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 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

WITNESSES

Sean Morrison, Information Commissioner, and

Cara O'Shanassy, General Counsel, Office of the Victorian Information Commissioner (OVIC).

The CHAIR: We are resuming our public hearing for the IOC's inquiry into the FOI Act, and I welcome our witnesses.

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

All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript 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.

I welcome, from the Office of the Victorian Information Commissioner, Sean Morrison, the new Information Commissioner – and congratulations on your appointment – and Cara O'Shanassy, General Counsel, both giving evidence at this hearing. Do you have any brief opening comments, or do you want to go straight to questions?

Sean MORRISON: I have a brief opening statement, if I may.

The CHAIR: Go ahead, please.

Sean MORRISON: Thank you, Chair, for the invitation to appear before the Committee as part of this inquiry into the operation of the *Freedom of Information Act*. My office has combined oversight of freedom of information [FOI], privacy and information security, administering both the *Freedom of Information Act* and the *Privacy and Data Protection Act* in Victoria. The *Freedom of Information Act*, as you are well aware, creates an important legal right for members of the community to access government-held information. OVIC's regulatory functions under the FOI Act include conducting reviews of agency decisions; handling complaints; developing, publishing and monitoring compliance with professional standards; conducting own-motion investigations; and providing education and guidance to agencies and the public to promote the object of the Act.

Every year OVIC publishes a report on the operation of the FOI Act based on data reported to OVIC by Victorian government agencies subject to the Act. The latest report for 2022–23 records the highest-ever number of FOI requests made. This is 48,177. Of those requests, approximately 64 per cent were granted in full and 33 per cent in part, and 3 per cent were refused in full. What this data demonstrates to OVIC is that Victoria's FOI system is heavily reliant on people having to first make a request to the government to receive information and heavily reliant on agencies processing requests using the procedures under the FOI Act. This is what we call the 'pull model'. OVIC's view is that the FOI Act's 1982 pull model is no longer fit for purpose and requires a complete overhaul. OVIC's submission makes 77 recommendations about how this can be achieved. The Act as currently drafted does not support a maximum amount of information being made available to the public in a timely and easy manner. The Act's out-of-date provisions do not align with how modern government operates, and the legislative drafting is technical and complex, making it hard for the public to understand and for agencies and ministers to administer.

Tinkering around the edges of the FOI Act is not going to fix these issues. Victoria needs to replace the FOI Act with a modern, third-generation access-to-information law. When the FOI Act first came into force, Victoria was a leader in access-to-information legislation across Australia. The inquiry provides an important opportunity to commence a law-reform process that will result in Victoria reclaiming its leadership. To do this well it will be critical not only to have strong access to information laws but also a positive culture of transparency, and I thank you again for the opportunity and the invitation to speak to our recommendations.

The CHAIR: Thank you very much. It is remiss of me; I have not introduced the Committee. I should do that. Let us start at the right-hand end with Paul Mercurio, then Eden Foster, Belinda Wilson and Ryan Batchelor. I am Tim Read. There is Deputy Chair Kim Wells, and online from Mildura we have Jade Benham. Let us go to Eden Foster with the first question.

Eden FOSTER: Thank you, Chair. And thank you both for coming in today. My first question is: clearly you are in support of a push FOI model, but what are the major reform considerations for transition from a pull FOI model to a third-generation access-to-information law?

Sean MORRISON: The major consideration for reform is, as you have stated, to move from a pull model to a push model, and that would be around introducing legislative push pathways to empower agencies to release more information to the public. We will have two proactive pathways – one informal release pathway, and a formal pull model request pathway. So we are still saying that the pull model should exist in limited circumstances, but it is all around proactive release – mandatory, and then agencies can also proactively release information. Then the informal release is really where people make a request, but you do not move to the formal process, you move outside of what would be an access-to-information law. That is a major reform consideration.

The second would be to tidy up and tighten the reasons for refusing access for legitimate reasons. You will see in our submission we talk about a three-step test model. It really is focusing in on the exemptions, or what we would call 'exceptions', in a new law.

