Submission No 55

INQUIRY INTO THE OPERATION OF THE FREEDOM OF INFORMATION ACT 1982

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Inquiry into the Freedom of Information Act 1982

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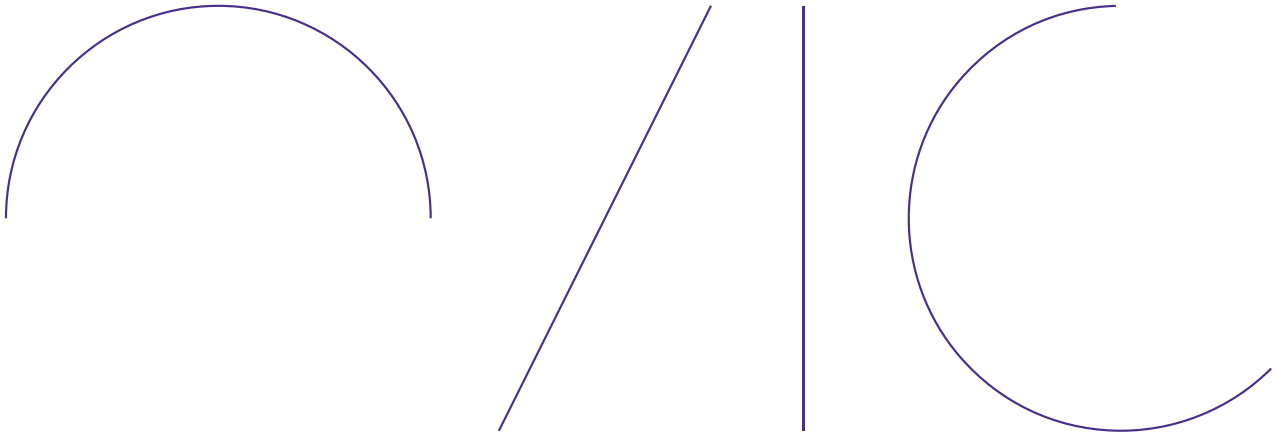

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Foreword

The Office of the Victorian Information Commissioner (**OVIC**) has combined oversight of freedom of information, privacy and information security under the *Freedom of Information Act 1982* (Vic) (**FOI Act**) and the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**).

The FOI Act creates a legal right for individuals to access government-held information. However, this right is significantly curtailed due to systemic issues with how the FOI Act operates.

Previously, Victoria was a leader in access to information (**ATI**) legislation in Australia. We were the first State in Australia to enact freedom of information legislation, after the Commonwealth.

Forty years on, our 'first generation' FOI Act has fallen well-behind other jurisdictions and is no longer fit for purpose. Victoria requires new third generation ATI legislation that builds upon second generation ATI legislation enacted in other jurisdictions, such as the Commonwealth, New South Wales and Queensland.

Victoria needs a modern ATI framework and legislation that:

- brings Victoria up to date with Australian and international best practice;
- reflects how modern government creates, stores, and manages information;
- supports the maximum disclosure of information;
- pushes more information to the public through proactive release mechanisms;
- authorises the informal release of information;
- situates formal requests as a last resort; and
- makes it easier and more efficient to publish and release information to the public.

The present legislative framework is contributing to an increasing number of FOI requests, increasing delays in providing decisions, high volumes of reviews and complaints to OVIC and to the Victorian Civil and Administrative Tribunal (**VCAT**), decreasing number of decisions granting access to information, and increasing costs to government and to the justice system.

Each of these issues present separate and compounding barriers to timely and cost-effective access to information, resulting in significant delays for the public and burdening workloads for agencies.

These issues are symptoms of a poorly functioning ATI system that is caused by a range of factors, including:

- the policy model of the FOI Act, which uses a 'pull' method for accessing information and has limited mechanisms for proactive and informal release of information;

- unnecessary procedural and administrative processes that make the FOI Act complex for the public to navigate and agencies to administer;
- the lack of an overarching framework or standard which must be met before access to a document may be refused, provisions which deem documents absolutely exempt, inconsistent public interest tests, and provisions in other pieces of legislation (such as secrecy provisions and exclusions from FOI) which undermine the object of the FOI Act;
- the inconsistent and piecemeal approach of prior legislative amendments over the past 40 years that have added to the complexity of administering the FOI Act; and
- information management practices and policies that do not consider access-by-design or access to information.

OVIC recommends a complete overhaul of Victoria's ATI framework and legislation. To support a new ATI law that should operate as a last resort, amendments are also recommended be made to the *Health Records Act 2001* (Vic) (HR Act) and PDP Act to make it easier and more efficient for individuals to obtain access to their personal and health information outside of the ATI law, subject to limited situations in which a person seeks review of a decision to refuse access to information.

OVIC recognises that reform and modernisation of the FOI Act is a significant step for Victoria. While a progressive State, it is traditional in the way in which it views and approaches providing information to the public. Agencies have become comfortable and familiar with the requirement for a member of the public to make a formal application in writing to government for a document, paying a fee, processing the request and responding by way of a formal decision. This approach currently applies whether a person seeks access to their own personal and health information or non-personal information.

In 2008, the Solomon Report considered, '[t]he sustaining, missing link in getting government from a freedom of information law to real enhancements in openness and accountability is a politically supportive and enabling broader information policy context'.[1] The VAGO audit similarly considered that whole-of-government leadership and governance was required to drive the significant cultural and operational changes needed to achieve open access to public sector information.[2]

OVIC seeks significant changes to the FOI Act to ensure Victoria moves to a modern, third generation ATI law that empowers the public sector to facilitate the free flow of information, improve government accountability and transparency, and public trust in government. A strong, positive culture of access-by-design and transparency led 'from the top' and promoted at all levels of government will be critical to the success of a new ATI law. Victoria needs a 'champion' within government and a non-partisan commitment by the Victorian Parliament.

[1] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 15.

[2] Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015).

The Victorian Parliament's Integrity and Oversight Committee's Inquiry into the FOI Act provides an important opportunity to modernise Victoria's ATI framework and legislation.

Central to a well functioning ATI system is a well functioning ATI regulator. It is critical that OVIC has the necessary functions and powers under its legislation, adequate funding and resources to effectively carry out those functions and powers, and has experienced and appropriately skilled Commissioners and staff to fulfil the duties of their roles. To fulfil our statutory functions, OVIC must also be, and must be seen to be, independent. In addition to the legislative reforms set out in this submission, OVIC also seeks a number of necessary changes to strengthen its independence from government and to ensure it has the necessary powers to be an effective and trusted regulator.

Joanne Kummrow
Acting Information Commissioner

Summary of submission

This submission is structured as follows:

- Recommendations
- Where it all started
- What is a best practice access to information law?
- Time and costs of providing access to information (Term of Reference 8)
- ATI law policy models (Term of Reference 1)
- Proactive and informal release (Term of Reference 2)
- Access to personal and health information (Term of Reference 3)
- Information management and record keeping (Term of Reference 4)
- Increasing disclosure of information using technology (Term of Reference 5)
- Purposes and principles of access to information (Term of Reference 6)
- Processes under the Act (Term of Reference 7)

The submission outlines the purpose, benefits, and principles of a best practice ATI law near the beginning of the submission (this relates to Term of Reference 6). OVIC refers to these principles throughout to support changes that would bring Victoria's ATI system up to date with best practice ATI laws. OVIC further discusses Term of Reference 6 later in the submission.

The submission also addresses Term of Reference 8 near the beginning, to provide context to some of the challenges with how the FOI Act is currently administered.

OVIC includes a table of all recommendations at the start of the submission. The recommendations are structured according to each Term of Reference. The submission also includes references to each recommendation in the body of the submission.

Recommendations

Policy model (Term of Reference 1)

1	Replace the FOI Act with a modern, third generation access to information law (**a new ATI law**), that: (a) uses plain language, simple processes, and minimal procedural requirements; (b) adopts a 'push' model of access, authorising the proactive and informal release of information, and positioning formal requests as a last resort; (c) implements the purposes and principles of best practice ATI law; (d) is fit for purpose in the digital age; and (e) retires the phrase 'freedom of information' in favour of modern access to information (**ATI**) language.	45, 46
2	Insert a requirement for an independent review of a new ATI law every four years, to be tabled in Parliament.	46

Mechanisms for proactive and informal release (Term of Reference 2)

3	Include four authorised access pathways in a new ATI law: (a) authorised mandatory proactive release of key information about the agency or Minister and key categories of documents of significant public interest, (b) authorised proactive release of additional information; (c) authorised informal release; and (d) authorised formal release, with a disclosure log.	52, 67, 70
4	(a) Protect agency officers and Ministers from civil liability in defamation and breach of confidence, and criminal liability, for providing access to information in good faith under the authorised access pathways.	53, 67, 70

	(b) Extend the same protection to the Information Commissioner, Public Access Deputy Commissioner and members of OVIC staff in respect of the performance of the Commissioners' functions under a new ATI law.	
5	Include a requirement for agencies and Ministers to review their proactive release program as appropriate, and at least every 12 months.	60, 67
6	The information and documents for authorised mandatory proactive release should include: (a) the agency's or Minister's structure and functions; (b) how the agency's or Minister's functions, in particular its decision making processes, affect members of the public; (c) the arrangements that enable members of the public to participate in the formulation of agency or Ministerial policy and the exercise of the agency's or Minister's functions; (d) the types of information held by the agency or Minister; (e) the types of information the agency or Minister makes (or will make) publicly available and whether it is available for free or for a charge; and (f) additional information for local government; (g) operational information (including policies, guidelines and procedures relating to policy and decision making, and decisions, reports, statements and submissions made by the agency or Minister); (h) information about the agency's or Minister's strategy and performance, including in documents tabled in Parliament; (i) financial information, including government contracts, projected and actual income and expenditure, tendering, procurement, and grants; (j) an Access to Information Policy (or similar); (k) information released routinely in response to formal requests; (l) information about how to informally and formally request information from the agency or Minister; (m) a record of documents determined not suitable for proactive release;	61, 67

	(n) a record of information considered for proactive release, arising from information released informally or in response to a formal request; and (o) a general obligation to release any other documents or information of significant public interest.	
7	Include legislative principles to guide the proactive release of information. For example, information and documents should be published in a way that is practical, timely, clear, easy to find, capable of being understood and accessible to members of the public, and there should be an obligation to facilitate public awareness of the availability of the agency's or Minister's information.	62
8	Include a requirement for information and documents under authorised mandatory proactive release to be made available for free on an agency's or Minister's website or digital platform, with exceptions.	63
9	For authorised mandatory proactive release and authorised proactive release of additional information, include a requirement for an agency or Minister to take reasonable steps to provide an alternative method of access to persons who cannot access the freely available method due to a disability, incarceration or other impediment to access.	63, 68
10	For authorised informal release, include a requirement for information to be made available for free or at the lowest reasonable cost.	70
11	Include a requirement for an agency or Minister to consider whether information or documents requested from an agency or Minister under a formal request can be released informally (under the authorised informal release pathway).	70
12	Include a requirement for an agency or Minister to provide reasonable advice and assistance to a person making an informal request for information.	70
13	For information and documents released under informal and formal release, include a requirement for an agency or Minister to consider proactive release of the information or document.	71
14	Include a requirement for documents released under formal release, to be included in an online, searchable disclosure log, governed by legislative principles that require information in a disclosure log to be easy to find and use, up-to-date and useful.	76

15	(a) Ensure adequate reporting and regulatory oversight by the Information Commissioner of agencies' and Ministers' implementation of proactive release requirements, including disclosure logs. (b) Include a requirement for an agency or Minister to prepare and publish an 'Access to Information Policy', or similar.	82
16	Ensure the Information Commissioner has the power and functions to enforce non-compliance, handle complaints, and conduct investigations, examinations and audits into agencies' and Ministers' implementation of proactive and informal release requirements, including disclosure logs.	82

Access to personal and health information (Term of Reference 3)

17	Enable agencies and Ministers to provide access to an individual's own personal and health information under the informal release pathway.	87
18	(a) Enable an individual to request access to their own personal and health information under the PDP Act and the *Health Records Act 2001* (Vic) (**HR Act**). (b) Re-draft the access and amendment provisions in the PDP Act and HR Act to remove technical requirements and use plain language. (c) Consider simplifying the regulation of privacy by consolidating the Health Privacy Principles (**HPPs**) and the Information Privacy Principles (**IPPs**) and moving the HPPs under the Information Commissioner's jurisdiction.	87
19	Retain the ability for an individual to request access to their own personal and health information under a formal request under a new ATI law (to ensure the individual has a right to an independent review of the decision).	87
20	Remove the ability of an individual to request an amendment and correction of their personal information under a new ATI law. Enable the amendment and correction of personal records under the PDP Act and the HR Act.	87

Information Management and record keeping (Term of Reference 4)

21	(a) Revisit a whole-of-government information management framework and associated policy and governance documents, that includes consideration of public access to all public sector information (not just data). (b) Embed the purposes and benefits of ATI, and the principle of access-by-design into the whole-of-government information management framework.	93, 95
22	(a) Include a requirement for agencies and Ministers to maintain an information asset register. (b) Include a requirement for agencies and Ministers to record in an information asset register, whether information can be or has been made available to the public under a new ATI law, and if so, under which access pathway. (c) Include a requirement for agencies and Ministers to publish a public version of their information asset register.	96
23	Include a requirement for agencies and Ministers to appropriately record and publish information relating to the use of artificial intelligence (AI) and machine assisted decision making.	98
24	Include a requirement for an agency or Minister to have an immediate right of access to documents created by or in the possession of contracted service providers, including sub-contractors, that perform functions on behalf of an agency or Minister, or that supply technology to an agency or Minister, that is used by an agency or Minister in its decision making processes.	100
25	Include a requirement in an ATI law for record keeping, information management and ATI training for all public sector employees.	30

Increasing disclosure with the use of technology (Term of Reference 5)

26	Explore the possibility of a centralised whole-of-government access to information portal, disclosure log and information asset register. The portal could enable individuals to make and track requests for access, and search for publicly available information across the entire Victorian public sector.	77, 102

27	Explore the use of machine assisted technology to help improve the timeliness of processes used by an agency and Minister in responding to formal access requests.	102
28	Explore the use of technology to assist agencies to implement access-by-design into information management processes and practices.	102

Implementing the purposes and principles of a best practice ATI law (Term of Reference 6)

29	Include a plain language objects clause in a new ATI law that: (a) recognises the right of any person to access information held by the Victorian public sector; (b) includes a presumption in favour of the maximum disclosure of information; (c) includes a requirement for any limitations on the right of access to be interpreted narrowly and to give effect, as far as is possible, to the presumption in favour of access; (d) includes Parliament's intention for the proactive and informal release pathways to be used first, and formal requests to be a last resort; and (e) includes a list of the purposes and benefits of ATI, and Parliament's intention for the ATI law to give effect to those purposes and benefits.	108
30	Ensure a new ATI law applies to all types of records and storage mediums used by and created on behalf of agencies and Ministers, including electronic files and communications, archived documents.	112
31	Include: (a) an obligation in a new ATI law for an agency or Minister to create a document containing information requested by an applicant if the requested information is not already contained in a document of the agency or Minister. (b) an exception to this obligation where the agency or Minister does not have the tools required to create the document.	113
32	Ensure a new ATI law applies to official documents of a Minister, including a former Minister.	115

33	Include an exception to the right of access for publicly available documents and information.	115
34	Include an exception to the right of access for repeat requests, modelled on section 60(1) of the GIPA Act so that an agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason): (a) the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision on the application; (b) the applicant has previously been provided with access to the information concerned under the ATI law or the FOI Act.	116
35	Include a power in a new ATI law for VCAT to declare a person to be a 'vexatious applicant' upon application by an affected agency or agencies.	117
36	Include: (a) An exception in a new ATI law that would enable an agency or Minister not to process a request if doing so would be a substantial and unreasonable diversion of its resources and there is no overriding public interest to process it. (b) A presumption in favour of processing the request and include factors that an agency must take into account when determining whether processing the request would meet the threshold for this exception.	120
37	(a) Ensure that agencies or Ministers cannot rely on the substantial and unreasonable diversion of resources exception on the grounds of consultation with third parties. (b) Ensure that where consultation with third parties would be a substantial and unreasonable diversion of resources, the agency can choose not to conduct consultation and proceed to process the request.	120, 159
38	Include a requirement that agencies and Ministers must not avoid their statutory duties under a new ATI law by withholding resources or failing to provide sufficient resources.	120
39	Do not include the exception in section 25A(5) of the FOI Act in a new ATI law.	121
40	Include a Part in a new ATI law titled, 'Limited exceptions' or similar, to cover the limited reasons an agency or Minister may refuse access to information.	124, 127

41	Include a presumption in favour of access and Parliament's intention for the limited exceptions to be interpreted narrowly.	124, 127
42	Ensure that the limited exceptions include legitimate protected interests only (step 1 of a three-part test).	127, 128
43	Ensure that all limited exceptions are subject to a substantial harm test (step 2 of a three-part test).	127, 130
44	Ensure that all limited exceptions are subject to a public interest override, that requires information to be released where the public interest in favour of disclosure outweighs the harm (step 3 of a three-part test).	127, 133
45	Ensure that a new ATI law lists irrelevant considerations that must not be taken into account when determining whether an agency or Minister can refuse access to information.	129
46	Ensure there is no ability in new ATI law for an agency or Minister to issue conclusive certificates.	130
47	(a) Ensure that overall time limits on limited exceptions are set appropriately. (b) Set an overall time limit of five years on exceptions for Cabinet documents and the effectiveness and integrity of internal decision making processes (section 30 of the FOI Act).	125
48	Narrow the Cabinet documents exception to: (a) Ensure that the exception applies to documents that were prepared for the sole or substantial purpose of submission to Cabinet or one of its committees and were actually submitted to the Cabinet and its committees. (b) Ensure that the exception applies to documents that disclose deliberations rather than a decision of the Cabinet. (c) Ensure the exception is subject to the substantial harm test and public interest override.	139
49	Enable an administrative access scheme for the proactive release of Cabinet documents.	137

50	Ensure that the exception for internal documents is limited to protecting the effectiveness and integrity of internal decision making processes and is subject to the substantial harm test and public interest override.	141
51	Use the definition of 'personal information' in the PDP Act, and 'health information' in the HR Act, in a new ATI law.	142
52	Update Victorian government policies and contracts (for example, those created by the Victorian Government Purchasing Board), to require agencies to include a clause in every procurement contract to the effect that contracts between private organisations and government should be open to public scrutiny.	144
53	Ensure that in situations where independent contractors, consultants and legal advisers are engaged by an agency or Minister, the agency or Minister is not permitted to refuse access to information that purely shows the agency or Minister fulfilling a statutory function and fulfilling or delivering a governmental service.	144
54	Conduct a review of all secrecy, confidentiality, and exclusion provisions in Victorian legislation.	146
55	Require an agency or Minister to consider waiving privilege before refusing access to the document.	147
56	Include an offence in a new ATI law similar to section 120 of the GIPA Act, to make it an offence to destroy, conceal or alter any record of government information for the purpose of preventing its disclosure under a new ATI law.	148
57	Include an offence in a new ATI law for wilfully obstructing access to information under the Act, including directing or improperly influencing an officer to make a decision contrary to the requirements of a new ATI law.	148
58	Include an offence in a new ATI law for wilfully obstructing, hindering or resisting the Information Commissioner, Deputy Commissioners or staff of OVIC (similar to section 63F of the FOI Act)	148

Processes under the Act (Term of Reference 7)

59	Include a requirement in a new ATI law for an agency to acknowledge receipt of a valid request in writing.	150

60	Have a nominal fixed application fee for formal requests under a new ATI (i.e., $30).	151
61	Ensure it is free (no application fee or access charges) for an individual to access their own personal or health information under the PDP Act, the HR Act or a new ATI law.	151, 153
62	Include a general discretion to waive, reduce or refund any fees or charges payable under a new ATI law.	153
63	Ensure a new ATI law allows an agency or Minister to charge for copying costs (where copying is required) only and provides for a certain number of copy pages to be accessed for free (a new ATI law should not include charges to search for documents, create a document or supervise inspection or the viewing of a document).	153
64	Include in the ATI law a power for the Information Commissioner to review an agency or Minister's decision to impose an access charge and the quantum of access charges (including a decision not to waive access charges).	154
65	Include a requirement in a new ATI law for an agency or Minister to take reasonable steps to enable an applicant to receive the requested information in a form that is accessible to the applicant.	155
66	Enable the full or partial transfer of a request to another agency or Minister under a new ATI law.	156
67	Retain in a new ATI law, the current time limits in the FOI Act for processing a request (30 days).	157
68	Include more flexible and uniform third party consultation requirements in a new ATI law.	159
69	Include a general obligation in a new ATI law for an agency or Minister to provide an edited copy of a document, that provides access to the remainder of a document, without disclosing the exempt information.	161
70	In a new ATI law, retain the following features of the FOI Act in formal requests: (a) the ability for any legal person to make a request (an individual or organisation); (b) the applicant does not need to provide reasons for their request; (c) the applicant does not need to identify themselves;	155, 162

	(d) requests must be made in writing (electronic or hard copy), with no requirement to use an official form or to explicitly state that it is a request made under the ATI law; (e) requests must provide enough information as is reasonably necessary to enable the agency or Minister to identify the requested information or document; (f) the duty to assist a person to make a request in a way that complies with the requirements of a new ATI law or to direct the applicant to the agency or Minister that is more likely to hold the requested information; (g) the requirement to consult with the applicant to assist in identifying the information or documents requested and to otherwise make a valid request; (h) the requirement to decide requests and provide access as soon as possible, with clear time limits, and extensions of the time limit; (i) the requirement to provide access in the form requested by the applicant, subject to clear and limited exceptions, such as protection of the record, infringement of copyright and unreasonable interference with the operations of the agency; and (j) no limitations on the use of information received in response to a formal request.	
71	Retain the Information Commissioner and Public Access Deputy Commissioner's current functions and powers in a new ATI law (including the powers to undertake reviews, handle complaints, provide advice, education, and guidance to agencies, Ministers and the public, issue Professional Standards and conduct investigations).	165
72	Include the following additional functions and powers for the Information Commissioner and Public Access Deputy Commissioner in a new ATI law: (a) Enable the Information Commissioner and Public Access Deputy Commissioner to delegate the function of making a fresh decision to OVIC staff. (b) Insert a new function for the Information Commissioner to prepare guidelines on a new ATI law which must be considered by agencies and Ministers when interpreting the legislation. (c) Ensure all ATI functions and powers are granted to both the Information Commissioner and the Public Access Deputy Commissioner. (d) Ensure OVIC is granted appropriate powers and sanctions to regulate compliance with a new ATI law, Professional Standards and Guidelines. (e) Include a power for a Commissioner to require an agency or Minister to make an FOI decision within a nominated period of time.	165

	(f) Insert a new function to allow the Public Access Deputy Commissioner to also commence an own-motion investigation into an agency or to direct an agency to take certain action following an investigation into a complaint, non-compliance or a breach of the Professional Standards or Guidelines.	
73	Recommend the following regarding protecting and enhancing OVIC's independence: (a) OVIC should be solely accountable to the Committee through the provision of an annual report on its performance and other data required under a new ATI law; (b) OVIC should not be required to report to a government department on its performance; (c) OVIC should receive its annual funding through the Victorian Parliament; (d) OVIC should submit its budget bids for additional funding, once endorsed by the Committee, directly to the Treasurer (through the Department of Treasury and Finance); and (e) salaries of the Information Commissioner, Public Access Deputy Commissioner and Privacy and Data Protection Deputy Commissioner should be reviewed and set by the Remuneration Tribunal.	166
74	Retain the current agency and Minister annual reporting requirements in the FOI Act in a new ATI law, subject to amendments that remove outdated items.	82, 167
75	Include the following additional reporting requirements to OVIC in a new ATI law, for the purposes of the Report on the Operation of the FOI Act: (a) greater reporting and oversight of proactive and informal release pathways in a new ATI law – for example, reporting on the comprehensiveness and currency of the information required to be proactively published, and where this information can be found; (b) reporting on the money spent on external service providers, such as legal fees and consultant fees, in meeting their obligations under ATI law.	82, 167
76	Amend the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and other relevant legislation to enable OVIC to obtain review application data held by VCAT.	167
77	Provide a broad immunity in a new ATI law to offer protection across OVIC for actions done in accordance with the Act and in good faith.	167

Where it all started

Democracy and the right to access information

1. Following the end of the Second World War, the United Nations General Assembly recognised 'freedom of information' as a 'fundamental human right' during its first general session in 1946,[3] and included the right to seek and receive information in the 1948 *Universal Declaration of Human Rights.*[4]

2. The right is guaranteed in Article 19(2) of the *International Covenant on Civil and Political Rights*, as part of the right to freedom of expression.[5] This right includes the freedom to seek, receive, and impart information and ideas and imposes a positive obligation to ensure access to information held by Government.[6]

3. The existence of a dedicated access to information (**ATI**) law is recognised as an essential requirement, to fully realise the public's right to access information, and to build effective, accountable, and participatory democracy at all levels of government.[7]

4. ATI laws reflect the fundamental premise of a democracy; that governments exist to serve their people. In a democracy, public bodies hold information not for themselves, but as custodians of the public good.

[3] United Nations, *Calling of an International Conference on Freedom of Information*, GA Res 59(1), 65th plen mtg (14 December 1946).

[4] United Nations, *Universal Declaration of Human Rights,* GA Res 217 (III) A (10 December 1948), 74. The UDHR is binding on all countries as a matter of customary international law.

[5] United Nations, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200 (XXI) A (16 December 1966), entered into force 23 March 1976.

[6] Resolution 1998/42, 17 April 1998, [2].

[7] See the United Nations Sustainable Development Goal 16.10: 'Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements'; United Nations Office of the High Commissioner for Human Rights, Freedom of opinion and expression: Report of the Office of the United Nations High Commissioner for Human Rights, 10 January 2022, A/HRC/49/38, res 44/12.

Victoria

5. The FOI Act sets out the public's legal right to access documents held by Victorian agencies and Ministers,[8] subject to certain exceptions and exemptions. The purpose of the FOI Act is to extend as far as possible the right of the community to access information in the possession of the Victorian Government.[9]

6. Victoria was the first State or Territory, and the second Australian jurisdiction after the Commonwealth, to enact FOI legislation, with the FOI Act receiving Royal Assent on 5 January 1983. The FOI Act commenced operation on 5 July 1983, making it the oldest State or Territory based FOI Act in Australia.

7. Former Victorian Premier, John Cain, introduced the FOI Act as 'tangible proof of [his] Government's commitment to open government in Victoria', which he described as a 'central need in a democracy'.[10]

8. The FOI Act was introduced on three major premises:

   - members of the public have a right to know what information is contained in government records about themselves;
   - a government that is open to public scrutiny is more accountable to the people who elect it; and
   - when people are informed about government policies, they are more likely to become involved in policy making and in government itself.[11]

9. The FOI Act is one of several integrity mechanisms that allow the public to scrutinise, participate in and have confidence in the work and decisions of government. This, in turn, promotes trust in government and the public sector.

[8] There are around 1,000 agencies in Victoria subject to the FOI Act, including government departments, Local Government, statutory authorities, public hospitals, universities, and TAFE colleges.

[9] This is reflected in the object of the FOI Act, in section 3.

[10] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1061 (Hon. John Cain, Premier of Victoria) https://www.parliament.vic.gov.au/images/stories/historical_hansard/VicHansard_19821014_19821020.pdf.

[11] Ibid.

10. The right to access information is required by section 94H of the Victorian Constitution:[12]

> *There is to be in force at all times as part of the laws of Victoria an Act the objectives and functions of which are to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information by creating a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.*

11. The right to access information is also protected under section 15(2) of the Charter of Human Rights and Responsibilities:[13]

> *Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria…*

12. Apart from the establishment of the Freedom of Information Commissioner in 2012, and OVIC in 2017, the FOI Act has not been substantially amended since it was first enacted in 1982.

13. While the FOI Act provides an essential right of access to government-held documents, there are several issues with how it operates in Victoria, including:

- an increasingly high number of FOI requests received by agencies;
- the high proportion of requests for an applicant's personal information, in particular public hospital patient records;
- the decreasing timeliness in agencies and Ministers making decisions on FOI requests;
- a decrease in the number of FOI decisions granting full access to information;
- the high volume of review applications and complaints made to OVIC;
- an increasing number of review applications made to the Victorian Civil and Administrative Tribunal (**VCAT**) (including deemed refusals where an agency or Minister does not make a decision in time); and
- an increase in the cost to government, its agencies and the civil justice system.

14. These issues contribute to the time and costs involved in administering the FOI Act (**Term of Reference 8**) and impacts a person's right to receive fulsome and timely access to documents.

[12] *Constitution Act 1975* (Vic), section 94H.

[13] Charter of *Human Rights and Responsibilities Act 2006* (Vic), section 15(2).

15. The issues outlined above are symptoms of a poorly functioning ATI system, caused by a range factors, which are increasing in scope and impact.[14] They will continue to worsen unless significant legislative reform to Victoria's ATI framework and legislation occurs, which addresses the primary causes of the issues, namely:

    - the policy model of the FOI Act uses a 'pull' model of information access with limited mechanisms or incentives for proactive or informal release by agencies or Ministers (**Terms of Reference 1, 2 and 3**);[15]
    - unnecessary formal procedural and administrative processes making the FOI Act complex and burdensome for agencies and the public to navigate (**Terms of Reference 6 and 7**);
    - information management practices and policies that do not consider transparency or openness by design or access to information (**Term of Reference 4**);
    - the FOI Act is 40 years old, has never been substantially amended, and has not kept pace with modern notions of government including the use of technology and the digital age (**Term of Reference 5**); and
    - inconsistent and piecemeal approach of prior reforms, adding to the complexity and technicality in administering the FOI Act.

16. Victoria needs a new, modern ATI framework and legislation that makes it easier and more efficient for the public to access, and also for government to provide, greater proactive and informal access to information while protecting information from disclosure where the public interest requires it.

17. New ATI legislation should reflect how modern government creates, stores, and manages its information in the digital information age.

18. Victoria can learn from other jurisdictions like the Commonwealth, New South Wales and Queensland that have had second generation ATI legislation in place for some time.

19. Instead of just meeting the other jurisdictions with second generation legislation, Victoria can pave the way for third generation legislation which incorporates learnings from around Australia and overseas.

20. Legislative reform is also an opportunity for Victoria to align its ATI law with broader information management and record keeping policies to enhance how the Victorian public sector creates, manages, and stores its information.

[14] For example, see OVIC's State of FOI in Victoria reports for a snapshot of how the FOI Act has been operating from 2014-15 to 2020-21.

[15] 'Pull' models largely require the public to make requests for information from agencies ('pulling' information out). Compare with 'push' models, such as those in Queensland and NSW, which emphasise proactive and informal release of information in the first instance, and which aim to make formal request a last resort.

21. Without a modern ATI law, Victoria will fall further behind other Australian jurisdictions in advancing and ensuring the public's right to access information. It will also come at a cost to government due to the increasing resources and costs involved in administering the FOI Act, and will have a detrimental impact on the public's trust in government and the public sector.

What is a best practice ATI law?

22. Term of Reference 6 relates to the purpose and principles of ATI legislation. To help guide this submission, OVIC sets out the purpose, benefits, and principles of a best practice ATI framework and legislation. These principles are referred to throughout this submission to support changes that would ensure Victoria's ATI framework and legislation reflects best practice ATI laws in Australia and internationally.

23. OVIC's submission responds to Term of Reference 6 in more detail, later.

Purposes and benefits

24. A strong ATI law promotes public trust in government and the public sector, by supporting:

    a. Transparency. A democratic government should operate in an open and transparent manner. This includes being transparent about how government operates, its functions and powers, activities, expenditure, and decisions. Transparency builds public trust.

    b. Accountability and good governance. In a democracy, the public have a right to political participation, to scrutinise the decisions and actions of their leaders and to engage in full and open debate about those decisions and actions. Democratic governance requires that Ministers and public sector employees are responsible for their decisions and actions. Openness is an important mechanism to identify poor governance practices and support good governance.[16]

       Accountability requires Ministers and agencies to provide information and explanations to the public about various aspects of their decisions and activities, such as the economy, welfare, healthcare, public infrastructure, procurement, and grants.[17] A failure of transparency makes it almost impossible to achieve accountability.

[16] Office of the United Nations High Commissioner for Human Rights, Good Governance Practices for the Protection of Human Rights (2007), 2, 5 and 6.

[17] Centre for Law and Democracy and Democracy Reporting International, 'International Standards on Transparency and Accountability', Briefing Paper 47, March 2014.

c. **Participatory democracy.** Access to information supports the fundamental right of an individual to participate in public affairs and to elect government. Without adequate information, members of the public cannot participate meaningfully during elections and in the development of government policies and programs.[18] For example, without access to a draft policy and the background information relied on by a policymaker, it would be difficult for the public to understand the proposal, assess its costs and benefits and provide informed feedback.

   When Ministers and agencies inform members of the public about their actions, and provide reasons and evidence for their decisions, they engage in a dialogue with the public that has the potential to foster trust in the government. The public is in turn, more likely to become involved in policymaking, improving the quality of policy development and decision making, and creating better outcomes for the community.[19]

d. **Combatting corruption and misconduct.** ATI laws are a key integrity tool to address corruption and wrongdoing in government.[20] Transparency reduces corruption and misconduct and improves the public's overall impression of and trust in the public service. Improving the public's access to information reduces the opportunity for officials to pursue policies that are more in their own interests than the interests of the public.[21] As U.S. Supreme Court Justice Louis Brandeis famously noted: 'Sunlight is said to be the best of disinfectants.'

   Conversely, a lack of transparency creates a *perception* that government is corrupt, whether or not actual corruption is occurring. In Australia, whilst community attitudes toward government is relatively positive, perceptions of corruption are on the rise. Transparency International ranks countries out of 100 on its Corruption Perceptions Index (where 100 is very clean and 0 is highly corrupt). In 2022, Australia saw the biggest drop of any OECD country, scoring 75 out of 100, down 10 points from its 2021 score.[22]

[18] Office of the United Nations High Commissioner for Human Rights, Good Governance Practices for the Protection of Human Rights (2007), 2, 5 and 6.

[19] Office of the United Nations High Commissioner for Human Rights, Good Governance Practices for the Protection of Human Rights (2007), 2, 5 and 6. Association of Australian Information Access Commissioners, Statement of principles to support proactive disclosure of government-held information (September 2021).

[20] Mr Frank La Rue, United Nations Special Rapporteur on the Promotion and Protection of the Right Freedom of Opinion and Expression, report to the United Nations General Assembly in 2013 (A/68/362, 4 September 2013), [3].

[21] Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 5, citing Stiglitz, J., 'Transparency in Government', in World Bank Institute, The Right To Tell: The Role of the Mass Media in Economic Development, (Washington DC, 2002), 28.

[22] Transparency International, Corruption Perceptions Index, Australia, 2022.

e. **Human dignity and personal autonomy.** The right to access personal information facilitates basic human dignity and informed personal decision making. Members of the public have a right to know what information is contained in government records about themselves. For example, guaranteeing the right of individuals to access medical records is crucial for helping individuals make decisions about treatment. The ability for an individual to access their own personal information, and correct incorrect data, supports the realisation of Article 17 of the ICCPR, which guarantees that nobody shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[23]

f. **Reducing misinformation and disinformation.** Steady access to reliable government-held information is a key tool in combatting misinformation and disinformation. A government that is consistently open can be trusted by the public as a true source of information. A government that is silent or vague, creates a vacuum, for others to fill with speculation, untruths, and conspiracy theories.[24]

g. **Innovation and economic development.** Access to information facilitates research, innovation, economic growth, and new business opportunities. The open data proactively published by governments around the world, creates opportunities to develop tools that are hugely beneficial to society with high economic value.[25]

   ATI laws also increases the transparency of procurement and grant processes. Unsuccessful businesses and community groups can request information that explains why they failed, allowing them to learn, iterate and come better prepared for future tenders and applications.

h. **Sustainable development.** Access to information on the environment is key to sustainable development and effective public participation in environmental governance.[26] The openness created by access to information laws promotes greater participation and hence greater ownership over development initiatives. This in turn helps to ensure sound development decisions and good governance in the implementation of projects.

