T R A N S C R I P T

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

WITNESS

Emrys Nekvapil SC, Barrister, Victorian Bar.

The CHAIR: We resume the public hearing for the IOC's inquiry into the operation of the *Freedom of Information Act*. Before we start there are some formalities I need to go through.

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From the Victorian Bar I welcome Emrys Nekvapil SC to give evidence at this hearing. I understand you have got some brief opening remarks.

Emrys NEKVAPIL: Yes. Thank you very much. I am very grateful to have this opportunity to give evidence on behalf of the Victorian Bar to this inquiry.

I started as a solicitor in 2007 working for Emilios Kyrou at Mallesons. He is now a very well-known judge in administrative law. For the first few years after I came to the bar in 2009, during that whole period FOI [Freedom of Information] was seen as a serious option for obtaining government information quickly and cost-effectively. It remains a good option for individuals who need to obtain personal information held about them and are not in a hurry to get it, but apart from that category I would say that FOI is no longer seen as a serious option. Systemic obfuscation and delay, in part due to underfunding and in part due to conflicting interests, have rendered what was once a cutting-edge innovation in public law and administration an outmoded technology that, like the fax machine or post, is no longer seen as fit for purpose by those who have any other option.

In my opinion, at the heart of the challenges facing FOI is an inherent conflict of interests. There is a clear public interest in most government information being available to the public by a clear, quick and efficient mechanism subject only to very specific categories of information that ought to be exempt, but the scheme is administered by government agencies and ministers who very often have both a specific and a systemic interest in not disclosing the information they hold. Over time this conflict of interest has in my opinion led to the scheme being warped in a number of ways that favour the interest of agencies and governments in defeating the public interest. I will give you a few examples. Just cut me off if I am going for too long.

First, there is a structural inequality of arms. Government agencies always have more information about the relevant facts and almost always have more money and resources to deploy on pursuing their interests than FOI applicants. In this I include both internal resources and access to external firms and counsel. Over time this has led to the development of forensic approaches litigated in long sequences of cases in VCAT [Victorian Civil and Administrative Tribunal] and the courts by which agencies and ministers have incrementally honed procedural mechanisms in the FOI Act into means of obfuscation and delay. By a similar process this has led to a body of case law about the scope of exemptions, especially in VCAT, such as to equip primary decision-makers with a smorgasbord of bases on which they can substantively refuse to provide information.

Second, the legislative scheme of the current FOI Act is such that delay almost always favours the agency or minister. As an architectural matter, that is the consequence of the legislation, which is made and amended by the government of the day, as you know.

Third, within that framework, delay in administration is a consequence of factors that are within the control of the government. I will just provide two examples. First, decision-making that relies on procedural barriers to access over which agencies have a high degree of control – at first instance, obviously the agencies make the decisions. The OVIC [Office of the Victorian Information Commissioner] is heavily reliant on and, without mincing words, readily influenced by the agencies because of that degree of reliance. And at the VCAT stage

the government can use its inequality of arms and informational advantages – it can use those to be successful in VCAT – and also, which is a problem with all institutional litigators, it can simply pull out of cases that it looks like it is going to lose so that the body of case law over time incrementally favours the government. The second example I would give of delay being within the control of government is that underfunding is almost completely within the control of the government of the day. The public interest in a robust FOI system is not likely ever to become a hot-button electoral issue, and as such underfunding will always be politically justifiable by reference to more simple and obvious issues such as health care and policing.

These features have over time degraded the system, which has then introduced self-perpetuating factors that worsen it. And I will just give an example of that. As changes in the system have made it no longer a serious option for rational applicants wishing to obtain governmental information, such that rational applicants and those who share their communities of interest have left the field, the proportion of applicants who are irrational increases. To put it crudely, when it is no longer rational to use the FOI system to achieve the objective of obtaining government information, it becomes the domain of those who either wish to obtain government information but are irrational or of those who wish to use the FOI system for some purpose other than obtaining governmental information. As a consequence, the Victorian Bar considers that the FOI system is no longer fit for purpose, and you have got our written submission, which sets that out in more detail.