Thirdly, there are myriad of changes that need to ensure that the law is fit for purpose for the digital age. That is, having purpose-based legislation rather than something that is prescriptive. You would see in the *Privacy and Data Protection Act* the IPPs [Information Privacy Principles] are purpose-based. I think with the way information is moving we do not know what the information landscape will look like in 10 years' time, with AI [artificial intelligence] and other large language models. Then I think the final change is an improvement on how information is recorded across government. That is beyond the remit potentially of OVIC, but it is about having the appropriate systems in place – the appropriate record-keeping laws. I know that we agree with the Keeper of Public Records and their submission to this committee. It is also having appropriate education and training for public servants.

Eden FOSTER: Thank you. I will move on to my second question, which is two-fold. What is required from an information-management and FOI culture perspective to support a Victorian transition to a third-generation ATI [access to information] law? And, with this in mind, what are your observations on the information-management and record-keeping practices of Victorian agencies and ministers?

Sean MORRISON: On the latter question, I think that would be better answered by the Public Record Office Victoria. I know they have put out guidance and they do a maturity rating of organisations. I think it might help the Committee if you could get access to that. Sorry, could you just repeat the first part of your question again?

Eden FOSTER: What is required from an information-management and FOI culture perspective to support a Victorian transition?

Sean MORRISON: Going back to my answer to the first question, I think it is critical that there is an access-to-information framework. I think a whole-of-Victorian-government information management framework, as has been proposed in the past, would assist – rather than potentially having disparate systems or policies or procedures, if there was one unifying framework. I think greater reporting and oversight of proactive informal release pathways to OVIC, which we do not have at the moment, to see how a third-generation law is operating. So apart from number of requests being made, seeing what information is actually being released through informal release or proactive pathways. An information asset register would assist the public in making requests, knowing what information is held by government or potentially what cannot be released. And I think, again, education and training – making sure that public records management is part of an agency office's day-to-day work, and not just the people dealing with records but those on the periphery.

Eden FOSTER: Thank you.

The CHAIR: Let us go to Paul Mercurio.

Paul MERCURIO: Just out of curiosity, I am just wondering: Is there is a difference between access to information and a right to information? If there is, what is it?

Sean MORRISON: My view would be, no. Different jurisdictions use 'access to information' or 'right to information'. That is around naming conventions. But stating that Freedom of Information is passé and we need to move on to something that reflects an innate right to have access to information, rather than, 'You may, subject to exemptions'. So, in short, I do not think so.

Paul MERCURIO: No. It is just that it has come up various times. I quite like 'right to information' and I just wonder, culturally, how that makes people feel, or how they act?

Sean MORRISON: 'Right' seems to be stronger. But again, I will leave it in the Committee's hands.

Paul MERCURIO: Yes. I am just curious. How does OVIC consider that a third-generation ATI law will interact with, and respect, the requirements of the Victorian *Privacy and Data Protection Act*?

Sean MORRISON: I think that if you look at our submission, we recognise that many requests – approximately 70 per cent from memory – are for people's own personal or health information. So we understand that this is potentially (1) a burden on the system itself and (2) not the best pathway for people to get access to this information. In our view, we think the right to seek access to personal and health information should be retained under ATI for instances where the less formal pathways cannot be accommodated under either the *Health Records Act* or the *Privacy and Data Protection Act*. We think they need to coexist and live in harmony, but the preference is for those other Acts to enable access in the first instance, even potentially with some redactions by agreement of the applicant seeking that information. But then it could be flipped over to ATI or right to information laws where access to all information is sought, and there might be material communicated in confidence. So we are not saying that the push model should apply to all health information and we are not saying that ATI laws should not apply to personal health information. We think they need to operate and coexist, but also those laws need significant amendment if they are to allow the pathways for ease of access and disclosure.

Paul MERCURIO: Okay. Thank you.

The CHAIR: Great. Belinda Wilson, I think, has some questions.

Belinda WILSON: Thanks so much for being here today. What kind of information should not be released in the disclosure logs?

