Integrity and
Oversight Committee

The operation of the *Freedom of Information Act 1982* (Vic)

Inquiry
September 2024

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About the Committee

The Integrity and Oversight Committee is a joint investigatory committee constituted under the *Parliamentary Committees Act 2003* (Vic).

Functions

7 Integrity and Oversight Committee

(1) The functions of the Integrity and Oversight Committee are—

(a) to monitor and review the performance of the functions and exercise of the powers of the Information Commissioner; and

(b) to consider and investigate complaints concerning the Information Commissioner and the operation of the Office of the Victorian Information Commissioner; and

(c) to report to both Houses of Parliament on any matter requiring the attention of Parliament that relates to—

(i) the performance of the functions and the exercise of the powers of the Information Commissioner; or

(ii) any complaint concerning the Information Commissioner and the operation of the Office of the Victorian Information Commissioner; and

(d) to examine the annual report of the Information Commissioner and any other reports by the Information Commissioner and report to Parliament on any matters it thinks fit concerning those reports; and

(e) to inquire into matters concerning freedom of information referred to it by the Parliament and to report to Parliament on those matters; and

(f) to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers; and

(g) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers, that require the attention of the Parliament; and

(h) to examine any reports made by the Victorian Inspectorate to the Integrity and Oversight Committee or the Parliament other than reports in respect of VAGO officers; and

(i) to consider any proposed appointment of an Inspector under section 18 of the *Victorian Inspectorate Act 2011* and to exercise a power of veto in accordance with that Act; and

(ia) to receive and assess public interest disclosures about conduct by or in the Victorian Inspectorate and engage an independent person to investigate any such disclosure that it has assessed to be a public interest complaint; and

(j) to monitor and review the performance of the duties and functions of the IBAC; and

(k) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament; and

(l) to examine any reports made by the IBAC to the Integrity and Oversight Committee or the Parliament; and

(m) to consider any proposed appointment of a Commissioner under section 20 of the *Independent Broad-based Anti-corruption Commission Act 2011* and to exercise a power of veto in accordance with that Act; and

(n) to carry out any other function conferred on the Integrity and Oversight Committee by or under—

(i) the *Ombudsman Act 1973*; and

(ii) the *Independent Broad-based Anti-corruption Commission Act 2011*; and

(iii) the *Victorian Inspectorate Act 2011*; and

(iv) the *Public Interest Disclosures Act 2012*.

(2) Despite anything to the contrary in subsection (1), the Integrity and Oversight Committee cannot—

(a) reconsider a decision of the Information Commissioner or Public Access Deputy Commissioner in relation to a review of a particular matter; or

(b) reconsider any recommendations or decisions of the Information Commissioner or Public Access Deputy Commissioner in relation to a complaint under the *Freedom of Information Act 1982*; or

(c) reconsider any findings in relation to an investigation under the *Freedom of Information Act 1982*; or

(d) reconsider the making of a public interest determination under the *Privacy and Data Protection Act 2014*; or

(e) reconsider the approval of an information usage arrangement under the *Privacy and Data Protection Act 2014*; or

(f) reconsider a decision to serve a compliance notice under the *Privacy and Data Protection Act 2014*; or

(g) disclose any information relating to the performance of a duty or function or exercise of a power by the Ombudsman, the Victorian Inspectorate or the IBAC which may—

(i) prejudice any criminal proceedings or criminal investigations; or

(ii) prejudice an investigation being conducted by the Ombudsman, the IBAC or the Victorian Inspectorate; or

(iii) contravene any secrecy or confidentiality provision in any relevant Act; or

(h) investigate a matter relating to the particular conduct the subject of—

(i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or

(ii) a particular disclosure determined by the IBAC under section 26 of the *Public Interest Disclosures Act 2012* to be a public interest complaint; or

(iii) any report made by the Victorian Inspectorate; or

(i) review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a public interest complaint within the meaning of that Act; or

(j) review any findings, recommendations, determinations or other decisions of the IBAC in relation to—

(i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or

(ii) a particular disclosure determined by the IBAC under section 26 of the *Public Interest Disclosures Act 2012* to be a public interest complaint; or

(iii) a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or

(k) review any determination by the IBAC under section 26 of the *Public Interest Disclosures Act 2012*; or

(l) disclose or share any information that is likely to lead to the identification of a person who has made an assessable disclosure and is not information to which section 53(2)(a), (c) or (d) of the *Public Interest Disclosures Act 2012* applies; or

(m) review any decision to investigate, not to investigate, or to discontinue the investigation of a particular complaint made to the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*; or

(n) review any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint made to, or investigation conducted by, the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*.

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Terms of reference

Inquiry into the operation of the *Freedom of Information Act 1982* (Vic)

The Legislative Assembly agreed to the following Terms of Reference on 20 June 2023:

That under section 33 of the *Parliamentary Committees Act 2003*, this House refers an inquiry to the Integrity and Oversight Committee for consideration and report no later than 30 September 2024 on the operation of the following matters relating to the *Freedom of Information Act 1982* (the Act):

(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;

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

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

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

(5) Opportunities to increase the disclosure of information relating to government services using technology;

(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;

(7) The effectiveness of processes under the Act and how those processes could be streamlined and made more effective and efficient; and

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

Chair's foreword

Victoria's 40-year-old Freedom of Information (FOI) regime is struggling to meet the needs of our modern democracy.

More than two-thirds of the requests made under our FOI system come from individuals seeking information about themselves held by nearly a thousand government agencies. They often wait many months, sometimes over a year, to get the information they need.

Others seek information for transparency; they may want to understand the reasons for a policy decision or they may be concerned about integrity. Often the information they seek is declared exempt from disclosure under FOI and is either redacted or the entire document withheld.

These days our FOI system too often fails to live up to the democratic ideals it was created to serve in the early years of the Cain Government. After a number of reports emphasising these problems, Parliament referred this Inquiry to the Integrity and Oversight Committee, to examine the current system, compare it to more modern systems and consider how best to improve Victoria's FOI regime.

The Committee accepted 69 submissions, most of which confirmed the problems outlined above. With more than 48,000 requests for information annually, and often onerous requirements for agencies to consult third parties before releasing information, the sheer volume of the work is a significant burden for some public agencies. The lack of alternative pathways to obtain information is a major reason for the large number of requests that clog Victoria's system.

The submissions and witnesses in public hearings also explained that many State agencies take a defensive approach to FOI, relying heavily on legal exemptions to release as little information as possible, contrary to the spirit of the Victorian FOI law. Delays, high fees, complexity, the poor state of public records, unhelpful culture, and refusals to release information are all cited as reasons for our current system's reputation for being impenetrable. At least one witness used the term 'Freedom from Information' to describe Victoria's regime.

The best practices in access to information regimes in other parts of the world that the Committee identified included: maximum disclosure; proactive publication; commitment to open government; limited 'exceptions' to the presumption of disclosure (noting that the human right to information is *not* absolute); and processes to ensure fair, easy, timely and affordable access to information.

After comparing these best practices with Victoria's current situation, the Committee recommended:

- a new third-generation 'push' FOI *Right to Information Act* to replace the existing Victorian first-generation Act, which requires users to 'pull' information out of agencies through formal requests;
- a new definition of information (rather than 'documents') suitable for the digital age; and
- a new three-part test to apply to almost all exemptions to disclosure of information, underpinned by a presumption favouring disclosure of information: so that, if *refusal* of access to information is contemplated by an agency, it must demonstrate (1) that they are protecting a legitimate interest (e.g., privacy), (2) that disclosure will cause substantial harm to that interest, and (3) that this harm is not outweighed by any public interest in disclosure (known as the 'public interest override').

The Committee heard from experts recommending that a greater proportion of Cabinet documents should be proactively released, when in the public interest, as is now the case in New Zealand and Queensland. This proved to be one of the more difficult decisions faced by the Committee and the majority of members favoured retaining a similar Cabinet document exception to the current one, to preserve the Westminster principles of Cabinet confidentiality and solidarity. However, the Committee has narrowed the exemption, by requiring certain documents to be prepared for the dominant purpose of submission to Cabinet in order to be exempt. The Committee further emphasised that the Cabinet exemption should not be used in an overly defensive fashion and that agencies should use it as it was intended. Votes are recorded in the extract of proceedings in this report.

The model recommended by the Committee will 'push' information out to Victorians via four release mechanisms: a mandatory proactive-release mechanism; an additional proactive-release mechanism; an informal-release mechanism; and a formal-release mechanism.

Under proactive-release mechanisms agencies will be *required* to publish a range of prescribed information, including information of significant public interest and will be supported to publish additional information. Much of the burden of formal FOI requests will be replaced by information pushed out proactively or informally released to individuals upon request.

Simply legislating a new FOI system will not be sufficient to improve access to information in Victoria. The Committee heard repeatedly from experts that the Victorian public sector needs a new culture of transparency favouring the proactive release of information. This will require political leadership and will be enhanced by adequate resourcing, plain-language drafting of legislation, a whole-of-government information framework and greater regulatory powers for the Office of the Victorian Information Commissioner (OVIC).

The Committee recommends abolishing application fees and limiting access charges to the costs of copying and delivering information. These and other recommendations are designed to foster this new culture, but will require support at senior levels of all government departments and agencies to really bring about the needed change. Importantly, the Committee has also recommended that the Victorian public not be charged for accessing their personal and health information.

On behalf of the Committee, I thank the many organisations and individuals who wrote submissions to the Inquiry, and the many witnesses who took the time to appear. While I particularly acknowledge the work of OVIC, whose submission is cited extensively in this report, there are many other excellent submissions worth reading. I thank my colleagues on the Committee who put considerable time and effort into this Inquiry and, in particular, I mention Eden Foster who has recently left the Committee due to illness; we are all thinking of her.

Finally, I thank the Secretariat of the Integrity and Oversight Committee for their diligence and scholarship in assisting the Committee with this Inquiry.

I hope the report assists the Government in drafting legislation and setting the tone for the new Right to Information system that Victoria should have.

Dr Tim Read MP
Chair

Recommendations

2 Effectiveness of current policy model

RECOMMENDATION 1: That the Victorian Government introduce in the State a third-generation 'push' FOI system, which prioritises the proactive and informal release of government and public sector information. **45**

RECOMMENDATION 2: That the Victorian Government seek to replace the *Freedom of Information Act 1982* (Vic) with a third-generation 'push' FOI system Act (named the *Right to Information Act*), drafted in plain language and appropriate for the digital age. **50**

RECOMMENDATION 3: That the new, third-generation 'push' FOI Act in Victoria include an objects or purposes section that:

- identifies the key rationales for, and advantages of, the new Act in enhancing representative democracy, responsible government and public administration
- recognises a person's right to access public sector information, in particular about themselves
- contains a presumption favouring maximum disclosure of information
- prioritises proactive disclosure and informal information-release mechanisms over the formal information-release mechanism
- requires restrictions on access to information to be narrowly drawn and interpreted
- expresses Parliament's intention that the new Act 'facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information' (*Freedom of Information Act 1982* (Vic) s 3(2)). **55**

RECOMMENDATION 4: That the new, third-generation 'push' FOI Act in Victoria include a broad, technologically neutral, definition of recorded 'information', rather than 'document', to encompass information in the digital age. **64**

RECOMMENDATION 5: That official documents of ministers and former ministers be subject to the new third-generation 'push' FOI Act in Victoria. **65**

RECOMMENDATION 6: That, under the new Victorian 'push' FOI Act, there be no formal right to request access to publicly available information. **70**

RECOMMENDATION 7: That the new third-generation 'push' FOI Act in Victoria include, in accordance with best practice principles:

- a Part entitled 'Limited exceptions', or similar, to encompass the limited reasons an agency or minister can refuse access to information; and
- a clear presumption in favour of disclosure of information; and
- a statement that Parliament intends the limited exceptions be interpreted narrowly. **71**

RECOMMENDATION 8: That the new third-generation 'push' Act in Victoria include a three-part test in accordance with best practice principles that incorporates:

- a list of legitimate protected interests; and
- a substantial harm test; and
- a public interest override. **75**

RECOMMENDATION 9: That the new third-generation 'push' Act in Victoria incorporate a list of irrelevant considerations that can never justify a refusal to disclose information, including:

- that disclosing the information might cause embarrassment to, or a loss of confidence in, the Government
- that disclosing the information might be misinterpreted or misunderstood by any person
- that access to the information could result in confusion or unnecessary debate
- the seniority of the person who created the information. **76**

RECOMMENDATION 10: That the Cabinet exemption provision in Victoria's new, 'push' FOI Act include reference to a document having been prepared for the 'dominant' purpose of submission for consideration by Cabinet or prepared for the 'dominant' purpose of briefing a minister in relation to issues to be considered by Cabinet, whether or not these kinds of documents are actually submitted to Cabinet. **79**

RECOMMENDATION 11: That there be a new limited internal information exception, subject to the recommended three-part test, to protect the integrity and effectiveness of internal decision-making processes. **88**

RECOMMENDATION 12: That, in a new 'push' FOI Act in Victoria, there be equivalent provisions to the *Freedom of Information Act 1982* (Vic) s 31(3)–(4), and that they not be subject to the three-part test. **91**

RECOMMENDATION 13: That a provision be included in the new 'push' FOI Act for Victoria that adequately protects information created or held by Victoria Police for law-enforcement intelligence purposes. **91**

RECOMMENDATION 14: That the new 'push' FOI Act in Victoria retain protections for the work of integrity agencies comparable to those presently found in the *Freedom of Information Act 1982* (Vic) ss 6AA and 31A, *Independent Broad-based Anti-corruption Act 2011* (Vic) s 194, *Ombudsman Act 1973* (Vic) s 29A and *Victorian Inspectorate Act 2011* (Vic) s 102. **93**

RECOMMENDATION 15: That the Victorian Government seek to amend s 194 of the *Independent Broad-based Anti-Corruption Act 2011* (Vic) to make clear that a Victoria Police investigation following a referral from the Independent Broad-based Anti-Corruption Commission (IBAC) is not an investigation 'conducted under the IBAC Act', so that documents collected by Victoria Police during such an investigation are not exempt under s 194 from the operation of the *Freedom of Information Act 1982* (Vic). **95**

RECOMMENDATION 16: That, under the new, third-generation 'push' FOI Act in Victoria, agencies and ministers must consider waiving legal professional privilege before refusing access to a document on this ground. **96**

RECOMMENDATION 17: That, with regard to the limited exception for privacy in Victoria's new third-generation 'push' FOI Act,

- the three-part test apply to it
- agencies use best practice 'access-by-design' tools to minimise the recording of personal information, and segregate it where necessary so information can more readily be disclosed while protecting privacy
- the Office of the Victorian Information Commissioner issue tailored guidelines to help agencies using the three-part test more accurately and consistently determine whether, in a particular case, it is in the public interest to disclose personal information. **98**

RECOMMENDATION 18: That a new 'push' FOI Act in Victoria use the definition of 'personal information' that is in the *Privacy and Data Protection Act 2014* (Vic). **98**

RECOMMENDATION 19: That, under the new 'push' FOI Act in Victoria, government agencies be required to include, in their procurement contracts with private organisations, a clause prescribing that these agreements are subject to public scrutiny. **101**

RECOMMENDATION 20: That, when a minister or agency has engaged legal advisers, consultants and independent contractors, that the minister or agency is not allowed to deny access to information which merely demonstrates that the minister or agency is performing a statutory function or providing a governmental service. **101**

RECOMMENDATION 21: That, as part of its consideration of law reforms relating to FOI in Victoria, the Victorian Government review the appropriateness of secrecy, and related, legislative provisions in the State, taking into account the 12 secrecy-offence principles identified in the Commonwealth Attorney-General's *Review of secrecy provisions: final report* (2023). **104**

3 Proactive and informal release of information

RECOMMENDATION 22: That legislation establishing Victoria's new third-generation 'push' FOI system authorise the release of government-held information via the following four distinct mechanisms:

(1) a mandatory proactive release mechanism

(2) an additional proactive release mechanism

(3) an informal release mechanism

(4) a formal release mechanism with disclosure log requirements. **130**

RECOMMENDATION 23: That legislation establishing Victoria's new third-generation 'push' FOI system emphasise the primacy of the mandatory proactive, additional proactive and informal release mechanisms. **131**

RECOMMENDATION 24: That legislation establishing Victoria's new third-generation 'push' FOI system protect agencies and ministers (and their staff) from civil and criminal liability where information is released in good faith under the mandatory proactive, additional proactive, informal and formal release mechanisms. **131**

RECOMMENDATION 25: That legislation establishing Victoria's new third-generation 'push' FOI system protect the Information Commissioner and Public Access Deputy Commissioner from civil and criminal liability in respect of their performance of their statutory functions. Additionally, that these protections be extended to other persons employed by the regulator in respect of their performance of statutory functions on behalf of the Information Commissioner and Public Access Deputy Commissioner. **131**

RECOMMENDATION 26: That legislation establishing the mandatory proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to release information of significant public interest, as statutorily defined, as well as information about:

- the kinds of information they hold, including what information they publish and are prepared to release (and whether it will be released free or for a fee)
- their organisational structure
- their functions and how their functions impact the public
- arrangements that facilitate public participation in the development of their policies and exercise of their functions
- their operations, strategic priorities, performance, financial affairs and related information published in tabled reports
- the kinds of information they routinely release under the formal release mechanism
- how the public can request information from them under the informal and formal release mechanisms
- a register of information determined to be unsuitable for release under the additional proactive release mechanism
- a register of information released under the informal and formal release mechanisms that has been considered for release to the broader public under the additional proactive release mechanism. **131**

RECOMMENDATION 27: That legislation establishing the mandatory and additional proactive release mechanisms in Victoria's new third-generation 'push' FOI system contain guiding principles on how agencies and ministers are expected to release information under the mechanisms. These principles should emphasise the responsibility of agencies and ministers to:

- make the public aware of the availability of the information they hold
- publish information in a timely manner and in a way that is practical, easily found, clear, capable of being understood and accessible. **132**

RECOMMENDATION 28: That legislation establishing the mandatory proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- publish free on their website, or other digital platform, information captured by the mechanism, except where the cost of publishing particular information online would be unreasonable
- release information that cannot be published online due to the exception via an alternative free method that is practical, timely, and accessible.

Where the exception applies, and the alternative methods available to provide public access to the information are not practical, timely or easily accessible, that agencies and ministers be empowered to charge reasonable costs associated with copying the information to comply with their obligations under the mechanism. **132**

RECOMMENDATION 29: That legislation establishing the mandatory and additional proactive release mechanisms in Victoria's new third-generation 'push' FOI system require agencies and ministers to take reasonable steps to provide an alternative method of access to information captured by the mechanism to persons who cannot access the information through the primary method due to disability, incarceration or other impediment to access. **132**

RECOMMENDATION 30: That legislation establishing the additional proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to review annually their approach to releasing information under the mechanism. **132**

RECOMMENDATION 31: That legislation establishing the informal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- provide reasonable advice and assistance to persons requesting information informally
- release information under the mechanism without charge or for the lowest reasonable cost. **132**

RECOMMENDATION 32: That legislation establishing the informal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- consider releasing to the broader public, under the additional proactive release mechanism, information that has been released to requesters under the informal release mechanism
- record all decisions to proactively release information which has been previously released under the informal release mechanism. **133**

RECOMMENDATION 33: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to consider whether formal requests can be dealt with under the informal release mechanism. **133**

RECOMMENDATION 34: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- record, in the form of a disclosure log, all information released under the formal release mechanism in response to FOI requests for non-personal information
- update their disclosure log within 10 business days of releasing information to a requester under the formal release mechanism
- publish their disclosure log on their website
- release to the broader public all information recorded in their disclosure log, except:
  - requesters' names
  - personal information or information that would unreasonably infringe personal privacy
  - confidential information or information communicated in confidence
  - information the publication of which is potentially defamatory
  - information prohibited under law from being disclosed or published
  - information that would cause substantial harm to an entity
- consider releasing, under the additional proactive release mechanism, all information released to applicants in response to FOI requests for non-personal information, and record and publish all such decisions. **133**

RECOMMENDATION 35: That legislation establishing Victoria's new third-generation 'push' FOI system ensure the Information Commissioner is granted appropriate regulatory functions and powers to regulate agency and ministerial compliance with the requirements relating to the proactive and informal release mechanisms, including with respect to disclosure logs. This should include reporting, complaint-handling, investigation, examination and audit powers, as well as the ability to take enforceable action with respect to non-compliance. **134**

RECOMMENDATION 36: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system contain guiding principles on how agencies and ministers are expected to meet their obligations with respect to disclosure logs. These principles should:

- emphasise the responsibility of agencies and ministers to ensure that their disclosure log is easy to find, search and use, and up-to-date and useful
- set minimum requirements for the format of disclosure logs (for example, the type of document released and a description of its content)
- permit agencies and ministers to provide additional contextual information with respect to a document recorded in a disclosure log, if they consider that it will help the public to understand it
- set out how documents recorded in a disclosure log are to be released to the public (for example, online via an active electronic link in the log)
- permit agencies and ministers to publish information in a different form and format from that provided to the requester if publishing it in its original format would be impractical or unreasonably burdensome. **134**

RECOMMENDATION 37: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- consider releasing to the broader public, under the additional proactive release mechanism, information which has previously been released to requesters under the formal release mechanism
- record all decisions to proactively release information that has been previously released under the informal release mechanism. **134**

RECOMMENDATION 38: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies and ministers to develop, implement and publish a policy setting out, among other matters, their compliance with the guiding principles for the proactive release mechanisms; their processes for releasing information under the proactive, informal and formal release mechanisms; and their compliance with disclosure log requirements (including the kinds of information released under the informal and formal release mechanisms that will not be released to the broader public). **135**

RECOMMENDATION 39: That legislation establishing Victoria's new third-generation 'push' FOI system include agency and ministerial reporting requirements with respect to the cost of administering the FOI scheme; compliance with their obligations under the proactive release mechanisms; the public's use of the informal release mechanisms; and the operational efficiency of those mechanisms. **135**

RECOMMENDATION 40: That the Victorian Government develop and implement a whole-of-government information-management framework ('framework')—applicable to all agencies, ministers and government-held information subject to the FOI scheme—to support Victoria's new third-generation 'push' FOI system.

That the framework:

- embed the purposes and benefits of a third-generation FOI system, including:
  - specifying, as a primary aim, improving the accountability and transparency of government and public participation in government affairs and decision-making
  - supporting the maximum disclosure of government-held information.
- embedding e-governance and access-by-design principles into the information- and data-management processes and practices of all agencies and ministers
- requiring agencies and ministers to record and publish information relating to the use of Artificial Intelligence and automated decision-making
- requiring agencies and ministers to use technology to facilitate the efficient release of information under the FOI scheme. **153**

RECOMMENDATION 41: That legislation establishing Victoria's new third-generation 'push' FOI system give effect to the key recommendations of the Information and Privacy Commission New South Wales in its report *Scan of the Artificial Intelligence regulatory landscape—information access and privacy* with respect to the government's use of Artificial Intelligence (AI), namely that government:

- ensure mandatory proactive disclosure of the use of AI
- ensure that open access information includes a statement of use, and a description of the operation of the AI
- expand information access rights under government contracted services to AI used for government decision-making
- include the use of AI as a factor in favour of disclosure of information. **153**

RECOMMENDATION 42: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- maintain an Information Asset Register (IAR)
- record in their IAR whether information can be, or has been, released to the public (and under which statutory release mechanism)
- publish a public version of their IAR on their website. **153**

RECOMMENDATION 43: That legislation establishing Victoria's new third-generation 'push' FOI system ensure that information created by or in the possession of third-party government contractors and sub-contractors is accessible under the FOI scheme. This should be facilitated by giving agencies and ministers an immediate right of access to such information. **154**

RECOMMENDATION 44: That legislation establishing Victoria's new third-generation 'push' FOI system ensure that private entities that receive public funding to perform public functions or provide public services are subject to the FOI scheme. **154**

RECOMMENDATION 45: That the Victorian Government explore the feasibility of implementing a mandatory training and education program for all public sector employees or FOI practitioners on Victoria's new third-generation 'push' FOI system. **154**

RECOMMENDATION 46: That the Victorian Government explore the feasibility of implementing a mandatory records-management and data-governance training and education program for all Victorian FOI practitioners. **154**

RECOMMENDATION 47: That the Victorian Government, in consultation with the Public Record Office of Victoria (PROV), review record-keeping and information-management requirements under the *Public Records Act 1973* (Vic), as well as the PROV's compliance monitoring and enforcement powers under the Act, to ensure their adequacy to support Victoria's new third-generation 'push' FOI system. **154**

RECOMMENDATION 48: That legislation establishing Victoria's new third-generation 'push' FOI system include specific reference to its interrelatedness with the *Public Records Act 1973* (Vic), and require agency and ministerial compliance with record-keeping and information-management obligations under the *Public Records Act 1973* (Vic). **154**

RECOMMENDATION 49: That the Victorian Government explore the feasibility of implementing a centralised whole-of-government FOI portal, supported by new and emerging technology, to centralise the making of requests and the publication of agency and ministerial disclosure logs and Information Asset Registers under Victoria's new third-generation 'push' FOI system, as well as information released through proactive and informal release mechanisms. **154**

RECOMMENDATION 50: That the Victorian Government explore the feasibility of:

- using technology, including Artificial Intelligence and automated decision-making, to facilitate the efficient administration of a third-generation FOI system.
- using technology to assist with embedding access-by-design principles into information-management processes and practices across the public sector.

In making this recommendation, the Committee recognises the importance of human supervision and oversight of any use of such technology, including the involvement of human decision-makers. **155**

RECOMMENDATION 51: That the Victorian Government—in consultation with Aboriginal Community Controlled Organisations, Aboriginal leaders, practitioners and community Members (including the Yoorook Justice Commission, Victorian Aboriginal Community Controlled Health Organisation and Victorian Aboriginal Legal Service)—explore the feasibility of recognising and embedding Indigenous Data Sovereignty and Indigenous Data Governance principles into a whole-of-government information management framework and in legislation establishing Victoria's new third-generation 'push' FOI system. **155**

4 Efficiency

RECOMMENDATION 52: That legislation establishing Victoria's new third-generation 'push' FOI system retain the existing functions and powers of the Information Commissioner and Public Access Deputy Commissioner in the *Freedom of Information Act 1982* (Vic), including their powers to undertake reviews and handle complaints; provide advice, education and guidance to agencies, ministers and the public; issue professional standards; and conduct investigations. Additionally, the Committee recommends that their delegation powers be retained. **223**

RECOMMENDATION 53: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system retain the following features of the *Freedom of Information Act 1982* (Vic) with respect to requests:

(i) legal persons can make a request, are not required to identify themselves (except when applying for personal or health information) or provide reasons for the request, and are not limited in their use of information released in response to a request

(ii) there is no prescribed form for requests but they must be in writing and contain sufficient information to enable agencies and ministers to identify the information sought

(iii) agencies and ministers must assist applicants to make a valid request, consult with them to make a request valid, and refer them to another agency or Minister that may hold the information requested

(iv) agencies and ministers must decide FOI requests within 30 days, with extensions of time permitted in certain circumstances

(v) agencies and ministers must take reasonable steps to provide access to information in a form or format requested by, or accessible to, an applicant, limited by clear and reasonable objections (for example, protection of the record, infringement of copyright and unreasonable interference with the operations of the agency). **223**

RECOMMENDATION 54: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system empower the Information Commissioner and Public Access Deputy Commissioner to give an enforceable direction to an agency (or minister) to release information to an applicant in a particular format or by a particular method. **223**

RECOMMENDATION 55: That legislation establishing Victoria's new third-generation 'push' FOI system retain agency and ministerial reporting requirements in the *Freedom of Information Act 1982* (Vic) subject to any needed amendments to remove outdated items. **223**

RECOMMENDATION 56: That legislation establishing Victoria's new third-generation 'push' FOI system simplify and streamline the definition of the entities subject to the FOI scheme. **224**

RECOMMENDATION 57: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to assist a prospective applicant to make a written request if they are unable to do so due to disability or disadvantage (for example, illiteracy). **224**

RECOMMENDATION 58: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to acknowledge receipt of a valid FOI request in writing within five business days and that the content of the written acknowledgement be prescribed. **224**

RECOMMENDATION 59: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a provision, modelled on s 44(2) of the *Government Information (Public Access) Act 2009* (NSW), permitting partial transfer of a request to another agency or minister. **224**

RECOMMENDATION 60: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system provide exceptions to the strict transfer and notification requirements under s 18 of the *Freedom of Information Act 1982* (Vic) for agencies with complex organisational structures. **224**

RECOMMENDATION 61: That all statutory time frames in legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system refer to business days rather than calendar days. **224**

RECOMMENDATION 62: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a repeat requests exception, modelled on s 60(1) of the *Government Information (Public Access) Act 2009* (NSW), empowering an agency (or minister) to refuse to deal with a request (in whole or in part) if:

(i) the agency decided a previous request for information substantially the same as the information sought in the request and there are no reasonable grounds for believing that the agency would make a different decision on the request to the previous decision; or

(ii) the applicant has previously been provided with access to the information under the FOI scheme. **224**

RECOMMENDATION 63: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a voluminous requests exception that:

(i) empowers agencies (and ministers) to refuse to deal with a request if doing so would substantially and unreasonably divert an agency's resources from the performance of its other operations, or substantially and unreasonably interfere with the performance of the minister's functions, and there is no overriding public interest to process the request

(ii) contains a presumption in favour of processing the request

(iii) prescribes the factors that agencies (and ministers) must take into account in determining whether the exception applies, by codifying the Information Commissioner's and the Victorian Civil and Administrative Tribunal's existing guidance on determining what is 'substantial' and 'unreasonable'

(iv) prescribes a statutory threshold definition of 'substantial and unreasonable' diversion or interference

(v) prohibits reliance on the exception on grounds that third-party consultation would likely be too onerous and provides flexibility for agencies not to consult in those circumstances

(vi) permits agencies to rely on the exception where the cumulative impact of processing multiple requests received from the same applicant would constitute a 'substantial and unreasonable' diversion or interference

(vii) prescribes the matters that must be contained in a 'refusal to process' decision relying on the voluminous requests exception. **225**

RECOMMENDATION 64: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies to adequately resource their FOI function and empower the Information Commissioner to direct agencies (and ministers) to review the adequacy of their FOI resourcing if their capacity to process requests is frequently constrained by the resourcing of their FOI function. **225**

RECOMMENDATION 65: That the s 25A(5) exception in the *Freedom of Information Act 1982* (Vic) not be retained in legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system. **225**

RECOMMENDATION 66: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system apply the same threshold for consultation across all third-party consultation provisions, modelled on s 54 of the *Government Information (Public Access) Act 2009* (NSW). **225**

RECOMMENDATION 67: That—for the purpose of facilitating partial access to information—legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a provision, modelled in part on s 22(1)(d), (2) of the *Freedom of Information Act 1982* (Cth) and s 73(2) of the *Right to Information Act 2009* (Qld):

(i) requiring agencies (and ministers) to provide an edited copy of a document if reasonably practicable, unless the applicant has indicated that they do not want to receive it

(ii) requiring agencies to provide partial access without disclosing exempt information, rather than authorising them to make such deletions as are necessary to provide partial access

(iii) permitting, but not requiring, agencies to delete irrelevant information. **226**

RECOMMENDATION 68: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system retain the Information Commissioner's power to decide an FOI review application under s 49P of the *Freedom of Information Act 1982* (Vic) and:

(i) extend that power to the Public Access Deputy Commissioner without the need for an instrument of delegation; and

(ii) empower the Information Commissioner and Public Access Deputy Commissioner to delegate, to senior staff, their power to decide an FOI review application, including the power to make a fresh decision on the original request. **226**

RECOMMENDATION 69: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system empower the Information Commissioner to ensure that agencies (and ministers) take appropriate action to give effect to the Office of the Victorian Information Commissioner's FOI review decisions, subject to their Victorian Civil and Administrative Tribunal review rights. **226**

RECOMMENDATION 70: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system extend the time frame specified in ss 49P(4)(b) and 52(9) of the *Freedom of Information Act 1982* (Vic) from 14 days to 30 days. **226**

RECOMMENDATION 71: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a vexatious applicant provision, modelled on ss 89K–89N of the *Freedom of Information Act 1982* (Cth) and s 114 of the *Right to Information Act 2009* (Qld), empowering the Information Commissioner to make a vexatious FOI applicant declaration on the application of an agency or minister, or on the Commissioner's own initiative, with a right of review to the Victorian Civil and Administrative Tribunal. **227**

RECOMMENDATION 72: That legislation establishing Victoria's new third-generation 'push' FOI system address Recommendations 4 and 5 in the Integrity and Oversight Committee's *Performance of the Victorian integrity agencies 2021/22* report. **227**

RECOMMENDATION 73: That legislation establishing Victoria's new third-generation 'push' FOI system protect the Information Commissioner, Public Access Deputy Commissioner and Office of the Victorian Information Commissioner staff from civil and criminal liability with respect to their good-faith performance of their statutory functions and the exercise of their statutory powers. **227**

RECOMMENDATION 74: That legislation establishing Victoria's new third-generation 'push' FOI system retain the legal protections afforded to agencies (and ministers) in s 62 of the *Freedom of Information Act 1982* (Vic), and extend those protections to the Information Commissioner and Public Access Deputy Commissioner with respect to their power to decide an FOI review application, as well as to persons with delegated authority to decide FOI review applications. **227**

RECOMMENDATION 75: That legislation establishing Victoria's new third-generation 'push' FOI system empower the Information Commissioner to make binding recommendations in connection with an FOI complaint. **227**

RECOMMENDATION 76: That legislation establishing Victoria's new third-generation 'push' FOI system empower the Information Commissioner to issue binding professional standards and guidelines on FOI legislation—including on how provisions should be interpreted—and require agencies (and ministers) to have regard to them when administering the FOI scheme. **227**

RECOMMENDATION 77: That legislation establishing Victoria's new third-generation 'push' FOI system ensure the Information Commissioner is granted appropriate powers to regulate compliance with the legislation, and professional standards and guidelines issued under it, including empowering the Information Commissioner to impose sanctions for serious or serial agency and ministerial non-compliance with their statutory obligations under the FOI scheme. **228**

RECOMMENDATION 78: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system:

(i) empower the Information Commissioner to make, vary and revoke a vexatious applicant declaration on the application of an affected agency (or minister) or on the Commissioner's own initiative

(ii) prescribe the grounds for making a vexatious applicant declaration—namely, repeat requests for information by the same applicant or applicants acting in concert which are manifestly unreasonable or an abuse of process

(iii) establish a right of review to the Victorian Civil and Administrative Tribunal in respect of a vexatious applicant declaration of the Information Commissioner. **228**

RECOMMENDATION 79: That legislation establishing Victoria's new third-generation 'push' FOI system introduce offence provisions for:

(i) destroy, conceal or alter any record of government information for the purpose of preventing disclosure under FOI legislation

(ii) wilfully obstruct access to information under FOI legislation, including directing or improperly influencing an FOI decision-maker to decide a request contrary to the requirements of the Act

(iii) wilfully obstruct, hinder or resist the Information Commissioner, Public Access Deputy Commissioner or member of staff of the Office of the Victorian Information Commissioner, modelled on s 63F of the *Freedom of Information Act 1982* (Vic). **228**

RECOMMENDATION 80: That the Victorian Government review the desirability and feasibility of making the position of Information Commissioner an independent officer of Parliament. **228**

RECOMMENDATION 81: That the Victorian Government review the desirability and feasibility of the Victorian Independent Remuneration Tribunal setting and reviewing the remuneration of the Information Commissioner and Public Access Deputy Commissioner. **228**

RECOMMENDATION 82: That the Victorian Government review the desirability and feasibility of directly funding the Office of the Victorian Information Commissioner through Parliament's appropriation, similar to the funding arrangements of the Independent Broad-based Anti-corruption Commission, Victorian Ombudsman and Victorian Inspectorate. **229**

RECOMMENDATION 83: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(1)(b) and (c) of the *Freedom of Information Act 1982* (Vic) and clarify that the respondent to the proceeding is the relevant agency. **229**

RECOMMENDATION 84: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(3D) of the *Freedom of Information Act 1982* (Vic) and clarify that the respondent to the proceeding is the original FOI applicant. **229**

RECOMMENDATION 85: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(3)–(3A) of the *Freedom of Information Act 1982* (Vic) and clarify that, where, as a result of machinery of government changes,

(i) a primary agency has possession and control of information of a legacy agency the subject of a review decision of the Information Commissioner; and

(ii) the primary agency would have a right to apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the Information Commissioner's decision under s 50 of the *Freedom of Information Act 1982* (Vic),

the legacy agency has standing to apply to VCAT as an affected third party. **229**

RECOMMENDATION 86: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system clarify that, in a review conducted by the Victorian Civil and Administrative Tribunal of a deemed refusal decision of an agency, the Tribunal will, for the purpose of deciding the review, consider the actual decision of the agency. **229**

RECOMMENDATION 87: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system clarify that the Victorian Civil and Administrative Tribunal cannot consider the adequacy of an agency's search for documents in connection with a request, except in respect of the Tribunal's review of a deemed refusal decision where a 'documents do not exist or cannot be located' decision is made by an agency before the review is heard or decided. **229**

RECOMMENDATION 88: That legislation establishing Victoria's new third-generation 'push' FOI system include a statutory requirement for the Act to be reviewed four years after its commencement, and every five years thereafter. **230**

RECOMMENDATION 89: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system ensure that there is no application fee. **230**

RECOMMENDATION 90: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system ensure that no access charges are imposed for requests for personal or health information. **230**

RECOMMENDATION 91: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system limit access charges for non-personal and non-health-related requests to the cost of copying and delivering the information sought, and ensure that the first 20 pages can be accessed free of charge. **230**

RECOMMENDATION 92: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system contain a general discretion to waive, reduce or refund any access charges payable under the Act, supported by binding FOI Guidelines issued by the Information Commissioner on decision-making with respect to the fee-waiver provision (including a straightforward standardised threshold for qualifying for the waiver that includes legal aid clients). **230**

RECOMMENDATION 93: That the Victorian Government, as part of the Treaty negotiations, consider how structural barriers to Aboriginal people and Aboriginal Community Controlled Organisations (ACCOs) accessing government-held information under the FOI scheme are best overcome. **230**

RECOMMENDATION 94: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system empower the Information Commissioner to review agency (and ministerial) decisions to impose an access charge and the quantum of such charges. **230**

RECOMMENDATION 95: That the public's right to request a correction or amendment of personal information under the *Freedom of Information Act 1982* (Vic), *Health Records Act 2001* (Vic) and *Privacy and Data Protection Act 2014* (Vic) be consolidated in the *Privacy and Data Protection Act 2014* (Vic). **230**

RECOMMENDATION 96: That the Victorian Government consolidate the Health Privacy Principles in the *Health Records Act 2001* (Vic) and the Information Privacy Principles in the *Privacy and Data Protection Act 2014* (Vic) in the *Privacy and Data Protection Act 2014* (Vic), under the regulation of the Office of the Victorian Information Commissioner. **231**

RECOMMENDATION 97: That access to personal and health information be regulated under Victoria's new third-generation push FOI system, and that this access arrangement replace the existing fragmented access arrangements under FOI and health and privacy legislation. **231**

RECOMMENDATION 98: That the public's enforceable access and review rights under the *Freedom of Information Act 1982* (Vic), with respect to personal and health information, be retained in legislation establishing the formal mechanism in Victoria's new third-generation 'push' FOI system, but positioned as a last resort for obtaining access to such information. **231**

RECOMMENDATION 99: That legislation establishing Victoria's new third-generation 'push' FOI system authorise, strongly encourage and support agencies (and ministers) to release personal and health information through the informal-release mechanism as a first port of call, and establish, for that purpose, administrative access schemes for frequently requested information. **231**

RECOMMENDATION 100: That legislation establishing Victoria's new third-generation 'push' FOI system protect FOI decision-makers from civil and criminal liability with respect to their good-faith release of information under the informal and formal release mechanisms. **231**

RECOMMENDATION 101: That legislation establishing Victoria's new third-generation 'push' FOI system exempt from the FOI scheme information that can be accessed under the access to information regime established by s 9 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). **231**

Acronyms and abbreviations

ACHPR	*African Charter on Human and People's Rights* (1981)
ACCCO	Aboriginal Community Controlled Organisation
ACT	Australian Capital Territory
ADSS	Australian Department of Social Services
AI	Artificial Intelligence
ARC	Administrative Review Council
ALA	Australian Lawyers Alliance
AM	Member of the Order of Australia
ALRC	Australian Law Reform Commission
AO	Officer of the Order of Australia
ARTK	Australia's Right to Know
ATI	access-to-information (system)
CEO	Chief Executive Officer
CHO	community housing organisation
CLAN	Care Leavers Australasia Network
DCJ	Department of Communities and Justice (New South Wales)
DELWP	Department of Environment, Land, Water and Planning (Victoria)
DFFH	Department of Families, Fairness and Housing (Victoria)
DHS	Department of Human Services (Victoria)
DHHS	Department of Health and Human Services (Victoria)
DJCS	Department of Justice and Community Safety (Victoria)
DJPR	Department of Jobs, Precincts and Regions (Victoria)
DOJR	Department of Justice and Regulation
DPC	Department of Premier and Cabinet (Victoria)
DTF	Department of Treasury and Finance (Victoria)
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950)
EMR	Electronic Medical Record system
EU	European Union
FOI	freedom of information
HCC	Health Complaints Commissioner, Victoria
HPP	Health Privacy Principles
IAR	Information Asset Register
IBAC	Independent Broad-based Anti-corruption Commission
ICCPR	*International Covenant on Civil and Political Rights* (1966)

ID	Indigenous Data
IDG	Indigenous Data Governance
IDS	Indigenous Data Sovereignty
IOC	Integrity and Oversight Committee
IPC NSW	Information and Privacy Commission NSW
IPPs	Information Privacy Principles
LCC	Legal and Constitutional Committee, Parliament of Victoria
LIV	Law Institute of Victoria
MAV	Municipal Association of Victoria
n.d.	no date
MP	Member of Parliament
NGO	non-government organisation
NSW	New South Wales
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
OIC Qld	Office of the Information Commissioner Queensland
OIC WA	Office of the Information Commissioner Western Australia
OVIC	Office of the Victorian Information Commissioner
PAEC	Public Accounts and Estimates Committee, Parliament of Victoria
PDSP	Protective Data Security Plan
PID	public interest disclosure
PROV	Public Record Office Victoria
SC	Senior Counsel
SSCCLA	Senate Standing Committee on Constitutional and Legal Affairs
SEMLS	South-East Monash Legal Service Inc
SRO	State Revenue Office (Victoria)
TAI	The Australia Institute
TOR	Term(s) of Reference
UDHR	*Universal Declaration of Human Rights* (1948)
UK	United Kingdom
UN	United Nations
UNCAC	*United Nations Convention Against Corruption* (2003)
UNESCO	United Nations Educational Scientific and Cultural Organization
UNODC	United Nations Office on Drugs and Crime
VAGO	Victorian Auditor-General's Office
VALS	Victorian Aboriginal Legal Service
VCAT	Victorian Civil and Administrative Tribunal

VGSO	Victorian Government Solicitor's Office
VI	Victorian Inspectorate
VLA	Victoria Legal Aid
VLSBC	Victorian Legal Services Board and Commissioner
VO	Victorian Ombudsman
VPDSF	Victorian Protective Data Security Framework
VPDSS	Victorian Protective Data Security Standards
VPSC	Victorian Public Sector Commission

Chapter 1
Introduction

1.1 Overview of Victoria's integrity system

Before introducing the Committee's inquiry into the operation of the *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') in Victoria, it is important to understand the context within which it operates, and, specifically, the nature of the State's integrity system. It also essential to understand the role of the Integrity and Oversight Committee (IOC) within the integrity system.

Accountability and integrity are two key principles underpinning responsible government, with governments accountable to the people through the Parliament of Victoria in accordance with representative democracy. Victoria's integrity system is comprised of a number of bodies, which perform distinctive roles in instilling and maintaining trust and confidence in public administration. Together, they help protect and advance the integrity of the public sector. The role of Freedom of Information (FOI) within this context is addressed later in this chapter.

