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

WITNESS *(via videoconference)*

Iain Anderson, ACT Ombudsman.

The CHAIR: We are just reopening the broadcast of the Integrity and Oversight Committee's inquiry into the operation of the FOI Act in Victoria and our public hearing. Mr Anderson, there are just a couple of formal things I have to cover, so bear with us.

Evidence taken at this hearing 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 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.

We have the pleasure of the company of Mr Iain Anderson, the Ombudsman for the ACT [Australian Capital Territory], giving evidence at this hearing.

I will just introduce you quickly to the Committee, Mr Anderson, from my left: Paul Mercurio; Belinda Wilson; Ryan Batchelor; me, Tim Read; Rachel Payne; Jade Benham; and Eden Foster – all Victorian MPs.

Do you have any brief opening comments?

Iain ANDERSON: If I may, Chair, just to note that in the ACT we have a very low rate per capita of formal FOI applications compared to Victoria, which appears to have a very high rate of formal applications. I think this is largely explained by the informal release mechanisms that exist in the ACT for release of in particular personal information and health information. Health records are outside the scope of the FOI Act in the ACT, and there is now a process for seeking access to your own health records through a digital system. That appears to be working extremely well. We also have a centralised open access process in terms of a portal so people can readily find information that is being released by agencies under the ACT open-access scheme. At the same time, there are always going to be questions of culture and agency practices that can inhibit the operation of a legislative scheme so that it does not go as smoothly as it could, so in my experience as the person who oversights the FOI Act in the ACT, culture can never be underestimated as something that you need to keep working on. I will stop there.

The CHAIR: Thank you, and thanks very much for being available to answer our questions. We will start with Ms Foster.

Eden FOSTER: Thank you, Chair. Thank you, Mr Anderson, for making yourself available to speak with us today. My question is: How did the ACT determine what kinds of information should or should not be subject to the proactive publication scheme?

Iain ANDERSON: That is an excellent question. I have been in this role for 18 months, so I may or may not be able to answer some of these questions. But I can presumably take them on notice if necessary to come back to you. It was through a process of external consultation, discussion papers and the like, and then I think there were some committee hearings for the Legislative Assembly – so consultation, policy consideration and then decision-making by the elected body.

The CHAIR: Great. Ms Benham.

Jade BENHAM: Thank you, Chair. Thanks for your time today. What are the advantages of the ACT government's open access information data portals for the 'second-gen' freedom of information scheme, and have they improved efficiency?

Iain ANDERSON: The greatest advantage is the centralised nature of the portals so that people can more readily find where the portals are; they do not need to search in lots of different places. I think that is the biggest single advantage. Otherwise, it is also just that they are relatively easy to search and to find information under. I

think when you have got a lot of different agencies, no matter how well agencies think they have organised themselves, you are asking a lot of members of the community if they have to keep searching in different places, so I think the greatest single advantage is just the centralised nature of them.

Jade BENHAM: Excellent.

The CHAIR: Thanks. Ms Payne.

Rachel PAYNE: Thank you, Chair. Thank you for your time today and speaking with us. My question is: What kinds of issues does the Ombudsman encounter with respect to proactive and informal release?

Iain ANDERSON: We get a relatively low number of requests for review of formal FOI decisions. In terms of the proactive release, sometimes it is agencies taking too formal an approach to an informal release. So, for example, if they get a request for information to be released, they might refer it to a dedicated FOI team who will work through it in a particular way, whereas it might be that the specialists in that area in the agency could more readily and more quickly say, 'Oh, no. We can release this.' Sometimes it is agencies being overly cautious with how they respond. I think another area is when agencies hold information that has come to them from a commercial or private sector entity, sometimes they feel inhibited in treating it in the same way as government-created information even if at its heart it is still information that could be released readily under the open access scheme. So, it is really risk aversion that I think is at the heart of both of those two issues.

Rachel PAYNE: Thank you.

The CHAIR: Thanks, Mr Anderson. If I could ask, what feedback have you had from agencies regarding the abolition of application fees for FOI requests for personal information?

Iain ANDERSON: Fees seem to play an extremely low role in the ACT. While you can still charge fees, it seems to just never happen. So, my impression is that agencies have really moved on past the notion of charging fees. If you have more than I think 50 pages of documentation, then you can charge a fee, but agencies have really internalised the idea that it is a right to information scheme and so you should facilitate the release of information to the extent possible.

The CHAIR: Great. Thanks. Mr Batchelor.

Ryan BATCHELOR: Thanks, Mr Anderson. The core test at the heart of the scheme is one of whether disclosure is contrary to the public interest. I am interested in your observations either in any sort of data or survey work that you have done or in the decisions that you are reviewing as to what are the most common or frequently used or cited reasons why disclosure of information is not in the public interest. Like, what appear to be the reasons that people say or that agencies say – decision-makers say – that is contrary to the public interest? Because it is a broad term and there are criteria underneath in the schedules to your Act. What pops up most often and probably what is most contentious?