While appreciating the disruption involved in rewriting legislation from scratch, the bar would urge you to start from a blank slate. The important thing would be to design a new scheme, fit for purpose in an age of electronic information storage, which will provide maximum access to government information with minimal administration and cost. The first and simplest way to do this would be to default in favour of disclosure rather than non-disclosure. This could include – and these are just examples; you will have much better ideas than this with your broader view of everything – removing altogether from the Act simple applications such as by a person for their own personal information; reducing procedural mechanisms that are able to be used by agencies to obfuscate, delay or otherwise prevent or reduce disclosure; changing the mechanisms in the Act that mean delay can benefit the agency – for example, by requiring disclosure if a request is not processed in time rather than preventing disclosure; and reducing the number and scope of exemptions.

In this regard – this is a bit of a legalistic contribution – I would note that the common law developed the doctrine of public interest immunity, which is what is applied in courts where, for example, in discovery or a subpoena there is some question about whether the public interest against disclosure outweighs the public interest in disclosure. The scope for an agency in litigation to deny access by reference to public access immunity is much smaller than the scope to deny access under the FOI Act even though they both purportedly serve the same public interest justification. That illustrates, in my submission, the overbroad nature of the exemptions, at least the way they have been interpreted and applied, but it also is a reason why whenever people experienced in this area are advising clients I would anticipate that they would always preference court-based coercive disclosure mechanisms such as preliminary discovery issue of subpoenas and so on rather going to the FOI Act, which shows why the FOI Act is no longer seen as a serious option. Thank you for your time. Those are my preliminary remarks.

The CHAIR: Thank you very much. Let us go to Paul Mercurio.

Paul MERCURIO: Wow. Thank you. There is a lot to unpack in that opening statement. Thank you very much. Obviously I can hear some of your frustration and anger about the Act. I was going to ask what the fix is, but you have basically said chuck it out and rewrite it, start again. I am just wondering: If you did that, would you call it 'right to information' instead of freedom of information?

Emrys NEKVAPIL: I think you could probably get overly distracted by words, but –

Paul MERCURIO: I just wonder if that changes the culture of it as well.

Emrys NEKVAPIL: As you know, some Freedom-of-Information legislation is called right to information. I am sure the same substantive issues arise. But right to information – I mean, I would probably prefer to call it an obligation to disclose information. Part of the problem is that the public interest really is in information being accessible. The way that occurs in practice is by individuals with a personal interest, or perhaps their own public interest, pressing for disclosure to them and, through them, to the world at large, but really that is a proxy for achieving the true public interest objective, which is to ensure that government information is transparent

and accessible. You have asked about push factors, or a push approach. In a sense it might even be better to name it as an obligation to provide accessible information. But a right to information is okay, and that would tie into the Charter [*Charter of Human Rights and Responsibilities Act 2006* (Vic)] right to freedom of expression, which is recognised in international case law and some domestic case law as including a right to access government information.

Paul MERCURIO: Good.

The CHAIR: Good. We will go to Eden Foster.

Eden FOSTER: Thank you. I was just wondering: What might be the benefits with a proactive release scheme of prescribing information, or categories of information, that agencies and ministers must publish?

Emrys NEKVAPIL: Yes. Thank you. It seems to me very likely that the disclosure of the vast majority of information that agencies decide under the FOI Act is exempt would have no discernible adverse impact on the functioning of government and much positive impact. Most of the existing exemptions do contain a kernel of a public interest against disclosure. For example, personal information about persons other than the applicant should not ordinarily be accessible unless there is some overriding public interest. However, most exemptions could either be consolidated or cut down so that they are not broadly interpreted and applied, and once this is done it should also be possible with the use of modern technology to default to a push model. This could be done by prescribing certain kinds of information that would be pushed, which I think is the basis of the question, or I suppose I would urge you to consider, by requiring accessibility of all information other than certain kinds of information.