The Independent Broad-based Anti-corruption Commission (IBAC) is responsible for identifying, exposing and preventing corrupt conduct in the Victorian public sector. Its functions include the oversight of Victoria Police. It is also the central clearinghouse for receiving, assessing and investigating disclosures about improper conduct by a public officer (including a public servant) or public body. These disclosures are known formally as 'public interest disclosures' (PIDs) and informally as 'whistleblower complaints'.

The Office of the Victorian Information Commissioner (OVIC), to which further attention is given later in this chapter, oversights Victoria's FOI, information privacy, and information security regimes. It aims to facilitate greater access to information while safeguarding privacy and data in appropriate circumstances.

The Victorian Ombudsman (VO) investigates and resolves complaints about the administrative actions of Victorian government agencies, including local councils. It is also empowered to 'enquire' into any administrative action that is incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter of Human Rights*').

The Victorian Inspectorate (VI) oversights a number of key integrity agencies, including IBAC, OVIC and the VO, by monitoring their compliance with the law, their use of coercive powers and their observance of procedural fairness requirements.

These integrity agencies are not subject to the direction or control of the executive government and are directly accountable to the Parliament through the IOC.

1

1.2 The Integrity and Oversight Committee

The IOC is a joint investigatory committee of the 60th Parliament of Victoria established under the *Parliamentary Committees Act 2003* (Vic) ('*PC Act 2003* (Vic)'). The IOC is responsible for monitoring and reviewing the performance of the duties and functions of some of Victoria's leading integrity agencies. The IOC performs this oversight role through, among other actions,

- monitoring and reviewing the performance of the duties and functions of IBAC, OVIC, the VI and the VO
- examining the agencies' reports, including annual reports
- reporting to both Houses of Parliament on any matter requiring the attention of Parliament.[1]

As noted, the Committee monitors and reviews the agencies' performance of their duties and functions, which include public information, education and prevention responsibilities; complaint handling, investigations and reviews of public sector body investigations; and inquiries into public sector bodies (including any consequent recommendations for those bodies).

In addition to the examination of agency reports, including their annual reports, the Committee exercises oversight by monitoring information about the performance of agencies it has received from complainants; that is in the public domain; or that has come from the integrity agencies themselves through correspondence, briefings, submissions and appearances at Committee hearings. Further, the Committee has power to inquire into matters that have been referred to it by the Parliament of Victoria or which have been self-referred by the Committee under the *PC Act 2003* (Vic).[2]

With regard to its own investigatory power, the Committee may, in the circumstances prescribed in the *PC Act 2003* (Vic), investigate complaints about the Information Commissioner and the operation of OVIC.[3] However, it cannot investigate complaints about IBAC, the VI or the VO. While the Committee cannot investigate these kinds of complaints, it can monitor and review them, and seek further information from the integrity agency concerned, where the Committee considers that a complaint has identified a systemic issue bearing on the performance of the agency (for example, its professionalism and timeliness in responding to a complaint).[4] The *PC Act 2003* (Vic) expressly prohibits the Committee, however, from reconsidering the decisions, findings or recommendations made by IBAC, OVIC, the VI and the VO.[5]

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1 *Parliamentary Committees Act 2003* (Vic) ('*PC Act 2003* (Vic)') s 7(1); *Ombudsman Act 1973* (Vic) s 26H(1).

2 *PC Act 2003* (Vic) s 33(1), (3).

3 *PC Act 2003* (Vic) s 7(1)(b).

4 *PC Act 2003* (Vic) s 7(1); Integrity and Oversight Committee (IOC), *Integrity and Oversight Committee*, <https://www.parliament.vic.gov.au/ioc> accessed 13 February 2024; IOC, *IOC complaint fact sheet*, <https://www.parliament.vic.gov.au/48f2ea/contentassets/f6fcfe3fe8634673b04e36e325a4b6b2/files/ioc-complaint-fact-sheet.pdf> accessed 13 February 2024.

5 *PC Act 2003* (Vic) s 7(2); *Ombudsman Act 1973* (Vic) s 26H(2).

The IOC is authorised to engage an independent investigator to investigate PIDs about the VI that the Committee determines are public interest complaints.[6]

Under the governing legislation, the IOC also has consultation and oversight functions in relation to the budgets of IBAC, the VI and the VO and their annual work plans;[7] recommends to Parliament the appointment of an independent person to conduct a performance audit of IBAC, the VI and the VO at least once every four years;[8] and has an oversight role regarding the appointment of the IBAC Commissioner and Victorian Inspector.[9]

1.3 The Victorian FOI environment, the Inquiry and the work of the Committee

It is now more than forty years since Victoria's FOI Act came into operation, the first such State Act and one of the first among Westminster jurisdictions. Today's world is much different from 1982's, not least when it comes to information creation, management and sharing.[10]

While hard copies and filing cabinets are still to be found in the public sector, today's office environment is characterised by computers, electronic documents, cloud storage, the internet, apps, social media and artificial intelligence. However, the FOI Act is largely stuck in the analogue era, one of the key reasons for the initiation of an inquiry into the legislation, and an important focus for the Committee's conduct of it.

As the Hon Mary-Anne Thomas remarked in the Victorian Parliament in 2023:

> [W]e do need to keep pace with changes that have occurred in our society and community … Access to information legislation must reflect how a government creates, stores and manages its information in the digital information age. …
>
> The FOI legislation … has not kept pace with how contemporary government works. The current act was passed in a predominantly paper-based environment … [A]dvances have changed how governments store and provide access to information, and this transformation through digital processes and data storage has contributed to information-rich governments. We now produce more documents than ever before, and … we store them in a completely different format.[11]

This concern with the need to modernise Victoria's FOI system has also been recognised by OVIC, which, in September 2021, recommended 'a public, consultative,

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6 *PC Act 2003* (Vic) s 7(1)(ia); *Public Interest Disclosures Act 2012* (Vic) ('*PID Act 2012* (Vic)') s 56A(1)(d).

7 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('*IBAC Act 2011* (Vic)') ss 167, 168(1); *Victorian Inspectorate Act 2011* (Vic) ('*VI Act 2011* (Vic)') ss 90A, 90B(1); *Ombudsman Act 1973* (Vic) ss 24A, 24B(1).

8 *IBAC Act 2011* (Vic) s 170; *VI Act 2011* (Vic) s 90D; *Ombudsman Act 1973* (Vic) s 24D.

9 *PC Act 2003* (Vic) s 7(1)(i), (m).

10 See Hon Mary-Anne Thomas MP (Leader of the House, Minister for Health, Minister for Health Infrastructure, Minister for Medical Research), Parliamentary Debates (Hansard), 60th Parliament, Legislative Assembly, 20 June 2023, pp. 2217–2218.

11 Hon Mary-Anne Thomas MP (Leader of the House, Minister for Health, Minister for Health Infrastructure, Minister for Medical Research), Parliamentary Debates (Hansard), 60th Parliament, Legislative Assembly, 20 June 2023, p. 2217.

and wide-ranging review of the FOI Act, to update the Act to reflect modern public administration and the digital information environment'.[12]

The need for modernisation and accommodation of new and emerging technologies is reflected in Term of Reference (TOR) 5 of this Inquiry, below, and, indeed, is a thread running throughout the TORs and this report.

Victoria has a first-generation, 'pull' FOI system, which relies heavily on applicants 'pulling' documents out of the public sector through formal requests under the Act.[13] There are more FOI requests in Victoria than in any other Australian jurisdiction, including the Commonwealth—48,117 in 2022/23.[14] Our State also has one of the highest per capita FOI request rates in Australia.[15] These demands have contributed to ever-increasing workloads for FOI decision-makers, backlogs and delays (in agency decision-making, handling of complaints about delays, and Victorian Civil and Administrative Tribunal reviews).[16]

These data trends have led OVIC to conclude that Victoria's current FOI system is 'unsustainable'.[17] As OVIC has explained:

> This increase in FOI requests … coincides with an unfortunate reality for many applicants—that of longer delays, while agencies face increasing FOI complaints as they struggle to meet statutory time frames.
>
> 'We are seeing a continuing trend of Victorians waiting longer to access information. This goes against the intent of the legislation' said [former Victorian Information Commissioner] Mr Bluemmel.[18]

While access to information about government and public sector plans, policies, decisions and operations remains an essential way to enhance transparency and accountability in the State's representative democracy,[19] Victorians' access to personal information held by agencies is also vital. This is reinforced by the fact that, consistent with longer-term trends, the majority of FOI requests received by agencies under the Victorian FOI Act are for personal and health information—68.8% of all requests received by agencies in 2022/23, with health-information requests (including personal health records) predominant.[20]

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12 Office of the Victorian Information Commissioner (OVIC), *Impediments to timely FOI and information release: twelve months on—review of agencies' implementation of the Information Commissioner's recommendations*, Melbourne, October 2022, p. 26.

13 See Section 2.2 in Chapter 2 of this report.

14 Box 2.1 in Chapter 2 of this report.

15 Box 2.1 in Chapter 2 of this report.

16 Box 2.1 in Chapter 2 of this report.

17 OVIC, *Submission 55*, 15 January 2024, p. 33.

18 OVIC, *Information Commissioner welcomes parliamentary review of the FOI Act to modernise access to information*, 20 June 2023, <https://ovic.vic.gov.au/mediarelease/information-commissioner-welcomes-parliamentary-review-of-the-foi-act-to-modernise-access-to-information> accessed 27 August 2024.

19 See Sections 1.4.2 and 1.6 in this chapter.

20 OVIC, *Submission 55*, 15 January 2024, p. 83; OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 111. On average, between 2014/15 and 2022/23, requests for personal and health information comprised 69% of all requests received by Victorian agencies (OVIC, *Submission 55*, 15 January 2024, pp. 83; OVIC, *Annual report 2022–23*, Melbourne, September 2023, pp. 111).

As Associate Professor Jennifer Beard told the Committee, access to personal information is important to ensure that it is accurate (and corrected if not) and used for proper purposes, and also for people to make informed and autonomous decisions affecting the courses of their lives:

> Access to personal information is important because it entitles individuals *to know* what the government knows about them and enables them to ensure that information the government holds about them is *correct and lawfully managed*. Access to this information is also important to enable individuals to manage their day to day lives. … [A]ccess to personal information is … closely related to individual human rights and capacities …[21]

People seek personal information for various reasons, including health records to inform their medical decisions and assess the quality of treatment received, information about State care for care leavers to better understand their identities and/or apply for redress, or as part of initiating court proceedings.[22] The focus on easier, timelier,[23] more efficient and more affordable access to personal and health information in Victoria is particularly reflected in TOR 3.

The Victorian Government, OVIC and other key stakeholders recognise the need for improvements in access to personal and health information.[24] For example, there was widespread support in evidence received by the Committee for greater informal release of personal and health information, including through tailored administrative release

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21 Associate Professor Jennifer Beard, Melbourne Law School, *Submission 40*, 14 January 2024, p. 3. See also OVIC, *Submission 55*, 15 January 2024, p. 33; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 4, 6, 9; Centre for Excellence in Child and Family Violence, *Submission 39*, 12 January 2024, pp. 1–2; Department of Families, Fairness and Housing (Victoria) (DFFH), *Submission 50*, 15 January 2024, p. 2; Victorian Aboriginal Legal Service (VALS), *Submission 54*, 15 January 2024, p. 17; Peta McCammon, Secretary, DFFH, public hearing, Melbourne, 24 June 2024, *Transcript of evidence*, pp. 1–2; Wayne Gatt, Secretary, The Police Association of Victoria (TPAV), public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 2; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 20; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 18; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 17; Lachlan Fitch, President, Victoria Branch, Australian Lawyers Alliance, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 46; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 16–17.

22 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 4, 11; Centre for Excellence in Child and Family Violence, *Submission 39*, 12 January 2024, pp. 1–2; DFFH, *Submission 50*, 15 January 2024, p. 4; VALS, *Submission 54*, 15 January 2024, pp.15–17; Peta McCammon, Secretary, DFF, public hearing, Melbourne, 24 June 2024, *Transcript of evidence*, p. 2; Wayne Gatt, Secretary, TPAV, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 2; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 18; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 17; Lachlan Fitch, President, Victoria Branch, Australian Lawyers Alliance, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 46; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 16; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 20. See also 'Dignity' in Section 1.6.2 in this chapter.

23 See, for example, OVIC, *Submission 55*, 15 January 2024, p. 33: '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.'

24 Hon Mary-Anne Thomas MP (Leader of the House, Minister for Health, Minister for Health Infrastructure, Minister for Medical Research), Parliamentary Debates (Hansard), 60th Parliament, Legislative Assembly, 20 June 2023, p. 2218; OVIC, *Submission 55*, 15 January 2024, pp. 83–88; OVIC, *Submission 55A*, 31 July 2024; Section 4.3.3 in Chapter 4 of this report.

schemes that do not require formal FOI requests through the Act.[25] Access to personal and health information is examined in depth in Chapter 4 of this report.

Given the nature of Victoria's current FOI environment and concerns identified about its fitness for purpose and efficiency, on 20 June 2023 the Victorian Parliament's Legislative Assembly referred[26] an inquiry into the operation of the *FOI Act 1982* (Vic) to the IOC, with the following TORs.

That the Committee consider 'and report no later than 30 June 2024 [extended to 30 September] on the operation of the following matters relating to the Freedom of Information Act 1982':

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;
2. mechanisms for proactive and informal release of information, including the effectiveness of information publication schemes;
3. efficient and timely mechanisms for persons to access their own personal and health information;
4. the information management practices and procedures required across government to facilitate access to information;
5. opportunities to increase the disclosure of information relating to government services using technology;
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;
7. the effectiveness of processes under the Act and how those processes could be streamlined and made more effective and efficient; and
8. the time and costs involved in providing access to information.

On 7 September 2023, the Committee proceeded to invite a wide range of Australian stakeholders to make a written submission to the Inquiry. This included Victorian and interstate integrity agencies; information and privacy commissioners; police forces; media representatives; legal sector and other professional associations; academics, FOI practitioners and other experts; NGOs and community organisations; government departments, local councils and statutory authorities; public sector thinktanks and other research institutes; and hospitals and health-related organisations. In addition, the Committee invited a wide range of comparable organisations overseas to

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25 Section 4.3.3 in Chapter 4 of this report.

26 Under *PC Act 2003* (Vic) s 33.

contribute to the Inquiry, including those in New Zealand, the United Kingdom, Ireland, Canada and the United States. These invitations were followed by a general call for submissions, to which any Victorian or Victorian organisation could respond. In total, the Committee accepted 69 written submissions, the overwhelming majority of which were accepted as wholly public submissions to be published on the Committee's web page (see Appendix A).

Further, the Committee invited 30 organisations to appear before the Committee in public hearings, and others to respond to written questions on notice, inquiring further into various dimensions of their written submissions as well as into issues that arose during the hearings. During February 2024, The Committee held 5 days of public hearings with 24 witnesses (see Appendix A).

Finally, the Committee undertook extensive legal and related research into FOI in Victoria within a comparative interstate and international context,[27] with a focus on the New South Wales, Queensland and New Zealand jurisdictions, which, for example, strongly influenced OVIC's extensive submission to the Inquiry.[28]

1.4 The *Freedom of Information Act 1982* (Vic): origin and purpose, previous reviews, overview and criticisms

1.4.1 Origin

Introduced as a Bill by the Cain Labor Government, though earlier Bills had been presented by the Thompson Liberal Government, the *FOI Act 1982* (Vic) came into operation on 5 July 1983, following the commencement six months earlier of the federal FOI Act.[29]

The federal FOI Act was the first in Australia, and the first among countries with a Westminster system of responsible government.[30] The federal Act came about as the result of an extensive parliamentary committee inquiry,[31] and was adapted from the

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27 See the selected bibliography in this report.

28 OVIC, *Submission 55*, 15 January 2024 (especially pp. 38–43).

29 Victorian Ombudsman (VO), *Review of the Freedom of Information Act: discussion paper*, Melbourne, May 2005, p. 3. See also Premier John Cain, Second Reading Speech, Parliamentary Debates (Hansard), 49th Parliament, Session 1982–83, Legislative Assembly, 14 October 1982, pp. 1061–1066 (*Cain Second Reading Speech*). Note, however, that pt II of the *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') came into effect on 5 July 1984—VO, *Review of the Freedom of Information Act*, Melbourne, June 2006, p. 14.

30 Australian Law Reform Commission and Administrative Review Council (ALRC and ARC), *Open government: a review of the federal* Freedom of Information Act 1982, Australian Government Publishing Service, Canberra, 1995, p. 11 ('*FOI report 1995*').

31 Senate Standing Committee on Constitutional and Legal Affairs (SSCCLA), *Freedom of Information: report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, Australian Government Publishing Service, Canberra, November 1979 ('*FOI report 1979*'). See also *Royal Commission on Australian government administration: report*, Australian Government Publishing Service, Canberra, 1976, pp. 345–346, 349–350, 352.

American FOI legislation enacted in 1966.[32] The American FOI Act[33] was developed in part as a reaction to wartime and Cold War secrecy and in response to advocacy by journalism organisations and the consumer rights movement.[34] Indeed, the phrase 'Freedom of Information' came into common usage as a result of press advocacy and popularisation in the USA from 1949 to the mid-1960s.[35]

Before the arrival of fully fledged FOI legislation in the USA in 1966,[36] the only comparable system was Sweden's, considered the first such system in the world, which was introduced 200 years earlier, in 1766.[37]

1.4.2 Purpose

In introducing the 1982 Bill, then Premier, John Cain, said the FOI Act would give Victorians 'a legally enforceable right of access'[38] to documents in the hands of the government and the public sector, subject to a range of exemptions.[39] Premier Cain identified three main justifications for the Act:[40]

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32 *FOI report 1979*, especially pp. 14–16; ***FOI*** *report 1995*, pp. 19–20; Michael Schudson, *The rise of the right to know: politics and the culture of transparency 1945–1975*, Harvard University Press, Cambridge, 2015; Johan Lidberg, 'From freedom to right—where will Freedom of Information go in the age of WikiLeaks?', *Australian Journalism Review*, vol. 35, no. 2, December 2013, pp. 74–75; United States Department of Justice, *What is FOIA?*, <https://www.foia.gov/about.html> accessed 1 March 2024; United States Department of Justice, *Freedom of Information Act statute*, <https://www.foia.gov/foia-statute.html> accessed 1 March 2024. For a firsthand account of the origins of the *Freedom of Information Act 1982* (Cth) ('*FOI Act 1982* (Cth)'), by the Chair of the 1979 Senate Inquiry, see Alan Missen's 1984 lecture extracted in 'Freedom of Information—the Australian experience', *Freedom of Information Review*, no. 100, August 2002, pp. 42–46. See also *FOI report 1995*, pp. 19–21.

33 *Freedom of Information Act* 5 US Code § 552 (1966).

34 Michael Schudson, *The rise of the right to know: politics and the culture of transparency 1945–1975*, Harvard University Press, Cambridge, 2015. See also United Nations (UN) General Assembly, *Calling of an International Conference on Freedom of Information*, GA/RES/59(1) (adopted 14 December 1946), London and Flushing Meadow, 1947.

35 Michael Schudson, *The rise of the right to know: politics and the culture of transparency 1945–1975*, Harvard University Press, Cambridge, 2015, p. 36; Stephen Lamble, 'Freedom of Information, a Finnish clergyman's gift to democracy', *Freedom of Information Review*, no. 97, February 2002, pp. 5 (' ..."Freedom of Information" is believed to have entered the vernacular in 1949 after it appeared as the title of a book published by journalist Herbert Brucker.'), 6; Enid Campbell, 'Public access to government documents', *Australian Law Journal*, vol. 41, no. 3, July 1967, pp. 82–83.

36 There was provision for some access to information held by federal agencies under s 3 of the US *Administrative Procedure Act* (1946), who 'were required to publish', among other things 'organization details, methods, rules, policies and interpretations'—Enid Campbell, 'Public access to government documents', *Australian Law Journal*, vol. 41, no. 3, July 1967, p. 82. However, Campbell (this footnote, p. 82) emphasised that 'it became apparent that ... [this provision] gave totally inadequate protection to the public right to know and allowed the administration too wide a discretion to withhold documents'. What came to be called the *Freedom of Information Act* in the USA arose out of an amendment to s 3 of *Administrative Procedure Act* (1946) via Bill S. 1160, which was passed by the Senate on 4 July 1966—Michael Schudson, *The rise of the right to know: politics and the culture of transparency 1945–1975*, Harvard University Press, Cambridge, 2015, p. 36; Campbell, this footnote, pp. 83–84; Stephen Lamble, 'Freedom of Information, a Finnish clergyman's gift to democracy', *Freedom of Information Review*, no. 97, February 2002, pp. 5–6.

37 Through the *Freedom of the Press Act* and the *Right to Access to Public Records Act*—Johan Lidberg, 'From freedom to right—where will Freedom of Information go in the age of WikiLeaks?', *Australian Journalism Review*, vol. 35, no. 2, December 2013, pp. 74–75; Stephen Lamble, 'Freedom of Information, a Finnish clergyman's gift to democracy', *Freedom of Information Review*, no. 97, February 2002, pp. 4–5.

38 *Cain Second Reading Speech*, p. 1061.

39 Ibid., pp. 1062, 1064–1065.

40 Ibid., pp. 1061, 1065.

- enhanced personal autonomy and privacy: Victorians would be able to better guard against intrusions, make more informed decisions, and correct any inaccuracies in personal information held about them[41]
- better transparency and accountability: when Victorians have more information about the operation of their government and its agencies, they can be better held to account
- increased and better-informed political participation: Victorians would be more engaged and better-informed participants in the democratic system.

It is worth quoting at some length from Premier Cain's account:

> Open government in the true sense is a central need in a democracy. People must have information to enable them to make choices about who will govern them and what policies the individuals or political parties that they choose to govern, shall implement …
>
> Freedom of information is very closely connected with the fundamental principles of a democratic society and is based on three main premises:
>
> 1. The individual has a right to know what information is contained in Government records about him or herself.
> 2. A Government that is open to public scrutiny is more accountable to the people who elect it.
> 3. Where people are informed about Government policies, they are more likely to become involved in policy making and in government itself.[42]

The Bill provided for a 'general right of access to information in documentary form' held by government and public sector bodies, with any discretions given under the Act to 'be exercised as far as possible … to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information'.[43] Premier Cain noted, however, that 'the Bill does not embody the principle that all information in the possession of the Government should become public', recognising a range of familiar exemptions for Cabinet documents, certain Commonwealth–State documents, internal working documents, law enforcement documents, documents bearing on 'personal privacy', documents relating to trade secrets and 'business and financial affairs', and documents including confidential material.[44]

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41 One of the early, important acknowledgements of this right was in US Department of Health, Education and Welfare, *Records, computers, and the rights of citizens: report of the Secretary's Advisory Committee on Automated Personal Data Systems*, Washington DC, July 1973, p. xx.

42 *Cain Second Reading Speech*, p. 1061.

43 *Cain Second Reading Speech*, p. 1062. See also *Freedom of Information Bill 1982: notes on clauses (Explanatory Memorandum)*, 14 October 1982, p. 1 (cl. 3(1)).

44 Cain Second Reading Speech, pp. 1062, 1064. See also *Freedom of Information Bill 1982: notes on clauses (Explanatory Memorandum)*, 14 October 1982, pp. 2 (cl. 13), 4–7 (pt IV, exempt documents).

1.4.3 Previous reviews

While this Committee's review of Victoria's FOI Act is one of the most wide-ranging and in-depth conducted, it is not the first. The Act was reviewed, notably, by a parliamentary committee in 1989, by the VO in 2006 and 2011, and by the Victorian Auditor-General's Office (VAGO) through audits in 2012 and 2015.[45] There have also been Victorian parliamentary committee reviews of access to commercial-in-confidence material, access to Victorian public sector information and data, and electronic democracy.[46] Aspects of the operation of the Act have of course also been examined by OVIC, which in September 2021 recommended a 'comprehensive review' of the legislation.[47]

Parliamentary review in 1989

In 1989, the Victorian Parliament's Legal and Constitutional Committee (LCC) received a reference to review the Act, including the scope of its application (for example, whether certain agencies should be excluded from its operation); the burden of FOI requests on agencies, especially 'voluminous' and costly FOI applications; whether, and if so how, Cabinet documents ought to be disclosed; and its interrelationship and interaction with the public records scheme.[48] Following the LCC's distribution of a discussion paper in 1988, the 1989 Inquiry received 72 written submissions and heard from 43 witnesses in public hearings.[49]

The LCC emphasised that the Act had 'bipartisan' support in Victoria given its critical role in the State's representative democracy.[50] It further observed, however, that the effective operation of the FOI scheme involved a careful balancing of the interest in disclosure of information with other important interests and rights.[51] The LCC accordingly concluded that the

> rights conferred by the Act are not, of course, absolute. They are moderated by the presence of certain exemptions designed to protect essential public interests including the Cabinet process and the personal and commercial affairs of persons providing information to the government.

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45 See Parliament of Victoria, Legal and Constitutional Committee (LCC), *Report upon Freedom of Information in Victoria*, Melbourne, November 1989 ('*1989 Victorian FOI review*'); VO, *Review of the Freedom of Information Act*, Melbourne, June 2006; VO, *Annual report 2011: Part 1*, Melbourne, August 2011, pp. 22–25; Victorian Auditor-General's Office (VAGO), *Freedom of Information: Victorian Auditor-General's report*, Melbourne, April 2012; VAGO, *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015.

46 See Parliament of Victoria, Public Accounts and Estimates Committee (PAEC), *Inquiry into commercial in confidence material and the public interest*, Melbourne, March 2000; Parliament of Victoria, Scrutiny of Acts and Regulations Committee (SARC), *Inquiry into electronic democracy: final report*, Melbourne, April 2005; Parliament of Victoria, Economic Development and Infrastructure Committee, *Inquiry into improving access to Victorian public sector information and data,* Melbourne, June 2009. See also Parliament of Victoria, Legislative Council Legal and Social Issues Committee, *Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, Melbourne, March 2017.

47 OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 610 of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021, pp. 5, 65 (Recommendation 17).

48 *1989 Victorian FOI review*, pp. 1–2.

49 Ibid., pp. 5–6.

50 Ibid., p. 5.

51 Ibid., pp. 4–5.

> … [The] Freedom of Information Act is an important and desirable initiative … However, the legislation should not be thought of as perfect. As both the Government and Opposition have observed, it has been and will continue to be difficult for a commonly agreed equilibrium between the Act's rights and limitations to be achieved …
>
> The Committee is of the view that the public interest in making the maximum possible amount of information available under FOI must be weighed against the public interest in efficient government administration.[52]

The LCC made 31 recommendations.[53] These included that: any exemptions to disclosure of information under the Act be determined by reference to the public interest on the basis of a document's content not the nature of the agency that held it;[54] information not be disclosed whenever 'reasonably likely to endanger a person's life or physical safety';[55] the Act be extended to local government, school councils and government-established corporations and associations;[56] a standard method for the calculation and recording of FOI costs be developed;[57] and merely 'factual, statistical, technical or scientific (including social scientific) material prepared' for Cabinet's consideration not be exempt information.[58]

Reviews by the Victorian Ombudsman

The VO investigated and reviewed the operation of the *FOI Act 1982* (Vic) in 2006,[59] following the distribution of a discussion paper in 2005.[60] Its findings and recommendations were revisited in an annual report in 2011.[61]

In August 2004, the VO began an own motion investigation into how well government departments and agencies were performing their obligations under the Act, and consulted extensively with departments and Victoria Police.[62] In its 2006 report, the VO found that there were a number of problems with the Act and its operation, including:

- agency failures to publish information, as required, about their governance, policies, processes, operations and document holdings
- poor record-management systems, especially electronic management systems
- unreasonable agency delays in responding to FOI applications—including delays caused by clarification of applications, consultations with third parties who might be affected by disclosure, and briefings of ministers

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52 Ibid., pp. 3, 5, 50.

53 Ibid., pp. xiii–xviii.

54 Ibid., pp. 12, 17.

55 Ibid., p. 20.

56 Ibid., pp. 36–38.

57 Ibid., pp. 44–45.

58 Ibid., pp. 95–96.

59 VO, *Review of the Freedom of Information Act*, Melbourne, June 2006.

60 VO, *Review of the Freedom of Information Act: discussion paper*, Melbourne, May 2005.

61 VO, *Annual report 2011: part 1*, Melbourne, August 2011, pp. 22–25.

62 VO, *Review of the Freedom of Information Act*, Melbourne, June 2006, pp. 10–13.

- pedantic and unreasonably technical agency responses to FOI applications and/or poor-quality advice
- misuse of exemptions, undermining the objects of the Act
- failure to work cooperatively with applicants to help them clarify their applications so they were valid and appropriately targeted (rather than over-broad, voluminous or otherwise unreasonably burdensome)
- inadequate statements of reasons for agency denials of applications
- inconsistent imposition or waiver of information-access charges
- lack of guidance on agencies' access to documents created by non-government bodies performing public functions (outsourcing)
- the challenges for applicants and agencies in understanding the multiple, overlapping and complex legislative schemes applicable to access to personal information and health records.[63]

Overall, the VO found that agencies were often not administering the Act in accordance with its objects and the spirit of 'open government' but, instead, defensively with a minimalist focus on compliance.[64] For instance, the VO observed:

> Some decisions showed little regard for the objects of the Act. Some responses provided material that might technically be relevant to the request but was of little or no value to the applicant. Some took advantage of every available exemption to provide as little material as possible.[65]

The VO further emphasised:

> Subject to the proper application of exemptions, agencies ought not to be reluctant to reveal the existence of sensitive documents or to play a cat-and-mouse game with applicants … [T]here is in some agencies a culture of concealment rather than of openness.[66]

The VO considered that it would be useful if the Act were comprehensively reviewed.[67] In the interim, the VO made a number of recommendations to improve:

- agencies' provision of information about their organisations
- the handling of exemptions based on confidentiality or personal information
- the resolution of ambiguity in requests for documents

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63 VO, *Review of the Freedom of Information Act*, Melbourne, June 2006, pp. 4–6, 8–9, 11–14, 18–28, 31, 43, 45, 57–59, 61, 62; VO, *Review of the Freedom of Information Act: discussion paper*, Melbourne, May 2005, generally, and especially pp. 8–11, 13–15, 20, 22–23, 24 ('[s]ome applicants have alleged undue pedantry or intentional delay [engaged in by agencies]'), 26, 28–29, 33–34, 41–44.

64 VO, *Review of the Freedom of Information Act: discussion paper*, Melbourne, May 2005, p. 44.

65 VO, *Review of the Freedom of Information Act*, Melbourne, June 2006, p. 5.

66 Ibid., p. 31.

67 Ibid., p. 64.

- the identification of high-priority requests among those made by an applicant,
- the quality of assistance given to applicants
- the timeliness of processing FOI applications (including by preventing delays caused by briefings to ministers)
- the explanation to applicants of searches undertaken
- the quality of agency reasons for denial of access to documents
- the access to documents created by non-government bodies performing outsourced functions
- agency information management and record-keeping (including recording data on FOI applications and the agency's deployment of staff to handle them)
- the format in which documents were supplied to applicants (for example, in electronic form if requested by an applicant)
- consistency and coherence in imposing or waiving information-access charges
- the management of unreasonable and burdensome applications, by giving the Victorian Civil and Administrative Tribunal (VCAT) the power to declare an applicant vexatious.[68]

In 2011, the VO reported that the problems with the operation of the FOI system identified in 2006 largely persisted, with little progress made in implementing its recommendations:[69]

> The purpose of the *Freedom of Information Act 1982* ... is to enable greater transparency in the dealings of government agencies, by providing a means for the appropriate release of information held by government agencies.
>
> Unfortunately, I continue to see departments and agencies applying the Act as an information protection system. ...
>
> In my view, the object and purpose of the legislation is not being followed consistently by departments and agencies and this is undermining the effectiveness of the Act.[70]

Audits by the Victorian Auditor-General's Office

In 2012, VAGO audited the then 11 government departments as well as Victoria Police regarding their compliance with the *FOI Act 1982* (Vic) and their FOI performance more generally.[71] The audit included a close examination of how efficiently and effectively Victoria Police and the Department of Human Services (DHS) were performing their FOI functions.[72]

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68 Ibid., pp. 7–9, 23–25, 37, 40, 45, 50–51, 59–61.

69 VO, *Annual report 2011: part 1*, Melbourne, August 2011, pp. 22–25.

70 Ibid., p. 22.

71 VAGO, *Freedom of Information: Victorian Auditor-General's report*, Melbourne, April 2012, p. vii.

72 Ibid.

The audit found that the problems identified in the VO's 2006 review persisted.[73] These problems included:

- lack of agency leadership in supporting the object of the Act
- lack of 'a consistent, whole-of-government approach to the proactive release of information', which would help 'reduce the reliance on FOI processes for the release of non-personal information'
- agencies being opaque and resistant to proper disclosure of information under the Act
- unacceptable delays, with 8 of the 12 agencies audited failing to meet statutory deadlines (noting, in particular, the impact of ministerial briefings, which also risked encouraging perceptions of 'political interference')
- poor record keeping and record management as well as methodologies for information searches.[74]

Overall, VAGO concluded that

> Since FOI legislation was introduced 30 years ago, Victoria has gone from being at the forefront of FOI law and administration to one of the least progressive jurisdictions in Australia. Over time, apathy and resistance to scrutiny have adversely affected the operation of the Act, restricting the amount of information being released. As a result, agencies are not meeting the object of the Act, which is 'to extend as far as possible the right of the community to access information'.
>
> The public's right to timely, comprehensive and accurate information is consequently being frustrated. The Victorian public sector's systemic failure to support this right is a failure to deliver Parliament's intent.[75]

VAGO's recommendation included that:

- the Department of Justice review the Act 'to improve its currency and to champion the proactive release of information', provide agencies with 'detailed guidance' on it, and deliver better FOI training
- agencies' principal officers set an appropriate tone from the top and monitor compliance with the Act
- Victoria Police and DHS[76] improve their record-keeping and information management to reduce the risk of lost documents, and to generally improve access to information
- DHS better prioritise the FOI applications it receives (that is, a form of triage).[77]

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73 Ibid., pp. vii–viii, 7.

74 Ibid., pp. vii–xi.

75 Ibid., p. vii.

76 The former Department of Human Services, now known as the Department of Families, Fairness and Housing.

77 VAGO, *Freedom of Information: Victorian Auditor-General's report*, Melbourne, April 2012, pp. xi–xii, xiii (quotation), xiv.

In 2015, VAGO audited the framework for access to public sector information in Victoria and the performance of selected agencies in relation to it, including, as relevant, the FOI regime, with the then Government's response to a 2009 parliamentary inquiry on access to public sector information also in focus.[78]

Specifically, VAGO audited the information-management 'maturity' of the State Revenue Office (SRO), the Department of Health and Human Services (DHHS) and the Department of Environment, Land, Water and Planning (DELWP), as well as their approach to public access to public sector information. The audit also examined the following agencies' performance in making public sector information available: Department of Treasury and Finance (DTF), the Department of Premier and Cabinet (DPC), the Public Record Office Victoria (PROV) and the Department of Justice and Regulation (DOJR).[79]

VAGO found that:

- there was no effective 'whole-of-government leadership and governance' to support 'open access' to public sector information in Victoria
- there was a lack of an overarching, statewide information-management framework, meaning that agencies did not have clear and 'consistent' standards for the categorisation, storage and management of public sector information
- agencies were not satisfactorily 'facilitating access' to their holdings of public sector information
- agencies had not developed and implemented a coherent, agency-wide approach to proactive release of public sector information
- agencies were largely failing to comply with the requirements under the FOI legislation (*FOI Act 1982* (Vic) pt II) to publish key information about themselves, as well as registers of their information holdings.[80]

In summary, VAGO concluded that

> the agencies we examined are not providing the public with the full and open access to the information to which they are entitled … [The] foundation of comprehensive and sound information management … practices have been neglected. This is crucial because agencies need to first understand and properly manage the information they hold before they can effectively facilitate public access …[81]

Similarly, if members of the public do not know what kinds of information an agency holds it is much harder for them to formulate useful and valid formal FOI requests.

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78 VAGO, *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015, pp. vii–viii; Parliament of Victoria, Economic Development and Infrastructure Committee, *Inquiry into improving access to Victorian public sector information and data,* Melbourne, June 2009; Victorian Government, *Whole of Victorian Government response to the final report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, Melbourne, February 2010.

79 VAGO, *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015, p. x.

80 Ibid., pp. vii, xi (quotation).

81 Ibid., p. iii.

This echoes a sentiment expressed by Premier Cain in 1982, when introducing the Bill for the State's inaugural FOI Act: 'If freedom of information legislation is to work effectively … persons must be aware of the existence of documents that might be of interest to them.'[82]

VAGO's recommendations included that DPC

- 'develop a whole-of-government information management framework', supported by legislation, with 'open access to public sector information as a default position … [and] effective implementation, governance and monitoring arrangements'
- assist agencies to fulfil their duties to publish 'comprehensive' lists of their information holdings
- 'review and advise' the Government on how the *FOI Act 1982* (Vic) might be modernised to meet best practice respecting record keeping and information management.[83]

And that agencies:

- 'review and improve their compliance' with the publication requirements under the Act (*FOI Act 1982* (Vic) pt II)
- implement proactive release programs
- ascertain the level of their information-management maturity
- implement best practice 'information management principles and standards for asset custodianship and governance'.[84]

1.4.4 Overview of the current Act and criticisms

Overview of the Act

The object of the Act 'is to extend as far as possible the right of the community to access to information in the possession of the Government' and public sector bodies (agencies).[85] The Act seeks to do this 'by … making available to the public information about the operations of agencies' and 'creating a general right of access to information in documentary form'.[86] Further, the Act provides that the Parliament intends the Act to be 'interpreted so as to further' this object, and that 'any discretions' under the Act 'shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information'.[87]

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82 *Cain Second Reading Speech*, p. 1063.

83 VAGO, *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015, pp. xiv (quotation), xv.

84 Ibid.

85 *FOI Act 1982* (Vic) ss 3(1), 5(1) ('agency means a department, council or a prescribed authority').

86 *FOI Act 1982* (Vic) s 3(1)(a)–(b) (see also pts II and III).

87 *FOI Act 1982* (Vic) s 3(2).

The Act applies to ministers, government departments, local councils, Victoria Police, public hospitals and schools, TAFEs (tertiary and further education institutions), universities and statutory authorities.[88]

Under pt II of the Act, agencies are required to publish information about their organisation, including functions, 'decision-making powers', document and literature holdings, and means for members of the public to inspect or purchase this material.[89]

Subject to a range of 'exceptions' (pt III) and 'exemptions' (pt IV) in the Act, under s 13, 'every person has a legally enforceable right to obtain access' to an agency document or 'official document' of a minister.[90]

In order to gain access to a document, a person must apply in writing for it, with sufficient precision for it to be identified, pay an application fee, unless waived, and any subsequent access charges imposed.[91] If a request for a document is not initially valid, an applicant has 21 days within which to rectify the invalidating issues, and agencies must help them do so.[92]

After a valid FOI application has been received, in the standard case the agency must determine 'as soon as practicable', and no later than 30 calendar days, whether to disclose the document, notifying the applicant in writing.[93] It should be noted, however, that the Act authorises extensions of this period if certain conditions are satisfied—for example, if an agency is required to consult with a third party over the potential impact of disclosure.[94]

Although developed in the pre-digital era, the Act has a broad definition of 'document',[95] which includes 'files, emails, text messages, case notes, draft material, handwritten notes, discs, photographs … [and] maps'.[96]

Consistent with the object of the Act, even if a formal application for a document has been made, the legislation authorises 'informal release' of information outside the Act

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88 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 4; *FOI Act 1982* (Vic) ss 5(1) (definitions of 'agency', 'department', 'document of an agency or document of the agency', 'officer', 'official document of a Minister or official document of the Minister', 'prescribed authority', and 'principal officer'), 13.

89 *FOI Act 1982* (Vic) pt II (especially ss 7–8, 11).

90 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 4. Note: this section of the chapter draws from this publication throughout.

91 OVIC, *Public access to information in Victoria: an introduction to Victorian public sector employees*, Melbourne, September 2022, p. 5; *FOI Act 1982* (Vic) ss 17, 22.

92 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5; *FOI Act 1982* (Vic) s 17; OVIC, *Professional Standards: issued by the Information Commissioner under Part IB of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, 2 December 2019 ('*FOI Professional Standards*'), Professional Standard 2 ('Receiving a request'), p. 8.

93 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, pp. 5–6; *FOI Act 1982* (Vic) ss 21(1), 26–27.

94 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 6; *FOI Act 1982* (Vic) s 21(2).

95 *FOI Act 1982* (Vic) s 5(1) (definition of 'document').

96 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5.

when it is lawful and appropriate to provide it.[97] In addition, under the FOI regime, and with the support of OVIC, 'proactive release' of information by agencies is allowed and encouraged; this is where an agency proactively releases information about its operations without the need for a formal application for information.[98]

In processing a valid, formal FOI request, the agency must thoroughly and diligently search for the documents sought;[99] assess the applicability of any exceptions or exemptions;[100] consult with third parties as required;[101] and decide whether access is to be denied or granted in full or part, supported by written reasons given to the applicant.[102]

Exceptions to the right of access to information are set out in pt III of the Act,[103] and notably exclude:

- documents that are 'publicly available for a fee or other charge'[104]
- documents that can be inspected in the PROV[105]
- certain documents 'stored for preservation or safe custody' at PROV[106]
- requests for information that the person has previously unsuccessfully requested and 'there are not reasonable grounds for making the request again'—the '[r]epeated requests' exception[107]
- where granting access to the requested document(s) would 'substantially and unreasonably divert the resources of the agency from its other operations' or, regarding a minister, 'substantially and unreasonably interfere with the performance of … [their] functions'[108]—also known as the 'unreasonable diversion of agency resources'[109] exception
- documents 'if … it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents'[110]—also known as the 'obviously exempt documents'[111] exemption.

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97 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, pp. 7–9; *FOI Act 1982* (Vic) s 16.

98 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, pp. 7–9; *FOI Act 1982* (Vic) pt II, s 16.

99 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5; OVIC, *FOI Professional Standards*, Professional Standard 6 ('Searching for documents'), p. 12.

100 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5; *FOI Act 1982* (Vic) ss 14, 24A–25A, pt IV.

101 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5; *FOI Act 1982* (Vic) ss 29–29A, 31, 31A, 33–35.

102 OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 5; *FOI Act 1982* (Vic) ss 21, 27.

103 See also OVIC, *Submission 55*, 15 January 2024, pp. 115–121.

104 OVIC, *Submission 55*, 15 January 2024, p. 115. See also *FOI Act 1982* (Vic) s 14(1)(a)–(b).

105 *FOI Act 1982* (Vic) s 14(1)(c).

106 *FOI Act 1982* (Vic) s 14(1)(d).

107 *FOI Act 1982* (Vic) s 24A.

108 *FOI Act 1982* (Vic) s 25A(1).

109 OVIC, *Submission 55*, 15 January 2024, p. 118.

110 *FOI Act 1982* (Vic) s 25A(5).

111 OVIC, *Submission 55*, 15 January 2024, p. 120.

In addition, access to a document, or information in a document, can be denied if there is an applicable exemption under pt IV the Act.[112] Notably, there are the following exemptions in the Act, described here only in broad terms:

- certain Cabinet documents
- documents the disclosure of which would be prejudicial to communications between the Commonwealth, States or Territories
- documents the disclosure of which would damage national security, defence or international relations
- documents of Court Services Victoria relating to the exercise of judicial or quasi-judicial functions
- internal working documents bearing on public sector opinions, advice, consultations and 'deliberative processes', disclosure of which would be contrary to the public interest
- law enforcement documents the disclosure of which would prejudice investigations, investigative 'methods or procedures' and fair trials, and identify confidential sources, or 'endanger the lives or physical safety' of law enforcement personnel or sources of confidential information
- documents relating to IBAC the disclosure of which would be prejudicial to their investigations, identify persons who have provided information to the agency, disclose investigative 'methods or procedures', or 'endanger the lives or physical safety' of associated persons
- documents 'affecting legal proceedings'—protection of legal professional privilege or client legal privilege
- documents 'affecting personal privacy', the disclosure of which 'would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)'
- commercial-in-confidence documents
- documents containing confidential information
- certain companies and securities documents
- documents subject to legislative secrecy provisions
- a range of other documents whose disclosure would be contrary to the public interest (for example, premature disclosures of documents of government departments, which would 'have a substantial adverse effect on the economy of Victoria').[113]

These exemptions are described and evaluated in the next chapter.

