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 26 February 2024

MEMBERS

Dr Tim Read – Chair
Hon Kim Wells – Deputy Chair
Ryan Batchelor
Jade Benham
Eden Foster
Paul Mercurio
Rachel Payne
Belinda Wilson

WITNESSES *(via videoconference)*

Stephanie Winson, Acting Information Commissioner, and

Suzette Jefferies, Assistant Information Commissioner, Office of the Information Commissioner Queensland.

The CHAIR: We are resuming our public hearing for the Integrity and Oversight Committee inquiry into the *Freedom of Information Act*. We have before us the Acting Commissioner from Queensland, Stephanie Winson, and the Assistant Information Commissioner from Queensland, also, Suzette Jefferies, appearing as witnesses. Before you give evidence, witnesses, there are couple of things I have just got to run through so please 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, and you will be provided with a proof version of the transcript for you to check once available. Verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

Once again, I welcome Ms Stephanie Winson and Ms Suzette Jefferies from the Office of the Information Commissioner in Queensland. I will just introduce the Committee to you quickly: from my left, Paul Mercurio; Belinda Wilson; Ryan Batchelor; me, Tim Read; Rachel Payne; Jade Benham; and Eden Foster.

Thank you once again for appearing. Do you have some brief opening remarks?

Stephanie WINSON: I do. Thank you very much, Mr Chair. Before I start, I would just like to on behalf of the Office of the Information Commissioner in Queensland acknowledge Aboriginal and Torres Strait Islander peoples as the First Australians, and I recognise their deep connection to the waters, seas and lands of Queensland and the Torres Strait. I wish to also acknowledge the traditional custodians of the land on which we are here today, Meanjin, and they are the Jagera and Turrbal people. I pay my respects to their elders past, present and emerging.

Mr Chair, members, thank you very much for giving us a moment to talk to you. We made a submission to you because we thought we could provide some assistance and information that might guide your inquiry. We felt that our experience with a different legislative regime might be beneficial to your inquiry. We have assumed that you have read our submission and will therefore not repeat the detail within it. I will in my opening remarks just briefly cover a few points that we feel emerge from the submission we made.

The first key point that I wish to make is that the legislation in Queensland reflects a very express political commitment to open access to government information. It does this not only in the title of the legislation – it is called the *Right to Information Act*; there was an express decision to move away from freedom of information legislation language – but also the explicit statements in the preamble of the legislation. It includes the specific statement, and I quote:

> It is Parliament's intention to emphasise and promote the right to government information.

This is reinforced in the statute by the inclusion of a provision that agencies and ministers should adopt a pro-disclosure bias when considering applications for information under the Act.

The second point that comes out of our submission is the way in which the commitment that I have just mentioned is enlivened in the legislation. This is done in two ways: firstly, by providing, and I quote:

> … a right of access … unless, on balance, it is contrary to the public interest …

and secondly, by setting the factors for deciding public interest within the legislation. This particular stance in the Queensland legislation reflects the express change that was recommended in 2008 by a report issued by Dr David Solomon AM, who reported to the Queensland Government on the reforms that might be needed in Queensland at the time to overcome concerns about the operation of the freedom of information legislation that

applied prior. So, in some ways it is very similar to the process you are going through now. I see that Mr Solomon has made a submission to your Committee, so you may hear from him personally. He drew out in his report at the time that it was very important to clarify the public interest test because it is the central and unifying feature of freedom of information legislation and certainly applies across many, many States and/or jurisdictions.

The third point in our submission really is that the statute gives expression to the key strategic policy shift that was made post that review that I have just mentioned – from a pull to a push model – noting, and I again quote:

> Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.

That is a statement in the legislation. This is further supported by the legislation providing specifically for things like publication schemes and disclosure logs and promoting administrative access.

Based on our knowledge of the applicable law in Victoria, it does seem to us that your inquiry is rather timely, because it would seem that reform is timely. Thank you, Mr Chair. We are available to answer any questions.

The CHAIR: Wonderful, and thanks again for appearing to answer them. I will pass first of all to Mr Mercurio.