Now, I appreciate that you are not just talking about technology, you are talking about legacy systems and also legacy cultures. Every time the core software I use in my practice updates I go through this frustrating period of adapting, and I appreciate that if you extrapolate that over the whole of government it is probably unworkable. But, as a matter of technology, it should really be possible now to have a scheme where most information is accessible. I would urge you, at least as a thought experiment, to consider what would it look like if we started with any information on servers for which the public are paying being accessible, and then looked at how you would go from there to making sure that information that is not accessible does not come out. I appreciate that even in considering this legislative change there are going to be interests at work of the kind that I have described so that what I am describing is probably pie in the sky, but, purely from the perspective of furthering the public interest underpinning this legislation, that, I think, is where you would start.

Eden FOSTER: Okay, right. Thank you.

The CHAIR: Thanks. Ryan Batchelor.

Ryan BATCHELOR: Related question: you have mentioned in the submission that the concept of a document probably should accompany the fax machine to the dustbin of history, and you would recommend something more akin to a broader definition of information. Firstly, if you could just expand on that a little bit for us as to how far you think – I think you touched on it in that previous answer about any information on a server owned by the public should be in the net. I am interested how wide you think that should go.

The second part is: we had some evidence last week or the week before, I cannot remember which, about whether individuals should be able to query databases held by government even if that particular query about them had never been previously performed – so in a sense if the information had not previously existed, but the component parts to create that query or an answer to that query could. Do you think that it should be within the scope of a Freedom-of-Information-style regime to give individuals that sort of access to ask a question of bits of government information and come up with an answer that may not have previously existed?

Emrys NEKVAPIL: You might have to remind me if I lose track of one of your questions in answering the other, but I think for 1982 the Act was very forward-looking and really was an excellent attempt at capturing information, including section 19, which deals with documents produced by use of a computer. In fact, section 19 enables exactly what you are describing – and I have attempted it a few times – as does the definition of 'document' in most interpretation-of-legislation Acts around the country in the Commonwealth. Section 19 – you can have a look at the text, but in effect what it does is it says if there is information that is held in a form that could be produced in a document by use of a computer but it does not exist in a discrete form, you can

request a document produced by use of the computer. At the moment it is possible for someone to say, 'Please go into your database and prepare a document for me comprising the third column with every row that has a hit for my name.' It is just that hardly anyone knows that. It means that people like me who know that can advise clients who pay me that that is possible, but obviously it is not really fit for purpose if it is not widely known that you can do that.

The short answer is you can already do it. But then the slightly longer answer is: yes, I absolutely think that if you were to rewrite the Act you should start from – What does government information look like today? The starting point in 1982 was there was a document on a file. You put in a request saying, 'All documents on the file concerning my application for such and such,' and someone went and pulled out a manila folder with your name on it and the documents were there. It is just not remotely what things look like anymore. I mean, you might have a folder, but most agencies would not have a folder. You have a database or you have a storeroom of information, which is then accessible by using particular access technology.

Really, I would start with information and then describe the mode or mechanism for access in technology-neutral terms, which inevitably will become outdated. I mean, if you are going to rewrite the Act now, you are going to quickly be into AI [artificial intelligence]. Really, I would think that within a few years' time there is no reason that AI could not provide access to 99 per cent of things without the need for a human being to do clunky decision-making processes, but that is maybe slightly off topic. You definitely want to be trying to describe information accurately to the form in which it is now held and in a way which will enable mechanisms for access that are as much as possible technology neutral to what we know today – or medium neutral.

The CHAIR: Great. Thank you. First of all, do you support the retention of FOI fees and access charges in Victoria?

Emrys NEKVAPIL: What we have said in our submission is that, based on our experience, Victoria is actually pretty good in the sense that the access charges do not seem to be prohibitive, but the Bar does not necessarily have the best view of that, because we have obviously only got the snapshot of our engagement. I certainly think that the whole fee model was based on retrieving files, photocopying, printing – things that are no longer relevant. I guess it is a matter of legislative policy whether you want to have a user-pays-type access scheme. I think obviously by removing fees, to the extent that they are a barrier for access to some people, you increase the fulfilment of the public interest the legislation pursues. The only thing I would say is that probably would need to be coupled with some way of dealing with high-volume users, because I think at the moment fees at least are partly inhibitive of some people who are using the FOI system in a disproportionate way – that is, a disproportionate volume of the resources devoted to the entire FOI system is going to servicing requests from a very small number of users with very discrete interests. I think that probably having some fees is some kind of brake on that. But I think you could have a better mechanism, as we have described in our submission, to deal with that disproportion, and if you did that, then I would think you could remove fees altogether if you thought, based on what you have heard, that that would otherwise reduce barriers to access.

