

TRANSCRIPT

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Monday 18 March 2024

MEMBERS

Dr Tim Read – Chair

Hon Kim Wells – Deputy Chair

Ryan Batchelor

Jade Benham

Eden Foster

Paul Mercurio

Rachel Payne

Belinda Wilson

WITNESSES

Victoria Elliott, Commissioner, and Stacey Killackey, Executive Director, Legal, Compliance and Assessment and Review, Independent Broad-based Anti-corruption Commission (IBAC).

The CHAIR: We are resuming the public hearing for the IOC inquiry into the *Freedom of Information Act*. To our witnesses, before you start there are some formal matters to cover, so bear with me.

Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things anywhere else, including on social media, those comments will not be protected by this privilege. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament.

All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript to check once available, and verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

I welcome, from the Independent Broad-based Anti-corruption Commission, Victoria Elliott, Commissioner, and Stacey Killackey, Executive Director, Legal, Compliance and Assessment and Review; both are giving evidence at this hearing. I believe you have got some brief opening comments.

Victoria ELLIOTT: Thank you, Chair, for the opportunity to address the Integrity and Oversight Committee this morning. Given the relevance of the FOI [Freedom of Information] Act to Ms Killackey's role, she will be assisting me today in responding to questions from the Committee on IBAC's behalf.

IBAC recognises the FOI scheme as a valuable part of Victoria's integrity framework. It supports government and public sector transparency and provides impartial decision-making. IBAC broadly supports measures to increase the proactive publication of meaningful information about government and public sector decisions and actions that affect the community, subject to the ability to maintain confidentiality where it is appropriate.

IBAC publishes a large amount of information about its operations and activities in annual corporate and special reports and a myriad of educational material. IBAC continually seeks ways to provide information to the public, and we see this as vital to our education and prevention functions. We also need to ensure that the public know where to go if they want to report public sector corruption and workplace misconduct. However, IBAC does operate under a legislative framework that focuses on confidentiality, providing protections to its investigations and its methods and to those persons who provide information to IBAC, in particular witnesses and whistleblowers. Therefore, there are limits imposed on disclosure of information under a number of Acts, including the *IBAC Act*, the *Public Interest Disclosures Act* and the FOI Act. This means that our interaction with the FOI Act is necessarily limited. IBAC does, however, aim to provide as much information as possible where appropriate, and we do acknowledge the FOI scheme as a valuable part of Victoria's integrity framework. Thank you, Chair.

The CHAIR: Thank you very much, Commissioner. We might go to Rachel Payne for the first question.

Rachel PAYNE: Yes, sure. Thank you. Thank you, Commissioner, and thank you, Stacey, for presenting today. Now, you did, in your opening remarks, just touch on confidentiality and limitations around that. But I guess my question is: Why in your view is the retention of the FOI exemptions applicable to the information held by IBAC important? I am referring to those such as section 194 of the *IBAC Act* and section 31A of the FOI Act.

Stacey KILLACKEY: Thank you. If I may assist the Committee, from IBAC's perspective, those exemptions are both necessary and appropriate. The way in which section 194 operates together with section 31A we say is consistent with the broader confidentiality regime under which we operate. I think as the Commissioner said in her opening remarks, confidentiality is one of the foundations of IBAC, so it flows through from everything we do from receiving a complaint through to conducting an investigation and how we engage with witnesses or anyone involved in the IBAC investigation. Confidentiality is also one of the key underpinnings for the public interest disclosure scheme. That ability for people to make a complaint of

improper conduct or misconduct or corrupt conduct – there are protections afforded to disclosers in those regimes.

I think when you then also look at the information which IBAC holds, it can be highly personal, it can be very sensitive, whether about a person, an individual or an organisation. So, without confidentiality, we think people's willingness to come forward and share that information with IBAC would be impeded and impacted and that would impact on our ability to investigate matters. To remove any of those – to remove the protections provided by section 194 or 31A – we think would be to remove one of, I guess, the pillars of confidentiality within which we operate, and that would impact on our ability to protect disclosers or the anonymity of people when appropriate to do so.

Rachel PAYNE: Thank you. I appreciate that.

Jade BENHAM: So, with regard to section 194(1)(b) and the documents relating to investigations under the IBAC Act that are exempt, how does this exemption apply to information held by Victoria Police with respect to that agency's investigation of complaints referred by IBAC?