[23] United Nations Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, [18] (**UNHRC General Comment No 34**). It also supports the realisation of the right to privacy in section 13 of the *Charter of Human and Rights and Responsibilities Act 2006* (Vic).

[24] Association of Australian Information Access Commissioners, Statement of principles to support proactive disclosure of government-held information (September 2021).

[25] Victorian Auditor General Office, *Access to Public Sector Information audit report* (10 December 2015). Victorian Government, DataVic Access Policy (viewed January 2024).

[26] For example, access to information is an indicator for Sustainable Development Goal 16.2 (16.10.2).

Principles

25. The key principles of access to information are set out in Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (**Principles**).[27] The Principles are endorsed by the United Nations,[28] and provide a useful framework to follow in the design and features of a best practice ATI law.

26. The Principles are summarised below, and referred to, where relevant, in response to each of the Terms of Reference.

    a. **Maximum disclosure.** ATI legislation should be guided by a presumption that all information held by public bodies is accessible, subject to very limited exceptions. This principle recognises that information held by government is a public resource and the public has a right of maximum access to it.

    b. **Obligation to proactively publish.** Public bodies should have to proactively publish, and disseminate widely, key information of public interest.

    c. **Measures to promote open government.** ATI laws should actively promote open government and the benefits of ATI. For example, through mandatory ATI training for all public sector employees, Ministers and advisers; effective information management practices; dissemination of education and guidance; effective reporting and oversight by an independent body; and sanctions for wilful obstruction of access to information.

    d. **Limited scope of exceptions.** Exceptions to the presumption that all public information is accessible must be clear and narrow. Information should only be withheld for legitimate interests, and where the harm caused by disclosure outweighs the public interest in favour of disclosure. The onus is on the agency or Minister to prove harm, in the specific context and circumstances of the proposed disclosure.

    e. **Processes to facilitate access.** Requests for information should be processed rapidly and fairly, and be subject to independent review and oversight. Procedures should be simple and readily understandable.

    f. **Costs.** Individuals should not be deterred from making requests for information by excessive costs.

[27] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016.

[28] United Nations Office of the High Commissioner for Human Rights, Freedom of Opinion and Expression: Report of the Office of the United Nations High Commissioner for Human Rights, 10 January 2022, A/HRC/49/38, res 44/1; Mr Abid Hussain, United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report to the 2000 Session of the United Nations Commission on Human Rights (E/CN.4/2000/63, 5 April 2000); Mr Frank La Rue, United Nations Special Rapporteur on the Promotion and Protection of the Right Freedom of Opinion and Expression, Report to the United Nations General Assembly (A/68/362, 4 September 2013).

g. **Disclosure takes precedence.** Secrecy laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

h. **Protections.** Protection from liability should be provided to individuals who, in good faith, disclose information in the exercise of any power or duty under the ATI law. Public sector employees should not have to fear sanctions for disclosing information under the ATI law.

The relationship between a best practice ATI law and a positive culture

27. A best practice ATI law provides a strong legislative foundation on which agencies may rely to provide access to information. To ensure the aims of the law are properly implemented, it must be supported by a positive ATI culture. As the Coaldrake Review noted: '[c]ulture, and a tone set from the top, is critical to giving effect to the spirit of the legislation.'[29]

28. Many of the recommendations in this submission will, if adopted, fundamentally change how agencies and Ministers provide access to information. This will require a strong, positive culture of access-by-design and transparency led 'from the top' and promoted at all levels of government.

29. For example, whole-of-government leadership and governance of information management is a critical step to creating and supporting a culture of maximum and proactive disclosure of public sector information. Strong leadership sets a clear expectation from the top that government is to be open, transparent and accountable, and that implementing the spirit of the ATI law is a key integrity mechanism and measure of good governance. This is true of senior and executive leadership within agencies too.[30]

30. The experience in jurisdictions that have had second-generation ATI laws for over a decade, demonstrates that a strong ATI law, on its own, will not substantially improve the proactive release of public sector information.[31]

31. Providing ongoing education to public sector employees on their record keeping, information management and ATI responsibilities, and properly resourcing agencies to implement strong information management practices will be critical to the success of a new ATI law.[32]

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[29] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022, 27.

[30] For example, research commissioned by OVIC into the culture of FOI in Victoria and on behavioural change found agency leadership is an enabler of transparency, and that agency leadership must value and have confidence in mechanisms like proactive and informal release and its benefits. Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021). Decision Design, Proactive and Informal Release Behaviour Change Final Report – Practical recommendations to increase proactive and informal release (June 2021).

[31] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022.

[32] See Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 6 (Principle 3: Promotion of Open Government); Mr Frank La Rue, United Nations Special Rapporteur on the Promotion and Protection of the Right Freedom of Opinion and

The time and costs involved in providing access to information (Term of Reference 8)

(8) the time and costs involved in providing access to information

32. The time and costs in providing access to information are an issue with Victoria's ATI system, and a symptom of a poorly functioning system that requires change.

33. Factors such as increasing numbers of FOI requests and subsequent workload, decreasing timeliness in making FOI decisions, high volumes of reviews and complaints made to OVIC, and increasing numbers of VCAT review applications, contribute to the increasing time and costs spent by the public sector in administering the FOI Act.

34. OVIC's response to Term of Reference 8 addresses the time and costs involved in providing access to information in response to formal FOI requests. This is the predominant mechanism used to access government-held information in Victoria.

35. This part outlines FOI data collected by OVIC and reported in its annual reports on the performance of agencies and Ministers in administering the FOI Act. OVIC collects FOI data from around 1,000 agencies and Ministers subject to the FOI Act and reports on the operation of the Act each financial year.[33] The data concerns FOI requests received, decision making on FOI requests, OVIC reviews and complaints arising from FOI requests, costs incurred, and challenges faced by agencies and Ministers in administering the FOI Act.

36. OVIC does not have data on the time and costs involved in providing access to information proactively or informally. These alternative access mechanisms are not well supported under the FOI Act and agencies and Ministers are not required to collect data, or report to OVIC, on them.

37. The data reported to OVIC by agencies and Ministers indicates that the time and costs of responding to formal FOI requests are a significant and increasing burden. In summary, the data demonstrates:

Expression, Report to the United Nations General Assembly (A/68/362, 4 September 2013) [104]. For example, the Australian Broadcasting Corporation (**ABC**) noted several steps it took to foster a more responsive FOI culture, which enabled it to improve FOI timeliness from 56% in 2021 to 93% in 2023, including: increasing FOI resourcing, conducting an internal FOI education campaign, introducing mandatory FOI training, and establishing FOI champions and contact people across the organisation. See, The Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), [3.77].

[33] OVIC reports on the operation of the FOI Act by agencies and Ministers in its annual reports. These reports include data collected from agencies and Ministers including the number of requests received, timeliness of responding to requests, and what kinds of decisions they make on requests. OVIC has also published reports looking at data over several years to look at FOI trends over time, measure the effectiveness of FOI in Victoria, and identify areas for improvement.

a. an increasing number of FOI requests received;

b. decreasing timeliness in making decisions on FOI requests;

c. an ongoing high volume of review applications and complaints made to OVIC;

d. an increasing number of review applications made to the Victorian Civil and Administrative Tribunal (**VCAT**) (including deemed refusals where an agency or Minister does not make a decision in time); and

e. an increase in the cost to government and the civil justice system.[34]

Increasing number of FOI requests and subsequent workload

38. Victorian agencies and Ministers receive more FOI requests than any other Australian jurisdiction, including the Commonwealth. In 2022-23, Victorian agencies received 48,117 requests, the highest number of requests ever received.[35] Conversely, Commonwealth agencies received 34,225 requests in the same period.[36]

39. Victoria also receives one of the highest rates of FOI requests per capita. Based on currently available data, in 2021-22, application rates per 1,000 people in jurisdictions with 'pull' models of access were 7.6 in Western Australia, 6.6 in Victoria, 6.5 in the Northern Territory and 5.5 in South Australia.[37] Whereas, during the same period, application rates in jurisdictions with 'push' based legislation were 1.4 nationally, 2.6 in Tasmania, 2.7 in New South Wales, and 3.5 in Queensland.[38]

40. On average, from 2014-15 to 2022-23, each FOI decision maker in Victoria had 62.02 requests per year to process.[39] The workload for the top 30 Victorian agencies, which between them receive around 84% of all FOI requests, is even higher, with an average of 173.2 requests per year per decision maker.[40] Despite a 9.6% increase in the number of FOI decision makers from 2014-15 to 2022-23, the overall workload of FOI decision makers increased by 32.2%.[41]

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[34] See, for example, Victorian Information Commissioner, *State of Freedom of Information in Victoria: Five years in review 2014 to 2019* (February 2020).

[35] OVIC, Annual Report 2022-23, 108.

[36] OVIC, Annual Report 2022-23, 138.

[37] National dashboard – Utilisation of Information Access Rights 2020-21. The submission discusses 'pull' and 'push' models under the heading 'ATI law policy models (Term of Reference 1)'.

[38] Ibid.

[39] FOI decision maker refers to a person authorised to make an FOI decision under section 26 of the FOI Act.

[40] OVIC, Annual Report 2022-23, 117.

[41] Overall workload refers to requests per decision maker.

41. In 2022-23, there were 6,867 requests received but not finalised in the financial year. Notably, as of November 2023, Victoria Police had over 3,220 open FOI requests and over 2,840 overdue requests. FOI backlogs are not unique; there is a growing number of agencies experiencing backlogs of FOI requests.

42. These figures show that the Victorian FOI system in its current form is unsustainable.

43. Anecdotally, OVIC is aware that agencies struggle to fund, and recruit, suitably skilled staff to assist with the FOI workload and the technical work involved in processing requests. This can result in agencies outsourcing their FOI workload to external consultants and law firms, involving a financial cost. In any event, while allocating additional funding may help in the short term in quelling an increase in requests, simply increasing resourcing is not a long-term solution as it fails to address the underlying causes of this FOI workload, which relate to deficiencies in the operation of the current FOI Act as a timely and efficient mechanism for providing the public with access to information.

Decreasing timeliness in making FOI decisions

44. Timeliness refers to agencies and Ministers responding to requests within the statutory requirements of the FOI Act. Agencies and Ministers have 30 calendar days to process a request.[42] However, this timeframe may change for a number of reasons, including where third party consultation is required or where the applicant agrees to an extension of time.[43]

45. In 2014-15, 95% of FOI decisions were made on time. Since that period, timeliness in decision making has trended downwards, with only 78.8% of decisions made on time in 2022-23.

46. When individuals seek access to information through the FOI Act, their need for information is often time critical. They may need information to help them make an important choice. For example, whether to commence or continue legal action, or to support advocacy to government before it makes a decision. Delays in providing access to information are detrimental to the rights of individuals and are, in effect, a denial of the legal right to access information.

[42] In September 2017, the time for deciding a request was reduced from 45 days to 30 days by section 8 of the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Vic).

[43] Section 21(1) of the FOI Act requires an agency to notify an applicant of a decision on a request within 30 days,[43] unless this time is extended for third party consultation or with the applicant's agreement. There are also exceptions under the FOI Act as to how calendar days are calculated for responding to valid requests. The processing period for unreasonably large requests is suspended under section 25A. Additionally, if a deposit is sought from an applicant, the time period commences when the deposit has been paid, or the timeframe can be negotiated to reduce the amount of charges payable: sections 22(5) and 22(6) of the FOI Act.

High volume of reviews and complaints made to OVIC

47. If an applicant is not satisfied with an agency's or Minister's decision, they may apply to the Information Commissioner for review of that decision. Before OVIC was established, between December 2012 and September 2017, this right of review was to the former FOI Commissioner.

48. A small number of applicants seek external review by OVIC, compared with the total number of decisions made every year by agencies and Ministers. For example, in 2022-23, the number of reviews received by OVIC represented around 1.3% of all FOI decisions made in the financial year.[44]

49. From 2014-15 to 2022-23, the number of review applications OVIC received increased by around 28% from 417 in 2014-15 to 536 in 2022-23. Reviews received in 2019-20 and 2020-21 were particularly high, at 646 and 607 respectively.

50. Between 2014-15 and 2022-23, the number of formal review decisions[45] made by a Commissioner[46] that differed from an agency or Minister's original decision increased by 13%. In 2022-23, over half (56%) of review decisions granted access to more information than the agency or Minister's original decision. Common exemptions subject to review include personal affairs information (section 33), opinion, advice and recommendation (section 30), Cabinet documents (section 28), information obtained in confidence from a third party (section 35) and substantial and unreasonable diversion of resources requests (section 25A(1)).[47]

51. Additionally, an applicant may make a complaint to OVIC about an agency or Minister, arising from an FOI request.[48] Common complaints include delays in processing requests within the statutory timeframe, decisions that documents do not exist or could not be located, and inadequate searches for documents.

52. In recent years the majority of complaints have involved delays by agencies in making an FOI decision. There is no power under the FOI Act for a Commissioner to require an agency or Minister to make an FOI decision by a specified date. OVIC supports the Committee's recent recommendation that this power be granted.[49]

53. From 2014-15 to 2022-23, there was a 167% increase in the number of complaints OVIC received (from 243 to 651 respectively). Complaints received in 2021-22 and 2020-21 were exceptionally high, at 825 and 739 respectively.

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[44] OVIC, Annual Report 2022-23, 65 and 113.

[45] Reviews can also be finalised in other ways, such as informal resolution, a fresh decision made by an agency, or a Commissioner dismissing or declining to accept a review application.

[46] Decisions can be made by either the Information Commissioner or the Public Access Deputy Commissioner.

[47] OVIC, Annual Report 2022-23, 71.

[48] Complaints are dealt with in Part VIA of the FOI Act.

[49] Integrity and Oversight Committee, *Performance of the Victorian integrity agencies 2021/22* Final Report, Recommendation 4, 75.

54. The high volume of reviews and complaints shows that the public do not accept decisions being made by agencies and Ministers, and how agencies and Ministers are processing their requests. In particular, the delays experienced in accessing information. The number of review decisions differing from an agency or Minister's original decision also indicates a tendency to deny access to information that should be released.

55. The high volume of complaints and reviews made to OVIC also places an unsustainable resource burden on OVIC to manage. Without further resources, OVIC will be unable to meet the demand to investigate complaints and complete review decisions in a timely manner which will result in further delays in the public exercising their right to access information. It will also likely result in an increase in matters proceeding to VCAT for determination, which will increase administration of justice costs.

Increasing number of review applications received by VCAT

56. If an applicant is not satisfied with a decision made by a Commissioner, they may seek review by VCAT.[50] A small number of applicants seek external review by VCAT, compared with the total number of decisions made every year. For example, in 2022-23, review applications made to VCAT represented around 0.16% of all decisions made by agencies and Ministers in the financial year.[51]

57. From 2014-15 to 2022-23, the number of review applications received by VCAT increased by around 122% from 86 to 191.[52] This overall annual increase in FOI review applications is adding to VCAT's expanding caseload and FOI review applications are also increasing financial and opportunity costs to government and the civil justice system.

58. OVIC understands that at present, all FOI review applications lodged at VCAT are on hold indefinitely until such time as members are available. Whilst new members were recently appointed, their appointment is for the purpose of clearing the backlog of residential tenancy matters and FOI review applications remain on hold.[53]

59. Prior to the hold on determining FOI review applications, VCAT was setting hearings for 8 to 12 months after receiving an application for review. This situation represents a further and significant delay in individuals gaining timely access to information.

[50] In some instances, an applicant may seek review by VCAT directly, without seeking review by the Information Commissioner first. For example, under section 50(1)(e), an applicant may apply to VCAT for a review of a decision of an agency or Minister refusing to grant access to a document that is claimed to be exempt under section 29A of the FOI Act.

[51] OVIC, Annual Report 2022-23, 78 and 113.

[52] VCAT's annual reports from 2014-15 to 2022-23 show the number of review applications initiated under the FOI Act are: 2014-15 (86), 2015-16 (105), 2016-17 (126), 2017-18 (188), 2018-19 (159), 2019-20 (151), 2020-21 (242), 2021-22 (213), 2022-23 (191).

[53] Premier of Victoria, 'New VCAT members to clear backlog and reduce waiting times' (Media centre, 28 November 2023). VCAT Annual Report 2022-23 also refers to its program to reduce the Residential Tenancies backlog.

Increasing costs to administer the FOI Act

60. Agencies spend more money on administering the FOI Act than they collect through application fees and access charges.[54]

61. In 2022-23, agencies spent $21,374,900 on administering the FOI Act, and collected $2,074,217.62 in application fees and access charges combined.[55]

62. On average, between 2014-15 and 2022-23, agencies and Ministers reported spending $21,374,900.89 on administering the FOI Act. This reported cost increased by 14% in that time, from $18,667,625.00 in 2014-15 to $21,374,900.00 in 2022-23.[56]

63. However, the actual cost to government in administering the FOI Act is difficult to quantify and is likely to be much higher. OVIC's annual FOI survey collects data on FOI staff directly involved in processing requests only, not those indirectly involved (for example, the cost of other agency staff who search for documents in relation to a request, undertake internal consultation, provide technical or legal advice about relevant documents, review decisions or report on FOI activities).

64. Similarly, the cost does not include fees for engaging external service providers, including lawyers, to assist with the processing of, responding to or advising on FOI requests, and in review applications dealt with by VCAT. OVIC is aware that some agencies do use external lawyers, however, OVIC does not have oversight of the extent of their use and the costs incurred by government agencies.

65. Therefore, while the reported cost to agencies on administering the FOI Act in 2022-23 was $21,374,900, the true figure is likely to be much higher.

[54] To make a valid FOI request under section 17, an applicant must pay an application fee. Section 17(2B) outlines that agencies may waive or reduce the application fee if payment of the fee would cause financial hardship to the applicant. Access charges are payable when a decision is made to provide access to documents in full or in part. Their purpose is to ensure agencies may recover some of the costs associated with providing access to documents in response to an FOI request. For example, access charges include photocopying documents, providing access to documents in an alternative form, supervising the viewing of documents, search costs, and generating documents from electronic data. Charges must be waived in limited circumstances, including where the applicant is impecunious, and the request is for their personal documents.

[55] Application fees and access charges are not intended to be a cost recovery exercise to administer the FOI Act. As reflected in the objects of the FOI Act in section 3(2), the process for accessing information is intended to be low cost for applicants. The data related to cost to agencies relates to the salary range of staff involved in making FOI decisions and the percentage of their time (rounded to the nearest 5%) they spent on FOI activities.

[56] Victorian Information Commissioner, *State of Freedom of Information in Victoria: Five years in review 2014 to 2019* (February 2020).

ATI law policy models (Term of Reference 1)

(1) The effectiveness of the Act's current policy model, which is based on formal requests for information, and other options available, including options utilised in other jurisdictions

Victoria's first generation 'pull' model of information access

67. The FOI Act's policy model contributes to inefficiencies and challenges with the FOI Act, including the time and costs associated with accessing information through formal requests (Term of Reference 8).

68. The FOI Act is commonly referred to as first generation ATI legislation because it relies on a 'pull' model of information access. This means that for an individual to access a document held by an agency or Minister, in most cases they must make a formal request under the FOI Act.

69. The 'pull' policy model used in the FOI Act has not been revisited since it was introduced in 1982. It reflects a historical understanding, at the time of the Act's creation, that the right to information meant a right to *request* and receive information from public bodies. This is no longer how the right to information is understood and implemented in other jurisdictions in Australia and internationally.[57]

70. Instead, a modern ATI law understands that the best way to give effect to the right to access government-held information, is to 'push' information out to the public.[58] These modernised laws still contain a 'pull' method, but it is positioned as the last resort, not the main or preferred way to provide access to government-held information.

71. In contrast, and reflecting the time of its creation in the early 1980's, the Victorian FOI Act contains limited provisions requiring agencies or Ministers to 'push' information out to the public proactively and informally. The provisions that do exist are out of date and no longer reflect how modern government works, or community expectations.[59]

[57] See, for example, New South Wales, Queensland, the Commonwealth, and New Zealand. Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016).

[58] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), see Principle 2: Obligation to publish.

[59] See, for example, Part II of the FOI Act and *Professional Standard 1.3* which require agencies to publish certain categories of information on their website.

72. ‘Proactive release’ refers to providing access to information outside of a request (for example, publishing a report on a website). ‘Informal release’ refers to providing access to information on request, but outside of the formal processes of the FOI Act. For example, by providing information to a person by email or setting up an informal or administrative release scheme that does not require a formal access request.

73. The ‘pull’ model in Victoria is contributing to the large annual volume of FOI requests that agencies and Ministers receive because of the strong reliance on agencies and Ministers requiring a formal FOI request.[60] This has contributed to an overdependence on formal access requests, rather than incentivising or requiring options for proactive and informal access to information.

74. The ‘pull’ model of information access does not support the principles of maximum and proactive disclosure, that are essential features of best practice ATI law.[61]

75. The FOI Act contains only limited ‘push’ mechanisms. These are discussed under ‘Proactive and informal release (Term of Reference 2)’ below.

Second generation ‘push’ models of information access

76. Jurisdictions such as the Commonwealth, NSW and Queensland introduced second generation ATI legislation in 2009 and 2010 replacing original ‘pull’ models, with ‘push’ models of access to information.

77. A ‘push’ model contains more extensive requirements for agencies to proactively publish and informally release information on an ongoing basis.[62] Under a ‘push’ model, proactive and informal release mechanisms are prioritised, with formal requests for information positioned as a last resort.

78. The move to a ‘push’ model came from recommendations made in a 2008 report by the FOI Independent Review Panel chaired by Dr David Solomon AM (**Solomon Report**). The report considered the following elements should form part of a ‘push’ model:

    a. publication schemes and proactive decision making processes that routinely release information at large (including documents themselves or public versions), or to specific interest sectors, as enabled by a range of ICT features;

[60] See ‘increasing number of FOI requests and subsequent workload’ in response to Term of Reference 8.

[61] Article 19, The Public’s Right to Know: Principles on Right to Information Legislation, 2016, Principles 1 and 2.

[62] See Compendium of information access laws across Australian States and Territories (September 2021) for an overview of the laws. Informal release can also be called ‘administrative’ release.

b. disclosure logs that provide online access to information released by an agency under an ATI law following a formal request;

c. greater administrative or informal release through the exercise of executive discretion in good faith and in appropriate circumstances, with sufficient legal protections, rather than the tendency to refer all requests for documents through a longer, more resource intensive and costly formal processing model; and

d. administrative access schemes for appropriate information sets, such as personal health records and criminal records.[63]

79. A 'push' model supports the presumption in favour of publishing the maximum amount of government-held information, and the ongoing obligation to proactively publish, and disseminate widely, key information of public interest.[64]

Benefits of proactive and informal release

80. There are significant economic and public interest benefits when government-held information is released proactively or informally. These benefits include:[65]

a. giving effect to the foundational principle of ATI legislation, to make the maximum amount of government-held information publicly available;

b. building public trust and confidence in decision making by government, agencies and Ministers, by increasing public awareness and understanding of government policies, programs and obligations;

c. enhancing public sector accountability and integrity;

d. reducing the risk of public sector and government corruption;

e. increasing public access to government information allows the public to participate meaningfully in government policy development and decision making as part of a properly functioning democracy;

f. improving government service delivery to the public by providing quicker and easier access to information, compared with responding to formal requests;

[63] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 19.

[64] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016, Principles 1 and 2.

[65] See OVIC's Practice Notes on 'Proactive release of information' and 'Informal release of information'. Mendel, T, *Freedom of Information: A Comparative Legal Survey*, Section Edition. UNESCO, Paris, 2008.

g. reducing the need for an individual to make a formal request, thereby reducing the resources and costs involved in administering the ATI law;

h. providing the opportunity for the wide dissemination of information, using accessible languages and formats;

i. providing the opportunity for an agency to provide contextual information to assist the public's understanding of the work of government; and

j. providing the opportunity for an agency and individual to agree on when and in what form information is to be released.

'Push' models can reduce the number of formal requests

81. Increasing the proactive disclosure of information helps the public and agencies, by reducing the need to make and respond to formal requests. In 2022-23, 45 agencies reported to OVIC that releasing information proactively led to a decrease in FOI requests being received or having to be processed.[66]

82. Jurisdictions with 'push' models, that authorise greater proactive and informal release, and position formal requests as a last resort, tend to receive less FOI requests than jurisdictions with a 'pull' model, like Victoria.

83. For example, in 2021-22, per 1,000 people, Western Australia received 7.6 requests, Victoria received 6.6, the Northern Territory received 6.5, and South Australia received 5.5 requests.[67] In contrast, Commonwealth agencies received 1.3 requests, Tasmania received 3.4, New South Wales received 2.9, and Queensland received 3.2.[68] The Commonwealth, Tasmania, New South Wales, and Queensland have 'push' model-based ATI legislation.

Queensland model

84. Queensland's *Right to Information Act 2009* (**RTI Act**) replaced the *Freedom of Information Act 1992* (Qld). The RTI Act was enacted by the Queensland Government following recommendations made in the 2008 Solomon Report. It is designed to make more information available to the public by making formal requests a last resort and instead preferring informal release of information.

[66] OVIC, Annual Report 2022-2023, 120.

[67] National dashboard – Utilisation of Information Access Rights 2021-22.

[68] Ibid.

85. The RTI Act achieves this through Parliament's intention in the preamble, the requirement for publication schemes that mandate the proactive release of certain information, and disclosure logs that provide online access to information released in response to RTI requests, as well as certain metadata about the RTI request.

86. The RTI Act is subject to amendment by the *Information Privacy and Other Legislation Amendment Act 2023* (Qld), which was passed by the Queensland Parliament on 29 November 2023.[69] The Act makes further enhancements to the RTI Act framework to:[70]

    a. clarify and improve its operation, with respect to proactive and informal release mechanisms and the processing of formal requests; and

    b. support the operation of a new administrative scheme for the proactive release of Cabinet documents.

87. The Act proposes to retain publication schemes and disclosure logs, but remove and relax certain prescriptive requirements, to modernise their operation. These mechanisms for proactive release are discussed in response to Term of Reference 2 (Proactive and informal release).

New South Wales model

88. The *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and *Government Information (Information Commissioner) Act 2009* (NSW (**GIIC Act**) replaced the *Freedom of Information Act 1989* (NSW).

89. The GIPA Act establishes a proactive, more open approach to gaining access to government information, recommended by a 2009 NSW Ombudsman report, which in turn, was inspired by recommendations made in the Solomon Report.[71]

90. The GIPA Act creates a framework under which there is a presumption in favour of disclosure of government information, rather than one under which information would be disclosed subject to formal request only. To facilitate disclosure, the GIPA Act provides four pathways for accessing government information; formal access applications (as under the FOI Act), as well as mandatory proactive release, authorised proactive release, and authorised informal release.

91. OVIC's response to Term of Reference 2 (Proactive and Informal Release) discusses the suitability of the NSW mechanisms for proactive and informal release in a Victorian context.

[69] Information on the Bill is available on the Committee's website.

[70] See the Bill's Explanatory Notes.

[71] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), see pages 3-4 'The Wisdom of Solomon'.

92. In recent years, the NSW Information Commissioner has called for legislative reform of the GIPA Act in the following areas:[72]

    a. modernising provisions to address the challenges of digital government. For example, agencies use of algorithms, digital archives, coding and contracting with third party digital services to store, use and produce government information;

    b. improving transparency in grants administration through publication of grants on a centralised grants website;

    c. improving transparency of Cabinet decision making;

    d. adding a new public interest factor in favour of disclosure for the care and protection of the environment;

    e. enhancing regulatory powers with respect to proactive and informal release mechanisms in the GIPA Act. For example, improving data collection, standards setting, and a power to issue a compliance notice; and

    f. adding an offence provision to safeguard information from destruction, concealment or alteration.

Commonwealth model

93. In late 2010, the Commonwealth moved its *Freedom of Information Act 1982* (**Commonwealth FOI Act**) to a 'push' model. The reforms align with the Solomon Report's recommendations to include an information publication scheme, and disclosure log requirement, to improve the statutory framework for the proactive publication of information.

94. In 2013, Dr Allan Hawke AC examined the extent to which the Commonwealth FOI Act continues to provide an effective framework for access to government information (**Hawke review**).[73] While the Hawke review found the reforms had been operating as intended and had been generally well received, the review also considered significant and complex issues about the effectiveness of FOI laws.

[72] See NSW IPC, Report on the Operation of the GIPA Act 2020-2021; NSW IPC Report on the Operation of the GIPA Act 2021-2022.

[73] Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 Report* (2 August 2013).

95. The Hawke review noted the Commonwealth FOI Act had been amended many times since 1982. However, those changes were largely developed and inserted into the form and structure of the FOI Act as it was in 1982. Despite the substantial changes to the Commonwealth FOI Act in the 2009 and 2010 reforms, the Hawke review considered a complete rewrite of the FOI Act in plain language is necessary to make the Act readily accessible and easily understood.[74]

96. The Hawke review recommended a comprehensive review of the Commonwealth FOI Act, which might consider:

    a. the interaction of the FOI Act with the *Archives Act 1983*, *Privacy Act 1988,* and other related legislation;

    b. legislative and administrative changes to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload; and

    c. changes and adjustments to the operation of the exemptions, fees and charges, and coverage of specific agencies.

97. OVIC's response to Term of Reference 2 (Proactive and Informal Release) discusses the suitability of the Commonwealth's mechanisms for proactive and informal release.

Second-generation policy models are becoming outdated

98. Second-generation ATI laws in the Commonwealth, NSW and Queensland are a significant improvement on Victoria's first-generation legislation. However, they are beginning to show their age,[75] and no longer represent best practice internationally.

99. The discussion of proactive and informal release mechanisms (Term of Reference 2) highlights the aspects of second-generation laws that could be modernised in the digital age to improve the utility of legislative requirements and accessibility of published information.

[74] Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 Report* (2 August 2013), 16.

[75] See discussion of each model above.

100. The RTI Ratings for the Commonwealth FOI Act and NSW GIPA Act also indicate other areas for improvement in the legislative frameworks of these jurisdictions.[76] The Commonwealth and NSW laws RTI Ratings are 87 out of 150[77] and 83 out of 150[78] respectively. Australia ranks 64th in the world, alongside countries such as Mongolia, Ivory Coast and Nigeria.[79]

101. Victoria's FOI Act was recently assessed by the Centre for Law and Democracy for an RTI rating, receiving a rating of 77 out of 148.[80] The Commonwealth FOI Act received an RTI rating of 87 out 150.[81]

102. To implement the principles of a best practice ATI law, the key areas for improvement in Australia's second-generation ATI laws include:[82]

    a. expanding the application of the ATI law to information held by State-owned corporations and private bodies that perform a public function or receive significant public funding;

    b. tightening the exceptions and exemptions to the right of access, to ensure they are clearly and narrowly defined to protect legitimate interests only, harm tested and subject to a strong public interest override;

    c. ensuring that secrecy laws in other legislation do not take precedence over the ATI law;

    d. ensuring that Information Commissioner decisions are binding and enforceable; and

    e. requiring agencies to provide ATI training to staff.

Leading the way – a third generation ATI law for Victoria

103. The FOI Act has been amended approximately 50 times since it was first introduced in 1982. These changes range from minor amendments (to update language) to more significant policy changes to FOI (such as the removal of internal agency reviews, and the introduction of the Information Commissioner in 2017).

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[76] The RTI Rating is the leading global tool for assessing the strength of national legal frameworks for accessing information held by public authorities. It is widely used by governments and legislators. The RTI Rating methodology is derived from Article 19's Principles, as well as best practice at the national level. The RTI Rating scores are based on 61 discrete indicators, each of which looks at a particular feature of a strong legal regime for ATI. These indicators are divided into seven main categories, namely Right of Access, Scope, Requesting Procedure, Exceptions & Refusals, Appeals, Sanctions & Protections and Promotional Measures.

[77] Global Right to Information Rating, Australia, March 2019.

[78] Global Right to Information Rating, New South Wales (Australia), August 2022.

[79] See Global Right to Information Rating country data. NSW is not ranked because it is not a national law, however its score would place it 76th in the world, alongside the United States.

[80] The Global Right to Information Rating for the Victorian FOI Act was published on 12 January 2024 and is available here.

[81] Global Right to Information Rating, Australia, March 2019.

[82] See Global Right to Information Ratings for Australia and NSW.

104. Over time, these reforms have contributed to the difficulty and complexity in administering the FOI Act. A further piecemeal approach to reform in response to this Inquiry will make it harder, not easier, to understand and administer the legislative framework.

105. The move to a new policy model in NSW and Queensland was so significant that new legislation was needed.[83] Similar to Victoria, the NSW GIPA Act had been amended more than 60 times since it was originally enacted, which made it confusing and difficult to navigate.[84] Given its complexity, the NSW Ombudsman considered that a new Act was the most effective way to bring about a new start in the way government provides access to information.

106. Unlike Queensland and New South Wales, the Commonwealth's 'push' model reforms in 2010 were inserted into the form and structure of the Act as it existed in 1982. This approach has been criticised, with recommendations made in 2013 to completely rewrite the Act in plain language, to make it clearer and easier to understand.[85]

107. OVIC strongly recommends that Victoria adopt a third generation policy model for its ATI law which would replace the FOI Act with a new ATI law, rather than implement piecemeal reforms to the structure or form of the current FOI Act.

108. A modern, third generation Victorian ATI law, should:

    a. use plain language, simple processes, and minimal procedural requirements;

    b. adopt a 'push' model of access, authorising the proactive and informal release of information, and positioning formal requests as a last resort;

    c. implement the purposes and principles of a best practice ATI law;

    d. be fit for purpose in the digital age; and

    e. retire the phrase 'freedom of information' in favour of modern ATI language.

Recommendation 1

109. To future proof a new ATI law, its provisions should, as much as possible, be broad and principles-based, rather than prescriptive, in giving effect to the aims and benefits of the law.

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[83] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report); NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 7.

[84] NSW Ombudsman, *Discussion Paper: Review of the Freedom of Information Act 1989* (September 2008) 1; NSW Ombudsman report, 7.

[85] Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 report* (2 August 2013).

110. The essential features of a third generation ATI law are discussed in response to the remaining Terms of Reference. This submission refers to 'a new ATI law' to reflect a third generation ATI law that OVIC recommends Victoria implements.

A new name

111. A new ATI law in Victoria should have a new name. Access to information or 'ATI' (or right to information or 'RTI'), is now the preferred way to refer to laws and policies that give effect to the right to access information held by public bodies.[86]

112. The term 'freedom of information' or 'FOI' has fallen out of common usage.[87] The term has been criticised as misleading, conveying very little, carrying negative baggage, and has lost too much respect.[88] It was replaced by 'right to information' in the early 2000s,[89] and then 'access to information' in the past decade.

113. A new name could be a 'powerful symbol' of the start of a new approach in providing access to government-held information.[90]

114. OVIC recommends retiring the phrase 'freedom of information' in favour of modern ATI language such as the 'Access to Information Act' or 'Right to Information', or similar, to clearly mark the beginning of a modern policy model and legislative framework for Victoria. A new title should better reflect the central purpose of the legislation – to provide the public with access to as much information as possible (proactively, informally, and in response to requests – in that order).