Sean MORRISON: There are some examples from other jurisdictions in the disclosure logs about what information: information relating to the applicant, personal information, information that is exempt by nature of the response to the request, information around state secrets – anything that could compromise the operation of the deliberative process. So disclosure logs will not be published carte blanche; they still will be subject to some material being removed.

Belinda WILSON: Yes. What are the advantages and disadvantages of having all public sector disclosure logs in one place, and are there any information security risks, for instance, in centralising information in this way?

Sean MORRISON: For information security risks, I think that the risks are the same whether they are published by an agency themselves or in a central place, save for, if that system was compromised, of course all data is compromised. But if it is information that can be disclosed to the public, the only security risk I see is using that disclosure log as a way to get access to other systems. We would hope and expect that this would be standalone and would not provide a gateway to a system.

Everything being published in the one place I do not see a downside to, as long as that was accessible and available to people in the formats they needed and could be easily found and searchable. The benefits I think would be that people may not make requests – information has already been released – it supports transparency and it provides a knowledge base to assist citizens in participating in government life.

Belinda WILSON: Yes.

The CHAIR: Good. Thank you. Let us go to Kim Wells.

Kim WELLS: I am referring to your submission: What were the results of the consultation with stakeholders, in relation to the proposals in your submission?

Sean MORRISON: Stakeholders were positive about reform. Of course it is our submission. We have seen people come before the Committee with differing views, but I think the through line here from stakeholders and from people who have appeared is that the laws need changing. So I think people would welcome reform, particularly to make it easier for agencies to administer and disclose information where needed.

Kim WELLS: Anything else? That was it?

Sean MORRISON: I can extrapolate if you would like. I mean, there were some things about application fees, where we have seen that some people think an application fee should be waived for all requests, while some think that it assists in testing the bona fides of an individual. There were views of certain agencies that OVIC should have the power to deal with vexatious litigants. And there was potentially some concern around the fearless and frank advice, if we were to release things like deliberative processes and cabinet documents.

The CHAIR: Thanks. I would like to hear a bit more about your proposed third-generation ATI law; how that would protect against departments' and agencies' overuse or misuse of statutory exemptions, and how that might ensure more consistent decision-making across agencies.

Sean MORRISON: I think by creating other pathways for personal health information and other release schemes, immediately you allow officers dealing with an ATI scheme or set of laws to focus more on what I would say is the more contentious material. We propose a three-step test to assist officers. The first one is: it is about only protecting legitimate interests. They would be quite narrow, so the material covered needs to deal with a legitimate interest. The next thing is we would require officers then to deal with a harm test and to see if disclosure would cause harm. Then the third: even if it does cause potential harm, we would go to the third limb of the test. I think that by having exemptions that are only for legitimate interests, having a harm test and then having the third limb, which is the public interest test, it really makes agencies focus in on the material that is to be exempt and draw out the reasons why rather than just saying, 'This class of document is exempt.' Disclosure logs also help by (1) allowing consistency in practice, (2) showing what is being released as well across government, and I think the other thing is we propose that there will be reasons that agencies cannot rely on – so embarrassment to the government and disclosure of corrupt conduct. I think those are the predominant reasons why.

The CHAIR: Thank you. Something else I wanted to ask you about: we have received evidence that FOI legislation should not apply to personal and health-related information that could be obtained through different statutory release schemes. We have also received evidence to the contrary – that it should apply – so we are interested in your view.

Sean MORRISON: Just to clarify, I am assuming if someone is seeking access to personal information that is contained within another document, say it is a Cabinet document – we are not talking about those scenarios. We are really talking about where the majority of the file is someone's own personal health information.

The CHAIR: Yes. Health records, police information –

Sean MORRISON: There is merit in not having the new ATI laws apply to health or personal information that can be sought elsewhere under an administrative release scheme or under a legislatively mandated scheme, but our concern would be that that is not another scheme that just contains exemptions or frustrates the applicant. If it is something that happens similar to what is in place at WorkSafe, we think ATI should not apply to that material that can be obtained elsewhere through an easily accessible administrative release scheme. Section 14 of the Act could be updated in a new ATI law to account for publicly available information as well, so not only information that is personal health information. If it is publicly available or available for a fee, as it is now, it should be exempt from being sought under ATI laws.