Iain ANDERSON: There are overlapping criteria, which probably does not help either. There are a number of different articulations of some of those public interests for and against disclosure so agencies can sometimes tie themselves up in knots a bit. The reasons for refusing release – Cabinet information is certainly high, legal professional privilege is high, prejudicing the protection of an individual's right to privacy is very high, and my observation is that agencies sometimes spend more time on the public interest against disclosure than the public interest in favour of disclosure. So, agencies can be very concerned about, for example, releasing information that might be about their employees when the employees themselves might not be particularly concerned about its release, that sort of thing. As I said, agencies do trip themselves up with spending more time on finding good reasons not to disclose rather than really doing what they are required to do under the Act, which is balancing the factors in favour of disclosure and the factors in favour of not disclosing and coming out with the overall public interest.

Ryan BATCHELOR: When you talk about employee information, are you talking about the names of public servants at the bottom of email trails or who has authored a brief – that kind of thing? Or is it more about third-party personal information – someone else has commented on a file or something like that?

Iain ANDERSON: I will give you some real-world examples. One was information about the remuneration of a senior public servant. That information was already public, but when it came to an FOI application the agency was very keen not to release it because they said that that was an unreasonable interference with the individual's right to privacy, even though that information was actually already in the public domain. When it came down to disclosing their actual employment contract, they did not want to release it.

Another example was a survey an agency had done of its staff. They were very loath to release the survey because a lot of it was actually critical of the agency's management. I said, 'Well, yes, just because it might be embarrassing and sensitive, actually the staff themselves knew that some of this was going to be released publicly. It's probably in the public interest for some of it to be released publicly,' because this particular agency's management had been a contentious public subject for some months 'and it might actually also help get some action on the issues that the staff are raising.' Those are examples of the agencies saying, 'We're placing such a premium on the privacy of our staff that we won't release the information,' whereas when you weigh up the other public interest tests the overall public interest was actually in favour of a much greater degree of disclosure of the information.

Ryan BATCHELOR: Sorry, one last before I pass to my colleague: How do you combat that attitude of the decision-makers in the weighing up? The legislation has got a pro-disclosure stance – of a right to access the information and really a presumption that disclosure will be made unless it is contrary to the public interest – but you seem to have a practice of decision-makers spending all of their time on the reasons against disclosure. How do you deal with that?

Iain ANDERSON: Well, in fairness, I should reiterate a point I made earlier that it is actually a very low rate of formal applications and then a very low rate of requests for review of those formal applications, so of the matters that I am seeing we are actually setting aside over the majority of those decisions – but it is a very small snapshot of the overall number of applications. I have a degree of confidence that, overall, agencies are applying the tests in the right way, but when we do find that they are getting it wrong, it is particularly because they are, as I say, putting an excessive premium on privacy issues, particularly when it comes to their own staff, and not really thinking about the public interest in favour of disclosure. We try and word our decisions very clearly. We publish them. I meet with the directors-general of all the agencies on a regular basis to also talk to them about what we are observing, and of course we publish annual reports as well.

Ryan BATCHELOR: Thanks. Thanks, Chair.

The CHAIR: Thank you. Ms Wilson.

Belinda WILSON: Thank you. Thanks for being here today. The Committee notes that the ACT's *Freedom of Information Act* does not apply to health-related information and that there is a separate statutory access scheme for such information under the health records Act. I guess our question is: Does this work well, and are there any limitations in this arrangement?

Iain ANDERSON: So, yes, our impression is that it does work well. We do not have visibility, in one sense, because we are not the agency that oversights that; it is the Australian Information Commissioner who oversights the process for seeking access to health records. [Mr Anderson subsequently clarified this statement to the Committee by explaining that 'complaints about right of access to health records can be made to the ACT Human Rights Commission'.] But my feeling, my perception, is that it works well primarily because, rather than just replacing the FOI Act with a different, mandated regime which has fees and is quite a seemingly strict regime – it is the development of a digital access tool that has really I think overhauled this and made it much easier for people to directly seek access to their own health information. It is the use of some technology and a process of very actively making that information available when people can log into it.

Belinda WILSON: Yes.

Iain ANDERSON: As opposed to the formal regime for seeking access if it has been refused to you.

Belinda WILSON: So the process is not difficult?

Iain ANDERSON: Yes, that is right.

The CHAIR: Thanks. Mr Anderson, if I could just clarify something about this digital health record that people can access, and I appreciate this might not be something that you are directly working on. Is that generated automatically? Is that something where, when health staff create a record, there is something that a patient or person can log into that is automatically generated? Or do people have to carefully write out something that is suitable for public access?