115. Changing the name of the Act is just one measure that could be used to signal a change and generate fresh enthusiasm for achieving the law's aims and benefits.

Recommendation 1

[86] This terminology is used in the UNESCO Massive Open Online Course on the right to access information held by public bodies (August 2022). This course has been developed by leading academics and officials at the Centre for Law and Democracy and the UN Educational, Scientific and Cultural Organisation (UNESCO). It reflects international best practice in the creation and implementation of laws giving effect to the right to access information held by public bodies; 'Access to Information' is used in the title of Gambia, South Africa, Namibia and Kenya's ATI law. Access to public information' is another common phrase used in the laws of top RTI rated countries, Mexico, Slovenia and Ukraine. The 'Right of Access to Information' is used in top rated RTI countries, Croatia, Sierra Leone and South Sudan.

[87] Mendel, T, Freedom of Information: A Comparative Legal Survey, 2nd ed. UNESCO, Paris 2008, cited in Solomon Report, 325.

[88] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 324. NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 34-35.

[89] The Queensland and Tasmanian Acts, passed in 2009, use the term 'Right to Information'. 'Right to Information' is also used in the Titles of ATI laws in top RTI rated countries, Sri Lanka, Albania, India and Vanuatu.

[90] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 34-35.

Four year independent review

116. To ensure a new ATI law remains effective and continues to meet its objectives, OVIC recommends the operation and implementation of a new ATI law be independently reviewed every four years, with a report tabled in Parliament.

Recommendation 2

Proactive and informal release (Term of Reference 2)

(2) Mechanisms for proactive and informal release of information, including the effectiveness of information publication schemes

Victoria's existing 'push' mechanisms are outdated and insufficient

117. A best practice ATI law requires government to proactively publish, and disseminate widely, information of public interest, subject to reasonable limits based on resources and capacity only.[91]

118. The FOI Act contemplates proactive and informal release of information through Part II (information publication scheme), section 16 (which outlines agencies and Ministers may provide access to exempt information if it is proper to do so), and the object of the FOI Act (which promotes the maximum disclosure of government-held information).

119. While agencies understand that proactive and informal release forms part of the FOI system in Victoria, there is a lack of legislative authority for agencies to provide access to information outside of FOI, and there are restrictions in other legislation preventing the use of more efficient mechanisms of access.[92]

120. Part II is outdated and difficult to comply with, and section 16 is not specific enough to enable agencies and Ministers to set up informal access schemes or encourage a culture of openness. For example, for providing access to a person's hospital patient file without requiring a formal FOI request.

121. Compounding this is both the PDP Act[93] and the HR Act[94] which prevent agencies from relying on relevant provisions that enable individuals to request access more easily to, and amend their personal and health records via those Acts. The provisions in those Acts make the FOI Act the main mechanism for access and correction.

[91] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016 (Principle 2: Obligation to publish).

[92] OVIC, Enhancing Victoria's FOI Culture to be Open by Design (September 2021) (https://ovic.vic.gov.au/wp-content/uploads/2021/09/Enhancing-Victorias-FOI-Culture-to-be-Open-by-Design.pdf).

[93] See section 14 of the *Privacy and Data Protection Act 2014* (Vic).

[94] See section 16 of the *Health Records Act 2001* (Vic).

122. The transparency obligations in the *Local Government Act 2020* (Vic) (LG Act) also intersect with the FOI Act, creating new and overlapping proactive release obligations for Local Government.[95] Anecdotally, OVIC understands the intersection of the LG Act's transparency provisions with the outdated provisions in the FOI Act has created confusion amongst stakeholders about their authority to release information, and subsequent protection from liability.[96]

Part II of the FOI Act is outdated

123. Part II of the FOI Act creates a limited information publication scheme where agencies must publish information about their functions and the documents they hold.

124. It was intended to assist members of the public in exercising their right to request access to documents. The idea being that a person could review an agency's hard copy statement and list of documents published under Part II, to help them identify documents to which they sought access. This model no longer works now that there is widespread use of the internet and digitisation of records.

125. The provisions of Part II are difficult, if not impossible, for agencies to comply with, given its age and overly technical language. Despite guidance being published, all agencies struggle to understand Part II of the FOI Act. Many do not have information published as required by Part II or have a very broad Part II statement that does not comply with the requirements.

126. In the context of discussing compliance with Part II of the FOI Act, in 2012 the Victorian Auditor-General stated:

> *It is important to understand that the FOI Act was passed in a predominantly paper-based environment and is now a significantly outdated piece of legislation.*[97]

127. Governments today routinely publish information on websites and via electronic communication methods like email and mobile applications. This is different to how government provided access to information in the 1980s. For example, initial guidance from 1985 on how to fulfil the requirements of Part II of the FOI Act outlines:

> *For the purposes of Part II, publication means a printed document, including microfiche or other machine produced documents or a copy of a typewritten document (e.g. roneoed or photocopied), or any other type of document encompassed within the definition of "Document in Section 5 of the Act, prepared for sale or distribution...*[98]

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[95] See OVIC's Practice Note, 'Framework for releasing council information proactively and informally under the Local Government Act 2020 (Vic) and the Freedom of Information Act 1982 (Vic)'.

[96] OVIC's Practice Note was created to help alleviate these concerns, in the absence of legislative reform to the FOI Act.

[97] Victorian Auditor-General's Report (April 2012), *Freedom of Information*, 13.

[98] Victorian Government, Guideline No. 7, Publication Requirements – Part II Statements, September 1985, 10. This guidance is no longer in effect however it illustrates how Part II was intended to be interpreted and implemented when it was drafted. The operation of Part II has not had material change since it was enacted in 1982.

128. The Victorian Auditor General found that:

> *… developments in information technology have rendered strict compliance with Part II unreasonably onerous for agencies. The Victorian Ombudsman's 2006 report Review of the Freedom of Information Act recommended that Part II be revised in order to mandate publishing information that is relevant and useful without creating an unnecessary administrative burden. This recommendation was reflected in proposed legislative amendments in 2008, however, these amendments were not passed.*[99]

129. The Commonwealth, NSW and Queensland all had similar provisions in their now repealed or superseded ATI laws.[100] These jurisdictions recognised over a decade ago, that the original conception of Part II was too rigid and burdensome, limited, ineffective, out of date and in need of replacement.[101]

130. Part II reform in these jurisdictions was borne out of the Solomon Report. The Solomon Report found:

> *… the Statement of Affairs [under Part II] is no longer of any relevance for most people seeking information about an agency. There is no doubt that most agencies publish material on their websites that is far more extensive and useful.*
>
> *What has been demonstrated in the past decade and a half is that it is desirable that both the content of the statement (or its equivalent) and its means of delivery or its availability, need to be flexible, so that they can be adjusted to changes in what information should be required to be made available, and how that happens.* [102]

131. OVIC recommends Part II of the FOI Act should be completely replaced.

Lack of clear authorisation and protection to release information proactively and informally

132. The FOI Act provides for informal release under section 16(2), which notes that nothing in the Act prevents an agency or Minister from providing a person with access to documents outside the Act, where it is possible and lawful to do so.

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[99] Victorian Auditor-General's Report (April 2012), *Freedom of Information*, 17.

[100] See Commonwealth FOI Act, Part II (as at 1 January 2011); Queensland *Freedom of Information Act 1992*, Part II (as at 1 July 2009); NSW *Freedom of Information Act 1989*, Part II (as at 30 June 2010).

[101] See FOI Independent Review Panel, *The Right to Information: reviewing Queensland's Freedom of Information Act* report, June 2008, 19, 283-84; NSW Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989*, Special report to Parliament, February 2009, 21; Australian Law Reform Commission, *Open Government – A review of the Federal Freedom of Information Act 1982,* (ALRC Report 77, January 1996) [6.25].

[102] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 283.

133. Further, Professional Standards 1.1 and 1.2 require an agency to consider whether a document in its possession and requested under the Act, can properly be provided outside the Act, and if so, facilitate access or otherwise advise how an applicant can access the document.

134. An independent Monash University report that surveyed several Victorian public sector agencies found the surveyed agencies want to release information without processing it under the FOI Act, but they are of the view that section 16 is not sufficient to allow them to do so.[103] Agencies want certainty and processes set out in legislation that they can follow and rely on. Without clear statutory provisions, agencies are unlikely to routinely release information.

135. Agencies and Ministers have protections from civil and criminal liability under the FOI Act for information they release under Part II, but not information they release outside the FOI Act (even under section 16).[104] This lack of legal protection inhibits agencies and Ministers from releasing more information proactively or informally when they know they will be protected if they release information under the FOI Act (for example, under a formal FOI request).

136. A similar situation existed in the Commonwealth, with a section similarly worded to section 16 of Victoria's FOI Act. In 1996, the Australian Law Reform Commission recognised agencies' failure to use the section to voluntarily release information and recommended that legislative protection be extended to releasing information outside the Act.[105]

137. Similar recommendations were made in NSW[106] and Queensland,[107] with the Solomon Report noting:

> *… there appeared to be a considerable amount of unease within agencies about the use of administrative release, other than through defined schemes. Some officers were unsure about whether they could release parts of a document, while others were hesitant about stepping outside the safety of the protection provided by the FOI Act.*[108]

[103] Associate Professor Johan Lidberg, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Pilot Study May – August 2019* (Final report, September 2019). Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021).

[104] The legal protections are in sections 62 and 63 of the FOI Act. They apply when access to a document is 'required' or 'permitted' under the FOI Act.

[105] Australian Law Reform Commission, *Open Government – A review of the Federal Freedom of Information Act 1982*, (ALRC Report 77, January 1996), Recommendations 10 and 11.

[106] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 23.

[107] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), Recommendation 118.

[108] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 295.

138. Despite the issues outlined above, some agencies have developed informal release schemes to try and address growing FOI workloads.[109] However, there is scope for greater release outside the FOI Act, particularly for personal and health information (see Term of Reference 3). Clear authority and protection for information released informally is likely to enable greater informal release, which may reduce FOI workloads and increase more timely access to information.

Best practice proactive and informal release

139. OVIC recommends that a new ATI law contain four authorised access pathways to access information:[110]

    a. authorised mandatory proactive release of key information about the agency or Minister and key categories of documents of significant public interest;[111]

    b. authorised proactive release of additional information, with an obligation to update the information published and consider increasing over time, the amount of information published;[112]

    c. authorised informal release of information;[113] and

    d. authorised formal release, with a disclosure log. To support maximum disclosure and formal requests as a last resort, this pathway should include an obligation to publish on an online disclosure log or register, information released in response to a formal request, and to consider proactive release of that information in future.[114]

Recommendation 3

[109] See, for example, Victoria Police Traffic Accident Reports, which are available for a fee to specific individuals.

[110] This is similar to the model used in the GIPA Act. See *Government Information (Public Access) Act 2009* (NSW) (GIPA Act), sections 6-9.

[111] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 8 (Principle 2: Obligation to publish).

[112] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 8 (Principle 2: Obligation to publish).

[113] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 19.

[114] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 19.

140. These pathways should be covered by protections against civil or criminal liability for disclosures made in good faith.[115]

Recommendation 4

141. This part of OVIC's submission discusses, and makes recommendations about, each pathway listed above.

Mandatory proactive release of key information and documents

142. An ATI law should set the tone as to the minimum standard of transparency expected of an agency or Minister, and impose regulatory consequences for poor performance. Proactive release should not be left entirely at the discretion of an agency or Minister.

143. Minimum disclosure requirements help to ensure that members of the public can access key information about agencies and Ministers and matters of significant public interest.[116] This is important because most people will never make an access request, meaning the extent of proactive publication is the only information they will ever receive. In an open democracy, the public has a right to this information, without needing to request it.

144. Mandatory disclosure requirements can also assist in reducing an agency's or Minister's FOI processing burden, because the information is already available and the agency or Minister can direct the applicant accordingly.

145. The following section outlines examples of mandatory proactive release mechanisms in NSW, Queensland, the Commonwealth, Mexico, and India.

Examples in other jurisdictions

New South Wales

146. In NSW, section 6 of the GIPA Act authorises the mandatory publication of 'open access information'. 'Open access information' is defined as:[117]

    a. the agency's current agency information guide;[118]

[115] These protections are in sections 62 and 63 of the FOI Act, but they only apply to information released in response to formal requests and under Part II.

[116] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

[117] GIPA Act, section 18.

[118] Defined further in GIPA Act, Division 2.

b. information about the agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament;

c. the agency's policy documents;[119]

d. the agency's disclosure log of access applications;[120]

e. the agency's register of government contracts;[121]

f. the agency's record (kept under section 6) of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure; and

g. additional information required to be released by local government.[122]

147. The agency information guide is a form of information publication scheme.[123] The categories of information required to be published in the guide include:[124]

a. the agency's structure and functions;

b. how the agency's functions, in particular its decision making processes, affect members of the public;

c. the arrangements that enable members of the public to participate in the formulation of agency policy and the exercise of the agency's functions;

d. the types of information held by the agency;

e. the types of information the agency makes (or will make) publicly available and whether it is available for free or for a charge; and

f. additional information for local government.

[119] Defined further in GIPA Act, Division 3.

[120] Defined further in GIPA Act, Division 4.

[121] Defined further in GIPA Act, Division 5.

[122] GIPA Regulations, Schedule 1.

[123] See example, Transport Asset Holding Entity, NSW Government, Agency Information Guide.

[124] GIPA Act, section 20.

Queensland

148. Queensland requires mandatory publication of information through its information publication scheme. Section 21 of the RTI Act sets up the scheme, with details of what is to be published contained in Ministerial Guidelines with which agencies must comply.

149. On 29 November 2023, the *Information Privacy and Other Legislation Amendment Bill 2023* (Qld) was passed.[125] The Bill will replace section 21 with a new model that inserts mandatory publication requirements into the RTI Act and allows additional information to be prescribed by regulation. There will no longer be any Ministerial Guidelines.[126]

150. The indicative reprint of the RTI Act indicates that an agency, at a minimum, would have to publish the same types of information as required in the NSW agency information guide.[127] However, Queensland's proposed model does not require the information to be published in a 'guide'. This offers more flexibility and less prescription as to the form of publication. For example, the information could appear in various sections of an agency's website, instead of a static 'guide' or 'publication scheme'.

151. At present, the Ministerial Guidelines require additional information to be published about:[128]

    a. the agency's finances (projected and actual income and expenditure, tendering, procurement and contract);

    b. the agency's priorities and how it is performing (strategy and performance information, plans assessments, inspections and reviews);

    c. how the agency makes decisions (Decision making processes, internal criteria and procedures, consultations relating to policy proposals and decisions); and

    d. the agency's policies and procedures.

152. The Ministerial Guidelines also provide that information made available under a publication scheme should be regularly reviewed to ensure information is current and up to date.

[125] The Bill was passed on 29 November 2023. Information on the Bill is available on the Committee's website.

[126] See the Bill's Explanatory Notes.

[127] *Right to Information Act* (2009) (Qld) (**RTI Act**), Indicative reprint, section 21.

[128] Queensland Government, Ministerial Guidelines for publication schemes and disclosure logs (February 2013) (**Qld Ministerial Guidelines**).

Commonwealth

153. Part II of the Commonwealth FOI Act sets up an information publication scheme. Section 8 sets out the categories of information that agencies must publish. The categories include those required in NSW and Queensland, with the additional requirements to publish:

    a. an agency plan;

    b. operational information about the agency;

    c. information that the agency routinely gives access in response to requests under the FOI Act; and

    d. details of an officer (or officers) who can be contacted about access to the agency's information or documents under the FOI Act.

154. The agency plan is a form of access to information policy. In the plan, agencies must include information about:[129]

    a. what information the agency proposes to publish in its IPS;

    b. how, and to whom, the agency proposes to publish its IPS information; and

    c. how the agency otherwise proposes to comply with its IPS requirements.

155. Agencies are required to keep IPS information accurate, up to date and complete.[130] However, agencies only have to review the scheme at least every five years.[131] In OVIC's view, this time period is too long. A shorter review period would help to ensure the public are kept up to date on agencies' information.

Internationally

156. Mexico has the second best ATI law in the world, according to the Global RTI Rating.[132] Mexico's *General Act of Transparency and Access to Public Information* contains extensive proactive publication requirements. These requirements set out numerous categories of information common to all agencies, and subsets of information that must be published by agencies at different levels of government and in different sectors, such as integrity bodies, higher education, labour, and trade unions.[133]

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[129] *Freedom of Information Act 1982* (Cth) (FOI Act (Cth)), section 8(1).

[130] FOI Act (Cth), section 8B.

[131] FOI Act (Cth), section 9.

[132] Global Right to Information Rating , Mexico.

[133] See *General Act of Transparency and Access to Public Information 2002* (Mexico), Title Five, Chapters II and III.

157. India's RTI Act is in the top 10 of ATI laws globally.[134] It specifies 19 categories of information subject to proactive release, that must be updated by agencies every year.[135] Similar to Mexico, the categories are more prescriptive than under Australian ATI laws. Many categories would likely fall within the types of information required to be published under the Commonwealth and NSW schemes, such as the:[136]

    a. particulars of an organisation's functions and duties;

    b. powers and duties of its officers and employees;

    c. procedure followed in the decision making process, including channels of supervision and accountability;

    d. norms set by it for the discharge of its functions; and

    e. rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions.

158. The extensive proactive publication requirements for financial information include:[137]

    a. the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

    b. the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

    c. the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

    d. particulars of recipients of concessions, permits or authorisations granted by it.

159. India's RTI Act also requires public bodies to publish all relevant facts while formulating important policies or announcing decisions which affect the public.[138]

[134] Global Right to Information Rating , India.

[135] Right to Information Act 2005 (India) (**RTI Act (India)**), section 4(1)(b).

[136] RTI Act (India), section 4(1)(b).

[137] RTI Act (India), section 4(1)(b).

[138] RTI Act (India), section 4(1)(c).

Method and form of access

Publishing information online or otherwise available for free

160. A best practice ATI law will require an agency or Minister to proactively publish information on a website or free application.[139]

161. The Commonwealth FOI Act and NSW GIPA Act require agencies to publish information for free on an agency's website.[140] An agency can charge for access to information that is not through the agency's website.[141]

162. The reforms in Queensland will similarly require an agency, as far as it is reasonably practicable, to publish the scheme on an 'accessible agency website'.[142] The current Ministerial Guidelines state there should be no charge for alternative access in cases where a person's inability to access a document online is due to a disability.[143]

163. The NSW GIPA Regulations also impose additional requirements on local government to make the information available for inspection free of charge, or a copy of the record free of charge or a charge not exceeding the reasonable cost of photocopying.[144]

164. In NSW, an agency does not have to publish the information on its website if it would impose unreasonable additional costs on the agency. In this situation, the agency must make at least one alternative method of access free of charge.[145]

165. A best practice ATI law will also require agencies to publish information using a method that will reach those who need the information or who are most affected by it.[146] The NSW GIPA Act supports this through an authorisation to make information publicly available in any other way the agency considers appropriate.[147] Similarly, the Commonwealth FOI Act requires agencies to publish information to classes of persons or entities, if the agency considers it appropriate.[148]

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[139] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

[140] GIPA Act, section 6; FOI Act (Cth), section 8D(3).

[141] FOI Act (Cth), section 8D(4); GIPA Act, section 6(3).

[142] RTI Act (Qld), Indicative reprint, section 21.

[143] Qld Ministerial Guidelines, 4.

[144] GIPA Regulations, section 5(1).

[145] GIPA Act, section 6.

[146] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

[147] GIPA Act, section 6.

[148] FOI Act (Cth), section 8D(2).

Easy to find, accessible and understandable

166. A best practice ATI law will require agencies and Ministers to make proactively released information easy to find, and publish it in an accessible format that is understandable to the general population.[149]

167. 'Understandable' means writing in plain language and aimed at a reading level of grade 8.[150] This might require agencies and Ministers to explain technical subjects, such as financial budgets, grants programs, infrastructure projects, health information and public procurement, in plain language, and translating information where appropriate.

168. To be accessible, the information should meet current web content accessibility guidelines, and be available in open, machine readable formats wherever possible, without further restrictions on use and disclosure.[151]

169. The NSW GIPA Act and Commonwealth FOI Act do not contain explicit accessibility requirements. Queensland's recently passed Bill will require agency websites to be accessible.

170. In contrast, India's RTI Act requires wide dissemination, in a form and manner that is easily accessible to the public.[152] All materials must be disseminated electronically, to the extent possible, taking into account cost effectiveness, local language and the most effective means of communication.[153] Information is provided free, or at copying cost.[154]

Recommendations for Victoria

171. The following section outlines recommendations for the mandatory proactive release authorising pathway.

What should be released

172. Agencies and Ministers should be required to proactively publish key information about the agency or Minister and key categories of documents of significant public interest.

[149] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

[150] See Victorian Government, Making digital content accessible (11 October 2023).

[151] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 6 (Principle 2: Obligation to publish); Victorian Government, Making digital content accessible (11 October 2023).

[152] RTI Act (India), section 4(3); The Indian ATI law defines 'disseminated' as 'making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority'.

[153] RTI Act (India), section 4(4).

[154] RTI Act (India), section 4(4).

173. Agencies and Ministers should be permitted to withhold information that would be considered exempt if access were requested under an ATI law.[155] However, to support the principle of maximum disclosure, agencies and Ministers should have to delete exempt matter where practicable, providing access to the rest of the document.[156] Documents should not be withheld in full on the basis that only some of the information in the document cannot be released.

174. To further support the principle of maximum disclosure, agencies and Ministers should be required to make a record of the information or documents that are not suitable for release, and to make this record publicly available. The record could be in the form of an information asset register (discussed further in response to Term of Reference 4).

175. Agencies and Ministers should be required to review their proactive release program every 12 months to ensure the published information remains accurate, current, and complete. Agencies are currently required to review Part II information every 12 months.[157]

Recommendation 5

176. The ATI law should include mandatory categories of information or documents for proactive release, based on the indicative reprint of Queensland's RTI Act and the NSW agency information guide.[158]

177. The information and documents for mandatory proactive release should include:

- the agency's or Minister's structure and functions;
- how the agency's or Minister's functions, in particular its decision making processes, affect members of the public;
- the arrangements that enable members of the public to participate in the formulation of agency or Ministerial policy and the exercise of the agency's or Minister's functions;
- the types of information held by the agency or Minister;
- the types of information the agency or Minister makes (or will make) publicly available and whether it is available for free or for a charge; and
- additional information for local government;

[155] The same permission to delete exempt information exists in GIPA Act, section 6(1); QLD RTI Act, Indicative reprint, section 21(4).

[156] See similar requirement in GIPA Act, section 6(4).

[157] Sections 7(1)(b), 8(1)(b) and 11(2)(b) of the FOI Act.

[158] This list aligns with the principles of a best practice ATI law: Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

- operational information (including policies, guidelines and procedures relating to policy and decision making, and decisions, reports, statements and submissions made by the agency or Minister);[159]
- information about the agency's or Minister's strategy and performance, including in documents tabled in Parliament;[160]
- financial information, including government contracts, projected and actual income and expenditure, tendering, procurement, and grants;[161]
- an Access to Information Policy (or similar);[162]
- information released routinely in response to formal requests;[163]
- information about how to informally and formally request information from the agency or Minister;
- a record of documents determined not suitable for proactive release;[164]
- a record of information considered for proactive release, arising from information released informally or in response to a formal request; and
- a general obligation to release any other documents or information of significant public interest.[165]

Recommendation 6

[159] See similar requirement in GIPA Act, section 18; Qld Ministerial Guidelines; FOI Act (Cth), section 8.

[160] See similar requirement in Qld Ministerial Guidelines; GIPA Act, section 18; FOI Act (Cth), section 8.

[161] See NSW Information Commissioner's call for legislative reform to enhance transparency in grants administration: NSW IPC, Report on the Operation of the GIPA Act 2020-2021. In Victoria, Buying for Victoria's Contract disclosure – goods and services procurement guide requires disclosure of key contract details for all contracts with a value at or above $100,000 (including GST) and full contract details for contracts with a value at or above $10million. All information must be published on Buying for Victoria – Tenders website within 60 days of the contract being awarded. Policies like this apply to all Victorian Government departments and any public bodies subject to the supply policies of the Victorian Government Purchasing Board.

[162] See 'reporting and oversight of proactive and informal release pathways' below.

[163] See similar requirement in the FOI Act (Cth), section 8.

[164] See similar requirement in the GIPA Act, section 18.

[165] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 8 (Principle 2: Obligation to Publish).

178. OVIC could provide guidance to support agencies and Ministers in identifying information holdings of significant public interest. For example, this may include:

    a. information concerning the environment, such as up to date information on natural resource exploitation, pollution and emissions, environmental impacts of proposed or existing large public works or resource extractions, and risk assessment and management plans for especially hazardous facilities;[166]

    b. the use of public funds spent by government on public infrastructure and reports on the progress of public projects and contract implementation and management, which would complement the role and work of the Victorian Auditor General; and

    c. the agency's or Minister's surveillance practices, including its surveillance policy. This would cover all forms of surveillance, both covert and overt, including indirect surveillance such as profiling and data-mining.[167]

Method and form of access

179. The method and form of access should be guided by principles rather than prescription. The principles should require agencies and Ministers to publish information in a way that is practical, timely, easy to find, and accessible, and to present information in a way that is capable of being understood, and accessible.[168] Using principles can help to future proof the law, as online communication tools and community expectations evolve and change over time.

180. The principles should include an obligation to facilitate public awareness of the availability of the agency's or Minister's information.[169] For example, where access is provided using an alternative free method, or for a charge, an agency or Minister should have to explain on its website or digital platform, how a person can access the information. Or an agency or Minister may publish categories of information on its website, and direct people to the website through a notice in a local newsletter.

Recommendation 7

[166] See *Global Principles on National Security and the Right to Information* (**the Tshwane Principles**), (signed in Tshwane, South Africa, 12 June 2013) Principle 10: Categories of Information with a High Presumption or Overriding Interest in Favour of disclosure, H. Public health, Public safety, or the Environment.

[167] See Tshwane Principles, Principle 10: Categories of Information with a High Presumption or Overriding Interest in Favour of disclosure, E. Surveillance.

[168] Similar to the transparency principles in the *Local Government Act 2020* (Vic). See also, UNHRC General Comment No 34, [19]; Open Government Partnership, Open Government Guide: Right to information (29 June 2015). See examples, *Right to Information Act 2005* (India), section 4(3); *Local Government Act 2020* (Vic), Public Transparency Principles.

[169] Similar to the transparency principles in the *Local Government Act 2020* (Vic) and supporting the principle of maximum disclosure: Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016).

181. Agencies and Ministers should have to make the information:

    a. available for free on an agency's or Minister's website or digital platform (for example, a free mobile application, such as the Service Victoria app); and

    b. available to those in need of or most affected by the information.[170] For example, information directly impacting residents should be disseminated using local channels, such as a Local Government's newsletter.

182. OVIC recommends using broad language, such as 'digital platform', to allow agencies and Ministers flexibility in how the information is disseminated, and to help future proof the legislation.

183. OVIC supports a provision containing an exception to publication requirements, where it would impose unreasonable costs to provide it online. However, the ATI law should require the agency or Minister to provide the information for free using another method.

184. OVIC also supports allowing agencies and Ministers to provide the information for a fee or charge. This would help cover situations where freely available methods are too costly for agencies and Ministers to provide online, and the alternative free method is not practical, timely or easy for members of the public to access. An agency or Minister should only charge for reasonable copying costs in making information available.[171]

Recommendation 8

185. The agency or Minister should have to take reasonable steps to provide an alternative method of access to persons who cannot access the freely available method due to a disability or other disadvantage (for example, where the person has low literacy, does not have internet access or is incarcerated).[172]

Recommendation 9

A note on information publication schemes

186. To ensure new ATI law's provisions can be interpreted in a modern and flexible manner, OVIC suggests the law refrain from using language from other jurisdictions, such as 'information guide' or 'information publication scheme'.

[170] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 2: Obligation to publish).

[171] See example *Government Information (Public Access) Regulations 2018* (NSW), section 5(1).

[172] See Qld Ministerial Guidelines; this supports the principle of a best practice ATI law: Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016).

187. The NSW agency information guides are often PDF documents, containing information that is otherwise, or could otherwise, be made available in an accessible format online.[173]

188. Further, whilst the Commonwealth and Queensland publication schemes do not require agencies to group the categories of information and documents together and call it a 'publication scheme', this is nevertheless how the legislation has been interpreted by agencies.[174] Often the publication schemes simply link to where the information is located on the agency's website (on intuitive and logical webpages for members of the public to navigate).

189. At a recent event hosted by OVIC, celebrating 40 years of the FOI Act, Professor John McMillan AO commented that information publication schemes have become outdated.[175] OVIC agrees.

190. OVIC considers it would be easier and more effective, if agencies were permitted to take a flexible and practical approach to publication, guided by overarching principles, which could be set out in the legislation. This approach is more likely to stand the test of time as Victoria transitions to digital government. This is explained in more detail above, under 'Method and form of access'.

191. If an agency publishes the required information on its website, in accordance with legislative principles outlined above, this should be sufficient to demonstrate compliance. There should be no additional requirement to create standalone 'publication schemes' or 'guides' or to signpost that the information is being published because the agency is required to do so under the law.

192. This recommendation is consistent with the approach OVIC takes to agency compliance with Part II of the FOI Act.[176] OVIC does not require agencies to provide 'statements' or 'lists' under sections 7 and 11 of the FOI Act. Instead, agencies are encouraged to publish this information on the agency's website, in a way that is practical, logical, easy to find and meets community expectations.

193. OVIC recognises that members of the public should not be expected to have knowledge, or an understanding, of what Part II of the FOI Act is or what it requires. It may even be unhelpful and not accessible to an ordinary member of the public for an agency to refer to 'Part II' by name, as this creates an expectation that the individual should know and understand what Part II entails.[177]

194. A new ATI law for Victoria should take a similarly flexible and practical approach to mandatory publication of information and documents.

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[173] See example, Transport Asset Holding Entity, NSW Government, Agency Information Guide.

[174] See examples, Queensland Ombudsman Publication Scheme; Department of Treasury, Commonwealth Government Information Publication Scheme; HM Revenue & Customs, UK Government, Publication Scheme.

[175] A recording of this event is available on OVIC's Vimeo account.

[176] See FOI Guidelines, Part II, sections 7, 8, and 11. OVIC takes a practical approach to compliance, given the incompatibility of Part II with the requirements of modern government.

[177] FOI Guidelines, Part II, section 7, [1.18].

Proactive release of additional information

195. To support agencies and Ministers in disclosing the maximum amount of information, an ATI law should authorise the general release of information proactively, outside of any mandatory proactive release requirements. An ATI law that makes it clear and easy for agencies and Ministers to proactively publish more information than what is required assists in reducing an agency's or Minister's FOI processing burden, because the information is already available.

196. The following section outlines examples of proactive release mechanisms of additional information in NSW, the Commonwealth, Queensland, India, and Victorian local government.

Examples in other jurisdictions

New South Wales

197. In NSW, section 7(1) of the GIPA Act contains a clear authorisation for agencies to make any government information it holds publicly available, unless it is exempt from release under the Act. The information can be made available in any manner the agency considers appropriate, either free of charge or at the lowest reasonable cost to the agency.[178]

198. An agency can facilitate access by deleting matter that would be exempt.[179]

199. The GIPA Act requires an agency to review its program of proactive release every 12 months. This is to identify the kinds of government information held by the agency that should, in the public interest, be made publicly available, and that can be made publicly available without imposing unreasonable additional costs on the agency.[180] This requirement supports international best practice, to increase the proactive disclosure of information over time.[181]

Commonwealth

200. The Commonwealth FOI Act grants a general discretion to agencies, to publish other information held by the agency in its information publication scheme.[182] Agencies and staff are protected against criminal and civil liability for publishing information in good faith.[183]

[178] GIPA Act, section 7(2).

[179] GIPA Act, section 7(4).

[180] GIPA Act, section 7(3).

[181] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 8 (Principle 2: Obligation to publish).

[182] FOI Act (Cth), section 8(4).

[183] FOI Act (Cth), sections 90 and 92.

201. Agencies must review their information publication schemes every five years but are not required to identify more information that could be released in the public interest. In OVIC's view, this model is not best practice for encouraging the maximum proactive publication of information because the period in which agencies must review information publication schemes is too long and there should be a requirement to consider if it can release more information.

Queensland

202. The Queensland RTI Act is passive, stating that 'information may be accessed other than by application under this Act' or other than 'under a publication scheme'.[184] There is no clear authorisation or requirement to proactively disclose more information, beyond the mandatory requirements of the agency's information publication scheme.[185]

India

203. India's RTI Act requires public bodies to make a 'constant endeavour' to provide as much information proactively as possible. The Act explains why this is a requirement – to minimise the need for the public to make formal requests for information.[186]

Victorian local government

204. The LG Act came into effect on 6 April 2020, replacing the *Local Government Act 1989* (Vic). It is a principles based legislation, designed to provide flexibility in the way that Local Government make information available to members of their local community.

205. The legislation is designed to enable Local Government to be responsive, innovative, and provide services that meet community expectations.[187]

206. Rather than prescribing information that must be made available, the LG Act assumes that all information must be made publicly available, unless it is confidential or contrary to the public interest. The intention of this policy model is to move away from a compliance culture to a culture founded on the principle of transparency of Local Government decisions, actions, and information.[188]

207. Under the LG Act, Local Government is required to adopt and maintain a public transparency policy that gives effect to the public transparency principles.[189]

208. The public transparency principles require that:

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[184] RTI Act (Qld), sections 19 and 22.

[185] See RTI Act (Qld), indicative reprint, sections 21 and 22.

[186] RTI Act (India), section 4(2).

[187] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 November 2019, 4311 (Marlene Kairouz, Minister for Suburban Development).

[188] See guidance.

[189] *Local Government Act 2020* (Vic), sections 57(1) and 58.

a. decision making processes must be transparent, except where the information is confidential;

b. information must be publicly available unless:

   i. the information is confidential; or

   ii. public availability of the information would be contrary to the public interest;

c. information must be clear, capable of being understood, and accessible to members of the community; and

d. public awareness of the availability of Local Government information must be facilitated.

209. Local Government is encouraged to engage with the community in developing their policy.[190]

Recommendations for Victoria

210. OVIC recommends a new ATI law contains clear authorisation for agencies and Ministers to release additional information proactively, modelled on section 7 of the GIPA Act. This would replace section 16 in the FOI Act. To support agency and Ministerial staff in giving effect to the provision, the law should protect individuals from liability for disclosures made in good faith.

Recommendations 3 and 4

211. OVIC supports the GIPA Act's requirement for agencies to review their proactive release program every 12 months. A requirement to regularly review the program helps to ensure published information remains accurate and current, and supports an agency to build its capacity to release more information over time. This could include a requirement to consult members of the public about the information they find most useful, and to prioritise this information for proactive release.[191]

Recommendation 5

212. To further support the principle of maximum disclosure, OVIC suggests that agencies and Ministers be required to make a record of the information or documents determined not to be suitable for proactive release, and to make this record publicly available. The record could be in the form of an information asset register (discussed further under Term of Reference 4).

Recommendation 6

[190] See guidance.

[191] Open Government Partnership, Open Government Guide: Right to information (29 June 2015) Recommendations; see also local government guidance on the implementation of the LG Act.

213. Similar to India's RTI Act, the purposes of the provision could be included in its text. For example, stating that the purpose of this provision is to facilitate the maximum disclosure of information, and to minimise the need for the public to make formal requests for information. This may assist in enhancing a culture of proactive and informal release in the public service.