Cara O'SHANASSY: And that might not just be under a legislative release scheme either. I am thinking, for example, [of] Legal Aid – when they release a client file if the client goes to another lawyer, that could be another area where documents could potentially be excluded from the Act too.

The CHAIR: So is that a form of informal release?

Cara O'SHANASSY: Well, that is what they would do. Sorry, I am just thinking out loud as you are talking about it, but I understand that is what Legal Aid do, as they are obliged to do under the solicitors' rules. If your client moves on, they have paid your fees, and what have you, then you are obliged to release that file, not including file notes and certain things. Then similar principles could apply in that kind of situation.

The CHAIR: Good, thank you. All right, let us go to Ryan Batchelor.

Ryan BATCHELOR: Thanks, Chair. I want to get to Cabinet in a minute, but I think it is a really interesting concept, because we had the evidence – I think it was the Australian Lawyers Alliance – saying that some agencies are really good at coming up with and having quite efficient and effective ways. WorkCover came up, but then also I think it was –

The CHAIR: WorkSafe.

Ryan BATCHELOR: WorkSafe, and ambos as well – Ambulance Victoria. They felt that there were some exemplar agencies where they did not need to use the FOI regime. So you are basically arguing if we can figure out ways to make those work, they should effectively be exempt or separate. I think it is an interesting concept, but it also might be a driver of better –

The CHAIR: Improvements.

Ryan BATCHELOR: Improvements – a facilitator of system improvement.

I am going to go to Cabinet. Your submission essentially supports the narrowing of the exemption for Cabinet material and reducing the time limit on the exemptions and supports the introduction of a proactive release model, sort of similar to the New Zealand experience. I am wondering if you have had any views from counterparts in New Zealand about their experience with the changes that have come in and how that might be preferable to current arrangements or preferable to the use of the current Cabinet exemptions here now?

Sean MORRISON: I have only had limited conversations, but I have had one on it, just briefly. They did note that it just happens as a matter of course, and the shift is basically it is just accepted as common practice now and that it does not disclose the deliberative processes of Cabinet. It is not disclosing who had a particular position in the Cabinet room or it is just disclosing the outcome of Cabinet, so they think it is a positive. And just to note, again, it is not enshrined in their law, but it is effectively a protocol as such, which is what we are suggesting.

Ryan BATCHELOR: Have you had any consultations or discussions with people who are involved in executive decision-making rather than people who are interested in FOI and access to information laws on the other side of the fence, I suppose – any discussions with people like that or who are interested in those types of issues? One of the things that has come to us from various people is that recognising that we have got to maintain the space for Cabinet to deliberate and the importance of protecting the principles of collective and individual ministerial responsibility seems like it is important – and the public service's ability to provide frank and fearless advice to inform those deliberations. I am wondering if you have spoken with anyone on that, maybe in the public service, and about their views on these types of issues.

Sean MORRISON: Noting that I have been here for five weeks –

Ryan BATCHELOR: Sure, sure.

Sean MORRISON: I have not, but I have discussed it with my officers, and they have had stakeholder discussions, noting that their meetings and forums and committees do involve executives from other government departments and agencies. There are concerns around the frank and candid advice and the chilling effect. This is noted. But the counterpoint to that, I think, is that if you go through the three-step test that we are proposing, and one of the legitimate interests to protect is – it is not about the internal advice, it is more around the deliberative process or if there is an audit or if it would undermine or presuppose an action; there still is space for that material, potentially, to be exempted. So we are not saying that that should not exist. I think it is just saying that the reach of the Cabinet exemption has maybe gone too far.

Ryan BATCHELOR: Do you think it should apply – your proposed substantial harm test and the public interest override, would they apply to the advice that departments give their ministers going into the Cabinet room?

Sean MORRISON: Yes. The three-step test would still apply. So you would look at: one, is it actually a Cabinet document? That would be the first instance – a document that is going to Cabinet. So if you were talking about a document that is briefing a minister to go into Cabinet, then we are outside of the Cabinet documents exemption and we are more back into the legitimate interest exemption. So the Cabinet document exemption really is only for documents that are prepared for deliberation by Cabinet – for Cabinet submission. The pre-briefing to the minister would not be covered. But potentially material could be exempted from release.