Paul MERCURIO: Thank you, Chair. Thank you for your time this afternoon. I was just interested in the data trends. What do the data trends show with respect to Queensland's transition to a second-generation freedom of information scheme?

Stephanie WINSON: Thank you very much for the question. When you speak of data trends, are you referring specifically to trends in relation to the amounts of requests – or what, in particular?

Paul MERCURIO: Well, just generally.

The CHAIR: Yes, I think that would be very helpful.

Stephanie WINSON: Well, what we did notice is that the data pre-2009, post-2009 – there was certainly a dip in the number of applications immediately after the legislation came into force. Over time that has been tracking upwards again, so we would certainly say that there are shifts afoot. We have not done research sufficiently deeply to understand whether those trends are simply time, familiarity and greater availability of information and awareness. The research that we have done cross-jurisdictionally in Australia would suggest that Queensland is second only to one other State in levels of awareness around right to access to information, and as a result we do suspect that that increased awareness has generated the uplift that we have certainly seen probably since about 2016 or '17.

The CHAIR: Thank you very much. Ms Wilson.

Belinda WILSON: Thank you, Chair. How has the work of the Office of the Information Commissioner changed over time?

Stephanie WINSON: Thank you. I will pass to Suzie.

Suzette JEFFERIES: Thank you for the question, Ms Wilson. We have seen significant change over time. The office was established in 1992, and it initially began simply as a review body where we had only the external review function. However, when the *Right to Information Act* and the *Information Privacy Act* were introduced in mid-2009, that brought to our office a significant number of additional functions. As well as external review, we then had a privacy function, audit and evaluation functions, training and providing assistance and guidance. Those additional functions actually provided significant support for us in facilitating this change to the push model because we were then able to support agencies in that transition to providing more administrative access and to making applications a last resort. Over time we have increasingly provided training. We provide a lot of guidance but now in more recent times a lot of tools for agencies as well to be able to really build their own capacity. It moved from us initially providing support for that transition, but now it is very much about supporting maturity in information access and privacy. You would see that that is reflected in our *10 Years On* report, which looked at the 10 years following the introduction of the new legislation, where

our audit team looked at the progress in a range of areas, including information governance, policy development and privacy practices, for example.

The CHAIR: Thank you. Mr Batchelor has got some questions.

Ryan BATCHELOR: Thank you very much, Chair. Commissioner, your submission talks about the problem that Queensland encountered with this duplicate right of access both in the RTI [Right to Information] Act and then also in the *Information Privacy Act*, I think it was, where particularly for personal information people seemed to have two ways that they could apply, and some amendments have been proposed to fix that. Given that a lot of the requests that we see here in Victoria – I think it was your submission that pointed this out – are from individuals relating to their own information, I wonder if you could talk through a little bit what did not work in your 2009 reforms so we can avoid making a similar set of steps, if we can avoid it, and whether you think the same scheme can deal with both personal information and then I suppose more broad government decision-making and policy-based documents. Is the one scheme capable of doing both?

Stephanie WINSON: Thank you very much, Mr Batchelor. That is a great question. In fact, the answer is yes. The duplication we have spoken about is that the *Information Privacy Act* had a similar – almost identical – scheme for access to information as the *Right to Information Act*. The legislative reforms we have mentioned in our submission: the Act was passed just before Christmas and will come into force in 2025 if all goes to plan, and that now brings the right to access personal information and amend personal information under the *Right to Information Act* and brings it under one access scheme. In that sense that duplication or differential will be taken away, and we would recommend, if you were going down this path, to put it all in one place.

