

TRANSCRIPT

INTEGRITY AND OVERSIGHT COMMITTEE

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

Melbourne – Monday 25 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

Jordan Brown, freelance journalist.

The CHAIR: We are resuming the Committee's inquiry into the operation of the FOI [Freedom of Information] Act. To our witness, before we start there are some formal things to cover.

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I welcome freelance journalist Jordan Brown to give evidence at this hearing. I will just quickly introduce the Committee to you. Online we have got Jade Benham in Mildura. We have the Deputy Chair Kim Wells. I am Tim Read. We have got Ryan Batchelor, Belinda Wilson and Paul Mercurio with us.

Jordan, do you have any brief opening comments to start with?

Jordan BROWN: I do have some, yes, please.

The CHAIR: All right. Great. If you want to kick off with those.

Jordan BROWN: Well, I firstly want to say thanks to the Committee for the opportunity. My name is Jordan Brown. I am an independent documentary filmmaker with a background in technical production. I am a member of Melbourne Activist Legal Support, or MALS, which is an all-volunteer organisation that fields legal observers at protest events in the community to monitor and report on police responses to protests and other Charter [of Human Rights–] protected political communication. MALS also works alongside the Police Accountability Project and the Inner Melbourne Community Legal Centre doing work that focuses on police accountability. So I am wearing a few different hats here in terms of the joint submission, but the bulk of it is experience using the FOI system for different aspects of police accountability work, and advocacy, community education or, turning to my work specifically, research and documentary.

The most fundamental thing I want to reiterate is that the system at the moment is completely stalled. The delays at the moment are massive. The review bodies seem overworked and underfunded, and VCAT [Victorian Civil and Administrative Tribunal] has completely stopped hearing FOI matters. The disclosure that we have previously had coming through as a trickle has now completely stopped, and as outlined in the submission there are a number of matters for which we are still chasing document release from 2022 in some form or another. In regard to the lateness, that is consistent, I imagine, with the other evidence that has been before you, so our experience is by no means an outlier. But I did want to stress the absolute direness of the situation right now.

A few quick things to say on that would be, again, echoing the evidence of others regarding how the culture inside agencies can very much affect how the [Freedom of Information] Act is interpreted and applied. I think that is very important, and sort of cuts to some of the troubles we are having at the moment. I would very much agree with the recommendations made by OVIC [Office of the Victorian Information Commissioner] that the system needs an overhaul and we need to start again. Then on top of this, I think the Victorian Ombudsman and other oversight bodies, and of course media reporting, would attest that we have got some serious issues around declining public trust and confidence in public bodies.

Where I am sitting, I think this perfect storm has emerged. We have got this declining trust, which I think is feeding into this appetite for greater accountability and disclosure. So people are turning to the FOI Act to try and get some answers and find out what is going on, but they just end up down this rabbit hole and usually give up, which is kind of where we are today. So I understand there is quite a task in front of you.

The CHAIR: Thank you very much, Jordan. We do have some questions for you. Shall we start with Paul?

Paul MERCURIO: Thanks, Jordan. Thanks for coming in and for that opening statement. That is why we are here trying to sort through it and fix it. What kinds of information do you request through Freedom of Information, and how does this information support the work that you do?

Jordan BROWN: Various different types – definitely personal information requests. Health information I have some experience with – probably most in that area with the *Health Records Act*, as opposed to FOI, with that one being very good. But also it is contracts or documents around tendering processes or outsourcing or other ways that public agencies are spending public money. Definitely there are policy documents, internal working documents, training materials, statistics – that is a very important one – and the contents of police complaint files, so the information about an investigation of the police complaint and how the outcome was discerned and then what evidence that decision was based on or lack thereof. I think that comes about because there is this conflict of interest that exists with the police. The police investigate themselves when a complaint arises, and there is this systemic occurrence of those complaints being dismissed. The figure I have here is less than 1 per cent of investigations into allegations against the police are independently investigated by IBAC [the Independent Broad-based Anti-corruption Commission], and the rest are referred back to Professional Standards Command – and that routinely dismisses complaints. So people would turn to FOI to sort of understand why their complaint has been dismissed – what is happening internally for that kind of systemic behaviour to be occurring. There are also no independent checks on or monitoring of use of force, when weapons are being used, stop-and-search powers being exercised, incidents of information-sharing and so on and so forth. So I think in the police accountability space the FOI system is largely being relied on to understand what the police are doing and why they are doing what they are doing.