Ryan BATCHELOR: On what grounds?

Sean MORRISON: Well, the legitimate interest could be, say, for example – not to play the role of an FOI officer – undermining the deliberative process where what is being discussed is at such a high level of important economic interest to the State that disclosing it at this point in time could undermine that process. It could be three bidders for a toll road, for example, and you would not want to disclose that information to the broader public. It could provide an advantage to a competitor.

Ryan BATCHELOR: We will tease this out, but I think there is a space where there is a legitimate public interest in agencies being able to provide frank and fearless advice to their ministers on the nature of matters that other Cabinet members are recommending and where the disclosure of that advice may impact future candour or would, upon disclosure, potentially reveal the deliberative processes of the Cabinet. We have spent a bit of time with various witnesses trying to figure out where to draw lines, as part of this exercise is all about line-drawing, the consequences of doing it – casting nets too widely or too narrowly – and the various public interests that we are seeking to protect. I am interested in that. Do you think that in a world where there is not a blanket exemption part of the factors that need to be taken into account could be the need to avoid chilling effects on public sector advice and to promote the ability of the public sector to be frank and fearless in their advice to government?

Sean MORRISON: Look, I do not think the chilling effect should initially be taken into consideration. I do understand the competing interests here, and I think you have the balance of the deliberative process and you have the requirement of public servants under the code of conduct and the *Public Administration Act* to provide full and frank advice. I am a realist. I understand how all this operates, and I would not like to see the chilling effect as a reason. I would still like to see, using the three-step test, that it is a legitimate interest. Then moving to the harm, potentially in what you are saying the harm may still be able to be made out. And then moving to the public interest test – again, that could still be made out. It is just engaging more with the material to provide reasons and significant deliberations on that rather than just saying it is a Cabinet document, noting we have all seen many Cabinet documents before, and some of that material is quite vanilla. And, as we know, under the Act at the moment purely statistical information, for example, should be released. So, without answering your question and answering it, I do not think the chilling effect should be a consideration, but I do understand the tension. And I think that is for the Committee to land somewhere between those.

Ryan BATCHELOR: It seems like people keep giving us hard problems to solve.

The CHAIR: It keeps coming back to us, Ryan, I agree.

Sean MORRISON: Yes.

The CHAIR: All right. Let us move on. Jade Benham.

Jade BENHAM: Thank you, Chair. Let us move on to Victoria Police and their FOI culture. What are your observations of Victoria Police's FOI culture?

Sean MORRISON: Sorry, I have not been addressing you up on the camera. I will just say my initial view on all FOI officers is that it is a tough job, and I think all FOI officers operate under the best intent and are working hard under the current system. I would just like to get it out there that OVIC recognises the significant job people are doing working in FOI at various agencies. I think that Victoria Police – and the statistics would show this – have been hit with a backlog during COVID and they have not quite recovered yet. So I think that

there are improvements that could be made with Victoria Police, but I also think that without the Act being significantly amended they cannot make those improvements. I think it is a bit of a chicken-and-egg scenario in that once you get behind with FOI, you throw resources at it, you lose FOI officers potentially, more requests keep coming in and it is hard to catch up.

Jade BENHAM: With regard to changes, given that it is a chicken-and-the-egg situation, where would be the best place to start as far as VicPol [Victoria Police] goes?

Sean MORRISON: Outside looking in – VicPol may have a counterpoint to this, and that is fine, because I do not work there and operationally they know their material better – I think it would be allowing a law that provides different pathways outside of ATI but still provides protections for that information that is released.

Jade BENHAM: Great. Thank you.

The CHAIR: All right. Ryan, would you like to –

Ryan BATCHELOR: Next question as well – great. We have heard from some other witnesses, including one this morning, that statutory exemptions are often applied in an inconsistent way between various agencies. You will get basically same types of things, different outcome on potentially very similar types of documents. Do you have any observations about that inconsistency across decision-makers in various agencies here in Victoria and how we might address the inconsistency of application just from a practice point of view?