I will certainly defer to Suzie when I finish here, but one thing that I would say is that we have had the same experience, and I think many jurisdictions have had the same experience: the majority of our applications for information are applications made by individuals and made for private information or personal information. This is a pattern that I think is possibly not surprising for jurisdictions that have the push model, because the sensitive nature of personal information and the risks associated with privacy breaches, which we know too well within Australia, mean that we do need to make sure that protections of private information and privacy are appropriately made when we are talking about access to information through a right-to-access information scheme. In that way, what has happened is that many agencies have adopted administrative access schemes. But there is a limit to how much you can release administratively, and that is why it seems to us that the majority of our information-access applications relate to personal information, because it requires greater judgement and more assessment around third-party personal information. Invariably that is where the challenge comes, and Suzie can confirm if I am right about that. But what we are seeing certainly is that – the best example I can think of right now is if you have been a child in care – if you wish to apply for the information relating to your care, the chances are that the information will be intermingled with significant amounts of personal information about others, such as the adoptive parents, foster parents, siblings and the like, and all of that needs to be assessed very carefully before it is provided and cannot just be made accessible. I do not know if Suzie wishes to add anything to that.

Suzette JEFFERIES: Yes, I think initially having separate schemes for accessing information in theory is a very strong idea. In practice, what tends to happen is that the information is often fairly mixed, so there are a lot of calls that have to be made, assessments made, on the documents as to whether they contain personal information. Where maybe some of the documents fall outside of that, then there is a process to switch the application to the *Right to Information Act*. It adds more process into it. It takes more time. It is more complex for people to understand, applicants to understand and practitioners to administer. I think that bringing it back into the one Act will in fact just simply streamline this process, and I think all that was able to be achieved with the separate Acts is still achievable having all access and amendment under the *Right to Information Act*.

Ryan BATCHELOR: Thanks very much.

The CHAIR: Do you have anything further?

Ryan BATCHELOR: Not on that.

The CHAIR: I would just like to ask: How did your office support cultural change across agencies when the *Right to Information Act* came in and you transitioned to the new model, and what advice can you give Victoria in overcoming barriers, particularly cultural change barriers?

Stephanie WINSON: I think I will start by saying 'leadership'. Leadership starts at the top, and when I say 'the top' I mean people like you. As politicians, if you are ministers and/or lead agencies, you need to live, breathe and demonstrably show your commitment to open government from the top. If you do not do that, it has a significant impact on the culture of the public sector that services you. Chief executives in agencies also, as leaders, play a significant role in setting the tone from the top. You may be aware that we had a review done by Professor Peter Coaldrake two years ago into the culture of the public sector here in Queensland, and he very strongly signalled leadership from the very top, at both political and DG [Director-General] levels, is quite important.

The other thing that we did, and Suzie mentioned briefly a moment ago, was that we spent quite a considerable time as the Office of the Information Commissioner, after we obtained those extra functions when the legislation changed, in supporting agencies. We do have a significant emphasis and focus on providing support, education, training and guidance to agencies. We think that doing that really early on – and doing that very, very vociferously – does make a difference in, I suppose, the confidence and the competence of the staff in those agencies to feel that they can deal with the reform and that push model. If you are coming from a context in which proactive release is not generally trusted or there is no comfort around that, that does require a significant shift in mindset, and as I say, that does require an ongoing awareness campaign. We do that consistently, so we do not stop the effort, as the information commission, in trying to continuously draw awareness to why this is important.

The other thing that is important is resourcing. Public sector agencies cannot perform these functions – and I will be so blunt as to say that democracy is expensive – if you do not pay and resource your agencies to actually do this job properly, they will not succeed, and it will undermine their ability to achieve.

Then the final one which our audits are finding regularly is training. That is not the training we provide but the ongoing training within agencies. The model that we have here in Queensland sets up what we call RTI practitioners – practitioners who lead the functions of doing right-to-information access applications and all the matters involving privacy and the right to information. The risk is that if the agency does not embed and imbue the training of transparency within the agency as a whole, you might have practitioners that sit in isolation attempting to access information from other parts of the organisation and are finding it difficult to get that information. So, the entire organisation, whether it is a local council or whether it is a large department, needs to be imbued and well trained in understanding the obligations of right to information and how that access regime works. Those would be my comments around that.

The CHAIR: Great. Thank you. Ms Payne.

Rachel PAYNE: Thank you, Chair. Thank you both for appearing today and speaking with us. Now, I feel as though you have probably touched on some of these key themes in answering the question around barriers to change, but more broadly, what kinds of issues does the Office of the Information Commissioner encounter regarding proactive and informal release?