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112 See OVIC, *Submission 55*, 15 January 2024, pp. 122–147; OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, pp. 4–5.

113 Respectively, *FOI Act 1982* (Vic) ss 28–33, 34–38.

Agencies must not only comply with the Act itself but with the binding FOI Professional Standards issued by OVIC.[114]

In certain circumstances, applicants may make a complaint to OVIC about an agency's or minister's handling of their FOI request (including about inadequate search, or delay).[115] Applicants may also apply to OVIC to have an agency denial of their FOI request in whole or in part reviewed.[116] Further, VCAT exercises a range of review powers in relation to agencies, ministers and OVIC.[117]

Criticisms

A number of key criticisms of the Act and its operation can be identified from previous reviews, OVIC's analysis, and evidence received during this Inquiry:

- the deficiencies of Victoria's 'pull' FOI system, one weighted towards formal requests for information by applicants rather than towards proactive release of information (and with formal requests as a last resort)
- inadequacies in agency record keeping and information management
- limited objects of the Act
- outdated emphasis on 'documents' (as opposed to the broader notion of 'information')
- inappropriate and inconsistent use of the exceptions and exemption provisions
- limited proactive and informal release of information
- unreasonable challenges encountered in accessing personal and health information
- inadequate resourcing of FOI within agencies
- unreasonable delays in processing FOI requests
- defensive agency cultures militating against disclosure
- limitations in the framework for, and efficacy of, regulation and oversight of FOI in Victoria
- unnecessarily long, dense, complicated and technical legislative drafting.[118]

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114 *FOI Act 1982* (Vic) ss 6U–6W; OVIC, *FOI Professional Standards*, p. 3.

115 *FOI Act 1982* (Vic) pt VIA.

116 *FOI Act 1982* (Vic) pt VI, div 1.

117 *FOI Act 1982* (Vic) pt VI, div 3.

118 See the discussion of previous reviews in Section 1.4.3 in this chapter. See also Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16; OVIC, *Submission 55*, 15 January 2024, especially pp. 22–25; OVIC, *The state of Freedom of Information in Victoria: five years in review 2014–2019*, Melbourne, n.d.; OVIC, *The state of Freedom of Information in Victoria: a special look at FOI in Victoria from 2019 to 2021*, Melbourne, April 2022, especially pp. 3, 11–15; OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 610 of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021; OVIC, *Impediments to timely FOI and information release: twelve months on—review of agencies' implementation of the Information Commissioner's recommendations*, Melbourne, October 2022.

OVIC Information Commissioner, Sean Morrison, gave the Committee a representative account expressing some of the key criticisms, which is worth quoting from at length:

> Every year OVIC publishes a report on the operation of the FOI Act based on data reported to OVIC by Victorian government agencies subject to the Act. The latest report for 2022–23 records the highest-ever number of FOI requests made. This is 48,177. … What this data demonstrates to OVIC is that Victoria's FOI system is heavily reliant on people having to first make a request to the government to receive information and heavily reliant on agencies processing requests using the procedures under the FOI Act. This is what we call the 'pull model'. OVIC's view is that the FOI Act's 1982 pull model is no longer fit for purpose and requires a complete overhaul. OVIC's submission makes 77 recommendations about how this can be achieved. The Act as currently drafted does not support a maximum amount of information being made available to the public in a timely and easy manner. The Act's out-of-date provisions do not align with how modern government operates, and the legislative drafting is technical and complex, making it hard for the public to understand and for agencies and ministers to administer.
>
> Tinkering around the edges of the FOI Act is not going to fix these issues. Victoria needs to replace the FOI Act with a modern, third-generation access-to-information law. When the FOI Act first came into force, Victoria was a leader in access-to-information legislation across Australia. The inquiry provides an important opportunity to commence a law-reform process that will result in Victoria reclaiming its leadership. To do this well it will be critical not only to have strong access to information laws but also a positive culture of transparency …[119]

1.5 The role of OVIC

OVIC is the principal, 'independent regulator' protecting Victorians' right to information. Led by the Victorian Information Commissioner, the Public Access Deputy Commissioner (FOI), and the Privacy and Data Protection Deputy Commissioner (privacy and information security), OVIC has jurisdiction over a range of public sector bodies defined in the *FOI Act 1982* (Vic) and *Privacy and Data Protection Act* 2014 (Vic) ('*PDP Act 2014* (Vic)').[120] Table 1.1, below, outlines the key segments of the public sector within OVIC's jurisdiction.

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119 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16. See also Emrys Nekvapil SC, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 13–14; Royce Millar, Senior Reporter, *The Age*, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 7; Jeremy King, Member, Victoria Branch, Australian Lawyers Alliance (ALA), public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 47.

120 OVIC, *Regulatory Action Policy 2022–25*, Version 2.0, Melbourne, October 2022, pp. 7–9.

Table 1.1 Who OVIC regulates

OVIC jurisdiction	Public sector segment
Privacy	'organisations' defined in ss 3 and 13 of the *PDP Act 2014* (Vic), including 'departments, councils, Victoria Police, public entities [defined in s 5 of the *Public Administration Act 2004* (Vic)], courts and tribunals', as well as public-purpose bodies, ministers and ministerial office-holders, and parliamentary secretaries
FOI	'agencies' defined in s 5 of the *FOI Act 1982* (Vic), including 'departments, councils and prescribed authorities such as TAFES, public hospitals and public schools'
Information security	'public sector bodies' [defined in ss 4–5 of the *Public Administration Act 2004* (Vic) and s 84 of the *PDP Act 2014* (Vic)], including 'departments, public entities, and Victoria Police'

Source: Adapted from OVIC, *Regulatory Action Policy 2022–25,* Melbourne, Version 2.0, Melbourne, October 2022, pp. 8–9.

OVIC has the following main functions regarding privacy, FOI and information security:

Privacy

- Promote awareness and understanding of the Information Privacy Principles (IPPs);
- Handle complaints and conciliate disputes about possible breaches of the IPPs by the Victorian public sector;
- Examine the practices of regulated bodies regarding personal information they hold and the IPPs;
- Conduct audits to assess compliance with the IPPs;
- Provide guidance to regulated bodies and the public about the PDP Act and the IPPs;
- Undertake research, issue reports, guidelines and other materials with regard to information privacy; and
- Investigate alleged breaches of the IPPs and the PDP Act by regulated bodies.

Freedom of information

- Promote understanding and acceptance by agencies and the public of the FOI Act and its object;
- Conduct reviews of decisions made by agencies and Ministers under the FOI Act;
- Handle complaints about an action taken, or failed to be taken, by an agency or Minister when performing their functions or meeting obligations under the FOI Act;
- Provide education, and guidance to agencies and the public in relation to OVIC's functions;
- Monitor compliance with the Professional Standards;
- Provide education and guidance to agencies and the public in relation to compliance with the Professional Standards;
- Investigate how a regulated body performed, or failed to perform, its FOI functions and obligations under the FOI Act and the Professional Standards; and
- Investigate public interest complaints related to the Information Commissioner's functions referred to OVIC by the Independent Broad-based Anti-corruption Commission ...

Information security

- Promote continuous improvement through guidance about information security;
- Monitor and promote compliance with the Victorian Protective Data Security Framework (VPDSF) and the PDP Act by review of protective data security plans (PDSPs) and audits;
- Conduct monitoring and assurance activities to assess compliance with the Victorian Protective Data Security Standards (VPDSS); and
- Undertake research, issuing reports, guidelines and other materials with regard to information security.[121]

In exercising these functions, OVIC can, variously, provide education, guidance and training; carry out audits; conduct investigations, supported by coercive powers; and prosecute agencies for failure to attend before it or produce required documentation.[122]

1.6 FOI standards, rationales and best practice principles

1.6.1 International and Victorian standards

The right to access information held by public bodies is recognised as a human right under international law.[123] Specifically, the right to information is part of the human right to freedom of expression, which refers to everyone's right 'to seek, receive and impart information and ideas'.[124] It was first recognised internationally in Article 19 of the United Nations's (UN) non-binding *Universal Declaration of Human Rights* (*UDHR*) (1948):

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[125]

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121 Ibid., pp. 7–8.

122 Ibid., pp. 9–11, 13. For an in-depth evaluation of OVIC's education and prevention functions, see Parliament of Victoria, Integrity and Oversight Committee, *Inquiry into the education and prevention functions of Victoria's integrity agencies*, Melbourne, April 2022, Sections 2.3, 3.3, 5.3, 6.1, 6.5.2. 6.6.2, 6.71, 6.73.

123 *International Covenant on Civil and Political Rights* (*ICCPR*) (1966), UNTS, vol. 999, I–14668, Article 19; Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Master of Research thesis, Law School, Macquarie University, 2005, pp. 11, 14–15; Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, pp. 25–55; Sylvie Coudray, 'UNESCO: freedom of expression, information and the media' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and freedom of expression and information: critical perspectives*, Cambridge University Press, Cambridge, 2015, p. 221.

124 United Nations (UN), *Universal Declaration of Human Rights* ('*UDHR*'), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 12 April 2024, Article 19.

125 *UDHR*, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 12 April 2024. Note that it has been argued that while the UDHR, as a UN General Assembly resolution, 'is not formally binding, parts of it, including Article 19, are widely understood as having matured into customary international law, binding on all States'—Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, p. 6.

To similar effect, Article 19(2) of the UN's binding *International Covenant on Civil and Political Rights* (*ICCPR*) (1966), provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[126]

Australia voted in favour of the adoption of the *UDHR*[127] and has ratified the *ICCPR*.[128]

The right to information as part of the freedom of expression has also been recognised in the key regional human rights treaties for Africa, Europe and Latin America.[129]

The right to information as a human right has, further, been recognised, reiterated and interpreted in a number of subsequent treaties, declarations, judgments and authoritative comments.[130]

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126 *ICCPR* (1966), UNTS, vol. 999, I-14668.

127 Australian Human Rights Commission, *Australia and the Universal Declaration of Human Rights*, <https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights> accessed 12 April 2024.

128 On 13 August 1980: Office of the UN High Commissioner for Human Rights, *Ratification status for Australia*, <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 12 April 2024.

129 *African Charter on Human and Peoples' Rights* (ACHPR) (1981), UNTS, vol. 1520, I-26363, Article 9 (especially (1): 'Every individual shall have the right to receive information'); *American Convention on Human Rights* (*ACHPR*) (1969), UNTS, vol. 1144, I-17955, Article 13(1); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*) (1950) (in European Court of Human Rights, *European Convention on Human Rights*, Strasbourg, n.d.), Article 10; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, p. 6.

130 See, for example: UN, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (*Aarhus Convention*), Aarhus, Denmark, 25 June 1998; UN Office on Drugs and Crime (UNODC), *UN Convention Against Corruption* (*UNCAC*) (2003), New York, 2004; UN Educational Scientific and Cultural Organization (UNESCO), *Brisbane Declaration—Freedom of Information: the Right to Know*, UNESCO World Press Freedom Day conference, Brisbane, 3 May 2010 (*Brisbane Declaration*); UN Human Rights Committee, *General comment no. 34—Article 19: freedoms of opinion and expression*, CCPR/C/GC/34, 102nd session, Geneva, 11–29 July 2011; Council of Europe, *Council of Europe Convention on Access to Official Documents*, Council of Europe Treaty Series, no. 205, Tromso, 18 June 2009 (*Tromso Convention*); *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples' Rights, 32nd session, 17–23 October 2002, Banjul, The Gambia; *Claude-Reyes et al. v Chile* (Inter-American Court of Human Rights, C/151, Judgment, 19 September 2006) [77].

The following key FOI standards can be derived from international law and its interpretation:[131]

- there is an international human right to access information held by public bodies (and potentially any body performing a public function)
- the right to information must be implemented in a clear and binding local (for example, national or State) FOI law
- the FOI law must be broad in terms of who, and what kind of information, is covered
- the law must be governed by the principle of 'maximum disclosure'[132]—subject only to legally well-defined, 'proportionate',[133] restrictions to protect 'legitimate interests'[134] that are '[n]ecessary in a democratic society',[135] including the rights of others
- when restricting the disclosure of information, public bodies have the onus of justifying the restriction by identifying a specific harm to a legitimate interest, with such harm outweighing any public interest in disclosure
- persons requesting information are not required to reveal the reasons for their request

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131 *UDHR*, Articles 19, 29(2), < https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 12 April 2024; *ICCPR* (1966), UNTS, vol. 999, I-14668, Article 19; *Aarhus Convention*, Article 4 (on access to information about the environment); *UNCAC*, Articles 1, 5–7, 9–10, 13; *Brisbane Declaration*; Open Government Partnership, *Open Government Declaration*, 20 September 2023; UN Human Rights Committee, *General comment no. 34: Article 19: freedoms of opinion and expression*, CCPR/C/GC/34, 102nd session, Geneva, 11–29 July 2011; UN, Human Rights Council, 49th session, 28 February–1 April 2022, *Freedom of opinion and expression: report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/49/38, 10 January 2022; *Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast)*, *Official Journal of the European Union*, L172/56 (*EU directive on open data 2019*); Council of Europe, Committee of Ministers, *Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents*, Rec (2002) 2, adopted by the Committee of Ministers, 21 February 2002, at the 784th meeting of the Ministers' Deputies; *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, <https://eur-lex.europa.eu/eli/reg/2016/679/2016-05-04> accessed 2 August 2024; *Tromso Convention*; *The Global Principles on National Security and the Right to Information* (*Tshwane Principles*), Tshwane, South Africa, 12 June 2013, Principles 1, 3–4, 9; *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples' Rights, 32nd session, 17–23 October 2002, Banjul, The Gambia; Office of the Australian Information Commissioner (OAIC), *Joint Statement: Statement of principles to support proactive disclosure of government-held information—developed by all Australian Information Commissioners and Ombudsmen*, September 2021, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/more-guidance/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> accessed 30 April 2024; UNODC, *Technical guide to the United Nations Convention Against Corruption*, New York, 2009; Toby Mendel, *Freedom of information: a comparative legal survey*, 2nd edn, UNESCO, Paris, 2008, pp. 1, 3–5, 7–41; Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Master of Research thesis, Law School, Macquarie University, 2005, pp. 11, 14–15; Sylvie Coudray, 'UNESCO: freedom of expression, information and the media' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and freedom of expression and information: critical perspectives*, Cambridge University Press, Cambridge, 2015, p. 221; Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, pp. 26, 28–31, 38, 40, 45; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014; OVIC, *Submission 55*, 15 January 2024, p. 29 (on onus on the agency); Article 19, *The public's right to know: principles on right to information legislation*, London, 2016.

132 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 4.

133 Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, p. 10.

134 OVIC, *Submission 55*, 15 January 2024, p. 127.

135 *Tshwane Principles*, Principle 3(b).

- persons must, generally, be able to know what information or data a public body holds about them and any sharing or other use made of it, as well as to have inaccurate information corrected
- procedures for requesting information must be clear, easy to understand and not unduly formal
- public bodies must assist those requesting information to frame and lodge their requests
- unless unreasonable, public bodies should provide information in a format requested by an applicant (such requests may, for example, meet the particular accessibility needs of the applicant)
- requests for information must be processed in a timely fashion, recognising that undue delay can undermine the right to information
- any fees imposed for applying for or accessing information must not be unreasonable and thereby deter or impede access
- while public bodies may deny access in limited circumstances, they must give written reasons for any denial, and make them available to the requester
- where part of a document cannot lawfully be released, but another part can, that part must, generally, be released
- denials of access must be subject to independent review and/or appeal
- public bodies must in the public interest proactively publish essential information about their governance, functioning and processes
- public bodies must maintain good record-keeping, and comply with legal standards on the preservation and destruction of information, so that information is coherently stored and readily accessible upon request
- public bodies must be adequately empowered and resourced to comply with these standards when preparing for and handling FOI requests (as must any independent bodies oversighting compliance).

It is important to note that although the right to information is governed by the principle of maximum disclosure, the right itself is not 'absolute',[136] but subject to the protection of other rights and legitimate public interests.[137] This is provided for in

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136 Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, p. 45: 'In common with almost all other rights protected by international human rights treaties, the right to information may, in certain circumstances, be restricted.'

137 Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Master of Research thesis, Law School, Macquarie University, 2005, pp. 11, 14–15; Sylvie Coudray, 'UNESCO: freedom of expression, information and the media' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and freedom of expression and information: critical perspectives*, Cambridge University Press, Cambridge, 2015, p. 221; Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, p. 45; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, pp. 10–11.

Article 19(3) of the *ICCPR*, under which the freedom of expression and the right to information within it

> carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> a. For respect of the rights or reputations of others;
>
> b. For the protection of national security or of public order (*ordre public*), or of public health or morals.[138]

The qualified nature of the right to information is recognised by OVIC:

> 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.[139]

The nature, justifications, categories and scope of lawful restrictions on the disclosure of information are analysed in depth in the next chapter.

The right to information in Victoria is entrenched through s 94H of the State's constitution, which provides:

> 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.[140]

The right is also recognised under s 15(2) of the *Victorian Charter of Human Rights*, which provides in part that

> … [e]very 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 …[141]

A range of lawful restrictions of the right is recognised under s 15(3) of the Act.

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138 *ICCPR* (1966), UNTS, vol. 999, I–14668. See also, for example, the restrictions authorised under the *Aarhus Convention*, Article 4; *Tromso Convention*, Article 3; *UNCAC*, Articles 10(a), 13(d); *ECHR*, Article 10(2); and *EU directive on open data 2019*, [16], [28] and Article 1.2.

139 OVIC, *Submission 55*, 15 January 2024, p. 125.

140 *Constitution Act 1975* (Vic); OVIC, *Submission 55*, 15 January 2024, p. 23.

141 See also Liberty Victoria, *Submission 25*, 8 December 2023, pp. 2–3.

Within the limitations of the *FOI Act 1982* (Vic), the FOI Professional Standards developed by OVIC are consistent with the international standards in aiming

> to extend as far as possible the right of the community to access information … [and to ensure] that the provisions of the Act are interpreted so as to further its object … to facilitate and promote the prompt disclosure of information at the lowest reasonable cost.[142]

1.6.2 Rationales

The rationales for effective FOI legislation revolve around the overlapping concepts of transparency, accountability, participation, integrity, dignity, knowledge, and truth, within an open, liberal democracy with effective representative government and maintenance of the rule of law.[143] Much of this ethos was distilled by Dr Enid Campbell, as she then was, in one of the earliest Australian accounts of the democratic underpinnings of FOI:

> It is common ground that in a society which professes to be democratic, citizens ought to be informed about what their government is doing. Citizens have a right to decide by whom and by what rules they shall be governed, and are entitled to call on those who govern on their behalf to account for their conduct. But if people are to fulfil the role democracy assigns to them—if they are to cast intelligent and rational votes and exercise sound judgment on the conduct of the government and the merits of public policies—they must have the facts, the true facts.[144]

Transparency and accountability

Democratic governments should act openly and be 'transparent about [their] … functions and powers, activities, expenditure, and decisions'.[145]

The transparency gained through FOI fosters more effective government accountability and 'good governance' by contributing to freer and better-informed debate over

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142 OVIC, *FOI Professional Standards*, p. 3 (see also Professional Standards 1, p. 7, and 9, p. 15). See also OVIC, *Submission 55*, 15 January 2024, especially pp. 21, 23, 26–30; OAIC, *Joint Statement: Statement of principles to support proactive disclosure of government-held information—developed by all Australian Information Commissioners and Ombudsmen*, September 2021, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/more-guidance/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> accessed 30 April 2024.

143 OVIC, *Submission 55*, 15 January 2024, pp. 26–28; OVIC, *Public access to information in Victoria: an introduction for Victorian public sector employees*, Melbourne, September 2022, p. 3. See also Sven Bluemmel, 'Government transparency in decision making', *Law in Context*, vol. 37, no. 2, September 2021, pp. 119–124; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 1–4; OAIC, *Joint Statement: Statement of principles to support proactive disclosure of government-held information—developed by all Australian Information Commissioners and Ombudsmen*, September 2021, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/more-guidance/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> accessed 30 April 2024; Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, pp. 25–55; Open Government Partnership, *Open Government Declaration*, 20 September 2023; SSCCLA, *FOI report 1979*, pp. 8, 21–27; Enid Campbell, 'Public access to government documents', *Australian Law Journal*, vol. 41, no. 3, July 1967, pp. 73–76; ALRC and ARC, *FOI report 1995*, pp. 11–14; and the discussion in Section 1.6.1 in this chapter.

144 Enid Campbell, 'Public access to government documents', *Australian Law Journal*, vol. 41, no. 3, July 1967, p. 74. See also ALRC and ARC, *FOI report 1995*, p. 12.

145 OVIC, *Submission 55*, 15 January 2024, p. 26.

government decisions and policymaking.[146] It also bolsters the kind of scrutiny expected in systems of representative and responsible government, by holding ministers and agencies to account, and identifying any shortcomings for which they should be answerable.[147]

Participation

In a representative democracy, constituents vote at elections but also participate in public life in more diverse ways through debate, advocacy, interest groups and individual causes. These channels of representative, participatory and pluralist democracy are also enhanced by FOI, since constituents can better communicate what they want governments to do on their behalf and also monitor their performance.[148] These channels also complement the constitutional implied freedom of political communication in Australia.[149] Overall, FOI can, moreover, strengthen public trust in government, as OVIC has noted:

> 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.[150]

It should of course be noted, as the Australian Law Reform Commission and Administrative Review Council did in their review of federal FOI laws almost thirty years ago, that FOI is not the only way citizens can be informed about the doings of government:

> There are numerous avenues by which government information is accessible to members of the public. The Parliamentary system, including the expanding parliamentary committee system, promotes the transfer of information from the government to Parliament, and then to the people. Members of the public can seek information through their local Member. Annual reporting requirements, community consultation, publication of information and administrative law requirements increase the flow of information from the government … [and the] ways in which the government provides information are being enhanced by technological advances.[151]

The role of a free and well-informed media is also crucial in a healthy democracy.[152]

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146 Ibid.

147 OVIC, *Submission 55*, 15 January 2024, p. 26; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, pp. 1–3.

148 OVIC, *Submission 55*, 15 January 2024, p. 27. See also Oliver Escobar, 'Pluralism and democratic participation: What kind of citizen are citizens invited to be?', *Contemporary Pragmatism*, vol. 14, no. 4, 2017, pp. 419–425; *Tromso Convention*, Preamble ('the importance in a pluralistic, democratic society of transparency of public authorities').

149 ALRC and ARC, *FOI report 1995*, p. 13 ('The High Court in the "free speech cases" … determined that freedom of public discussion of government … is not merely a desirable political privilege, but inherent in the idea of a representative democracy … [The] view of the Court indirectly supports FOI objectives …').

150 OVIC, *Submission 55*, 15 January 2024, p. 27.

151 *FOI report 1995*, p. 14.

152 See, for example, Melbourne Press Club, *Submission 41*, 14 January 2024; Nine, *Submission 29*, 22 December 2023; Australia's Right to Know, *Submission 27*, 14 December 2023. See also *UDHR*, Article 19, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 12 April 2024; *ICCPR* (1966), Article 19, UNTS, vol. 999, I–14668.

Integrity

Regarding integrity, OVIC has emphasised that the right to information is 'a key … tool to address corruption and wrongdoing in government'.[153] The public's right to information reduces the risk of public officials pursuing their own interests, rather than the public interest, and makes it easier to hold them to account if they do—bolstered by media scrutiny, the work of anti-corruption bodies, and voters' exercise of choice at the ballot box.[154]

Dignity

There is also a liberal rationale underpinning FOI, which is connected with the importance of privacy, dignity, autonomy, and informed decision-making in people's lives.[155] People have at least a qualified right—putting aside for now potential law enforcement, national security and similar exceptions—to know what information the government and public sector agencies hold about them, with whom it has been shared, and how it has been used.[156] Further, people should have the opportunity to correct any inaccurate information.[157] This was recognised as early as 1973 in an American government report on the impact on citizens' rights of computer-generated information and data:

> There must be a way for an individual to find out what information about him is in a record and how it is used … [and] to correct or amend a record of identifiable information about him.[158]

Additionally, access to personal information may be important for a person's identity, for example in relation to someone who has been in the care of the state and wants to know more about the course of their life and care, as well as their family background. There are also a range of practical reasons why a person might seek access to personal

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153 OVIC, *Submission 55*, 15 January 2024, p. 27. See also *UNCAC*, Articles 5.1, 6.1(b), 7.4, 9.2, 10, 13; UNODC, *Technical guide to the United Nations Convention Against Corruption*, New York, 2009, pp. 42–45, 61–64; Transparency International, *Open government and rights to information*, Position Paper no. 5, January 2016.

154 OVIC, *Submission 55*, 15 January 2024, p. 27.

155 OVIC, *Submission 55*, 15 January 2024, p. 28; ALRC and ARC, *FOI report 1995*, p. 13; The Hon Justice Michael Kirby AC CMG, 'Freedom of Information: the seven deadly sins', British Section of the International Commission of Jurists Fortieth Anniversary Lecture Series, London, 17 December 1997. See, also, on privacy: *UDHR*, Article 12 ('No one shall be subjected to arbitrary interference with his privacy …'), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 12 April 2024; *ICCPR* (1966), Article 17 ('No one shall be subjected to arbitrary or unlawful interference with his privacy …') UNTS, vol. 999, I–14668; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13 ('the right … not to have that person's privacy … unlawfully or arbitrarily interfered with').

156 OVIC, *Submission 55*, 15 January 2024, p. 28; *FOI report 1995*, p. 13; The Hon Justice Michael Kirby AC CMG, 'Freedom of Information: the seven deadly sins', British Section of the International Commission of Jurists Fortieth Anniversary Lecture Series, London, 17 December 1997.

157 US Department of Health, Education and Welfare, *Records, computers and the rights of citizens: report of the Secretary's Advisory Committee on Automated Personal Data Systems*, Washington DC, July 1973, p. xx; UN, Human Rights Council, 49th session, 28 February–1 April 2022, *Freedom of opinion and expression: report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/49/38, 10 January 2022, pp. 4–5; UN Human Rights Committee, *General comment no. 34: Article 19: freedoms of opinion and expression*, CCPR/C/GC/34, 102nd session, Geneva, 11–29 July 2011, p. 4.

158 US Department of Health, Education and Welfare, *Records, computers and the rights of citizens: report of the Secretary's Advisory Committee on Automated Personal Data Systems*, Washington DC, July 1973, p. xx.

information, including for their health care needs, or to pursue legal action in relation to alleged harms suffered.[159]

Knowledge and truth

Finally, and connected closely with liberal justifications of freedom of expression, FOI supports the free exchange and testing of information, ideas and hypotheses, which, among other things, are necessary for research, innovation, the growth of knowledge and the pursuit of truth:

> 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.[160]

In addition, FOI helps combat 'misinformation', 'disinformation' and cynicism in the public sphere, thereby building confidence in government and public sector agencies as trustworthy sources of information.[161] As OVIC has commented:

> Steady access to reliable government-held information is a key tool in combatting [sic] misinformation and disinformation. A government that is consistently open can be trusted by the public as a true source of information.[162]

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159 OVIC, *Submission 55*, 15 January 2024, p. 28; Centre for Excellence in Child and Family Welfare, *Submission 39*, 12 January 2024; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024; Department of Families, Fairness and Housing, *Submission 50*, 15 January 2024; Care Leavers Australasia Network, *Submission 59*, 18 January 2024; VALS, *Submission 54*, 15 January 2024; ALA, *Submission 28*, 21 December 2023; Victorian Bar, *Submission 57*, 15 January 2024; IDCARE, *Submission 47*, 15 January 2024; Disability Discrimination Legal Service, *Submission 7*, 13 November 2023; Karen Cusack, 'Handling of health in Victoria', *Precedent*, Issue 166, September–October 2021, pp. 30–33; Moira Paterson and Melissa Castan, 'New rules and recordkeeping: supporting redress for survivors of child abuse', *Alternative Law Journal*, vol. 41, no. 1, 2016, pp. 43–47; Moira Paterson, 'Records management and the rights of children in care', *Precedent*, Issue 166, September–October 2021, pp. 34–38; Angela Sdrinis, 'Getting records from the gatekeeper', *iQ*, May 2012, pp. 38–40.

160 OVIC, *Submission 55*, 15 January 2024, p. 28. See also *Aarhus Convention*, Article 4 (on access to information about the environment); *EU directive on open data 2019*; UN, Human Rights Council, 49th session, 28 February–1 April 2022, *Freedom of opinion and expression: report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/49/38, 10 January 2022, pp. 8–9; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, p. 12 (on 'open data').

161 OVIC, *Submission 55*, 15 January 2024, p. 28. See also Sven Bluemmel, 'Government transparency in decision making', *Law in Context*, vol. 37, no. 2, September 2021, pp. 119–124.

162 OVIC, *Submission 55*, 15 January 2024, p. 28.

1.6.3 Best practice principles

The following best practice principles, summarised by OVIC, follow the international standards and are drawn from the international organisation Article 19's Principles on Right to Information Legislation, which has been endorsed by the UN.[163] Stated here in a general terms, they were drawn on throughout the Committee's Inquiry:

a. *Maximum disclosure.* ATI [Access to information] 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 … through [for example] 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.

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.[164]

In addition to these principles, the Committee emphasises the importance of a culture in the public sector supportive of the right to information and best practice legislation designed to realise it in Victoria.[165]

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163 OVIC, *Submission 55*, 15 January 2024, pp. 29–30; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016 (see, especially, p. 2 regarding the endorsement in 2000 of the Principles by the UN Special Rapporteur on Freedom of Opinion and Expression).

164 OVIC, *Submission 55*, 15 January 2024, pp. 29–30.

165 OVIC, *Submission 55*, 15 January 2024, p. 30. See also Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16.

1.7 Structure of the report

This chapter has introduced Victoria's integrity system, the role of the IOC, and the role of OVIC. It has also given an overview of the course of this Inquiry; the origin and purpose of the *FOI Act 1982* (Vic), its current operation and criticisms; and FOI standards, rationales and best practice principles.

Chapter 2 examines the effectiveness of the current FOI policy model in Victoria, addressing Terms of Reference (TOR) 1 and 6, including the object of the Act, its definition of 'document', and the operation of legislative exemptions and exceptions.

Chapter 3 examines the proactive and informal release of information, addressing TOR 2, 4 and 5, which concern the effectiveness of current mechanisms (including information publication schemes), government information-management practices and procedures, and the use of information technology.

Chapter 4 examines the efficiency of the operation of the current Victorian pull FOI system, addressing TOR, 3, 7 and 8. These TOR concern, respectively, access to personal and health information, processes under the legislation, and the costs and time involved in the provision of information.[166]

Chapter 5 concludes the report with reflections on the Committee's recommendations.

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166 For the full Terms of Reference, see Section 1.3 in this chapter.

Chapter 2
Effectiveness of current policy model

2.1 Introduction

This chapter assesses the effectiveness of the current policy model for FOI in Victoria, which is a first-generation 'pull' model based on information principally being extracted from government and the public sector through individual, formal requests under the *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)').[1]

Central to this assessment is a comparison with the 'push' model of FOI, in which government and the public sector regularly push information out to the public proactively and informally, with formal requests for information under the Act generally a last resort. The Committee also considers whether the problems identified with Victoria's pull system and the FOI legislation can be remedied through selected amendments or if a new Act is needed.

Additionally, the Committee evaluates the appropriateness of the object of the current FOI Act (its point and purpose), as well as the definition of 'document' in the legislation, compared, for instance, with broader notions of 'information'.[2]

The analysis then turns to the appropriateness of the exceptions and exemptions to disclosure of information under the current Act. Note that issues relating to access to personal and health information are examined in depth in Chapter 4.[3]

Throughout, where relevant, the Committee draws on international standards, best practice principles and interstate and international FOI experience, especially that of second-generation push jurisdictions such the Commonwealth, New South Wales and Queensland.

As will be explained below, and explored further in the next chapter, the Committee recommends Victoria establish a push FOI system under a new, third-generation right to information Act. The recommended system follows New South Wales's approach, and institutionalises four information-release mechanisms: two proactive (a. mandatory and b. authorised) mechanisms; one informal mechanism; and one formal mechanism, positioned as a last resort.[4] For clarity, when in this chapter the

1 This addresses Term of Reference (TOR) 1 of the Inquiry.

2 Addressing TOR 6.

3 Addressing TOR 3.

4 See Section 4.3.3 in Chapter 4 of this report.

Committee considers the appropriateness of the exceptions and exemptions under the current FOI Act it focuses on the *formal release* mechanism—that is, formal applications for information under the legislation.[5]

2.2 The current Act's pull model: overview and evaluation

As noted, Victoria has a first-generation, pull system of FOI, largely dependent on formal, individual applications for government and public sector documents. The pull metaphor describes a system in which a person must identify and pull documents out from agencies and ministers. Upon receipt of such applications, public sector bodies assess them within legislated time frames and decide whether they are required to release that information, taking into account various exceptions and exemptions in the Act that allow them to deny release in whole or part. In general terms, then, the system is *reactive* rather than proactive, and also depends to a large degree on FOI requesters knowing what kinds of documents a body holds and, in particular, which documents might provide them with the answers they seek.[6]

As the Office of the Victorian Information Commissioner (OVIC) has observed of the *FOI Act 1982* (Vic), with the human right to access information and the best practice principles for FOI systems in mind:

> The FOI Act is commonly referred to as first generation … 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.
>
> 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.
>
> Instead a modern … [FOI] 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 …
>
> In contrast, and reflecting the time of its creation in the early 1980s, 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.[7]

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5 See Section 2.5.3 in this chapter.

6 See, for example, Professor Moira Paterson, quoted in FOI Independent Review Panel, *The right to information: reviewing Queensland's Freedom of Information Act*, Brisbane, June 2008 (*Solomon report*), pp. 16–17.

7 Office of the Victorian Information Commissioner (OVIC), *Submission 55*, 15 January 2024, p. 37.

OVIC collects data on the operation of the FOI system in Victoria from approximately one thousand agencies and ministers, and analyses and reports on it as part of its annual reports.[8] The data relates to the number of FOI requests received, FOI decision-making in response to those requests, OVIC FOI reviews and complaint-handling, costs, and 'challenges faced by agencies and Ministers in administering the FOI Act'.[9]

OVIC found that there is an ever-increasing workload placed on public sector bodies in assessing and processing formal FOI applications, which increases costs and contributes to delays in the provision of information to applicants:[10]

> In summary, the data demonstrates:
>
> 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.[11]

See Box 2.1, below, for a more detailed description of the key data supporting these findings by OVIC.

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8 OVIC, *Submission 55*, 15 January 2024, p. 31.

9 Ibid.

10 Ibid.

11 Ibid., pp. 31–32.

Box 2.1 Operation of Victoria's pull FOI system: key data

- Victorian agencies and Ministers receive more FOI requests (48,117 in 2022/23) than any other jurisdiction, including the Commonwealth (34,225 in 2022/23).
- Victoria receives one of the highest rates of FOI requests per capita (application rates per 1,000 people):
  - Pull systems: Western Australia 7.6, Victoria 6.6, Northern Territory 6.5, South Australia 5.5
  - Push systems: Nationally 1.4, New South Wales 2.7, Tasmania 2.6, Queensland 3.5
- From 2014/15 to 2022/23, the overall workload of FOI decision-makers increased by 32.2%.
  - On average, from 2014/15 to 2022/23, each FOI decision-maker in Victoria had 62.02 requests per year to process.
- FOI backlogs: In 2022/23, there were 6,867 requests received but not finalised in the financial year.
- Timeliness: Timeliness in FOI decision-making has declined from 95% of FOI decisions made on time[12] in 2014/15 to 78.8% in 2022/23.
- OVIC reviews of agency or minister FOI decisions: The number of review applications received annually by OVIC has increased by around 28% in the last decade, from 417 in 2014/15 to 536 in 2022/23.
- Complaints about an agency or minister arising out of an FOI request (for example, about delays, decisions that a document does not exist, or inadequate search for documents): The number of complaints received annually by OVIC has increased by 167% in the last decade, from 243 in 2014/15 to 651 in 2022/23.
- VCAT reviews of OVIC decisions: The number of review applications received annually by VCAT has increased by around 122% in the last decade, from 86 in 2014/15 to 191 in 2022/23.
- Cost of administering FOI: The reported annual costs of agencies and ministers administering the *FOI Act 1982* (Vic) increased by 14% between 2014/15 and 2022/23, from $18.7 m to $21.4m.
  - Agencies spend more money on administering the FOI Act than they collect through application fees and access charges.

Source: OVIC, *Submission 55*, 15 January 2024, pp. 32–36 (adapted with only slight modification).

12 'Timeliness refers to agencies and Ministers responding to requests within the statutory requirements of the FOI Act'; consequently, a decision will be classified as having been 'made on time' if it is decided within the relevant statutory time frame(s) applicable to the request (OVIC, *Submission 55*, 15 January 2024, p. 33). For most requests, that will be 30 days (or 45 days where third-party consultation is required), noting that agencies can also extend the statutory-processing time frame with the agreement of the applicant) (*FOI Act 1982* (Vic) s 21).

These characteristics of the operation of Victoria's FOI system were also identified in research undertaken as part of the National Dashboard of Metrics on the Public's Utilisation of Information Access Rights (National Dashboard), which covered data from 2015 to 2022.[13]

The data showed that first-generation pull FOI systems—Victoria, South Australia and Western Australia—are much more reliant on formal FOI applications than second-generation push systems that mandate and prioritise proactive disclosure:

> For example, over the eight years for which data is available, Victoria, South Australia and Western Australia … consistently score significantly higher on this metric than NSW, Queensland and the Commonwealth …
>
> This equates to there being approximately 2.8 times more formal applications per capita, on average, in jurisdictions with first generation legislation as compared to those with second generation legislation.[14]

In interpreting this and other data from the project, the Office of the Information Commissioner Western Australia concluded that in Victoria and Western Australia 'many formal FOI decisions are being made to grant access to documents in situations which may be better suited to informal and/or proactive release'.[15]

According to OVIC, these data trends demonstrate that Victoria's pull FOI system is 'unsustainable',[16] and fails to comply with FOI best practice principles because

> it does not:
>
> a. practically support the maximum possible amount of information being made available to the public quickly and at a 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; and
>
> d. ensure exceptions and exemptions are clearly and narrowly drawn.[17]

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13 Cited in Office of the Information Commissioner Western Australia (OIC WA), *Submission 66*, 31 January 2024, p. 2. For the complete National Dashboard data for 2015–2022, see <https://www.ipc.nsw.gov.au/sites/default/files/2023-07/OGP_Metrics_all_jurisdictions_all_years_June_2023.pdf> accessed 28 June 2024.

14 OIC WA, *Submission 66*, 31 January 2024, pp. 2–3.

15 Ibid., p. 3.

16 OVIC, *Submission 55*, 15 January 2024, p. 33.

17 OVIC, *Submission 55*, 15 January 2024, p. 104. See also OVIC, *Proactive and informal release of information in the Victorian public sector—discussion paper*, Melbourne, March 2020, p. 4.

OVIC's critical view of the nature and operation of the present Victorian pull FOI system was overwhelmingly supported by evidence from other stakeholders, received by the Committee during this Inquiry.[18]

2.2.1 Nature and advantages of push FOI systems

Nature of push FOI systems

The starting position for a push FOI system is the recognition, in accordance with international law standards, of the human right to access public sector information, and compliance with the best practice principle of the maximum disclosure of information. Public sector information under this system is generally proactively or informally released by agencies and ministers as a matter of course unless disclosure would cause an identifiable harm that is not outweighed by any public interest in releasing the information.[19] In terms of culture, the first question asked by FOI officers under a push system is, 'What information can I release?', rather than, 'How I can withhold this information?'

Drawing on Queensland's Solomon Report, OVIC has described the key characteristics of push FOI systems as follows:

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;

b. disclosure logs that provide online access to information released by an agency under an ATI [access-to-information] 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.

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.[20]

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18 See, for example, Disability Discrimination Legal Service Inc, *Submission 7*, 13 November 2023; Victorian Government Solicitor's Office (VGSO), *Submission 13*, 29 November 2023; Office of the Information Commissioner Queensland (OIC Qld), *Submission 16*, 30 November 2023, pp. 1–3; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 2; Law Institute of Victoria (LIV), *Submission 22*, 4 December 2023, pp. 1–4; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 4–8; Australia's Right to Know (ARTK), *Submission 27*, 14 December 2023; Australian Lawyers Alliance (ALA), *Submission* 28, 21 December 2023, p. 5; Nine, *Submission 29*, 22 December 2023, pp. 2–3; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 1; The Centre for Public Integrity, *Submission* 37, 11 January 2024, pp. 1, 3; Melbourne Press Club, *Submission 41*, 14 January 2024; Name withheld, *Submission* 48, 15 January 2024, p. 63; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 9–10; Victorian Aboriginal Legal Service (VALS), *Submission 54*, 15 January 2024, pp. 6–8; Victorian Bar, *Submission 57*, 15 January 2024, pp. 2, 12; OIC WA, *Submission 66*, 31 January 2024, pp. 2–3.

19 *Solomon report*, pp. 2, 4, 16–17, 19, 34–35, 65–66, 319.

20 OVIC, *Submission 55*, 15 January 2024, pp. 38–39 (drawing on *Solomon report*, p. 19).

This approach was also endorsed in the New South Wales Ombudsman's review of that State's *Freedom of Information Act 1989*, which resulted in the move to the push FOI system that currently operates there.[21] Writing in 2009, the review drew attention to a

> key element in the new system we are proposing [that] requires all government agencies to make significant amounts of information available to the public as a matter of course. And it will not be enough to simply make more information available; it must be done in a way so the information is easy to find.[22]

The nature and operation of push FOI systems, with a focus on proactive and informal release, is explored in depth in the next chapter.

Advantages of push FOI systems

The key advantage of a push FOI system is that it is consistent with the international standards and best practice principles as well as the rationales for FOI laws, namely the safeguarding and enhancement of transparency and accountability, citizen participation in a representative democracy, public sector integrity, individual autonomy and dignity, and the growth of knowledge.[23] Such an approach reflects 'modern ideals that cast government agencies as custodians—rather than owners—of information'.[24]

OVIC has identified the following advantages of push systems:

- fulfilling the best practice principle of maximum disclosure of public sector information
- making the public more aware of government programs, policies and actions, thereby increasing its trust and confidence in the government and public sector
- improving the integrity and accountability of the public sector (including by identifying and addressing potential corruption, and other misconduct, risks)
- fostering greater opportunities for public debate over government matters, and for participation in policy-making within a representative democracy
- helping make public sector service delivery better by ensuring more efficient and affordable access to information (in contrast to more burdensome responses to formal requests)

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21 NSW Ombudsman, *Opening up government: review of the* Freedom of Information Act 1989*: a special report under s. 31 of the* Ombudsman Act 1974 (*Opening up government*), Sydney, February 2009, pp. 7–8.

22 *Opening up government*, p. 7 (see also pp. 1–2, 8–10, 19–26, 33–34, 39–40, 53–57).

23 See the discussion in Section 1.6 in Chapter 1 of this report. On the economic benefits of push systems, see Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 17–18. See also *Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast)*, *Official Journal of the European Union*, L172/56. These benefits are particularly relevant to the development of the 'knowledge economy'—on the knowledge economy, see Walter W Powell and Kaisa Snellman, 'The knowledge economy', *Annual Review of Sociology*, vol. 30, February 2004, pp. 199–220.

24 Decision Design and OVIC, *Proactive and informal release behaviour change: final report—practical recommendations to increase proactive and informal release* (*Proactive and informal release behaviour change*), Melbourne, June 2021, p. 3.

