Received 23 April 2024

Attachment A

1) Why is the retention of the Freedom of Information (FOI) exemptions applicable to information held by the VO (e.g., under s 29A of the Ombudsman Act 1973 (Vic)) important?

By way of brief background, section 29A was inserted into the *Ombudsman Act 1973* (Vic) (**Ombudsman Act**) in 2001, initially to protect whistleblowers. In 2012, as part of broader reforms to the integrity system, section 29A was expanded to protect information relating to complaints, enquiries, investigations, recommendations, and reports. This was to ensure all confidential documents of the Ombudsman would be protected from disclosure, irrespective of whether those documents were in the possession of the Ombudsman or another person or body.

The exemption from the FOI Act is consistent with the confidentiality and secrecy requirements set out in the Ombudsman Act. It is a necessary and proportionate mechanism to protect the privacy and reputation of people who engage with the office, including complainants, witnesses, and people subject to allegations of maladministration or improper conduct. Further, section 29A provides essential reassurance for people confidentially complaining to the Ombudsman about the actions and decisions of state and local government and publicly funded organisations. It follows that this reassurance also encourages public officers to assist the Ombudsman in performing their functions and duties under the Ombudsman Act, by providing frank advice without fear of reprisal. This was a notable feature of the evidence in the former Ombudsman's *Alleged politicisation of the public sector: Investigation of a matter referred from the Legislative Council on 9 February 2022 – Part 2.*

The exemption contained in section 29A is not unique in Victoria's integrity system. For example, the Independent Broad-based Anti-Corruption Commission (**IBAC**), Victorian Auditor General (**VAGO**) and Victorian Inspectorate (**VI**) all have equivalent provisions in their legislation.[1] The *Public Interest Disclosures Act 2012* (Vic) also contains an exemption provision protecting the confidentiality of information related to public interest disclosures, assessable disclosures and the identity of disclosers.[2]

Such provisions are critical safeguards to ensure enquiries and investigations are not prejudiced, and when sensitive information is ultimately disclosed in the public interest, it has been subject to a procedural fairness process and is tabled as a report protected by parliamentary privilege.

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[1] See *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 194, *Victorian Inspectorate Act 2011* (Vic) s 102 and *Audit Act 1994* (Vic) s 70.

[2] See s 78.

There is also an efficiency to section 29A of the Ombudsman Act. It means the FOI Act simply doesn't apply to categories of documents that would otherwise be exempt under Part IV of that Act. It saves public resources by individually exempting confidential information from release.

Further, until such time as a 'vexatious applicant' provision is included in Victoria's FOI Act, section 29A remains an important efficiency measure in handling repeated and unreasonable requests for information, as detailed in the VO's submission to the Committee.

As noted in our submission to the Committee, most FOI requests to the VO are from people seeking information about their own dealings with the VO, and about our dealings with respondent agencies. The VO notes that despite the section 29A exemption, the VO releases information outside the FOI Act to people on a case-by-case basis where doing so would not prejudice the performance of the Ombudsman's duties and functions or otherwise breach confidentiality. This can include summarising the VO's contact with respondent agencies, providing copies of correspondence between the VO and the person requesting information and reiterating reasons for decisions.

2) Can Victoria's FOI legislation better protect against agencies' misuse of, or overreliance on, statutory exemptions to providing access to information? If so, how?

While we consider statutory exemptions like section 29A of the Ombudsman Act are essential for the integrity system to operate effectively, broader discretion could be given to integrity agencies to release information in the public interest.

For example, in accordance with section 26FC(1) of the Ombudsman Act, the Ombudsman may disclose information to the public but only if the information relates to the commencement or progress of an own motion investigation or an own motion enquiry and disclosure would not lead to the identification of any person or be adverse to an authority (without the authority's consent).

A broader discretion to disclose information in the public interest in the Ombudsman Act would, for example, allow the Ombudsman to issue a statement to exonerate a person subject to unsubstantiated allegations where the allegations against them are already in the public domain.

3) Does the VO favour the introduction of a proactive publication scheme for Cabinet documents in Victoria? If so, why? If not, why not?