Stephanie WINSON: I will answer first and then pass to Suzie, because she has much deeper experience at the coalface. But I think my impression is certainly that the most important barrier that occurs is cultural, obviously. It is important that the culture is re-enforced regularly. When you look at our report that Suzie mentioned, our *10 Years On* report, that shift in culture has occurred, but it has not achieved the heights that we would expect, so that is certainly an important one, and this is the culture around the push model. Agency staff need to feel confident that they will be supported if they live and breathe open government, and if there is a fear that they may be in trouble if they release information, then that impacts the culture.

The other thing that I think is quite important is technology. Unfortunately, most public sector agencies, like most entities, frankly, have entered the technological age iteratively. So, we have databases and then we have a new database and a legacy database and then this other one over here and an app over there, and before you know it the information is spread across multiple sources. Then add to it, for example, body-worn cameras and CCTV footage, not to mention artificial intelligence technology. All of this adds to a very complex picture of where information and data might be stored, and the ability to comprehensively and cohesively access that by agencies is actually really, really difficult. Members of the public often do not really appreciate that, and when they make requests, they assume you just punch in a few words and up pops the data – 'How difficult can this be?' But, unfortunately, what we have seen is that that is a big barrier. Often that is not so accessible, and it

takes a lot of work. The challenge for us as the Office of the Information Commissioner is that we would like to see agencies really demonstrably support open government, but when there is a burden of navigating multiple databases and the concern that you might have missed information and therefore have not given a complete picture, that can be quite overwhelming for agency staff. As a result, they might therefore opt for decisions that are restricted, that are conservative and that are perhaps less helpful for members of the public in an attempt to, I suppose, try and manage the load and the burden of the work. So those are the sorts of barriers that I think are real, and we see them here. I suspect if you shifted to a different model, you would see them in Victoria as well. I will just defer to Suzie and see if she has anything to add.

Suzette JEFFERIES: Thank you, Stephanie. I think the thing that I would add that we do see is that again it probably comes back to both resourcing and culture sometimes, because if the staff in RTI units are feeling quite stretched, they can become quite focused on that formal access application strategy, whereas the agency may well have available administrative release options and you need to have, as a cultural thing, training which is making sure that all the staff are informed of policies around administrative release, what the authorisations are around administrative release, so that you can effectively move the workload away from formal access applications and move it back more broadly into the agency. That is a matter of training and awareness raising, and championing access to information across the agency.

Rachel PAYNE: Thank you.

The CHAIR: Thanks very much. Let us go to Ms Benham.

Jade BENHAM: Thank you, Chair, and thank you both for your time today. It is much appreciated and very interesting. We talk a lot about the issues and challenges, but what are the benefits of the legislative reforms to Queensland's *Right to Information Act*, and why should Victoria bear them in mind when considering a push model?

Stephanie WINSON: I think the most obvious benefit is that it is good for democracy and participation in our representative democracy. Legislative pro-disclosure bias also ensures that it holds government to account. It is really, really important that if you are going to participate in and hold government to account, you actually need access to the information, and that is the real benefit. The other benefit of our model I think, as I said right at the beginning, is a political commitment from the parliament, the legislature, around open government. Efficiency gains – if agencies spend a bit of time making sure they have prepared administrative access schemes and have their disclosure logs and the like maintained, they are proactively pumping that information out all the time and not spending a lot of time on cumbersome application mechanisms that anger the community because they can be quite onerous, they can be time consuming and they can be costly for members of the community, so that is a benefit. That of course creates an ease of access to the community. Most members of the community – there are still in Queensland, and I am sure it is the same for you – small pockets of the community that might not have access to technology, but the majority are able to access technology, whether that is websites, Apps and the like. Getting that information as quickly and as readily as possible ultimately does have a benefit and it saves you money rather than dealing with applications. So those are simply the things that we would say have provided benefit to us.

Jade BENHAM: Thank you.

The CHAIR: Great. Ms Foster.

Eden FOSTER: Thank you, Chair, and thank you again to both of you for being available today. The Committee notes that Queensland has recently introduced a proactive release model for Cabinet documents, similar to the New Zealand model. Does Queensland's model adequately protect the need for frank and fearless advice in executive decision-making?