Again, I could point to some figures that were reported in *The Age* from last year: one in five people in Victoria do not trust the police currently; Victoria Police has paid out more than \$42 million in the last five years in legal and civil settlements for their bad behaviour. So accountability I think is more important than ever, and, yes, we have this situation where access to insights through the FOI system that feeds into our accountability and advocacy work is just completely stalled at the moment.

Paul MERCURIO: I am kind of interested in your success rate in terms of FOIs. Like, do you know a number – for instance, have you put in 100 and succeeded in 30 and been knocked back on 40? You know, can you give me an idea of how that works for you?

Jordan BROWN: That is a great question. I would be happy to take that on notice to give you something more concrete. But I think where it stands at the moment is that requests are still in limbo. They have not even been resolved from 2021. So things are still ongoing.

Paul MERCURIO: Did you say from 2021?

Jordan BROWN: 2021. Yes.

Paul MERCURIO: Wow. That speaks volumes.

Jordan BROWN: In some form or another, I should say – sorry.

[The witness subsequently informed the Committee that the correct year was 2022 not 2021.]

The CHAIR: Thank you. We will go to Belinda Wilson.

Belinda WILSON: Thanks, Jordan. How would a proactive and informal release model in Victoria better support the work that you do?

Jordan BROWN: I imagine we are talking about a push model sort of thing – yes. I think statistics would definitely be useful in a push model and something that could be easily put together, I imagine. In our capacity we have an interest around getting regular data around when and where stop-and-search powers are being exercised or when and where stop-and-question powers are being exercised. Again, regular publishing of use-of-force data would be very useful, and what types of force that was, whether it was weapons or physical force or other types of force. The point is that the police are already logging that sort of data. You know, whenever

there is a use-of-force incident they are required to fill out a form. They are collecting a lot of this data internally. So yes, it would be very beneficial and useful if that was just pushed out. I imagine that would take a lot of the burden off formal requests in that area.

Crime statistics – I think that, yes, that is another area. Sometimes things can be discerned from annual reports, but I think the point – and this is where we turn to FOI – is that these are all reporting on conclusions. We do not get the commensurate insight into how this came about and what the police were doing to arrive at that result. So for example, the crime statistics may go up in a particular suburb, but the piece of the puzzle that is missing for us is that, say for example, stop-and-search or stop-and-question powers may have tripled in that same suburb or that pre-emptive policing tactics were employed or increased surveillance was undertaken or there was a racial profiling element that was a component there that has contributed to the increase in the statistics. They are the sorts of things that we would want to understand and that we turn to the FOI system to try and get some insight into.

Belinda WILSON: You did say you were wearing a couple of hats today, and you seem quite focused on the police aspect of what you do. What journalism work do you do?

Jordan BROWN: I did some background work several years ago now, research on how the public transport system was privatised, and I turned to the FOI Act to work out where public money was being spent and how advertising companies were making money off public infrastructure and through contractual arrangements. There was a short film that was going to be put together for that, but it did not come through because of not very much success unfortunately through the FOI Act. But, yes, that has been an area in terms of the filmmaking work. Yes.

Belinda WILSON: Right.

The CHAIR: Thank you. Ryan Batchelor, have you got a question?

Ryan BATCHELOR: Thanks, Chair. Your submission makes a recommendation that records of search be made available to applicants. I was just wondering if you could elaborate on why you think that is important, what function you think that would serve in terms of the objectives of the FOI Act and any comment you might have on potential arguments about administrative burden that that would place on FOI officers and agencies or OVIC, given that one of the clear issues that we are hearing is that there is a lot of work for these officers to do.

Jordan BROWN: Yes. Thank you for that. As outlined in the submission, in the search process, from an applicant's perspective there is not much known about how the search is conducted, what material was considered and what was not, and what the processes were that had been put in place [to undertake the search]. I get a sense through other evidence that has been put to the Committee that sometimes this is even a problem within agencies. What databases do we look in, for example? But, as part of the Professional Standards parts of the Act, the agency is meant to keep a record of how the search is being undertaken, where they are looking and the methodology, I believe. I do not think it would be burdensome to close that gap by just disclosing that [information] to the applicant – what processes have been undertaken in order to form a decision in relation to a request. In our submission we did have some examples around disputes concerning the thoroughness or diligence of searching, and the problem that we emphasise in the submission is that there is no right of review at the moment pertaining to searching. You can only make a complaint and, depending on how satisfactory that process is for the applicant, that does end with OVIC. There is no place to go after that, so if they are being disproportionately burdened at the moment with disputes over this area, then I can see how those –

Ryan BATCHELOR: Do you think there should be a right of review on searches?

