial Review) Act 1977 (ADJR Act)*.

Legal framework maximum costs orders

4. Jurisdiction to award costs is conferred on the court or a judge by s 43(1) of the *Federal Court of Australia Act 1976*. By sub-section (3), costs are in the discretion of the court or judge.
5. The general principle is that costs ordinarily follow the event. Rule 40.51(1) of the Federal Court Rules provides that a party may apply to the court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding. Subsection (2) sets out amounts which will not be included in a maximum costs order.
6. The principles relating to the exercise of the discretion to make a maximum costs order, also known as a protective costs order, are relatively settled¹ and were recently summarised in *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission*.²

¹ See generally the authorities cited in Costs Practice Note (GPN-COSTS), [3.11]: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Haraskin v Murrays Australia Ltd* (2010) 275 ALR 520; [2010] FCA 1133; *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36 and *Shurat HaDin, Israel law Center v Lynch (No 2)* [2014] FCA 413.

² [2021] FCA 435, [8] – [10]

- (a) the timing of the application
 - (b) the complexity of the factual or legal issues raised in the proceedings
 - (c) the amount of damages that the applicant seeks to recover, and the extent of any other remedies sought
 - (d) whether the applicant's claims are arguable and not frivolous or vexatious
 - (e) the undesirability of forcing the applicant to abandon the proceedings
 - (f) whether there is a public interest element to the case
 - (g) the nature of the relief sought
 - (h) the amount of costs which are likely to be incurred
 - (i) the likely duration of the proceedings overall and the length of any trial
 - (j) the interests of the parties in both prosecuting and defending the litigation
 - (k) the basis upon which legal representatives are acting, for example, if the legal representatives for the applicant area acting on a pro bono basis
 - (l) whether the applicant has a pecuniary interest in the outcome of the proceeding
 - (m) the apparent merit of the proceeding.
7. The list is non-exhaustive; no factor is of itself conclusive. The weight each factor carries will vary according to the particular circumstances of the case.
8. The principal object of the court's discretion to make a maximum costs order is to arm the court with the power to limit the exposure to costs of parties engaged in litigation which involves less complex issues and is concerned with the recovery of moderate amounts of money.³

The public interest aspect of the proceeding

9. There is a public interest element to the proceeding "which is a factor of some significance in the awarding of costs"⁴ and derives from:
- (a) the nature of the Applicant's applications for review, and the FOI applications upon which they are based;
 - (b) the broader relevance of the outcome of the litigation to other entities with outstanding applications for review with the Respondent; and
 - (c) the purposes of the FOI Act.
10. Evidence of the nature of a sample of the FOI applications and the purpose and importance of the information sought under them is before the court.⁵ Third party affidavits filed on behalf of the Applicant support the broader public interest of the proceeding:
- (a) William Browne, Senior Researcher employed by The Australia Institute,⁶ deposes that the organisation uses the FOI system to obtain information that assists it to

³ *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511-2; (1993) 118 ALR 265, 267-8.

⁴ *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [45].

⁵ Affidavit of Stella Maree Majury affirmed 15 October 2021, [28] – [51].

⁶ Affidavit of William Browne sworn/affirmed 14 October 2021.

conduct public policy research. The Australia Institute currently has three applications for review before the Respondent, one was commenced more than four years ago.

- (b) the Hon Mark Dreyfus⁷ deposes to his use of the FOI system to obtain information that assists him to perform his role as a Federal Member of Parliament, including to engage in scrutiny, discussion, comment and review of the Government's activities. Mr Dreyfus currently has a number of applications for review with the Respondent, including one commenced more than two years ago.
- (c) Benjamin Bucknell, Chief Executive Officer of OnMarket BookBuilds Pty Ltd⁸ deposes that he uses the FOI system to obtain information that assists him to identify facts to establish whether government has breached its obligations under various competition policies. On 19 July 2021, he received email correspondence which stated that, "Due to the number of IC review applications on hand allocation to a review officer may take up to 12 months."
- (d) David Morris, Chief Executive Officer of the Environmental Defenders Office Ltd (EDO)⁹ deposes that EDO frequently uses FOI laws to obtain information to assist clients and the general public who are concerned about public interest environmental matters. He describes three past FOI applications made by EDO on behalf of its clients.

11. By its very nature, FOI legislation is concerned with matters of public interest. Government information is managed for public purposes.¹⁰ The FOI Act seeks to achieve an appropriate level of public access to government information to promote Australia's representative democracy.¹¹ The Parliament:¹²

intends that functions and powers given by [the FOI Act] are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

The novel aspect of the proceeding

12. In addition to this public interest character, the proceeding raises a question as to the appropriate timeframe for the discharge of the Respondent's functions under the FOI Act.