Sean MORRISON: It is difficult to comment on the inconsistency because we only see a small subset of decisions, but having that stated first, OVIC does publish guidelines – FOI practice notes – to try and promote consistency. As my colleague just mentioned to me, which is relevant to the VicPol question, there is a high turnover of FOI staff we have seen as well, so consistency comes with consistency of practice. I think consistency would be an issue where you have – because everything has to be judged on its merits under FOI – a particular set of circumstances that are nearly exact and a person requests it and then they may request that same information again plus some extra and it is redacted differently. I do not have an issue so much with consistency as long as the exemptions can be made out, but again the disclosure logs would promote consistency under a new-generation ATI law, and with the limited exemptions that could apply, I think that would promote consistency as well. I think it is difficult for an FOI officer when you have personal information being redacted, who has given consent, for example, or other types of material where you are trying to go on limited information or it is nuanced. That is why having the legitimate exemptions and disclosure logs would help with consistency, but again there is a role for OVIC to play in education as well.

The CHAIR: Great. Let us go to Paul Mercurio.

Paul MERCURIO: I will jump ahead, if I may. We have had a quite a few discussions with witnesses about the influence of the emerging sort of technologies such as AI [artificial intelligence] and things like that. I am just wondering about your thoughts on how FOI, ATI, RTI [right to information] legislation can best deal with these emerging technologies.

Sean MORRISON: You will note in our submission that the next generation of ATI laws needs to account for the use of AI and that the public should know when it is being used, how it is being used and should be able to access information it is producing, particularly by third parties. So I think we need to explicitly call it out in the next generation of laws – getting access to it, when it is being used, and when and how it is being used by third parties delivering the service on behalf of an agency.

Paul MERCURIO: Good.

The CHAIR: Just on Professional Standards, how important is it that they be reviewed by someone independent to OVIC?

Sean MORRISON: I think that is quite important, and just to update the Committee, if they are unaware: we have commenced an external review of the [FOI] Professional Standards, and we hope to have them in place later this year. I think just having any independent and external oversight from OVIC helps with taking in the views of stakeholders, not just OVIC's views, and helps us get a set of workable, pragmatic standards.

The CHAIR: Thank you. Let us go back to Eden Foster.

Eden FOSTER: Thank you, Chair. The Committee has received evidence that OVIC should have power to conciliate all FOI complaints before they proceed to VCAT [Victorian Civil and Administrative Tribunal] and that OVIC should also have the power to mediate FOI complaints. What is your view on that?

Sean MORRISON: We do note that most matters that go to VCAT do have a conciliation process built into them. We do try and informally conciliate matters at the moment, and we have informal processes that we have built over the years to allow us to resolve requests. We do note that in our recommendations we talk about that the current conciliation processes are too restrictive and we would welcome having conciliation processes that allow for an informal process. But I am not sure that we need a full-blown mediation and conciliation service. I think that if the laws were tweaked to allow us to recognise that informal process, that would be extremely helpful.

Eden FOSTER: Okay. Thank you.

The CHAIR: Thank you. Did you want to go to your next question?

Eden FOSTER: Are the existing mechanisms under the FOI Act sufficient to protect victims of crime, including family violence, whose perpetrators seek access to information about them under the FOI scheme? We were just talking about a case example of that. Could you elaborate on that, please?

Sean MORRISON: Under the current FOI or the newly proposed –

Eden FOSTER: Under the existing mechanisms – so the current.

Cara O'SHANASSY: Now, I should have had my legislation open. There is a provision in there which talks about taking into account the safety of any person. Excuse me; I cannot remember off the top of my head. I would have thought that that would be sufficient. I do not know how agencies are dealing with it. It is not something that I have seen much of in the FOI space. We obviously see a lot of it in privacy, but I have not seen any instances of where it has been a problem, where it has not been appropriately accounted for. But, as Sean said, that is just the small number of matters that we see. I have not heard anything anecdotally. I have not heard of any examples where it has not been sufficient.