The CHAIR: Yes. So, you are talking about vexatious applicants.

Emrys NEKVAPIL: Yes.

The CHAIR: I might just skip ahead here, Kim. Is there anything more you wanted to say about vexatious applicant provisions and whether they are important and how well they operate?

Emrys NEKVAPIL: Yes. I did a case years ago where I looked at what you might describe as the 'academic research' on querulous litigants 120 years ago. I mean, if you had a diagnostic and statistical manual back then, it would have been included as a diagnosable illness, and it was seen that way. But then it was realised sometime around the start of the 1900s that actually people with a legitimate grievance could easily be sort of wrapped up and pushed out of the system by being classified as vexatious. I think that is the difficulty at the heart of it – as soon as you have a category which will prevent someone from accessing the system, you will also have an interest from agencies, to put it bluntly, in categorising people in that way, and you just need to be careful as legislators to ensure that you are not precluding people with legitimate interests from using the system.

That said, I think the vexatious litigants Act – I have forgotten exactly what it is called; *Vexatious Proceedings Act*, something like that – has been good in the courts and in VCAT. VCAT has jurisdiction under that Act in a

more general sense, and even though it has been a bit slow and clunky to actually classify someone and start precluding them, that is really necessary because of the reason I have just mentioned, so that you do not act too quickly and put the wrong people in the category. But I think there would be a neat way of extending the methodology of that legislation to FOI.

At the moment, as you know, if someone makes exactly the same request again, then that can just be refused, but the trouble is – this is based on my own experience of some people who I would put in this category – people suffer a genuine grievance of some kind, but then they get to a point where they just need to keep pushing with a process in order to express their feeling about that grievance. That is how I would put it. Often they are very intelligent people who spend a lot of time reading decisions about the FOI Act, and they become quite good at using it, and so then, rather than requesting exactly the same thing, they will be pursuing the same interest or the same issue but they will be making requests in different terms. Really, I think the problem with it is not so much the person or their interest or their grievance; the problem with it is that it takes a disproportionate volume of the resources, which are there to deal with the whole system, in a way that is no longer proportionate to the value of that person being able to pursue their interest.

I think the *Vexatious Proceedings Act* would provide a good model, and I think it is important that you do something about that, because as I have put it in my opening remarks, it is probably a bit of a side effect of the system breaking down a bit so that you have lost people who had interests that were commensurate with the value of them pursuing them, and therefore what you are left with is a higher and higher proportion of people who repeatedly are using the system over 10, 15, 20 years.

The CHAIR: Good. Thank you. Kim Wells.

Kim WELLS: Thanks. The Committee has received evidence that access to personal, health-related information should be separate from the FOI scheme. What is your view on that?

Emrys NEKVAPIL: I guess the answer is it depends on what you do with it, as in you would not want to remove it entirely from legislation, so provided that you ensure there is some way of accessing it – but I think, do you mean by that question removing it so that people just have a right to it without it being amenable to exemptions?

Kim WELLS: There would be obviously some structure around it, so you would have to go through some process, but should it be part of an FOI system or should it be separate from an FOI system in regard to legislation?

Emrys NEKVAPIL: I think people should be able to just access their own personal and health-related information. You would have to work out how to define it, but I think they should be able to access that without having to go through the FOI system. Just by way of context, for years I wrote the FOI chapter of the Victorian Administrative Law looseleaf service, which meant that I read every single FOI decision over a period of about four years. Then after that for another 10 years I wrote the VCAT book, which meant that I read a lot of FOI cases, and during that I read a lot of examples of exemptions being applied to deny people their own personal information in a way which I think you would do away with. So, the short answer is, yes, I would take it out of the general run of the FOI legislation. It is just you are then going to need to define it and you are going to need to ensure that that does not compel access to something that does contain genuine exempt information. So, it is just a question of how you do that.