As noted in the former Ombudsman's recent investigation into the alleged politicisation of the public sector:

> Transparency in government processes is widely seen as essential for high quality decision-making and democratic scrutiny. Excessive secrecy breeds distrust and – as our investigation found – leads to concerns in and outside government that the integrity and apolitical quality of public administration is impaired.
>
> Contemporary support for greater transparency has led to a re-examination of secrecy in all government processes. Cabinet confidentiality – a cherished tradition – is not immune from this appraisal. Other jurisdictions in Australia and abroad have adopted (or are considering) greater proactive disclosure of Cabinet material, while still allowing a degree of confidentiality over Cabinet deliberations.
>
> We endorse that trend by recommending that, as a matter of policy, most Cabinet records are proactively disclosed within 30 days of a decision, subject to reasonable exceptions.

The Committee would also be aware that the Ombudsman is not able to require the production of Cabinet information or the deliberation of Ministers of Parliamentary Committees in the course of an investigation. We consider this exemption also requires re-examination.

Ombudsman investigations, including referrals from Parliament, can run up against prohibitions preventing disclosure of Cabinet information to the Ombudsman. This can impede an investigation's understanding of the necessary facts, and in some cases disadvantage witnesses who are left unable to explain certain decisions. The Victorian Auditor-General's Office does not face these restrictions, and nor should the Ombudsman.

Following the investigation into the alleged politicisation of the public sector, and to ensure greater transparency and democratic scrutiny of public sector processes, particularly in the provision of advice to Government, the former Ombudsman recommended 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.
- Victorian Government and the Attorney-General review *the Ombudsman Act 1973* (Vic) and introduce amendments to sections 19, 19A and 25A(1)(b) to:
    - empower the Ombudsman to obtain Cabinet information where reasonably necessary for the purposes of an investigation
    - authorise the Ombudsman to include this information in a report to Parliament under section 25 of the Act where the Ombudsman is of the opinion that it is in the public interest to do so.
- Consider similar amendments to the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

4) Have you spoken to your equivalent interstate counterparts on FOI? If so, what insights have Ombudsmen in the second-generation FOI jurisdictions (e.g., NSW, Queensland and the Commonwealth) had to offer regarding proactive and informal release?

Much like section 29A of the Victorian Ombudsman Act, we understand information about the New South Wales Ombudsman's complaint handling, investigative and reporting functions is classified as 'excluded information' under the *Government Information (Public Access) Act 2009* (NSW). The NSW Ombudsman can informally release information subject to Ombudsman's non-disclosure obligations; however, we are informed this is extremely rare.

We also understand the Queensland Ombudsman is subject to the *Right to Information Act 2009* (Qld), however, also appropriately subject to the confidentiality requirements of their Ombudsman Act and can only release information with the permission of the Speaker of the Queensland Parliament.

The Commonwealth Ombudsman is subject to the *Freedom of Information Act 1982* (Cth), but also subject to similar confidentiality obligations. We understand the Commonwealth Ombudsman discloses corporate-type information in accordance with the Information Publication Scheme.

5) Could the VO proactively release more information than it currently does? If so, why? If not, why not?

The VO is committed to the proactive release of information and publishes significant details of its operations in its annual and other reports, and on its website. The VO considers this to be a key accountability and transparency measure.

The information published on our website already includes the VO's:

- Policies dealing with our operations and statutory functions
- Code of Conduct
- Gifts, Benefits and Hospitality Policy and Register
- Human Rights Policy
- Privacy Statement
- Public Interest Disclosure Policy
- Service Delivery Charter.

Our 14 operational policies relate to our enquiries and investigations; conciliation; dealing with complex behaviour; complaints about and oversight of the Ombudsman; information requests, confidentiality and privacy, and more.

The VO supports changes to the FOI scheme to increase the proactive release of public information, subject to any reasonable and public interest restrictions.

6) How effective has the VO's use of technology, such as time-limited Cloud portals, been in improving the efficiency of its FOI processes?

As noted in the VO's submission to the Committee, we support the use of technology to both facilitate disclosure of information and make information available to an FOI requestor. A time-limited Cloud portal may be one such approach.

Currently, the VO receives FOI requests via the portal managed by the Department of Justice and Community Safety, though most FOI requests managed by the VO are still received via direct email. We do not have any proprietary cloud portals to manage FOI requests.

Given the volume of FOI requests the VO receives, the resources required to implement a time-limited portal to better manage them would be disproportionate at this point in time.