Sean MORRISON: Section 33 does allow for – I think what Cara was referring to is if it is likely to cause harm not to release information. But I welcome the example you are referring to and am happy to speak to it, if there is an example of it being released when it should not be.

Eden FOSTER: I mean, sometimes, whether it be in a hospital setting or medical setting, the partner of a patient there has sought information and there has been a history of domestic violence – and so it is information that, for the safety of the patient perhaps, should not be shared.

Cara O'SHANASSY: And family members.

Eden FOSTER: Yes.

Cara O'SHANASSY: It does come up quite a lot in that setting, but all the agencies that we have seen, all the health providers, are very, very conscious of that, and so they are always very careful. They do seem to be very careful in going through every page of the documents that they have. I have never seen an instance where something has been inappropriately released, but if you want us to –

Eden FOSTER: I guess under the current model, the pull model, the culture is there to perhaps be quite protective of information. With a push model, where perhaps there would be a cultural shift, what risks perhaps can you imagine being involved in that, particularly relating to situations like victims of crime, for example?

Sean MORRISON: Just on your example of information being released to a former partner, a perpetrator, for example, I think that comes to rigour of practice. If there is proper rigour, that should not happen, because it is someone seeking access to someone else's file where they do not have authority to act. We are not proposing a push model for all health information – it is people seeking access to their own information only under an administrative scheme, so that would be excluded. People would be required to go through the formal ATI pathway if they were seeking someone else's record without authority or being the next of kin, for example.

Eden FOSTER: Yes. Okay. Thank you.

The CHAIR: All right. Let us go to Paul Mercurio.

Paul MERCURIO: What do you think are the benefits of listing in FOI legislation the factors favouring disclosure and non-disclosure that decision-makers must take into account when applying the public interest test, as well as irrelevant factors?

Sean MORRISON: I think there is benefit in proposing what people cannot rely on when potentially looking at an exemption. We do not support the listing of factors against disclosure, because the whole model is proposing that we start from a release-first perspective, and it would have factors in there that support disclosure which would assist agencies in getting over that hump and making them get in the mindset of: What are the factors that are in the public interest to release? But limiting factors I think – the three-step test helps agencies come up with their own view of what the limiting factors are and really engage with the material.

Paul MERCURIO: Okay. Instead of having the factors listed in the legislation, could they be included in OVIC's FOI Professional Standards?

Sean MORRISON: They could be in the Professional Standards, or OVIC could get the power to issue guidelines and agencies could be required to take into consideration the guidelines of OVIC or practice notes. I think one thing we are coming back to here is also: if we going to have a purpose-based legislation and we do not know the information government holds, anything that can be updated without going back to Parliament potentially – that does not confer rights or limit rights – is probably a recommended model, such as guidelines.

The CHAIR: Paul, did you want to ask your next question?

Paul MERCURIO: I am done.

The CHAIR: You are done? Forgive me. All right, back to you, Ryan.

Ryan BATCHELOR: We have had evidence from the Australian Lawyers Alliance or association, one of the two, that in some circumstances – particularly they mentioned in cases of children who used to be in institutional care seeking access to their records but also for prisoners seeking access to their health records – often they encounter what I am characterising as, like, a batch limit, a page limit, so 500 pages at a time for children who used to be in institutional care and 150 pages for prisoners seeking access to their health records. Is that a practice that OVIC has come across, and in your opinion is it consistent with the Act?

Sean MORRISON: It is a practice OVIC has come across. I think, without knowing all the facts and circumstances, I would have issue with that practice if it was just applied without actually engaging with the request and the material, because the test really is: Is it an unreasonable diversion of resources? Someone's request for 500 pages for one set of material may differ in another context. So I think I would have issues with a blanket approach. I understand why agencies do do that. My belief is that it is not to limit the access to the applicant; it is more about competing demands. Again, we propose that those demands would be reduced if there were greater release pathways.

Cara O'SHANASSY: And certain documents are going to take longer to review than others, so you need to really understand in each individual situation what are the documents that are being requested and how long is that actually going to take you to process.

Sean MORRISON: Handwritten notes take longer than computer –

Ryan BATCHELOR: Yes, of course. I may have misinterpreted the evidence that we were receiving, but it seemed that therefore people were having to come back and do further and further applications, which just seems to me to be a thing that clogs up the system rather than making it more efficient.