214. OVIC supports agencies and Ministers being able to make information available for free or at the lowest reasonable cost.[192] However, the agency or Minister should be required, or at least encouraged, to take reasonable steps to provide an alternative method of access to persons who cannot access the agency's or Minister's chosen method due to a disability or other disadvantage (for example, where the person has low literacy, does not have internet access, or is incarcerated).[193]

Recommendation 9

215. Agencies and Ministers should be required, as far as possible, to publish information in a way that is practical, timely, easy to find, capable of being understood, and accessible.

Informal release

216. To support agencies and Ministers in disclosing the maximum amount of information, an ATI law should clearly and specifically authorise the informal release of information. An ATI law that makes it clear and easy for agencies and Ministers to informally release information assists in reducing an agency's FOI processing burden, by providing an alternative option to making a formal request.

217. Informal release can provide a quicker and cheaper access option for both the applicant and the agency. It allows an individual to avoid the cost, time and effort required to prepare and lodge a formal access application, and where this option is suitable, enables an agency or Minister to avoid the cost, time and effort of following the processes in the Act for responding to formal requests.

218. Informal release gives agencies and Ministers flexibility in deciding how to release information and whether to impose conditions on its use.

[192] GIPA Act, section 7(2).

[193] See Qld Ministerial Guidelines; this supports the principle of a best practice ATI law: Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016).

Examples in other jurisdictions

219. In NSW, section 8 of the GIPA Act explicitly authorises agencies to release information in response to an informal request, unless there is an overriding public interest against disclosure. The information can be released subject to any reasonable conditions that the agency thinks fit to impose, and the agency can decide the method of releasing the information. The agency can delete matter that would be exempt, to enable the document to be released.

220. Importantly, agencies are protected from liability, for disclosing information in good faith, using this informal release pathway. [194]

221. The NSW Information and Privacy Commission (**IPC**) recommends that agencies exercise their discretion to deal with requests informally, wherever possible, to facilitate and encourage timely access to government information at the lowest reasonable cost.[195]

222. The IPC recommends that government agencies make the public aware of informal release pathways, to ensure citizens are able to avoid the cost, time and effort required to make a formal access application, if informal release would be more suitable.[196]

223. The Queensland RTI Act and Commonwealth FOI Act do not specifically authorise informal release or protect agency officers from releasing information in this way.

Recommendations for Victoria

224. OVIC strongly recommends a new ATI law provide clear authorisation for an agency or Minister to respond to a request for information or documents informally, outside the ATI law, modelled on section 8 of the GIPA Act. This mechanism would replace section 16 of the FOI Act.

225. To support agency staff to use this pathway, the law should protect individuals from civil and criminal liability for disclosures made in good faith.[197]

226. A legislated informal release pathway would provide greater flexibility in administering the Act and reduce the number of formal requests.

[194] GIPA Act, sections 113, 115.

[195] NSW Information and Privacy Commission (**IPC**), Report on the Operation of the GIPA Act 2020-2021.

[196] NSW IPC, Report on the Operation of the GIPA Act 2020-2021.

[197] See GIPA Act, sections 113, 114, 115.

227. The mechanism would allow agencies and Ministers to set up access schemes for commonly requested information. For example, lawyers requesting client Transport Accident Commission or WorkCover files, patients requesting their health record, and individuals requesting care leavers records. It would also enable agencies and Ministers to release information informally, in response to individual, one-off requests, where appropriate to do so.

Recommendations 3 and 4

228. The legislation should require agencies to make information available for free[198] or at the lowest reasonable cost.

Recommendation 10

229. OVIC suggests consideration be given to requiring agencies and Ministers to:

    a. consider whether it is appropriate to release information informally;[199] and

    b. provide reasonable advice and assistance to a person making an informal request for information.[200] This may include assisting an individual to clarify the kind of information they are seeking or assist an individual to make a formal access request where information or documents cannot be released informally.[201]

230. OVIC is well placed to assist agencies and Ministers to identify when informal release may be appropriate, including considerations of fairness when using this pathway. OVIC commissioned research[202] into informal release, and provides education, practice notes, and a template policy and guide to encourage agencies and Ministers to informally release information.[203] Legislative authorisation will enhance the visibility and application of this guidance for agencies and Ministers.

Recommendations 11 and 12

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[198] Free is best practice: See OVIC Access to Information (Proactive and Informal Release) Policy Template, 8; NSW IPC, *Information Access Guideline 11 – Informal Release of Information* and research commissioned by the NSW IPC: UNSW, *Informal Release of Information under Section 8 of the GIPA Act report* (December 2022).

[199] Similar Professional Standard 1.1. Compare NSW GIPA Act, section 8(3) 'An agency cannot be required to disclose government information pursuant to an informal request and cannot be required to consider an informal request for government information'.

[200] See Professional Standard 1.2, which requires agencies to facilitate access to the document or advise the application how the document can be accessed.

[201] See OVIC Access to Information (Proactive and Informal Release) Policy Template.

[202] See Associate Professor Johan Lidberg, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Pilot Study May – August 2019* (Final report, September 2019). Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021) available on OVIC's website.

[203] See OVIC's resources on informal release and education on OVIC's Vimeo account.

231. An agency or Minister should make a record of their decision whether or not to release the information informally,[204] and make this record available publicly. The record could be in the form of an information asset register (discussed further in response to Term of Reference 4). Records are useful for reporting purposes and can be useful in determining if a document has been previously released, or is being routinely requested.

232. To support maximum disclosure, a new ATI law should require an agency or Minister to consider making the information it releases informally, proactively available to a wider audience where appropriate, and to make a record of that decision. This mechanism would be for situations where an agency or Minister releases a document informally, that would otherwise have been disclosed on the agency's or Minister disclosure log,[205] if access had been granted in response to a formal request.

Recommendation 13

Formal requests for access and disclosure logs

233. A formal request pathway (making an FOI request) ensures a person has a legally enforceable right to access information in accordance with the ATI law. This is the pathway in Part III of the FOI Act (discussed in response to Terms of Reference 6 and 7).

234. In jurisdictions with second-generation ATI laws, this pathway includes a proactive release mechanism, known as a disclosure log. A disclosure log is a register on an agency's or Minister's website, that records and provides access to documents that agencies and Ministers have released in response to formal requests.[206] The documents on a disclosure log do not include those containing an applicant's own personal information and certain other types of information.

235. Disclosure logs are used in the United Kingdom, Queensland, the Commonwealth, and NSW and are considered to be a 'push' model enabler.[207] The primary purpose of a disclosure log is to support the principle of maximum disclosure, by making information released to one person, available to a wider public audience.[208]

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[204] OVIC Practice Note: Informal release of information.

[205] Disclosure logs are discussed in more detail later, under 'Formal requests for access and disclosure logs'.

[206] See examples, OAIC Disclosure log; Qld Department of Premier and Cabinet, Disclosure log – 2023.

[207] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), Recommendation 3.

[208] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 68; NSW IPC, Report on the Operation of the GIPA Act 2014-15.

236. Other purposes and benefits of a disclosure log include:[209]

a. increasing community participation in government processes and decision making and contributing to a better-informed community;

b. improving service delivery by providing information to the public in a way that is easy, quick and free, compared to making a formal request and waiting for an agency to process the request;

c. allowing information released to be accompanied with supporting information, explaining issues of public interest in greater depth;

d. giving the public greater understanding of what information the public authority holds, thus enabling the public to make better informed information requests in the future;

e. giving agencies a greater understanding of the information needs of the community, to enable expansion of an agency's proactive release program; and

f. reducing costs and resourcing in administering the Act, by decreasing the need for and number of formal access requests and consequently the volume of reviews and complaints to OVIC (for example, for topical requests which seek access to the same document).

Examples in other jurisdictions

237. Disclosure logs are not a legislative requirement in the United Kingdom, but are considered best practice, and government departments are strongly encouraged to maintain them.

238. Australia's second-generation ATI laws include requirements to maintain a disclosure log.[210] In the Commonwealth and Queensland, disclosure logs must include:

a. a copy of the document released to the applicant in response to a formal request, if reasonably practicable;

b. details identifying the released document (only if the document is not included in the disclosure log); and

c. information about the way the released document may be accessed (if it is not included in the disclosure log).

[209] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 68; NSW IPC, Report on the Operation of the GIPA Act 2014-15.

[210] GIPA Act, Part 3, Division 4; FOI Act (Cth), 11C; RTI Act (Qld), Part 7, Division 2 (see also, indicative reprint for proposed changes to Division 2).

239. In NSW, the disclosure log does not have to include a copy of the document released to the applicant. Instead, the disclosure log is a record of:

    a. the date the formal access application was decided;

    b. a description of the information to which access was provided; and

    c. a statement as to whether the information is now available to other members of the public, and if so, how it can be accessed.[211]

240. A person should be able to access documents contained in or listed in a disclosure log, for free.[212] The Commonwealth FOI Act enables agencies to be reimbursed for specific reproduction costs if access is given other than on the agency's website.[213]

241. The Queensland RTI Act and the NSW GIPA Act do not prescribe where the disclosure log must be published or its form. The Commonwealth FOI Act requires the disclosure log to be on an agency's website.

242. All three jurisdictions require certain information to be deleted from information included in a disclosure log (in addition to what may already have been removed from a document in granting access in response to the formal request).[214] Information that cannot be included in a disclosure log includes the applicant's name, and any information:

    a. the publication of which is prevented by law;

    b. that may be defamatory;

    c. that would, if included in the disclosure log, unreasonably invade an individual's privacy;

    d. that is confidential and was communicated in confidence, or is protected from disclosure under a contract; or

    e. that would cause substantial harm to an entity.

243. In the United Kingdom and NSW, agencies may choose to only include information in the disclosure log if the agency considers it may be of interest to other members of the public.[215] The Queensland and Commonwealth laws do not contain this discretion.

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[211] GIPA Act, section 26.

[212] RTI Act (Qld), indicative reprint, section 78A(2); FOI Act (Cth), section 11C(4).

[213] FOI Act (Cth), section 11C(4).

[214] RTI Act (Qld), section 78B (see also indicative reprint); FOI Act (Cth), section 11C(1); GIPA Act, sections 26(3) and 56.

[215] See GIPA Act, section 25.

244. The Commonwealth FOI Act requires agencies to update disclosure logs within 10 working days after giving access to the document.[216]

Method and form of access

245. A 2017 report by the NSW IPC found that whilst disclosure logs complied with the formal requirements of the GIPA Act, their effectiveness as a proactive release tool could be improved. The NSW IPC encouraged agencies to integrate the disclosure log into the agency's Open Data strategies, and to provide direct links to documents, rather than making them available 'on request'.[217]

246. Similarly, in 2021 the Office of the Australian Information Commissioner (**OAIC**) published its findings of a desktop review of agency disclosure logs.[218] The review found:

> *… some agencies are requiring members of the public to contact them for access to documents on their disclosure logs rather than publishing the documents on the agency's disclosure log for members of the public to access. Further, some agencies do not provide a clear description of the released documents which makes it difficult for members of the public to search for and identify what the documents contain and decide whether to request access. This places an unnecessary barrier between the public and government held information and increases work for the agency in responding to requests for access to disclosure log documents.*

247. The OAIC's desktop review found 21 of the agencies reviewed in 2021 (60%) published all documents released in 2019-20 for download from their disclosure log. Eleven reviewed agencies (31%) required the public to contact them to access all of their 2019-20 disclosure log entries, and two agencies required the public to contact them to access most, but not all, entries on the disclosure log.

248. In its recommendations, the OAIC considered it better practice for agencies to:

> *… make documents available for download directly from their website and only ask members of the public to contact them for access when they are unable to upload a document, due to the size of the file, the need for specialist software to view the information, or for any other reason of this nature. Such an approach is consistent with the object of the FOI Act to facilitate and promote public access to information promptly and at the lowest reasonable cost.*

[216] FOI Act (Cth), section 11C(6).

[217] NSW IPC, Monitoring of Agency Disclosure Log Practices Report (September 2017).

[218] Office of the Australian Information Commissioner (**OAIC**), Disclosure log desktop review (September 2021).

249. The OAIC's FOI Guidelines on disclosure logs offers practical guidance on how to publish content on a disclosure log, suggesting the document can be published in a different form to what was released to the applicant: [219]

> *For example, if the FOI applicant inspected a document or viewed a video it may be necessary to make a different publication arrangement on the disclosure log. Similarly, if a document released to an FOI applicant would be difficult to publish online in an accessible fashion … publishing the information in the document in a different accessible form may be more efficient (for example, as a Word document or providing a textual description of an image).*

250. A 2020 report by the Office of the Information Commissioner Queensland on disclosure logs found that '[m]ost departments have not designed their disclosure logs to support browsing or searching, although some have tools, like the ability to filter the list or search by keyword'.[220]

251. The Queensland Information Commissioner noted, 'recurring themes appear in the information topics listed in most departments' disclosure logs. Agencies have an opportunity to identify information frequently sought and consider if they can make that information available more easily and efficiently'. The Information Commissioner recommended that agencies make their disclosure logs easy to find and use, up-to-date, and useful.[221]

252. The Commonwealth FOI Guidelines provide practical guidance on how to make a disclosure log useful, stating:

> *An agency may wish to highlight that information in a document published on the disclosure log has been revised and published in a different form; that the information provides only partial or superseded information about an issue; or that the information is taken from an internal working paper or other document that does not necessarily reflect the views of the agency, minister or the Australian Government.*[222]

Recommendations for Victoria

253. The policy intention of a disclosure log is a good one. If information has been disclosed under a formal request, an agency or Minister should, where appropriate, make it available to the wider public, without individuals needing to make more requests, and agencies or Ministers needing to process those requests. There should be a mechanism in Victoria's ATI law that reflects this principle.

254. A disclosure log is useful, as a record of what documents are being requested by the public and how agencies and Ministers are responding to those requests. The transparency of this information may encourage greater consistency across agencies and Ministers in how the legislation is applied.

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[219] OAIC, FOI Guidelines, Part 14, disclosure logs.

[220] Office of the Information Commissioner Queensland (**OIC Qld**), Disclosure logs audit report (August 2020).

[221] OIC Qld, Disclosure logs audit report (August 2020).

[222] OAIC, FOI Guidelines, Part 14, disclosure logs.

255. The existence of a log also provides a location to publish documents that do not otherwise fit neatly into the structure of an agency's or Minister's website, such as documents showing an agency or Minister carrying out their functions (internal emails, file notes, diagrams and draft documents).

256. Anecdotally, OVIC understands the information in disclosure logs of other jurisdictions are used by the media and members of the public to generate news stories and to help applicants formulate access requests. For example, Commonwealth agency data on disclosure logs shows a total of 77,954 unique visitors and 210,452 views, for just 14% of agencies (those that collect this data).[223] Agencies with high traffic to disclosure logs include the Department of Home Affairs, Department of Finance, Department of Industry, Science, Energy and Resources, Department of Defence, Australian Electoral Commission, Fair Work Ombudsman, Services Australia and the Federal Court of Australia.

257. OVIC considers, on balance, that the concept of a disclosure log is the best way to give effect to the principles of maximum and proactive disclosure. However, to ensure the concept remains fit for purpose in the digital age, a new ATI law should include legislative principles that require information in a disclosure log to be easy to find and use, up-to-date, and useful.

258. Features that may promote these principles, include:

    a. requiring the register to be searchable using filters and keywords;

    b. requiring agencies and Ministers to provide a description of the type of document (for example, 'email') and a summary of the information contained in the document (for example, 'this internal email discusses the creation of a community grants program');

    c. enabling agencies and Ministers to provide additional contextual information, to help the public make sense of information contained in a document (for example, an agency may explain the document was produced at a point-in-time and provide links to current information); and

    d. enabling agencies and Ministers to create a new record, where release of the original record would be too burdensome or not accessible (for example, creating a textual description of an image).

Recommendation 14

[223] Disclosure log reporting by federal government agencies 2021-22.

259. In 2013, the Hawke review recommended the disclosure logs for each agency and Minister be accessible from a single website to enhance ease of access.[224] The Committee may wish to consider a similar recommendation in Victoria.

260. Centralising all disclosure logs in one place could improve consistency as to the information included in a disclosure log and save time and expense in maintaining separate disclosure logs. A central, searchable log is likely to make it easier for members of the public to find what they are looking for, as they will not need prerequisite knowledge about which agency or Minister holds the information.

Recommendation 26

261. To further enhance the accessibility of government information, a new ATI law should require agencies and Ministers to consider whether the information released in response to a formal request, can be released proactively.[225] The purpose of this requirement would be to ensure that documents, which should be released proactively, are being released proactively, rather than listed on a disclosure log only. For example, if an agency releases internal policy documents in response to formal requests, these documents should be published proactively on the agency's website. The disclosure log could include a link to where the documents are published, rather than making the documents available for download only from the disclosure log. The public should be able to access these types of documents without needing to visit and search a disclosure log.

262. An agency or Minister should make a record of its decision whether or not to proactively release the information,[226] and make this record publicly available. The record could be in the form of an information asset register (discussed further in response to Term of Reference 4).

263. The requirement to make a record of the decision:

    a. enables agencies and Ministers to regularly review whether additional information can be proactively released over time; and

    b. allows agencies and Ministers to report on the extent to which information released in response to a formal request is made available to a wider audience.

[224] Dr Allan Hawke AC, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 report* (2 August 2013) (Hawke Review), Recommendation 36.

[225] Recommendation 7 of the Senate Report on the Operation of the Commonwealth FOI Act recommends amending the Cth FOI Act to require agencies to make directly available for public download, either from the disclosure log or another website, all information that is released through an FOI request subject to recognised technical constraints and privacy concerns: Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), Recommendation 7, x.

[226] See similar obligation in the GIPA Act to make a record of information that is not suitable for proactive release under section 6.

Reporting and oversight of proactive and informal release

264. Australia's second-generation ATI laws contain minimal reporting requirements and oversight of proactive and informal release mechanisms.

265. In NSW, the IPC has oversight over a subset of the information required to be released under mandatory proactive release only. The GIPA Act requires agencies to notify the Information Commissioner before adopting or amending an agency information guide and requires agencies to consult with the Information Commissioner about their agency information guide if requested by the Information Commissioner.[227] The Information Commissioner can issue guidelines and model agency information guides.[228]

266. The NSW IPC conducts annual desktop audits of an agency's compliance with mandatory proactive release requirements under the GIPA Act. This includes the agency information guide, proactive release of policy documents, contracts register and disclosure logs. However, a significant limitation of these audits is that they do not examine how comprehensive or current the information is that is made available, such as whether an agency has published all of its policy documents or whether the information is up to date.[229]

267. Commonwealth agencies are only required to update their information publication schemes every five years. To assist agencies with this process, the OAIC conducts a survey and produces a report every five years on agencies' compliance with their information publication scheme obligations.[230]

268. The Commonwealth FOI Act requires agencies to make and publish an 'agency plan', which acts as a form of reporting and oversight. In the plan, agencies are required to include information about:[231]

    a. what information the agency proposes to publish in its information publication scheme;

    b. how, and to whom, the agency proposes to publish its information publication scheme information; and

    c. how the agency otherwise proposes to comply with its information publication scheme requirements.

269. The OAIC's annual report includes information on disclosure logs, such as:[232]

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[227] GIPA Act, section 22(1).

[228] GIPA Act, section 22(2).

[229] See example, NSW IPC, Report on the Operation of the GIPA Act 2021-2022.

[230] See OAIC, Information Publication Scheme review survey 2018 ; OAIC, Information Publication Scheme review survey 2012.

[231] FOI Act (Cth), section 8(1).

[232] See example, OAIC Annual report 2022-23, 158.

a. the number of FOI requests where access was granted that are listed in the agency or Minister's disclosure log;

b. the number of listings on the agency or Minister's disclosure log that have been published; and

c. if the agency or Minister collects the figures, the number of unique visitors and page views for webpages that are part of the disclosure log.

270. To assist the OAIC to oversee agency compliance with disclosure log requirements, the OAIC encourages agencies to keep an internal information asset register.[233]

271. The Commonwealth, NSW and Queensland jurisdictions do not require agencies to report on information released informally. The lack of reporting requirements makes it hard to assess the effectiveness of this mechanism or the extent of its use.[234]

272. The Queensland Information Commissioner's *10 years on* report recommended agencies begin tracking requests for information made through informal channels, such as informal access schemes.[235] In addition to being able to track the frequency and volume of access requests made via informal pathways, this would also help agencies identify commonly sought information that the community finds useful.[236] Agencies can use this insight to proactively push information to the public, and reduce informal requests.[237]

Recommendations for Victoria

273. There should be greater reporting and oversight of proactive and informal release pathways in a new ATI law. This aligns with calls for increased reporting and oversight in other jurisdictions, discussed above.

274. This could be achieved through a requirement for agencies and Ministers to prepare and publish an access to information policy (**ATI Policy**).[238] The name of the policy should align with the name of a new ATI law for consistency and so the public understands the legislative context.

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[233] OAIC, FOI Guidelines, [14.77].

[234] See UNSW, *Informal Release of Information under Section 8 of the GIPA Act report* (December 2022).

[235] OIC Qld, 10 years on: Queensland government agencies' self-assessment of their compliance with the *Right to Information Act 2009* (Qld) and the *Information Privacy Act* (Qld), 18.

[236] NSW IPC, Report on the Operation of the GIPA Act 2021-2022.

[237] OIC Qld, 10 years on: Queensland government agencies' self-assessment of their compliance with the *Right to Information Act 2009* (Qld) and the *Information Privacy Act* (Qld), 18.

[238] Expanding on the requirement for agencies to make and publish an 'agency plan' in the Commonwealth FOI Act. Independent research by Monash University, commissioned by OVIC, on the culture of FOI in Victoria recommended the development of proactive and informal release policies, which may include analysis of FOI requests to identify commonly requested information that could be proactively released (Recommendations 6 and 7); Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021), available here. Similarly, OVIC engaged a consultant to explore and advise how OVIC can influence behavioural change to enable more efficient FOI administration through proactive and informal release. The consultant also recommended the development of policies to assist agency staff to provide

275. The ATI Policy could be used as a mechanism for agencies and Ministers to report on:

Mandatory proactive release

a. the comprehensiveness and currency of the information required to be proactively published, and where this information can be found; and

b. how the agency or Minister gives effect to legislative principles on proactive release (such as publishing information in a way that is practical, timely, easy to find, capable of being understood, and accessible).

Proactive release of additional information[239]

a. the process for approving additional information for proactive release;

b. how the agency or Minister identifies information for proactive release;

c. what information or classes of information the agency or Minister has approved for proactive release, including any conditions on release (this could be recorded in an information asset register);

d. where the information can be publicly found;

e. how the agency or Minister will increase the amount of information released, and what information the agency has identified for possible future release; and

f. how the agency or Minister gives effect to legislative principles on proactive release (such as publishing information in a way that is practical, timely, easy to find, capable of being understood, and accessible).

Informal release[240]

a. the process for approving information for release informally; and

b. what information or classes of information the agency or Minister publishes informally and any opportunities to release more information informally, and how and to whom the agency or Minister releases this information.

access to information outside of the FOI Act; Decision Design, Proactive and Informal Release Behaviour Change Final Report – Practical recommendations to increase proactive and informal release (June 2021).

[239] See OVIC Access to Information (Proactive and Informal Release) Policy Template, 11-13 and Appendix.

[240] See OVIC Access to Information (Proactive and Informal Release) Policy Template, 10.

Disclosure log and record of considering proactive release

a. a record of the agency's or Minister's decisions whether to include a document in its disclosure log; and

b. a record of the agency's or Minister's decisions to approve for proactive release, information that was released in response to an informal or formal request (this record may describe the categories of information not available for proactive release and could be in the form of an information asset register, or appear in a table in the ATI Policy).

276. Agencies and Ministers should be required to review their ATI Policy regularly (at least every 12 months).[241] This helps to ensure published information remains accurate and current, and supports an agency or Minister to build its capacity to release more information over time. Agencies and Ministers should be encouraged to consult with members of the public in preparing their ATI policy, to understand the public value of information that the agency or Minister holds.[242]

277. The ATI Policy should help to:

a. embed a culture of proactive and informal release within an agency, by demonstrating executive and senior leadership, and empowering employees to release information;

b. build proactive and informal release capability over time;

c. provide visibility over an agency's or Minister's proactive and informal release program, which is of benefit to the agency or Minister, members of the public, other agencies and Ministers, and to OVIC in its regulatory role, to oversee how agencies provide access to information;

d. make the maximum possible amount of information available promptly and inexpensively;

e. make formal requests a last resort for accessing information; and

f. enable the public to participate meaningfully in society and support better government decision making through public access to information and transparency.[243]

[241] See OVIC Access to Information (Proactive and Informal Release) Policy Template; This aligns with the requirement in NSW to review an agency's proactive release program every 12 months: section 7(3) of the GIPA Act.

[242] Open Government Partnership, Open Government Guide: Right to information (29 June 2015) Recommendations; see also local government guidance on the implementation of the LG Act.

[243] See OVIC Access to Information (Proactive and Informal Release) Policy Template.

278. Agencies and Ministers should be required to report to OVIC on their implementation of proactive and informal release pathways, including disclosure logs, for the purposes of OVIC's annual report on the operation of the FOI Act.

Recommendations 15 and 74

279. A new ATI law should ensure OVIC has the power and functions to enforce non-compliance, handle complaints, and conduct investigations, examinations and audits into agencies' and Ministers' implementation of proactive and informal release requirements, including disclosure logs.

Recommendation 16

Access to personal and health information (Term of Reference 3)

(3) Efficient and timely mechanisms for persons to access their own personal and health information

High proportion of FOI requests for personal and health information

280. The majority of requests received under the FOI Act are personal requests made by applicants or their agent (for example, a legal representative) for personal documents about the applicant (including their health information).[244]

281. Non-personal requests include those made by Members of Parliament, the media, organisations, and generally include requests for documents relating to government functions or a government agency.[245] Non-personal requests also include those made by an applicant requesting personal documents about a person other than themselves.

282. On average, personal requests represent around 69% of total requests received between 2014-15 and 2022-23, while non-personal requests represent 31% of requests.

283. Personal requests include requests for an individual's health records. When accessing health records in Victoria, individuals are typically directed by the public health service to make a formal FOI request.

284. In 2022-23, out of the top 30 agencies that received the highest volume of requests, 20 or two thirds were public hospitals or health services.[246] The number of requests for an applicant's own health record (20,668) represents 50% of the total requests received by the top 30 agencies, and on average, 63% of the FOI workload for these public health services.

[244] OVIC, Annual Report 2022-23, 111.

[245] OVIC, Annual Report 2022-23, 111.

[246] OVIC, Annual Report 2022-23, 114.

Individuals should not have to rely on FOI exclusively to access personal and health information

285. Individuals should not have to rely on the formal and costly processes in the FOI Act to access their own personal and health information.

286. Eighty four percent of requests made to the public health sector are granted in full.[247] This is a strong indication that an applicant's own health information is suitable for release informally and outside the FOI Act.

287. Individuals should have the option to access their information through simpler and more cost-effective means, such as through informal release schemes or other, less prescriptive legislation. However, the current access to information regime in Victoria does not support this:

    a. section 16 of the FOI Act lacks the specificity to authorise agencies to set up informal access schemes, such as for the provision of public health services patient files without processing them under the FOI Act; and

    b. the PDP Act[248] and HR Act[249] prevent agencies from relying on relevant provisions that would enable individuals to easily request access to, and amendment of, personal and health records.

288. Requiring individuals to use the FOI Act as the primary mechanism for accessing their own information is detrimental to their personal autonomy and is an inefficient use of government resources.

289. In NSW, personal records are routinely provided through alternative mechanisms, with ATI legislation not relied on or only used as a last resort. In addition to the access mechanism in the GIPA Act, an individual's public health records and personal information can be requested under relevant health and privacy legislation, at no cost or for a fee,[250] with no procedural requirements, limited reasons for refusal, and the agency must provide access without excessive delay or expense.[251] Agency staff are protected from civil or criminal liability in the giving of access.[252]

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[247] OVIC, Annual Report 2022-23, 117.

[248] See section 14 of the *Privacy and Data Protection Act 2014* (Vic).

[249] See section 16 of the *Health Records Act 2001* (Vic).

[250] Fees can be imposed for access to health records only: section 16 of the *Health Records Act 2001* (Vic).

[251] See *Health Records and Information Privacy Act 2002* (NSW), Schedule 1, HPP 7; *Privacy and Personal Information Protection Act 1998* (NSW), section 14.

[252] *Health Records and Information Privacy Act 2002* (NSW), section 72; *Privacy and Personal Information Protection Act 1998* (NSW), section 66A.

290. Agencies in Victoria want to release information informally, but the legislative landscape is too complex, and there is concern about legal liability arising from informal release. To help overcome these challenges, OVIC provides guidance on how to disclose an applicant's own health information under Health Privacy Principle (**HPP**) 2.2(b), which permits disclosure with the express or implied consent of that person.[253] This is not an intuitive use of HPP 2.2(b) and exemplifies the lack of clear legislative authorisation to release health information informally in Victoria.

291. Providing alternative means for individuals to access their own personal information would likely have a dramatic impact on the number of FOI requests received, given the high proportion (69%) of personal requests received by Victorian agencies.[254] By comparison, in NSW, personal requests make up only 46% of requests received. The amount of total requests received per 1,000 people is 2.9 in NSW, compared to 6.6 in Victoria.[255] Reducing the number of formal requests, can save time and costs involved in processing requests, and makes it easier for members of the public to access their own information.

292. At the Commonwealth level, Home Affairs decreased its FOI backlog by 73% and reduced average processing times to 11 days, by processing requests for an applicant's own personal information under the *Privacy Act 1988* (Cth) (**Privacy Act**) instead of under the Commonwealth FOI Act (**Commonwealth FOI Act**).[256] Home Affairs processed 34% of personal requests on time under the Commonwealth FOI Act compared to 89% of personal requests processed on time under the Privacy Act.

Recommendations for Victoria

Providing alternative legislative pathways for accessing personal and health information

293. OVIC provides two proposals for how the Committee could approach providing access to personal and health information.

[253] OVIC Practice Note: Release of health records held by Victorian public sector agencies.

[254] OVIC, Annual Report 2022-23, 111.

[255] NSW IPC, Agency GIPA Dashboard 2021-22.

[256] The Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), [3.79] and [3.88]. Home Affairs also noted that in parallel to processing more requests under the Privacy Act, Home Affairs also increased its FOI resourcing, implemented tools to streamline applications and case management, and established a senior-level working group on FOI matters.

294. First, OVIC recommends a model similar to NSW, that would enable individuals, or their next-of-kin, to request access to their own personal and health information under the PDP Act or the HR Act, respectively, or under the ATI law (under both informal release and formal release). Decision makers should be protected from civil and criminal liability for disclosures made in good faith under the PDP Act and HR Act.

295. OVIC recommends retaining the right to seek access to personal or health information under a formal request under a new ATI law, as a last resort, to ensure individuals have a legally enforceable right of access and review rights.

296. This would mean having three mechanisms through which an individual may seek access to their personal or health information.

297. To help give effect to this kind of model in Victoria, OVIC strongly recommends amending the access and correction provisions in the PDP Act and HR Act[257] to simplify and remove legislative prescription. For example, IPP 6 in Schedule 1 of the PDP Act, which relates to access and correction of personal information, runs to three pages, whereas the equivalent privacy principle in the NSW Privacy and Personal Protection Act is one sentence.[258] Removing outdated formality and technicality will reduce the workload and cost to government and remove unnecessary barriers to individuals accessing their own information.

298. If the current provisions in the PDP Act and the HR Act are retained without amendments, enabling individuals to access their personal or health information under these Acts will not have the intended effect of making access easier and simpler. This is because agencies will need to consider which prescriptive pathway to use in the particular circumstances, and have the knowledge, resources and internal processes to implement each one.

299. Consideration should also be given to ensuring appropriate resourcing of the Health Complaints Commissioner to conciliate any complaints made in relation to access to personal health information under the HR Act.[259]

300. With respect to the amendment of personal information, OVIC recommends this mechanism be removed from the FOI Act. Currently there are two separate processes for correcting and amending personal information: under Part V of the FOI Act and IPP 6 of the PDP Act. In OVIC's view, requests for amendment of personal information naturally and logically fall within legislation regulating personal information, as opposed to legislation providing a right to access information. NSW provides for amendment and correction mechanisms in its privacy legislation, not the GIPA Act.

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[257] PDP Act, IPP 6; HR Act, HPP 7 and Part 5.

[258] *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act), section 14.

[259] Under section 45 of the HR Act, a person may make a complaint to the Health Complaints Commissioner about an act or practice that may be an interference with the individual's privacy.

301. Second, and alternatively, the Committee may wish to consider simplifying the regulation of privacy in Victoria by consolidating the HPPs and the IPPs, and moving the HPPs to OVIC to regulate. This would assist individuals to access their own information by being able to seek access under fewer laws for both their health information and their personal information. This option would also require amendments to the PDP Act and the HR Act, outlined above.

302. OVIC notes recent reforms which passed in Queensland consolidate the National Privacy Principles (which apply to health agencies) and the Information Privacy Principles (which apply to all other agencies) into one set of privacy principles: the Queensland Privacy Principles.[260] In NSW, individuals may request access and amendment under either the *Privacy and Personal Information Protection Act 1998* (for personal information) or the *Health Records and Information Privacy Act* (for health information). IPC NSW has oversight over both Acts.

303. However, if OVIC were to regulate both information privacy and health privacy, it would require substantial additional resources to absorb another privacy jurisdiction and to properly administer and regulate both.

Recommendations 17 to 20

Authorising informal release under ATI law

304. A legislative pathway in the ATI law that authorises informal release would enable agencies and Ministers to provide efficient and timely access to personal and health information.[261] Access under this pathway would still need to comply with the IPPs in the PDP Act, but would protect agencies and Ministers from civil and criminal liability for disclosures made in good faith.

305. This would give agencies and Ministers a firm foundation to set up informal release access schemes, such as for providing patient files in hospitals by way of an online patient portal, without processing them under the Act.

306. This pathway could also result in enhancements and efficiencies to current informal release schemes in Victoria, such as the Victorian Care Leavers Records Service administered by the Department of Fairness, Families and Housing (**DFFH**).

307. The Care Leavers Service is designed to enhance the service provided by DFFH, for people seeking records about their own or a family member's time in out-of-home care. Due to the limited authorising pathways in the FOI Act, requests are still processed under the FOI Act. However, requests are informed by additional principles that are designed to ensure that the service that DFFH provides is tailored to meet an individual's needs.

[260] *Information Privacy and Other Legislation Amendment Act 2023* (Qld).

[261] This is proposed access pathway 3 (authorised informal release), in response to Term of Reference 2.

308. To achieve its principles, the service departs from the technical requirements of the FOI Act, such as by:[262]

    a. waiving all application and access charges;

    b. expediting requests in special circumstances, for example, if a Care Leaver has a serious medical condition or an impending court matter; and

    c. tailoring the release of records around the preferences of Care Leavers, including the option of supported release, which includes:

        i. helping Care Leavers understand their records (the historical context, the language used, and how decisions were made at the time);

        ii. discussing any potentially distressing content;

        iii. helping to understand why some information may have been redacted;

        iv. helping to submit further applications, especially if records provide new information about the location of other records;

        v. providing assistance to make an annotation to address any inaccuracies or misrepresentations; and

        vi. helping to access additional counselling.

309. Providing an authorised informal release pathway is also likely to facilitate innovation in how personal and health records are accessed. For example, Alfred Health has developed a patient portal which allows patients to access their Alfred Health medical information online.[263] Similarly, a growing number of public hospitals have implemented patient portals (such as the Royal Melbourne Hospital, Royal Children's Hospital, Royal Women's Hospital, and Peter MacCallum Cancer Centre have partnered with Health Hub to provide a centralised online patient portal).