Kim WELLS: Yes, okay.

The CHAIR: Thank you. Jade Benham.

Jade BENHAM: Thank you, Chair. Thank you for what you have presented today; it has been really valuable. I want to go back: you brought up AI briefly earlier. Can you elaborate? AI is a pretty broad term, and you mentioned that it in the next couple of years it could provide access to 99 per cent of information. If we talk about AI with regard to decision-making or whether that is retrieval or how it is trained, can you discuss some of the legal risks that you may foresee that we are going to have to really consider? Because this is something that comes up over and over again, so it is going to have to be very real consideration.

Emrys NEKVAPIL: I was talking about AI as a method of retrieval, and I think that is what you are talking about as well.

Jade BENHAM: It is a broad term. There have been discussions about it making decisions eventually or it being trained, because it is constantly evolving obviously and you can teach AI to do whatever you need it to do. If you can train it to make the decision, surely that comes with enormous legal risks?

Emrys NEKVAPIL: Well, I am not sure about that. Let us take the simplest example, which is, going back to Mr Wells's question, high volume. An agency, let us say a statutory insurance-type agency or compensation agency, that keeps files containing predominantly information of individuals and there is a very high volume of requests by individuals for their information and there is then a process by which a human being sits down, reads through, finds any name or personal information of a person other than the applicant and redacts it and then hands it over. A task like that where information of a particular kind is kept in a particular place and it is a very high-volume procedure where as long as you remove third-party information there is no real risk of it containing national security information or whatever – now, I know about Robodebt and so on, and obviously there are risks. But I think as long as you introduced it slowly and carefully and had sort of human supervision until it was working and so on – I think something like that. AI, as I understand it – I am not an expert on it – is very good at a high-volume task where it can learn from a lot of examples and effectively replicate them.

I guess beyond easy examples like that, the degree of risk probably goes back to what I was saying earlier about how I think there is an overinflated sense of how risky it is to disclose government information. I have acted a lot of times for government agencies where you do put arguments – and they succeed – on the potential risk of disclosing information. Certainly for some categories there is a high risk, but I suspect across the board there would be quite a few categories that would fall into what I have just described – being fairly high-volume, fairly low-risk. But obviously if it is not properly supervised and developed and incremental and so on, you might end up with large disclosures of the wrong sort of information. I think that is just a matter of implementing it properly. I would think that probably those higher-volume things are where lots of the administrative burden and expense lies.

Jade BENHAM: Great.

The CHAIR: Rachel Payne.

Rachel PAYNE: Thank you, Chair. Thank you, Emrys, for presenting today. Just to completely change the topic, I would like to talk about protections for victims of crime. In your opinion, how can Victoria's FOI legislation better protect victims of crime whose perpetrators seek access to information about them under the FOI scheme?

Emrys NEKVAPIL: As we have noted in our submission, there does seem to be a rising issue with the use of FOI requests in situations of domestic violence, abuse and other forms of coercive control. It is important obviously to think carefully about how to distinguish those situations from other third-party situations. Really, to answer your question, as you have picked up from our submission hopefully, we think it would be good to distinguish it in the legislation, because the problem is that ordinarily as a matter of procedural fairness it is important to have some mechanism for consultation with third parties before you disclose their information. The trouble is that in this particular instance, as well as other legal and nonlegal mechanisms, perpetrators will find a way of using the mechanism as a way of continuing to perpetrate violence, abuse or coercive control.