- reducing the resources and cost burden on agencies associated with processing formal FOI requests
- giving agencies a useful means (especially through proactive disclosure) of contextualising and explaining information released, which helps reduce any public misunderstandings
- facilitating engagement between agencies and individuals, so agreements can be reached on when and how information is released.[25]

These virtues and advantages have been expanded on by the Australian Information Commissioners and Ombudsmen in their joint statement in support of proactive disclosure.[26]

The weight of evidence received by the Committee during this Inquiry has supported Victoria moving from a pull to a push system, which prioritises proactive and informal release of information over the formal information-release mechanism.[27]

However, the Committee notes that some stakeholders expressed support for certain dimensions of Victoria's current pull FOI system and a degree of wariness about any move to a push system.[28]

Addressing concerns over push FOI systems

The Royal Melbourne Hospital and Peninsula Health identified the following aspects of the current FOI system they considered valuable: the formality of applications for documents imparting some 'rigour'[29] to the process by ensuring that FOI requests are

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25 OVIC, *Submission 55*, 15 January 2024, pp. 39–40, 104–105. See also *Proactive and informal release behaviour change*, p. 3.

26 Office of the Australian Information Commissioner (OAIC), *Joint Statement: Statement of principles to support proactive disclosure of government-held information—developed by all Australian Information Commissioners and Ombudsmen*, September 2021, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/more-guidance/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> accessed 30 April 2024.

27 See, for example, Victoria Legal Aid, *Submission 18*, 1 December 2023, p. 3; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2–3; LIV, *Submission 22*, 4 December 2023, pp. 1–4; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 3–4, 7–8; Health Complaints Commissioner, *Submission 26*, 12 December 2023, p. 2; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 2, 7–8; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 1–2, 5–6; Dr David Solomon AM, *Submission 44*, 15 January 2024, p. 1; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 59–60; Department of Families, Fairness and Housing (Victoria) (DFFH), *Submission 50*, 15 January 2024, p. 4; VALS, *Submission 54*, 15 January 2024, pp. 8, 15, 18–19, 22; Victorian Bar, *Submission 57*, 15 January 2024, pp. 8–9; Marion Attwater, *Submission 63*, 23 January 2024, pp. 1–6; South-East Monash Legal Service Inc, *Submission 67*, 29 January 2024, p. 10; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 13–14; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 15, 19, 21; Lachlan Fitch, President, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 46; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 27–28; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 1–7.

28 See, for example, Independent Broad-based Anti-corruption Commission (IBAC), *Submission 17*, 1 December 2023, pp. 1–2, 5; Victorian Ombudsman (VO), *Submission 60*, 22 January 2024, pp. 1–5; Victoria Police, *Submission 24*, 7 December 2023, pp. 4–5; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, *Transcript of evidence*, pp. 4–5; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 12.

29 Andrew Mariadason, Legal Counsel and Manager Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 4.

properly defined and validly made, and that information is lawfully and appropriately released (ensuring, for example, the appropriate protection of privacy rights, confidential information, and candid clinical assessments and deliberations in the interests of patients and their families).[30]

The Royal Melbourne Hospital elaborated 'that the pull model, the FOI process at the moment, places important responsibilities on the applicant at the outset of the process'.[31] This included applicants making a 'valid request'; considering carefully whether they need the documents concerned, given the applicable application fee; scoping and 're-scoping' the parameters of the request; and understanding the time lines within which the agency is required to process the request, having engaged with the agency.[32] In the Hospital's view, 'These all add what we consider to be very important rigour to the process, and the push model may turn the sentiment away from that sort of rigour'.[33]

The Victorian Ombudsman (VO) also defended the formality of the current FOI system:

> The VO considers the current policy model, based on formal requests for information, to be an important safeguard ensuring that FOI requests are made in a considered, structured way and that information is released under proper authority. Should the formality of the existing FOI scheme be changed, any alterations must account for the resulting increased administrative burden on the agency from whom information is requested, particularly in circumstances where the requestor does not clearly identify the information or documents that they want.[34]

Similarly, the Independent Broad-based Anti-corruption Commission (IBAC) expressed concern over how a move to a push FOI system might affect the agency, especially regarding the operation of necessary legal restrictions on the kinds of information it can release:

> The *Independent Broad-based Anti-corruption Act* 2011 (Vic) contains a number of restrictions on the disclosure of information unless there is a clear authority to do so. In this context, IBAC considers formal FOI requests are necessary to ensure requested information is properly identified, assessed, and released under legal authority.
>
> Any change to the FOI process should consider how a reduction in formality for applicants would shift the burden onto the processing agency, especially in assessing

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30 Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 4–7; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 12–13, 15. See also GL Lipton and W White, 'Freedom of Information: Can we afford to be anything but clinical?', *Australian and New Zealand Journal of Psychiatry*, vol. 18, no. 2, June 1984, pp. 158–162; Megan Prictor and Mark J Taylor, 'Privacy and confidentiality in healthcare' in Ben P White et al., *Health law in Australia*, Lawbook Co, Sydney, 2024, Chapter 9; Nils Hoppe and Jose Miola, *Medical law and medical ethics*, Cambridge University Press, Cambridge, 2014, Chapters 1–2.

31 Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 4.

32 Ibid.

33 Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, *Transcript of evidence*, p. 4. See also Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 12–14.

34 VO, *Submission 60*, 22 January 2024, p. 1.

> whether there is legal authority to release information without a clear request to respond to, and the risk of additional delays in the release of information caused by that shift in burden.[35]

However, the Committee considers that concerns expressed by these stakeholders can be addressed within a new Victorian push FOI system.

First, regarding the concern that a new push FOI system will increase the administrative burden on agencies, the Committee has received evidence that through proactive release, push systems can, and have, *reduced* the number of formal FOI requests and the burden associated with them.[36] Further, logically, the publication of documents in disclosure logs, for example, can provide answers to many more people, with similar information needs, than an isolated response to a formal request for that information can.[37] As one submitter to this Inquiry emphasised:

> A disclosure log is not only beneficial to the openness and transparency of the operation of the Act, but also practical in the proactive release of information to the public. It is not uncommon to receive a request for the same or similar information from various applicants. With a disclosure log of published decisions, multiple applicants will have ready access to the same information that will prevent multi-handling of requests.[38]

Second, as explained in Chapter 1,[39] neither the international standards nor best practice principles endorse unlawful, injudicious, inadvertent or otherwise inappropriate release of information—instead, they all recognise there are legitimate limitations, through 'clearly and narrowly drawn' exceptions,[40] on the release of information. To reiterate, as OVIC has explained:

> 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.[41]

The Committee therefore considers that the concern that information might be released unlawfully and/or imprudently can be addressed through well-designed 'limited exceptions', as OVIC terms them, to the expectation that information will be released, as well as a very narrow class of absolute exemptions (for example, in relation to disclosure of police intelligence).[42] This is examined further in Section 2.5.3, below.

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35 IBAC, *Submission 17*, 1 December 2023, p. 1.

36 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 39, 40 ('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.').

37 On the benefits of disclosure logs, see, for example, OVIC, *Submission 55*, 15 January 2024, p. 72, 75–76; *Solomon report*, pp. 19, 65, 225–226; *Opening up government*, pp. 7, 22–23, 26; OIC Qld, *Submission 16*, 30 November 2023, p. 2; Name withheld, *Submission 48*, 15 January 2024, pp. 7–8.

38 Name withheld, *Submission 48*, 15 January 2024, p. 7. Disclosure logs are examined in depth in Section 3.2.2 of Chapter 3 in this report.

39 See Section 1.6.

40 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 7.

41 OVIC, *Submission 55*, 15 January 2024, p. 125.

42 Ibid., p. 124.

Third, stakeholders with concerns over the move to a push FOI system in Victoria, with the exception of Royal Melbourne Hospital, expressed at least qualified support for proactive disclosure and informal release of information and, moreover, have themselves pushed out a range of information to the public in this way.[43]

OVIC has noted that, while second-generation, push FOI systems are significantly better than Victoria's pull system, even these systems can be enhanced. In particular, OVIC has argued that third-generation push FOI systems must be underpinned by plain-language legislation with 'simple processes … and minimal procedural requirements', comply with best practice principles, be well-adapted to the digital world, and use 'modern' access-to-information language.[44]

The Committee is persuaded that, to paraphrase Associate Professor Johan Lidberg, the evidence is in on the benefits of a push, over a pull, FOI system:[45]

> … [A]s you know, Professor Paterson and I have done this for a long time now, and we both feel that the research really is in on this now. We do not need to do more research on the functionality side [of FOI in Victoria]. It is in; it is settled that it could work much better. That is very clear. Now is the time to act.[46]

The Committee agrees: Victoria should move from the current first-generation, pull FOI system to a third-generation, right-to-information push system.

RECOMMENDATION 1: That the Victorian Government introduce in the State a third-generation 'push' FOI system, which prioritises the proactive and informal release of government and public sector information.

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43 IBAC, *Submission 17*, 1 December 2023, p. 2; Victoria Elliott, Commissioner, IBAC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 8 ('IBAC broadly supports measures to increase the proactive publication of meaningful information about government and public sector decisions and actions that affect the community, subject to the ability to maintain confidentiality where it is appropriate.'); VO, *Submission 60*, 22 January 2024, pp. 1 ('The VO … considers mechanisms for proactive and informal release of information … should be used by agencies as much as possible, limiting the need for FOI requests to be made.'), 2 ('The VO is committed to the proactive release of information … [and] considers this to be a key accountability and transparency measure … The VO supports changes to the FOI scheme to increase the proactive release of public information, subject to any reasonable and appropriate restrictions.'); Victoria Police, *Submission 24*, 7 December 2023, p. 5 ('Victoria Police considers there is significant benefit in proactively releasing information where appropriate.'); Susan Middleditch, Deputy Secretary, Corporate and Regulatory Services, Victoria Police, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 32; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 12 ('Peninsula Health has adopted an informal push model in respect of providing patients with their discharge summaries.').

44 OVIC, *Submission 55*, 15 January 2024, p. 45.

45 Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21.

46 Ibid.

2.2.2 A new Act with a new name

A new Act

Having recommended that Victoria move to a push FOI system, the next question arising is whether this can be accomplished through selected amendments to the *FOI Act 1982* (Vic) or if, instead, a new Act is needed.

In the Committee's view, since the push FOI system is markedly different from its pull predecessor in values, purposes, procedures and terminology, and from the analogue information environment in which it developed, a new Act is warranted—one built from the ground up. Since the distinctive policy and legal architecture of the push system is drawn from a different blueprint from the pull system, attempted repairs to, or even renovation of, the current Act will be neither sufficient nor coherent. Worse, such limited repairs would make the current Act even more dense, complex and hard to navigate by asking it to bridge three generations of FOI.[47]

Queensland and New South Wales each faced the same issue—repair or rebuild—during their reviews of FOI laws in 2008 and 2009 respectively.[48] Each decided a new Act was warranted.[49]

The Independent Review Panel that conducted the Solomon review in Queensland concluded:

> The Panel argues … [that] FOI's place in the government information experience should be recast as the Act of last resort moving the existing 'pull' model to a 'push' model where government routinely and proactively releases government information without the need to make an FOI request.
>
> …
>
> This report has concentrated on the central issues of FOI and includes recommendations of such a nature that their implementation would be best achieved through a new Act.[50]

Similarly, the New South Wales FOI review concluded that, given the scale of change needed to move from a pull to a push FOI system, a new Act was needed: 'In our view the most effective way to bring about a new start for access to government information is to replace the FOI Act with a new Act.'[51]

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47 On the complexity and density of the *FOI Act 1982* (Vic), see, for example, OVIC, *Submission 55*, 15 January 2024, pp. 6 (the Act has 'unnecessary procedural and administrative processes that make … [it] complex for the public to navigate and agencies to administer'), 9 (on the need for plain language), 24, 45, 107 (on 'outdated and complex language'). See also Victorian Bar, *Submission 57*, 15 January 2024, p. 2 (see also p. 12); Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 13.

48 *Solomon report*; *Opening up government*.

49 *Solomon report*, pp. 319, 326; *Opening up government*, pp. 7, 33, 39.

50 *Solomon report*, pp. 4, 319.

51 *Opening up government*, p. 7.

OVIC has told the Committee that if, as it recommends, Victoria moves to a push FOI system, it needs a new Act to bring it about:

> [A] new, modern ATI [access-to-information] 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.
>
> New ATI legislation should reflect how modern government creates, stores, and manages its information in the digital information age.[52]

Moreover, OVIC, noting that the current FOI Act has been amended around 50 times since 1982, also observed that further 'piecemeal' amendments would not only fail to introduce a coherent push system but be counterproductive—making the Act still more complex and challenging to understand, use and administer.[53]

In similar terms, the Victorian Bar submitted:

> The *Freedom of Information Act 1982* (Vic) … is no longer fit for purpose. While it was a groundbreaking reform at the time, it is now a relic of a bygone era. The Integrity and Oversight Committee should therefore focus on how to rebuild—rather than renovate—the FOI regime in this State.[54]

On behalf of the Victorian Bar, Emrys Nekvapil SC compared the current FOI Act to a formerly 'cutting-edge innovation in public law and administration' that has become 'an outmoded technology', which 'like the fax machine … is no longer seen as fit for purpose'.[55]

The Committee received a considerable body of evidence in the same vein: that Victoria's FOI scheme is 'broken', not fit for purpose, and cannot be fixed by selected legislative patch-up jobs.[56]

The Committee is therefore persuaded that a coherent and effective third-generation, push FOI system can only be introduced in Victoria by a new right-to-information Act.

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52 OVIC, *Submission 55*, 15 January 2024, p. 24.

53 Ibid., pp. 44, 45 (quotation).

54 Victorian Bar, *Submission 57*, 15 January 2024, p. 2 (see also p. 12).

55 Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 13.

56 See, for example, Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16 ('Tinkering around the edges of the FOI Act is not going to fix these issues' with the Act); The Police Association Victoria (TPAV), *Submission 19*, 1 December 2023, p. 2 ('From a user perspective, the freedom of information system is broken …'); Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 2 ('Our research clearly shows the current information "pull" model … is an ineffective and overall poor way to utilise FOI staff.'); LIV, *Submission 22*, 4 December 2023, pp. 1–2 ('[T]he current Act … [is] out of date … [N]ew legislation is required to reform and simplify the existing FOI processes.'); ARTK, *Submission 27*, 14 December 2023, p. 1 ('The Victorian FOI regime is not fit-for-purpose … It is therefore imperative that these laws undergo major modernization and reform.'); Jordan Brown et al., *Submission 49*, 15 January 2024, p. 9 ('The Freedom of Information … system in Victoria is broken and is not meeting its statutory objectives.'); Name withheld, *Submission 48*, 15 January 2024, p. 63 ('Over 40 years of a "ticking along" culture, the Act has rather "gone to seed" and is no longer fit for purpose.'); Royce Millar, Senior Reporter, The Age, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 7 ('… FOI in Victoria is no longer fit for purpose. Most of our journalists believe the system is broken …'); Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 47 (referring to the 'broken FOI system').

A new name

The Independent Review Panel for the review of Queensland's then *Freedom of Information Act 1992* (Qld) considered whether the move to a push FOI system warranted a change of name to the legislation.[57] It received evidence from the Queensland Government and the Ombudsman that a change was unnecessary given the then commonality of 'Freedom of Information' in Act titles in Australia and internationally, and the public's familiarity with the term.[58] They also considered the effort, communication and investment of resources, that might be required to explain any new title, and which might count against the Act title being changed.[59]

While the Panel conceded that the term Freedom of Information 'has history on its side … [as] the most common title given to this kind of legislation',[60] it nevertheless considered that a new title was needed.[61] This was to ensure that the title reflected the key purposes of the new Act under the push system, performed a 'symbolic' function[62] in highlighting people's right to public sector information, and signalled to agencies that a change of culture was needed:[63]

> The Panel knows that changing the title is not a 'remedy' of itself but the Panel's recommended redesign of the Act's architecture is significant and directed to remedying many layers of problems with the current FOI experience. So too, the Panel's related information policy recommendations in favour of a 'push' model. The name change is an important part of the change package, and a minor administrative effort to communicate an important message of difference.
>
> There would be considerable advantage in using a new title to indicate to users and to government that Queensland is entering a new era, with legislation that is far easier to use than earlier models, and more productive of information. It could help bring about the cultural change that is needed. And if the right title is chosen it could strengthen the message.[64]

The Panel considered a range of possible Act titles, including the *Access to Information Act* (Canada), *Right to Information Act* (India) and the *Official Information Act*

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57 *Solomon report*, pp. 322–326.

58 *Solomon report*, pp. 322–323. See also Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 20 ('I am in two minds on this one … We have spent decades now trying to educate people and public servants and Members of Parliament on Freedom of Information …').

59 *Solomon report*, pp. 322–324.

60 Ibid., p. 324.

61 Ibid., pp. 325–326.

62 Ibid., p. 322 (quoting the FOI Independent Review Panel discussion paper).

63 Ibid., p. 325.

64 *Solomon report*, p. 325. See also the NSW Ombudsman's 2009 FOI review (*Opening up government*, pp. 34–35), which came to the same conclusion as the Queensland Panel that a new name was needed for their new push Act: 'If there is to be a fresh approach to FOI, a new name could also be a symbol of this new start … A change in name can be a powerful symbol, a line being drawn in the sand and the start of a new approach to providing information to citizens in NSW.'

(New Zealand), ultimately recommending 'Right to Information', which is the name of the current Queensland Act.[65]

In his appearance before the Committee in this Inquiry, Dr David Solomon AM, who chaired the Queensland Panel, elaborated on its thinking behind the change to 'Right to Information':

> We spent quite a bit of time after we had developed the [push] system discussing whether a name change was appropriate or, as we decided, really necessary to indicate to everyone that there had been a significant change in the way information should be accessed and made available by government to the public. So, it was an important marker of that change. … [The phrase] 'right to information' … conveyed the right idea of what we were trying to get across … [,] that people had rights in relation to information. The name change was important, we thought, just to help bring about cultural change within government as well …[66]

OVIC considers that the *FOI Act 1982* (Vic) should be renamed, favouring *Access to Information Act* or *Right to Information Act*

> 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).[67]

The Committee considers that 'Right to Information' is preferable to 'Access to Information', noting that the Queensland Panel rejected the latter on the following basis:

> The Panel does not favour the title 'Access to Information' because of the Panel's broader recommendations for a whole of government strategic information policy that heralds proactive disclosure by agencies as a foundational principle. *Access* to public sector information under the new proposals would be occurring more as a matter of course, proactively, and without the need for a formal application for access to be made under the Act. To this extent, 'Access to Information' could be misleading by suggesting that application under the Act is *the* way to access information rather than a last resort.[68]

More significantly, the phrase 'Right to Information' is elegant, concise and memorably emphasises the human right to information, which is underpinned by

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65 *Solomon report*, pp. 325–326. See also *Access to Information Act*, R.S.C., 1985, c. A-1 (Canada); *Right to Information Act 2005* (India); *Official Information Act 1982* (NZ); *Right to Information Act 2009* (Qld) ('*RTI Act 2009* (Qld)'); *Right to Information Act 2009* (Tas).

66 Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 1.

67 OVIC, *Submission 55*, 15 January 2024, p. 46.

68 *Solomon report*, p. 325.

international standards, best practice principles, and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[69] Liberty Victoria put this point well:

> [B]y having the word 'right' front and centre, it would be made clear to government that a person is entitled to receive information, rather than simply be free to request information which a FOI body may decide to withhold at their discretion.[70]

The Committee recommends that the *FOI Act 1982* (Vic) be replaced with a push FOI system Act, to be named the *Right to Information Act*.[71]

RECOMMENDATION 2: That the Victorian Government seek to replace the *Freedom of Information Act 1982* (Vic) with a third-generation 'push' FOI system Act (named the *Right to Information Act*), drafted in plain language and appropriate for the digital age.

2.3 The object of the current Act

Section 3 is the 'Object' provision of the *FOI Act 1982* (Vic). Section 3(1)(a)–(b) provides:

> [T]he object of this Act is to extend as far as possible the right of the community to access information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes … by … making available to the public information about the operations of agencies … [and] 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.

Section 3(2) provides that Parliament intends that the Act be *interpreted* to further the object of extending the right of the community 'as far as possible' to access public sector information, and that 'any discretions' under the Act be 'exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information'.

The object of the Act is largely consistent with the intended purposes of the Act outlined by Premier John Cain at the time of the Bill's introduction (see Section 1.4.2 in Chapter 1). OVIC has construed s 3 as requiring the Act 'to be interpreted in a way that

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69 See Liberty Victoria, *Submission 25*, 8 December 2023, pp. 11–12; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence,* p. 15 ('… a right to information is okay [as a new Act title], and that would tie into the Charter … right to freedom of expression, which is recognised in international case law and some domestic case law as including a right to access government information'); Professor Moira Paterson, Adjunct Professor, Faculty of Law, Monash University, public hearing, 12 March 2024, *Transcript of evidence*, p. 20 ('"Right to Information" is quite nice because it really emphasises the fact that it is a right.'); Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 18 ('we need to move on to something that reflects an innate right to have access to information …'); Name withheld, Submission 48, 15 January 2024, p. 5 ('The Act should be renamed … the *Right to Information Act* as the imperative is not about the information being "free", but rather a person having a *right to access* the information as a foundational principle …').

70 Liberty Victoria, *Submission 25*, 8 December 2023, p. 12.

71 See the discussion in Section 2.2.2 in this chapter and OVIC, *Submission 55*, 15 January 2024, p. 9 (Recommendation 1).

maximises disclosure and limits exceptions', but considers that the current 'outdated and complex language' makes this requirement hard to see and understand.[72]

Given that the Committee recommends Victoria move to a push FOI system, and introduce a new *Right to Information Act* to replace the current Act, the object provision in the new Act must coherently accord with its rationale, purposes and content.

Similarly, OVIC argues[73] that any object provision in a new information-access Act must be modernised to clearly communicate the nature of the legislation as part of a third-generation push system in which proactive disclosure and informal release are prioritised over formal requests for information, and limited-exception[74] provisions are narrowly drawn and interpreted in accord with international standards and best practice principles. OVIC further emphasises[75] that the reference in the current object provision to prompt and affordable provision of information should be part of any new section (though the precise wording used in the new Act may of course differ somewhat).

OVIC also suggests that the Committee consider recommending the inclusion in the object section of 'a requirement for access to be provided in a way that meets community expectations (for example, accessible, understandable).'[76] However, the Committee's view is that this is better dealt with by specific provisions regarding the recommended information-release mechanisms (see Chapters 3 and 4).

Overall, OVIC has recommended[77] the following regarding any new object provision:

> 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;[78]
>
> 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.

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72 OVIC, *Submission 55*, 15 January 2024, p. 107.

73 Ibid., pp. 107–108.

74 Ibid., p. 124.

75 Ibid., p. 107.

76 Ibid.

77 Ibid.

78 'This includes all natural and legal persons, irrespective of citizenship or residence.' (OVIC, *Submission 55*, 15 January 2024, p. 107).

In its submission to this Inquiry, OVIC then discusses[79] a range of 'broader purposes and benefits'[80] of a new push information-access Act, examining preamble, object and related provisions in the Queensland, New South Wales and Commonwealth jurisdictions.

The key point the Committee discerns from OVIC's discussion is that the new Act should make reference to the main 'purposes and benefits'[81] of the push model, drawing on applicable international standards, rationales and best practice principles—in short, those related to transparency, accountability, participation, integrity, dignity, knowledge and truth (see Section 1.6 in Chapter 1). One useful synthesis of these purposes and benefits is to be found in the Atlanta Declaration on access to information, which reads, in part, that 'the right of access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption …'[82]

Likewise, the Committee also considers that the object provision in a new Victorian *Right to Information Act* should draw on the rationales, purposes and advantages of the third-generation push FOI system.

Before setting down more precisely the recommended features of the object provision, it is instructive to examine relevant object provisions in the Queensland, New South Wales and Commonwealth FOI legislation.

The object section in Queensland's *Right to Information Act 2009* (Qld) provides that '[t]he primary object of this Act is to give a right of access' to public sector information 'unless, on balance, it is contrary to the public interest' to do so, and that the legislation 'must be applied and interpreted' accordingly.[83]

The Queensland object provision is complemented by the Act's preamble, which lists 'Parliament's reasons for enacting' the legislation.[84] These include the need 'in a free and democratic society' for 'open discussion of public affairs', public sector information as 'a public resource', the public being 'kept informed of government's operations',

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79 OVIC, *Submission 55*, 15 January 2024, pp. 107–110.

80 Ibid., p. 108.

81 Ibid.

82 Quoted in *Solomon report*, p. 33. See also *Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information* (2008), p. 1, 29 February 2008, <https://www.cartercenter.org/resources/pdfs/peace/americas/ati_atlanta_declaration_en.pdf> accessed 17 July 2024.

83 *RTI Act 2009* (Qld) s 3(1). See, to similar effect, *Freedom of Information Act 2016* (ACT), s 6(a).

84 *RTI Act 2009* (Qld) Preamble, 1.

open and accountable government, increased public participation in democracy (leading to 'better informed decision-making'), and improved public administration.[85]

Importantly, as recommended by the Solomon Review,[86] the preamble expressly signals the shift involved in moving from a pull to a push FOI system favouring proactive release of information:

> The 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.[87]

The 'pro-disclosure bias', as the Act terms it, and the narrow interpretation of grounds for refusing disclosure, are helpfully reiterated in a number of provisions in the legislation.[88]

In a similar vein, the object section in the New South Wales *Government Information (Public Access) Act 2009* (NSW) ('*GIPA 2009 (NSW)*') provides, in part:

> In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by—
>
> (a) authorising and encouraging the proactive public release of government information by agencies, and
>
> (b) giving members of the public an enforceable right to access government information, and
>
> (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.[89]

Subsection (2)(b) of the object section states, similar to the current Victorian provision,[90] that Parliament's intention is that 'discretions' under the Act 'be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information'.[91]

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85 *RTI Act 2009* (Qld) Preamble, 1. See also *Official Information Act 1982* (NZ) s 4(a) ('to enable … more effective participation … and … to promote … accountability'); *Access to Information Act*, RSC, 1985, c. A-1 (Canada) s 2(1) ('The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.'); Alina M Semo, Director, Office of Government Information Services, United States of America, to Dr Tim Read MP, Chair, Integrity and Oversight Committee, correspondence, 28 December 2023, p. 1: 'The United States Supreme Court has explained that "[t]he basic purpose of the … [US *Freedom of Information Act*] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The … [US *Freedom of Information Act*] is often explained as a means for citizens to know "what their Government is up to". *NARA v Favish*, 541 U.S. 157, 171–172 (2004).'

86 *Solomon report*, pp. 70–77.

87 *RTI Act 2009* (Qld) Preamble 2.

88 See, for example, *RTI Act 2009* (Qld) ss 39(3), 44(1), (4), 47(2); OVIC, *Submission 55*, 15 January 2024, p. 109.

89 *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act 2009* (NSW)') s 3(1).

90 *FOI Act 1982* (Vic) s 3(2).

91 See also, to similar effect, *Freedom of Information Act 1982* (Cth) ('*FOI Act 1982* (Cth)') s 3(4); *Freedom of Information Act 2016* (ACT) s 6(f); *Right to Information Act 2009* (Tas) s 3(4)(b). See also *Opening up government*, pp. 33–34.

The objects section in the Commonwealth *Freedom of Information Act 1982* (Cth) provides, in part, that

> (2) … Parliament intends … to promote Australia's representative democracy by contributing towards …
>
> (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]
>
> (3) … to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.[92]

Taking these interstate and federal object provisions into account, along with evidence from OVIC and other stakeholders,[93] the Committee recommends that there be an objects or purposes provision in the new third-generation push FOI Act in Victoria that:

- (drawing on best practice principles and push FOI legislation in Australia), identifies the key rationales for, and advantages of, the new Act, in enhancing representative democracy, responsible government and public administration—for example, by enhancing transparency, public participation, scrutiny, accountability, and public sector decision-making
- gives recognition to a person's right to access public sector information
- incorporates a presumption favouring maximum disclosure of information
- prioritises proactive disclosure and informal information-release mechanisms over the formal information-release mechanism
- requires any restrictions on access to information be narrowly drawn and interpreted (favouring access)
- retains the purpose of the current reference (*FOI Act 1982* (Vic) s 3(2)) to Parliament's intention that the Act 'facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information'.[94]

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92 *FOI Act 1982* (Cth) s 3(2)–(3). See also, to similar effect, *Right to Information Act 2009* (Tas) s 3(1).

93 OVIC, *Submission 55*, 15 January 2024, pp. 14, 107–110; Name withheld, *Submission 48*, 15 January 2024, p. 18 ('There should be a new Object … that the purpose of the Act is to legislatively promote openness, transparency, and accountability by those bound by the Act.'); Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 8 ('Transparency is not explicitly mentioned in the object of the current FOIA [Victorian FOI Act]; it should be.'); Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 6; Information and Privacy Commission NSW (IPC NSW), *Submission 12*, 27 November 2023, p. 2.

94 The Committee's recommendation closely follows the tenor and content of OVIC's Recommendation 29 for a new objects provision (OVIC, *Submission 55*, 15 January 2024, p. 14) and the analysis underpinning it (OVIC, this footnote, at pp. 107–110).

RECOMMENDATION 3: That the new, third-generation 'push' FOI Act in Victoria include an objects or purposes section that:

- identifies the key rationales for, and advantages of, the new Act in enhancing representative democracy, responsible government and public administration
- recognises a person's right to access public sector information, in particular about themselves
- contains a presumption favouring maximum disclosure of information
- prioritises proactive disclosure and informal information-release mechanisms over the formal information-release mechanism
- requires restrictions on access to information to be narrowly drawn and interpreted
- expresses Parliament's intention that the new Act 'facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information' (*Freedom of Information Act 1982* (Vic) s 3(2)).

2.4 The definition of 'document' in the current FOI Act

The *FOI Act 1982* (Vic) came into operation in an analogue era of typewriters, hard copies and filing cabinets, rather than the digital one of computers, drives and apps.[95]

There was a consensus among stakeholders who contributed to this Inquiry that, accordingly, the definition of 'document' in the current Act needs to be modernised to fully encompass the diverse ways information is created, received, recorded, used, shared, stored and provided by the public sector in the digital age.[96] The Committee

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95 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 111–112; Victorian Bar, *Submission 57*, 15 January 2024, p. 2 ('The FOI Act is anchored in a world of hardcopy documents and simple data storage and retrieval.'); Emrys Nekvapil SC, barrister, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 15–16; Name withheld, *Submission 48*, 15 January 2024, p. 23; Professor Lyria Bennett Moses, Director, UNSW Allens Hub for Technology, Law and Innovation, University of New South Wales, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 22–24 (on the impacts of artificial intelligence), 24–25 (on the challenges, with rapid technological change, of defining phenomena such as 'data', 'documents', 'records' and 'information', and as well as language aiming to accurately describe the relationship between a person or body and that phenomena—for example, the terms 'holds', 'possesses', 'controls', 'custody'); Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 16, 17 (on the use of technology for work purposes, such as Google Meet and Teams, and similar, chat groups: '[A] lot of what is important is [now] done in that electronic way. If you exclude that, then you are excluding a lot of really valuable information that sheds light on what the government is doing.'); Victorian Civil and Administrative Tribunal (VCAT), Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 4–5. See also Lyria Bennett Moses, 'Who owns information? Law enforcement information sharing as a case study in conceptual confusion', *UNSW Law Journal*, vol. 43, no. 2, June 2020, pp. 615–641.

96 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 111–113; Professor Lyria Bennett Moses, Director, UNSW Allens Hub for Technology, Law and Innovation, University of New South Wales, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 26; Emrys Nekvapil SC, barrister, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 16; Victorian Bar, *Submission 57*, 15 January 2024, pp. 2–4; Victorian Inspectorate (VI), *Submission 10*, 23 November 2023, p. 3; LIV, *Submission 22*, 4 December 2023, p. 5; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 6–7; Name withheld, *Submission 48*, 15 January 2024, p. 23; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 2; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 16–17; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 23–28; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 4–5.

agrees that this part of the FOI regime needs to be revised in any new Act. Revision of the definition is needed so it accords with international standards and best practice principles, under which information is understood broadly and maximum disclosure is supported.[97]

Section 13 of the current Act gives every person a 'legally enforceable right' to access a public sector document that is 'in the possession of' an agency or minister, provided it is not exempt from disclosure.[98]

The current definition of 'document' in s 5(1) of the Act, which was admirably broad for its time,[99] provides in part that a 'document includes, in addition to a document in writing':

(a) any book map plan graph or drawing; and

(b) any photograph; and

(c) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever; and

(d) 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; and

(e) any film negative tape *or other device* in which one or more visual images are embodied so as to be capable … of being reproduced therefrom; and

(f) *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; and

(g) any copy, reproduction or duplicate of any thing referred to in paragraphs (a) to (f); and

(h) any part of a copy, reproduction or duplicate referred to in paragraph (g)—

but does not include such library material as is maintained for reference purposes … [emphasis added].

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97 See Section 1.6 in Chapter 1 of this report. See also, for example, Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 4 ('"information" …. should be defined broadly').

98 *FOI Act 1982* (Vic) s 13; s 5(1) (definitions of 'document of an agency', 'document of the agency', 'official document of a Minister', and 'official document of the Minister'). Note that OVIC has explained (OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 23) that a '"document of an agency" is a record of information in the possession or control of an agency, regardless of the way it is stored, and whether the agency created or received the document [citing *Monash University v EBT* [2022] VSC 651 [7], [83]]. The focus of the definition is on "possession" as opposed to ownership. It does not matter if the document was created by another agency, belongs to someone else, or is stored electronically [citing *Williams v Victoria Police (General)* [2005] VCAT 2516]. If it is in the possession of the agency, it is subject to access under the Act.' For further analysis of what 'possession' involves, see OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, pp. 23–24.

99 See, for example, Emrys Nekvapil SC, barrister, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 15 ('… I think for 1982 the Act was very forward-looking and really was an excellent attempt at capturing information'); Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 2 ('the definition of "document" is broad and captures any record of information in any form …'); Name withheld, Submission 48, 15 January 2024, p. 23 ('The definition provided in s 5 of the Act for document goes significantly beyond the traditional understanding of a "document".').

One can see from this definition the drafter's intent to encompass almost all known documentary materials, and to be as technologically neutral as possible in order to be flexible enough to encompass new technologies not yet developed.[100] This is evident in the phrases that have been emphasised in the above extract, such as 'other device' embodying 'sounds or other data', and, especially, the reference in (f) to 'anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning'.

Yet this effort to be encyclopaedic and prescriptive has a downside. The particular examples of documentary material it identifies (though those technologies and media still exist) are now showing their age—for example, the references to 'disc tape sound track' and 'film negative tape'.[101]

There is also an odd focus on whether documentary material can carry a 'definite meaning to persons conversant with' the material (doubtless referring to foreign-language and technical material that can only be understood by persons with relevant expertise). This approach is over-prescriptive, unclear and often anachronistic given the diverse, and often non-physical, nature of digital technologies and forms of communication, including the impacts of artificial intelligence (AI).[102]

Nevertheless, the current 'non-exhaustive'[103] definition is 'broad'[104] and includes a range of electronic material.[105] As OVIC's FOI Guidelines explain:

> It captures any record of information in any form and however stored, whether a draft or final version, physical or electronic. It also includes a copy, reproduction, or duplicate of a document, or any part of a copy, reproduction or duplicate of a document.[106]

In the Guidelines, OVIC gives the following examples of material included in the current definition of document:

- emails and letters;
- Excel, Word, or PDF documents;

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100 OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 22.

101 As is the exclusionary provision relating to 'such library material as is maintained for reference purposes' (*FOI Act 1982* (Vic) s 5(1) (definition of 'document')).

102 On Artificial Intelligence (AI) and related technological developments and their current and potential legal, political, policy-making and decision-making impacts, see OVIC, *Closer to the machine: technical, social, and legal aspects of AI*, Melbourne, August 2019; Andrew Ray, 'Implications of the future use of machine learning in complex decision-making in Australia', *Australian National University Journal of Law and Technology*, vol. 1, no. 1, March 2020, pp. 4–14; Andrew Ray et al., 'Access to algorithms post-Robodebt: Do Freedom of Information laws extend to automated systems?', *Alternative Law Journal*, vol. 47, no. 1, 2022, pp. 10–15; Lyria Bennett Moses and Louis de Koker, 'Open secrets: balancing operational secrecy and transparency in the collection and use of data by national security and law enforcement agencies', *Melbourne University Law Review*, vol. 41, no. 2, 2017, pp. 530–570; Yee-Fui Ng et al. 'Revitalising public law in a technological era: rights, transparency and administrative justice', *UNSW Law Journal*, vol. 43, no. 3, 2020, pp. 1041–1077.

103 OVIC, *Submission 55*, 15 January 2024, p. 110.

104 OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 22.

105 OVIC, *Public access to information in Victoria: an introduction for public sector employees*, Melbourne, September 2022, p. 5; OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 22; OVIC, *Submission 55*, 15 January 2024, pp. 110–112.

106 OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 22; *FOI Act 1982* (Vic) s 5(1) (definition of 'document': (g)–(h)).

- diary and calendar entries;
- SMS and WhatsApp messages;[107]
- CCTV footage;
- handwritten notes, file notes, or sticky notes;
- policy guides or manuals;
- maps and photographs;
- files;
- fingerprint records;[108]
- telephone call or interview recordings; and
- voice messages.[109]

Like other Australian jurisdictions,[110] the current Victorian definition does *not* include information that has not been recorded, so would not, for example, encompass a conversation between agency employees.[111] However, OVIC notes that any

> informal written records or file notes about the conversation would be considered a document. Similarly, an audio recording of the conversation would be a document for the purpose of the Act.[112]

OVIC has recommended that any definition of 'document' in a new push FOI system Act should be broadened so that 'it clearly captures all types of records and storage mediums used by modern government' and be as technologically neutral ('form-agnostic') as possible to accommodate future developments.[113]

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107 Citing *'EW6' and Development Victoria* [2022] VICmr 234 [28].

108 Citing *Lawless v Department, Chief Commissioner of Police & Director of Public Prosecutions* (1985) 1 VAR 42.

109 OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 22.

110 See Commonwealth: *FOI Act 1982* (Cth) s 4(1) (definition of 'document'); New South Wales: *GIPA Act 2009* (NSW) s 4(1), sch 4 cl 10 (meaning of 'record'); Tasmania: *Right to Information Act 2009* (Tas) ss 5 (definition of 'information': '(a) anything by which words, figures, letters or symbols *are recorded* … and (b) anything in which information is *embodied* so as to be *capable of being reproduced*'—emphasis added), 7; Ombudsman Tasmania, Right to Information Act 2009 *Tasmania*: *Ombudsman's manual* (first published July 2010), n.d., pp. 6–7 ('Note that s 7 of the [Tasmanian *Right to Information*] Act gives a right to information, not documents … and more frequently and more appropriately uses the word "record" to refer to something in which information is contained … Documents, unless blank, have information in them. Information can also be contained in things that are not documents, such as computers, audio recordings or paintings.'); Ombudsman Tasmania, *Guidelines to assist agencies and applicants in relation to access to information under the* Right to Information Act 2009 *and the* Personal Information Protection Act 2004, Guideline No. 1, August 2013, pp. 2, 4; Queensland: *RTI Act 2009* (Qld) s 23 and *Acts Interpretation Act 1954* (Qld) sch 1 (definition of 'document'); Western Australia: *Freedom of Information Act 1992* (WA) s 9, Glossary cl 1 (definition of 'document'); South Australia: *Freedom of Information Act 1991* (SA) s 4 (definition of 'document'); Australian Capital Territory: *Freedom of Information Act 2016* (ACT) ss 3; Dictionary (definition of 'record'), 14; Northern Territory: *Information Act 2002* (NT) s 4 (definitions of 'government information' and 'record'); Victorian Bar, *Submission 57*, 15 January 2024, pp. 2–4.

111 OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, Melbourne, May 2023, p. 23.

112 Ibid.

113 OVIC, *Submission 55*, 15 January 2024, p. 112. See also Victorian Bar, *Submission 57*, 15 January 2024, p. 3; Professor Lyria Bennett Moses, Director, UNSW Allens Hub for Technology, Law and Innovation, University of New South Wales, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 26; Emrys Nekvapil SC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 15–16; Name withheld, *Submission 48*, 15 January 2024, p. 23; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 16–17.

OVIC also emphasised that a 'strong ATI [access-to-information] law will apply not only to documents but also to information', citing best practice principles, though it did not make an express recommendation that any push FOI system move from documents to the broader concept of information.[114] Other stakeholders, however, did recommend, more or less strongly, that this move be made.[115]

The Victorian Bar, for instance, argued that

> the Victorian FOI regime should seek to eliminate the distinction between 'documents' and 'information' and instead adopt an approach that focuses on facilitating the access to information, rather than the form in which it is provided. Definitions should be less prescriptive, to ensure that the regime has greater flexibility to adapt as technology advances.[116]

Another submitter also supported using 'the term "information"', considering that by not being limited to 'a document or a record' it would better encompass the way digital information is created, used and stored, and 'future proofs to a large degree for technological developments'.[117]

The Law Institute of Victoria (LIV) recommended 'that the FOI process should be reformed to encourage applicants to request the specific information they require', since, in the Institute's view, presently 'many applicants request access to a document, and not the specific information that they require from the document'.[118] It should be noted in this context, however, that the current Act authorises a public sector body to use a computer to create a document containing information sought by a person, and to release information informally.[119]

Both VCAT and the Victorian Inspectorate (VI) have suggested[120] that a revised definition of 'document' follow the Commonwealth FOI legislation by including a broad reference to 'any … record of information'.[121] VCAT went further in suggesting that 'it might even be appropriate to shift the focus of the FOI Act to access to "information".'[122]

Lidberg et al. also supported a move to information rather than documents:[123]

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114 OVIC, *Submission 55*, 15 January 2024, p. 112.

115 See Jordan Brown et al., *Submission 49*, 15 January 2024, p. 28; Name withheld, *Submission 48*, 15 January 2024, p. 23; LIV, *Submission 22*, 4 December 2023, p. 5; Victorian Bar, *Submission 57*, 15 January 2024, p. 3; VI, *Submission 10*, 23 November 2023, p. 3; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 4–5.

116 Victorian Bar, *Submission 57*, 15 January 2024, p. 3.

117 Name withheld, *Submission 48*, 15 January 2024, p. 23.

118 LIV, *Submission 22*, 4 December 2023, p. 5.

119 Under, respectively, ss 19 and 16 of the *FOI Act 1982* (Vic). See also OVIC, *Submission 55*, 15 January 2024, pp. 111, 113.

120 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 4; VI, *Submission 10*, 23 November 2023, p. 3.

121 *FOI Act 1982* (Cth) s 4(1) (definition of 'document').

122 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 4–5.

123 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 7.

> Changing the coverage of the Act so that it applies to 'information' generally, as opposed to 'documents', would have at least three advantages. First, it would make it easier for applicants who may be aware that information exists but are unable to identify the specific documents in which that information is located. Second, 'information' is an inherently broader term, and therefore better able to deal with evolving technology. Third, providing a right of access to information also would make it unnecessary to include a specific provision dealing with the use of computers to create documents from information not available in discrete form.
>
> We therefore recommend:
>
> - replacing the expression 'document' with 'information' and defining it having regard to the modern technological environment.[124]

Jordan Brown et al., taking inspiration from the United Kingdom's (UK) regime, goes furthest in recommending that there be a right of access not only to information but also to 'institutional knowledge':

> Amend the Act to strengthen an applicant's 'right to know' by providing an explicit right of access to the institutional knowledge of an agency, so that any person making a request for information to an agency (or minister) is entitled to be informed in writing by the respondent whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to them.[125]

The argument for this recommendation was that it would address issues such as applicants not knowing what kinds of documents might exist, containing the information they seek; agencies cynically denying a request for information that is not embodied in specific documents; and agency staff choosing not to record information in documents so that it cannot be accessed.[126]

Jordan Brown et al.'s recommendation is closest to the position in New Zealand.[127] Under the *Official Information Act 1982* (NZ), official information 'shall be made available unless there is good reason for withholding it'.[128] 'Official information'

> … means *any information held* by—
>
> (i) a public service agency; or
>
> (ii) a Minister of the Crown in his official capacity; or
>
> (iii) an organisation …[129] [emphasis added]

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124 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 7. The third advantage cited by Lidberg et al. is a reference to s 19 of the *FOI Act 1982* (Vic), which provides, in part, that an agency can use a computer to 'produce a written document … in discrete form' that contains information sought by a person, if the information sought is 'not available in discrete form in documents of the agency'. See also VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 4.