310. More health providers may consider offering, or partnering with other health providers', patient portals and informally releasing health information, if staff were protected.

311. Sectors other than the health sector could also set up informal access schemes for individuals to access their records (such as the Legal Services Board and Commissioner).

Recommendation 17

[262] See DFFH, Care Leaver Access to Records Policy.

[263] 'Patient Portal' Alfred Health https://www.alfredhealth.org.au/patients-families-friends/patient-portal. See also other informal release options: Royal Women's Hospital, Release of Information Request; 'What happens to my information' Bendigo Health https://bendigohealth.org.au/my_information/.

Information management and record keeping (Term of Reference 4)

(4) The information management practices and procedures required across government to facilitate access to information

312. Best practice information management and recordkeeping is essential for providing access to information. Even the best ATI law will fail in its aims if agencies do not know what records they hold, and cannot locate and identify information for release in a timely way.

313. Some ATI laws contain requirements for information management. For example, India's RTI Act contains specific requirements to catalogue and index records in a form which facilitates the right to information under the Act.[264] However, most ATI laws are silent on the topic, despite its critical importance to achieving the aims of the law.

314. Increasing complexity of the information management environment is a challenge, with information management maturity ratings for certain agencies relatively low.[265] Factors that can improve ratings include awareness, management by design, active monitoring, maximising tools, sufficient resources, and inclusion (consultation with specialists on policy and strategy).[266]

315. In making recommendations regarding agency information management maturity, the Public Record Office Victoria (**PROV**) notes three key areas of importance:

    a. information management and data management within an organisation should be coordinated so that strategies, plans, and practices are aligned;

    b. information and data management be designed into new systems and processes and actively maintained; and

    c. sufficient and ongoing resources be provided to enable information and data to be managed well, in line with legislative and regulatory requirements, and business needs.

[264] RTI Act (India), section 4(1)(a).

[265] Of the participating agencies, the average rating was a rating of 2 – Aware, with one dimension reaching a rating of 3 – Formative for the first time since the commencement of the IMMAP. Public Record Office Victoria, Information Management Maturity Assessment Program 2021-22 Report, Version 2: De-identified (May 2-23), 12. PROV's Information Management Maturity Assessment Program involves all Victorian Government Departments and Victoria Police. PROV also accepts submissions from other agencies who have previously participated.

[266] Public Record Office Victoria, Information Management Maturity Assessment Program 2021-22 Report, Version 2: De-identified (May 2-23), 12.

316. In this part of the submission, OVIC discusses a whole-of-government information management framework, information asset registers, embedding access-by-design into information management practices, and retention and destruction of the public record in the digital age.

Whole-of-government information management framework

317. The need for a Victorian whole-of-government information management framework to facilitate public access to information was identified by a Committee of the Victorian Parliament over a decade ago.[267]

318. The 2009 *Inquiry into Improving Access to Victorian Public Sector Information and Data* (**PSI Inquiry**) considered that creating an overarching framework was 'essential to open access because agencies cannot effectively facilitate access to information that is not effectively catalogued, stored and managed'.[268]

319. In 2015, the Victorian Auditor General conducted an audit of *Access to Public Sector Information* (**VAGO audit report**).[269] The VAGO audit report found:

> *In responding to the 2009 parliamentary Inquiry into Improving Access to Victorian Public Sector Information and Data, government committed to transform the way the public sector provides access to its PSI by adopting an 'open by default' approach.*
>
> *However, the agencies we examined are not providing the public with full and open access to the information to which they are entitled. This is largely because the critical foundation of comprehensive and sound information management practices has been neglected.*
>
> *Ineffective whole-of-government leadership and governance of information management has failed to drive the significant cultural and operational changes needed to achieve open access to PSI.*
>
> *Consequently, access to PSI has not significantly improved, falling well short of the government's original intentions.*

[267] Victorian Parliament Economic Development and Infrastructure Committee, *Inquiry into Improving Access to Victorian Public Sector Information and Data* (2009) (**PSI Inquiry report**). A copy of the PSI Inquiry report is not available from the Victorian Parliament's website. The information cited in this submission is sourced from the Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015).

[268] A copy of the PSI Inquiry report is not available from the Victorian Parliament's website. This information is cited in VAGO Audit Report.

[269] Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015).

320. VAGO explains the history of what occurred between 2009 and 2015:

> *Government created a project sponsors' board to implement its response to the PSI Inquiry. By late 2011 the board developed the Public Sector Information Release Framework (PSIRF) covering government's commitment to implement a holistic whole-of-government IM framework.*
>
> *By early 2012, the Department of Treasury & Finance (DTF) assumed responsibility for implementing PSIRF. However, instead of proposing the framework for government endorsement, it advised government to proceed with only a partial application of PSIRF. The proposed policy—the DataVic access policy—mandated the release of data held by public sector agencies through a centralised data portal. Government endorsed the proposed policy and did not mandate that agencies establish and apply systematic and consistent practices for categorising, storing and managing PSI.*

321. By 2015, the VAGO audit report found 'a fragmented and confused governance framework and a proliferation of numerous unconnected, overlapping and inconsistent plans'. VAGO considered:

> *Whole-of-government leadership and oversight have been inadequate for developing and implementing a framework to effectively provide public access to PSI because:*
>
> - *a single point of accountability for the intended framework was not maintained—IM oversight and leadership had been removed*
> - *parts of the intended framework essential for achieving open access—such as developing and implementing systematic and consistent practices for categorising, storing and managing PSI—were left without authorisation and oversight*
> - *advocacy efforts of CIOC to promote improved IM in a small number of agencies lacked authority and were ineffective in driving the necessary changes*
> - *the implementation of just a portion of the government's commitment meant that only some of the components needed to provide open access have been progressed and reported on.*

322. VAGO recommended the Department of Premier and Cabinet (**DPC**) take the lead in creating a whole-of-government information management framework that will effectively support and oversee significantly improved performance. The information management framework was to:

    a. apply to all forms of public sector information;

    b. include open access to public sector information as a default position;

    c. incorporate the data release requirements of the DataVic access policy;[270]

[270] See DataVic Access Policy.

d. include metadata and information asset registers as key aspects of the framework;

e. include effective implementation, governance and monitoring arrangements; and

f. be underpinned by appropriate legislation.

323. Following VAGO's report, DPC led the development of a suite of information management policies and standards,[271] including an Information Management Framework (**IMF**),[272] Information Management Policy, Information Management Governance Standard, Metadata Standard,[273] and Information Management Maturity Measurement Tool (**IM3**).[274]

324. These policies, standards and tools apply to Departments, Victoria Police, Cenitex, Service Victoria and Parks Victoria, but not the wider public sector. Where they touch on access to information, the documents are primarily focussed on realising the benefits of data sharing, rather than the broader benefits to the public of improving access to all types of public sector information.[275] The IMF and its supporting policies and standards have not been updated since they were first released.[276]

325. In 2008, the Solomon Report considered, '[t]he sustaining, missing link in getting government from a freedom of information law to real enhancements in openness and accountability is a politically supportive and enabling broader information policy context'.[277] The VAGO audit similarly considered that whole-of-government leadership and governance was required to drive the significant cultural and operational changes needed to achieve open access to public sector information.[278]

326. Given the age of the information management framework, its supporting policies and standards, their limited application across the wider public sector, and limited references to the benefits of open access to information, it is timely to revisit these documents and explore the development of a whole-of-government information management framework.

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[271] See Information Management Policies and Standards.

[272] Information Management Framework for the Victorian public service (21 December 2016).

[273] Victorian Government data directory metadata standards (10 September 2018).

[274] Public Record Office Victoria, Information Management Maturity Measurement Tool (IM3).

[275] See example Information Management Framework for the Victorian public service (21 December 2016) 'Vision', 'Objectives', 'Enabler: use, share and release'; Information Management Policy (May 2017), Principle 4: Information is shared and released to the maximum extent possible, 'releasing information to the public promotes government transparency, stimulates innovation and commercial activity, gives researchers access to more data and leverages information by making it available to reuse, repurpose and share'.

[276] The IMF was released in December 2016. OVIC understands an update of the IMF is being prepared by government. However, agency responsibility for the IMF is unclear following machinery of government changes after the 2022 Victorian State election.

[277] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 15.

[278] Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015).

327. It will be important to harmonise or distinguish common terms across the information management landscape to avoid confusion. The information management lexicon in Victoria can be complex, with common terms used in administration and legislation meaning different things in different contexts. Clarifying the language will help to build an understanding of what the terms mean in the ATI context and the broader information management context.

328. Improving government transparency and accountability and community participation in government, should form part of the vision and objectives of a whole-of-government information management framework. Facilitating the maximum disclosure of all types of public sector information (not just data), should be included as a key component of the framework.

Recommendation 21

Embedding access-by-design into information management practices and e-governance

329. As Victoria transitions to digital government, strong e-governance will be needed to ensure the effective implementation of a new ATI law.[279]

330. The United Nations Educational, Scientific and Cultural Organisation (**UNESCO**) defines e-governance as the public sector's use of the most innovative information and communication technologies to deliver citizens with improved services, reliable information, and greater knowledge, to facilitate access to the governing process and encourage deeper public participation.[280]

331. Good e-governance means being proactive about transparency; to be intentional about creating appropriate documentation that can be released to the public.

332. A mature information management framework will consider access-by-design in all agency processes. This means designing policies, processes, and templates with access to information in mind, to empower public sector employees to write for release, and to continuously identify information for release when carrying out public functions.

333. Access-by-design includes building access to information into IT systems and producing records.[281] This may include:

[279] OVIC's views align with those of the NSW Information Commissioner Elizabeth Tydd, *AI, e-Governance and access to information: Why digital government must remain accountable to citizens* (The Mandarin, 27 September 2022).

[280] As cited in NSW Information Commissioner Elizabeth Tydd, *AI, e-Governance and access to information: Why digital government must remain accountable to citizens* (The Mandarin, 27 September 2022).

[281] See OVIC Practice Note: Proactive release of information.

a. writing for public release (for example, silo sensitive information, or prepare a summary of a report which might otherwise not be suitable for public release);

b. using tools and systems to support public release of information such as:

    i. by labelling information in document management systems or using metadata to flag information for public release at the outset and throughout the duration of a document's lifecycle;[282]

    ii. by building in systems for the segregation of exempt information (for example, personal information);

    iii. tagging information using keywords to enable relevant searches;

    iv. using customised and powerful search functions;

    v. ensuring information is available in an accessible form (for example digitising and converting records into machine-readable formats);

c. considering whether information assets recorded in the agency's or Minister's information asset register may be suitable for public release and update the register accordingly;

d. considering whether information can be released at different trigger points. For example:

    i. when a record is first created or captured in a records management system;

    ii. finalisation/approval of information;

    iii. revision of content;

    iv. revision of a protective marking;

    v. addition to an information asset register.[283]

334. Access-by-design should form part of the government's overarching information management framework.[284]

[282] This was recognised as an enabler of proactive release back in 2008 in the Solomon Report, see page 26.

[283] See Queensland Government Guideline, *Predetermining the release status of information*.

[284] Including the VPDSF and protective data security principles to maintain the confidentiality, integrity and availability of public sector information and information systems.

335. Access-by-design should be done safely and securely, considering information security and privacy. Agencies should also consider other data frameworks in providing access to information, such as Indigenous data sovereignty and data governance.[285]

Recommendation 21

Information asset registers

336. The 2015 VAGO audit report recommended that agencies develop a proactive public sector information release program, using comprehensive information asset registers as a core tool for release decisions.[286] VAGO recommended agencies publish their information asset registers to promote proactive release of information.[287]

337. DPC's Information Management Governance Standard, developed in response to VAGO's audit, requires departments to implement an information asset register.[288]

338. In 2019, OVIC created a sample Information Asset Register Template, to assist agencies to create their own information asset registers.[289] The information asset register is reported through Standard 2 of the Victorian Protective Data Security Standards (**VPDSS**), which requires public sector organisations to identify and understand their information assets and maintain an information asset register.[290] An information asset register provides a complete record of an agency's entire information holdings and is an important mechanism for agencies ensuring the security of their information assets.

339. OVIC's guidance also recognises that information asset registers can be used by agencies as a tool to identify information for public release.[291]

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[285] Yoorrook Justice Commission (2022) 'Indigenous Data Sovereignty and Data Governance', Information Sheet, https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/04/041922_Yoorrook_DataSovereigntyGuidance.pdf.

[286] Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015).

[287] Victorian Auditor General Office, *Access to Public Sector Information* audit report (10 December 2015) [2.3.1].

[288] See Information Management Governance Standard (September 2017) Requirement 7.

[289] OVIC, Sample Information Asset Register Template. VPDSS E2.020 under Standard 2 states 'The organisation identifies, documents and maintains its information assets in an information asset register (IAR) in consultation with its stakeholders.' The objective of this element is to ensure appropriate governance is being given to the protection of public sector information, through central oversight and management of the organisations information holdings. 60. The primary source for E2.020 is OVIC's Practitioner Guide: Identifying and Managing Information Assets.

[290] The Standards provide a risk-based approach to information security designed to protect public sector information. Organisations subject to Part 4 of the *Privacy and Data Protection Act 2014* (Vic) (PDP Act) must adhere to the Standards.

[291] OVIC Practice Note: Proactive release of information.

340. In line with VAGO's recommendation, consideration should be given to requiring agencies and Ministers to publish a public version of their information asset registers. This would greatly improve transparency, by enabling the public to understand the extent of, and nature of, an agency's or Minister's document holdings and improve visibility and public understanding of the documents an agency or Minister does not approve for public release. This would also contribute to what Part II of the FOI Act aims to do: to create a register of documents that the public may use to assist them to find the information they need.

341. The Solomon Report went further, recommending publication of a whole-of-government information asset register as a further mechanism to improve the openness and transparency of government.[292] Whilst a footnote in the Victorian Government's Information Management Governance Standard indicates a whole-of-government information asset register was being prepared,[293] OVIC is unaware of whether one was ever completed. There is, in any case, no publicly available whole-of-government information asset register.

Recommendation 22

Retention and destruction of the public record in the digital age

342. A best practice ATI law will be supported by legislated minimum standards regarding the maintenance and preservation of information held by public bodies.[294] In Victoria, this is achieved through the *Public Records Act 1973* (Vic) (**Public Records Act**) and standards, policies, and retention and disposal authorities issued by PROV.[295]

343. As government increasingly adopts digital technology, it has a duty to implement information management practices that safeguard the legislated commitment to open government and the fundamental right of the public to access government-held information.

344. It is essential that government has the capability and capacity to retrieve records, including records that may be saved used outdated technology.

345. As much as possible, Victoria's information management laws should be technology neutral, to ensure Victoria can keep pace with changes in digital technologies and future proof the State's information management framework.

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[292] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), 28.

[293] Information Management Governance Standard (September 2017) footnote 1.

[294] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 5 (Principle 1: Maximum Disclosure).

[295] PROV sets mandatory Standards for the management of public records. The Standards apply to data/information/records held across the public office, in all formats, systems and storage environments. In addition, PROV publishes policies and guidelines on record keeping. See PROV website.

Private communication tools

346. 'Document of an agency' is defined broadly under the FOI Act. It includes emails sent using private accounts, messages sent via private mobile phone numbers (including audio recordings and images), WhatsApp and other messaging services, where the email or message was created as part of, or for the purpose of the officer's or Minister's duties.[296] Individuals can request access to this information under the FOI Act. These records form part of the public record and needs to be captured appropriately by government agencies and Ministers.

347. In Queensland, the *10 years on* report found that only 30% of agencies capture and retain information from personal devices, private accounts, and modern communication systems, such as messaging tools, Facebook, and WhatsApp.[297]

348. NSW Information Commissioner, Elizabeth Tydd, has also drawn attention to the use of instant messaging software and encrypted and/or irrecoverable communication for government purposes that give rise to a requirement for the creation and retention of public records.[298]

Documenting information about the use of AI and other digital technology

349. The Victorian Information Access Community Attitudes study notes that 70% of respondents agree that agencies should be required to publicly report on their use of artificial intelligence (AI) and 83% agree that public access to government information improves transparency and accountability.[299]

350. As the public sector adjusts to using machine learning technologies in its service delivery, it's important that appropriate documentation is also being created, to help current and future generations understand the use of these technologies.

351. The community should be able to access information from the government about:

    a. why and how AI technologies are being used by government;

    b. what government-held information and data an AI algorithm can access, use, and infer; and

    c. what the effects or outcomes are of the government's use of AI technologies.[300]

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[296] OVIC, FOI Guidelines, section 5, [1.14], [1.22].

[297] OIC Qld, 10 years on: Queensland government agencies' self-assessment of their compliance with the *Right to Information Act 2009* (Qld) and the *Information Privacy Act* (Qld), 22.

[298] NSW Information Commissioner Elizabeth Tydd, *AI, e-Governance and access to information: Why digital government must remain accountable to citizens* (The Mandarin, 27 September 2022).

[299] See OVIC, Information Access and Community Attitudes Study (2022).

[300] This is similar to the Robodebt Royal Commission's Report, Recommendation 17.1, which recommends that where automated decision making is implemented, departmental websites should contain information advising that automated decision making is used and explaining

352. This will require agencies to appropriately capture information, and label, categorise, store and preserve it. To do this well, requires an agency to have robust information management processes and systems that operate within a culture of integrity, accountability, and transparency. For example, information about the logic involved in automated decision making processes, including AI, needs to be documented in a way that is meaningful. If the information requires a Masters degree to understand it, then it is meaningful to 1.2% of the population only.[301]

353. Where contracted service providers are used by government, this means adopting contractual terms and establishing strong assurance mechanisms to ensure appropriate documentation is created and can be accessed by government, and in turn the public.

Recommendation 23

Accessing information from third party contractors

354. The ATI law must ensure that agencies are legally in possession of documents created and held by contracted service providers and sub-contractors, so that access to these documents can be facilitated under the ATI law.

355. Two case examples in Victoria and NSW illustrate the negative consequences on the right to access, and to transparency and accountability, when an agency does not have access to information held by its contracted service providers.

356. In the OVIC decision, *EC3 and Department of Jobs, Precincts and Regions* [2022] VICmr 47,[302] the applicant sought access under the FOI Act to documents relating to their application to take part in the Department's Digital Jobs Program. As part of the application process, the applicant used a behavioural interview tool provided by a private company. The tool was used to assess the personality and employability of applicants for the Digital Jobs Program. The applicant requested access to the report generated by the private company, of the applicant's use of the behavioural interview tool. The agency decided it was not in possession of the report and OVIC agreed. Relevant to the decision was the:

    a. contractual relationship between the Department and the private company which did not give the Department an immediate right to possession of the documents held by the private company (no constructive possession); and

in plain language how the process works. See also, Public Record Office Victoria, *Artificial Intelligence (AI) Capturing and Managing Records Generated by or using AI technologies* (December 2023).

[301] See Australian Government style manual, Literacy and access, Reading levels in Australia.

[302] Available on Austlii.

b. fact the Department did not have physical possession of any reports by the private company and could not access the behavioural interview tool.

357. In the NSW decision of *O'Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100,[303] a social housing tenant asked for information about the calculation of her rental subsidy. In a non-digital environment, this information would be readily available. However, the Department determined it did not hold the algorithm, software specification, source code or test suites sought in the request. The information was held by a private entity contracted by the Department to develop software to manage private rental subsidies in the Department's database.

358. The NSW Civil and Administrative Tribunal (NCAT) upheld the Department's decision that it did not hold the requested information. The NSW Tribunal held there was no right of access included in the terms of the contract between the Department and the private contractor. Further, even if the Department did have an immediate right of access under the contract, the Tribunal doubted whether section 121 of the GIPA Act would provide access. The section does not impose a requirement on the contractor to provide information to the agency that would place the contractor at a commercial disadvantage to the agency, now or into the future.

359. The protection of commercial confidentiality should not come at the complete expense of public transparency when government functions are outsourced, or where third party tools are used to support government decision making processes.

360. Section 6C of the Commonwealth FOI Act requires an agency to take contractual measures to ensure that the agency receives a document if the document is created by or in the possession of a contracted service provider or subcontractor and the document relates to the performance of the contract.

361. Similarly, section 121(1) of the NSW GIPA Act requires an agency to have an immediate right of access to:

a. information that relates directly to the performance of the services by the contractor,

b. information collected by the contractor from members of the public to whom it provides, or offers to provide, the services, and

c. information received by the contractor from the agency to enable it to provide the services.

[303] See NSW IPC case note.

362. Victoria's FOI Act contains no similar provisions.

363. The decision in *O'Brien* demonstrates that a provision like section 121(1) of the NSW GIPA Act will not, on its own, ensure government possession of documents held by third party contractors. It needs to be supported by standardised government contracts and procurement policies that require agencies not to agree to 'commercial-in-confidence' provisions, unless there is a strong reason.

364. The right of immediate access should not be watered down by exceptions that are inappropriately weighted towards commercial confidentiality. In *O'Brien*, the Tribunal found that even if the government contract granted an immediate right of access, the exceptions in section 121(2) of the NSW GIPA Act would have prevented the government from possessing the contractor's information. That provision provides (amongst other exceptions) that an immediate right of access does not have to be provided if the contractor considers that the information, if disclosed to the agency, could reasonably be expected to place the contractor at a substantial commercial disadvantage in relation to the agency, whether at present or in the future. It should not be left to the commercial entity to make this decision in relation to information arising from or created in relation to a service contract with government.

365. The NSW Information Commissioner has called for legislative reform, to standardise government procurement contracts, to ensure the right of access to information relating to outsourced services.[304]

Recommendation 24

[304] NSW Information Commissioner Elizabeth Tydd, *AI, e-Governance and access to information: Why digital government must remain accountable to citizens* (The Mandarin, 27 September 2022).

Increasing disclosure of information using technology (Term of Reference 5)

(5) Opportunities to increase the disclosure of information relating to government services using technology

Using technology to process formal requests and proactively release information

366. Lack of technical capacity to process information is a problem observed by the United Nations Special Rapporteur on Freedom of Opinion and Expression, and the former Queensland Information Commissioner.[305] For example, all agencies should have equal access to redaction and pixelation software and appropriate training on how to use the software, to ensure the maximum release of government-held information. If agencies do not have these tools, they will need to withhold access to the entire record, instead of facilitating access to the parts of the record that do not contain exempt information.

367. Some agencies in Victoria use available technology to improve the process for responding to an access request. For example, Grampians Health use AI to automate the process of receiving and responding to FOI requests. At the Commonwealth level, the Department of Home Affairs implemented Robotic Process Automation (**RPA**), including an FOIBOT to help streamline FOI processes and reduce the administrative burden on staff. However, OVIC believes the adoption and investment in technology by agencies, including agencies that receive large numbers of FOI requests to assist in responding to and managing FOI workloads, is minimal.

368. However, any use of technology must also be done safely, with privacy and security front of mind. Before implementing new technology, OVIC recommends undertaking a privacy impact assessment and security risk assessment to identify and mitigate any risks before using new technology.[306]

[305] Mr Frank La Rue, United Nations Special Rapporteur on the Promotion and Protection of the Right Freedom of Opinion and Expression, report to the United Nations General Assembly in 2013 (A/68/362, 4 September 2013), [78]; See comments made by the former Queensland Information Commissioner in OVIC's Information Access Series, Proactive and Informal Release Panel, available on OVIC's Vimeo account.

[306] OVIC has guidance to assist agencies to undertake privacy impact assessments and security risk assessments, available on OVIC's website.

369. Further, it is essential for agencies and Ministers to properly classify and label their information assets for technology, such as machine learning, to work. As outlined above under Term of Reference 4 (information management), agencies and Ministers must properly capture information, label, categorise, store, and preserve it. There is a risk that, if information is not labelled correctly, an AI tool will not identify it.

370. The Philippines has developed a whole-of-government information access lodgement portal, supported by AI to enable applicants to make requests online and be directed to the appropriate agency.[307] The portal also provides access to information released in response to requests (similar to the concept of a disclosure log). OVIC understands another jurisdiction in Australia is exploring the feasibility of offering a similar whole-of-government tool.

371. Mexico has a similar whole-of-government portal called the National Transparency Platform (**NTP**). [308] The NTP enables any person to request access to information from any government agency. Requests can be made to multiple agencies by filling out one online form and ticking the agencies the individual wishes to make their request to.[309]

372. Albania has a platform that exists alongside a twin system which was developed by the Information and Data Protection Commissioner in partnership with the National Agency of Information Society.[310] The platforms enable applicants to submit requests online, to central and local government agencies or make complaints to the Commissioner.

373. A centralised whole-of-government disclosure log and information asset register, could form part of a whole-of-government ATI portal in Victoria, allowing individuals to both make requests and search for publicly available information. This kind of technology would assist in capturing data on frequent requests, so this information can be made proactively available. A requirement to tag information, and the ability to search by keyword, would also improve visibility over the extent of proactive and informal release and the application of exemptions for similar types of information across agencies.

374. While Victoria has an online FOI portal for the lodgement of requests, administered by the Department of Justice and Community Safety, only a very small number of agencies are registered users as there is a fee to use the portal. This portal is not integrated with other systems and users have to log in to access requests made to them. A primary use of the portal is to facilitate collection of electronic application fee payments by agencies from applicants.

Recommendations 26, 27 and 28

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[307] See https://www.foi.gov.ph/.

[308] Plataforma Nacional de Transparencia: https://www.plataformadetransparencia.org.mx/es/web/guest/home?p_p_id=com_liferay_login_web_portlet_LoginPortlet&p_p_lifecycle=0&p_p_state=normal&p_p_state_rcv=1.

[309] See https://www.youtube.com/watch?v=ibPYIsj2ULo.

[310] See: https://www.pyetshtetin.al/.

Using technology to increase OVIC's efficiency and timeliness

375. Much of the technology described above could also assist OVIC with improving its timeliness in completing reviews and complaints and increasing our general efficiency by reducing the manual administrative burden across our three statutory jurisdictions of FOI, privacy and information security.

Purposes and principles of access to information (Term of Reference 6)

(6) The purposes and principles of access to information and whether the Act meets those purposes and principles, including:

a. the object of the Act as set out in section 3;

b. the definition of document in section 5; and

c. the operation of exemptions and exceptions in Part III and Part IV

The FOI Act does not meet best practice ATI law

376. The FOI Act, in its current form, does not meet the purposes and principles of a best practice ATI law[311] as it does not:

    a. practically support the maximum possible amount of information being made available to the public quickly and at low cost;

    b. empower and encourage public sector employees and Ministers to proactively release information and position formal requests for information as a last resort;

    c. promote a culture of open government;[312] and

    d. ensure exceptions and exemptions are clearly and narrowly drawn.

377. The FOI Act impairs the realisation of the aims and benefits of best practice ATI law, including:

    a. building public trust and confidence in decision making by government agencies and Ministers, by increasing public awareness and understanding of government policies, programs and obligations;

    b. improving transparency, accountability and good governance;

[311] See the purposes and principles of a best practice ATI law at the beginning of this document.

[312] Whilst the Act does provide for an independent oversight body tasked with providing education and guidance (see FOI Act (Vic), section 6I(2)), OVIC's education function is limited by the deficiencies of the FOI Act's 'push' policy model (discussed in response to Terms of Reference 1 and 2), and outdated objects and operative provisions (discussed in response to this Term of Reference).

c. improving the ability for members of the community to participate meaningfully in policy development and government decision making;

d. reducing corruption and perceptions of corruption and wrongdoing;

e. facilitating basic human dignity and informed personal decision making, through access to an individual's own personal and health information;

f. reducing misinformation and disinformation through the proactive release of information that explains and supports government decisions and actions; and

g. creating better outcomes for the community through improved dialogue on key issues of public interest such as healthcare, sustainable development, and the protection of the environment.

378. The FOI Act's limited 'push' model also creates a barrier to realising the specific benefits of proactive and informal release, such as:

a. improving government service delivery to the public by providing quicker and easier access to information, compared with responding to formal requests;

b. reducing the need for an individual to make a formal request, thereby reducing the resources required to administer the ATI law;

c. providing the opportunity for wide dissemination of information, using accessible languages and formats;

d. providing the opportunity for an agency to provide contextual information, to assist the public's understanding of the work of government; and

e. providing the opportunity for the agency and individual to agree on when and in what form information is to be released.

Decreasing number of decisions granting access to information

379. Section 13 of the FOI Act grants a right of access to documents of an agency and official documents of a Minister. The Act contains exceptions to the right of access in Part III and exemptions to the right of access in Part IV.

380. According to the objects of the FOI Act, these exceptions and exemptions should be limited only to what is necessary for the protection of essential public interests, and private and business affairs. However, there is a decreasing number of decisions granting access to information and an increasing reliance on exceptions.

381. When making an FOI decision, an agency may decide to grant access to a document in full, in part, or decide to deny access to it in full.[313] From 2014-15 to 2022-23, on average each year around 67% of requests were granted in full, 30% of requests were granted in part, and 3% of requests were denied in full.

382. The percentage of requests granted in full decreased, from 70% in 2014-15 to 64% in 2022-23. The percentage of requests granted in part increased from 27% in 2014-15 to 33% in 2022-23, while the percentage of requests denied in full increased from 2% in 2014-15 to 3% in 2022-23. These figures demonstrate a general trend toward releasing less information, against the purpose and objects of the FOI Act.

383. Agencies and Ministers are also increasingly relying on exceptions in sections 25A(1) and 25A(5) of the FOI Act to avoid processing requests. From 2014-15 to 2022-23, the number of times section 25A(1) was cited increased from 126 times to 545 (by around 332%). In the same period, the number of times sections 25A(5) was cited increased from 101 times to 484 (by around 378%). Over the past three years (2020-21, 2021-22 and 2022-23) OVIC varied over 28% of 25A(5) decisions.[314]

384. Section 25A(1) may be used to refuse to grant access to documents in accordance with a request without processing it, where an agency is satisfied the work involved in processing the request would substantially and unreasonably divert its resources from its other operations.[315]

385. Section 25A(5) outlines that an agency may refuse access to documents in accordance with a request without having identified any or all of the documents, if it is apparent from the nature of the request the documents would be exempt, and where removal of the exempt material would not facilitate release of the documents, or if it is clear the applicant does not seek an edited copy of the documents.

386. The use of sections 25A(1) and 25A(5) is significant as an agency may categorically refuse a request without identifying or assessing any of the documents requested.

387. Trust is central to the relationship between citizens and government. Government earns trust when its actions are transparent and open to public scrutiny, especially when that scrutiny is inconvenient or feels uncomfortable. Government loses trust when it does the opposite. An increasing trend in denying access to information, whether in full or part, is detrimental to trust.

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[313] Section 25 of the FOI Act provides an agency may provide access to an edited copy of a document with exempt or irrelevant material deleted if it is practicable to do so and it appears from the request (or the applicant subsequently indicates) that the applicant would wish to have access to an edited copy.

[314] For example, OVIC varied 32% of section 25A(5) decisions in 2020-21, 36% of decisions in 2021-22 and 17% of decisions in 2022-23. Reasons for changes in the percentage of varied decisions may include OVIC resolving more matters informally (such as where the agency has improperly applied the exception and subsequently made a fresh decision which the applicant agrees with) or an increase in reviews from DFFH and/or Victoria Police (OVIC tends to uphold the section 25A(5) decision to certain documents of these agencies).

[315] Section 25A(1)(a) of the FOI Act; section 25A(1) may also be applied, in the case of a Minister, where the Minister is satisfied that the work involved in processing the request would substantially and unreasonably interfere with the performance of the Minister's functions, section 25A(1)(b) of the FOI Act.

388. This Inquiry offers an opportunity to revisit the exceptions and exemptions in the FOI Act to ensure they strike the right balance between protecting legitimate interests and making the maximum amount of information publicly available.

389. Improving the objects of the FOI Act, alongside a robust regime of legitimate exceptions and exemptions, that are clear and narrow, should assist to decrease the number of FOI requests made to agencies and Ministers and decrease the number of decisions subject to review by OVIC and VCAT.[316]

The object of the FOI Act

390. The object of the FOI Act is in section 3. The language is dated and complex, and it has not been updated since 1982.

391. Section 3(1)(b) of the Victorian FOI Act is a reference to the right to make a request for documents under Part III, and the exceptions in Part III and exemptions in Part IV of the FOI Act that limit the right of access. The effect of section 3(1)(b) and the first part of section 3(2) is to require the FOI Act to be interpreted in a way that maximises disclosure and limits exceptions. However, the outdated and complex language makes it difficult to readily understand this.

392. The second half of section 3(2) requires access to information to be quick and low cost. This supports the principles of best practice ATI law[317] and should be retained in Victoria's ATI law. Consideration should also be given to including a requirement for access to be provided in a way that meets community expectations (for example, accessible, understandable).

393. OVIC recommends that an objects clause in a new ATI law be drafted using modern, plain language. The objects clause should:

    a. retain the statement in the Victorian FOI Act which recognises that access to information held by government is a fundamental right of any person;[318]

    b. include a clear and specific intention for the maximum amount of information to be made available proactively and informally, and for formal requests to be used as a last resort;

    c. create a broad and beneficial presumption in favour of the maximum disclosure of all information with clear instructions to specifically interpret exceptions and exemptions narrowly, and to interpret the Act in a way that best gives effect to the presumption of maximum disclosure. This is important for setting the tone of the culture expected of government.

[316] See increasing reviews to OVIC and VCAT, in response to Term of Reference 8.

[317] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016 (Principle 1: Maximum disclosure).

[318] This includes all natural and legal persons, irrespective of citizenship or residence.

394. This is a modern, third-generation, adaption of the second preamble in Queensland's RTI Act, which requires information to be released administratively outside the Act, and formal requests used only as a last resort. A third-generation ATI law provides the mechanisms for proactive and informal release in the Act and requires them to be used ahead of formal requests.

395. A best practice ATI law will also refer to the broader purposes and benefits of the law and require the law to be interpreted in a way that gives effect to those stated benefits.[319] At a minimum, the purposes and benefits should include:[320]

    a. acknowledging that the law aims to promote a free and democratic society;

    b. recognising that transparency enhances accountable and effective government;

    c. encouraging the open discussion of public affairs;

    d. recognising that information in the government's possession or under the government's control is a public resource;

    e. recognising that the community should be kept informed of government operations;

    f. recognising that access to information increases the participation of members of the community in democratic processes, leading to better informed decision making;

    g. recognising that transparency reduces the risk of corruption and perceptions of corruption and wrongdoing;

    h. enhancing the ability of the public to scrutinise the exercise of public power; and

    i. acknowledging that access to information laws are only one of several measures adopted by government to maximise the disclosure of information to the community.

396. A simplified object, that makes direct reference to its purposes and benefits will better reflect the intent of a third-generation ATI law. It will also enhance the ability for the public, agencies and Ministers to understand the Act's objects, thus improving the chances of the law meeting its stated objectives.

Recommendation 29

[319] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016; see the Preamble to Queensland's RTI Act.

[320] See Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 141; RTI Act (Qld), Preamble.

Examples in other jurisdictions

397. The GIPA Act in NSW recognises the benefits of the ATI law in its objects clause,[321] with a separate section creating a presumption in favour of disclosure of government information.[322] The purposes and benefits of the law are said to be to: 'maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective'.[323]

398. A deficiency of the GIPA Act is that agencies are not required to have regard to the presumption in favour of disclosure when determining if there is an overriding public interest against disclosure of government information.[324] Further, the GIPA Act does not contain a clear instruction to interpret the public interest considerations against disclosure narrowly.

399. In Queensland, the purpose and benefits of the RTI Act, and Parliament's intention, are in the Act's preamble.[325] They are extensive and reflected in OVIC's suggestions above.