Stacey KILLACKEY: Section 194(1)(b) provides that a document held by any person that relates to an investigation under the *IBAC Act* – IBAC's view for a long time, including since 2018, has been that that is an IBAC investigation. That was affirmed in a VCAT decision in 2018 as well, so our position has consistently been that that section is necessarily limited to an IBAC investigation.

Jade BENHAM: To an IBAC investigation – okay. Thank you.

Ryan BATCHELOR: Does anyone have a contrary view?

Stacey KILLACKEY: I am not aware. Well, I am –

Ryan BATCHELOR: You have not come across someone who has asserted a contrary view to that which has been espoused by VCAT?

Stacey KILLACKEY: There have been a series of cases, yes, that have gone to VCAT, which I think are all Victoria Police cases.

Ryan BATCHELOR: Okay. Interesting.

The CHAIR: All right. Mr Wells.

Kim WELLS: Mine is to you, Commissioner. Commissioner, it is important for IBAC to have a public presence to keep reminding Victorians that there is an anti-corruption body in this State, but it seems that this year, 2024, IBAC has gone into hibernation. Is there a reason for that? Because we have not heard – there are no press releases; there are no comments. There is not anything that has taken place for this year. Is there a reason why that has happened?

The CHAIR: Mr Wells, I think we are going to be asking questions about the FOI Act, so I am going to rule that question out of order.

Kim WELLS: All right. So, my question is in relation to the exemption around section 194. The Committee has received evidence that Victoria Police should be explicitly excluded from the operations of the section 194 exemption. What is your view on that?

Stacey KILLACKEY: From our perspective, there are two parts to section 194. So, there is subsection (1), which deals with information held by anybody, and that information relates to whether it is an IBAC investigation, an IBAC report or an IBAC recommendation. Subsection (2) is information held by IBAC. So, to the extent the question relates to excluding Victoria Police or any person from section 194(1), we think that the way the section operates at the moment is clear and appropriate, and it is appropriate for documents that fall within section 194 to remain excluded from the FOI scheme. So, we think that section 194(1)(b) in its current form is appropriate. Unless there is clarity that is further required to make sure that everyone understands the scope of 194(1)(b), then we think it is appropriate in its current form and no further exclusions are necessary.

Kim WELLS: Right. So, the view of IBAC is you think it should be just left the way it is?

Stacey KILLACKEY: Yes.

Kim WELLS: Yes. Okay. Thanks.

The CHAIR: But on that, I would be interested to hear your observations of Victoria Police's FOI culture.

Victoria ELLIOTT: IBAC is not really in a position to comment in relation to Victoria Police or any public sector agency in relation to FOI culture. We have a very limited interaction with the FOI scheme, and also under the legislation, OVIC is the guardian or the steward of the FOI scheme, so we are not in a position to comment in relation to any public sector agency's involvement with FOI, given we have very limited interaction with FOI ourselves.

The CHAIR: Okay, fair enough. Mr Batchelor.

Ryan BATCHELOR: I am interested in Cabinet documents and whether you have got any views about the exemption for Cabinet documents under section 28 in the FOI Act and how that section impacts on the exercise of your investigatory powers.

Victoria ELLIOTT: Firstly, IBAC is encouraged by the discussion that is taking place in relation to Cabinet-in-confidence documents. The greater transparency in relation to such documents will improve the public's understanding about decision-making. However, we do acknowledge there does need to be a protected space for fearless and frank discussions. So, we are encouraged by the discussion, and we also note OVIC's considered advice in relation to that matter. In relation to IBAC, for example, IBAC does not access its information under the FOI Act, so that would be a separate point. In relation to IBAC, IBAC is more effective with more information available to it. It will inform our investigations and it will inform our recommendations.

Ryan BATCHELOR: But given that you do not rely on the FOI Act to undertake investigatory powers, it does not have much impact, if any at all, on your capacity to do your job properly?

Victoria ELLIOTT: It would not, no.

Ryan BATCHELOR: Okay. That is useful. Thanks very much.

The CHAIR: Eden Foster.

Eden FOSTER: Thank you, Chair. I might skip the one that I was going to ask and move on. I think it has been covered. So, my question is: Have you spoken to your interstate counterparts regarding FOI, and if so what insights have the second-generation FOI jurisdictions, such as New South Wales, Queensland and the Commonwealth, had to offer regarding proactive and informal release?