Sean MORRISON: I think the counterpoint to that is: maybe agencies would argue, 'Well, we would have one officer offline for X amount of days if they were doing 2000 pages, but we could batch it up.' People can only consume that information in a certain amount of time, and by the time they consume that they can come back and get another batch, and in the meantime we will have done another three requests for another person.

Cara O'SHANASSY: You could do that with the applicant's agreement.

Ryan BATCHELOR: Yes.

Sean MORRISON: Yes.

Cara O'SHANASSY: You can say to them –

Ryan BATCHELOR: You could set up a release schedule with their agreement and consent.

Sean MORRISON: Yes.

Cara O'SHANASSY: Yes.

Ryan BATCHELOR: I just worry that for, particularly children leaving institutional care who have been traumatised quite significantly in many cases by their interaction with the state for their entire lives, we appear to be taking an approach with respect to giving them information about things like who their parents are that potentially is retraumatising or continuing that trauma, and it is kind of the opposite approach that we should be taking. I thought if there was any guidance that you might have to practitioners in the system that would enable us to collectively facilitate a more understanding and caring approach, particularly for those people, but, also, understandably, in the prison system as well, those who for other reasons are institutionalised by the state, it would be preferable.

Sean MORRISON: I will say that our proposal would potentially allow a different release pathway for that, because I understand agencies have concerns that they are not covered by the protections to, for example, give people inspection to their records or provide the whole file through a solicitor.

Ryan BATCHELOR: You used a phrase there – 'cover'. What do you mean by that?

Sean MORRISON: Well, there are certain protections that apply to an authorised officer when releasing information as part of a formal request, but not an informal release, so even though section 16 says you can provide material outside of these formal pathways, you do not get the protections from liability.

Ryan BATCHELOR: So you would argue that the informal release pathway should attract a protection from liability if it is done for a public purpose?

Sean MORRISON: Yes, acting in good faith.

Ryan BATCHELOR: Acting in good faith, yes. There would need to be a qualifier on the protection, but there should be a liability protection in place.

Sean MORRISON: Yes, because of course there is the tension between – agency officers of course are not authorised to release information without proper authority. It would be authorised officers acting in good faith.

Ryan BATCHELOR: Yes. If you would not mind following up on the batch issue, I think –

Sean MORRISON: Yes, we can –

Ryan BATCHELOR: Ahead of any recommendations the Committee might make, and ahead of any legislative response from the Government, it appears to me to be a discrete area of concern that warrants potentially a bit more of an understanding and compassionate approach.

The CHAIR: Thank you. Just briefly, I wonder if I could take you back to health information, which seems to consume a lot of resources. There are a lot of requests for health records, often made by lawyers looking to review quality of care. Big hospitals employ a number of staff to review every page, as I understand it, looking to redact references to third-party sources. For example, a family member said, 'This patient is doing this thing,' and that might be very sensitive and need to be redacted. Has OVIC given any thought to how that process could be made more efficient so that people experience less delay and there are less hospital resources consumed?

Sean MORRISON: Not down to the operational level, but we do note in our submission that for a third-generation law to work effectively, potentially there might need to be systemic change from operational systems and the way information is recorded. If you are starting from a blank page, you would record information where the actors in that scenario would be listed maybe at the top of the document and then de-identified throughout, or information passed on to medical practitioners could be hived off from the particular clinical notes. I think it comes back to record keeping in the first instance, noting that hospitals are quite busy and record systems take a significant amount of money and time. The other way is to introduce, again, an informal release pathway where there are protections, and potentially to engage with the people who provide confidential information at the first point and say, 'This is going on the record. Are you happy for me to?' At point of contact it could be recorded. But it is a difficult question.

The CHAIR: Sure. Thank you. Any further questions from the Committee? Alright. You have given us a good amount of time. Thank you very much, both of you, for your detailed submission and for coming along today. Thanks again, and we will suspend the hearing briefly and resume in a few minutes with our next witness.

Witnesses withdrew.