400. The presumption in favour of access, and requirement to interpret exemptions narrowly,[326] are repeated throughout the RTI Act. For example, there is a pro-disclosure bias when dealing with access applications[327] and deciding access to documents.[328]

401. The preamble explains that information is to be released outside the RTI Act and formal requests used as a last resort:

> *Government is proposing a new approach to access to information. 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.*[329]

402. The Commonwealth FOI Act does not contain a presumption in favour of access to information, and no requirement to interpret exemptions narrowly. The objects clause does not support the principle of maximum disclosure.[330]

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[321] GIPA Act, section 3(1).

[322] GIPA Act, section 5.

[323] GIPA Act, section 3(1).

[324] See section 15, GIPA Act. The section refers to the Objects in section 3, but not the presumption in section 5.

[325] RTI Act (Qld), preamble 1.

[326] RTI Act (Qld), section 47(2): 'It is the Parliament's intention that the grounds [of exemption] are to be interpreted narrowly'.

[327] RTI Act (Qld), section 39(3).

[328] RTI Act (Qld), sections 44(1) and 44(4).

[329] RTI Act (Qld), preamble 2.

[330] See FOI Act (Cth), section 3(1).

403. The objects clause in the Commonwealth FOI Act does refer to the aims and benefits of the law, in promoting Australia's representative democracy. These include:[331]

    a. increasing public participation in Government processes, with a view to promoting better informed decision making;

    b. increasing scrutiny, discussion, comment and review of the Government's activities; and

    c. recognising that information held by the Government is to be managed for public purposes, and is a national resource.

Scope of bodies covered by the Act

404. The scope of bodies subject to the FOI Act and PDP Act should be harmonised to reduce confusion amongst stakeholders of legislative obligations and improve consistent application of beneficial legislation. This could be achieved by harmonising the definitions of 'agency' in section 5(1) of the FOI Act, 'organisation' in Part 3 of the PDP Act, and 'agency or body' in Part 4 of the PDP Act, with the *Public Administration Act 2004* (Vic). Any harmonisation in terminology should not result in fewer bodies being covered by the ATI law.

The definition of document

405. The definition of a 'document' is in section 5(1) of the FOI Act. It is non-exhaustive, and includes:

    a. a document in writing;

    b. any book, map, plan, graph, or drawing;

    c. any photograph;

    d. any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;

    e. any disc, tape, sound track, or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom. The 'document' is the device, not the sound recording or data file;

[331] FOI Act (Cth), section 3(2).

f. any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom. The 'document' is the device, not the visual image;

g. anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them;

h. copies, reproductions or duplicates of any of the above listed things, or any part of a copy, reproduction or duplicate.

406. In 2006, subsection (g) and (h) (outlined in (h) above) were added, to help enable agencies and Ministers to delete exempt or irrelevant material from a document and give access to the remainder of the document.[332]

Right to access electronic documents

407. The substantive definition of 'document' has not been updated since 1982, when computers were not being used by the public service. The wording used to describe sound, data and visual files illustrates the dated language. The FOI Act deems the 'device' to be the document, not the sound recording, data file, or visual image.[333]

408. Digital transformation has contributed to information-rich governments, and advances in technology have changed how governments store and provide access to information. Not only does government create significantly more documents today compared to the 1980s, the format of documents and where and how they are stored has also changed significantly.

409. Changes in how documents are created and stored has led to contention as to whether electronically stored documents (such as an email, Word document or PDF) fall within the definition of a 'document' in section 5(1) of the FOI Act, when considering section 19 of the FOI Act. Section 19 can require an agency to create a document that does not exist in a discrete form, where the agency could produce a written document containing the requested information by using a computer or other equipment ordinarily available to it.

410. Some agencies have tried to argue that the definition of a 'document' in section 5(1) of the FOI Act and the terms of section 19 are out of date and do not recognise the concept of an electronically or digitally stored 'document'. This led a Victorian agency to seek to impose significant charges for an applicant to access digitally stored documents, such as emails in *Monash University v EBT* 2022 VSC 651 by arguing that electronically stored documents are not 'documents' for the purpose of section 5(1), and therefore the agency had to create a document under section 19 to fulfill the terms of the request. The Supreme Court held that electronic documents are 'documents' for the purpose of section 5(1) of the FOI Act.

[332] Inserted by the *Terrorism (Community Protection) (Further Amendment) Act 2006*, section 19.

[333] See the definition of 'document' in section 5(1), subsection (g).

411. While the EBT decision has clarified this specific issue, it does not remove the ambiguity and uncertainty created by outdated concepts that were conceived 40 years ago, prior to digital technologies used by modern government.

412. The right of access to information held by public bodies in Article 19(2) of the ICCPR, encompasses a right to records held by a public body, regardless of the form in which the information is stored, its source, and the date of production.[334]

413. OVIC recommends the definition of 'document' be amended to ensure it clearly captures all types of records and storage mediums used by modern government. This will provide clarity for agencies, by ensuring all records in whatever form – hard copy or electronic – are captured by the ATI legislation.

414. For example, the NSW GIPA Act grants a right of access to 'government information', where:[335]

    a. 'government information' means information contained in a record held by an agency; and

    b. 'record' means any document or other source of information compiled, recorded, or stored in written form or by electronic process, or in any other way or by any other means.

415. Under the *Official Information Act 1982* (NZ), applicants are given the right to request 'official information'.[336] 'Official information' is defined as any information held by a body covered by the Act.[337] The Act then sets out how information may be made available, when it comprises a document. Section 2(1) defines a 'document' as a document in any form, and includes 'any information recorded or stored by means of any tape recorder, computer or other device; and any material subsequently derived from information so recorded or stored'.

Recommendation 30

Right to access information, not just documents

416. A strong ATI law will apply not only to documents but also to information.[338] This supports the principle of maximum disclosure and helps to future proof ATI law, by being form-agnostic.

[334] United Nations Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, [18].

[335] GIPA Act, section 4 and Schedule 4, clause 10.

[336] Official Information Act 1982 (NZ), section 12.

[337] Official Information Act 1982 (NZ), section 2.

[338] Article 19, The Public's Right to Know: Principles on Right to Information Legislation, 2016 (Principle 1: Maximum disclosure).

417. There should be a provision requiring agencies to make some effort to extract information from records they hold, to give effect to the right to information, where it is not held in records or documents of the agency.[339]

418. For example, in Sweden a request was made for information relating to the 'cookies' (trackers on browser usage) on the Swedish Prime Minister's computer. The request was granted, with the information indicating that there were no cookies on his computer, revealing that the Swedish Prime Minister did not use the Internet at the time of the request, which was important information in the public interest.[340]

419. The FOI Act creates a right of access to documents, not information.[341] Whilst section 19 is a positive inclusion, in that it creates a duty to create a document containing information requested by an applicant, the duty is only enlivened where the information is not available in 'discrete' form, and can be made available using a computer or other equipment ordinarily available to the agency or creating a transcript from an audio file. This section is formal and technical and uses dated language.

420. Jurisprudence on section 19 is inconsistent and unclear as to the meaning of 'discrete,' as well as when and how the section applies. The provision was drafted in 1982 and does not consider the way electronic information is stored and recorded now.

421. The recent Supreme Court decision in *Monash University v EBT* [2022] VSC 651 clarifies that electronic documents are 'discrete' 'documents' for the purposes of section 5(1) of the FOI Act and should be provided in accordance with the ordinary operation of the FOI Act rather than the circumstances referred to in section 19.

422. While the decision in *EBT* has clarified this issue, modernising the legislation would provide greater certainty and clarity regarding the kinds of documents to which the law applies and when an agency may be required to create a document.

423. The obligation to create a document should be expressed in plain language, with an exception for situations where doing so would be an unreasonable diversion of resources, or the agency does not have the required tools to create the document. To support the principle of maximum disclosure, the provision should be expressed as a duty, rather than a discretion.[342]

Recommendation 31

[339] Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 31.

[340] Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 31.

[341] FOI Act (Vic), section 13.

[342] Compare GIPA Act, section 75.

Official document of a Minister

424. Under the FOI Act, an 'official document of a Minister' means a document in the possession of a Minister that relates to the affairs of an agency, but is not a document of an agency.[343] Similarly, the Commonwealth FOI Act defines 'official document of a Minister' as a document in the possession of a Minister, or the Minister concerned.[344]

425. The Senate Legal and Constitutional Affairs References Committee report into the Operation of Commonwealth Freedom of Information (FOI) Laws (**Senate Report**) notes the definition of an 'official document of a Minister' is interpreted by the OAIC as excluding documents of former Ministers, even where the request was made when the Minister was still in office. This has led to an issue where access has been refused to documents of a former Minister.[345] This includes where the request was made to the Minister while they were still in office. The report refers to the Australia Institute's submission, which submits that the 'loophole' can lead to the destruction of documents when Ministers are no longer in office.[346]

426. Submissions to the Senate Report make several suggestions to avoid this issue. These include:

- amending the definition of 'official document of a Minister' to expressly include documents of a former Minister;
- amending the definition of 'official document of a Minister' to be 'a document in the possession of the Minister at the time of the FOI application;
- amending the FOI Act to require documents of a former Minister to be retained and 'kept within the reach of FOI law' where there has been a change of Minister; and
- requiring documents that may be subject to an FOI request to be transferred to the OAIC until a decision is reached. [347]

427. OVIC has followed the OAIC's interpretation of 'official document of a Minister'.[348]

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[343] FOI Act (Vic), section 5(1).

[344] FOI Act (Cth), section 4(1).

[345] The Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), 75.

[346] The Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), 75, referring to the Australia Institute, *Submission 23*, 22.

[347] The Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), 75, referring to Grata Fund, *Submission 5,* 4, Public Interest Advocacy Centre, *Submission 4*, 3, The Australia Institute, *Submission 23*, 21, and Mr Jonathan Hall Spence, Principal Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, 37.

[348] *FJ4' and Minister for WorkSafe and the TAC* (Freedom of Information) [2023] VICmr 90 (17 August 2023).

428. Federal Court proceedings are underway to test the OAIC's interpretation of 'official document of a Minister'.[349] However, OVIC recommends a new ATI law make clear that the right of access applies to documents of a former Minister, and prevent the destruction of documents of a former Minister where the Minister is no longer in office.

Recommendation 32

The operation of exceptions in Part III

429. The FOI Act contains exceptions to the right of access in Part III: sections 14, 24A, 25A(1) and 25A(5).

430. The legislative drafting of these provisions is complex and convoluted. This is problematic as it can lead to inconsistent use between agencies and the application of exceptions that do not align with the maximum disclosure purpose and object of the FOI Act.

Section 14 – documents not subject to ATI law

431. Section 14 excludes certain documents from being accessed under the FOI Act. The section does not include freely available information. It only excludes documents that are publicly available for a fee or other charge.

432. A new ATI law should include a provision that excludes documents and information that is already freely available (for example, on an agency's website, disclosure log, mobile application or public register), as well as documents and information that is already available for a fee or other charge (for example, a public register or administrative access scheme) from the right of formal access.

433. This is a common sense amendment to enable agencies to decline requests for information or documents that are already in the public domain.[350] This was the original intent of section 14 to reduce duplication of efforts where the document is available another way.

Recommendation 33

[349] *Rex Lyall Patrick v Attorney General of the Commonwealth of Australia* (SAD40/2023). The Federal Court of Australia's judgment in this proceeding is currently reserved.

[350] This is already the case in NSW and QLD. See GIPA Act, section 59; RTI Act (Qld), section 53. This amendment was put forward in clause 8 of the Freedom of Information Amendment Bill 2007 (Vic), but the Bill was not passed.

Section 24A – repeated requests

434. Section 24A places limits on the time and resources an agency or Minister spends on the affairs of one single applicant. The section was inserted in 1993 for the purpose of addressing an identified burden on agency resources that was affecting the administration and operation of the FOI Act.[351]

435. The elements of section 24A are very hard to satisfy because VCAT must have confirmed the agency or Minister's decision to refuse the request. Few decisions go to VCAT for review given OVIC's review jurisdiction and the fact that, proportionately, a small percentage of applicants seek review by OVIC and/or VCAT.

436. To give effect to Parliament's intention, OVIC suggests simplifying the elements of section 24A. The provision could be modelled on section 60(1)(b) and (b1) of the NSW GIPA Act:

> *Section 60(1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason) –*
>
> *…*
>
> *(b) the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision on the application.*
>
> *(b1) the applicant has previously been provided with access to the information concerned under this Act or the Freedom of Information Act 1989.*

Recommendation 34

Vexatious applicants

437. Subject to the limited application of section 24A for repeated requests (discussed above), an applicant can apply under the FOI Act for documents as many times as they want.

438. Anecdotally, some agencies have difficulties with a small number of applicants who make high volumes of FOI requests, often of a repetitive, persistent and complex nature over an extended period of time, which can become a significant drain on an agency's resources and inhibit the timely processing of FOI requests made by other applicants.

[351] *Freedom of Information (Amendment) Act 1993* (Vic); Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148 (Haddon Storey, Minister for Tertiary Education and Training) https://www.parliament.vic.gov.au/images/stories/volume-hansard/Hansard%2052%20LC%20V412%20May1993.pdf.

439. Agencies experience an unsustainable burden on FOI resources to process an increasing number of FOI requests with limited resources.[352] Vexatious applicants can further strain these resources as the agency must allocate a disproportionate amount of its resources to dealing with one or a minority of applicants.

440. The Queensland Information Commissioner can declare a person to be a 'vexatious applicant'.[353] This provision in the RTI Act was enacted following a recommendation made in the Solomon Report.[354] Similarly, the Commonwealth FOI Act allows the Information Commissioner to declare a person to be a 'vexatious applicant'.[355]

441. In NSW, the GIPA Act permits NCAT to make an order that a person is not permitted to make an access application without first obtaining NCAT approval.[356] This provision was enacted following a recommendation by the NSW Ombudsman.[357]

442. The *Freedom of Information Amendment Bill 2007* (Vic) proposed the insertion of a new Part VIA into the FOI Act to enable a person to be declared a vexatious applicant by VCAT.[358] The Bill was not passed.

443. OVIC recommends a new ATI law include a power for VCAT to declare a person to be a 'vexatious applicant' upon an agency making an application to the Tribunal. This power would be distinct from VCAT's power to declare a person to be a vexatious litigant under the *Vexatious Proceedings Act 2014* (Vic).[359]

444. OVIC considers VCAT is the most appropriate body to make this determination given the significance of removing a right for a person to make a request. VCAT has the ability to conduct an in person hearing and take evidence under oath or affirmation. If the power were given to the Information Commissioner, the determination would be made on the papers, thereby limiting the affected party's opportunity to be fully heard on a decision affecting their legal right to access government-held information.

Recommendation 35

[352] OVIC, The State of Freedom of Information in Victoria: A special look at FOI in Victoria from 2019 to 2021 (April 2022), 13.

[353] RTI Act (Qld), section 114.

[354] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Solomon Report), chapter 15.

[355] FOI Act (Cth), section 89L.

[356] GIPA Act, section 110.

[357] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 87-88.

[358] Freedom of Information Amendment Bill 2007 (Vic), clause 20.

[359] VCAT can hear cases about litigation restraint orders, as a way to manage and prevent vexatious litigation in courts and tribunals.

Section 25A(1) – unreasonable diversion of agency resources

445. Section 25A(1) may be used to refuse to grant access to documents in accordance with a request without processing it, where an agency is satisfied the work involved in processing the request would substantially and unreasonably divert its resources from its other operations.[360]

446. Section 25A was introduced in 1993 and is modelled on section 24 of the Commonwealth FOI Act.[361] The provision was inserted because substantial and unreasonable diversion requests were seen to be causing severe disruption to agencies, even though the number of such requests was relatively small.[362]

447. The section gives effect to a 1989 report by the Legal and Constitutional Committee of the Victorian Parliament,[363] which recommended a provision be inserted into the Act to strike a balance between two public interests. Firstly, the public interest, as expressed in the object of the Act, to facilitate and promote the maximum disclosure of information held by government, and secondly, the public interest in efficient government administration.

448. The purpose of section 25A is to prevent the mischief that occurs when an agency's or Minister's resources are substantially and unreasonably diverted from its other operations.[364]

449. The use of section 25A(1) significantly curtails the public's right of access, because it enables an agency to categorically refuse a request without identifying or assessing any or all documents requested.

450. To support the principle of maximum disclosure, section 25A(1) should only be applied in a clear case of substantial and unreasonable diversion of agency or Minister resources. However, OVIC sees agencies and Ministers increasingly relying on this exception to avoid processing requests. For example, from 2014-15 to 2022-23, the number of times section 25A(1) was cited increased from 126 times to 545 (by around 332%).

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[360] Section 25A(1)(a) of the FOI Act; section 25A(1) may also be applied, in the case of a Minister, where the Minister is satisfied that the work involved in processing the request would substantially and unreasonably interfere with the performance of the Minister's functions, section 25A(1)(b) of the FOI Act.

[361] *Freedom of Information Act (Amendment) Act 1993* (Vic).

[362] *Freedom of Information (Amendment) Act 1993* (Vic); Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148 (Haddon Storey, Minister for Tertiary Education and Training).

[363] Victorian Parliament Legal and Constitutional Committee, *A report to Parliament upon freedom of information in Victoria* (Parliamentary Paper, 38th report to Parliament, 1989) [5.19].

[364] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [48].

451. OVIC has noted agencies relying on section 25A(1) when required to consult with individuals under the third party consultation provisions introduced in 2017. For example, if an applicant requests access to their health record, which contains 100-250 names of individuals, the agency argues they can contact the individuals as they have their current contact details and, while it is technically practicable[365] to consult, to do so would be an unreasonable diversion of resources.

452. The interaction of section 25A(1) with the consultation provisions needs to be addressed, to ensure that section 25A(1) is only used when it is actually necessary rather than to avoid processing a request.

453. For example, agencies should be prevented from relying on section 25A(1) where the burden to agency resources relates to third party consultation.[366] In those circumstances, consultation should not be required, and the agency should process the request. In other words, if a request will be an unreasonable diversion of resources because of third party consultation, then third party consultation is unlikely to be reasonably practicable and the agency or Minister does not have to consult.

454. Section 25A(2) sets out a non-exhaustive list of matters an agency or Minister must have regard to in deciding whether to refuse a request under section 25A(1). These matters are relevant to estimating the work involved in processing a request.

455. Subsection 25A(2) has not been amended since 1993. The way agencies process requests, the information holdings an agency now has, and subsequent amendments to other sections of the FOI Act since 1993, have clouded the interpretation of section 25A(1) for agencies.

456. OVIC recommends codifying the current jurisprudence to make it clear the factors an agency can consider in determining whether processing a formal request would be an unreasonable diversion of its resources. In addition to the current factors listed under 25A(2) a new ATI law should include at a minimum, factors such as the:[367]

    a. agency's size and resources; and

    b. statutory period for processing a request (30 days) without considering the availability of extensions of time.

457. This amendment would provide greater assistance to agencies and applicants in understanding why the request is too large.

[365] Third party consultation and the concept of 'practicability' is addressed further in response to Term of Reference 7.

[366] Currently, resources that would have to be used in consulting with third parties in relation to a request is listed as a factor that an agency may consider in deciding whether to refuse the request.

[367] See for example, section 60 of the GIPA Act.

458. The provision should include a presumption in favour of processing the request and a public interest override, that would require the agency to process the request if the public interest in favour of disclosure outweighs the factors being considered to refuse processing it.[368]

459. Consideration should also be given to ensuring that agencies and Ministers do not avoid their statutory duty by deliberately withholding resources or deliberately failing to provide proper resources for its FOI function.[369] Professional Standard 9.1(a) requires a principal officer of an agency to ensure their agency is sufficiently resourced to receive and process requests.[370]

460. If the processing of requests is regularly constrained by the level of resourcing allocated to FOI, the agency or Minister must review the adequacy of its resourcing, not apply section 25A(1).

Recommendations 36, 37 and 38

Section 25A(5) – refusing a request because the documents are obviously exempt

461. Section 25A(5) is designed to save the resources of an agency or Minister that would have been spent in processing a request for obviously exempt documents. It is intended as a safeguard against the misuse of the FOI Act by an applicant, similar to the safeguards in sections 24A (repeat applicants) and 25A(1) (voluminous requests).[371]

462. Section 25A(5) allows a request to be refused, without beginning to process it, if it is apparent from the nature of the documents, as described in the request, that all the documents would be exempt from access and the agency could not provide edited copies with the exempt information removed.

463. If an agency or Minister wishes to refuse a request because the requested documents are exempt, it must normally locate, identify and examine the documents and give reasons why the exemptions apply to each document or class of document.

464. In contrast, section 25A(5) significantly limits a person's right of access under the FOI Act. It limits transparency and procedural fairness, by preventing an applicant from knowing if and how many documents exist, and whether the exemptions do, in fact, apply to each document or class of document. Agencies are also not required to consult with the applicant to assist them to rescope the request to allow it to be processed.

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[368] See examples, section 60(3B) GIPA Act (NSW) and section 39 RTI Act (Qld). Section 39(1) of the RTI Act makes it clear that it is Parliament's intention that an agency should process an application, and section 39(3) enables an agency to process a request, even if they may refuse to deal with it under the RTI Act.

[369] *Re A v Department of Human Services* (1998) 13 VAR 235, 247.

[370] The FOI Professional Standards are a binding legislative instrument that apply to agencies but not to Ministers.

[371] *Knight v Corrections Victoria* [2010] VSC 338, [58].

465. From 2014-15 to 2022-23, the number of times sections 25A(5) was cited increased from 101 times to 484 (by around 378%). Proportionally, agencies are relying on section 25A(5) more, outside of the increase in the number of requests received. OVIC also receives an increasing number of reviews for section 25A(5) decisions (increasing from 4% of all reviews in 2018-19 to 11% in 2020-21). On review, over the last three years (2020-21, 2021-22 and 2022-23) OVIC varied over 28% of 25A(5) decisions.[372]

466. To support the principle of maximum disclosure, section 25A(5) should be applied in clear and limited circumstances only, where, as an objective fact, it is clear from how the documents are described in the request that all of the documents are exempt in nature in full.

467. This exclusion currently does not strike the right balance between promoting access to government-held information and safeguarding against the misuse of the FOI Act. It grants too much discretion to an agency to refuse a request without processing it, in circumstances that are not transparent or procedurally fair. The impact on individuals' rights is particularly worrying given the growing reliance on section 25A(5), with which OVIC increasingly determines is not established on an objective basis.

468. A new ATI law should not include this exclusion. The impairment to the right of access goes too far, impairing the levels of transparency and accountability that are essential to building trust between government and the community. Second generation ATI laws do not contain this exclusion. Agency resources are sufficiently protected through exclusions for repeat requests and substantial and unreasonable requests.

469. However, OVIC acknowledges the limited instances where section 25A(5) is appropriately applied (for example, to Child Protection records when someone other than the child to whom the record relates seeks access to the records). Removing the exception is likely to create additional work in those specific instances. However, on balance, OVIC's view is the benefit to transparency outweighs the cost to the agencies that would have to process requests under a new ATI law that they would not be required to process under section 25A(5).

470. To address concerns where section 25A(5) is properly applied to Child Protection records, legislation that deals with Child Protection records could be amended to remove the right of access to certain documents under an ATI law.

Recommendation 39

[372] For example, OVIC varied 32% of section 25A(5) decisions in 2020-21, 36% of decisions in 2021-22 and 17% of decisions in 2022-23. Reasons for changes in the percentage of varied decisions may include OVIC resolving more matters informally (such as where the agency has improperly applied the exception and subsequently made a fresh decision which the applicant agrees with) or an increase in reviews from DFFH and/or Victoria Police (OVIC tends to uphold the section 25A(5) decision to certain documents of these agencies).

The operation of exemptions in Part IV

471. The object of the FOI Act refers to a general right of access to documents limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.[373]

472. Part IV of the FOI Act contains 14 exemptions which outline various reasons an agency can refuse access to a document, or information in a document, when responding to a formal request for access under Part III.

473. The exemptions in Part IV of the FOI Act operate independently of each other. There is no overarching framework or standard which must be met before an agency can refuse access.

474. The exemptions are confusing and overly technical to apply. For example, section 33 of the FOI Act details the process involved in determining if personal affairs information is exempt from disclosure. This section now runs in excess of seven pages as a result of dozens of legislative amendments making it unnecessarily complex and procedural to apply. Section 33 can be contrasted with the NSW GIPA Act, where the equivalent provisions are expressed in no more than a single page in a clear manner.[374]

475. Additionally, some sections contain multiple clauses that must be satisfied before the exemption applies. Or, conversely, clauses that contain exceptions as to when the exemption does not apply. This can make applying the exemption complicated and confusing. For example, for section 30 to apply, both section 30(1)(a) and section 30(1)(b) must apply. However, section 30(1) will not apply if sections 30(3) or 30(4) or 30(6) apply.

476. Some exemptions in the FOI Act contain a public interest test, some contain an 'unreasonable' test,[375] some contain a 'prejudice' test,[376] and some contain a 'damage' test.[377]

477. Some exemptions deem documents absolutely exempt, simply by the type of document or subject matter contained in them. For these exemptions, there is no requirement to consider whether, in the particular circumstances, there would be actual harm in disclosure, or whether there is nevertheless, an overriding public interest in favour of disclosing the document.[378]

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[373] Section 3(1)(b) of the FOI Act (Vic).

[374] See GIPA Act, section 14 Table, Individual rights.

[375] FOI Act (Vic), sections 33 and 34.

[376] FOI Act (Vic), sections 29, 31 and 31A.

[377] FOI Act (Vic), section 29A.

[378] See examples FOI Act (Vic), sections 28, 29A(1A), (1B), 29B, 31(1)(c), 32, 34(1)(a) and 38.

478. The exemptions containing a public interest test are inconsistent. They use different terminology, including both positive and negative tests (as well as different variations of the positive and negative tests). For example:

   a. section 30(1): 'and, would be contrary to the public interest';

   b. section 31(2): 'if it is in the public interest that access be granted';

   c. section 34(2)(d): 'whether there are any considerations in the public interest in favour of disclosure…';

   d. section 35(1)(b): 'disclosure would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair…';

   e. section 29(1): 'contrary to the public interest'; and

   f. section 36: deemed 'contrary to the public interest' by reason of circumstance versus factors.

479. Differing terminology and multiple variations of the public interest have made the application and consideration of the public interest difficult to interpret, and allowed for inconsistent outcomes.

480. OVIC recommends all exemptions use plain language to help with more consistent application and outcomes.

Presumption in favour of disclosure

481. It is easy to focus on the level of complexity and technicality of the exemptions and lose sight of the beneficial purpose and object of the FOI Act and the presumption in favour of access.

482. The object of the FOI Act outlines Parliament's intention that agencies and Minister should exercise any discretions under the Act in a way that facilitates and promotes the disclosure of information, quickly and inexpensively to the applicant. Section 16 of the FOI Act helps to give effect to this intention, outlining that agencies and Ministers may disclose exempt documents where it is proper to do so. [379]

[379] The submission discusses the object of the FOI Act in more detail above.

483. While this intention is expressed in the object of the FOI Act, there should be a clear presumption in favour of disclosure of information in the Act. For example, a clear presumption in favour of disclosure at the beginning of the Part, and simple changes in wording, such as 'An agency or Minister may only refuse access to a document if…', instead of 'a document is an exempt document if…',[380] would go some ways to address the tendency amongst some agencies to apply exemptions first and think about access later.

Retiring the word 'exemption'

484. Internationally, the term 'exemption' is not used to refer to a basis for refusing access. Instead, the word 'exception' is used, as these are the exceptions to the overriding rule and presumption that information is to be disclosed. The word 'exception' indicates these situations are meant to be limited.

485. The word 'exemption' is used in Commonwealth countries only. It creates the impression that there are classes of documents or information that are always inaccessible. In a best practice ATI law, the non-disclosure of information must be justified on a case-by-case basis. Exemptions should not apply in a 'blanket' way to classes of documents or information.

486. In its report recommending a new Act to replace the NSW FOI Act, the NSW Ombudsman stated:

> *The term 'exemptions' should become a thing of the past, with the new Act instead containing 'reasons for refusal', with access only being refused if it can be demonstrated that releasing the information could reasonably be expected to cause some form of detriment or harm* [381]

487. OVIC suggests retiring the word 'exemptions' in favour of the words 'limited exceptions', or similar. This should be accompanied by a clear presumption in favour of access and a requirement for exceptions to be interpreted narrowly.

Recommendations 40 and 41

[380] This phrase appears at the start of each exemption.

[381] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 8.

Overall time limits on exemptions

488. Best practice ATI laws contain limits on how long exemptions apply to a document, after which the document or information is no longer exempt.[382] Hard 'historical disclosure' time limits create a presumption that the original harms no longer exist. After this time limit ends, an agency or Minister must justify any continued withholding of the information.[383]

489. Victoria's FOI Act contains overall time limits for Cabinet documents and internal working documents.[384] In OVIC's view, the time limits on these exemptions should be reduced from 10 to five years.[385] Reducing the time limit reflects that deliberative documents progressively lose sensitivity after deliberation has concluded and a decision is made.

490. Ten years is arbitrary and impairs the right of access and the benefits that flow from transparency of government's deliberative processes. Reducing overall time limits from 10 years to five years would be a notable change for Victoria which would demonstrate its commitment to transparency and accountability.

491. The Committee may also wish to consider addressing the inconsistency created by section 10(1) of the Public Records Act, which prevents public access to permanent Cabinet-in-Confidence records in PROV's custody for 30 years.[386]

Recommendation 47

Consistent three-part test for exemptions

492. International law recognises that the right to information is not absolute. Every government holds information that should legitimately be withheld from open access. The principle of maximum disclosure cannot mean the release of all documents.

[382] Centre for Law and Democracy and Democracy Reporting International, 'International Standards on Transparency and Accountability', Briefing Paper 47, March 2014, 11.

[383] Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 31.

[384] FOI Act (Vic), sections 28 (Cabinet documents) and 30 (internal working documents).

[385] FOI Act (Vic), section 30(6).

[386] See also, https://prov.vic.gov.au/recordkeeping-government/accessing-transferred-cic-records.

493. An ATI law regime of exceptions lies at the very heart of any ATI law, as it defines the dividing line between transparency and secrecy. It is vital for the framework to cover all legitimate secrecy interests, both because these are legitimate to protect and because the ATI law will lose credibility if it is overly broad. It is also equally important for exemptions not to be overbroad, vaguely defined or inappropriate, or the Act fails to achieve its aims.[387]

494. As a fundamental human right, any restrictions on the right to access government-held information must be clearly and narrowly drawn, and subject to strict 'harm' and 'public interest' tests.[388]

495. Under international law, any restriction on freedom of expression in Article 19 of the ICCPR must comply with a three-part test. The restriction must:

    a. protect one of the legitimate interests listed in Article 19(3), being the rights or reputations of others , national security, public order or public health or morals;

    b. be necessary to protect this interest; and

    c. proportionate.[389]

496. This international standard has been distilled into a three-part test for exclusions in an ATI law,:

    a. the ATI law must contain a full and narrow list of protected interests which justify non-disclosure;

    b. access should only be refused where disclosure would or would be likely to cause substantial harm to that protected interest (the harm test); and

    c. even if harm is likely to occur, the information should still be released if the benefits of disclosure outweigh the harm (the public interest override).[390]

497. A best practice ATI law should follow this three-part test for exceptions to the right of access. The following section discuss each of these in more detail.

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[387] United Nations Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, [34]; UN Special Rapporteur on Freedom of Opinion and Expression, Report to the UN General Assembly (A/68/362, 4 September 2013) [83].

[388] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 7 (Principle 4: Limited scope of exceptions); UN Special Rapporteur on Freedom of Opinion and Expression, Report to the UN General Assembly (A/68/362, 4 September 2013) [99].

[389] United Nations Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, [22].

[390] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 7 (Principle 4: Limited scope of exceptions); Centre for Law and Democracy and Democracy Reporting International, 'International Standards on Transparency and Accountability', Briefing Paper 47, March 2014, 10.

498. The FOI Act contains numerous exemptions that are not harm-tested, such as sections 29(1)(b), 29A(1A), 30(1), 31(3) and 34(1)(a). There is also no mandatory public interest override, to require information to be disclosed where the public interest in favour of disclosure outweighs the harm to a protected interest.

499. Second generation ATI laws also score poorly in the RTI Rating for their regime of exemptions.[391]

Recommendations 40 to 44

Protecting legitimate interests

500. A new ATI law should provide a complete list of legitimate protected interests which may justify non-disclosure. The list should be limited to matters recognised under international law, such as the protection of:[392]

a. privacy;

b. national security, defence and international relations;

c. the prevention, investigation and prosecution of criminal activities;

d. legitimate commercial and other economic interests;

e. legal privilege;

f. conservation of the environment;

g. public safety;

h. management of the economy; and

i. effectiveness or integrity of government decision making (confidentiality of deliberative processes within or between public bodies during the internal preparation of a matter).

501. Exemptions should be based on the content of the information in a document, rather than the type or category of a document.

[391] The Commonwealth FOI Act scored 1 out of 4 points for the harm test, and 1 out of 4 points for the public interest override. The NSW GIPA Act scored 0 out of 4 possible points for not having harm tested exemptions and 2 out of 4 for the public interest override, due to the GIPA Act containing conclusive presumptions that it would be contrary to the public interest to disclose many categories of information.

[392] Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, 35; Tshwane Principles, Principle 2: Application of these Principles. See examples, Council of Europe, *Recommendation Rec(2002)2 of the Committee of Ministers to Member States on access to official documents*, Principle IV, possible limitations to access to official documents; Model Inter-American Law on Access to Public Information 2.0 (2020), Articles 32-34.

502. Second generation ATI laws score poorly for this indicator on the RTI Rating. The exemptions for Cabinet documents and internal working documents are considered too broad.[393] The exceptions in the NSW GIPA Act relating to disclosure that would prejudice the effective exercise by an agency of the agency's functions, and for business and financial interests are also considered too broad.[394] Suggestions for improving certain exemptions in the FOI Act are discussed later in response to this Term of Reference.

503. The protected interests should be listed in the body of the ATI law, not in a schedule. This should help to ensure that any amendments to exemptions are properly considered by the Parliament, and less likely to be inserted in response to single and transitory concerns.[395] It should also help to future proof the legislation from piecemeal amendments that make it difficult to understand and apply, and from amendments that seek to broaden the protected interests over time in ways that may not be legitimate.

Recommendation 42

Illegitimate interests that should not be protected

504. International law recognises that the following interests can never justify a refusal to disclose information:[396]

    a. protecting the government from embarrassment or a loss of confidence in the government;[397] or

    b. protecting the government from exposure to wrongdoing, including human rights violations and corruption.

[393] RTI Rating, Indicator 29, Victoria, New South Wales, Australia.

[394] RTI Rating, Indicator 29, New South Wales, score 3/10.

[395] See similar recommendation in NSW Ombudsman report, 54.

[396] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 7 (Principle 4: Limited scope of exceptions); Tshwane Principles, Principle 3; UN Special Rapporteur on Freedom of Opinion and Expression, Report to the 2000 Session of the United Nations Commission on Human Rights (E/CN.4/2000/63, 5 April 2000), [44].

[397] This is an irrelevant consideration in the GIPA Act, section 15(c); RTI Act (Qld), Schedule 4, Part 1, clause 1; FOI Act (Cth), section 11B(4)(a).