Victoria ELLIOTT: I suppose it is the same point in relation to Victoria: we just do not have that information or have not had those discussions, because we have such limited involvement with the FOI Act. IBAC has the approach that we are encouraged by and welcome the proactive release of information, as we can see FOI is essential to building integrity into the system and improving people's confidence.

Eden FOSTER: Okay. Thank you.

The CHAIR: Great. Paul Mercurio.

Paul MERCURIO: I am going to skip a question as well, Chair. Could IBAC proactively release more information than it currently does? If yes, how? And if not, why not?

Victoria ELLIOTT: IBAC already does release a significant amount of information in its corporate annual and special reports, and as we said, in a myriad of education pieces. I must admit on my return to IBAC that is one thing I did notice – the wealth of information on its website. That is a big change from when I was there before. I suppose as the organisation has grown and matured it has developed in its ability to share information. Having said that, we do operate under a legislative regime where we cannot share information in relation to our investigations. There are prohibitions under the *IBAC Act*, the *Public Interest Disclosures Act* and various other

Acts that limit what information we can share when conducting our investigations and also in relation to our special reports and the natural justice processes that we must go through. We share as much as we can share, but we are always looking for ways to think of, I suppose, more innovative ways of sharing information. That is what I was talking about upon my return – the more innovative ways. The informative videos that are on the website, the informative guidelines about what is improper conduct or how to report or how IBAC does its work – all of those pieces – have grown over the years as IBAC has matured, and that information I think is very valuable to the public.

Paul MERCURIO: It is. In your opening statement you talked about the need to push out lots of information. In your submission you say that IBAC considers:

... the use of technology can ... streamline process-heavy tasks ... must not exclude humans ...

I am just wondering: Does IBAC use artificial intelligence [AI] to gather information or share information at the moment?

Stacey KILLACKY: No, we do not currently use it. We recognise that obviously as technology shifts and grows we will have to look at new ways to collect information, but we do not use artificial intelligence at the moment.

Paul MERCURIO: Do you have any views on how AI might affect your work?

Victoria ELLIOTT: It is something that we will look at. It is something that all the corruption agencies across the Australian integrity framework are looking at – how artificial intelligence can assist our work – and we are looking at that piece together. If it can assist our work, then that is obviously very helpful, but there is also caution – humans still have to make the decision, and you need effective decision-making and you also need accountability. There are also security risks as well, so these things need to be well considered.

Paul MERCURIO: Thank you.

The CHAIR: Thanks. We have received evidence that Body Worn Camera footage should not be excluded from the operation of the FOI Act. I would be curious to know your view on that.

Victoria ELLIOTT: I will just say it is a broader consideration, other than FOI. There may be other pieces of legislation that may need to be considered and other considerations such as privacy and health considerations. Obviously Body Worn Cameras will identify other persons, not just a person of interest or persons of interest. They are also going to identify, show footage of, tense situations, obviously health situations and mental health situations, so there are a number of considerations in that space, and IBAC would consider that as a matter for Government to consider.

The CHAIR: I will just push you on that, though, in the sense that it would be fairly straightforward, I would have thought, to cut from footage scenes that are irrelevant to what might be a matter of court proceedings. It might only be a few seconds that are necessary to show – particularly if it is around a matter of police use of violence or use of force. Do you not think that that would add value to resolving disputes around that?

Victoria ELLIOTT: I do not know if I am the best person to talk about the evidential processes in editing footage that could be used in a court proceeding, in that instance. I guess you would have to determine if you are talking about FOI or if it is for court proceedings. Court proceedings is a different matter than releasing it under the FOI Act.

The CHAIR: In the pre-discovery phase – I guess that would be the –

Victoria ELLIOTT: That is what I am considering. There would have to be a number of considerations that you would have to look at. I guess there would also have to be a lot of consideration in how you would preserve the evidence if you started to amend the footage or if you edited the footage. That would probably take it out of the FOI Act then if you are starting to amend footage for public release under the FOI Act. They are considerations. I am not the best person to answer those questions, and maybe I have got them wrong a little bit too.

The CHAIR: No problem. Other questions from the Committee? We are good. All right. Thank you very much again, both for your submission and for appearing. We will suspend the hearing now.

Witnesses withdrew.