Jordan BROWN: I think that would be helpful. Yes. The way that would be assisted is that the complaints process is closed; it is not open in the same way a review process is open. An applicant makes a submission as part of the complaints process, and OVIC goes away and has some communication that the applicant is not privy to with the agency to make some decision: 'Yes, the search was thorough and diligent' or 'No, it wasn't'. But it dead-ends with OVIC. There is no right of review beyond that.

Ryan BATCHELOR: So you are saying you would prefer a process that came back to the applicant?

Jordan BROWN: Pardon me?

Ryan BATCHELOR: You are saying the process is closed. I assume that means you do not think it is transparent enough. What do you want to see that is different?

Jordan BROWN: Sorry. Okay. Now I understand. It would be nice to see an avenue to go to VCAT [Victorian Civil and Administrative Tribunal], should that be desirable or relevant, particularly when OVIC is, again, overburdened at the moment and there is this impetus to get through things fast and hard, in a sense.

The CHAIR: Thank you. I have got a quick question. In your submission you recommend that legislation give an explicit right of access to the institutional knowledge of an agency. What do you mean by that?

Jordan BROWN: I think that turns on the documents versus information argument that we made in the submission, and as we said in the submission, that points to this UK model, where there is an ability for an applicant to ask a question of an agency.

The CHAIR: And this is because they might not know exactly what documents to ask for.

Jordan BROWN: Yes. There is sort of this Kafkaesque space that arises where it is incumbent on the applicant to describe to the agency what documents it is seeking when it does not necessarily know what documents the agency has, very contrasted to the UK model where the applicant is able to ask an agency a question and the agency responds. That does seem much simpler and more efficient in terms of getting sharp answers to questions as opposed to devolving into this squabbling around what constitutes a document, what is information versus a document and so on and so forth.

The CHAIR: Okay, great. Thanks for clarifying that. Let us go to Kim Wells.

Kim WELLS: I have got a question, but I want to clarify a point that Paul asked. In regard to the hit rate or unsuccessful rate of getting FOIs back, do you receive a phone call from the FOI officer to say, 'Hey, listen, what actually are you after?' or 'Can we narrow the scope of what you are actually after?' Do you get those phone calls of that communication to be able to try and work out if you are satisfied with exactly what you are getting?

Jordan BROWN: I have never received a phone call.

Kim WELLS: No communication.

Jordan BROWN: We've received letters and correspondence, but obviously that is very slow – but I've not received a phone call.

Kim WELLS: So with the letters or other correspondence, is it about trying to work out what specifically you want in your FOI, or is it just a fobbing-off exercise?

Jordan BROWN: In my experience it has mostly been attempts by the agency to reduce the scope of the material, less about clarifying exactly what you are looking for. Invoking section 25A, for example, is something we have had a bit of experience with – the voluminous requests. But again, part of the problem with that is that the applicant is not the best person in that transaction to know what documents an agency has, and it can be difficult for them to describe to the agency exactly what they are looking for. And again, to contrast it with the UK model, it would be much easier if you could just ask a simple question and get an answer. I think that would be helpful.

Kim WELLS: Okay. Just in respect to your view that OVIC should have the power to penalise agencies that improperly redact or withhold information in bad faith, how would that actually work in practice?

Jordan BROWN: I am not sure. I have some suggestions about that, but behind that I think – it is definitely one of the foundations of our submission that we have experience of agencies withholding information or invoking exceptions in fanciful or speculative ways. Those decisions would often be overturned on review; so OVIC comes in and says, 'Yes, the provisions weren't properly made out' or 'The exception has not been properly made out,' and more information has been [ordered to be] disclosed [, and it is disclosed]. But the agencies do not seem to be incorporating that feedback consistently. We get decisions that continue to invoke those exceptions in speculative or fanciful ways. Yes, I think the reason to getting to this suggestion that there needs to be some kind of penalty or sanction is that there has got to be some kind of serious disincentive that

can be put to an agency in order for them to reform their culture internally, or whatever needs to be done, just to seriously disincentivise that kind of systemic behaviour.

The CHAIR: Thanks. Let us go to Jade Benham online.

Jade BENHAM: Thank you, Chair. You have mentioned the UK model, but other jurisdictions like New South Wales, Queensland and even the feds have the push FOI models or access to information. Have you spoken to any of your counterparts in other jurisdictions, and have they offered any insights that we might find valuable?