This might go a bit beyond what we have said in our submission, but I think there is much to be said for providing a new exemption narrowly framed so that it clearly only relates to this kind of situation so that there is no requirement for any consultation – it just becomes a basis for refusal. As we have said in our submission, that is not going to prevent access where it is necessary for the administration of justice. Just to step through that a bit, if there are genuine legal rights or obligations at issue, then ordinarily they can be resolved by a justiciable controversy in very often the Magistrates' Court or some other court process. And if there is a legitimate forensic purpose – which is the language of subpoenas and discovery in courts – in the perpetrator, or the alleged perpetrator I should say, obtaining information in order that that controversy is properly adjudicated, then there are subpoenas, discovery and so on which will be able to be assessed and balanced by the judicial operator hearing the controversy, because one of the problems with FOI is you sometimes do have applications or issues concerning related litigation, but it is very difficult for an agency, OVIC or VCAT, to really assess

how important this information is in the context of that litigation. It is much better dealt with in the litigation itself.

Rachel PAYNE: Okay. And you would see that at that offer of an exemption, that ability to have that point of refusal?

Emrys NEKVAPIL: I mean, I think it should be, because it is really – now, there may be cases – you have to work out how to draft it. You obviously want it to be as least restrictive as possible, but it is dreadful where people are exerting coercive control by using a legislative scheme that was not designed with that in mind, so I think you should legislate for it. If it is drafted too broadly, then that is a drafting problem. If there is a genuine need for it in a category where it does apply, that should be able to be dealt with in a court case. You would only need an FOI request where you do not have a court case if there are no rights or interests that you are actually sufficiently concerned about to litigate.

Rachel PAYNE: Yes. Thank you.

The CHAIR: Thanks. We are running a little low on time, so just briefly, I have got a couple of quick questions, if you do not mind. We have received evidence that OVIC should have the power to conciliate all FOI complaints before they get to VCAT and the power to mediate FOI complaints. Any comments?

Emrys NEKVAPIL: We have said in our submission that it is not clear to us that OVIC has been a net positive. Now, that is a particular angle, but – I cannot remember exactly what year OVIC was introduced, say it was 2014; I might be wrong about that – the first few years I was at the Bar there was obviously a higher volume of cases in VCAT. My perception was – and I was briefed, it was a large part of my work in my first few years at the bar – that VCAT efficiently, fairly and really excellently heard and determined genuine controversies about an FOI request. I think – and this is again from a very narrow viewpoint – that it would be better if OVIC just had a conciliation function, something like the Australian Human Rights Commission [AHRC] has under the Commonwealth legislation and the Victorian Equal Opportunity and Human Rights Commission used to have under the Victorian legislation. But take the AHRC, basically what happens there is, if you sue under one of the Commonwealth discrimination Acts, you first have to make a complaint, which is then conciliated. Then you can go to the Federal Court, and your claim in the Federal Court is by default limited to the subject matter of your complaint. But I think it would be better to have a system where you have to – other than perhaps in some limited category of case – start at OVIC and try and conciliate, and OVIC could conciliate it, but then if there is going to be a controversy and it is a genuine controversy that needs evidence and adjudication, the government would give VCAT proper funding to deal with it, because that is what VCAT is expert at.

The CHAIR: Yes. That leads me to my last question, just very briefly: Is your experience of VCAT adjourning FOI matters due to the lack of members?

Emrys NEKVAPIL: I am not there as often as I would like to be anymore, but I have asked around for people who are practising there regularly and I have heard, especially recently, of several cases where things been held up in OVIC, they finally get to VCAT and then they are just adjourned without a timetable or a further hearing date. Now, that is entirely destructive, because VCAT is the ultimate point where an applicant can go if everything else does not work, if they encounter obfuscation and delay and overuse of exemptions and so on. They have got to be able to get to VCAT and get a good, fair, quick decision, otherwise everyone knows they are not going to get there and then the whole system is just going to break down. It is like, you have got to have the High Court so that everyone knows that eventually someone is going to adjudicate it fairly and that reflects on everything that happens before it. That is just a disaster, and I have never known that situation before. I am sure it has got to do with COVID and delays and so on, but really, that needs to be sorted out urgently. If VCAT does not have enough properly qualified members with enough capacity to hear FOI cases, that is I think probably the single most urgent thing to fix, and that is more of a funding thing I would say rather than a justice thing.

The CHAIR: All right. Thank you very much for your efforts, both in the submission and for appearing in front of us and answering our questions. We will suspend the public hearing now and move shortly to our next witness.

Witness withdrew.