125 Jordan Brown et al., *Submission 49*, 15 January 2024, p. 28.

126 Ibid., pp. 23–26.

127 *Official Information Act 1982* (NZ) ss 2(1) (definition of 'official information'), 4 (Purposes), 5 (Principle of availability)

128 Section 5. See also s 4(a) ('The purposes of this Act are … to increase progressively the availability of official information to the people of New Zealand …).

129 *Official Information Act 1982* (NZ) s 2(1) (definition of 'official information').

Following this provision, the Act lists a range of exclusions; that is, information that is *not* included in the phrase 'any information'.[130] Despite these exclusions, the New Zealand conception of information is arguably one of the broadest in the common law world, and certainly broader than exists in Australian, UK or Canadian legislation. Chiefly, this is because, under the New Zealand Act, official information need not have been recorded in any form and can be 'held' by an organisation via something in the mind or memory of an official[131]—this is not the case in Australia, UK or Canada.[132]

In addition to a range of materials that would come within Australian legislative definitions of documents, information and records, 'official information' in New Zealand distinctively includes

> … information which is known to an agency, *but which has not yet been recorded in writing or otherwise* (including knowledge of a particular matter held by an officer, employee or member of an agency in their official capacity) …
>
> The information could be held in the memory of an employee of the agency.[133]

The Committee thus had before it a range of stakeholder recommendations and legislative examples to consider in determining how to reform the Victorian definition of 'document' in the current Act. The two key options, in the Committee's view, are:

1. to replace the current definition of 'document' with a broad definition of 'information', with that information having been recorded in some fashion (drawing on Australian examples); *or*
2. to replace the current definition of 'document' with a still broader definition of 'information' along New Zealand lines, with information not being required to be recorded, and extending to what is in officials' minds (including their memories).

If the Committee were to take Option 1, there are a range of useful, broader definitions in other Australian jurisdictions, some using the term 'document', some 'information'.

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130 *Official Information Act 1982* (NZ) s 2(1) (definition of 'official information': (d)–(m)).

131 Ombudsman New Zealand, *The OIA for Ministers and agencies: a guide to processing official information requests*, August 2019, p. 6; Law Commission, *The public's right to know: a review of the* Official Information Act 1982 *and Parts 1–6 of the* Local Government Official Information and Meetings Act 1987, Issues Paper 18, Wellington, September 2010, p. 39 ('any knowledge however gained or held', citing *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC) at 586 per Jeffries J); Peter Boshier, Chief Ombudsman, Ombudsman New Zealand, to Dr Tim Read MP, Chair, Integrity and Oversight Committee, correspondence, 30 November 2023, p. 2; Ursula Cheer, *Burrows and Cheer Media Law in New Zealand*, 8th edn, Lexis Nexis, Wellington, 2021, p. 727 ('It probably covers even information held only in the memory of officials.').

132 In Australian jurisdictions, to put it broadly, information must have been recorded in some fashion (see the references cited in footnote 110, above). The Canadian *Access to Information Act*, RSC, 1985, c. A-1 provides a 'right to … be given access to any record under the control of a government institution' (s 4(1)), with 'record' defined in s 3 as 'any documentary material, regardless of medium or form'. While, in s 1, the UK *Freedom of Information Act 2000*, like the New Zealand Act, refers to information 'held by public authorities', the Information Commissioner has explained that the Act 'does not cover information that is in someone's head' (Information Commissioner's Office, *What is the FOI Act and are we covered?*, <https://ico.org.uk/for-organisations/foi/what-is-the-foi-act-and-are-we-covered> accessed 8 July 2024).

133 Ombudsman New Zealand, *The OIA for Ministers and agencies: a guide to processing official information requests*, August 2019, p. 6 (emphasis added).

Section 11 of the Commonwealth FOI Act gives persons a legally enforceable right to documents,[134] which is defined as 'any of' a range of materials itemised in a similar fashion to the Victorian Act, together with the distinctive catch-all phrase, 'any other record of information'.[135] As noted earlier, this provision has garnered support from VCAT and the VI.[136]

The Queensland, Western Australian and South Australian FOI Acts each give persons rights to public sector documents, defined broadly.[137]

Under the Queensland right-to-information scheme, 'document … means a record of information, however recorded' and 'includes … an electronic document', while 'record includes information stored or recorded by means of a computer'.[138]

Under the Western Australian FOI Act, document means, in part, 'any record', with 'record' meaning 'any record of information however recorded'.[139]

Finally, under the South Australian FOI Act, 'document' is defined to include 'anything in which information is stored or from which information may be reproduced'.[140]

The New South Wales *GIPA Act 2009* gives persons a legally enforceable right to access 'government information', which is defined as 'information contained in a record held by an agency'.[141] 'Record' is defined as 'any document *or other source of information* compiled, recorded or stored in written form *or by electronic process, or in any other manner or by any other means*'.[142] While elegantly concise and broad in scope, in contrast to the New Zealand position 'the knowledge of a person' is excluded from the meaning of 'record'.[143]

Under the Tasmanian *Right to Information Act 2009*, 'information' is defined, in part, as 'anything by which words, figures, letters or symbols are recorded' and, more broadly, 'anything in which information is embodied so as to be capable of being reproduced'.[144]

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134 *FOI Act 1982* (Cth) ss 11 (see also 11A).

135 *FOI Act 1982* (Cth) s 4(1) (definition of 'document').

136 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 4–5; VI, *Submission 10*, 23 November 2023, p. 3.

137 *RTI Act 2009* (Qld) s 23; *Acts Interpretation Act 1954* (Qld) sch 1 (definitions of 'document' and 'record'); OIC Qld, *Documents of an agency and documents of a Minister*, 13 February 2024, <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/receiving-and-assessing-applications/documents-of-an-agency-and-documents-of-a-minister?> accessed 9 July 2024; *Freedom of Information Act 1992* (WA) ss 9, 10(1), Glossary cl 1 (definitions of 'document' and 'record'); *Freedom of Information Act 1991* (SA) ss 4(1) (definition of 'document'), 12.

138 *Acts Interpretation Act 1954* (Qld) sch 1 (definitions of 'document' and 'record').

139 *Freedom of Information Act 1992* (WA) s 9, Glossary cl 1 (definitions of 'document' and 'record').

140 *Freedom of Information Act 1991* (SA) s 4(1) (definition of 'document').

141 *GIPA Act 2009* (NSW) ss 4(1) (definition of 'government information'), 9(1).

142 *GIPA Act 2009* (NSW) sch 4 cl 10(1) (emphasis added).

143 *GIPA Act 2009* (NSW) sch 4 cl 10(3). The Australian Capital Territory provision (*Freedom of Information Act 2016* (ACT) s 14; Dictionary: definition of 'record') is almost identical, although it does not have the express exclusion for knowledge found in the New South Wales Act.

144 *Right to Information Act 2009* (Tas) s 5(1) (definition of 'information').

The Northern Territory *Information Act 2002* also gives persons a right to access 'government information',[145] which means

> recorded information in any form (including data in a computer system) that is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation …[146]

The latter phrase that recorded information be only that which is required to be retained as 'evidence' of the organisation's 'activities or operations' limits an otherwise broad definition.

From these Australian legislative definitions, the Committee has determined that there should be a new, concise, but broad, definition of public sector information in the recommended new Victorian push FOI system Act. The neatest solution is to adapt part of the definition in the Commonwealth legislation—that is, under the new Victorian Act persons would be given the right to access *any record of information*. This formulation does not restrict the ordinary meaning of information but requires the information to have been recorded in some fashion, understood as broadly as possible. This recommended definition, to borrow the Victorian Bar's phrasing, is much 'less prescriptive' than the current definition of 'document' and is flexible enough to 'adapt as technology advances'.[147] If further specification of the elements of a record of information were thought necessary—which may not be the case—the Committee considers this would be best handled by (separately or in combination) a schedule in the Act, OVIC Professional Standards[148] and regulations.

The Committee considers that Option 2—a move to a still broader conception of information going beyond information that has been recorded in some fashion—is neither necessary nor prudent.

It therefore does not recommend that Victoria follow the path of New Zealand in including information that is known by a public sector organisation but not yet recorded, and which may be 'held' instead, for example, by the organisation via the content of officials' minds and memories.[149]

First, the Committee considers that this strains the ordinary meaning of 'held'—in what sense does an organisation 'hold' the minds and memories of its staff? Second, the nexus between the thinking of individual officials and *institutional* knowledge will surely often be difficult to establish. Third, not only do individual persons' recollections and interpretations of, for example, an organisation's decision-making

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145 *Information Act 2002* (NT) ss 4 (definition of 'government information'), 15.

146 *Information Act 2002* (NT) s 4 (definition of 'record').

147 Victorian Bar, *Submission 57*, 15 January 2024, p. 3.

148 See, for example, on the meaning of 'document', OVIC, *Professional standards: issued by the Information Commissioner under Part IB of the* Freedom of Information Act 1982 *(Vic)* (*OVIC professional standards*), Melbourne, December 2019, pp. 4, 12.

149 *Official Information Act 1982* (NZ) s 2(1) (definition of 'official information'); Ombudsman New Zealand, *The OIA for Ministers and agencies: a guide to processing official information requests*, August 2019, p. 6; Peter Boshier, Chief Ombudsman, Ombudsman New Zealand, to Dr Tim Read MP, Chair, Integrity and Oversight Committee, correspondence, 30 November 2023, p. 2.

often differ amongst each other at the time of decisions, their memories change over time and can prove to be unreliable. Fourth, the FOI rationales of transparency and accountability rightly focus on *authoritative* policy-making and decision-making, the outcomes of which are recorded in some fashion, rather than people's thinking processes along the way, or, perhaps even less reliable, individuals' interpretations and reflections potentially years later.[150] Fifth, as a practical matter, such an approach is likely to increase the FOI burden on the public sector, a sector which, as this report demonstrates, struggles to process even FOI requests for documents in a timely way.[151] Finally, a number of jurisdictions often thought of as good models for FOI—namely, New South Wales, UK and Canada—do not go beyond recorded information.[152]

As part of its review of the then governing *Freedom of Information Act 1989* (NSW), the main outcome of which was to recommend a new push FOI system, the New South Wales Ombudsman considered whether the New Zealand approach should be adopted.[153] It is instructive that it decided not to.[154] The Ombudsman received evidence from the State's Department of Primary Industries that if the New Zealand approach were adopted,

> [c]ompliance would be difficult to demonstrate and unlikely to satisfy an aggrieved [FOI] applicant.
>
> Information held 'in the mind' of a public official is essentially a personal opinion and has no Departmental impact or status until it is applied, documented or actioned.[155]

The New South Wales Ombudsman agreed with this view, noting that, 'Information is forgotten over time and memories can become inaccurate. If the information is at all contentious rationalisation is likely and the risk of selective recall is real.'[156]

The Committee recommends that any new push FOI Act in Victoria replace the definition of 'document' with a broad definition of recorded information which is technologically neutral.

RECOMMENDATION 4: That the new, third-generation 'push' FOI Act in Victoria include a broad, technologically neutral, definition of recorded 'information', rather than 'document', to encompass information in the digital age.

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150 See the discussions in *Opening up government*, p. 41.

151 See, for example, the data in Box 2.1 in this chapter.

152 See *GIPA Act 2009* (NSW) sch 4 cl 10(3); Information Commissioner's Office, *What is the FOI Act and are we covered?*, <https://ico.org.uk/for-organisations/foi/what-is-the-foi-act-and-are-we-covered/> accessed 8 July 2024; *Access to Information Act*, RSC, 1985, c. A-1 (Canada) s 3 (definition of 'record'), 4(1) ('right to access to any record under the control of a government institution').

153 *Opening up government*, p. 41.

154 Ibid.

155 Quoted in *Opening up government*, p. 41.

156 *Opening up government*, p. 41.

2.4.1 'Official document of a Minister' under the *FOI Act 1982* (Vic)

Under s 5(1) of the *FOI Act 1982* (Vic), 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'.[157]

There is a comparable provision in the Commonwealth FOI Act.[158] As well summarised by the Senate Legal and Constitutional Affairs Committee in its report on its inquiry into Commonwealth FOI laws,

> the OAIC [Office of the Australian Information Commissioner] has interpreted this section [*Freedom of Information Act 1982* (Cth) s 4(1)] to potentially exclude documents of a *former* minister, even in cases where the [FOI] application was lodged whilst the minister was still in office …
>
> [D]ue to lengthy delays in processing FOI applications and reviews … the relevant minister may have moved or may have left office before a decision is reached, at which time the documents in question may no longer be available to the applicant.[159]

Further, The Australia Institute submitted to the Senate inquiry that there is a risk that 'official documents belonging to the previous Minister are … destroyed.'[160]

OVIC interprets the Victorian provision in the same way as the OAIC, and considers that the same risks—denial of access and/or destruction of documents—exist with the operation of s 5(1) of the *FOI Act 1982* (Vic).[161]

OVIC has therefore recommended that the right of access to documents (as a subset of 'information' under the new push Act) be applicable to former ministers' official documents, in part to 'prevent the destruction of documents of a former Minister where the Minister is no longer in office.'[162]

The Committee agrees.

RECOMMENDATION 5: That official documents of ministers and former ministers be subject to the new third-generation 'push' FOI Act in Victoria.

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157 OVIC, *Submission 55*, 15 January 2024, p. 114.

158 *FOI Act 1982* (Cth) s 4(1) (definition of 'official document of a Minister or official document of the Minister').

159 Senate, Parliament of Australia, Legal and Constitutional Affairs References Committee (LCARC), *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023, p. 75. See also OVIC, *Submission 55*, 15 January 2024, p. 114.

160 The Australia Institute, *Submission 23* to the LCARC Inquiry into the Operation of Commonwealth Freedom of Information (FOI) Laws, March 2023, p. 12. See also OVIC, *Submission 55*, 15 January 2024, pp. 114–115.

161 OVIC, *Submission 55*, 15 January 2024, p. 114.

162 OVIC, *Submission 55*, 15 January 2024, p. 115. See also The Australia Institute, *Submission 23* to the LCARC Inquiry into the Operation of Commonwealth Freedom of Information (FOI) Laws, June 2023, pp. 12, 25.

2.5 Exceptions and exemptions in the current FOI Act

Given the Committee recommends the adoption of an entirely new *Right to Information Act* for Victoria, this section does not examine, line by line, all the exception and exemption provisions in pts III and IV of the *FOI Act 1982* (Vic), which would perhaps be warranted if that Act were merely being selectively repaired.[163] Instead, this section surveys and evaluates the key exceptions and exemptions, identified in evidence received by the Committee during this Inquiry, against international standards and best practice principles, with a focus on how they should be treated in a new push FOI Act.[164]

Note that in this section of the chapter, to avoid confusion, the term 'exception' is used for provisions in pt III of the current Act, whereas the currently used term 'exemption' is used for those in pt IV. The Committee recognises, however, that, in best practice principles, 'exemptions' are often called 'limited exceptions' to emphasise that they should be narrowly drawn.[165]

2.5.1 International standards and best practice principles

As explained in Chapter 1, the human right to access information is not absolute.[166] FOI expert Emeritus Professor Maeve McDonagh has observed, 'In common with almost all other rights protected by international human rights treaties, the right to information may, in certain circumstances, be restricted.'[167] OVIC also recognises this, noting that '[e]very government holds information that should legitimately be withheld from open access. The principle of maximum disclosure cannot mean the release of all documents.'[168]

Necessary and lawful restrictions on the human right to access public sector information are recognised in all the key international and regional instruments, including in Article 19 of the International Covenant on Civil and Political Rights (*ICCPR*) protecting the right to freedom of expression, which was the foundation

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163 The Queensland Solomon Review, which led to the adoption of a push FOI system in that State, took a similar approach in this regard: 'In undertaking this task the [Independent Review] Panel decided it would not commence with yet another line-by-line examination of the existing legislation. Rather, it would engage in an analysis of the issues that underlie the concept of freedom of information and the problems that are apparent in the operation of the regime, focussing on how those problems might be best resolved.' (*Solomon report*, p. 63).

164 See Section 1.6 in Chapter 1 of this report.

165 Article 19, *The public's right to know: principles on right* to *information legislation*, London, 2016, pp. 7–8. The term 'limited exceptions' is also favoured by OVIC (OVIC, *Submission 55*, 15 January 2024, pp. 15, 124).

166 See Section 1.6.

167 Maeve McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, vol. 13, no. 1, February 2013, p. 45.

168 OVIC, *Submission 55*, 15 January 2024, p. 125.

of the right to information.[169] Article 19(3) of the *ICCPR* provides that lawful and necessary restrictions can be imposed on the freedom of expression to ensure 'respect of the rights or reputations of others' and to protect 'national security … [or] public order … [or] public health or morals.'[170] These restrictions are reproduced in the freedom of expression provision in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[171]

Restrictions are also recognised in s 94H of the Victorian Constitution, which provides that 'a general right of access to information in documentary form' is

> 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.[172]

Two key best practice principles relating to FOI—drawing from the international organisation Article 19's Principles on Right to Information Legislation, endorsed by the United Nations (UN)[173]—have been ably summarised by OVIC as follows:[174]

> … *Maximum disclosure*. ATI [access-to-information] legislation should be guided by a presumption that all information held by public bodies is accessible, *subject to very limited exceptions* …
>
> *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. [emphasis added]

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169 *International Covenant on Civil and Political Rights* (*ICCPR*) (1966), UNTS, vol. 999, I–14668. See also *Universal Declaration of Human Rights* (*UDHR*) (1948), Article 29, <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> accessed 30 July 2024; United Nations (UN), *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (*Aarhus Convention 1998*), Aarhus, 25 June 1998, Article 4; UN Office on Drugs and Crime, *UN Convention Against Corruption* (2003), New York, 2004, Articles 10(a), 13(d); Council of Europe, *Council of Europe Convention on Access to Official Documents* (*Tromso Convention*), Council of Europe Treaty Series, no. 2205, Tromso, 18.VI.2009, Article 3; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*) (1950) (in European Court of Human Rights, *European Convention on Human Rights*, Strasbourg, n.d.), Article 10(2); *Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast)*, *Official Journal of the European Union* (*EU directive on open data 2019*), L172/56.

170 *ICCPR* (1966), UNTS, vol. 999, I–14668.

171 Section 15(3). See also the more general grounds on which rights protected in the Charter may be 'limited': s 7(2).

172 *Constitution Act 1975* (Vic).

173 Article 19, *The public's right to know: principles on right* to *information legislation*, London, 2016, pp. 4–5 ('Principle 1: Maximum disclosure'), 7–8 ('Principle 4: Limited scope of exceptions').

174 OVIC, *Submission 55*, 15 January 2024, pp. 29 (quotation), 30; Article 19, *The public's right to know: principles on right* to *information legislation*, London, 2016 (see p. 2 regarding the endorsement of the Principles by the UN Special Rapporteur in 2019).

The Article 19 organisation has also given a useful account of the kinds of 'legitimate' restrictions on the disclosure of information, which accords well with international law, international and regional standards,[175] and national norms and laws:[176]

> [T]he legitimate aims which may justify non-disclosure should be provided in the law … and … limited to matters recognized under international law such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.[177]

Similarly, the 2022 UNESCO Survey on Public Access to Information regarding legal, and related, 'guarantees for public access to information' found a consistent range of authorised restrictions on that right:[178]

> Out of the 114 responding countries and territories with access to information legal guarantees, 96% (110) reported that their respective legal guarantees explicitly mention having permissible exemptions that are elaborated in well-defined categories and [in] terms of which certain requests for information may be legally denied.[179]

Figure 2.1, below, displays the commonest, based on responses to the survey, 'permissible exemptions' to the provision of information.

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175 See, for example, *Aarhus Convention 1998*, Article 4 (4)(a)–(f) (adverse effect on 'confidentiality of the proceedings of public authorities'; '[i]nternational relations, national defence or public security'; '[t]he course of justice'; 'confidentiality of commercial and industrial information', '[i]ntellectual property rights'; '[t]he confidentiality of personal data and/or files'); *Tromso Convention*, Article 3(1) (limitations with 'the aim of protecting … a. national security, defence and international relations; b. public safety; c. the prevention, investigation and prosecution of criminal activities; d. disciplinary investigations; e. inspection, control and supervision by public authorities; f. privacy and other legitimate private interests; g. commercial and other economic interests; h. the economic, monetary and exchange rate policies of the State; i. the equality of parties in court proceedings and the effective administration of justice; j. environment; or; k. the deliberations within or between public authorities concerning the examination of a matter.'); *EU directive on open data 2019*, [28] ('concerns in relation to privacy, protection of personal data, confidentiality, national security, legitimate commercial interests … [and] intellectual property rights of third parties should be duly taken into account, according to the principle "as open as possible, as closed as necessary".').

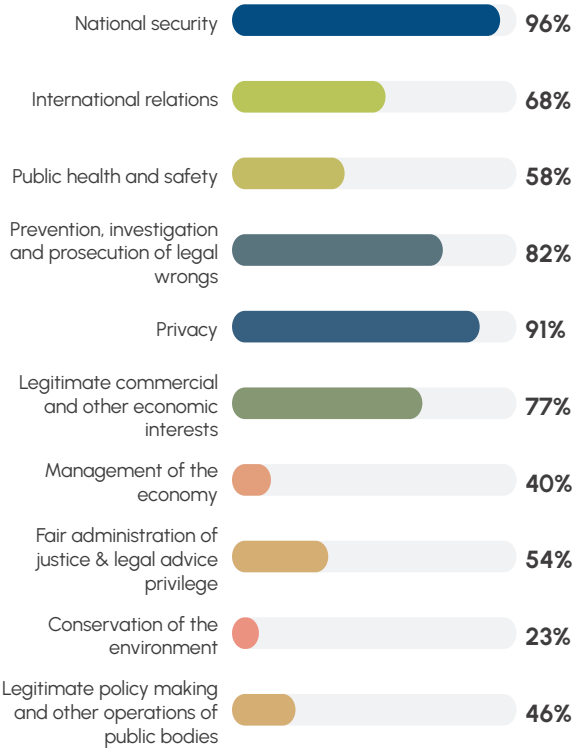
176 See, for example, UN Educational, Scientific and Cultural Organization (UNESCO), *A steady path forward: UNESCO 2022 report on public access to information* (SDG 16.10.2) (*A steady path forward*), pp. 7, 16.

177 Article 19, *The public's right to know: principles on right* to *information legislation*, London, 2016, p. 8.

178 *A steady path forward*, pp. 3 ('Short summary'), 6 (quotation) 7, 16.

179 Ibid., p. 16.

Figure 2.1 Permissible exemptions in Access to Information legal guarantees



Source: UNESCO, *A steady path forward: UNESCO 2022 report on public access to information* (SDG 16.10.2), Paris, 2023, p. 16.

2.5.2 Exceptions in Part III

OVIC has observed that the 'drafting of these provisions is complex and convoluted', which can cause inconsistent use between agencies and run counter to best practice principles, especially the maximum disclosure principle.[180]

Note that the following process-based provisions in pt III of the current FOI Act are examined in Chapter 4 of this report: ss 24A (repeat requests, including the issue of vexatious applicants), 25A(1) (voluminous requests[181]) and s 25A(5) ('obviously exempt'[182] documents requests).[183]

Section 14

Section 14 of the current FOI Act excludes a range of documents from the requirement to be assessed under it, including documents already available to members of the public for payment of a fee, charge or purchase price.[184] However, the section is long,

180 OVIC, *Submission 55*, 15 January 2024, p. 115.

181 Ibid., pp. 118–120.

182 Ibid., pp. 120–121.

183 See Section 4.2.2 in Chapter 4 of this report.

184 Section 14 also excludes a range of documents available to members of the public in the State Library of Victoria and Public Record Office of Victoria: *FOI Act 1982* (Vic) s 14(1)(c), (2).

confusing and does not clearly exclude all material 'freely available' to people without a charge of any kind, such as information on an agency's website.[185]

OVIC has recommended that all 'freely available' information (including documents), accessible with or without a charge, should be excluded, as is the case in New South Wales and Queensland:[186]

> This is a common sense … [recommendation] to enable agencies to decline requests for information or documents that are already in the public domain. This was the original intent of section 14 to reduce duplication of efforts where the document is available another way.[187]

The Committee agrees that, under the new Victorian push FOI Act, there should be no formal right to request access to 'publicly available'[188] information.

RECOMMENDATION 6: That, under the new Victorian 'push' FOI Act, there be no formal right to request access to publicly available information.

2.5.3 Exemptions in Part IV

Overview and a new three-part test for exemptions

OVIC amply demonstrated in its submission to this Inquiry the wide range of defects in Victoria's current FOI Act with respect to the nature, scope and expression of exemptions and public interest tests (where they exist).[189]

These defects, as this report has shown, mean that Victoria's pull FOI Act is showing its age and falling short of international laws and standards and best practice principles. For these reasons, the Committee has recommended that Victoria move to a new push system governed by a best practice, third-generation Right to Information Act.

With regard to the exemptions in pt IV of the Act, OVIC has identified that they are drafted in often arcane language, 'confusing' to understand, inordinately 'technical to apply', and not fully consistent with each other.[190] More significantly, as noted above, the exemptions are often not 'limited' and 'narrowly drawn' as the best practice principles require.[191]

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185 OVIC, *Submission 55*, 15 January 2024, p. 115.

186 OVIC, *Submission 55*, 15 January 2024, p. 115 (see *GIPA Act 2009* (NSW) ss 58–59; *RTI Act 2009* (Qld) s 53). See also Name withheld, *Submission 48*, 15 January 2024, pp. 29–30; Department of Health (Victoria), *Submission 68*, 27 February 2024, pp. 2–3.

187 OVIC, *Submission 55*, 15 January 2024, p. 115.

188 The term 'publicly available' is used in s 59 of the *GIPA Act 2009* (NSW).

189 OVIC, *Submission 55*, 15 January 2024, pp. 122–133, 148.

190 OVIC, *Submission 55*, 15 January 2024, pp. 122 (quotation), 123.

191 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 7 (quotation), 8.

The evidence received to this Inquiry overwhelmingly supported OVIC's characterisation of the current exemptions and their operation. The Committee received evidence that the exemptions are hard to understand and over-used in risk-averse way, with a starting position of asking what information can be withheld rather than released.[192]

OVIC has further argued that the principle of maximum disclosure should be incorporated in any new push Act through a presumption in favour of disclosure of information:[193]

> [T]here 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 [on limited exceptions], 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…', would go some ways to address the tendency amongst some agencies to apply exemptions first and think about access later.[194]

The Committee agrees with OVIC's recommendations that there be a new Part in the new push Act entitled '"Limited exceptions" or similar, to cover the limited reasons an agency or Minister may refuse access to information', and that it incorporate 'a presumption in favour of access' and state that it is Parliament's intention that the limited exceptions 'be interpreted narrowly.'[195]

RECOMMENDATION 7: That the new third-generation 'push' FOI Act in Victoria include, in accordance with best practice principles:

- a Part entitled 'Limited exceptions', or similar, to encompass the limited reasons an agency or minister can refuse access to information; and
- a clear presumption in favour of disclosure of information; and
- a statement that Parliament intends the limited exceptions be interpreted narrowly.

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192 See, for example, Save Albert Park, *Submission 8*, 19 November 2023; VGSO, *Submission 13*, 29 November 2023; TPAV, *Submission 19*, 1 December 2023; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023; LIV, *Submission 22*, 4 December 2023; Liberty Victoria, *Submission 25*, 8 December 2023; ARTK, *Submission 27*, 14 December 2023; ALA, *Submission 28*, 21 December 2023; Nine, *Submission 29*, 22 December 2023; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024; The Centre for Public Integrity, *Submission 37*, 11 January 2024; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024; Melbourne Press Club, *Submission 41*, 14 January 2024; Name withheld, *Submission 48*, 15 January 2024; Jordan Brown et al., *Submission 49*, 15 January 2024; VALS, *Submission 54*, 15 January 2024; Victorian Bar, *Submission 57*, 15 January 2024.

193 OVIC, *Submission 55*, 15 January 2024, pp. 123–124.

194 Ibid., p. 124.

195 Ibid., pp. 15–16 (quotation), 124.

A new three-part test for exemptions

Similar to the exemptions, OVIC has shown that the current public interest tests, where they exist, are complex, unhelpfully varied and difficult to interpret and apply, leading to 'inconsistent outcomes'.[196] The weight of evidence received from other stakeholders throughout this Inquiry strongly corroborates OVIC's criticisms.[197]

OVIC follows the organisation Article 19's approach in recommending a three-part test for any new push Act, one which distils the relevant international law and standards and best practice principles, and which has been endorsed by the UN.[198]

OVIC sets out the three-part test as follows:

a. the ATI [access-to-information] 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).

A best practice ATI law should follow this three-part test for exceptions to the right of access.[199]

Again, the weight of evidence received during this Inquiry supported the tenor of this approach to discerning and applying the public interest.[200]

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196 Ibid., p. 123.

197 VGSO, *Submission 13*, 29 November 2023, pp 6–8; ARTK, *Submission 27*, 14 December 2023, pp. 3–4; Nine, *Submission 29*, 22 December 2023, pp. 2–4; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 4–8; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 9, 29–58; Latrobe City Council, *Submission 69*, 8 March 2024, p. 4; Nine, Response to Integrity and Oversight Committee questions on notice, 29 April 2024, 3–8; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 13–14; Lachlan Fitch, President, Victoria Branch and Jeremy King, Member, Victoria Branch, ALA, public hearing, 21 December 2023, *Transcript of evidence*, pp. 52–53; Wayne Gatt, Secretary, TPAV, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 4–5; Royce Miller, Senior Reporter, *The Age*, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 7–8, 13; Sam White, Editorial Counsel, Nine Publishing, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 13; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 31.

198 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 2.

199 OVIC, *Submission 55*, 15 January 2024, p. 126. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 7–8.

200 IPC NSW, *Submission 12*, 27 November 2023, pp. 2–3; ACT Ombudsman, *Submission 14*, 29 November 2023, pp. 2–4; OIC Qld, *Submission 16*, 30 November 2023, pp. 2–3; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 6; Liberty Victoria, Submission 25, 8 December 2023, pp. 4–5, 7, 10; ARTK, *Submission 27*, 14 December 2023, pp. 3–4; Nine, *Submission 29*, 22 December 2023, pp. 2–3; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 5–6; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 6–8; Dr David Solomon AM, *Submission 44*, 15 January 2024, p.1; Name withheld, *Submission 48*, 15 January 2024, pp. 12–16, 41-50; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 6–7, 27, 29–33, 49–50, 51–52; VALS, *Submission 54*, 15 January 2024, pp, 10, 20–21; Jordan Brown, freelance journalist, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 6–7; VO, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, p. 2; Iain Anderson, ACT Ombudsman, public hearing, Melbourne, 26 February 2026, *Transcript of evidence*, pp. 16–17; Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, *Transcript of evidence*, pp. 8–9, 12–13; Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, *Transcript of evidence*, p. 1.

However, one should note the Solomon Review's argument, with which the Committee agrees, that there are a 'small number of true exemptions—those without a public interest test'.[201] The Solomon Review explained the rationale for these 'true exemptions' as follows:

> These exemptions do not include a public interest test because the Parliament has, in effect, decided that the public interest in the exemption is of such importance that it would not be outweighed by other factors.[202]

This is discussed below in the sections on Cabinet documents, law enforcement and integrity agencies, and secrecy laws. It is instructive that OVIC itself applied similar reasoning in concluding that the three-part test ought *not* apply to the legitimate interest in safeguarding legal professional privilege:[203]

> In considering whether to require [that] the three part [sic] test [apply] to legal privilege, OVIC's view is that it should not apply given the nature of the protection in legal privilege. An ATI [access-to-information] law should not seek to override legal privilege.[204]

With regard to the *first part of the three-part test*, OVIC identifies the following 'legitimate protected interests' as among those that 'may justify non-disclosure' of information, and which should be incorporated in the body of any new Act (not a schedule):[205]

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).[206]

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201 *Solomon report*, p. 2.

202 Ibid.

203 OVIC, *Submission 55*, 15 January 2024, p. 147. See also the 'Legal professional privilege' section in this chapter.

204 OVIC, *Submission 55*, 15 January 2024, p. 147.

205 Ibid., p. 127.

206 Ibid.

Regarding the *second part of the three-part test*, should an agency wish to refuse access to information they must show that disclosure 'would cause substantial harm' to a legitimate protected interest:[207]

> 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.[208]

The *third part of the three-part test* is known as the 'public interest override':[209]

> 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.[210]

The Committee notes that a number of jurisdictions have Acts containing lists of factors favouring or disfavouring—or, more bluntly, 'for' or 'against'—disclosure of information, including the Commonwealth, Queensland, New South Wales and the Australian Capital Territory.[211] OVIC did not expressly recommend including lists of these kinds of factors in push system legislation,[212] and the Committee considers that their inclusion is not preferable. The attempt to define the public interest in this way in legislation is too rigid and therefore insufficiently flexible and adaptable over time.[213]

Instead, the Committee considers that OVIC is well placed to provide guidance on how the three-part test should be interpreted and applied, including any useful factors identified in jurisdictions that use them. This makes sense given OVIC's subject-matter expertise, breadth of experience and role as a promoter of the purposes of FOI in Victoria. The Committee suggests that OVIC could develop binding guidance in its FOI Professional Standards, complemented by its FOI Guidelines, practice notes and other explanatory material. This approach received some support from Sean Morrison, the Victorian Information Commissioner:

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207 Ibid., p. 129.

208 Ibid.

209 Ibid., p. 130.

210 Ibid.

211 *FOI Act 1982* (Cth) s 11B; *RTI Act 2009* (Qld) s 49, sch 4 pts 2–4; *GIPA Act 2009* (NSW) ss 12–15; *Freedom of Information Act 2016* (ACT) s 17(1), sch 2 ss 2.1–2.2.

212 OVIC, *Submission 55*, 15 January 2024, p. 131 (but see also p. 133).

213 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal* Freedom of Information Act *1982*, Australian Government Publishing Service, Canberra, 1995 (*FOI report 1995*), p. 96 ('[The] … Review does not consider that any attempt should be made to define the public interest in the [Commonwealth] FOI Act. The public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility.'). See also Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 9 ('… I would prefer to have the more simple public interest test in the legislation itself and then to have—again, via the information commissioner—perhaps those lists of factors and guidelines that they must take account of.'); Danielle Moon and Carolyn Adams, 'Too much of a good thing? Balancing transparency and government effectiveness in FOI public interest decision making', *AIAL Forum*, no. 82, November 2015, pp. 28–39; Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Masters of Research thesis, Macquarie Law School, Macquarie University, 2015; Danielle Moon, 'Instrument, culture and myth: disclosure of "thinking process material" under the *Freedom of Information Act 1982* (Cth)', PhD thesis, Macquarie Law School, Macquarie University, 2020; Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (*Senate FOI report 1979*), Australian Government Publishing Service, Canberra, 1979, pp. 65–66.

> [The factors] … could be in the Professional Standards, or OVIC could get the power to issue guidelines and agencies could be required to take into consideration the guidelines of OVIC or practice notes … [I]f we [are] going to have purpose-based legislation … anything that can be updated without going back to Parliament potentially … is probably a recommended model …[214]

To avoid any risk of a democratic deficit in having OVIC develop and issue binding guidance on the interpretation and use of the three-part test by agencies, and to ensure Parliament's proper involvement in these matters, the Victorian Government should include in the new push FOI Act a power to make regulations with respect to OVIC's binding guidance on the three-part test. Any such regulations will be subject to the usual parliamentary scrutiny, including disallowance. For example, regulations may prescribe a list of factors concerning the determination of the public interest that OVIC may take into account in developing its official guidance through the Professional Standards or FOI Guidelines.

The Committee considers it important to identify, and include in the new push FOI Act, a concise list of what OVIC terms '[i]llegitimate interests' (also known as 'irrelevant' considerations) which 'can never justify a refusal to disclose information'.[215] These include protection of the government from 'embarrassment or a loss of confidence in the government',[216] that a disclosure 'might be misinterpreted or misunderstood' by someone,[217] that the person who developed a document (or information) has or had high seniority in an agency,[218] or that accessing a document could cause 'confusion or unnecessary debate'[219] (OVIC reports that the last-mentioned interest is often used by agencies to deny access).[220]

RECOMMENDATION 8: That the new third-generation 'push' Act in Victoria include a three-part test in accordance with best practice principles that incorporates:

- a list of legitimate protected interests; and
- a substantial harm test; and
- a public interest override.

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214 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 24. See also Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 9.

215 OVIC, *Submission 55*, 15 January 2024, pp. 128–129.

216 OVIC, *Submission 55*, 15 January 2024, p. 128 (quotation); *FOI Act 1982* (Cth) s 11B(4)(a); *RTI Act 2009* (Qld) sch 4 pt 1 cl 1; *GIPA Act 2009* (NSW) s 15(c).

217 OVIC, *Submission 55*, 15 January 2024, p. 129 (quotation); *FOI Act 1982* (Cth) s 11B(4)(b); *RTI Act 2009* (Qld) sch 4 pt 1 cl 2; *GIPA Act 2009* (NSW) s 15(d).

218 OVIC, *Submission 55*, 15 January 2024, p. 129; *FOI Act 1982* (Cth) s 11B(4)(c); *RTI Act 2009* (Qld) sch 4 pt 1 cls 3–4.

219 OVIC, *Submission 55*, 15 January 2024, p. 129 (quotation); *FOI Act 1982* (Cth) s 11B(4)(d).

220 OVIC, *Submission 55*, 15 January 2024, p. 129.

RECOMMENDATION 9: That the new third-generation 'push' Act in Victoria incorporate a list of irrelevant considerations that can never justify a refusal to disclose information, including:

- that disclosing the information might cause embarrassment to, or a loss of confidence in, the Government
- that disclosing the information might be misinterpreted or misunderstood by any person
- that access to the information could result in confusion or unnecessary debate
- the seniority of the person who created the information.

Cabinet documents

As with the overlapping exemption related to internal working documents discussed below, the Cabinet documents exemption is recognised in best practice principles[221] and international and regional law and standards.[222] The Article 19 organisation recognises a limited exception for protection of 'the effectiveness and integrity of government decision-making processes', which encompasses Cabinet documents.[223]

Current provision and rationale

While the Committee received evidence that the current exemption in Victoria's FOI Act may be too broad, and sometimes used inconsistently with the object and spirit of the Act,[224] there was significant support for the fundamental Westminster principles the exemption protects.[225]

In the Committee's view, Parliament rightly designed the current stand-alone Cabinet documents exemption as a necessary means to ensure the continued adequate

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221 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 8; See also OVIC, *Submission 55*, 15 January 2024, p. 139.

222 See, for example, *Aarhus Convention 1998*, Article 4(4)(a) ('The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law …'); *Tromso Convention*, Article 3(1)(k) ('the deliberations within or between public authorities concerning the examination of a matter'); Council of Europe, Committee of Ministers, *Recommendation Rec (2002)2 of the Committee of Ministers to member states on access to official documents* (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), IV(1)(x) ('the confidentiality of deliberations within or between public authorities during the internal preparation of a matter').

223 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 8.

224 OVIC, Submission 55, 15 January 2024, pp. 138–139. See also Peter Coaldrake, *Let the sunshine in: review of culture and accountability in the Queensland public sector: final report* (*Coaldrake report*), Brisbane, June 2022, pp. 60, 62–63; VO, *Alleged politicisation of the public sector: investigation of a matter referred from the Legislative Council on 9 February 2022—Part 2* (*Alleged politicisation of the public sector*), Melbourne, December 2023, p. 251 (Recommendation 7).

225 See, for example, OVIC, *Submission 55*, 15 January 2024, p. 137. See also Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Masters of Research thesis, Macquarie Law School, Macquarie University, 2015, p. 11 ('A fundamental tenet of modern democracy is that government ought to be accountable. Traditionally in Westminster-style governments, the expectation is that parliament holds government accountable, the electorate holds parliament accountable, and the judiciary ensure that the power of each branch is exercised within appropriate bounds.'). See also the discussions in *Opening up government*, pp. 58–59 and *Solomon report*, pp. 106–114. Ministers are collectively responsible to 'Parliament (and the public) for the whole conduct of administration' and ministers have 'individual responsibility for the administration of their departments' (Greg Taylor, *The constitution of Victoria*, Federation Press, Sydney, 2006, p. 157, quoting *FAI Insurances v Winneke* (1982) 151 CLR 342, 364).

protection of these essential principles, and should therefore not be subject to the three-part test. Moreover, the Committee considers that the scope of the current exemption appropriately encompasses the diverse range of briefing, submission and advice documents that are used to effectively inform ministers, protect robust Cabinet-room deliberations, and establish and maintain an environment within which government decisions can best be made.[226] However, the Committee has recommended, below, that the Cabinet exemption provision in Victoria's new push FOI Act be tightened to ensure that only genuine Cabinet documents come within its protection.

The Committee also received evidence favouring the introduction of a proactive administrative release scheme in Victoria, following the examples of New Zealand and Queensland.[227] However, the Committee considers that any such scheme—as with any narrowing of the current exemption—would risk weakening vital links in the chain of effective executive government in accordance with fundamental Westminster principles, and should therefore not be introduced. As the Victorian Government *Cabinet handbook* emphasises:

> As with other Westminster Governments, Cabinet['s] ... strength is maintained via adherence to a number of principles focused on shared purpose, and robust deliberation.[228]

Section 28 of the *FOI Act 1982* (Vic) makes a range of Cabinet documents absolutely exempt in order to protect the confidentiality of Cabinet processes.[229] This is linked to, and underpinned by, the fundamental Westminster doctrines and conventions of responsible government,[230] Cabinet secrecy and solidarity, and collective and individual ministerial responsibility.[231] As the Solomon Review put it:

> Cabinet and the doctrine of ministerial responsibility are at the heart of the Westminster system of Government. The system relies on secrecy to protect its central tenet: the unity of the executive government. Every country and every sub-national government that subscribes to the Westminster system has included within their freedom of information laws special exemption for Cabinet documents.[232]

Victoria's protection of Cabinet documents is therefore not unusual: indeed, all the major Westminster jurisdictions do have, as the Solomon Review noted, particular exemption provisions to protect certain Cabinet, or related government, materials

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226 See, for example, *FOI Act 1982* (Vic) s 28(1)(a)–(ba), (d).

227 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 135–137.

228 Department of Premier and Cabinet (Victoria), *Victorian Cabinet handbook*, June 2023, p. 10, <https://www.vic.gov.au/cabinet-handbook> accessed 4 August 2024.

229 OVIC, *Submission 55*, 15 January 2024, pp. 133, 138–139.

230 Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Masters of Research thesis, Macquarie Law School, Macquarie University, 2015, p. 11.

231 See, for example, the discussions in *Opening up government*, pp. 58–59 and *Solomon report*, pp. 106–114; Greg Taylor, *The constitution of Victoria*, Federation Press, Sydney, 2006, p. 157. See also *Senate FOI report 1979*, pp. 35–44.

232 *Solomon report*, p. 106.

and information.[233] As noted, the Cabinet documents exemption in s 28 of the *FOI Act 1982* (Vic) is not unique. Appendix B compares the main features of Victoria's Cabinet documents exemption with equivalent provisions in FOI legislation in other Australian jurisdictions. There is significant overlap between the kinds of Cabinet documents protected by the equivalent exemptions in the Commonwealth, New South Wales and Queensland second-generation push jurisdictions, as well as other jurisdictions with push features, such as Tasmania and the Australian Capital Territory. Official records of Cabinet, including documents disclosing Cabinet deliberations, are generally protected, as are documents created for the purpose of briefing ministers in relation to issues to be considered by Cabinet or for submission for consideration by Cabinet. The legislative provisions relating to the Cabinet documents exemption tend to be broadly drafted, though Queensland provides more guidance on the nature of the activities and kinds of documents covered by the exemption. Further, some jurisdictions, New South Wales and Queensland included, emphasise the discretion of the Premier and/or Cabinet to voluntarily release exempt information.

Consistent with the Victorian approach, the Cabinet documents exemption in the FOI legislation in other Australian jurisdictions is generally confined to documents that are less than 10 years old. There is also widespread recognition that information of a purely factual or statistical nature will not ordinarily be captured by the exemption unless it is so intertwined with opinion, recommendations or ministerial positions (considered, taken or intended to be taken) that its disclosure would disclose Cabinet deliberations or decisions.