⁷ Affidavit of Mark Dreyfus affirmed 8 October 2021.

⁸ Affidavit of Benjamin Bucknell sworn/affirmed 8 October 2021.

⁹ Affidavit of David Morris sworn/affirmed 16 October 2021.

¹⁰ FOI Act, s 3((3).

¹¹ FOI Act, s 3(2).

¹² FOI Act, s 3(4).

13. No Australian case law has considered unreasonable delay in the context of the FOI Act. In considering s 7(1) of the ADJR Act in the context of the *Australian Citizenship Act 2007*, Bromberg J observed,¹³

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

14. The proceeding is brought in the context of “the number of IC review applications which remain outstanding at the end of each financial year continuing to increase”¹⁴ and, at any point in time, “more than 200 reviews waiting to be allocated to a review adviser.”¹⁵ In three emails sent to the Applicant on 18 August 2021 in relation to three review applications currently before the Respondent, it was stated on behalf of the Respondent that the high volume of applications for review is causing a delay of up to 12 months in a review adviser being able to consider the application.¹⁶
15. The essence of the Applicant’s position is that a large number of review applications made by him and others are effectively “stalled” with the Respondent and applicants are unable to either obtain documents or progress to appeal at the Administrative Appeals Tribunal.

The confined nature of the proceeding

16. The case spans confined legal issues. The primary question for determination is whether the Respondent’s delay in making decisions on the applications for review is unreasonable within the meaning of s7(1) of the ADJR Act. Factual matters will be largely, if not wholly, uncontested.
17. It is expected that there will be limited to no discovery and no further interlocutory steps are anticipated. On this basis, an estimate of 1 to 2 days for trial appears appropriate.

Purpose of the proceeding and timing of the costs order application

18. In initiating this proceeding, and in making the FOI applications, the Applicant does not act for personal gain, nor does he seek monetary relief in the proceeding. The FOI applications and this proceeding are brought by the Applicant in his capacity as a senator for South Australia in the Federal parliament. They are brought for the purposes of obtaining information to assist the

¹³ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530, [23].

¹⁴ Respondent’s Concise Statement in Response, [11].

¹⁵ Respondent’s Concise Statement in Response, [16].

¹⁶ Affidavit of Stella Maree Majury affirmed 15 October 2021, [54], Annexures SMM26 and SMM27.

Applicant in executing the accountability and transparency aspects of his role as a senator and to assist his constituents.¹⁷

19. This interlocutory application was included in the originating material and has been made at the first opportunity thereby providing the Respondent with an opportunity to make pragmatic decisions about the conduct of the proceeding.

Relative exposure of the parties

20. The effect an adverse costs order would have on the Applicant is significantly greater than the effect of such an order on the Respondent. The Applicant's solicitor on the record works within the Applicant's office and counsel is appearing pro bono.¹⁸ Consequently, there is no risk for the Respondent in relation to the Applicant's costs. This position can be contrasted with that of the Applicant who is exposed to personal liability for the costs of the Respondent's counsel and instructing solicitor.
21. The Applicant does not know the costs arrangements as between the Respondent and its solicitor and counsel. It is submitted that \$20,000 to \$40,000 party-party costs is a reasonable estimate of the Respondent's costs.¹⁹
22. The Applicant seeks to bring this application to resolve a question fundamental to the operation of the FOI process as an individual against a government entity with no personal exposure. This disparity in the position of the parties is a relevant matter to be considered on this application.²⁰

... It seems to me undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited funds.

Conclusion

23. The proceeding seeks to establish precedent in relation to the boundaries of reasonable delay in the context of applications to a public body assessing government decisions on the release of information managed for public purposes. It is respectfully submitted that the interests of justice favour the making of a maximum costs order in the form sought. Further, costs in the interlocutory application should be costs in the proceeding.

**TIPHANIE ACREMAN
ISAACS CHAMBERS**

22 November 2021

¹⁷ Affidavit of Stella Maree Majury affirmed 15 October 2021, [2] – [3].

¹⁸ Affidavit of Stella Maree Majury affirmed 15 October 2021, [10] – [12].

¹⁹ Affidavit of Stella Maree Majury affirmed 15 October 2021, [14]; as to an assessment of costs on a maximum costs order application generally, see *Haraksin v Murrays Australia Ltd* (2010) 275 ALR 520, [20] – [21].

²⁰ *Kent v Cavanagh* (1973) 1 ACTR 43, in *Woodlands & Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139 at 147.