505. Australia's second generation ATI laws also deem it to be an irrelevant consideration that disclosure of information might be misinterpreted or misunderstood by any person.[398] Further, in Queensland it is irrelevant that disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant.[399] In Queensland and the Commonwealth, it is irrelevant that the person who created the document was or is of high seniority within the agency.[400] In the Commonwealth, it is irrelevant that access to a document could result in confusion or unnecessary debate – grounds that are regularly relied on by agencies to refuse access to documents.[401]

506. In contrast, Victorian case law enables these factors to be taken into account when determining if it would be contrary to the public interest to disclose a document.[402] To rectify this, OVIC strongly suggests the same irrelevant considerations be set out in a new ATI law.

Recommendation 45

Substantial harm test

507. An ATI law is beneficial legislation that gives effect to a fundamental human right. If there is no actual harm, the information should be disclosed.

508. International best practice requires an agency to show that disclosure of the information would cause substantial harm to that protected interest.[403] It is not enough that information simply falls within the scope of a protected interest.

509. Non-disclosure of information must also be justified on a case-by-case basis. Exemptions cannot be applied in a blanket way to classes of documents or information.

510. Agencies that want to withhold information must establish the harm that would be caused by disclosing it. It is not sufficient for an agency to simply assert that there is a risk of harm; there must be specific, substantive reasons to support its assertions.[404]

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[398] GIPA Act (NSW), section 15(d); RTI Act (Qld), Schedule 4, Part 1, clause 2; FOI Act (Cth), section 11B(4)(b).

[399] RTI Act (Qld), Schedule 4, Part 1, clauses 3 and 4.

[400] RTI Act (Qdl), Schedule 4, Part 1 clauses 3 and 4; FOI Act (Cth), section 11B(4)(c).

[401] FOI Act (Cth), section 11B(4)(d).

[402] *Coulson v Department of Premier and Cabinet* [2018] VCAT 229, restating the factors in *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

[403] Model Inter-American Law on Access to Public Information 2.0 (2020), Article 35.

[404] Tshwane Principles, Principle 4: Burden on Public Authority to establish Legitimacy of any restriction; Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 8 (Principle 4: Limited scope of exceptions).

511. In some cases, disclosure may benefit as well as harm the legitimate interest. For example, the exposure of corruption in the military may at first appear to weaken national defence but actually, over time, help to eliminate corruption, and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.[405]

Recommendation 43

Conclusive certificates

512. Conclusive certificates are not best practice and should not be used.[406] The FOI Act enables a conclusive certificate to be issued under section 29A(2) (documents affecting national security, defence or international relations). The Information Commissioner cannot review, handle a complaint, or conduct an investigation where a certificate has been issued. While conclusive certificates are not used often in Victoria, they further reduce transparency and accountability by removing regulatory oversight.[407]

513. NSW also has categories of information conclusively presumed to be contrary to the public interest to disclose.[408] This was criticised in the NSW RTI Rating.[409]

514. To align with best practice and improve transparency and procedural fairness, Victoria's ATI law should not provide for conclusive certificates.

Recommendation 46

Public interest override

515. ATI laws should have a public interest override. Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate interest, the information should still be disclosed if the benefits of disclosure outweigh the harm.

516. For example, certain information may be private in nature but at the same time expose high-level corruption within government. The potential harm to the legitimate interest must be weighed against the public interest in having the information made public.

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[405] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 8 (Principle 4: Limited scope of exceptions).

[406] NSW Ombudsman report, recommendation 50; Solomon report, recommendation 49; Tshwane Principles, Principle 4: Burden on Public Authority to establish Legitimacy of any restriction.

[407] FOI Act (Vic), section 29A(3).

[408] GIPA Act, section 14(1), Schedule 1.

[409] RTI Rating, New South Wales.

517. Under international law, the public interest override only works one way – to mandate the disclosure of information where this is in the overall public interest.[410] It cannot be relied on to justify keeping information secret. The exception will apply where there is a demonstrable harm and the public interest in disclosure does not outweigh that harm.

518. The public interest override is designed to ensure that any restrictions on access are proportionate to the aim of protecting the legitimate interest.[411] Restrictions that go beyond what is necessary, for example by making more information secret than is strictly required, unreasonably interfere with the exercise of the right to access government-held information.

Lack of harm test and public interest override in Australian ATI laws

519. The public interest tests in the Victorian, NSW and Commonwealth ATI laws, operate to withhold information where the public interest favours non-disclosure. The laws do not require agencies to establish that harm would occur if the information was disclosed.

520. Using public interest tests without establishing harm can lead to an overbroad, and vague application of exemptions, where agencies claim it is not in the public interest to disclose the documents, even though there would be no actual harm if the information were released.

521. This does not support the principle of maximum disclosure and can lead to an overuse of exemptions, damaging transparency, accountability and the ability for members of the public to participate meaningfully in government policy and decision making.

522. The NSW GIPA Act sets out the public interest considerations that may be taken into account against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.[412] The GIPA Act scored 0 out of 4 points on the RTI Rating harm test indicator. The public interest test does not require there to be actual harm and it allows for conclusive presumptions that disclosure is contrary to the public interest.[413] Queensland also has a list of information conclusively presumed to be exempt.[414]

523. The Commonwealth FOI Act contains absolute exemptions for protected interests such as commercially valuable information, material obtained in confidence, Cabinet documents, law enforcement and national security. There is no obligation to consider whether the public interest favours disclosure, and the Cabinet exemption and trade secrets exemption contain no harm test. The exemptions that are subject to a public interest test are not all subject to a harm test, or only contain limited harm tests.[415]

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[410] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 8 (Principle 4: Limited scope of exceptions).

[411] See Lingens v. Austria, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

[412] GIPA Act, section 14 table.

[413] RTI Rating, New South Wales, Indicator 30.

[414] RTI Act (Qld), Schedule 3.

[415] RTI Rating, Australia, Indicator 29 .

General and concrete public interest overrides

524. ATI laws should contain both a general public interest override, as well as concrete overrides in certain circumstances.[416] For example, violations of human rights, crimes against humanity, corruption or abuse of power, and threats to public health or the natural environment.[417]

525. Examples of laws with public interest overrides include:

a. Model Inter-American Law on Access to Public Information (in Article 54 extracted below), with concrete public interest overrides in other Articles for serious violations of human rights or crimes against humanity,[418] and corruption by public officials;[419]

Article 54

1. The Public Authority shall have the burden of proof to establish that the requested Information is subject to one of the exceptions contained in Articles 32 and 33 above. In particular, the Public Authority must establish:

a. that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American System;

b. that disclosure of the Information would cause substantial harm to an interest protected by this Law; and

c. that the likelihood and gravity of that harm outweighs the public interest in disclosure of the Information. [420]

b. African Model Law:

*25(1). Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably out- weighs the public interest in the release of the information [**part three**].*

(2) An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.[421]

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[416] RTI rating, Indicator 31.

[417] Tshwane Principles, Principles 3 and 10.

[418] Model Inter-American Law on Access to Public Information 2.0 (2020), Article 27.

[419] Model Inter-American Law on Access to Public Information 2.0 (2020), Article 28.

[420] Model Inter-American Law on Access to Public Information 2.0 (2020), Article 54. See protected interests in Article 32 (confidential information), Article 33 (reserved information), harm test in Article 35, public interest override in Article 26, and public interest test for confidential information in Article 36. The protected interest in Article 36 (defense and national security) is not subject to the harm test and public interest override.

[421] African Union, Model Law on Access to Information for Africa (2013).

526. The mandatory and absolute overrides should apply to all exemptions.

527. A list of non-exhaustive public interest factors in favour of disclosure could be listed in the legislation and supported by Guidelines issued by the Information Commissioner.

528. Examples of factors in favour of disclosure of information include, that disclosure could reasonably be expected to:[422]

    a. promote open discussion of public affairs;

    b. reveal or substantiate that an agency or an officer of the agency has engaged in misconduct or negligent, improper or unlawful conduct;

    c. benefit public health or safety;

    d. contribute to positive and informed debate on important issues or matters of serious interest;

    e. promote effective oversight of and accountability for the running of government and the expenditure of public funds;

    f. contribute to the community being better informed about an agency's operations, including its deliberative, consultative and decision making processes;

    g. enable scrutiny or criticism of decisions and the decision making process and build the community's trust in government and its decision making processes;

    h. contribute to the protection of the environment;

    i. contribute to innovation and the facilitation of research;

    j. allow a person to access their own personal or health information.

Recommendation 44

Cabinet documents

The exemption (section 28)

529. The exemption for Cabinet documents is in section 28 of the FOI Act. It is intended to ensure the Cabinet process remains confidential.[423]

[422] See examples, RTI Act (Qld), Schedule 4, Part 2; GIPA Act, section 12.

[423] Second Reading Speech, Freedom of Information (Amendment) Bill, 7 May 1993, Wade; see *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [16].

530. The section exempts five types of Cabinet documents from disclosure:

a. the official record of any deliberation or decision of the Cabinet;[424]

b. a document that has been prepared by a Minister, or prepared by an agency on behalf of a Minster, for the purpose of submission for consideration by the Cabinet;[425]

c. a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;[426]

d. a document that is a copy or draft of, or contains extracts from, a document referred to in the above three dot points;[427] or

e. a document which, if disclosed, would involve the disclosure of any deliberation or decision of the Cabinet.[428]

531. The exemption does not apply to:

a. a document that is more than 10 years old; [429]

b. a document that contains purely statistical, technical, or scientific material, unless it would disclose any deliberation or decision of Cabinet;[430] or

c. a document by which a decision of the Cabinet was officially published.[431]

532. The exemption is broad, extending to documents beyond those that are produced to and considered by Cabinet and its committees.[432]

[424] FOI Act (Vic), section 28(1)(a).

[425] FOI Act (Vic), section 28(1)(b).

[426] FOI Act (Vic),section 28(1)(ba).

[427] FOI Act (Vic), section 28(1)(c).

[428] FOI Act (Vic), section 28(1)(d).

[429] FOI Act (Vic), section 28(2).

[430] FOI Act (Vic), section 28(3).

[431] FOI Act (Vic), section 28(1)(d).

[432] See NSW Ombudsman report, recommendation 42(b): 'The definition of Cabinet documents in the new Act should be narrowed to documents brought into existence for the purpose of consideration by the Cabinet'; Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 62.

533. The exemption is absolute, in that if a document falls within one of the five types of documents described in the exemption, it is exempt from release. It does not require an agency to show that releasing the information would cause harm. An agency is also not required to consider whether there is a public interest in favour of its disclosure. This is not best practice.[433] It does not support the aim of an ATI law to maximise disclosure and limit exceptions.

534. Consistent with international best practice, the reasons for withholding release should require there to be actual harm that outweighs the public interest in favour of disclosure.

Proactive release of Cabinet documents

535. The RTI Act in Queensland is subject to amendment by the recently passed *Information Privacy and Other Legislation Amendment Act 2023* (Qld).[434] The Act amends the RTI framework to, amongst other things, support the operation of an administrative scheme which will provide for the proactive release of Cabinet documents through amendments to the Cabinet Handbook.[435] Once enacted, the proactive release scheme in Queensland will be the first of its kind in Australia.

536. The scheme is the result of a recommendation made by Professor Peter Coaldrake AO in his report, *Let the sunshine in: Review of the culture and accountability in the Queensland public sector*, published in June 2022 (Coaldrake review).[436] The Coaldrake review recommended the Queensland government adopt the New Zealand model for the release of Cabinet documents to improve the transparency and accountability of Cabinet decision making.

537. New Zealand's model requires all Cabinet submissions (and attachments), minutes and decision papers to be proactively released and published online within 30 business days of a final decision being taken by Cabinet, subject to reasonable and limited exceptions.[437]

538. The Act includes a new section 22A to protect Ministers from civil liability for actions undertaken in good faith in relation to proactive release of Cabinet documents or other information under a publication scheme or administrative scheme.[438] It will also protect public interest immunity.[439]

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[433] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), recommendation 42(c): 'The reason for refusing access to Cabinet and Executive Council documents should be based on the nature of the detriment or harm which could be caused by release and should focus on detrimental impact on the collective ministerial responsibility of Cabinet'.

[434] Information on the Act is available on the Committee's website.

[435] See the Bill's Explanatory Notes.

[436] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), Recommendation 10.

[437] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 60-63. This scheme applies to Cabinet papers lodged from 1 January 2019: Hon Chris Hipkins, Minister for Public Service, New Zealand Public Service Commission, *Cabinet Paper Strengthening Proactive Release Requirements* (18 September 2018). The requirements are set out in the Cabinet Office Circular CO (23) 4.

[438] See the Bill's Explanatory Notes, clause 89.

[439] See the Bill's Explanatory Notes.

539. The New Zealand Public Service Commission reviewed the Cabinet release scheme in 2019 and found it was operating as intended, with around 600 papers released in the first nine months of the policy being in place.[440] The Commission noted:

> *Agencies covered by the policy have developed processes and supporting procedures to address the increased volume, complexity and sensitivity of the material they are now expected to routinely prepare for release.*

540. The NSW Information Commissioner has also called for legislative reform, to improve the transparency of Cabinet decision making citing the Coaldrake review recommendation. [441]

541. The Royal Commission into the Robodebt Scheme report recommended repealing the Cabinet exemption in section 34 of the Commonwealth FOI Act and amending the Commonwealth Cabinet Handbook so that the description of a document is no longer itself a justification for secrecy.[442] The Royal Commission highlighted the strong public interest in public scrutiny of government decision making.

542. The Victorian Ombudsman report into Alleged Politicisation of the Public Sector endorsed the trend of adopting greater proactive disclosure of Cabinet material, recommending that the Department of Premier and Cabinet and the Premier develop a policy requiring all Cabinet submissions, agendas and decision papers (and appendices) to be proactively disclosed and published online within 30 business days of a final Cabinet decision, subject to specified reasonable exceptions.[443]

Recommendations for Victoria

Proactive release of Cabinet documents

543. The Committee should consider an administrative access scheme for the proactive release of Cabinet documents in Victoria, similar to New Zealand and recently enacted in Queensland.

544. OVIC notes there is a current proactive release mechanism in section 10, Part II of the FOI Act, which requires the Premier to publish a register of Cabinet decisions at the Premier's discretion. However, in over 40 years, no register has ever been created.[444]

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[440] Hon Chris Hipkins, Minister for Public Service, New Zealand Public Service Commission, *The next steps in the public release of official information* (17 May 2022), 4. The New Zealand Public Service Commission reports every six months on the release of Cabinet papers, see, for example: https://www.publicservice.govt.nz/assets/DirectoryFile/Report-Proactive-release-of-Cabinet-papers-six-monthly-data.pdf.

[441] NSW IPC Report on the Operation of the GIPA Act 2021-2022, 4.

[442] Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* (Report, July 2023) vol 1, 656 and 657.

[443] Deborah Glass OBE, Victorian Ombudsman, *Alleged politicisation of the public sector: Investigation of a matter referred from the Legislative Council on 9 February 2022 – Part 2* (December 2023), 251 (Recommendation 7).

[444] The Victorian Auditor General has previously criticised this situation: see VAGO audit, Access to public sector information (December 2015), 2.4.

545. Transparency of government decision making improves citizens trust in their government.[445] A proactive release scheme for Cabinet documents could provide better opportunities for members of the public to be informed about and get involved in the formulation of government policy. This supports participatory democracy and creates better outcomes for the community.

546. The New Zealand model acknowledges that '[d]emocracies thrive when citizens trust and participate in their government. Proactive release of information promotes good government and transparency and fosters public trust and confidence in agencies'.[446]

547. The New Zealand model allows for information not to be published for 'good reasons'. This includes matters relating to national security, international relations, commercial, trade or travel sensitivities, privacy obligations, national security, potential liability (such as defamation, breach of contract, copyright).[447] The policy provides that '[w]here information is redacted, the reasons should be clearly stated'.[448]

548. The policy underlying the New Zealand model is intended to maintain the free and uninhibited exchange of ideas that is necessary for the development of robust policy advice.

549. The Coaldrake review examined examples of documents released under New Zealand's regime and found that only small sections of documents were redacted on the basis of free and frank advice.[449] The New Zealand policy states that the possibility of a Cabinet paper being proactively released must not undermine the quality of advice included in the paper and therefore the quality of the decision ultimately reached by Ministers.[450]

Recommendation 49

The exemption

550. OVIC understands the need to maintain confidentiality around Cabinet deliberations, particularly in their early stages. However, too much confidentiality is detrimental to public trust in the quality and impartiality of decision making.

[445] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 60.

[446] See New Zealand, Cabinet Circular CO (23) 4, Proactive Release of Cabinet Material: Updated Requirements.

[447] New Zealand, Cabinet Circular CO (23) 4, Proactive Release of Cabinet Material: Updated Requirements, 3-5.

[448] New Zealand, Cabinet Circular CO (23) 4, Proactive Release of Cabinet Material: Updated Requirements, [20].

[449] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 62.

[450] New Zealand, Cabinet Circular CO (23) 4, Proactive Release of Cabinet Material: Updated Requirements, 4.

551. The Coaldrake review considered that the imperative for maintaining secrecy of Cabinet documents applies principally to documents which record deliberations, rather than those which are developed to assist the Cabinet in its considerations.[451]

552. The current Cabinet exemptions in section 28(1) of the FOI Act are too broad. They should be narrowed to promote transparency, while still maintaining appropriate confidentiality of Cabinet decision making. An aim of narrowing the exemptions includes to mitigate against improper use of a broad exemption. For example, the Victorian Ombudsman recently identified evidence in her report 'Alleged politicisation of the public sector: Investigation of a matter referred from the Legislative Council on 9 February 2022 – Part 2' that some 'consultancy staff were instructed to label all work on a public sector project as 'Cabinet-in-Confidence' unless advised otherwise.'[452] While simply labelling a document as 'Cabinet-in-Confidence' does not automatically mean the document will be exempt under section 28 of the FOI Act, it demonstrates a behaviour to try to keep information secret.

553. Some agencies express concern that releasing documents created for Cabinet, which do not go to Cabinet, or documents which reveal internal working or draft documents would impact agency officers' ability and willingness to provide advice or record discussions in writing. An unintended consequence being that an increase in transparency in relation to Cabinet documents would result in a reduction in written records about or for Cabinet.

554. However, recent reports which discuss Cabinet confidentiality suggest otherwise. For example, the Robodebt Royal Commission report notes:

> *'[n]othing I have seen in ministerial briefs or material put to Cabinet suggests any tendency to give full and frank advice that might be impaired by the possibility of disclosure, and the Cabinet minutes which are in evidence are sparing in detail, with a careful mode of expression revealing nothing of individual views.*[453]

555. Further, as outlined below under 'Effectiveness and integrity of internal decision making processes (section 30)', it is the duty of agency officers to provide robust and frank advice in accordance with the *Code of Conduct for Public Sector Employees*. The Code expressly requires agency officers to maintain accurate and reliable records, and to make such records available to appropriate scrutiny when required. These obligations ensure that agency officers implement government policy in an open and transparent manner.[454]

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[451] Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 63.

[452] Deborah Glass OBE, Victorian Ombudsman, *Alleged politicisation of the public sector: Investigation of a matter referred from the Legislative Council on 9 February 2022 – Part 2* (December 2023), [111].

[453] Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* (Report, July 2023), 656. This was referred to in Deborah Glass OBE, Victorian Ombudsman, *Alleged politicisation of the public sector: Investigation of a matter referred from the Legislative Council on 9 February 2022 – Part 2* (December 2023), [164] in the context of illustrating the Commission's report's findings about breaches of the fundamental values of the Westminster tradition.

[454] *Code of Conduct for Victorian Public Sector Employees*, section 8: 'Demonstrating Accountability'.

556. Agency officers are responsible for ensuring advice provided to agencies, Ministers and the government is accurate, properly considered, and impartial regardless of whether such information is intended to be publicly released.[455] It is a myth that 'FOI prevents us from being frank and candid in our discussions.'[456]

557. OVIC recommends the Cabinet documents exemption in a new ATI law be narrowed to include documents that are prepared for the sole or substantial purpose of submission to Cabinet or one of its Committees, and were actually submitted to the Cabinet and its committees. The Cabinet exemption should apply to documents that disclose deliberations of Cabinet rather than a decision of Cabinet.[457] Consistent with international best practice, any Cabinet document exceptions should be subject to a substantial harm test and public interest override that permits release where the public interest in favour of disclosure outweighs the harm.[458]

Recommendation 48

Effectiveness and integrity of internal decision making processes (section 30)

558. Section 30(1) of the FOI Act contains an exemption for certain internal working documents, where disclosure would be contrary to the public interest.

559. It is legitimate for an ATI law to contain an exception to the right of access to protect the effectiveness and integrity of internal decision making processes.[459] Governments need to be able to run internal operations effectively and have time to think. The following harms may need to be prevented:

    a. prejudice to the effective formulation or development of public policy;

    b. frustration of the success of a policy, by premature disclosure of that policy;

    c. undermining of the deliberative process in a public body by inhibiting communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions; and

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[455] *'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195.

[456] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 57.

[457] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), recommendation 42(b): 'The definition of Cabinet documents in the new Act should be narrowed to documents brought into existence for the purpose of consideration by the Cabinet'; Professor Peter Coaldrake AO, *Review of culture and accountability in the Queensland public sector*, Final report, 28 June 2022 (Coaldrake Review), 63.

[458] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), Recommendation 42(c) recommends that the reasons for refusing access to Cabinet, and Executive Council, documents should be based on the nature of the detriment or harm which could be caused by release.

[459] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 8 (Principle 4: Limited scope of exceptions).

d. undermining of the effectiveness of testing or auditing procedures.[460]

560. The exemption must be clearly and narrowly drawn to protect legitimate interests only and be subject to a substantial harm test and public interest override, to ensure documents are only withheld where disclosure would be likely to cause harm in the particular circumstances, and the harm outweighs the public interest in favour of disclosure.

561. The title of the exemption should reflect the limited legitimate interest that needs protecting: the effectiveness and integrity of internal decision making processes. The words 'internal working documents' are too broad and should not be used.

Illegitimate considerations

562. To ensure the exemption is only applied to protect legitimate interests, it should be subject to a list of irrelevant considerations (discussed above under 'Protecting legitimate interests').

Inhibiting frankness and candour

563. Victorian case law enables an agency to consider whether the disclosure would be likely to inhibit frankness and candour, when determining whether disclosure would be contrary to the public interest.[461]

564. In an open, accountable democracy, disclosure of internal deliberative processes should only inhibit free and frank advice and exchange of views in very limited situations. An agency would need to support this assertion with detailed evidence and reasons why disclosure would inhibit free and frank advice, and why the public interest in favour of disclosure does not outweigh the harm.

565. It should never be presumed that disclosure of internal deliberations will inhibit frankness and candour. The possibility of public scrutiny may improve the quality of advice that is given.[462]

566. A 2023 communique of the Association of Information Access Commissioners of Australia and New Zealand (**AIAC**) notes:

> *… Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities. In this setting, transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished.*[463]

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[460] See Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008; OVIC Practice Note: *Section 30 – Opinion, advice, recommendation, consultation or deliberation*.

[461] *Coulson v Department of Premier and Cabinet* [2018] VCAT 229, restating the factors in *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

[462] *Graze v Commissioner of State Revenue* [2013] VCAT 869.

[463] Association of Information Access Commissioners of Australia and New Zealand (AIAC) meeting communique (24 July 2023).

567. It is the duty of agency officers to provide robust and frank advice in accordance with the *Code of Conduct for Public Sector Employees* (Responsiveness, Integrity, Impartiality, Accountability and Leadership). The Code expressly requires agency officers to maintain accurate and reliable records, and to make such records available to appropriate scrutiny when required. These obligations ensure that agency officers implement government policy in an open and transparent manner.[464]

568. Agency officers are responsible for ensuring advice provided to agencies, Ministers and the government is accurate, properly considered, and impartial regardless of whether such information is intended to be publicly released.[465]

569. It is a myth that 'FOI prevents us from being frank and candid in our discussions':

> *Contrary to this claim, knowing that what they say may be made public should improve the standard of advice. It ought to cause staff to check information and structure their work in a professional manner. These are surely good developments. Difficult and controversial decisions will always have to be made, and these decisions will be more defensible if they are supported by honest, professional and clear advice.*[466]

Recommendation 50

Protecting privacy (section 33)

570. Privacy and access to information are two sides of the same coin. They both serve key accountability functions. Access to information holds government to account by granting people access to publicly held information, increasing transparency, public participation in government and deterring corruption and wrongdoing. Privacy imposes limits on the degree to which government can access and influence the private lives of individuals and establishes important safeguards to prevent personal information from being misused or lost.

571. Section 33(1) of the FOI Act exempts 'personal affairs information' where disclosure would be unreasonable. In OVIC's view the privacy exception in Victoria's ATI law should adopt the definition of 'personal information' in the PDP Act.[467] This would provide consistency in understanding across the administration and application of both Acts.

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[464] *Code of Conduct for Victorian Public Sector Employees*, section 8: 'Demonstrating Accountability'.

[465] *'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195.

[466] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 57.

[467] This was recommended back in 2007 in the defeated Freedom of Information Bill 2007 (Vic), clause 7.

572. As OVIC administers both the FOI and PDP Acts, a single definition and interpretation would allow for more authoritative guidance on 'personal information' as opposed to the current dual streams and enable the more efficient use of OVIC's limited resources.

573. The privacy exemption should also be subject to a substantial harm test and public interest override, to ensure the right balance is struck between protecting privacy and promoting open government.

574. Good information management systems that build in access-by-design are key to promoting the disclosure of the maximum amount of information, whilst ensuring the privacy rights of individuals are respected. Access-by-design policies, templates and processes can be used to ensure that the recording of personal information is minimised, and where it must be recorded, is contained in a discrete part of a record, rather than sprinkled throughout an entire record. Minimising and segregating personal information make it timely and easy for an agency to redact the personal information and disclose the rest of the document.

575. Guidelines issued by OVIC could set out principles to guide agencies in deciding whether disclosure would cause a substantial privacy harm and whether the public interest in favour of disclosure outweighs that harm.

576. In appropriate circumstances, Victoria's ATI law should permit, authorise and protect an agency officer, to enable release of personal information under the ATI law, that would otherwise be a breach of the IPPs in the PDP Act. This facilitates the public interest override, to enable release where the public interest in favour of disclosure outweighs the harm caused by a breach of the IPPs.[468]

Recommendation 51

Personal information of public sector employees and Ministers

577. OVIC's guidance on deciding whether to release personal information of agency officers is that this information is not automatically exempt.[469]

578. Often, agency staff (regardless of their seniority) are identified while carrying out their role as a public sector employee. Consequently, their personal information is not usually sensitive with the occasional exception of direct contact information such as a mobile phone number or email address. OVIC guides agencies to consider the following factors:

[468] This is already the case in Victoria: see section 6(2) of the PDP Act. See also section 5 of the PPIP Act (NSW).

[469] OVIC Practice Note, section 33 – disclosure of personal affairs information would be unreasonable in the circumstances.

- **The seniority of an employee**. The more senior their role, the greater their level of accountability for decisions, and the more likely their details are in the public domain. In those circumstances, disclosure is not unreasonable unless special circumstances apply.[470]

- **The relevance of the employee to the issue that is the subject of an applicant's request.** If the employee was directly involved in the matter then disclosure of their involvement is unlikely to be unreasonable. If an employee had an administrative role, then disclosure may be unreasonable.

- **Whether the identity or personal information of the employee is known to the applicant or the public**. For example, despite their seniority, if the employee has a public facing role such as service delivery or attending public meetings, then the disclosure of their name is less likely to be unreasonable.

- **Other matters relevant to the employee**. This may include personal safety concerns either in relation to the applicant or another person,[471] or the sensitivity of the employee's role in the agency (for example, an undercover police officer).

579. OVIC's guidance aligns with the OAIC's FOI Guidelines,[472] and guidance issued by NSW IPC.[473]

Commercial-in-confidence (section 34)

580. The issue of government possession of documents and information created or held by private contractors, sub-contractors and service providers is addressed in response to Term of Reference 4.

581. This section addresses the exemption in section 34 of the FOI Act, for business, commercial and financial information, which can apply to protect the commercial interests of a private individual or organisation, as well as the government when it engages in trade or commerce.

582. Some commercial interests are legitimate to protect. However, the exception must be drafted in a way that strikes the right balance between protecting the interests of the private business, and the giving of access to information to promote transparent and accountable government.

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[470] *Marke v Victoria Police* [2020] VCAT 557; *'FB4' and Moonee Valley City Council* [2023] VICmr 21 [53].

[471] *Monash University v Naik* [2021] VCAT 557 [45], [47], [48]; *Chopra v Department of Education* [2019] VCAT 1941.

[472] Commonwealth FOI Guidelines states at 6.153: Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.

[473] NSW IPC, Fact Sheet – Public officials and personal information under the GIPA Act (September 2021): 'In summary, under the GIPA Act, information about a public official that reveals nothing more than the exercise of a public function is not considered personal information and should generally be released. However, in exceptional circumstances there may be legitimate reasons why release is not favoured.' NSW IPC considers non-personal contact details such as a work telephone number, work mobile number or work email address to not be personal information under the GIPA Act. If a document contains an officers name and/or other personal information, legitimate reasons to exclude it include work, health and safety and where the information is irrelevant (the applicant does not need it).

583. This exemption should be subject to a 'substantial harm' test and public interest override, to ensure that claims of commercial-in-confidence and financial harm do not impair the right to access government information and the democratic benefits that flow from an open government.

584. A breach of a contractual obligation of confidentiality is not a reason, on its own, to withhold information under an ATI law. The confidentiality clause is there to protect the commercial interests of the third party, not the public interest in transparency of public affairs.

585. Government transparency and accountability requires private organisations contracting with government to expect more public scrutiny over their dealings.[474] This includes the possibility that their business, financial or commercial information may be disclosed to the public under the Act.[475] This expectation of higher public scrutiny should be reflected in Victorian government procurement contracts.

586. Similarly, the exception must be drafted in a way that strikes the right balance between protecting the commercial interests of the government when it engages in trade or commerce, and the promotion of transparent and accountable government through the giving of access to information that relates to government services and functions.

587. Just because an agency is engaging in commercial or financial transactions, does not necessarily mean it is engaging in trade or commerce. An agency that enters into contracts to deliver statutory services or functions, is not doing so for the purposes of trade or commerce, they are doing so to fulfil their statutory functions and deliver governmental services.[476] For example, building public roads, including appointing contractors in competitive tenders is not engaging in 'trade or commerce', it is delivering a government service.[477]

588. In OVIC's view, a new ATI law should reflect this position. Tendering out projects, entering commercial contracts, managing budgets, or buying goods and services should not be exempt where the activity forms part of the delivery of a public function that should be subject to public visibility and scrutiny in the way public funds are spent.

Recommendations 52 and 53

[474] See OVIC Practice Note: Section 34(1)(b) – business, commercial or financial information of a third party undertaking.

[475] *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427, [477].

[476] In *Pallas v Road Corporation* [2013] VCAT 1967.

[477] In *Pallas v Road Corporation* [2013] VCAT 1967.

Secrecy laws and exclusions from ATI

589. Section 38 of the FOI Act exempts information that is prohibited from disclosure under a secrecy provision in another enactment. This exemption is absolute in that the information is accepted as exempt, irrespective of whether the secrecy provision protects a legitimate interest, any harm that would flow from release, and any public interest in favour of disclosure. This is not best practice for an ATI law. It does not support the principle that secrecy laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

590. Victoria scores 0 out of 4 points for this indicator in the draft RTI rating.[478]

591. The Commonwealth and NSW also scored poorly in the RTI rating, for listing secrecy provisions in a Schedule and applying an absolute exemption to documents falling within the listed secrecy provisions.[479] Queensland's RTI Act also contains an absolute exemption for documents falling within secrecy provisions listed in the Act.[480]

592. Some Acts in Victoria contain exclusions from the FOI Act. The effect of this is that the FOI Act does not apply to the documents or classes of documents that are excluded in the other Act. Exclusions from FOI are similar to a blanket exemption, like secrecy provisions, in that if the document fits the character of the document described in the Act, the FOI Act will not apply to it. Exclusions also limit OVIC's review jurisdiction to considering whether nature of the document described fits within the exclusionary provision. Similar to secrecy provisions, exclusions from ATI laws provide a means for agencies and Ministers to legislate out of transparency. This does not align with best practice ATI law.

593. Internationally recognised principles on ATI legislation make it clear that:

    a. the ATI law should take precedence over secrecy provisions in other enactments; and

    b. secrecy laws in other enactments should be revised or revoked, to ensure they are interpreted in a manner consistent with the objects of the ATI law.[481] That is, to ensure they do not keep information secret in circumstances where it would be released under the ATI law.[482]

[478] RTI Rating, Indicator 28, Victoria.

[479] RTI Rating, Indicator 29, New South Wales, Australia. The Commonwealth scored 0 out of 4 for its section 38 exemption.

[480] RTI Act (Qld), section 48, Schedule 3, clause 12(1).

[481] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) (Principle 8: Disclosure takes precedence); Mendel, T, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008.

[482] UN Special Rapporteur on Freedom of Opinion and Expression, Report to the 2000 Session of the United Nations Commission on Human Rights (E/CN.4/2000/63, 5 April 2000), [44]; UN Special Rapporteur on Freedom of Opinion and Expression, Report to the UN General Assembly (A/68/362, 4 September 2013) [100].

594. At the Commonwealth level, the Attorney-General published a report in November 2023 which reviewed secrecy provisions across Commonwealth laws.[483] The Government accepted the report's 11 recommendations, including to:

- adopt 12 principles for framing new secrecy provisions, including:
  - limiting secrecy provisions to circumstances where there is an essential public interest that requires criminal sanctions (Principle 1);
  - taking a harms-based approach in framing secrecy offences so that secrecy provisions (Principle 4):
    - contain an express harm element;
    - cover a narrowly defined category of information and the harm to an essential public interest is implicit; or
    - to protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government;
  - all Commonwealth departments and agencies should regularly review specific secrecy offences in legislation they administer as part of reviews of legislation and legislative instruments (Principle 12);
- repeal certain secrecy provisions and non-disclosure duties as identified as no longer required (Recommendation 2).[484]

595. OVIC recommends that a similar review be conducted of all secrecy, confidentiality, and exclusion provisions in Victorian legislation. The review should apply the principles outlined above, to ensure the provisions only remain where there is an essential public interest that requires criminal sanctions. The framing of the provisions should take a harms-based approach, ensuring provisions contain an express harm element and cover a narrowly defined category of information.

Recommendation 54

[483] Australian Government, Attorney-General's Department, *Review of Secrecy Provisions Final Report* (21 November 2023).

[484] Australian Government, Attorney-General's Department, *Review of Secrecy Provisions Final Report* (21 November 2023), 9.

Legal professional privilege

596. In Victoria, legal privilege is protected at common law and under the *Evidence Act 2008* (Vic). Section 32(1) of the FOI Act exempts documents subject to legal professional privilege or client legal privilege. The purpose of legal privilege is to promote the public interest in the proper conduct of litigation and the provision of legal advice between a client and their lawyer. It does this by protecting confidential communications between a lawyer and their client, to allow them to speak freely.

597. Some ATI laws include a requirement for an agency to consider waiving privilege. See, for example:

- the Commonwealth FOI Act includes an exemption for legal privilege, but it notes a document will not be exempt if the person entitled to claim privilege in relation to the production of the document waives that claim;[485]
- the GIPA Act has a conclusive exemption for legal privilege, unless privilege is waived. The GIPA Act also requires the relevant agency to consider whether it would be appropriate to waive privilege before refusing access;[486]
- the RTI Act includes an exemption for legal privilege;[487]
- the Official Information Act in New Zealand lists maintaining legal privilege as a 'good reason' for withholding official information, unless 'the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available'.[488]

598. In considering whether to require the three part test to legal privilege, OVIC's view is that it should not apply given the nature of the protection in legal privilege. An ATI law should not seek to override legal privilege.