Regarding the tightening of the Cabinet documents exemption, the Committee notes that the second-generation push Commonwealth FOI Act provides, in part, that a document is exempt if 'it was brought into existence for the *dominant* purpose' of 'submission for consideration by the Cabinet' or 'for the *dominant* purpose of briefing a Minister'.[234] Similarly, under the New South Wales *GIPA Act* exempt Cabinet documents include 'a document prepared for the *dominant* purpose of … being submitted to Cabinet'.[235] In contrast, s 28 in the current Victorian first-generation FOI Act provides that exempt Cabinet documents include documents 'prepared … for the purpose of submission for consideration by the Cabinet' or 'prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet'.[236] The Committee considers that Victoria should follow these jurisdictions in adding the qualification 'dominant' to purpose in the new push FOI Act to ensure that the protection given by the exemption is not cast too widely.

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233 *FOI Act 1982* (Cth) s 34; *GIPA Act 2009* (NSW) sch 1 cl 2; *RTI Act 2009* (Qld) s 48, sch3 cls 1–2; *Right to Information Act 2009* (Tas) ss 26–27; *Freedom of Information Act 2016* (ACT) sch 1, s 1.6; sch 2, s 2.2(a)(i); *Information Act 2002* (NT) s 45. See also *Official Information Act 1982* (NZ) ss (2)(f)–(g), 9(1); *Freedom of Information Act 2000* (UK) s 36; *Access to Information Act*, RSC, 1985, c. A-1 (Canada) s 21.

234 *FOI Act 1982* (Cth) s 34(1) (emphasis added).

235 *GIPA Act 2009* (NSW) s 14, sch 1 cl 2(1)(b) (emphasis added).

236 *FOI Act 1982* (Vic) s 28(1)(b)–(ba).

However, the Committee also notes that the New South Wales *GIPA Act* additionally provides as follows:

> a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (*whether or not the document is actually submitted* to Cabinet).[237]

This is consistent with s 28 in the Victorian FOI Act, which only requires a document to have been *prepared for* the purpose of submission for consideration by the Cabinet to qualify for exemption, and *not* to have been in fact submitted, and with OVIC's interpretation of the provision.[238] Nevertheless, the Committee considers it important to make this aspect of the exemption explicit so that the protection is unambiguously *not* limited to documents actually submitted to Cabinet.

RECOMMENDATION 10: That the Cabinet exemption provision in Victoria's new, 'push' FOI Act include reference to a document having been prepared for the 'dominant' purpose of submission for consideration by Cabinet or prepared for the 'dominant' purpose of briefing a minister in relation to issues to be considered by Cabinet, whether or not these kinds of documents are actually submitted to Cabinet.

The Westminster doctrines and conventions of collective responsibility and confidentiality are incorporated in the Victorian *Cabinet handbook*:

> Collective responsibility
>
> Cabinet decisions are collective and binding on all Ministers as government policy. Accordingly, all Ministers give their support in public debate to the collective decisions of Cabinet, even if they do not agree with them.
>
> Confidentiality
>
> The openness and frankness of discussions in the Cabinet room are protected by the strict observance of confidentiality … [A]ll Cabinet information (including verbal and written) must be kept strictly confidential and secure at all times.
>
> Unauthorised or premature disclosure of Cabinet deliberations may be prejudicial to the proper consideration of an issue by government and can be damaging to the public interest.[239]

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237 *GIPA Act 2009* (NSW) s 14, sch 1 cl 2(1)(b) (emphasis added).

238 OVIC, *Freedom of Information Guidelines: Part IV—exempt documents*, March 2024, p. 11: 'The [Cabinet documents exemption in s 28] is broad, extending to documents *beyond those that are produced to* and considered by Cabinet and its committees' (emphasis added and citing *Department of Premier and Cabinet v Newbury* [2021] VCAT 331 [12]). See also OVIC, *Submission 55*, 15 January 2024, p. 134.

239 Department of Premier and Cabinet (Victoria), *Victorian Cabinet handbook*, June 2023, p. 10, <https://www.vic.gov.au/cabinet-handbook> accessed 4 August 2024.

An apt description of Cabinet solidarity was provided by Blackburn CJ in *Whitlam v Australian Consolidated Press*:

> If any disagreement remains [among Ministers of the Crown] there must nevertheless be a decision, but it will be one which some members like less than others. Both practical politics and good government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience, he can resign. So the price of acceptance of Cabinet office is the assumption of the liability to support Cabinet decisions. The burden of that liability is shared by all …[240]

OVIC has given a useful account[241] of the kinds of Cabinet documents that are, and are not, exempt from disclosure under s 28. The following kinds of Cabinet documents *are* exempt from disclosure:

a. the official record of any deliberation or decision of the Cabinet;

b. a document that has been prepared by a Minister, or prepared by an agency on behalf of a Minister, for the purpose of submission for consideration by the Cabinet;

c. a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

d. a document that is a copy or draft of, or contains extracts from, a document referred to in … [a.–c.]; or

e. a document which, if disclosed, would involve the disclosure of any deliberation or decision of the Cabinet.[242]

The exemption is not limited to documents 'produced to and considered by Cabinet and its committees.'[243] If a document falls within one of the above five categories it is absolutely exempt.[244]

The following documents, however, are *not* exempt:

a. document that is more than 10 years old;

b. a document that contains purely statistical, technical, or scientific material, unless it would disclose any deliberation or decision of Cabinet; or

c. a document by which a decision of the Cabinet was officially published.[245]

In relying on the Cabinet documents exemption, it is important that agencies fully comply with s 28 and follow OVIC's FOI Guidelines on the provision.[246] In particular, the Guidelines states that s 28 'must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access

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240 (1985) 60 ACTR 7, 14, quoted in Greg Taylor, *The constitution of Victoria*, Federation Press, Sydney, 2006, p. 157.

241 OVIC, *Submission 55*, 15 January 2024, p. 134.

242 OVIC, *Submission 55*, 15 January 2024, p. 134; *FOI Act 1982* (Vic) s 28(1).

243 OVIC, *Submission 55*, 15 January 2024, p. 134.

244 Ibid., p. 135.

245 Ibid., p. 134.

246 OVIC, *Freedom of Information Guidelines: Part IV—exempt documents*, March 2024, p. 9.

government held information'.[247] Further, the Guidelines state that, to be exempt, a document 'must fit squarely within one of the' kinds of documents identified in s 28(1) of the *FOI Act 1982* (Vic)[248]—it is insufficient 'for the document to merely have some connection with the Cabinet or to be perceived as having a Cabinet "aroma"'.[249] This approach is consistent with the advice in the Victorian Government's *Cabinet handbook*:

> The protection of the section 28 exemption cannot be obtained by merely asserting that a document is a document of Cabinet or Cabinet Committee. For the confidentiality and integrity of documents relating to Cabinet to be protected, it must be possible to prove before VCAT that the document sought has the characteristics of an exempt document detailed in section 28.[250]

The Committee reinforces the importance of agencies not only complying with the letter of the law, with respect to s 28, but its spirit. In this regard, agencies should ensure that they are not using the s 28 exemption in an overly defensive fashion.

None of the stakeholders who contributed to this Inquiry suggested that the Cabinet exemption be removed. Indeed, there was strong support in the evidence received for the need for Cabinet confidentiality in relation to deliberations in the Cabinet room. It was understood that this is necessary for full, frank and uninhibited discussion of ideas as well as of the policy-making proposals and legislative reforms that depend on it. It was also appreciated that that protection of Cabinet deliberations is necessary to underpin Cabinet solidarity and collective ministerial responsibility: diverse perspectives can be put, robust arguments and disagreements engaged in, with, nonetheless, an expectation that ministers will unite behind the Cabinet decisions which bind them.[251]

In this context, Associate Professor Jennifer Beard helpfully submitted:

> Cabinet discussions are generally exempt from freedom of information requests on the basis that cabinet secrecy is necessary to ensure the effective operation of Cabinet discussions and government decision-making processes. The underlying rationale is that cabinet ministers must have the confidence to challenge each other in private and that disclosure has the potential to compromise the doctrine of collective responsibility and the integrity of this important and safe space of contestation. This justification

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247 Ibid., p. 11.

248 Ibid., p. 13.

249 OVIC, *Freedom of Information Guidelines: Part IV—exempt documents*, March 2024, p. 13 (quoting *Ryan v Department of Infrastructure* [2004] VCAT 2346 [33]). See also OVIC, *Submission 55*, 15 January 2024, p. 138; *Alleged politicisation of the public sector*, p. 26; *Solomon report*, p. 107.

250 Department of Premier and Cabinet (Victoria), *Victorian Cabinet handbook*, June 2023, p. 37, <https://www.vic.gov.au/cabinet-handbook> accessed 4 August 2024.

251 Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 6-7. See also The Centre for Public Integrity, *Submission 37*, 11 January 2024, p. 5; Dr Catherine Williams, Research Director, The Centre for Public Integrity public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 1, 4–5; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 20–21; Name withheld, *Submission 48*, 15 January 2024, pp. 42–43; Victoria Elliott, Commissioner, IBAC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 10 ('we do acknowledge there does need to be a protected space for fearless and frank discussions'); VALS, Submission, *Submission 54*, 15 January 2024, p. 10; Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 4.

> is particularly acute in representative democracies driven by party politics where politicians have little space to advance opinions that may be unpopular or controversial or counter to party policy.[252]

Dr David Solomon AM, who was the Chair of the Independent Review Panel that recommended that Queensland replace its pull FOI Act with a push right-to-information Act, also gave a strong defence of the place of Cabinet confidentiality within effective representative government:

> As to how the decision is reached, no, our system of government requires secrecy in relation to some decision-making—how decisions are made—to allow Cabinet to operate as a Cabinet instead of as a dictatorship, so that people can discuss things freely. It is necessary that there be Cabinet secrecy in relation to how decisions are made—who is on which side, which arguments came forward and even which departments favoured X and which would have said, 'No way.' That is inherent in our system of government, and I think there is a limit to how far [a] right to information can get into the Cabinet process.[253]

The Committee also draws attention to the importance of maintaining the critical role of a neutral public service providing free, frank and fearless advice to ministers within a relationship of trust. This also helps reduce the risk of any potential 'chilling' effects in relation to that advice and any disinclination to record that advice in writing.[254]

As Dr Solomon told the Committee:

> You need a system which—and I am talking mainly about public servants—does not encourage public servants … not [to] write notes at all, about advice that is part of the deliberative process for fear that they will be obtained by the public … and used in a way that inflicts political damage but also damages the process. In Queensland there is a public records Act which spells out … the need to record decisions but also to record process and advice. There is no doubt that in other levels of government, in the Commonwealth, for example … that there are many—this has emerged from recent royal commissions and so on—decisions where advice is simply not put on paper for fear that it will be discovered through FOI.[255]

In a similar spirit, the Committee recognises the crucial role that information, analysis and frank and fearless advice in Cabinet submissions plays in the decision-making process, by properly informing ministers on matters for deliberation so they can

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252 Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 6–7. See also The Centre for Public Integrity, *Submission 37*, 11 January 2024, p. 5; Dr Catherine Williams, Research Director, The Centre for Public Integrity public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 1, 4–5; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 20–21; Name withheld, *Submission 48*, 15 January 2024, pp. 42–43; Victoria Elliott, Commissioner, IBAC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 10; VALS, Submission, *Submission 54*, 15 January 2024, p. 10; Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 4.

253 Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 4.

254 See, for example, David Donaldson, 'Freedom of Information at risk as officials stop note-taking', *The Mandarin*, 18 May 2015; Stephen Easton, 'Record-keeping and the limits of transparency', *The Mandarin*, 16 March 2015; Stephen Easton, 'FOI laws: fixing the chilling effect on frank advice', *The Mandarin*, 18 June 2015.

255 Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 4–5.

form a view on a matter. While public servants are legally obliged to provide and record impartial and professional advice,[256] in reforming Victoria's FOI system, the Government, OVIC, the Victorian Public Sector Commission and public sector agencies themselves must be vigilant to minimise any risk of any resistance to the provision of frank, fearless and professional advice, which is properly recorded in writing. This can be advanced by emphasising the binding nature of the 'public sector values' in s 7 of the *Public Administration Act 2004* (Vic), the obligations under applicable employee codes of conduct, and, more generally, by instilling and maintaining a culture that reinforces, habituates and operationalises the values of a professional and independent public service.

Internal working documents

Under the heading 'Internal working documents', s 30(1) of the *FOI Act 1982* (Vic) provides that a document is exempt if its disclosure would, 'contrary to the public interest',

> … disclose matter in the nature of *opinion, advice or recommendation* prepared by an officer or Minister, or *consultation or deliberation* that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the *deliberative processes* involved in the functions of an agency or Minister or of the government … [emphasis added]

Section 30 'does not apply to the record of a final decision, order or ruling given in the exercise of an adjudicative function, and any reason which explains that decision, order or ruling'[257]—that is, it applies to 'working' (provisional) documents only.

Further, the provision 'does not apply to a document by reason only of purely factual material' within it, or to a document ten years after it was created.[258]

The Article 19 organisation has characterised this kind of provision as aimed at protecting 'the effectiveness and integrity of government decision-making processes' in the public sector.[259] It is recognised in the best practice principles as one of the legitimate grounds upon which to restrict access to information[260] and also in international and regional standards.[261]

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256 *Public Administration Act 2004* (Vic); VPSC, *Code of conduct for Victorian public sector employees*, Melbourne, 2015; *Public Records Act 1973* (Vic); OVIC, *Submission 55*, 15 January 2024, pp. 137–141.

257 *FOI Act 1982* (Vic) s 30(4).

258 *FOI Act 1982* (Vic) s 30(3), (6).

259 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 8. See also OVIC, *Submission 55*, 15 January 2024, p. 139.

260 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 8.

261 See, for example, *Aarhus Convention 1998*, Article 4(4)(a) ('The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law …'); *Tromso Convention*, Article 3(1)(k) ('the deliberations within or between public authorities concerning the examination of a matter'); Council of Europe, Committee of Ministers, *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents* (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), IV(1)(x) ('the confidentiality of deliberations within or between public authorities during the internal preparation of a matter').

The exemption has also been supported in all major inquiries into FOI[262] and by evidence received in this Inquiry.[263]

OVIC agrees that it 'is legitimate for' a push FOI Act to have an exemption to the right to access information 'to protect the effectiveness and integrity of internal decision making processes', since governments 'need to be able to run internal operations effectively and have time to think'.[264]

Further, the Committee received evidence from stakeholders in the legal and health sectors in defence of the internal working documents exemption in terms of how it supports the integrity and effectiveness of their performance of statutory, and other, functions, especially in relation to investigations, complaint-handling and reviews.[265]

The Victorian Legal Services Board and Commissioner (VSLBC), which regulates the legal profession in Victoria and handles complaints about lawyers, explained that the release of internal working documents can be against the public interest.[266] In particular, they can:

- have a chilling effect on lawyers, consumers and other parties cooperating with an investigation
- provoke unnecessary and confusing debate over organisational positions that are only provisional, in contrast to final, authoritative decisions supported by reasons
- (as only internal drafts) suffer from 'omissions, misconceptions or errors'
- reveal evidence-gathering and other investigative techniques, undermining their effectiveness in the future.
- undermine the trust and confidence of persons who have provided information to the VLSBC in confidence, 'making it more difficult to obtain complete information efficiently'.[267]

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262 See, for example, *Senate FOI report 1979*, pp. 218, 220; *FOI report 1995*, pp. 114–115; *Opening up government*, pp. 61–62; Australian Government, *Review of the* Freedom of Information Act 1982 *and* Australian Information Commissioner Act 2010 (*Hawke review*), Canberra, 2013, pp. 47–49; UK Government, *Your right to know: the Government's proposals for a Freedom of Information Act*, The Stationery Office, London, December 1997, pp. 19–20; Access to Information Review Task Force, *Access to information: making it work for Canadians—report of the Access to Information Review Task Force*, Ottawa, 2002, pp. 47–50; Information Commissioner of Canada, *Striking the right balance for transparency: recommendations to modernize the* Access to Information Act, Gatineau, 2015, pp. 55–56. See also Office of the Information Commissioner of Canada, *Observations and recommendations from the Information Commissioner on the Government of Canada's review of the access to information regime*, Gatineau, 2021.

263 See Victorian Legal Services Board and Commissioner (VLSBC), *Submission 15*, 29 November 2023, p. 4; Fiona McLeay, Commissioner, VLSBC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 21; Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 12–13; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 7–8; Name withheld, *Submission 48*, 15 January 2024, p. 46.

264 OVIC, *Submission 55*, 15 January 2024, p. 139. The Committee also notes evidence received that the exemption is both too broad and overused: Name withheld, *Submission 48*, 15 January 2024, pp. 45–46; OVIC, *Submission 55*, 15 January 2024, pp. 140–141; ARTK, *Submission 27*, 14 December 2024, pp. 3–4; Jordan Brown et al., *Submission 49*, 15 January 2024, p. 32.

265 VLSBC, *Submission 15*, 29 November 2023, p. 4; Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 7–8.

266 VLSBC, *Submission 15*, 29 November 2023, p. 4.

267 Ibid.

Andrew Mariadason from the Royal Melbourne Hospital told the Committee that the internal working documents exemption was, similarly, important in ensuring necessary candour and trust among staff so matters such as clinical incidents can be thoroughly explored through root-cause analyses and investigations:[268]

> To … give you an example of an internal working document, it is where there is an adverse patient event or some scenario that occurs and an incident report is generated as a result of that … clinical event [such as a 'code blue … major medical emergency'] will not typically be stored in the electronic medical record, but if there is a request for that incident report then we would go through the same process of looking into whether that document … should be released … Sometimes they are drafts and opinions of people as to why perhaps that code blue occurred …
>
> [Medical personnel] should be free to air their opinions about things without necessarily having formulated a view on those and have some sort of protection around those opinions.[269]

The Committee considers that these kinds of frank and fearless analyses and investigations are in the interests of patient care, staff professionalism and welfare, risk-minimisation and organisational improvement. Without appropriate protection of internal working documents produced in the course of these analyses and investigations, information vital to these purposes (including notes resulting from brainstorming, hypothesising, conjecture and opinion) may be withheld.

The Committee considers that this evidence bolsters the justification for a comparable internal working document exemption to be retained in a new push FOI Act in Victoria.[270]

In considering the internal working documents exemption, OVIC recognised that a range of harms that should be prevented:

- prejudice to the effective formulation or development of public policy;
- frustration of the success of a policy, by premature disclosure of that policy;
- 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
- undermining of the effectiveness of testing or auditing procedures.[271]

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268 Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 7–8.

269 Ibid.

270 See also Danielle Moon and Carolyn Adams, 'Too much of a good thing? Balancing transparency and government effectiveness in FOI public interest decision making', *AIAL Forum*, no. 82, November 2015, pp. 28–39; Danielle Moon, 'A matter of balance? Freedom of Information and deliberative documents', Masters of Research thesis, Macquarie Law School, Macquarie University, 2015, pp. 13, 21; Danielle Moon, 'Instrument, culture and myth: disclosure of "thinking process material" under the *Freedom of Information Act 1982* (Cth)', PhD thesis, Macquarie Law School, Macquarie University, 2020, pp. 2–3, 33, 205–206, 235.

271 OVIC, *Submission 55*, 15 January 2024, pp. 139–140 (citing Toby Mendel, *Freedom of information: a comparative legal survey*, 2nd edn, UNESCO, Paris, 2008 and OVIC, *Practice note: section 30—opinion, advice, recommendation, consultation or deliberation*).

The Committee agrees with OVIC that in a new push FOI Act, the exemption should be narrowly drawn, subject to the three-part test (including the irrelevant considerations prohibition, substantial harm test and public interest override).[272] The name of the limited exception should be changed from the over-broad label 'internal working documents', which focuses on the nature of the document, to the protection of internal decision-making processes, or similar, which better describes the purpose of the exception and the harms it is designed to prevent.[273]

VCAT has suggested that it would be beneficial for the 'well settled' criteria it developed in *Friends of Mallacoota Inc v Department of Planning and Community Development* to be incorporated in a revised internal working documents exemption.[274] The criteria are as follows:

> Regard must be had to both the nature of the information and the nature of the document.
>
> The more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed.
>
> Draft internal working documents or preliminary advices and opinions are more generally than not be [sic] inappropriate for release. That is particularly so when the final version of the document has been made public.
>
> It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill informed [sic] debate, to give a spurious standing to such documents or promote pointless and captious debate about what might have happened rather than what did.
>
> Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.
>
> It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.[275]

The Committee agrees that these criteria should be taken into account in developing a new, limited exception to protect the integrity and effectiveness of internal decision-making in Victoria. Respectfully, however, since the Committee is recommending a new push FOI Act, rather than merely amendment of selected provisions of the current Act, it does not recommend wholesale incorporation of these criteria into the new legislation. Naturally, the criteria reproduced above were developed

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272 OVIC, *Submission 55*, 15 January 2024, p. 140.

273 Ibid.

274 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 5; *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889, [51] (see also [53]–[54]); *Department of Transport v Davis (Review and Regulation)* [2024] VCAT 79.

275 *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889, [51].

in response to the particular text of s 30 within the context of the current pull FOI Act, including its object. Therefore, all the criteria, in the way they are framed and phrased, may not be suitable for a new push Act that includes a new object and orientation, which are reflected, for example, in a new three-part test and narrowly drawn limited exceptions. To the extent that VCAT's criteria are used in the new FOI regime, the Committee considers they should be incorporated in OVIC FOI's Professional Standards that will identify and describe factors for or against disclosure of information.[276]

As OVIC notes, under current Victorian case law an agency is authorised to consider whether disclosure 'would be likely to inhibit frankness and candour' in communication, deliberation and advice.[277] OVIC has emphasised that such inhibition should not be presumed or assumed, but rather would have to be established through evidence to satisfy the three-part public interest test: '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.'[278] In this regard, OVIC approved the view of the New South Wales FOI review in 2009:

> [Public sector staff] 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.[279]

OVIC further cites the obligations of agency officers under the Code of Conduct for Public Sector Employees to give independent 'robust and frank advice', and keep accurate records open to proper scrutiny when required:[280]

> 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.[281]

The view of the New South Wales FOI review, quoted above, may readily be accepted provided, to reiterate, there is appropriate protection of a space in which public officials can brainstorm, identify and frame issues, hypothesise, research, synthesise, think, discuss, consult, deliberate, problem-solve, distil, draft, reflect, review, revise, edit and authorise—all necessary steps in producing sound, authoritative advice and decisions.[282]

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276 See 'Overview and a new three-part test for exemptions' in Section 2.5.3 of this chapter, above.

277 OVIC, *Submission* 55, 15 January 2024, p. 140 (citing *Coulson v Department of Premier and Cabinet* [2018] VCAT 229).

278 OVIC, *Submission 55*, 15 January 2024, p. 140 (citing *Graze v Commissioner of State Revenue* [2013] VCAT 869).

279 OVIC, *Submission 55*, 15 January 2024, p. 141 (quoting *Opening up government*, p. 57).

280 OVIC, *Submission 55*, 15 January 2024, p. 141 (citing Victorian Public Sector Commission (VPSC), *Code of conduct for Victorian public sector employees 2015*, 5.1–5.6 ('Demonstrating Accountability').

281 OVIC, *Submission 55*, 15 January 2024, p. 141 (citing *'ES4' and Department of Jobs, Precinct and Regions (Freedom of Information)* [2022] VICmr 195).

282 See also Name withheld, *Submission 48*, 15 January 2024, p. 46 ('Deliberative [information] has been established as information that is "pre-decisional" or an agency's "thinking processes—the process of reflection, for examples [sic], upon the wisdom or expediency of a proposal or a particular decision or a course of action"'—quoting *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588).

The Committee agrees with OVIC that any new exception in a new push FOI Act in Victoria be 'limited to protecting the effectiveness and integrity of internal decision-making processes' and be 'subject to the substantial harm test and public interest override',[283] that is, the three-part test.

RECOMMENDATION 11: That there be a new limited internal information exception, subject to the recommended three-part test, to protect the integrity and effectiveness of internal decision-making processes.

Law enforcement and integrity agencies

Law enforcement and related functions are recognised under the best practice principles and international and regional law and standards as a legitimate interest to be protected through limited exceptions to disclosure of information.[284]

While the Committee received evidence from some stakeholders that Victoria Police has understood the law enforcement exemption in the current FOI Act (s 31) too broadly, and overused it,[285] the Committee considers that these issues can be addressed by: the application of the recommended three-part test (requiring an agency to establish that any claimed substantial harm is not outweighed by any public interest favouring disclosure); process changes to reduce delays and agency non-compliance; cultural change; and enhancements to the role, powers and operation of OVIC as the regulator.[286]

Documents identified in section 31(1) to be subject to the three-part test

As an exemption, the Committee considers that the documents identified in s 31(1) should be subject to the recommended three-part test in the new push FOI Act in Victoria.

Section 31(1) is an exhaustive list of documents that are exempt provided that:

- their disclosure 'would, or would be reasonably likely to' have prejudicial, or other negative, consequences; and

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283 OVIC, *Submission 55*, 15 January 2024, p. 17.

284 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 8; *EU directive on open data 2019,* [28], Article 1(2)(d)(ii) ('the protection of national security (namely, State security), defence, or public security'); UN Human Rights Committee, *General comment no. 34: Article 19: freedoms of opinion and expression*, CCPR/C/GC/34, 102nd session, Geneva, 11–29 July 2011, [29]; *Aarhus Convention 1998*, Article 4(4)(c); *Tromso Convention*, Article 3(1)(a)–(c); Council of Europe, Committee of Ministers, *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents* (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), IV(1)(i)–(iii); *Tshwane Principles*, p. 11 (definition of 'Legitimate national security interest'), pt II (especially Principle 9(a)(iv)); UN, Human Rights Council, 49th session, 28 February–1 April 2022, *Freedom of opinion and expression: report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/49/38, 10 January 2022, [6]; Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Strasbourg, 28.I.1981, Article 9(1)(a) ('protecting State security, public safety …').

285 Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 44–52. See also South-East Monash Legal Service Inc, *Submission 67*, 29 January 2024, p. 6.

286 See Chapters 3 and 4 in this report regarding proactive disclosure and process issues.

- the documents do not fall within one of the categories in s 31(2) (see the discussion below); and
- it is not in the public interest for them to be disclosed (s 31(2)).

The documents listed in s 31(1) are those whose disclosure would, or would be reasonably likely to:

- … prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
- … prejudice the fair trial of a person or the impartial adjudication of a particular case;
- … disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
- … disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- … endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

The s 31(1) exemption does not apply to certain kinds of information that would ordinarily fall within the scope of the exemption, if it is in the public interest for them to be disclosed.[287] These documents are listed in s 31(2) and include documents revealing that an investigation has 'exceeded the limits imposed by law' and ones 'revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law'. The s 31(2) exception to the exemption in s 31(1) is essentially a recognition of the fact that it will generally be in the public interest for documents revealing unlawful conduct by a law enforcement agency to be released.[288] This is an important exception because there is a good purpose served in exposing unlawful conduct.

The Committee considers that the:

- s 31(2) exception should be retained in the new FOI legislation;
- three-part test should *not* apply to documents captured by the s 31(2) exception, given that the s 31(1) exemption cannot be used to refuse access to them.[289]

What this will mean in practice is that a s 31(2) document will be assessed for release like other non-exempt information requested by applicants.

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287 *FOI Act 1982* (Vic) s 31(2), (6).

288 OVIC, *Freedom of Information guidelines: Part IV—exempt documents*, Melbourne, 2024, p. 89.

289 The Committee considers that it will be important, when drafting provisions to this effect for the new Act, that attention be given to whether an agency or minister must be required to consult with a relevant agency, minister or authority in order to seek their view on whether a document should be released (as is the case presently under the *FOI Act 1982* (Vic) s 31(6)).

Documents in section 31(3)–(4) to be absolutely exempt and not subject to the three-part test

Section 31(3) provides that, '[n]otwithstanding anything to the contrary in this section', intelligence documents created by certain units of Victoria Police are exempt. That is, they are *not* subject to the current public interest test in s 31(2).

Section 31(4) provides that, '[d]espite anything to the contrary in this section', documents 'contained in the Register established and maintained under section 62 of the Sex Offenders Registration Act 2004' are exempt. That is, they are *not* subject to the current public interest test in s 31(2).

Given the sensitivity of the information encompassed by s 31(3)–(4), the importance of the institutions, processes and interests they are designed to protect, and the gravity of the harm public disclosure will cause, they should, to use the characterisation of the Queensland Solomon Review, be treated as being among a 'small number of true exemptions—those without a public interest test'.[290] The *Solomon report* explained the rationale for these kinds of exemptions as follows:

> These exemptions do not include a public interest test because the Parliament has, in effect, decided that the public interest in the exemption is of such importance that it would not be outweighed by other factors.[291]

Accordingly, the Committee considers that the current absolute exemptions for these documents should be *retained* in a new push FOI Act in Victoria.

Further, following Victoria Police's recommendation,[292] the Committee considers that s 31(3) should be revised to comprehensively encompass all intelligence information received and held by the Police.

Section 31(3) of the FOI Act 1982 (Vic) provides in part:

> Notwithstanding anything to the contrary in this section, a document is an exempt document if it is a document created by the Bureau of Criminal Intelligence or … by the Intelligence and Covert Support Command of Victoria Police.

Victoria Police explained[293] that when the current FOI Act was introduced:

> [i]ntelligence practitioners were centralised in the Bureau of Criminal Intelligence which later became [the] ICSC [Intelligence and Covert Support Command] …

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290 *Solomon report*, p. 2.

291 Ibid.

292 Victoria Police, *Submission 24*, 7 December 2023, pp. 10, 15.

293 Ibid., pp. 9–10.

> Recent organisational change means intelligence practitioners are no longer centralised within ICSC. This has created a legislative gap where intelligence documents created by intelligence practitioners outside ICSC are no longer expressly protected. Due to this gap, there is an ongoing risk that general intelligence[294] used to inform operational policing including crime prevention and community safety is not protected where it does not otherwise fit within section 31(1) exemptions.

For these reasons, Victoria Police recommended that s 31(3) be 'amended to address this legislative gap and reflect current operational practices.'[295] The Committee agrees that a provision should be included in a new push FOI Act in Victoria to protect information created or held by Victoria Police for law-enforcement intelligence purposes.

RECOMMENDATION 12: That, in a new 'push' FOI Act in Victoria, there be equivalent provisions to the *Freedom of Information Act 1982* (Vic) s 31(3)–(4), and that they not be subject to the three-part test.

RECOMMENDATION 13: That a provision be included in the new 'push' FOI Act for Victoria that adequately protects information created or held by Victoria Police for law-enforcement intelligence purposes.

In the remainder of this section, the Committee addresses two issues: the appropriateness of provisions protecting the work of integrity agencies, and exemptions relating to IBAC in the police oversight context.

Current provisions protecting the work of integrity agencies

The Committee received evidence in support of the current provisions[296] that protect the investigative and related work of Victorian integrity agencies, and none against.

The relevant provisions are:

- IBAC: *FOI Act 1982* (Vic) s 31A and *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('*IBAC Act 2011* (Vic)') s 194
- OVIC: *FOI Act 1982* (Vic) s 6AA

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294 'General intelligence is used to inform operational policing … For example, general intelligence may relate to drug trafficking methods used by criminal organisations … If this information is not protected from release, it can be used for purposes to counter crime prevention …' (Victoria Police, *Submission 24*, 7 December 2023, p. 9).

295 Victoria Police, *Submission 24*, 7 December 2023, p. 10.

296 See IBAC, *Submission 17*, 1 December 2023, pp. 3 ('IBAC documents are subject to a range of exemptions and exceptions to the FOI Act. This is necessary given the sensitive and covert nature of IBAC's investigative work, and the protection of people who provide information to IBAC.'), 4; VI, *Submission 10*, 23 November 2023, pp. 2, 3 ('[I]t is important that section 102 [of the *Victorian Inspectorate Act 2011* (Vic) ('*VI Act 2011* (Vic)')] is retained given the complex and sensitive information contained in the documents in the VI's possession.'); VO, *Submission 60*, 22 January 2024, p. 3 ('It is the VO's strong view that it is necessary to preserve this provision [s 29A] to protect the confidentiality of dealings with respondent agencies.').

- VI: *Victorian Inspectorate Act 2011* (Vic) ('*VI Act 2011* (Vic)') s 102
- VO: *Ombudsman Act 1973* (Vic) s 29A.

Section 31A(1) of the current FOI Act provides that a document 'is an exempt document if its disclosure under … [the] Act would, or would be reasonably likely to':

- 'prejudice an investigation undertaken' by IBAC; or
- disclose 'the identity of any person or body (other than Victoria Police) who has provided information to' IBAC; or
- 'disclose methods or procedures for preventing, investigating or dealing with protected disclosures [sic], complaints or notifications relating to corrupt conduct or police personnel conduct' that 'would, or would be reasonably likely to, prejudice … [their] effectiveness'
- 'endanger the lives or physical safety of persons engaged in or in connection with the IBAC's functions or persons who have provided information' to it.

Section 194(1) of the *IBAC Act 2011* (Vic) provides that the *FOI Act 1982* (Vic) 'does not apply to a document that is in the possession of *any person or body* to the extent to which the document discloses information that relates to' [emphasis added] recommendations made by IBAC, or investigations conducted by IBAC, or reports (including draft reports) on investigations, conducted under the *IBAC Act 2011* (Vic). Section 194(2) of the *IBAC Act* 2011 (Vic) provides that the *FOI Act 1982* (Vic) 'does not apply to a document that is in the possession of *the IBAC* to the extent to which the document discloses information that relates to' [emphasis added] complaints, information received by IBAC under s 56, notifications to IBAC and preliminary inquiries.

Under s 6AA of the *FOI Act 1982* (Vic), this Act does not apply to documents in OVIC's possession 'to the extent that the document[s]' are 'the subject of' or disclose information 'that relates to' FOI reviews, complaints or investigations.[297]

Section 102 of the *VI Act 2011* (Vic) provides that the *FOI Act 1982* (Vic) 'does not apply to a document that is in the possession of a relevant person or body[298] to the extent to which the document discloses information that relates to' complaints made, inspections made, investigations conducted, recommendations made, and reports (including 'progress report[s]'), under the *VI Act 2011* (Vic).

Section 29A of the *Ombudsman Act 1973* (Vic) provides that the *FOI Act 1982* (Vic) 'does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to' complaints made (including referred complaints to the VO), enquiries or investigations conducted, recommendations made, and reports (including draft reports), under the *Ombudsman Act 1973* (Vic).

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297 See also OVIC, *Freedom of Information Guidelines: Part I—Preliminary*, v 1.0, May 2023, pp. 36–37.

298 The phrase 'relevant person or body' is defined in s 102(2) of the *VI Act 2011* (Vic), which lists a wide range of persons and bodies, *including* the VI, a VI officer, IBAC, the office of the Ombudsman, an Ombudsman officer, OVIC and an OVIC officer.

Together, these provisions properly support integrity agencies in lawfully, appropriately and effectively performing their functions to, variously, identify, investigate and otherwise address corruption, wrongdoing, maladministration and non-compliance in the public sector and improve integrity in that sector. Without the retention of comparable provisions alongside the development of a new push FOI Act in Victoria, the Committee considers that the important investigative, complaint-handling and review work of integrity agencies, which depends in certain circumstances on secrecy and confidentiality, would be undermined.

RECOMMENDATION 14: That the new 'push' FOI Act in Victoria retain protections for the work of integrity agencies comparable to those presently found in the *Freedom of Information Act 1982* (Vic) ss 6AA and 31A, *Independent Broad-based Anti-corruption Act 2011* (Vic) s 194, *Ombudsman Act 1973* (Vic) s 29A and *Victorian Inspectorate Act 2011* (Vic) s 102.

Operation of s 194 of the IBAC Act 2011 (Vic) and FOI in the police oversight context

The Police Association Victoria (TPAV) raised with the Committee[299] concern over whether, under s 194(1)(b) of the *IBAC Act 2011* (Vic), exemption from the *FOI Act 1982* (Vic) applies when a matter (such as a complaint about police) has come to IBAC but has been referred back under s 73 of the *IBAC Act 2011* (Vic) to Victoria Police to investigate. This is in a context in which the overwhelming majority of such matters coming to IBAC are referred back to Victoria Police for investigation—in 2018, for example, the parliamentary IBAC Committee found that IBAC only investigates around 2% of complaints about police.[300]

If the current FOI Act does not apply to Victoria Police investigations of complaints about police, on referral from IBAC, then a large field of its activity would not be subject to FOI, even though Victoria Police *is* subject to the Act, and complainants, for example, would not be able to make an FOI application for a document.[301] Nevertheless, TPAV gave evidence that Victoria Police does rely on the exemption in s 194(1)(b), which provides that a document is exempt if it 'discloses information that relates to … an investigation conducted under this Act [the *IBAC Act 2011* (Vic)]'. TPAV's

299 TPAV, *Submission 19*, 1 December 2023, pp. 4–6; Wayne Gatt, Secretary, TPAV, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 3–4.

300 Parliament of Victoria, IBAC Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Melbourne, September 2018, p. xviii ('The vast majority of complaints are referred back to Victoria Police for investigation. IBAC investigates around 2% of the allegations that it determines warrant investigation, referring the remainder back to police, while Professional Standards Command (PSC), Victoria Police, investigates approximately 10% of the complaints it receives, referring the rest to regions, departments or commands.').

301 See the discussion in Parliament of Victoria, IBAC Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Melbourne, September 2018, pp. 264–268.

evidence is consistent with evidence received by the parliamentary IBAC Committee, which was reported on in 2016 and 2018.[302]

Uncertainty over the s 194(1)(b) exemption persists in part due to conflicting cases at VCAT, with one, *Gilmore,*[303] holding that Victoria Police is covered by the exemption and another, *Marke*,[304] that it is not.

The Committee considers that *Marke* is better in law, being more consistent with 'a plain reading of the text of s 194 of the IBAC Act, supported by its statutory context, purpose and legislative history'—namely, that the provision sought to exempt documents disclosing information relating to an investigation *conducted by IBAC*, not one conducted by Victoria Police.[305] Significantly, this is also OVIC's view, which is expressed in its FOI Guidelines:

> For the purposes of section 194(1)(b), 'an investigation conducted under the IBAC Act' means an investigation *conducted by IBAC* according to the processes and powers under the provisions of the IBAC Act. It does not mean an investigation conducted by a third party, even if that investigation was referred to the third party by the IBAC.[306] [emphasis added]

In 2018, Ms Christine Howlett, then Director—Prevention and Communication at IBAC, suggested that an amendment to s 194

> to make clear that a police investigation following a referral is not an investigation 'conducted under the IBAC Act [2011 (Vic]' would make unmistakably clear that documents collected by Victoria Police during an investigation following referral are not exempt under section 194.[307]

The IBAC Committee followed this suggestion and accordingly recommended that such an amendment be made to s 194.[308] However, no such amendment has been made to s 194, and there continues to be concern and uncertainty over it.

For these reasons, the Committee recommends an amendment to s 194 to make clear that a Victoria Police investigation on referral is not an investigation under the *IBAC Act 2011* (Vic), and that Victoria Police is not exempt from the FOI Act on that basis.

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302 Parliament of Victoria, IBAC Committee, *Strengthening Victoria's key anti-corruption agencies?*, Melbourne, February 2016, pp. 75–78; Parliament of Victoria, IBAC Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Melbourne, September 2018, pp. 264–268.

303 *Gilmore v Victoria Police FOI Division* [2018] VCAT 899, [90]; TPAV, *Submission 19*, 1 December 2023, p. 5.

304 *Marke v Victoria Police FOI Division* [2018] VCAT 1320, [168]; TPAV, *Submission 19*, 1 December 2023, p. 5.

305 *Marke v Victoria Police FOI Division* [2018] VCAT 1320, [168]. See also TPAV, *Submission 19*, 1 December 2023, 6 ('the Association views *Marke* as a victory for common sense and the correct application of the rules of statutory interpretation').

306 OVIC, *Freedom of Information Guidelines: Part IV—exempt documents*, March 2024, p. 126 (citing *Marke v Victoria Police FOI Division* [2018] VCAT 1320, [7]–[8], [65]–[69]).

307 Parliament of Victoria, IBAC Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Melbourne, September 2018, p. 267.

308 Ibid., p. 268 (Recommendation 53).

RECOMMENDATION 15: That the Victorian Government seek to amend s 194 of the *Independent Broad-based Anti-Corruption Act 2011* (Vic) to make clear that a Victoria Police investigation following a referral from the Independent Broad-based Anti-Corruption Commission (IBAC) is not an investigation 'conducted under the IBAC Act', so that documents collected by Victoria Police during such an investigation are not exempt under s 194 from the operation of the *Freedom of Information Act 1982* (Vic).

Legal professional privilege

Under s 32(1) of the *FOI Act 1982* (Vic), documents subject to 'legal professional privilege or client legal privilege' are exempt documents.[309] As OVIC explains, legal privilege has a vital purpose in promoting

> the public interest in the proper conduct of litigation and the provision of legal advice between a client and their lawyer … by protecting confidential communications between a lawyer and their client, to allow them to speak freely.[310]

Given this purpose, the Committee agrees with OVIC that the exemption for legal privilege should be retained in any new push FOI Act in Victoria, and, moreover, not be subject to the recommended three-part test.[311]

The Committee also agrees with OVIC, however, that, under the legal privilege exemption in a new Act, agencies and ministers be required, before 'refusing access'[312] to a document, to 'consider waiving privilege'.[313] This would be more consistent with the best practice principle of maximum disclosure and the approach in the Commonwealth[314] and New South Wales[315] push jurisdictions.[316]

Under the relevant New South Wales provision,

> [i]f an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.[317]

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309 OVIC, *Submission 55*, 15 January 2024, p. 147.

310 Ibid.

311 Ibid.

312 Ibid., pp. 17 (Recommendation 55), 147.

313 Ibid.

314 *FOI Act 1982* (Cth) s 42(2) ('A document is not an exempt document … if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.').

315 *GIPA Act 2009* (NSW) sch 1 cl 5.

316 OVIC, *Submission 55*, 15 January 2024, p. 147.

317 *GIPA Act 2009* (NSW) sch 1 cl 5(2).

RECOMMENDATION 16: That, under the new, third-generation 'push' FOI Act in Victoria, agencies and ministers must consider waiving legal professional privilege before refusing access to a document on this ground.

Privacy

Section 33(1) of the *FOI Act 1982* (Vic) provides that a

> document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information[318] relating to the personal affairs of any person (including a deceased person).

Under sub-s (2A), an agency or minister must, in deciding whether to disclose personal information, 'take into account … whether … disclosure … would, or would be reasonably likely to, endanger the life or physical safety of any person'. There is also a provision that authorises agencies and ministers to deny access to a document containing health information about the person requesting it if they reasonably believe that providing it 'would pose a serious threat to the life or health' of that person.[319]

Section 33 also provides protections in relation to release of information that would expose persons to a greater risk of experiencing family violence.[320]

The privacy exemption reflects an important liberal value that individuals be protected from unreasonable intrusions by others, including the state, into their lives and personal information, and that they maintain an appropriate level of control and autonomy over themselves in leading their lives.[321] This value is associated with the 'dignity' rationale for FOI described in Chapter 1.[322] As OVIC has observed:

> 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 …[323]

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318 This 'includes information … that identifies any person or discloses their address or location; or … from which any person's identity, address or location can reasonably be determined' (*FOI Act 1982* (Vic) s 33(9)).

319 *FOI Act 1982* (Vic) s 33(4).

320 *FOI Act 1982* (Vic) s 33(2AB)–(2AC), (2C) (see also s 33A).

321 OVIC, *Submission 55*, 15 January 2024, p. 141. See also Beate Roessler and Judith DeCew, 'Privacy', *The Stanford encyclopedia of philosophy* (Winter 2023 edn), 19 October 2023, <https://plato.stanford.edu/entries/privacy> accessed 13 July 2024.