Iain ANDERSON: It is a bit of both. Health records are captured electronically, so they are accessible electronically through the digital My Health Record. A potential issue sometimes arises where something is not perceived to be a health record. It might be a record created in a slightly different context that contains health information in it but is not perceived by the agency creating it as being a health record. So sometimes people do need to link things, and sometimes those linkages do not occur when they should. But if they are pure health records, then my understanding is that it is a fairly seamless process for creating them and linking them to the system so that they can be accessed.

The CHAIR: Great.

Iain ANDERSON: Sorry, if I can just tease it out, there is an example that my staff drew to my attention. In a guardianship or senior context there might be records of agencies making decisions about elderly Australians – part of which is about health and part of which is not about health – and making sure that the health part of those records is equally accessible is sometimes a challenge.

The CHAIR: Okay. Thanks. That is very interesting. Let us go to Mr Mercurio.

Paul MERCURIO: Thank you, Chair. G'day, Iain. I have really enjoyed your answers; they were really informative. Thank you very much for that. I have got two questions, and I am not quite sure how to put them to you. Our Act came into being in 1982, and since then there has been a lot of change in technology. I have heard the words 'artificial intelligence' bandied around a little bit in some of the submissions that we have been getting. I am just wondering: Do you have concerns or thoughts or have there been discussions about AI in this freedom of information space?

Iain ANDERSON: I mean, it is going to be particularly challenging with information created by AI and ensuring that it is treated in the same way as other government-created information. There is an area where AI is being looked at, and that is in the agency that has the greatest challenges with access to information in the ACT, the Community Services Directorate. They hold a lot of personal information and health information about individuals. I think we talked about this in our submission. Sometimes they might have 17,000 pages about someone who has had a lot of contact with government throughout their childhood and life. They have a very big backlog, and one thing they are looking to do now is to use AI to help them search through documentation and potentially apply redactions. I have simply said to them that I am going to be very curious about how they ensure it is doing the right thing. With any AI, I think there is a challenge of knowing what it is actually doing, and if it is off-the-shelf AI, as opposed to an AI program you have developed yourself, it is even harder to know what the actual tests are that it is applying in deciding if something should be identified or should be redacted or should not be. So, I think it is going to be very challenging.

I cannot give you a definitive answer on that. I know that the Victorian information commission has been doing a lot of work on AI. I heard Rachel Dixon, when she was acting in that office last year, say some very powerful things about the challenges of AI. But at this stage in the ACT we are really just looking to see what agencies are doing and we are very cautious as to how it is going to work. Most importantly, though, you should not have any differences between something that is created by AI and something that is created by individual public servants.

Paul MERCURIO: Okay. That will be an interesting one, won't it, the difference between AI and what is created by a public servant? We were speaking about being concerned about the overgeneralisation that AI might sort of attribute to a situation. But I agree there is going to be a lot of work there. Thank you for that. My other question, quite simply, is: What single piece of advice would you have today for us as we look at developing a new *Freedom of Information Act*?

Iain ANDERSON: Easy. Simplify the informal release of personal information and health information. I think that is the core learning from the ACT system. And it has got to be backed up by the work with agencies on culture to make sure that it actually works that way. But my observation from Canberra is that the Victorian

system is caught up in people having to make formal applications for things that are their own information. Surely there should be simpler ways of them getting access to it.

Paul MERCURIO: Thank you very much.

The CHAIR: Thank you. Ms Benham has got more questions.

Jade BENHAM: I have, just one more. Thank you, Mr Anderson. You just touched on culture again then, but in your opening remarks you referred to how culture can inhibit the process. What have you or previous ombudsmen done to improve the culture within your own organisation or to enable agencies to improve it? Do you have a silver bullet for that?

Iain ANDERSON: No, unfortunately. We do outreach, we meet regularly with FOI officers in agencies, but we also try and publish things and do outreach for community members who are thinking about FOI. In particular it is the outreach to the agencies at senior levels and at FOI decision-maker levels to keep pushing them and prompting them and sharing information, because often you will find a really good example of something that has gone well in one agency, and so it is publicising that with the others. At its heart it is about that risk aversion when really the risks of releasing information are generally quite small. If it is something that is particularly sensitive – Cabinet-in-confidence [information], legal advice, things like that – the agencies have a good handle on that. It is normally the personal information where they get, as I said, overly risk-averse, when there will not actually be negative consequences for the most part of releasing information, and so publicising the positive examples is quite powerful.

Jade BENHAM: Interesting. Thank you.

The CHAIR: Great. Are there any further questions from the Committee? I think we are all good. Mr Anderson, do you have any final closing remarks or other titbits to offer?

Iain ANDERSON: No, just to wish you all well with your task.

The CHAIR: That is great. All right, thank you very much. Thanks again for appearing before us and answering those questions. We will end the broadcast and close the hearing now.

Committee adjourned.