599. However, OVIC recommends the Committee consider updating the language in a legal privilege exemption to require an agency or Minister to consider waiving privilege before it refuses access to the document. Or, to clarify in an ATI law that a document will not be exempt if the person waives privilege. This would align Victoria better with second generation ATI laws, such as the GIPA Act, the Official Information Act, and the Commonwealth FOI Act.

Recommendation 55

[485] Section 42 of the Commonwealth FOI Act.

[486] Clause 5 of Schedule 1 in the GIPA Act.

[487] Section 7 of the RTI Act.

[488] Section 9(2)(h) of the *Official Information Act 1982*.

Sanctions

600. A best practice ATI law will contain offences for wilfully destroying information.[489] For example, section 120 of the NSW GIPA Act makes it an offence to destroy, conceal or alter any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under the GIPA Act.

601. OVIC recommends a similar provision be included in a new ATI law.[490]

602. A best practice ATI law will also contain offences for wilfully obstructing access to information.[491] For example, the GIPA Act contains offences for making a decision in response to an access request that the officer knows to be contrary to the requirements of the Act, or to direct or improperly influence an officer to make a decision contrary to the requirements of the Act.[492]

603. OVIC recommends similar provisions be included in a new ATI law.[493]

604. The offence in the FOI Act for wilfully obstructing, hindering or resisting the Information Commissioner, Deputy Commissioners or staff of OVIC should be retained in Victoria's ATI law.[494]

Recommendations 56, 57 and 58

[489] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 5 (Principle 3: Measures to promote open government); RTI rating, Indicator 50 (Sanctions).

[490] The FOI Act does not include offences for destroying, concealing or altering records.

[491] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016), 5 (Principle 3: Measures to promote open government); RTI rating, Indicator 50 (Sanctions).

[492] GIPA Act, sections 116-118.

[493] Under the FOI Act decisions can only be made by an authorised person (section 26). Professional Standard 8.1 states that an authorised person must make their decision independently and cannot be directed to make a particular decision under the Act. This should be elevated to an offence provision in the legislation.

[494] See FOI Act, section 63F.

Processes under the Act (Term of Reference 7)

(7) The effectiveness of processes under the Act and how those processes could be streamlined and made more effective and efficient

605. Requests for information should be processed quickly and fairly, and an independent review of any decisions to refuse access should be available.[495]

606. Rules need to be simple, practical and clear so that ordinary people can easily understand them and be able to make requests, and agency officers can easily understand the steps required to process and make decisions on requests.

607. The FOI Act contains unnecessary procedural and administrative processes, making the FOI Act complex and burdensome for agencies and the public to navigate. The inconsistent and piecemeal approach of prior reforms also adds to complexity in its administration. For example, section 23 addressing forms of access runs over two pages. Section 27, requiring a notice of decision where access is refused, runs to three pages. In contrast, similar provisions in the NSW GIPA Act are less than one page and one paragraph respectively.[496]

608. This section of the submission addresses the processes in Part III of the FOI Act, relating to making and responding to a formal request for access.

609. Part II of the FOI Act, and section 16, are addressed in response to Terms of Reference 1 and 2.

610. The processes for individuals to seek access to their own personal and health information is addressed in response to Term of Reference 3.

Acknowledging receipt of a request (section 17)

611. OVIC suggests the ATI law contain a requirement for an agency to acknowledge receipt of a valid request in writing.[497] This requirement is a feature of a best practice ATI law and is found in the GIPA Act.[498]

[495] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 9 (Principle 5: Processes to facilitate access).

[496] GIPA Act, sections 61 and 72.

[497] RTI rating, Indicator 18.

[498] GIPA Act, section 51(1)(a), (3).

612. At present, OVIC provides a Template[499] for agencies to use, to acknowledge a request is valid and being processed. The Practice Note states an agency should acknowledge receipt of a valid request, and that it is good practice to notify the applicant in writing of:

   a. the date the request became valid;

   b. the due date for notifying the applicant of a decision on the request;

   c. the terms of the request (this may be the wording of an original valid request or the wording of a clarified valid request);

   d. the possibility that the processing time may be extended by up to 15 days if third party consultation is required, or by 30 days by agreement with the applicant.

613. The Committee may wish to consider requiring agencies and Ministers to acknowledge a request within a reasonable timeframe (for example, five business days after receiving a formal request).

614. For example, section 51(2) of the GIPA Act requires:

> *(2) An agency's decision as to the validity of an application must be made and notified to the applicant as soon as practicable after the agency receives the application and in any event within 5 working days after the application is received.*

Recommendation 59

Fees and charges (sections 17 and 22)

Application fee

615. A best practice ATI law makes it free to make an access request.[500] This supports ATI as a universal human right. It also supports timely access to information, as the process of paying the fee or considering waiver of the fee can sometimes delay access and result in technical barriers to making a request.

616. In Victoria, the current application fee to make a formal request for access is $31.80. The fee increases each year with indexation.

[499] OVIC, Template 8 – request is valid and being processed.

[500] Indicator 24, RTI rating.

617. When the FOI Act was first introduced in 1982, it did not require an applicant to pay an application fee. A fixed application fee of $20 was introduced in 1993 to help with demand on agency resources by ensuring applicants are 'genuinely interested' in seeking access to documents.[501] The application fee was amended in 2004 to refer to fee units, which increases each year in line with indexation.[502]

618. There is no application fee in the Commonwealth jurisdiction.[503] In NSW the application fee is set at $30 and does not increase with indexation.[504] The Victorian government has previously considered removing application fees in the Freedom of Information Bill 2007 (that was not passed).[505]

619. To help align Victoria with best practice ATI laws, the Committee may wish to consider fixing the application fee to a nominal amount that does not increase over time (for example, $30). This would help to manage demands on resources by maintaining a level of financial disincentive. However, reducing and fixing the fee will help to ensure members of the public are not unreasonably deterred from making a request because of the cost involved.

620. OVIC recommends that requests for an applicant's own personal or health information should not be subject to an application fee.

621. At the Commonwealth level, the Senate, in its Report into the Operation of the Commonwealth FOI Act noted fees and charges 'serve to disincentivise engagement with the FOI system and therefore run counter to the spirit of the FOI Act'.[506] The Report highlighted that managing fees and fee waivers (and reductions) is resource intensive and may increase demand on FOI resources.[507]

Recommendations 60 and 61

[501] *Freedom of Information (Amendment) Act 1993* (Vic), section 6. The application fee was first introduced to 'ensure that applicants are genuinely interested in obtaining and paying for documentation.' It was introduced in the context of several amendments to the FOI Act, aimed at curbing 'unreasonable demands on agency resources.' Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148, Hon. Haddon Storey.

[502] *Monetary Units Act 2004* (Vic), section 15 (Sch. 1 item 9). The purpose of the Monetary Units Act 2004 was to provide for fees and penalties to be fixed by reference to fee units or penalty units that can be indexed annually by an amount to be fixed by the Treasurer (section 1).

[503] The requirements of a valid request in section 15 do not include payment of a fee, see FOI Act (Cth), section 15.

[504] GIPA Act, section 41(1)(c).

[505] The Freedom of Information Amendment Bill 2007 proposed removing application fees in clause 9.

[506] Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), [5.55].

[507] Senate, Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (December 2023), [5.55].

Legitimate access charges

622. Section 22 of the FOI Act and the *Freedom of Information (Access Charges) Regulations 2014* (**Access Charges Regulations**) permit agencies to charge for the time spent by an agency officer in searching for documents, creating a document containing information requested by the applicant, and supervising the applicant's inspection of a document. These charges should not be permitted in Victoria's ATI law.

623. A best practice ATI law provides information at no or low cost and limits the costs to actual costs of reproduction and delivery. This does not include search costs, inspection costs and costs to prepare documents for access.[508] A best practice ATI law will also provide for a certain number of copy pages to be accessed for free.[509]

624. Imposing charges for receiving access to information acts a barrier to government-held information. While this can help manage demand on resources, it can also negatively impact individuals' rights to receive access to information.[510] The public should not have to bear the cost of government to administer an ATI law. Nor do access charges (or application fees) amount to full cost recovery for agencies and Ministers.[511]

625. Limiting charges to those actually incurred in reproducing and supplying documents better supports the object of the FOI Act to provide access to information at the lowest reasonable cost.[512] It also maintains a financial disincentive for vexatious requests.[513]

626. OVIC recommends that agencies and Ministers should only be able to charge for copying costs (where copying is required) and provide for a certain number of copy pages to be accessed for free. A new ATI law should not include charges for searching for documents, creating a document, or supervising inspection or viewing of a document. Access to an electronic document by way of email should be free.

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[508] Aligns with Indicator 25, RTI rating.

[509] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 10 (Principle 6: Costs).

[510] A 1990 report by the Electoral and Administrative Review Commission, cited by the Solomon Report, proposed there should be no application fee for FOI and that applicants should not be charged for the time spent searching for documents or for decision-making time. The only charges the Commission thought were necessary were charges for photocopying (not for the first 50 pages). Electoral and Administrative Review Commission, *Report on Freedom of Information*< December 1990, 181. Solomon Report, 185.

[511] For example, in 2022-23, agencies spent $21,374,900 and collected $2,074,217.62 in application fees and access charges combined. This is not unique to Victoria.

[512] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 10 (Principle 6: Costs).

[513] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989, A special report to Parliament under s.31 of the Ombudsman Act 1974* (February 2009), 81.

627. The access charge amounts should continue to be set out in the ATI law or regulations and apply equally to all agencies subject to the ATI law.[514]

Recommendation 63

Waiving fees and charges

628. The FOI Act and Access Charges Regulations do not contain a general discretion to waive or reduce fees payable under the Act, such as the application fee and access charges.[515]

629. Section 17(2B) contains a discretion to waive or reduce an application fee if payment of the fee would cause hardship to the applicant.

630. Section 22 contains various situations where an agency must waive access charges, including for routine requests, requests for the applicant's own personal information if the applicant is impecunious, and a subset of charges for requests for the applicant's own personal information, where the applicant is a member of the Legislative Council or the Legislative Assembly of Victoria, or where the applicant intends to use the document for a general public interest or benefit.

631. The types of access charges that can be waived varies, according to which category the applicant falls within, or the type of information requested. The section is unnecessarily complex (running to four pages), overly formal and technical, and restrictive, rather than beneficial to an applicant. Further, agencies have questioned their ability to otherwise waive fees, as this is not provided for in the FOI Act.[516]

632. OVIC recommends replacing sections 17(2B) and 22 with a general discretion to waive, reduce or refund any fees and charges applicable under the ATI law. The flexibility provided by the general discretion, could be supported by FOI Guidelines published by OVIC which could provide guidance on when an agency or Minister may decide to waive fees and how to do this. This may include where the request is for the applicant's own personal information, where the applicant is a Member of Parliament, where the applicant is experiencing financial hardship, and requests made in the public interest.

633. The flexibility of a general discretion, supported by authoritative guidance, would assist agencies and Ministers to best give effect to the policy intention underlying these provisions which is to provide access to information at the lowest reasonable cost.

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[514] This aligns with Indicator 25, RTI rating.

[515] Compare regulation 8 of the Commonwealth Regulations which states charging fees is discretionary.

[516] Section 22(1) of the FOI Act outlines when an agency must waive fees, otherwise the agency must apply the access charge if that charge is required to be paid before the agency can give access to the document.

634. A general discretion may also reduce the time and costs involved in calculating access charges, requesting a deposit notice, making an access charges decision, and (if applicable) responding to OVIC.[517]

635. In practice many agencies waive fees and charges as the cost of collection outweighs the actual payment received by many agencies. From 2014-15 to 2022-23, FOI expenditure remained much higher than FOI revenue received through application fees and access charges. In 2022-23, agencies spent $21,374,900 and collected $2,074,217.62 in application fees and access charges combined.

636. This experience is not unique to Victoria, with other countries suggesting that access costs are not an effective means of offsetting the costs of an ATI regime.[518]

Recommendations 61 and 62

Right to an independent review

637. The ATI law should provide for an applicant to request a review by the Information Commissioner of a decision to impose an access charge and the quantum of access charges (including a decision not to waive access charges). Currently, an applicant may apply to VCAT for this kind of review, but only after OVIC has certified the matter.[519]

638. At present, the Information Commissioner can only review decisions not to waive or reduce application fees.[520]

639. This amendment would also remove the need for OVIC to issue access charges certificates.

Recommendation 64

[517] Under section 22(3) of the FOI Act, an agency must notify an applicant if the expected charge is going to exceed $50.00 and ask if the applicant wants to continue with the request. The agency must also ask the applicant to pay a deposit (section 22(4) of the FOI Act) and may have to discuss with the applicant practicable alternatives for amending the original request or reducing the anticipated access charge (section 22(6) of the FOI Act). If an applicant disagrees with the agency's decision to impose access charges, the applicant may apply to VCAT to review the decision. Before an applicant can do this, OVIC must certify that the matter is one of sufficient importance for VCAT to consider. In doing so, OVIC may seek information from the agency to better understand why the access charges have been imposed.

[518] Country report of Canada, ICIC Conference 2023.

[519] Section 50(1)(g) of the FOI Act (Vic).

[520] Section 49A(1)(c) of the FOI Act (Vic).

Providing assistance to applicants (sections 17 and 23)

Making an application

640. Agencies and Ministers must assist an applicant to make a request in a way that meets the requirements of the FOI Act.[521] This should be retained in a new ATI law, with more detailed requirements in the legislation or Professional Standards.

641. OVIC interprets this duty to include taking reasonable steps to assist a person to reduce their application to writing, in circumstances where they may not otherwise be able to do so (for example, because of a disability or because they have low literacy). The ATI law could make this explicit, to better ensure assistance for disadvantaged groups.[522]

642. The Committee may consider the requirement to provide advice or assistance could be broadened beyond a duty to assist a person to make a valid request. For example, section 16 of the GIPA Act also requires an agency to provide advice as to whether or not the information is publicly available from the agency and (if it is) how the information can be accessed. Victoria has a similar, but not the same, obligation in Professional Standard 1.2. This requires agencies to tell an applicant how to access a document in the agency's possession, that can be provided outside of the FOI Act. The Professional Standards apply only to agencies. They do not apply to Ministers.

Recommendation 70

Form of access

643. The requirement to provide assistance in relation to making a request (outlined above) should also extend to providing reasonable assistance to enable the applicant to receive the requested information in a form that is accessible to the applicant. A best practice ATI law ensures that persons with a disability, low literacy or who do not speak the language of the record, are able to access government information.[523]

Recommendation 65

[521] Section 17(3) of the FOI Act (Vic).

[522] Indicator 17, RTI rating.

[523] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 9 (Principle 5: Processes to facilitate access).

Transferring a request (section 18)

644. Section 18 of the FOI Act allows an agency or Minister to transfer a request where the requested document is held by another agency or Minister or the subject-matter of the document is more closely connected with the functions of another agency or Minister. Section 18 permits transferring an entire request only. It does not allow part of a request to be transferred to another agency or Minister.

645. Government is large and changes to structure and function occur regularly. Applicants should not be penalised for not understanding a particular government function has moved to or exists in another agency. ATI law should enable government to be flexible and adaptable in promoting applicant's access to information.

646. A new ATI law should enable partial transfer (or the splitting) of a request to one or more agencies. For example, section 44(2) of the GIPA Act enables an agency to split an application into two or more applications for the purpose of transferring part of an access application to another agency.[524]

Recommendation 66

Time limits for FOI decisions

647. Under section 21 of the FOI Act, agencies and Ministers must process a request as soon as possible and within 30 days, with the option to extend by agreement or to conduct third party consultation. This time requirement is consistent with international standards and the GIPA Act.[525] Any longer than this would curtail the right to access government information.

648. OVIC's guidance makes it clear to agencies that internal policies for processing requests must be designed in a way that enables the agency to make an independent[526] and timely decision. However, OVIC is aware that some agencies experience delays in finalising requests because of internal processes that require the agency to brief the relevant Minister, executive or another agency business unit, for the purpose of noting a decision before it is made. Timeframes do not, and should not, pause for noting or briefing processes.[527]

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[524] See also section 48 of the GIPA Act for the effect of the transfer on the application fee and processing charges.

[525] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 9 (Principle 5: Processes to facilitate access); GIPA Act, section 57.

[526] Only an agency's principal officer, authorised officers or the responsible Minister of an agency can make a decision on an FOI request on behalf of the agency: section 26 of the FOI Act. Under Professional Standard 8, an authorised officer must make their decision independently and cannot be directed to make a particular decision under the Act when properly exercising their statutory decision making power.

[527] See OVIC Practice Note 'Noting and briefing processes on freedom of information decisions'.

649. In OVIC's view, agency concerns around meeting legislated timeframes[528] can be addressed by:

a. moving to a 'push' model, which may result in a reduction of formal requests received;

b. authorising and protecting officers from liability for releasing information informally under a new ATI law (saving on the resources that would otherwise be used in complying with the procedural requirements of formal requests);

c. improving information management systems to make it easier to find documents and understand when they can be released. This can be achieved by keeping an up-to-date information asset register and incorporating access-by-design into the creation and storage of documents;

d. simplifying third party consultation requirements for agencies and Ministers;

e. simplifying other processes in the FOI Act, such as access charges, exemption provisions and providing edited copies of documents;

f. ensuring agencies provide sufficient resources to fulfill their ATI functions;

g. providing OVIC with the power to conduct audits of the processes undertaken by agencies to process requests, with the ability to make enforceable recommendations for improvements; and

h. introducing sanctions for any person who directly or improperly influences an officer to make a decision contrary to the requirements of the Act or who deliberately delays making a decision.

650. The ability for an applicant to seek review of a decision made out of time is also consistent with international standards and should be retained in a new ATI law.[529]

Recommendation 67

Simplify third party consultation provisions

651. Mandatory third party consultation requirements were inserted into the FOI Act in 2017. The provisions require agencies and Ministers to consult with third parties when considering a range of different exemptions under the FOI Act.

[528] As reported to OVIC, see OVIC Annual Report 2022-23, 119.

[529] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 9 (Principle 5: Processes to facilitate access).

652. While it appears that Parliament's intention was to encourage wide-ranging consultation, it is a significant and onerous requirement for agencies. Agencies continue to report that third party consultation has increased their administrative workload significantly and has led to delays in finalising decisions due to the time it takes to receive and consider consultation responses.[530]

653. An independent study undertaken by Monash University involving several agencies reported that every agency involved in the study indicated that the consultation provisions have caused delays in processing requests.[531]

654. The third party consultation provisions contain different wording relating to when consultation is or is not required. The inconsistent wording is confusing and makes it difficult to determine when it is practicable to consult.[532]

655. For example, in relation to when agencies must conduct third party consultation, the following provisions express the practicability test in various ways:

    a. section 29, 29A, 31, 31A, 34 – an agency, if practicable, must consult and/or notify third parties;

    b. section 33(2B) – an agency must consult, but consultation is not required if it is not practicable;

    c. section 33(3) – an agency, if practicable, must notify third parties;

    d. section 35(1A) – an agency must consult, but consultation is not required if it is not practicable;

    e. section 35(1C) – an agency must notify regardless of practicability.

656. What is 'practicable' has been a point of concern for many agencies. Agencies have noted confusion between the meaning of 'if practicable' and 'unless practicable', especially where both terms are used in one section (for example, sections 33 and 35).

[530] OVIC, Annual Report 2022-23, 119.

[531] Associate Professor Johan Lidberg, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Pilot Study May – August 2019* (Final report, September 2019). Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021).

[532] Associate Professor Johan Lidberg, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Pilot Study May – August 2019* (Final report, September 2019). Associate Professor Johan Lidberg and Dr Erin Bradshaw, Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria Part II* (Final report, June 2021).

657. Most agencies have interpreted the provisions strictly and are of the view they must consult all third parties involved no matter the number. This increases FOI workload and can lead to delays in decision making, and in some cases a reliance on section 25A(1) to refuse to process voluminous requests (see response to Term of Reference 6, above, for more information on section 25A(1)).

658. The benefit of consulting every party in every circumstance does not appear to outweigh the delay in providing access to information and the burden and cost to agencies, especially agencies who handle documents with hundreds of third parties involved.

659. Section 54 of the GIPA Act requires consultation where 'reasonably practicable' and where the person proposed to be consulted 'may reasonably be expected to have concerns about the disclosure of the information'. The same threshold is used in section 37 of the Queensland RTI Act. This language may assist in lowering the threshold, to enable agencies and Ministers to choose not to conduct consultation and proceed to process the request.

660. Whatever threshold is chosen, a new ATI law should apply the same clear and consistent test in all circumstances where consultation is required.

661. The legislation could be supported by Guidelines and Professional Standards developed by OVIC. These tools could give context to, and explain or list factors that agencies and Ministers can consider to identify whether a third party may be reasonably concerned about a document's release and to determine whether consultation is 'reasonably practicable'.[533]

662. An agency or Minister should not be permitted to refuse a request without processing it on the grounds that conducting third party consultation would be a substantial and unreasonable diversion of its resources. Instead, a new ATI law should allow the agency or Minister to not conduct consultation and proceed to process the request.

Recommendations 37 and 68

Obligation to provide an edited copy to maximise disclosure (section 25)

663. A best practice ATI law requires agencies and Ministers to withhold the specific information that is exempted in documents only and provide access to the remaining information.[534] This supports the principles of maximum disclosure and limited exceptions.

[533] See OVIC Practice Note 12: Practicability and third party consultation and notification; OVIC Professional Standard 7.1.

[534] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) 7 (Principle 4: Limited scope of exceptions).

664. Section 25 of the FOI Act requires an agency or Minister to remove or redact exempt or irrelevant information from a document, to facilitate access to the relevant and non-exempt information in the same document. This is known as providing partial access to an edited copy of a document. However, the obligation is limited because it is only enlivened when the applicant indicates they wish to receive an edited copy.[535] In contrast, the equivalent provision in the Commonwealth FOI Act is expressed negatively, requiring the agency to provide an edited copy unless the applicant indicates they would decline an edited copy.[536]

665. The application of section 25 can lead to perverse outcomes whereby agencies will not release a document where it only has one or very few redactions because an applicant has advised that they do not wish to receive edited copies. The section also requires applicants to be aware of asking for copies with deletions, or they might not get anything. This requires agencies and Ministers to properly explain to applicants the requirement to positively assert that they want edited copies, and the outcomes that flow from the applicant's response. Often applicants do not understand what is being asked of them, and say no to receiving edited copies, because they do not understand that if they say no, the entire document will be released.

666. Limiting the obligation to provide partial access to where an applicant indicates they wish to receive an edited copy only is burdensome for agencies, confusing for applicants, and places applicants at a disadvantage. It does not support the principles of maximising disclosure and limiting exceptions. In OVIC's view, it should not appear in Victoria's ATI law.

667. A new ATI law should require agencies and Ministers to provide edited copies with exempt information deleted, where it is practicable to do so, with no requirement for applicants to indicate whether they want this.

668. Agencies and Ministers should have an obligation to provide as much information as possible. To help facilitate this, a provision for deleting irrelevant information should be expressed as 'may', not 'must'.[537] This may result in more information being provided to an applicant. While it might not be relevant to their request, it may help to provide greater context to the document and may save the agency or Minister time in redacting otherwise irrelevant information.

669. The current wording of section 25 has also been outpaced by technology, which allows for the pixilation and editing of CCTV footage, something which the FOI Act did not anticipate.[538]

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[535] *Freedom of Information Act 1982* (Vic), section 25(c).

[536] FOI Act (Cth), section 22.

[537] See example: RTI Act (Qld), section 73 'may', section 74 'must'.

[538] For example, in *Lonigro v Victoria Police* [2013] VCAT 1003, [55]-[57], VCAT noted that pixilation or filtering to remove subjects does not amount to 'deletion' for the purposes of section 25

670. A new ATI law should use neutral language that does not refer to how an agency or Minister removes the exempt information, but simply requires the agency or Minister to enable access to be provided without disclosing the exempt information.

Recommendation 69

What is working well and should be retained

671. The following features of the process for making formal requests for access should be retained in a new ATI law:

a. the ability for any legal person to make a request (an individual or organisation);[539]

b. the applicant does not need to provide reasons for their request;[540]

c. the Act does not require an applicant to identify themselves.[541] On a practical level, most agencies only need to ask for details to enable delivery of the information, where access is provided by way of a copy. Where the applicant is requesting their own personal or health information, an agency will usually ask the applicant to confirm their identity for privacy reasons. Otherwise, the agency may refuse access to the personal or health information;

d. requests must be made in writing (electronic or hard copy), with no requirement to use an official form or to explicitly state that it is a request made under the FOI Act;[542]

e. requests must provide enough information, as is reasonably necessary, to enable the agency or Minister to identify the requested information or document;

f. the duty to assist a person to make a request in a way that complies with the requirements of the FOI Act (such as assisting them to make their request in writing) or to direct the applicant to the agency or Minister that is more likely to hold the requested information;[543]

[539] Aligns with Indicator 4, RTI rating.

[540] Aligns with Indicator 13, RTI rating.

[541] Aligns with Indicator 14, RTI rating. Compare, FOI Act (Cth), section 15(2)(aa) and GIPA Act, section 41(1)(b), which require applicants to cite the Act. GIPA Act, section 41(1)(d) also requires an applicant to provide their name.

[542] Aligns with Indicator 15, RTI rating.

[543] Aligns with Indicator 16, RTI rating.

g. the requirement to consult with the applicant to assist in identifying the information or documents requested and to otherwise make a valid request;[544]

h. the requirement to decide requests and provide access as soon as possible, with clear time limits, and extensions of the time limit;[545]

i. the requirement to provide access in the form requested by the applicant, subject to clear and limited exceptions, such as protection of the record, infringement of copyright and unreasonable interference with the operations of the agency;[546] and

j. no limitations on the use of information received in response to a formal request.[547]

Recommendation 70

A stronger, more independent regulator

OVIC functions and powers

672. In addition to the functions and powers already given to the Information Commissioner and Public Access Deputy Commissioner under the FOI Act, OVIC suggests the following alterations and additions:

    a. Enable the Information Commissioner and Public Access Deputy Commissioner to delegate the function of making a fresh decision to a member of OVIC staff.[548]

        a. Currently, only the Information Commissioner and the Public Access Deputy Commissioner may make a review decision under section 49P, which impacts OVIC's ability to provide timely decisions to applicants.

        b. Given the volume of review applications received by OVIC, it is impractical for there to be two decision makers only.

        c. Allowing a Commissioner to delegate decision making in appropriate matters to senior staff would improve the efficiency of finalising routine and straightforward review decisions.

[544] Aligns with Indicator 16, RTI rating.

[545] Aligns with Indicators 21, 22, 23, RTI rating.

[546] Aligns with Indicator 20, RTI rating.

[547] Aligns with Indicator 27, RTI rating.

[548] Section 6I(2)(d) of the FOI Act (Vic) grants the power to make a fresh decision under section 49P to the Information Commissioner and Public Access Deputy Commissioner. Section 6R, subsections (1)(b) and (4) prevent the Information Commissioner and Public Access Deputy Commissioner from delegating this function to a member of staff.

b. Enable OVIC to receive and make copies of all documents subject to review.

    a. Currently, OVIC can receive electronic copies of documents claimed to be exempt under sections 28, 29A, 31 or 31A, but OVIC cannot make copies of them.[549] OVIC is permitted to inspect the document by secure electronic means only.

    b. Removing restrictions on how OVIC handles documents subject to review helps OVIC to make review decisions more efficiently and effectively. For example, OVIC prepares marked up copies of documents subject to review to indicate the Commissioner's decision. This also helps the agency or Minister to provide access to additional information, in line with the review decision.

c. Make OVIC review decisions legally binding and enforceable.

    a. This is a key feature of an ATI law, which helps to ensure a regulator has appropriate powers to require an agency or Minister to give effect to the review decision (subject to it being appealed to VCAT).[550]

d. Give the Information Commissioner and Public Access Deputy Commissioner the power to direct agencies and Ministers to provide access to a document in a certain format. For example, this may be a format that is accessible to the applicant. The power should enable OVIC to direct an agency or Minister to provide access using a particular method, such as access by email.

e. Insert a new function for the Information Commissioner to prepare guidelines on the FOI Act which must be considered by agencies and Ministers when interpreting the legislation.[551]

    a. Guidelines will deliver greater consistency in FOI decisions. They will help agencies that make few FOI decisions to understand how provisions are interpreted and encourage other agencies to improve consistency of interpretations. Guidelines would also allow OVIC to respond quickly to changes in jurisprudence and communicate those changes to agencies.[552]

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[549] FOI Act (Vic), sections 63D(3) and 63D(4).

[550] IPC NSW, *Key Features of Right to Information Legislation* (April 2019), 13. See also, section 55N of the Commonwealth FOI Act, which requires an agency or Minister to comply with an Information Commissioner's review decision and section 55P of that Act, which provides for application to the Federal Court of Australia for an order directing an agency or Minister to comply with section 55N, where the agency or Minister has failed to comply.

[551] Integrity and Oversight Committee, Parliament of Victoria, *Inquiry into the education and prevention functions of Victoria's integrity agencies* (Final Report April 2022), Recommendation 7, 111.

[552] See examples in section 132 of RTI Act and sections 9A and 93A of the Commonwealth FOI Act.

f. Ensure ATI functions and powers in a new ATI law are granted to both the Information Commissioner and the Public Access Deputy Commissioner. For example, the power to conduct an investigation.[553]

g. Ensure the Information Commissioner and the Public Access Deputy Commissioner have appropriate powers to regulate compliance with the Act, Professional Standards and Guidelines, including the ability to impose consequences on agencies for non-compliance.

    a. Currently, the Information Commissioner and Public Access Deputy Commissioner are granted the power to monitor compliance with Professional Standards only.[554] This function is performed by identifying and assessing instances of non-compliance and taking educative or informal action for minor/technical breaches, or formal action for substantial or systemic breaches, such as reporting instances of substantial breaches in OVIC's annual report.

    b. Regulatory oversight of a new ATI law and Professional Standards would be strengthened if the Commissioners were granted the power to impose sanctions on agencies for repeated or serious non-compliance, and to make appropriate structural recommendations (for example to conduct more training, or to engage in better information management).

h. Include the power for the Information Commissioner, Public Access Deputy Commissioner or delegated OVIC staff member, to require an agency to make an FOI decision within a nominated period of time.[555]

i. Extend the protection of section 62 to include the Information Commissioner and Public Access Deputy Commissioner in respect of the performance of the Commissioners' functions, in conducting a review, complaint or investigation under the FOI Act.

    a. Section 62 of the FOI Act offers FOI decision makers statutory protections from legal claims such as defamation. OVIC contends those same protections should be extended to the Information Commissioner, the Public Access Deputy Commissioner and OVIC decision makers that stand in the shoes of agency officers.

    b. Likely to be most relevant to avoid a defamation claim made by an individual in respect of an investigation report or other document made public by the Information Commissioner (i.e. where the document is not tabled in Parliament).

[553] Section 6I(1)(e) of the FOI Act grants the power to conduct investigations to the Information Commissioner only. Section 6R(2) grants the Information Commissioner a discretion to delegate the power to the Public Access Deputy Commissioner.

[554] FOI Act (Vic), section 6I(2)(c).

[555] Integrity and Oversight Committee, *Performance of the Victorian integrity agencies 2021/22* Final Report, Recommendation 4.

j. Provide a broad immunity to offer protection across OVIC for actions done in accordance with the Act and in good faith.

Recommendations 71 and 72

Stronger independence

673. Central to a well functioning ATI system is a strong, independent ATI regulator.

674. Since its establishment in 2017, OVIC has built a reputation as an independent regulator that protects and upholds the information rights of Victorians. While OVIC functions well, there are some areas that could protect and enhance how OVIC fulfils statutory functions.

675. OVIC must be and must be seen to be independent and must have sufficient resources to carry out our functions. OVIC forms part of Victoria's integrity framework, however, we do not have a sufficient level of independence from government.

676. The FOI Act sets out several functions and powers that enable OVIC to be an independent regulator. This includes the Information Commissioner's power to employ staff,[556] and that the Information Commissioner and the Public Access Deputy Commissioner are not subject to the direction or control of the Minister regarding the performance of their duties and functions, and the exercise of their powers under the FOI Act.[557]

677. However, OVIC is also a statutory office within the Attorney-General's portfolio, in the Department of Justice and Community Safety. OVIC reports to the Department on its performance, including on its financial statements[558] and is subject to cuts to or savings imposed by the Department to its budget. Proposed budget bids are also required to be submitted to the Department for input and the Department manages the passage of OVIC budget bids. Finally, the remuneration of the Information Commissioner and Public Access Deputy Commissioner is determined by the Governor in Council on a recommendation from the Attorney-General following advice received from the Department and is not subject to independent or periodic review.[559] OVIC's independence from government could be strengthened in this regard.

[556] See, section 6Q of the FOI Act.

[557] See, section 6B(3) of the FOI Act.

[558] OVIC's annual financial statements are consolidated into the Department of Justice and Community Safety's annual financial statements pursuant to determinations made by the Minister for Finance under section 53(1)(b) of the *Financial Management Act 1994* (Vic).

[559] See, section 6L of the FOI Act.

678. Other integrity agencies such as the Independent Broad-based Anti-Corruption Commission, the Victorian Inspectorate and the Victorian Ombudsman receive funding appropriations directly from Parliament. Once these appropriations are received, they are controlled by the relevant agency.[560] This is preferred to how OVIC currently receives appropriations because it provides for greater transparency and helps to ensure OVIC is in full control of its budget.

679. OVIC recommends the Committee consider the following regarding the strengthening of OVIC's independence:

- OVIC should be solely accountable to the Committee through provision of an annual report on its performance and other data required under a new ATI law;
- OVIC should not be required to report to a government department on its performance;
- OVIC should receive its annual funding through the Victorian Parliament;
- OVIC should submit budget bids for additional funding, once endorsed by the Committee, directly to the Treasurer (through the Department of Treasury and Finance); and
- Salaries of the Information Commissioner, Public Access Deputy Commissioner and Privacy and Data Protection Commissioner should be reviewed and set by the Victorian Independent Remuneration Tribunal.

Recommendation 73

Reporting to OVIC

680. OVIC recommends that a new ATI law retain existing reporting requirements currently in the FOI Act, subject to amendments that remove outdated items.

681. OVIC also recommends additional reporting requirements:

a. there should be greater reporting and oversight of proactive and informal release pathways in a new ATI law – for example reporting on the comprehensiveness and currency of the information required to be proactively published (including public versions of information asset registers and disclosure logs), and where this information can be found; and

b. the amount of legal fees and consultant fees spent on responding to FOI requests, reviews and complaints.

[560] See IBAC 2022-23 Annual Report, 66. Victorian Ombudsman Annual Report 2022-23, 122. Victorian Inspectorate Annual Report 2022-23, 110.

682. In addition, OVIC recommends amending the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and other relevant legislation to enable OVIC to obtain review application data held by VCAT for more accurate reporting in OVIC's annual report.[561]

Recommendations 74 to 77

Improving transparency of external legal and consultant fees

683. To improve transparency over the use of public funds, OVIC recommends agencies and Ministers should be required to report on the money spent on external service providers, such as legal fees and consultant fees, in processing and advising on FOI requests, in responding to and advising on OVIC reviews and complaints and in responding to or initiating VCAT matters.[562]

684. This additional reporting requirement would allow for greater accuracy in calculating the true cost of FOI in Victoria.

[561] Integrity and Oversight Committee, *Performance of the Victorian integrity agencies 2021/22* (November 2023), Recommendation 5, 77.

[562] This would be an additional reporting requirement under section 64(2), or an equivalent section in a new ATI law for Victoria.

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