322 See Section 1.6.2.

323 OVIC, *Submission 55*, 15 January 2024, p. 141.

Moreover, there is a human right to privacy,[324] and it well recognised as a legitimate ground on which to restrict access to information.[325]

The need for an appropriate exemption to protect personal information from unreasonable disclosure was well-supported in evidence provided to the Committee,[326] especially from health sector stakeholders, who have to carefully manage sensitive clinical information involving health care professionals, patients and their family members.[327]

In its submission,[328] OVIC made the following suggestions concerning the privacy exemption, with which the Committee agrees:

- the three-part test should apply to the exemption to strike 'the right balance' between the protection of privacy and the fostering of open government
- that agencies should use best practice 'access-by-design' tools to minimise the recording of personal information, and segregate it where necessary so information can more readily be disclosed while protecting privacy[329]
- that OVIC should issue tailored guidelines to help agencies using the three-part test more accurately and consistently discern whether, in a particular case, it is in the public interest to disclose personal information.

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324 *UDHR* (1948), Article 12; *ICCPR* (1966), Article 17; ECHR (1950), Article 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; Beate Roessler and Judith DeCew, 'Privacy', *The Stanford encyclopedia of philosophy* (Winter 2023 edn), 19 October 2023, <https://plato.stanford.edu/entries/privacy> accessed 13 July 2024.

325 See, for example, *Tromso Convention*, Article 3(1)(f); *EU directive on open data* (2019), [28], Article 1(2)(h); Council of Europe, Committee of Ministers, *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents* (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), IV(1)(iv); Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, ETS 108, Strasbourg 28.1.1981 ('Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples.'—Preamble); Beate Roessler and Judith DeCew, 'Privacy', *The Stanford encyclopedia of philosophy* (Winter 2023 edn), 19 October 2023, <https://plato.stanford.edu/entries/privacy> accessed 13 July 2024.

326 See, for example, IBAC, *Submission 17*, 1 December 2023, pp. 2–3, 5; Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW AI Institute and UNSW Allens Hub, University of New South Wales, *Submission 21*, 1 December 2023, p. 4; LIV, *Submission 22*, 4 December 2023, p. 4; Victoria Police, *Submission 24*, 7 December 2023, pp. 3–4, 5–9, 14; Peninsula Health, *Submission 38*, 12 January 2024, p. 2 ('There are sound public policy and safety and wellbeing reasons for maintaining some of the exemptions, particularly in respect of sensitive health information.'); Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 4; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 2, 4–5, 7; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 11–13.

327 See, for example, Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 2, 4–5, 7; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 11–13.

328 OVIC, *Submission 55*, 15 January 2024, p. 142.

329 See also Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 5.

RECOMMENDATION 17: That, with regard to the limited exception for privacy in Victoria's new third-generation 'push' FOI Act,

- the three-part test apply to it
- agencies use best practice 'access-by-design' tools to minimise the recording of personal information, and segregate it where necessary so information can more readily be disclosed while protecting privacy
- the Office of the Victorian Information Commissioner issue tailored guidelines to help agencies using the three-part test more accurately and consistently determine whether, in a particular case, it is in the public interest to disclose personal information.

Further, OVIC has expressly recommended[330] that in a new push FOI Act the definition of 'personal information' in the *Privacy and Data Protection Act 2014* (Vic)[331] replace the phrase 'information relating to the personal affairs of a person', which is in the current FOI Act.[332] This is to ensure a consistent meaning of this information and more coherent and efficient oversight and administration of the two Acts by OVIC.[333] The Committee agrees with this recommendation.

RECOMMENDATION 18: That a new 'push' FOI Act in Victoria use the definition of 'personal information' that is in the *Privacy and Data Protection Act 2014* (Vic).

Public sector employees' and ministers' personal information

Another area in which a balance must be struck between the disclosure of personal information in the service of public sector accountability, and the denial of disclosure in the interests of privacy and other public interests, is that of agency employees' and ministers' personal information.[334]

OVIC's official view is that the personal information of agency officers 'is not automatically exempt':[335]

> 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.[336]

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330 OVIC, *Submission 55*, 15 January 2024, pp. 17, 142.

331 The *Privacy and Data Protection Act 2014* (Vic) s 3 defines 'personal information' as follows: 'personal information means information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the Health Records Act 2001 applies …'

332 *FOI Act 1982* (Vic) ss 5(1) (definition of 'record'), 39, 53A(1)(b).

333 OVIC, *Submission 55*, 15 January 2024, pp. 141–142.

334 OVIC, *Submission 55*, 15 January 2024, pp. 142–143.

335 Ibid., p. 142.

336 Ibid.

OVIC advises agencies to take into account various factors when considering whether to release information[337]—see Box 2.2, below.

Box 2.2 Releasing public sector employees' and ministers' personal information: OVIC guidance

OVIC guides agencies to consider the following factors:

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.

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, or the sensitivity of the employee's role in the agency (for example, an undercover police officer).

Source: OVIC, *Submission 55*, 15 January 2024, pp. 142–143.

While the Committee considers this guidance sound, it emphasises the importance of appropriately protecting agency employees' rights to privacy and their safety.[338]

Commercial-in-confidence

Section 34 of the *FOI Act 1982* (Vic) exempts certain business, financial or commercial information from disclosure in order to protect the commercial interests of individuals, businesses or government agencies when engaging in trade or commerce—in particular by preventing unreasonable exposure to disadvantage.[339]

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337 Ibid., pp. 142–143.

338 Peninsula Health, The Royal Melbourne Hospital and Latrobe City Council expressed concern about risks to the safety, welfare and wellbeing of staff when personal information identifying them is released—Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 4; Latrobe City Council, *Submission 69*, 8 March 2024, pp. 4–5.

339 OVIC, *Submission 55*, 15 January 2024, p. 143; *FOI Act 1982* (Vic) s 34.

While OVIC recognises it may be justified to exempt certain information of this kind to safeguard commercial interests, this will not always be the case.[340] In their view, therefore, it is essential that these interests be subject to the three-part test:

> 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.
>
> 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.[341]

Regarding 'private organisations', OVIC considers that they should reasonably 'expect more public scrutiny over their dealings' when they contract with government.[342] This might include, when justified, disclosure to the public of their business, financial or commercial information,[343] and this understanding should be incorporated in the terms of Victorian government procurement contracts.[344]

Further, OVIC argues that when a government agency undertakes financial or commercial transactions it is 'not necessarily … engaging in trade or commerce'—[345] for example, if the agency is entering into contracts 'to fulfil their statutory functions and deliver governmental services.'[346] As OVIC elaborates:

> 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.[347]

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340 OVIC, *Submission 55*, 15 January 2024, p. 143. See also Name withheld, *Submission* 48, 15 January 2024, p. 48 ('There will always be situations … where this sort of information will need to be protected so as not to devalue the ability of agencies or business in getting value for money or the best cost-benefit outcomes.').

341 OVIC, *Submission 55*, 15 January 2024, pp. 143–144. See also Name withheld, *Submission* 48, 15 January 2024, p. 48 ('The rationale behind this is that any business, financial or commercial undertaking with government is done at the expense of taxpayer funds. This should have a presupposition of greater accountability in favour of the public interest.'); Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 57–58; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 3, 7.

342 OVIC, *Submission 55*, 15 January 2024, p. 144. See also Kaitlyn Oliver, 'Accountability and redress mechanisms for outsourced government services', *Australian Journal of Administrative Law*, vol. 28, no. 3, 2021, pp. 149–165—especially pp. 157 ('Greater transparency is available for public services directly provided by the government, and, unless the public interest is made a priority in contractual arrangements with private contractors, an accountability gap will arise.'), 158 (noting that 'the [Australian] federal government is obliged under s 6C of the … [*FOI Act 1982* (Cth)] to take contractual measures to ensure they are entitled to get documents relating to the performance of contracts'); *FOI Act 1982* (Cth) s 6C.

343 OVIC, *Submission 55*, 15 January 2024, p. 144 (citing *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427, [477]).

344 OVIC, *Submission 55*, 15 January 2024, p. 144.

345 Ibid.

346 OVIC, *Submission 55*, 15 January 2024, p. 144 (citing *Pallas v Road Corporation* [2013] VCAT 1967).

347 OVIC, *Submission 55*, 15 January 2024, p. 144.

For these reasons, OVIC has recommended,[348] first, that relevant government policies and contracts, such as those developed by the Victorian Government Purchasing Board,[349] be revised to include a requirement that agencies have a clause in all procurement contracts between government and private organisations that these agreements 'should be open to public scrutiny'.[350] Second, OVIC has recommended that, in circumstances in which a Minister or agency has engaged consultants, independent contractors or legal advisers, they be prohibited from denying access to information that only 'shows the agency or Minister fulfilling a statutory function and fulfilling or delivering a governmental service.'[351]

The Committee agrees that these recommendations help strike a better balance between the protection of private and government commercial interests and the promotion of transparency, accountability and probity in the public sector.[352]

RECOMMENDATION 19: That, under the new 'push' FOI Act in Victoria, government agencies be required to include, in their procurement contracts with private organisations, a clause prescribing that these agreements are subject to public scrutiny.

RECOMMENDATION 20: That, when a minister or agency has engaged legal advisers, consultants and independent contractors, that the minister or agency is not allowed to deny access to information which merely demonstrates that the minister or agency is performing a statutory function or providing a governmental service.

Secrecy laws

Section 38 of the *FOI Act 1982* (Vic) provides that 'an exempt document' is one containing any information disclosure of which is prohibited by another enactment (a 'secrecy law'), whether the prohibition in the secrecy law is absolute or qualified.

OVIC criticises this provision as inconsistent with the FOI best practice principles favouring maximum disclosure and the underpinning rationales for access to information: transparency, accountability and open government within a representative democracy.[353]

Specifically, OVIC argues that the current broad nature of s 38, as an absolute class-based, rather than content-based, exemption conflicts with the best practice

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348 Ibid., p. 17 (Recommendation 52).

349 'The Victorian Government Purchasing Board sets the policies that govern procurement of non-construction goods and services across all Victorian government departments and some specified entities.'—*Victorian Government Purchasing Board*, 18 June 2024, <https://www.buyingfor.vic.gov.au/victorian-government-purchasing-board-vgpb> accessed 12 July 2024.

350 OVIC, *Submission 55*, 15 January 2024, p. 17 (Recommendation 52).

351 Ibid., p. 17 (Recommendation 53).

352 The Committee draws on OVIC, *Submission 55*, 15 January 2024, p. 17 (Recommendations 52–53) in doing so.

353 OVIC, *Submission 55*, 15 January 2024, p. 145. See also Name withheld, *Submission 48*, 15 January 2024, p. 50.

principle that 'Disclosure takes precedence',[354] which is organisation Article 19's Principle 8: 'Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.'[355]

OVIC also argues, more broadly, that s 38 is inconsistent with international law and standards which lie behind best practice access-to-information laws.[356] This view is consistent with their argument for a new, overarching three-part test to apply to the disclosure of information,[357] which the Committee has endorsed.

To reiterate, this test means that, in accordance with the maximum disclosure presumption, access to information will only be denied when: (1) it is necessary to protect a legitimate interest (for example, national security or the protection of the integrity of investigations and intelligence), and (2) if disclosure 'would be likely to cause substantial harm to that protected interest (the harm test)', and (3) that harm is not outweighed by a public interest in disclosure ('the public interest override').[358] Currently, no such test exists, and an official is not required to weigh these matters in applying the absolute exemption under s 38. As OVIC observed:

> 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 [access-to-information] law. It does not support the principle that secrecy laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.[359]

However, the Committee notes that there is support in international and regional laws and standards for the protection in the public interest of secret and confidential information in limited circumstances and in accordance with narrowly drawn exceptions.[360]

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354 OVIC, *Submission 55*, 15 January 2024, p. 145 (citing Article 19, *The public's right to know: principles on right* to *information legislation*, London, 2016, p. 12).

355 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 12.

356 OVIC, *Submission 55*, 15 January 2024, pp. 145–146.

357 Ibid., p. 126.

358 OVIC, *Submission 55*, 15 January 2024, p. 126. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 7.

359 OVIC, *Submission 55*, 15 January 2024, p. 145.

360 See, for example, *Tromso Convention*, Preamble, Article 3(1)(a), (c), (f)–(h), (k); Council of Europe, Committee of Ministers, *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents* (adopted by the Committee of Ministers on 21 February 2002 at the 84th meeting of the Ministers' Deputies), I (definition of 'official documents'), IV (1) (i–v, x), 2; UN Human Rights Committee, *General comment no. 34: Article 19: freedoms of opinion and expression*, CCPR/C/GC/34, 102nd session, Geneva, 11–29 July 2011, pp. 5–9; UN, Human Rights Council, 49th session, 28 February–1 April 2022, *Freedom of opinion and expression: report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/49/38, 10 January 2022, pp. 3, 6; *EU directive on open data 2019*, [28], [36], Articles 1(2)(d)–(e), 10(1); *Aarhus Convention 1998*, Article 4(4); *The Global Principles on National Security and the Right to Information* (*Tshwane Principles*) (2013), Preamble ('striking the appropriate balance between the disclosure and withholding of information is vital to a democratic society'), Principle 1(c), Principle 3(a)–(b), Principle 9(a)(iv) ('Information pertaining to, or derived from, the operations, sources, and methods of intelligence services, insofar as they concern national security matters'). See also *A steady path forward*, p. 16; Centre for Law and Democracy and Democracy Reporting International, *International standards on transparency and accountability*, Briefing Paper 47, March 2014, pp. 8, 10–11.

Further, it should be noted that similar provisions to s 38 exist in Commonwealth, New South Wales and Queensland FOI laws.[361] The rationale for these exclusions is that Parliament has decided that the disclosure of certain secret, confidential or otherwise sensitive information will never be in the public interest.[362] The Solomon Report, as noted in the Committee's examination of exemptions relating to law enforcement and integrity agencies, described these exclusions as 'true exemptions—those without a public interest test'.[363] The Report justified them as follows:

> These exemptions do not include a public interest test because the Parliament has, in effect, decided that the public interest in the exemption is of such importance that it would not be outweighed by other factors.[364]

Like the Solomon Review, the Committee agrees that any such absolute exemptions should be strictly limited in number and clearly prescribed.[365]

OVIC referred to the Commonwealth Attorney-General's 2023 report on its review of federal secrecy provisions.[366] The report made 11 recommendations, all of which were accepted by the Government; the report included recommendations 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
    - … 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).[367]

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361 *FOI Act 1982* (Cth) s 38, sch 3 ('Secrecy provisions'); *GIPA Act 2009* (NSW): s 11, sch 1 ('Information for which there is conclusive presumption of overriding public interest against disclosure) cl 1 ('Overriding secrecy laws'); *RTI Act 2009* (Qld) ss 47(3)(a) (refusal of access to 'exempt information'), 48 ('Exempt information'), sch 3 ('Exempt information') cl 12.

362 *Solomon report*, p. 2.

363 Ibid.

364 Ibid.

365 See *Solomon report*, p. 2 ('small number of true exemptions').

366 OVIC, *Submission 55*, 15 January 2024, p. 146; Attorney-General's Department (Cth), *Review of secrecy provisions: final report*, Canberra, 2023.

367 OVIC, *Submission 55*, 15 January 2024, p. 146. See also Attorney-General's Department (Cth), *Review of secrecy provisions: final report*, Canberra, 2023, pp. 4, 8–9.

OVIC recommends that a review of this kind is warranted regarding 'all secrecy, confidentiality, and exclusion provisions in Victorian legislation' in accordance with principles listed above:[368]

> 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.[369]

The Committee agrees that such a review is warranted, bearing in mind the need to balance the public interest in access to information with the public interest in secrecy and confidentiality protections where appropriate and narrowly drawn. As the Attorney-General's *Review of Secrecy Provisions* report recognised:

> … Open and accountable government is fundamental to our democracy, and secrecy offences sit within a broader context of mechanisms that protect or facilitate access to Commonwealth information. …
>
> Secrecy offences play a legitimate and important role in protecting the confidentiality of certain Commonwealth information where an unauthorised disclosure or other dealing may cause harm to public interests, such as national security and public safety, or harm to the relationship of trust between individuals and/or entities and the Australian government.[370]

As part of the recommended review, the Victorian Government may consider making a reference to the Victorian Law Reform Commission to examine selected law reform aspects.[371]

RECOMMENDATION 21: That, as part of its consideration of law reforms relating to FOI in Victoria, the Victorian Government review the appropriateness of secrecy, and related, legislative provisions in the State, taking into account the 12 secrecy-offence principles identified in the Commonwealth Attorney-General's *Review of secrecy provisions: final report* (2023).

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368 OVIC, *Submission 55*, 15 January 2024, p. 146.

369 Ibid.

370 Attorney-General's Department (Cth), *Review of secrecy provisions: final report*, Canberra, 2023, p. 4 (see also p. 101: 'There can be a range of reasons why information, including sensitive information, is provided to government by individuals, entities and other governments. In providing this information, there is an expectation that it will only be used for the purposes for which it was provided or required.'). See also Australian Law Reform Commission, *Secrecy laws and open government in Australia: report*, Report 112, Sydney, 2009, pp. 18, 21 ('Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not.'—quoting *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, [98]–[99]), 22 ('As part of the spectrum of information handling in the public sector, secrecy laws may serve a legitimate role in generating personal responsibility for the handling of Commonwealth information.'), 23 (on 'striking a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential'), 25, 549–550; Lyria Bennett Moses and Louis de Koker, 'Open secrets: balancing operational secrecy and transparency in the collection and use of data by national security and law enforcement agencies', *Melbourne University Law Review*, vol. 41, no. 2, 2017, pp. 530–570, especially pp. 536, 538 ('While transparency is crucial to sustain democratic controls over government, particularly in the context of data practices, it is also recognised that some aspects of government require a level of confidentiality or secrecy to support operational effectiveness. This is particularly relevant in relation to NSLE [national secrecy and law enforcement] agencies.'), 555.

371 Under the *Victorian Law Reform Commission Act 2000* (Vic) s 5(1)(a).

2.6 Conclusion

In this chapter, the Committee has explored how well the current pull FOI policy model underpinning the *FOI Act 1982* (Vic) is working after more than forty years in the State, drawing on a wide range of jurisdictions.

The Committee found that the system is heavily oriented towards formal applications for documentary material and straining under the weight of a complex legislative framework—one that neither meets best practice nor serves the key rationales for access to information, including transparency, accountability and participation.

The question then became whether the Act could be, at best, finetuned or, at worst, patched-up. The Committee found that Victoria's first-generation FOI legislation cannot be repaired, or even renovated, to fit in with the third generation. Instead, the legislation needs to be rebuilt from the ground up.

The Committee recommends that Victoria move from a pull to a push system with a new Right to Information Act reflecting international standards and best practice. Accordingly, in evaluating the object (purpose) provision, the definition of document and the nature of the current exceptions and exemptions, the Committee shifted its focus to how they would be treated under a new push system Act. The Committee closely examined a range of exemptions under the Act, recognising that the right to information is not absolute and that 'limited exceptions' will continue to have a proper place if designed in accordance with best practice principles.

An important recommendation in this regard is the replacement of the current ad hoc, complex and inconsistent public interest tests with a simpler and coherent overarching three-part test for access to information rather than 'documents'. The test is underpinned by a presumption that favours disclosure of information and, if refusal of access is being considered, requires an agency to demonstrate (1) that they are protecting a legitimate interest, (2) that they can establish that disclosure will cause substantial harm to that interest and, even so, (3) that this harm is not outweighed by a public interest in access.

The next chapter takes up two core components of push FOI systems—proactive disclosure and informal release of information.

Chapter 3
Proactive and informal release of information

3.1 Introduction

It is evident to the Committee, as many submissions to the Inquiry highlighted,[1] that Victorian agencies and ministers are struggling to process the volume of Freedom of Information (FOI) requests they receive, and that the regulator, the Office of the Victorian Information Commissioner (OVIC), is struggling to deal with its FOI workload.

As OVIC and others noted, the data shows that increasing demand, backlogs and processing delays are driving high numbers of FOI complaints and review applications to the regulator.[2] In turn, the FOI workload of the Victorian Civil and Administrative Tribunal (VCAT) has increased, as has the 'cost to government and the civil justice system' of administering the FOI scheme.[3] The situation is so dire that Victoria's current 'pull'[4] FOI system has been described by the regulator as 'unsustainable'.[5]

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1 See, for example, Office of the Victorian Information Commissioner (OVIC), *Submission 55*, 15 January 2024, pp. 32–36; Victorian Inspectorate (VI), *Submission 10*, 23 November 2023, p. 2; Victorian Government Solicitor's Office, *Submission 13*, 29 November 2023, pp. 4–6; Victorian Legal Services Board and Commissioner, *Submission 15*, 29 November 2023, pp. 2, 5– 6; Victoria Legal Aid (VLA), *Submission 18*, 1 December 2023, p. 6, The Police Association Victoria (TPAV), *Submission 19*, 1 December 2023, pp. 2–3; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2, 8–9; Law Institute of Victoria (LIV), *Submission 22*, 4 December 2023, pp. 1–2; Victoria Police, *Submission 24*, 7 December 2023, pp. 4, 13; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 6–10; Australia's Right to Know (ARTK), *Submission 27*, 14 December 2023, pp. 1–3; Australian Lawyers Alliance (ALA), *Submission 28*, 21 December 2023, pp. 5–12; Nine, *Submission 29*, 22 December 2023, pp. 2–4; William Summers, *Submission 30*, 27 December 2023, pp. 2–4; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 2, 5; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 1, 3–4; Peninsula Health, *Submission 38*, 12 January 2024, pp. 2, 4; Melbourne Press Club, *Submission 41*, 14 January 2024, p. 1; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 9, 12–17; Department of Families, Fairness and Housing (Victoria) (DFFH), *Submission 50*, 15 January 2024, p. 4; Municipal Association of Victoria (MAV), *Submission 51*, 15 January 2024, pp. 2–6; Victorian Aboriginal Legal Service (VALS), *Submission 54*, 15 January 2024, pp. 7–8, 16–18; The Australia Institute (TAI), *Submission 61*, 18 January 2024, pp. 1, 6–15; Name withheld, *Submission 64*, 24 January 2024, pp. 1–2; South-East Monash Legal Service Inc (SEMLS), *Submission 67*, 29 January 2024, pp. 5–9; Latrobe City Council, *Submission 69*, 8 March 2024, pp. 2–4.

2 OVIC, *Submission 55*, 15 January 2024, pp. 31–36; TAI, *Submission 61*, 18 January 2024, pp. 7, 9, 11–12, 14. TAI noted that between OVIC's establishment in 2017/18 and 2022/23, the proportion of FOI requests processed by Victorian agencies and ministers within the statutory time frame fell from 82% to 79%, and that the proportion of requests processed 45 days or more outside the statutory time frame rose from 3% to 13%.

3 OVIC, *Submission 55*, 15 January 2024, pp. 32 (quotation), 35–36. OVIC noted that, while FOI review applications to VCAT comprised only 0.16% of all agency and ministerial FOI decisions in 2022/23, such applications had increased by 122% in the eight years to 2022/23, placing significant strain on VCAT's capacity to hear FOI matters, and resulting in significant delays in such proceedings being decided. OVIC also noted that the combined cost to agencies and ministers of administering the FOI scheme increased by 14% in the eight years to 2022/23.

4 A 'pull' FOI system is an information access model that generally 'require[s] the public to make requests for information from agencies ('pulling' information out)' with 'limited [statutory] mechanisms or incentives for proactive or informal release by agencies or Ministers' (OVIC, *Submission 55*, 15 January 2024, p. 24).

5 OVIC, *Submission 55*, 15 January 2024, p. 33.

Since OVIC's establishment in 2017, the number of FOI requests received annually by Victorian agencies and ministers has increased almost year-on-year, hitting an all-time high of 48,117 requests in 2022/23, the highest of any Australian jurisdiction.[6] Indeed Victoria receives significantly higher FOI requests per capita than its 'push'[7] counterparts.[8] Efforts to increase the number of FOI practitioners within agencies have been unsuccessful in addressing the problem given that their workload increased by over 32% in the eight-year period to 2022/23.[9]

So, too, the number of FOI complaints received annually by OVIC has increased over time, as has the proportion of those complaints relating to delay by agencies and ministers in processing requests within statutory or agreed time frames.[10] Further, the number of FOI review applications received annually by OVIC and the proportion of those applications decided outside the statutory time frame has increased.[11] OVIC has, additionally, made little progress in reducing the average number of days taken to finalise an FOI complaint,[12] and the number of FOI review applications received annually by OVIC remains stubbornly high.[13]

There are strong indications that Victorian agencies and ministers can release more information proactively and informally than they currently do. In 2022/23, they granted partial or full access in 97% of FOI requests,[14] the highest rate of any Australian jurisdiction and part of a longer term trend.[15] Additionally, OVIC noted that in 2022/23, 56% of its FOI review decisions differed from the agency's or minister's original decision, demonstrating 'a tendency to deny access to information that should be released'.[16]

The Committee agrees with OVIC and others that the current problems with the functioning of Victoria's FOI scheme arise principally from structural deficiencies in its FOI system that need to be addressed through major legislative reform.[17] The *FOI Act*

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6 OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 108; OVIC, *Submission 55*, 15 January 2024, p. 32; TAI, *Submission 61*, 18 January 2024, pp. 1, 8.

7 A 'push' FOI system is an information-access model that 'emphasise[s] proactive and informal release of information in the first instance, and which aim[s] to make formal request[s] a last resort' (OVIC, *Submission 55*, 15 January 2024, p. 24).

8 OVIC (OVIC, *Submission 55*, 15 January 2024, p. 32) has noted that while Victoria received 6.6 FOI requests per capita in 2021/22, the Commonwealth, New South Wales (NSW) and Queensland push jurisdictions received, respectively, 1.4, 2.7 and 3.5 requests per capita during that same period.

9 OVIC, *Submission 55*, 15 January 2024, p. 32.

10 Which in 2022/23 comprised 69.4% of all Freedom of Information (FOI) complaints to OVIC (OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 81). See also OVIC, *Submission 55*, 15 January 2024, pp. 33–34.

11 Noting that, in 2022/23, 40% of FOI review decisions were made outside the 30-day statutory time frame and the average number of days taken to finalise an FOI review was 120 days, well in excess of the 30-day statutory time frame (OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 77; *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') s 49J).

12 Which was 111.1 days in 2022/23 (OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 87).

13 OVIC, *Submission 55*, 15 January 2024, pp. 32–36; OVIC, *Annual report 2022–23*, Melbourne, September 2023, pp. 65, 70, 77, 81, 87; OVIC, *Annual report 2017–18*, Melbourne, September 2018, pp. 37, 40, 43, 44, 50.

14 In 2022/23, full access was granted in 64% of FOI requests, partial access was granted in 33% of requests, and access was denied in only 3% of requests (Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16).

15 TAI, *Submission 61*, 18 January 2024, p. 16.

16 OVIC, *Submission 55*, 15 January 2024, p. 35. See also ARTK, *Submission 27*, 14 December 2023, p. 2.

17 OVIC, *Submission 55*, 15 January 2024, pp. 5–7, 32–36, 44–45; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21.

1982 (Vic) is not well adapted to the functioning of modern government in the digital age and needs to be replaced with a new 'third-generation access-to-information law' that prioritises and facilitates proactive disclosure of government-held information.[18]

The Committee considers that a major part of the legislative reform agenda should be transitioning to a push FOI system that prioritises and facilitates proactive disclosure and informal release of government-held information and makes formal FOI requests a last resort for obtaining access to information.[19] The manifold benefits of proactive disclosure are well-known and well-established by evidence[20] and have been recognised and endorsed by all Australian Information Commissioners and Ombudsmen.[21] A secondary aspect is the need to improve the record-keeping and information-management practices of Victorian agencies and Ministers to facilitate the effective and efficient operation of a push FOI system.[22]

This chapter sets out the way forward to address these issues.

3.2 Proactive and informal release of information

3.2.1 Current mechanisms

The *FOI Act 1982* (Vic) makes provision for proactive and informal release of information.[23] The 'principle of maximum disclosure'[24] is promoted in the Object of the Act, which enshrines a right of access to government information limited only by exemptions necessary for the protection of legitimate interests.[25] This is supported by s 16 of the Act, which requires agencies and Ministers to have regard to the principle of maximum disclosure when administering the Act.

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18 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16.

19 Ibid., p. 17.

20 Office of the Information Commissioner Queensland (OIC Qld), *Submission 16*, 30 November 2023, pp. 2–3; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21. See also, for example, Johan Lidberg et al., *The culture of administering access to government information and Freedom of Information in Victoria Part II: final report*, Monash University, Melbourne, June 2021; OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 61O of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021; OVIC, *The state of Freedom of Information in Victoria: a special look at FOI in Victoria from 2019 to 2021*, Melbourne, April 2022; OVIC, *Impediments to timely FOI and information release: twelve months on*, Melbourne, October 2022; Professor Peter Coaldrake AO, *Let the sunshine in: review of culture and accountability in the Queensland public sector*, Brisbane, June 2022; Lyria Bennett Moses et al., *Informal release of information under section 8 of the* Government Information (Public Access) Act 2009 *(NSW)*, University of New South Wales (UNSW), Sydney, December 2022; Parliament of Australia, Legal and Constitutional References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023.

21 See Office of the Australian Information Commissioner (OAIC), *Joint Statement: Statement of principles to support proactive disclosure of government-held information—developed by all Australian Information Commissioners and Ombudsmen*, September 2021, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/more-guidance/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> accessed 30 April 2024.

22 Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21.

23 *FOI Act 1982* (Vic) ss 3, 16, pt II; OVIC, *Submission 55*, 15 January 2024, p. 48.

24 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 4 ('Principle 1: Maximum disclosure … [t]he principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances.').

25 *FOI Act 1982* (Vic) s 3; OVIC, *Submission 55*, 15 January 2024, p. 48.

Pt II of the Act requires agencies and councils to publish certain information in their annual reports, including information about an agency's functions and powers, the kinds of documents held by it, its FOI officers and procedures and public meetings of internal advisory bodies.[26] Agencies are also required to make available, for inspection and purchase, certain information relating to the performance of their functions and exercise of their powers (including legislative interpretation documents relevant to their enforcement of an Act or scheme, policies, procedural manuals, guidelines and practices, as well as a list of reports and other documents containing recommendations or advice prepared by or behalf of an agency).[27] Cabinet decisions must also be published.[28] Finally, providing access to information outside formal FOI mechanisms, where appropriate or required by law, is not prohibited or discouraged under the Act.[29]

3.2.2 Evaluation of current mechanisms

The main criticisms of the current proactive and informal release mechanisms in the *FOI Act 1982* (Vic) include:

- the primacy of the formal release mechanism in the Act[30]
- the lack of legal protection from civil and criminal liability for agencies and ministers releasing information informally, outside the Act, which has a chilling effect on their preparedness to release information outside formal FOI mechanisms[31]
- the lack of clear legislative authorisation and processes for informal release[32]
- the lack of clarity with respect to what information is required to be published under pt II of the Act, and what agencies are required to do to comply with pt II,[33] resulting in inconsistent approaches to releasing information proactively and to the kinds of information released proactively[34]

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26 *FOI Act 1982* (Vic) s 7. See also OVIC, *Submission 55*, 15 January 2024, p. 48.

27 *FOI Act 1982* (Vic) ss 8, 11. See also OVIC, *Submission 55*, 15 January 2024, p. 48.

28 *FOI Act 1982* (Vic) s 10. See also OVIC, *Submission 55*, 15 January 2024, p. 48.

29 *FOI Act 1982* (Vic) s 16.

30 Jordan Brown et al., *Submission 49*, 15 January 2024, p. 59.

31 OVIC, *Submission 55*, 15 January 2024, pp. 50–51: OVIC has noted that the statutory protections against civil and criminal liability in ss 62 and 63 of the *FOI Act 1982* (Vic) only apply to documents that are 'required' or 'permitted' to be released under the Act, and would not apply to information released outside the Act, including information released informally under s 16 of the Act.

32 OVIC, *Submission 55*, 15 January 2024, pp. 50–51. See also Johan Lidberg, *The culture of administering access to government information and freedom of information in Victoria: pilot study May–August 2019*, Monash University, Melbourne, September 2019; Johan Lidberg et al., *The culture of administering access to government information and freedom of information in Victoria Part II: final report*, Monash University, Melbourne, June 2021.

33 Public Record Office Victoria (PROV), *Submission 9*, 22 November 2023, p. 1; VI, *Submission 10*, 23 November 2023, p. 2.

34 LIV, *Submission 22*, 4 December 2023, pp. 3–4. See also Marion Attwater, *Submission 63*, 23 January 2024, pp. 2–6.

- the inability of pt II of the Act to adapt to technological changes in how government information is created, stored and published, diminishing its intended purpose and making it extremely difficult for agencies to comply[35]
- competing legislative provisions that promote formal FOI mechanisms as the primary means of accessing and correcting government held information[36] or which create separate but overlapping obligations with respect to transparency.[37]

Similar criticisms led to the abolition of equivalent provisions in FOI legislation in the Commonwealth, New South Wales (NSW) and Queensland jurisdictions.[38]

Best practice principles for proactive and informal release

The access model

There was widespread support in submissions and other evidence to the Inquiry for proactive and informal release of government-held information that is meaningful to the public,[39] particularly for the release mechanisms[40] in or similar to New South Wales's *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act 2009* (NSW)').[41]

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35 For example, the provisions in pt II of the *FOI Act 1982* (Vic) were intended to simplify the process of requesting hard-copy documents by helping the public to determine whether the information they were seeking was contained in 'documents' held by an agency, whereas, in the digital age, government information is frequently published on agencies' websites and via other electronic means (OVIC, *Submission 55*, 15 January 2024, p. 49).

36 For example, s 14 of the *Privacy and Data Protection Act 2014* (Vic) ('*PDP Act 2014* (Vic)') and s 16 of the *Health Records Act 2001* (Vic) ('*HR Act 2001* (Vic)'), which ensure that the *FOI Act 1982* (Vic) is the primary means of accessing and correcting personal and health information (OVIC, *Submission 55*, 15 January 2024, p. 48).

37 For example, '[t]he public transparency principles' in s 58 of the *Local Government Act 2020* (Vic), which require councils to proactively release, except in limited circumstances, information held by them, and, where possible, deal with requests for information informally—see OVIC, *Submission 55*, 15 January 2024, p. 49; OVIC, *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)*, Melbourne, September 2022.

38 OVIC, *Submission 55*, 15 January 2024, pp. 50–51.

39 See, for example, VI, *Submission 10*, 23 November 2023, p. 2; Independent Broad-based Anti-corruption Commission (IBAC), *Submission 17*, 1 December 2023, p. 2; VLA, *Submission 18*, 1 December 2023, pp. 2–3, 8; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2–3; LIV, *Submission 22*, 4 December 2023, pp. 1–4; Victoria Police, *Submission 24*, 7 December 2023, pp. 5–6; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 3–8; Health Complaints Commissioner, *Submission 26*, 12 December 2023, p. 2; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 1–2, 7–8; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 1–6; Dr David Solomon AM, *Submission 44*, 15 January 2024, p. 1; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 59–60; DFFH, *Submission 50*, 15 January 2024, p. 4; VALS, *Submission 54*, 15 January 2024, p. 18; Victorian Bar, *Submission 57*, 15 January 2024, pp. 8–9; Victorian Ombudsman (VO), *Submission 60*, 22 January 2024, p. 1–2; Marion Attwater, *Submission 63*, 23 January 2024, pp. 1–6; SEMLS, *Submission 67*, 29 January 2024, pp. 6–7, 10; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 3, 5, 7; Department of Education (Victoria), Response to Integrity and Oversight Committee questions on notice, 13 May 2024, p. 3; VO, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 5–6; Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, p. 115.

40 Otherwise known as 'access pathways'—see OVIC, *Submission 55*, 15 January 2024, p. 52.

41 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 52–82; PROV, *Submission 9*, 22 November 2023, p. 1; Information and Privacy Commission NSW (IPC NSW), *Submission 12*, 27 November 2023, pp. 2–4; Nine, *Submission 29*, 22 December 2023, p. 2; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 1–2, 4–10; Name withheld, *Submission 48*, 15 January 2024, pp. 18–19, 31–32; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 16–19; Royce Millar, Senior Reporter, The Age, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 9; VI, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, pp. 1–2.

The access model established by the *GIPA Act 2009* (NSW) is a push FOI system with two proactive and two reactive access pathways (otherwise known as release mechanisms), with the former being given prominence.[42] First, agencies are required to push certain kinds of information out to the public through the mandatory proactive release pathway 'unless there is an overriding public interest against' disclosing it. Second, they are strongly encouraged to release other information they hold through the additional proactive release pathway. Information released under the proactive pathways is published free of charge on their websites. Third, agencies are encouraged to deal with requests for information from the public informally, through the informal release pathway, which 'provides a faster and cheaper option for both the applicant and the agency'. Finally, the formal release pathway, which has set fees, time frames and administrative procedures for dealing with a request, is a path of last resort.[43]

The benefits of this approach were summarised by the New South Wales Acting Information Commissioner as follows:

> The four pathways operate as a virtuous circle. They combine to facilitate the public release of information and they preserve the right of access for citizens to that information. They collectively ensure that government can provide information to the public promptly and at the lowest reasonable cost … [In addition, the access system] provides for review rights for citizens in relation to the formal pathway, and … provides a vehicle for dealing with agency conduct that might be associated with the other pathways.[44]

The role of FOI culture

FOI culture is critical to the success of an FOI push system.[45] As Dr Danielle Moon noted, FOI legislation intended to make it easier for the public to access government-held information will not have the desired effect if agencies and Ministers 'are not interpreting and applying the law in a straightforward way … because of culture and organisational factors'.[46] This view was echoed by the Queensland Acting Information Commissioner, who cautioned:

> Agency staff need to feel confident that they will be supported if they live and breathe open government, and if there is a fear that they may be in trouble if they release information, then that impacts the culture.[47]

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42 IPC NSW, *Submission 12*, 27 November 2023, pp. 2–3; Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 1.

43 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 1.

44 Ibid., pp. 1–2.

45 See Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 21–22, 24–26, 86–95, 41, 47, 100–102, 105–107, 110, 115.

46 Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 8.

47 Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 11. The ACT Ombudsman also raised the need to change approaches to administering the FOI scheme that are overly and unnecessarily 'risk-averse'—Iain Anderson, Australian Capital Territory (ACT) Ombudsman, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 19.

The Committee received evidence of the need to foster a proactive release culture by:

- continuously promoting the benefits of proactive release through FOI legislation, political leadership on and commitment to open government, and the work of the regulator
- positioning proactive release as the primary means of obtaining access to information in FOI legislation
- making it easy through new FOI legislation for agencies and ministers to determine what information can be released proactively and to release it proactively
- facilitating 'top-down'[48] leadership on FOI culture within agencies, especially by agency heads and ministers
- ensuring that the regulator has appropriate review, audit and monitoring functions, particularly with respect to the proactive and informal release mechanisms
- ensuring that FOI practitioners are well-supported by the regulator, especially during the transition phase to a push FOI system (for example through access to comprehensive and initial and ongoing sector-specific training as well as educational resources, guidance, tools and templates)
- making the benefits of proactive release the focus of FOI training rather than how to apply statutory exemptions to withhold information
- ensuring that agencies and ministers have appropriate supporting policies, tailored to their needs
- ensuring that FOI practitioners have autonomy to decide FOI requests in accordance with the spirit and requirements of FOI legislation
- ensuring that agencies have records management systems, processes and practices that support the effective and efficient administration of FOI legislation[49]
- appropriately resourcing agencies to administer the FOI scheme well.[50]

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48 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 4 (quotation); OVIC, *Submission 55*, 15 January 2024, p. 30. This extends to ensuring that an agency's executive leadership has a sound 'knowledge and understanding' of the FOI scheme (Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 86–95, 100–102, 105–107, 115 (quotation)).

49 Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 28–33, 42–46, 62–63, 75–76, 103–105, 109–110.

50 OVIC, *Submission 55*, 15 January 2024, p. 30; OIC Qld, *Submission 16*, 30 November 2023, pp. 4–5; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2–3. See also Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 5–6; SEMLS, *Submission 67*, 29 January 2024, p. 10; Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, pp. 2–5; Suzette Jefferies, Assistant Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 9; Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 11; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21; Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 12–13; Jude Hunter, Senior Legal Counsel and Manager, Freedom of Information and Privacy, WorkSafe Victoria, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 35, 37; Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 36–39, 48–49, 53–56, 62, 78–79, 94–95, 101–105, 110, 115.

The authorised release mechanisms in the access model

The Committee endorses OVIC's proposed access model of four statutory release mechanisms.[51]

Mandatory proactive release mechanism

Legislative considerations—requiring timely publication of certain information

The right to seek and receive government information is central to Article 19 of the *Universal Declaration of Human Rights* ('Right to freedom of opinion and expression')[52] and critical to open government in a democracy.[53] Making 'key information' about agencies and ministers and 'matters of significant public interest' available to the public, without their needing to request it, supports this right,[54] and is recognised by the United Nations as best practice with respect to Article 19.[55]

A legislative mandatory proactive release mechanism (commonly known as a mandatory publication scheme) is important in standardising and enforcing the public's expectation of minimum transparency.[56] Typically, such schemes require agencies to publish information that is 'common across all entity types',[57] such as:

- information about the kinds of information they hold, including what information they publish and are prepared to release (free or for a fee)
- information about their organisational structure, statutory functions and operations; policies and procedures; 'decision making processes';[58] and contracts with third-party suppliers
- information about their strategic priorities, performance and financial affairs
- information released in response to the FOI requests they receive (commonly known as a disclosure log).[59]

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51 See OVIC, *Submission 55*, 15 January 2024, pp. 52–82.

52 United Nations (UN), *Universal Declaration of Human Rights*, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 14 June 2024.

53 Open government is defined as 'a culture of governance that promotes the principles of transparency, integrity, accountability and stakeholder participation in support of democracy and inclusive growth' (Organisation for Economic Co-operation and Development (OECD) Council, *Recommendation of the Council on Open Government*, OECD doc OECD/LEGAL/0438 (adopted 14 December 2017), p. 3). See also Liberty Victoria, *Submission 25*, 8 December 2023, p. 4.

54 OVIC, *Submission 55*, 15 January 2024, p. 53; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 3–4.

55 See Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish') (see also p. 2 regarding the endorsement in 2000 of the Principles by the UN Special Rapporteur on Freedom of Opinion and Expression).

56 OVIC, *Submission 55*, 15 January 2024, p. 53.

57 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 4.

58 OVIC, *Submission 55*, 15 January 2024, pp. 54 (quotation), 55.

59 OVIC, *Submission 55*, 15 January 2024, pp. 53–56. See also *Freedom of Information Act 1982* (Cth) ('*FOI Act 1982* (Cth)') s 8; *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act 2009* (NSW)') ss 6, 18, 20, div 2–5; *Right to Information Act 2009* (Qld) ('*RTI Act 2009* (Qld)') s 21; Queensland Government, *Ministerial Guidelines: operation of publication schemes and disclosure logs under section 21(3) and sections 78, 78A and 78B of the* Right to Information Act 2009, Brisbane, February 2013; Information Privacy and Other Legislation Amendment Bill 2023 (Qld).

The Committee received evidence that proactive publication of this kind of information should be 'a normal course of government administration'[60] because it:

- encourages public participation in governance and government decision-making, including by enabling 'individuals with relatively little public authority … to assert and protect basic welfare rights, such as those relating to housing, health and education'
- facilitates public awareness and understanding of what, why and how government is doing what it is doing, which in turn supports the work of integrity bodies like the Independent Broad-based Anti-corruption Commission, the Victorian Ombudsman (VO) and the Victorian Auditor-General's Office
- limits government's ability to control the public's awareness and understanding of how the administrative state is performing
- 'promotes good governance by providing a framework for advice, education, and guidance to agencies and the public'
- fosters public trust in government.[61]

The Committee also received evidence that designing proactive release mechanisms to respond to sector-specific risks[62] and matters of 'broad community interest' with respect to the performance of agencies in particular sectors[63] fosters greater transparency by facilitating meaningful public engagement with, and interrogation of, government-held information.[64] The Committee notes the unique challenges faced by

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60 Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 5.