Stephanie WINSON: Thank you very much for that question. At this stage, I do not know the answer to that, because it has not come into effect yet. Our Premier has recently announced that it is anticipated that this will happen at the end of March, so we look with interest. What I can, however, say is that I am a reasonably recent import from across 'the ditch' and I have experience in the New Zealand model, so I am happy to share with you my impressions and experiences there.

Eden FOSTER: Yes, please.

Stephanie WINSON: I think the model is an important example of how proactive disclosure can be taken right outside of the legislation. In New Zealand, there is no legislative provision for it. In Queensland, the only legislative provisions that have been made are protections for parties involved and also for how you would treat information once it has been released in this way. The model in New Zealand – and if that is the model Queensland adopts – is actually very robust. It requires essentially the same test, the public interest test, that gets done as if you were doing an information request. It does very firmly protect the frank and fearless – or free and frank, as they say in New Zealand – advice, and also makes sure that Cabinet collective responsibility is maintained. The minister responsible for the papers that go up, invariably their office assesses the material and informs the Cabinet Office whether or not that information can be released in full or whether certain elements of it not. So, it is not an all-or-nothing approach; it is quite a considered and careful approach. And it works really well in New Zealand, so I think it can work very well here too.

The CHAIR: Is that information just on the New Zealand Parliament's website or government website?

Stephanie WINSON: It will be on the New Zealand Cabinet website. They administer the process.

The CHAIR: We should have a look. Mr Batchelor might have some more questions.

Ryan BATCHELOR: Yes. You have talked a little bit, particularly here, but also earlier, about the public interest test being a sort of deciding factor as to whether the right is upheld or documents are withheld in full or in part; I am interested in what are in your experience the most common reasons or most common elements of that test that see documents not be made publicly available in full or in part, and if there are any noticeable or observable trends over time in that.

Stephanie WINSON: I am going to pass that one to Suzie, because Suzie has probably got deeper practice experience with the specific test.

Ryan BATCHELOR: Thank you.

Suzette JEFFERIES: My experience is in our external review function. I do not have the exact figures before me, but based on experience I can say that the public interest considerations that lead to refusals are most often – we frequently see personal information of other people being refused. If you took an example of, say, medical records, if it is the person whose record it is applying for it, it will mostly be their information, but often a medical record will contain information about other people that might have provided information to practitioners to help with the person's treatment because they were concerned about them, for example. That information might have been provided in confidence, and that would be a basis for it not being provided.

Other grounds exist where, for example, government agencies may have sought legal advice, and that would be a basis on which information could be refused – similarly if information is covered by a contract that has confidentiality provisions, for example. So, there are really actually quite a range of reasons – in prisons, for example, if the good order and functioning of the prison would be affected. There are a whole range of reasons to do with people's health, safety, mental and physical wellbeing. These are all grounds on which documents need to be considered quite carefully to determine access.

In the Queensland legislation, we have exempt information provisions. But they are quite limited, and they have been determined by the Parliament to comprise information that is contrary to public interest, on balance, to release. If no exemption applies and the information is considered then under a public interest balancing test, that is then when you go to looking at the factors that are contained in the schedules, so making sure that you are not taking into account any irrelevant factors, looking at the factors that favour disclosure and those that favour non-disclosure, balancing those to see where the weight of public interest lies when determining disclosure, but always with a pro-disclosure bias and, always, explicitly in the legislation, any of the exemption provisions are to be interpreted narrowly. So, the legislation is consistently reflecting this pro-disclosure bias, the starting position being that the information is open as a starting point. But, of course, third party and other – commercial, for example – interests all do need to be taken into account where they are relevant.

The CHAIR: Time for one more, if anyone has got one. I think we are near the end of our questions, so do you have any closing remarks at all?

Stephanie WINSON: We would just like to thank you very much for the opportunity to present. We hope that your considerations go well, and we wish you luck. Thank you very much.

The CHAIR: Thank you both very much. We will take a break from the broadcast now and resume in a little under 10 minutes, at 2:50.

Witnesses withdrew.