Jordan BROWN: I do not have a lot to contribute to that question, unfortunately, sorry. But in a personal capacity I have had some experience with the GIPA Act [*Government Information (Public Access) Act 2009* (NSW)] in New South Wales requesting personal information, but in bringing it to the police accountability space, unfortunately not – no experience in other jurisdictions. But looking to the UK model, as some of the material annexed in the joint submission shows, the examples pulled from the UK in the police accountability space, to see that kind of model being introduced in Victoria I think would be very helpful.

Jade BENHAM: Okay. Interesting. Thank you.

Jordan BROWN: Thanks.

The CHAIR: Thanks. Back to Kim Wells.

Kim WELLS: Can you elaborate, please, on your view about the Body Worn Cameras? It has been one of the issues that has been raised from witnesses to this committee. What is your view about the footage? Should police officers not have it excluded from the operation of the Victorian FOI Act? What is your general view on the Body Worn Camera video?

Jordan BROWN: My comment would be that I think it is useful and appropriate to see Body Worn Camera footage disclosed under the Act. The police already have extensive capability to protect sensitive information. I understand there is a concern there, and that is reasonable. I would see that Body Worn Camera footage should be no different to any other document – say, CCTV footage, for example. They have significant discretion to use – and we would argue they have been using it overzealously – exemptions to withhold sensitive information appropriately, say, personal information or police methodology. But to respond to the point around disclosing police tactics, police officers turn on and off their Body Worn Cameras essentially when they please. Yes, there are some directions in the Victoria Police Manual, and some policy around that, but it is essentially officer discretion on when it goes on and off. They also have the ability to mute the audio in the moment, which brings up a question around redactions in the source material, which we could have a conversation about around efficacy and other areas. But beyond that they already have extensive tools available to them to protect sensitive information in ways that are appropriate. Yes, Body Worn Camera footage would be great, but at the moment we are not getting any documents. I think that is probably more of a pressing concern, in my mind.

Kim WELLS: One of the concerns from one of the witnesses has been that if you were to release Body Worn camera video, then it could be edited to suit the person receiving it, who can then go to the media and go, ‘Look what happened.’ So I guess there is that concern. Thoughts?

Jordan BROWN: I would just reiterate what I have said: there is a capability to redact the source material in the moment. That already exists, and the capabilities that already exist in the Act I think would be appropriate – the privacy provisions, for example, and the law-enforcement exemptions, for example.

Kim WELLS: Okay. Thanks.

The CHAIR: Thank you. I would just like to get you to say a bit more about the fact that VCAT has been staying proceedings and its impact on the efficiency of Victoria’s FOI review mechanisms.

Jordan BROWN: The matters began to be stayed, in my experience, I believe in mid-2023. I am not exactly sure why. I think one order from VCAT that I presented to the Committee said there were just no members available to hear the matters, but beyond that I have no idea how that has come about. But, yes, VCAT seems

completely closed from an applicant's perspective, and the technicality there is that VCAT, for the statutory lateness, for example, is the only place you can go, apart from making a complaint, obviously.

The CHAIR: If we are looking at redesigning the system from a legislative point of view, can you think of any changes that we could make? Obviously, part of this is going to be resourcing VCAT, but beyond that is there anything else we could do to improve the system?

Jordan BROWN: That is another great question. I think I would prefer to consider that. Perhaps I will take it on notice and get back to you.

The CHAIR: I think you might have mentioned an increased role for OVIC in your submission.

Jordan BROWN: Well, yes. That part of the submission could be relevant, I think. An overhaul of the reviews process is something that we did mention in the joint submission. At the moment it seems very labyrinthine to navigate. You go to OVIC for certain things and not others. For certain things you have a right to only complain; you do not have a right for review. For other parts of the Act you can only go to VCAT to get resolved and OVIC has no ability to get involved. Things feel a bit sort of fragmented and siloed for certain things, so that would perhaps be a suggestion.

The CHAIR: Thank you. And feel free to get back to us on notice on anything more that you would like to.

Jordan BROWN: Of course. I would be pleased to assist the Committee.

The CHAIR: Do Committee members have anything else we would like to ask? All right. I feel like you have got us at the end of the day.

Jordan BROWN: Yes, that's fair enough.

The CHAIR: It has been very informative and very helpful. Thank you for your detailed submission, and thanks for coming along and taking questions. I declare today's hearing closed.

Committee adjourned.