61 Ibid., pp. 4, 5 (quotation).

62 As the NSW Acting Information Commissioner highlighted, it is about recognising that some matters carry sector-specific risks if information about them is concealed from the public—such as decision-making with respect to development applications—that 'warrant a more specific remediation and response through [FOI]', for example, by imposing additional mandatory proactive release requirements on information connected with such matters to ensure transparency—Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 4. Additionally, things like 'declarations of interest in the local government sector, travel in the ministerial sector, and acquisition and disposal of assets in the government department sector' should also be proactively released (see IPC NSW, *Submission 12*, 27 November 2023, p. 5). This is backed by findings of independent research on the need for sector-specific 'rules and guidelines regarding which documents, policies and datasets … [can] be released outside' FOI legislation (Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 63 (quotation), 110).

63 For example, information of 'broad community interest' the publication of which would not prejudice an agency's operational activities (Wayne Gatt, Secretary, The Police Association of Victoria (TPAV), public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 4)—such as statistical information on the number and geographic spread of police officers; police use of force; the prevalence and geographic spread of the use of police stop-and-search powers; Triple Zero response times; and ambulance ramping (Wayne Gatt, Secretary, The Police Association of Victoria (TPAV), public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 4–5; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 28–29; Royce Millar, Senior Reporter, The Age, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 9; Sam White, Editorial Counsel, Nine Publishing, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 9).

64 IPC NSW, *Submission 12*, 27 November 2023, p. 4. Support was expressed for this view in other submissions received by the Committee—see, for example, Latrobe City Council, *Submission 69*, 8 March 2024, p. 5.

agencies in different sectors in responding to FOI requests,[65] and considers that this kind of approach would be worthwhile in Victoria.

There was widespread support expressed for listing, in FOI legislation, the kinds of information that must be released proactively.[66] Requiring agencies to regularly review the information they publish under a mandatory proactive release mechanism is also necessary to ensure the currency, accuracy and completeness of such information.[67]

Legislative or regulatory guidance is needed on what information meets the threshold of 'significant public interest'.[68] Such information may include, for example:

- information that the digital economy relies on being able to access easily and quickly[69]
- environmental management (including information about the exploitation of natural resources, the environmental impact of large-scale government-led projects and extraction of natural resources, governmental management of pollution, and how risks associated with major hazard facilities are assessed and managed)
- expenditure of public funds on government infrastructure projects, including progress reports related to such projects
- policies and practices relating to overt, covert and indirect[70] government surveillance
- information that is important to informing the public discussion on issues of major public concern;[71] for example, the funding of large-scale public infrastructure projects.[72]

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65 For example, Latrobe City Council highlighted that the majority of FOI requests received by local council sector agencies are for non-personal information (which can involve 'complex assessment and decision making' with respect to statutory exemptions and extensive consultation with third parties), whereas the majority of requests received by health sector agencies are for personal information. Additionally, SEMLS raised the need for FOI processes and practices to be standardised across sectors (for example, health sector agencies) to ensure consistency of approach and enable agencies to share and adopt best-practice lessons—Latrobe City Council, *Submission 69*, 8 March 2024, p. 4 (quotation); SEMLS, *Submission 67*, 29 January 2024, pp. 8–9, 11.

66 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 53–57, 59–62; PROV, *Submission 9*, 22 November 2023, p. 1; IPC NSW, *Submission 12*, 27 November 2023, pp. 2–3, 4–5; ACT Ombudsman, *Submission 14*, 29 November 2023, pp. 1–2, 8; OIC Qld, *Submission 16*, 30 November 2023, pp. 2–3; VLA, *Submission 18*, 1 December 2023, pp. 1, 3; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2–3; LIV, *Submission 22*, 4 December 2023, pp. 3–4; Liberty Victoria, *Submission 25*, 8 December 2024, pp. 7–8; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 4–5; Dr David Solomon AM, *Submission 44*, 15 January 2024, p. 1; VALS, *Submission 54*, 15 January 2024, pp. 8, 15; Latrobe City Council, *Submission 69*, 8 March 2024, p. 5.

67 OVIC, *Submission 55*, 15 January 2024, pp. 55–56. See also Queensland Government, *Ministerial Guidelines: operation of publication schemes and disclosure logs under section 21(3) and sections 78, 78A and 78B of the* Right to Information Act 2009, Brisbane, February 2013, p. 4; *FOI Act 1982* (Cth) s 8B.

68 OVIC, *Submission 55*, 15 January 2024, p. 62.

69 For example, Professor Moira Paterson noted that 'weather apps … would not work without the weather data that the … Bureau of Meteorology … and other such agencies make available' (Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 17).

70 This would include activities such as 'profiling and data-mining'—OVIC, *Submission 55*, 15 January 2024, p. 62.

71 Royce Millar noted that a lot of journalists' time is 'wasted chasing information that is not actually especially controversial or should not be controversial … [but is] the kind of information that should be contributing to public discussion, whether it be health … [or] the funding of the cost of public infrastructure'—Royce Millar, Senior Reporter, The Age, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 10.

72 OVIC, *Submission 55*, 15 January 2024, p. 62; Royce Miller, Senior Reporter, The Age, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 10.

The Committee agrees with OVIC that Victorian FOI legislation should include a mandatory proactive release mechanism, requiring agencies and ministers to release 'documents or information of significant public interest'[73] as well as information about:

- the kinds of information they hold, including what information they publish and are prepared to release (and whether it will be released free or for a fee)
- their organisational structure
- their functions and how their functions, particularly their 'decision making processes',[74] impact the public
- any arrangements that facilitate public participation in the development of their policies and exercise of their functions
- their operations (including, for example, their 'policies, guidelines and procedures relating to policy and decision making, and decisions, reports, statements and submissions')[75]
- their strategic priorities, performance, financial affairs and related information published in tabled reports (including, for example, financial forecasting and profit and loss, procurement, third-party suppliers contracts, and grants administration)
- the kinds of information they routinely release in response to formal FOI requests
- how the public can request information from them informally and formally
- a register of documents determined to be unsuitable for proactive release
- a register of information released informally or formally that has been considered for proactive release.[76]

Furthermore, in the Commonwealth jurisdiction, agencies and ministers are required to create and publish a plan detailing the above and additional matters,[77] which the Committee recommends for Victoria.[78]

Moreover, the Committee agrees with OVIC that FOI legislation should establish guiding principles with respect to how information subject to a mandatory proactive release mechanism should be released.[79]

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73 OVIC, *Submission 55*, 15 January 2024, p. 61; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish').

74 OVIC, *Submission 55*, 15 January 2024, p. 60.

75 Ibid., p. 61.

76 OVIC, *Submission 55*, 15 January 2024, pp. 60–61. See also *FOI Act 1982* (Cth) s 8; *GIPA Act 2009* (NSW) s 18.

77 *FOI Act 1982* (Cth) s 8.

78 See also OVIC, *Submission 55*, 15 January 2024, p. 61.

79 OVIC, *Submission 55*, 15 January 2024, p. 62.

Legislative considerations—requiring information to be published free, and in a way that is easily found, accessed and understood by the public

Consistent with the underlying purpose of a legislative mandatory proactive release mechanism, information should be released in a way that is easily accessible by those most impacted by it and by those who need to access it.[80]

In the digital age, this means publishing the information free, in plain language,[81] in an accessible format,[82] and so it is likely to be easily found and understood by the public. While information will generally be disseminated electronically, via a website or other digital platform (for example, a mobile phone application),[83] it is important, wherever possible, for agencies and ministers to provide an alternative means of access for persons unable to access the information via the primary method due to disability or disadvantage (for example, illiteracy or lack of internet access).[84]

Appropriate protections are necessary for agencies and ministers where the cost of publishing information subject to a mandatory proactive release mechanism online is prohibitive. In such cases, the agency or minister should be required to release the information free of charge via an alternative method. Where the alternative methods available are 'not practical, timely or easy' for the public to access without charge, the agency or minister should be able to charge reasonable costs associated with copying the information in order to make it available.[85]

Legislative considerations—compliance

The Committee agrees with OVIC that it is important for FOI legislation to be responsive to changes over time and provide flexibility in the way in which agencies and ministers can disseminate information to the public.[86]

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80 OVIC, *Submission 55*, 15 January 2024, pp. 58–59, 63. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish'). This principle is incorporated in the push FOI systems in the Commonwealth, NSW and Queensland jurisdictions. See *FOI Act 1982* (Cth) s 8D (agencies must publish information subject to the proactive release mechanism free on their websites and, where appropriate, to 'classes of persons or entities'); *GIPA Act 2009* (NSW) s 6 (agencies must publish information subject to the proactive release mechanism free on their websites, or, if the cost of doing so 'would impose unreasonable additional costs', via an alternate means); *RTI Act 2009* (Cth) s 21 (legislative reforms that will take effect in 2024 will require agencies to publish information subject to the proactive release mechanism free on their websites).

81 Plain language is a form of communication where the 'wording, structure, and design are so clear that the intended audience can easily find what they need, understand what they find, and use that information'—Plain Language Association International, *What is plain language?*, 2024, <https://plainlanguagenetwork.org/plain-language/what-is-plain-language> accessed 9 April 2024.

82 For example, in a format that complies with the Victorian Government's Web Content Accessibility Guidelines (which set out how to make information published online accessible to persons with disability), is 'machine readable', and does not restrict a user's ability to use and disclose the information—OVIC, *Submission 55*, 15 January 2024, p. 59; Victorian Government, *Web Content Accessibility Guidelines 2.2*, 5 October 2023, <https://www.w3.org/TR/WCAG22> accessed 9 April 2024.

83 OVIC, *Submission 55*, 15 January 2024, pp. 58–59, 63. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish'); Victorian Government, *Making content accessible—digital guide*, 5 December 2023, <https://www.vic.gov.au/make-content-accessible> accessed 9 April 2024.

84 OVIC, *Submission 55*, 15 January 2024, p. 63.

85 OVIC, *Submission 55*, 15 January 2024, p. 63. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish').

86 OVIC, *Submission 55*, 15 January 2024, pp. 62–63. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish').

The idea that FOI legislation should establish a stand-alone information publication scheme requiring agencies and ministers to create information guides, and indicate on their websites that information is being published in compliance with FOI law, is outdated.[87] Agencies and ministers should instead be encouraged to publish information subject to a mandatory proactive release mechanism on their websites 'in a way that is practical, logical, easy to find and meets community expectations'.[88]

Preferably, broadly worded guiding principles should be enshrined in FOI legislation for how information subject to a mandatory proactive release mechanism should be released to the public, requiring agencies and ministers to:[89]

- publish information in a way that is practical, timely, easy to find and accessible …
- present information in a way that is capable of being understood, and accessible …
- facilitate public awareness of the availability of the … information [they hold].[90]

The requirements for compliance should also be simplified and streamlined, requiring nothing more than that agencies and Ministers publish, in conformity with the guiding principles, information subject to the mandatory proactive release mechanism on their websites.[91]

Additional proactive release mechanism

Best practice FOI legislation seeks to increase over time the proactive disclosure of government-held information.[92] Agencies and ministers should therefore be encouraged to proactively release as much information as possible and be legally protected from civil and criminal liability when doing so in good faith.[93]

Legislative support and authorisation for proactive release of information generally, outside (and in addition to) information subject to a mandatory proactive release mechanism, is crucial to achieving this. It also supports the principle of maximum disclosure.[94] These elements are incorporated in FOI legislation in the Commonwealth and New South Wales jurisdictions, which have push systems.[95]

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87 OVIC, *Submission 55*, 15 January 2024, p. 64.

88 Ibid.

89 Ibid., pp. 62–63.

90 OVIC, *Submission 55*, 15 January 2024, p. 62. See also *Local Government Act 2020* (Vic) s 58 ('public transparency principles').

91 OVIC, *Submission 55*, 15 January 2024, p. 64.

92 OVIC, *Submission 55*, 15 January 2024, p. 65. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 5 ('Principle 2: Obligation to publish').

93 OVIC, *Submission 55*, 15 January 2024, p. 65.

94 Ibid.

95 OVIC, *Submission 55*, 15 January 2024, pp. 65–66. See also *FOI Act 1982* (Cth) s 8 (agencies can publicly release any information they hold in addition to information subject to the mandatory proactive release mechanism); *GIPA Act 2009* (NSW) s 7 (agencies are authorised to publicly release any information they hold unless there is overriding public interest against releasing it, in any way they consider appropriate, freely or for a minimal fee).

Further, requiring agencies and ministers to regularly review their approach to releasing information under an additional proactive release mechanism will ensure they are continuously identifying opportunities to release information in the public interest. It will also safeguard the accuracy and currency of information published under a pathway of this kind. The Committee considers that the New South Wales approach, which provides for annual reviews, should be followed.[96]

Informal release mechanism

Release of government-held information to the public informally, outside the processes for responding to formal requests under FOI legislation, not only supports the principle of maximum disclosure, but can help reduce the burden on agencies and ministers of administering the FOI scheme.[97]

This is because it may reduce the number of formal requests, as the public seeks to avoid the 'cost, time and effort'[98] associated with making such requests, including the resources needed to meet the rigorous statutory requirements for processing formal requests. It also allows flexibility in how, and under what conditions, agencies and ministers choose to release information.

Finally, it can create opportunities for streamlining the process of releasing frequently requested information, such as Care Leaver records[99] and claimant files held by WorkCover or the Transport Accident Commission, by enabling the establishment of informal release access schemes for such information.[100]

It is important for FOI legislation to make it easy for agencies and ministers to release information informally in order to encourage and support them to do so. This requires clear authorisation for informal release, and protection from civil and criminal liability when information is released in good faith.[101]

The Committee considers that the New South Wales approach—which creates a clear informal release mechanism with appropriate legal protections, specifically authorising the release of information informally unless the public interest strongly favours non-disclosure—should be followed.[102] Under the New South Wales model, agencies have discretion to informally release information subject to any 'reasonable conditions' they think fit, to decide the method by which information is released, and to redact exempt information in order to facilitate the informal release of a document.[103]

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96 OVIC, *Submission 55*, 15 January 2024, pp. 65, 67, 81. See also *GIPA Act 2009* (NSW) s 7(3).

97 OVIC, *Submission 55*, 15 January 2024, p. 68.

98 Ibid.

99 The term 'Care Leaver' refers to 'people who grew up in out-of-home care, including Forgotten Australians, Former Child Migrants and members of the Stolen Generations' (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 3).

100 OVIC, *Submission 55*, 15 January 2024, pp. 68, 70.

101 Ibid., pp. 68–69.

102 OVIC, *Submission 55*, 15 January 2024, p. 69. See also *GIPA Act 2009* (NSW) ss 8, 113–115.

103 OVIC, *Submission 55*, 15 January 2024, p. 69.

Agencies and ministers should additionally be encouraged to deal with requests under an informal release mechanism 'wherever possible' and inform the public of the pathway if it is a more suitable option than making a formal request.[104]

This could be further facilitated by requiring agencies and ministers to give consideration to the appropriateness of releasing information informally and to 'provide reasonable advice and assistance' to persons requesting information informally.[105] Agencies and ministers should also be required to record and publish their decisions with respect to informal release, so they and the public can see what information is frequently requested and whether a particular document has previously been released.[106]

There was support expressed for providing guidance on the kinds of information that can be released informally.[107]

The Committee notes the best practice principles for informal release contained in the report commissioned by the IPC NSW, *Informal release of information under s 8 of the* Government Information (Public Access) Act 2009 *(NSW)*,[108] and considers that the Victorian Government should take account of the report's recommendations in designing the statutory informal release mechanism for the State's new push FOI system, especially the need for:

- internal agency processes for deciding requests received under the mechanism
- professional guidance on appropriate response times for responding to and deciding requests received under the mechanism
- professional guidance on the information to be provided for a partial release decision under the mechanism, including the kinds of decisions that can be made (for example, conditional release or redaction of certain information within a document)
- appropriate record-keeping with respect to requests received and decisions made under the mechanism
- reporting requirements with respect to decisions made under the mechanism
- public awareness of the mechanism.[109]

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104 OVIC, *Submission 55*, 15 January 2024, p. 69. See also IPC NSW, *Report on the operation of the* Government Information (Public Access) Act 2009*: 2020–2021*, Sydney, November 2023, p. 22.

105 OVIC, *Submission 55*, 15 January 2024, p. 70.

106 Ibid.

107 For example, VLA processes requests for personal legal files informally, outside the *FOI Act 1982* (Vic)—see VLA, *Submission 18*, 1 December 2023, p. 3.

108 See Lyria Bennett Moses et al., *Informal release of information under section 8 of the* Government Information (Public Access) Act 2009 *(NSW)*, UNSW, Sydney, December 2022, pp. 14–21.

109 Ibid., pp. 4, 24–25.

Formal release mechanism

While positioned as a last resort, best practice FOI legislation retains a formal release mechanism, to ensure that the public's right of access to government-held information is 'legally enforceable'.[110]

Legislative considerations—requiring the keeping and publication of disclosure logs

In Australian jurisdictions with push systems, agencies and ministers are required to publish a disclosure log, recording and providing broader public access to information they have released in response to formal FOI requests.[111] Disclosure logs are beneficial in:

- supporting the principle of maximum disclosure
- facilitating public understanding of, and participation in, government affairs and decisions
- facilitating access to government-held information likely to be of broader public interest in a way that is timely, accessible and free
- enabling agencies to explain public interest issues in 'greater depth' by allowing them to publish 'supporting information' when releasing information in response to formal requests[112]
- improving the quality of formal FOI requests by fostering greater public understanding of the information held by agencies and ministers
- encouraging agencies and ministers to continually reassess what information they can release through proactive mechanisms by enabling them to easily identify and better understand the kinds of information being sought by the public through the formal release mechanism [113]
- promoting consistent FOI decision-making across the board by making it easy for agencies and ministers to see what information is being requested and released
- reducing the incidence of requests by different applicants for the same information
- reducing the number of formal FOI requests and, consequently, lessening the number of FOI-related complaints and review requests to OVIC and the burden on agencies and Ministers of administering the FOI scheme.[114]

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110 OVIC, *Submission 55*, 15 January 2024, p. 71.

111 OVIC, *Submission 55*, 15 January 2024, p. 71. See also *FOI Act 1982* (Cth) s 11C; *GIPA Act 2009* (NSW) pt 3 div 4; *RTI Act 2009* (Qld) pt 7 div 2.

112 OVIC, *Submission 55*, 15 January 2024, p. 72.

113 For example, agencies and ministers, through their disclosure logs, can identify what information is being frequently requested by the public via formal FOI requests and consider whether they can make such information available to the interested parties in ways that are more efficient or better suit the needs of requesters—OIC Qld, *Disclosure logs—Queensland Government departments: report no. 2 to the Queensland Legislative Assembly for 2020–21*, Brisbane, August 2020, p. 2. See also OVIC, *Submission 55*, 15 January 2024, p. 75.

114 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 71–72, 75. See also, Name withheld, *Submission 48*, 15 January 2024, p. 7.

There was widespread support expressed for the broader publication, through disclosure logs, of information released in response to formal requests, particularly for common FOI requests.[115]

Legislative considerations—form and format of disclosure logs

Typically, a disclosure log must contain the date of the access decision, the type of applicant, and either a copy of the documents released to the requester or a clear description of the documents and instructions on how the broader public can access them.[116] There are limited exceptions to this requirement, such as requesters' names and information released in response to formal FOI requests for personal information.[117] Additionally, information that must not be released includes information that:

- is prohibited from being disclosed or published under law (including under the terms of a contract)
- is potentially defamatory
- would unreasonably infringe a person's privacy
- is 'confidential' or 'was communicated in confidence'
- 'would cause substantial harm to an entity'.[118]

The Committee considers that the Commonwealth approach—which requires disclosure logs to be published on agency and ministerial (or other publicly accessible) websites, free-of-charge except in limited circumstances,[119] and updated within 10 business days after providing access to the requester[120]—should be followed.

The findings of recent interjurisdictional reviews on the practical efficacy of disclosure logs suggests that they need to be 'easy to find and use' as well as 'current, complete and accurate'.[121] This means that they should be designed and published in a way that 'support[s] browsing or searching',[122] and that the public should generally be

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115 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 71–72, 75–77; IPC NSW, *Submission 12*, 27 November 2023, p. 3; ACT Ombudsman, *Submission 14*, 29 November 2023, pp. 2, 8; OIC Qld, *Submission 16*, 30 November 2023, pp. 2–3; TPAV, *Submission 19*, 1 December 2023, pp. 3, 8; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 7–8; Name withheld, *Submission 48*, 15 January 2024, pp. 7–8; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 59–60.

116 OVIC, *Submission 55*, 15 January 2024, pp. 72–73; Name withheld, *Submission 48*, 15 January 2024, pp. 7–8. See also *FOI Act 1982* (Cth) s 11C; *GIPA Act 2009* (NSW) s 26; *RTI Act 2009* (Qld) pt 7 div 2.

117 OVIC, *Submission 55*, 15 January 2024, pp. 71, 73.

118 OVIC, *Submission 55*, 15 January 2024, p. 73. See also *FOI Act 1982* (Cth) s 11C; *GIPA Act 2009* (NSW) ss 26, 56; *RTI Act 2009* (Qld) s 78B.

119 Under *FOI Act 1982* (Cth) s 11C(4), Commonwealth agencies can only charge for access to information required to be released to the broader public in a disclosure log if the information cannot be accessed via a publicly accessible website, in which case the cost of (or incidental to) reproducing that information is chargeable. See also OVIC, *Submission 55*, 15 January 2024, p. 73.

120 *FOI Act 1982* (Cth) s 11C(6); OVIC, *Submission 55*, 15 January 2024, p. 74.

121 OIC Qld, *Disclosure logs—Queensland Government departments: report no. 2 to the Queensland Legislative Assembly for 2020–21*, Brisbane, August 2020, p. 1. See also OVIC, *Submission 55*, 15 January 2024, p. 75.

122 OVIC, *Submission 55*, 15 January 2024, p. 75, quoting OIC Qld, *Disclosure logs—Queensland Government departments: report no. 2 to the Queensland Legislative Assembly for 2020–21*, Brisbane, August 2020, p. 2.

able to download documents recorded in a disclosure log directly from an agency or ministerial website, rather than being required to request access to such information.[123]

Provision should also be made for situations where it is impractical to publish a document on a website (for example, due to its large file size or the need for additional viewing software to access it), in which case the public should easily be able to 'search for and identify'[124] the content of the document from the description provided in the disclosure log.[125] Additionally, there has been support expressed for centralising the publication of disclosure logs on one website to make it easier for the public to access and search for such information.[126]

The Committee agrees with OVIC that FOI legislation establishing disclosure log requirements for the formal release mechanism should 'require information in a disclosure log to be easy to find and use, up-to-date, and useful',[127] and that disclosure logs should:

- be easily searchable (including, for example, search-filter options)
- set minimum requirements for the description of documents recorded[128]
- permit agencies and ministers to provide important 'contextual information' to aid public understanding of a document[129]
- permit agencies and ministers, in limited circumstances, to publish information in a different form and format from that provided to the original requester.[130]

Additionally, the Committee received evidence of the need for the regulator to have power to enforce the mandated publication time frame—for example, the power to deal with complaints from requesters about an agency's or minister's failure to publish

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123 OVIC, *Submission 55*, 15 January 2024, p. 74; OAIC, *Disclosure log desktop review*, 16 September 2021, <https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/disclosure-log-desktop-review> accessed 15 April 2024; IPC NSW, *Monitoring of agency disclosure log practices report*, Sydney, September 2017, pp. 8–9.

124 OVIC, *Submission 55*, 15 January 2024, p. 74, quoting OAIC, *Disclosure log desktop review*, 16 September 2021, <https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/disclosure-log-desktop-review> accessed 15 April 2024.

125 OVIC, *Submission 55*, 15 January 2024, p. 74; (OAIC), *Disclosure log desktop review*, 16 September 2021, <https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/disclosure-log-desktop-review> accessed 15 April 2024; IPC NSW, *Monitoring of agency disclosure log practices report*, Sydney, September 2017, pp. 8–9.

126 OVIC, *Submission 55*, 15 January 2024, p. 77. See also Australian Government, *Review of the* Freedom of Information Act 1982 *and* Australian Information Commissioner Act 2010 *report*, Canberra, 2013, pp. 98–99; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 15–16.

127 OVIC, *Submission 55*, 15 January 2024, p. 76.

128 Such as the kind of document (for example, 'email') and a brief overview of its contents (for example, 'this internal email discusses the creation of a community grants program.')—OVIC, *Submission 55*, 15 January 2024, p. 76.

129 For example, explaining that a document was created at a certain 'point-in-time', and providing a link to the current iteration—OVIC, *Submission 55*, 15 January 2024, p. 76. See also Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 15–16.

130 Such as where publishing the document online would be 'burdensome' or inaccessible in its original format (such as 'creating a textual description of an image')—OVIC, *Submission 55*, 15 January 2024, pp. 75, 76 (quotation). See also, OAIC, *FOI Guidelines*, Canberra, November 2023, cl 14.46.

an updated disclosure log with the information released to them within the legislated time frame.[131]

The Committee therefore proposes a disclosure log model that will require agencies and ministers to:

- keep a disclosure log that records all information released to applicants in response to FOI requests for *non-personal information* processed under the formal release mechanism
- release to the broader public, whether through file access links in disclosure log entries or as attachments to the log, all such information, except for:
  - applicants' names; and
  - information that cannot be disclosed or published under law, is potentially defamatory, would unreasonably infringe personal privacy, is confidential or was communicated in confidence, or would substantially harm an entity
- make alternative arrangements to release to the broader public information that is impractical to publish in their disclosure log or on their website
- publish their disclosure log, free-of-charge, either on their website or in a centralised whole-of-government location, in a way that is easy to find and in a format that is accessible and searchable
- update their disclosure log within 10 business days after providing access to information to an FOI applicant.

Legislative considerations—requiring consideration to be given to proactively releasing information released under a formal release mechanism

Agencies and ministers should be required to consider whether information released under a formal release mechanism (and recorded in a disclosure log) can be released through the additional proactive release mechanism.[132] This will ensure that all information that can be proactively released is released, and that the public can access such information without needing to access disclosure logs.[133]

Decisions about whether or not to proactively release documents recorded in a disclosure log should be recorded and published. This will support accurate reporting of the amount of information released under a formal release mechanism which is being disseminated to the broader public, and encourage agencies and ministers to continually reassess what information they can release through proactive mechanisms.[134]

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131 Name withheld, *Submission 48*, 15 January 2024, pp. 7–8.

132 For example, if an 'internal policy' is released to a requester through the formal release mechanism and subsequently recorded in an agency's disclosure log, it should also be published on the agency's website proactively—OVIC, *Submission 55*, 15 January 2024, p. 77.

133 OVIC, *Submission 55*, 15 January 2024, p. 77.

134 Ibid.

Legislative considerations—formal release mechanism not to apply to information released under the proactive release mechanisms

The Committee received evidence that the formal release mechanism should include a provision specifically prohibiting requests for information that *has been* published under the proactive release mechanisms. It was suggested that this will avoid perverse outcomes that have resulted in practice with respect to the operation of s 14 of the *FOI Act 1982* (Vic). Specifically, agencies must process a formal FOI request for information that is publicly available (other than information that is available for a fee or charge), unless the requester consents to withdrawing it. This is because agencies have no power to refuse a request on the grounds that the information sought is publicly available for free.[135] The Committee agrees.

Legislative considerations—reporting and oversight of proactive, informal and formal release mechanisms

In Australian jurisdictions with push systems, reporting and oversight requirements vary with respect to agency and ministerial compliance with proactive and informal release mechanisms, and include measures such as:

- requiring agencies to notify the regulator before adopting or reviewing their agency information guides[136] and, upon request, consult with the regulator on such guides[137]
- empowering the regulator to issue guidelines and templates on agency information guides[138]
- requiring agencies to periodically review their information guides or plans[139]
- requiring the regulator to periodically review and report on agencies' compliance with their obligations under the mandatory proactive release mechanism[140]

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135 Name withheld, *Submission 48*, 15 January 2024, pp. 29–30.

136 Under the *GIPA Act 2009* (NSW) s 20, each agency is required to create an 'agency information guide' setting out its operational structure and statutory functions; how its functions impact the public; how the public can participate in the development of its policies and the exercise of its functions; the kinds of information it holds; the kinds of information it makes, and will make, available to the public, and how; and what information will be released free or for a fee. The equivalent in the Commonwealth jurisdiction is the '[a]gency plan', which is required to set out how an agency will comply with its statutory obligations under the mandatory proactive release mechanism in the *FOI Act 1982* (Cth) s 7A (referred to as an '[i]nformation publication scheme'), including what information it will publish under the mechanism and how—see *FOI Act 1982* (Cth) s 8(1). See also OVIC, *Submission 55*, 15 January 2024, p. 78.

137 See *GIPA Act 2009* (NSW) s 22(1).

138 See *GIPA Act 2009* (NSW) s 22(2).

139 Every five years, Commonwealth agencies are required to review with the regulator their information publication schemes, while NSW agencies are required to review annually their approach to the additional proactive release mechanism and their agency information guides. See *FOI Act 1982* (Cth) s 9; *GIPA Act 2009* (NSW) ss 7, 21.

140 Pursuant to its obligations under the *FOI Act 1982* (Cth) s 9, the OAIC surveys agencies' compliance with their statutory obligations under the information publication scheme every 5 years and publicly reports on its findings. See, for example, OAIC, *Information publication scheme: survey of Australian government agencies*, Canberra, June 2019. See also OVIC, *Submission 55*, 15 January 2024, p. 78. The IPC NSW tracks agencies' compliance with their statutory obligations under the mandatory proactive, authorised proactive and formal release mechanisms in the *GIPA Act 2009* (NSW) annually, and publicly reports on its findings. See, for example, IPC NSW, *Report on the operation of the* Government Information (Public Access) Act 2009*: 2020–2021*, Sydney, November 2023.

- encouraging agencies to maintain an 'internal information asset register'[141] to track and demonstrate compliance with their obligations with respect to disclosure logs[142]
- requiring the regulator to publish, in their annual reports, information about agency and ministerial compliance with disclosure log requirements.[143]

As OVIC highlighted, there are, however, no reporting requirements with respect to information released under informal-release mechanisms in the Commonwealth, New South Wales and Queensland push jurisdictions.[144] This makes assessing the effectiveness of such mechanisms difficult.[145] Requiring agencies and ministers to capture data relating to requests made and processed under an informal release mechanism, such as the volume and frequency of such requests, can greatly assist them in identifying what information is useful to the public and what additional information they can release under an additional proactive release mechanism.[146]

OVIC suggested that, to promote data collection and reporting on the use of proactive and informal release mechanisms, agencies and ministers should be required under FOI legislation to develop and publish a policy[147] covering the following matters:

- With respect to the mandatory proactive release mechanism—
  - how they comply with the guiding principles underpinning the mechanism
  - where the public can find the information required to be published under the mechanism and whether that information is complete and current.[148]
- With respect to the additional proactive release mechanism—
  - how they comply with the guiding principles underpinning the mechanism
  - what information, or kinds of information, they will release under the mechanism and under what conditions[149]

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141 OVIC, *Submission 55*, 15 January 2024, p. 79.

142 See OAIC, *FOI Guidelines*, Canberra, November 2023, cl 14.77: The 'internal register' should record every FOI request received by an agency and information about whether or not information was released in response to a request and, if so, whether or not the documents are listed in the agency's disclosure log and whether the information is available online or the public have been instructed how to access it.

143 The OAIC reports annually on the number of new disclosure log entries reported by Commonwealth agencies and ministers, as well as the proportion of those entries for which information is publicly available (by download or other means) and statistical data on visitor numbers and page views with respect to disclosure logs. See OAIC, *Annual report 2022–23*, Canberra, September 2023, p. 158. See also OVIC, *Submission 55*, 15 January 2024, pp. 78–79.

144 OVIC, *Submission 55*, 15 January 2024, p. 79.

145 OVIC, *Submission 55*, 15 January 2024, p. 79. See also Lyria Bennett Moses et al, *Informal release of information under section 8 of the* Government Information (Public Access) Act 2009 *(NSW)*, UNSW, Sydney, December 2022, pp. 24–25; IPC NSW, *Report on the operation of the* Government Information (Public Access) Act 2009*: 2020–2021*, UNSW, Sydney, November 2023, p. 22; 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 2009 *(Qld)*, Brisbane, June 2019, pp. 17–18.

146 OVIC, *Submission 55*, 15 January 2024, p. 79. See also Lyria Bennett Moses et al., *Informal release of information under section 8 of the* Government Information (Public Access) Act 2009 *(NSW)*, UNSW, Sydney, December 2022, pp. 8, 12–13, 24–25.

147 OVIC, *Submission 55*, 15 January 2024, pp. 79–80.

148 Ibid., p. 80.

149 OVIC has suggested that this information 'could be recorded in an information asset register'—OVIC, *Submission 55*, 15 January 2024, p. 80.

  - what information, or kinds of information, they have identified for future possible release under the mechanism
  - how they intend to increase the information they release under the mechanism over time
  - their processes for releasing information under the mechanism, including how information is identified, considered and approved for release under the mechanism
  - where the public can find the information released under the mechanism.[150]
- With respect to the informal release mechanism—
  - what information, or kinds of information, they publish under the mechanism
  - their processes for releasing information under the mechanism, including who that information is released to and how.[151]
- With respect to the formal release mechanism—
  - a record of all decisions made regarding whether or not a document is to be included in their disclosure log
  - a record of all decisions made to publish or otherwise release, under the additional proactive release mechanism, information released under the informal and formal release mechanisms[152]
  - the kinds of information they release under the informal and formal release mechanisms that they will not publish or otherwise release to the broader public under the additional proactive release mechanism.[153]

There are manifold potential benefits of this kind of policy, including:

- supporting the principle of maximum disclosure
- ensuring that government-held information is provided in a timely and cost-effective way
- enabling senior and executive leaders to show strong support for proactive and informal release mechanisms
- strengthening the capacity of agencies and ministers to release information under proactive and informal release mechanisms over time
- ensuring that a formal release mechanism is used as a last resort

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150 OVIC, *Submission 55*, 15 January 2024, p. 80.

151 Ibid.

152 OVIC has suggested that this information could be recorded in an 'information asset register … or table [in the policy itself]'—OVIC, *Submission 55*, 15 January 2024, p. 81.

153 OVIC, *Submission 55*, 15 January 2024, p. 81.

- ensuring that agencies, ministers, the regulator and the public can see how government-held information is being released and how agencies and ministers are complying with their obligations under proactive and informal release mechanisms
- enhancing transparency and meaningful public participation in government decision-making.[154]

The Committee agrees.

As OVIC has highlighted, encouraging agencies and ministers to undertake public consultation when developing their policy will ensure that they 'understand the public value of information' they hold.[155]

It is also important that FOI legislation empower the regulator to monitor and report on agency and ministerial compliance with their statutory obligations with respect to proactive and informal release mechanisms,[156] and to take appropriate enforcement action where necessary.[157]

Finally, the Committee received evidence that data collection regarding the public's use of these mechanisms is important in helping the regulator to identify new and better ways of supporting agencies and ministers and building their capability.[158]

OVIC reported that the lack of formal reporting requirements with respect to the informal release mechanism in FOI legislation in the Commonwealth, New South Wales and Queensland push jurisdictions 'makes it hard to assess the effectiveness of … [the] mechanism or the extent of its use'.[159] This view was supported by IPC NSW, who lamented the lack of formal reporting requirements with respect to the proactive and informal release mechanisms, noting that data received through FOI complaints and reviews provides limited insights on the functioning of these pathways.[160] The report of the Queensland Information Commissioner's 10-year review of the *RTI Act 2009* (Qld) also recommended that agencies track informal requests to assist with identifying additional information of interest to the community that can be released under the proactive release mechanism.[161]

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154 Ibid.

155 Ibid.

156 For example, the power to receive, investigate and decide complaints with respect to agency and ministerial 'implementation of proactive and informal release requirements', as well as the power to 'conduct investigations, examinations and audits' in respect of such matters (OVIC, *Submission 55*, 15 January 2024, p. 82).

157 OVIC, *Submission 55*, 15 January 2024, p. 82.

158 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, pp. 6–7. See also OVIC, *Submission 55*, 15 January 2024, pp. 79, 166–167.

159 OVIC, *Submission 55*, 15 January 2024, p. 79.

160 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, pp. 6–7. See also OVIC, *Submission 55*, 15 January 2024, p. 79.

161 See 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 2009 *(Qld)*, Brisbane, June 2019, p. 18; OVIC, *Submission 55*, 15 January 2024, p. 79.

To foster greater transparency, facilitate data collection and improve the accuracy of annual estimates of the total cost of administering the FOI scheme, the Committee considers that FOI legislation establishing Victoria's new third-generation push FOI system should—in addition to 'existing reporting requirements'[162] in the *FOI Act 1982* (Vic)—require agencies and ministers to report on:

- their expenditure on legal and consultancy fees in connection with administering the FOI scheme, including responding to FOI requests received under the informal and formal release mechanisms and OVIC FOI complaints and reviews (and, additionally, 'responding to or initiating' VACT FOI proceedings)[163]
- actions taken with respect to their obligations under the proactive and informal release mechanisms, for example, the 'comprehensiveness and currency'[164] of information published proactively, including their Information Asset Registers (IARs) and disclosure logs
- the number of requests received under the informal release mechanism and a breakdown of the kinds of decisions made in response to those requests
- a breakdown of the kinds of information requested and released under the informal release mechanism.[165]

3.2.3 Recommended reforms

The Committee endorses many of OVIC's recommendations in its submission to the Inquiry with respect to Terms of Reference 2,[166] and makes additional recommendations to give effect to its views described in Section 3.2.2, above.

RECOMMENDATION 22: That legislation establishing Victoria's new third-generation 'push' FOI system authorise the release of government-held information via the following four distinct mechanisms:

(1) a mandatory proactive release mechanism

(2) an additional proactive release mechanism

(3) an informal release mechanism

(4) a formal release mechanism with disclosure log requirements.

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162 OVIC, *Submission 55*, 15 January 2024, p. 166.

163 OVIC, *Submission 55*, 15 January 2024, p. 167. This was supported by other evidence received to the Inquiry. See, for example, Dr Rueben Kirkham, *Submission 53*, 15 January 2024, p. 3.

164 OVIC, *Submission 55*, 15 January 2024, p. 166.

165 See OVIC, *Submission 55*, 15 January 2024, pp. 79–80, 166–167; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, p. 17. See also Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 60 ('Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.').

166 See OVIC, *Submission 55*, 15 January 2024, pp. 9–12.

RECOMMENDATION 23: That legislation establishing Victoria's new third-generation 'push' FOI system emphasise the primacy of the mandatory proactive, additional proactive and informal release mechanisms.

RECOMMENDATION 24: That legislation establishing Victoria's new third-generation 'push' FOI system protect agencies and ministers (and their staff) from civil and criminal liability where information is released in good faith under the mandatory proactive, additional proactive, informal and formal release mechanisms.

RECOMMENDATION 25: That legislation establishing Victoria's new third-generation 'push' FOI system protect the Information Commissioner and Public Access Deputy Commissioner from civil and criminal liability in respect of their performance of their statutory functions. Additionally, that these protections be extended to other persons employed by the regulator in respect of their performance of statutory functions on behalf of the Information Commissioner and Public Access Deputy Commissioner.

RECOMMENDATION 26: That legislation establishing the mandatory proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to release information of significant public interest, as statutorily defined, as well as information about:

- the kinds of information they hold, including what information they publish and are prepared to release (and whether it will be released free or for a fee)
- their organisational structure
- their functions and how their functions impact the public
- arrangements that facilitate public participation in the development of their policies and exercise of their functions
- their operations, strategic priorities, performance, financial affairs and related information published in tabled reports
- the kinds of information they routinely release under the formal release mechanism
- how the public can request information from them under the informal and formal release mechanisms
- a register of information determined to be unsuitable for release under the additional proactive release mechanism
- a register of information released under the informal and formal release mechanisms that has been considered for release to the broader public under the additional proactive release mechanism.

RECOMMENDATION 27: That legislation establishing the mandatory and additional proactive release mechanisms in Victoria's new third-generation 'push' FOI system contain guiding principles on how agencies and ministers are expected to release information under the mechanisms. These principles should emphasise the responsibility of agencies and ministers to:

- make the public aware of the availability of the information they hold
- publish information in a timely manner and in a way that is practical, easily found, clear, capable of being understood and accessible.

RECOMMENDATION 28: That legislation establishing the mandatory proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- publish free on their website, or other digital platform, information captured by the mechanism, except where the cost of publishing particular information online would be unreasonable
- release information that cannot be published online due to the exception via an alternative free method that is practical, timely, and accessible.

Where the exception applies, and the alternative methods available to provide public access to the information are not practical, timely or easily accessible, that agencies and ministers be empowered to charge reasonable costs associated with copying the information to comply with their obligations under the mechanism.

RECOMMENDATION 29: That legislation establishing the mandatory and additional proactive release mechanisms in Victoria's new third-generation 'push' FOI system require agencies and ministers to take reasonable steps to provide an alternative method of access to information captured by the mechanism to persons who cannot access the information through the primary method due to disability, incarceration or other impediment to access.

RECOMMENDATION 30: That legislation establishing the additional proactive release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to review annually their approach to releasing information under the mechanism.

RECOMMENDATION 31: That legislation establishing the informal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- provide reasonable advice and assistance to persons requesting information informally
- release information under the mechanism without charge or for the lowest reasonable cost.

RECOMMENDATION 32: That legislation establishing the informal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- consider releasing to the broader public, under the additional proactive release mechanism, information that has been released to requesters under the informal release mechanism
- record all decisions to proactively release information which has been previously released under the informal release mechanism.

RECOMMENDATION 33: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to consider whether formal requests can be dealt with under the informal release mechanism.

RECOMMENDATION 34: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- record, in the form of a disclosure log, all information released under the formal release mechanism in response to FOI requests for non-personal information
- update their disclosure log within 10 business days of releasing information to a requester under the formal release mechanism
- publish their disclosure log on their website
- release to the broader public all information recorded in their disclosure log, except:
  - requesters' names
  - personal information or information that would unreasonably infringe personal privacy
  - confidential information or information communicated in confidence
  - information the publication of which is potentially defamatory
  - information prohibited under law from being disclosed or published
  - information that would cause substantial harm to an entity
- consider releasing, under the additional proactive release mechanism, all information released to applicants in response to FOI requests for non-personal information, and record and publish all such decisions.

RECOMMENDATION 35: That legislation establishing Victoria's new third-generation 'push' FOI system ensure the Information Commissioner is granted appropriate regulatory functions and powers to regulate agency and ministerial compliance with the requirements relating to the proactive and informal release mechanisms, including with respect to disclosure logs. This should include reporting, complaint-handling, investigation, examination and audit powers, as well as the ability to take enforceable action with respect to non-compliance.

RECOMMENDATION 36: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system contain guiding principles on how agencies and ministers are expected to meet their obligations with respect to disclosure logs. These principles should:

- emphasise the responsibility of agencies and ministers to ensure that their disclosure log is easy to find, search and use, and up-to-date and useful
- set minimum requirements for the format of disclosure logs (for example, the type of document released and a description of its content)
- permit agencies and ministers to provide additional contextual information with respect to a document recorded in a disclosure log, if they consider that it will help the public to understand it
- set out how documents recorded in a disclosure log are to be released to the public (for example, online via an active electronic link in the log)
- permit agencies and ministers to publish information in a different form and format from that provided to the requester if publishing it in its original format would be impractical or unreasonably burdensome.

RECOMMENDATION 37: That legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- consider releasing to the broader public, under the additional proactive release mechanism, information which has previously been released to requesters under the formal release mechanism
- record all decisions to proactively release information that has been previously released under the informal release mechanism.

RECOMMENDATION 38: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies and ministers to develop, implement and publish a policy setting out, among other matters, their compliance with the guiding principles for the proactive release mechanisms; their processes for releasing information under the proactive, informal and formal release mechanisms; and their compliance with disclosure log requirements (including the kinds of information released under the informal and formal release mechanisms that will not be released to the broader public).

RECOMMENDATION 39: That legislation establishing Victoria's new third-generation 'push' FOI system include agency and ministerial reporting requirements with respect to the cost of administering the FOI scheme; compliance with their obligations under the proactive release mechanisms; the public's use of the informal release mechanisms; and the operational efficiency of those mechanisms.

3.3 Information-management practices required across government

The Committee received evidence that effective record keeping and information management practices are vital to the efficacy and efficiency of the push system.[167] As Professor Moira Paterson explained:

> [For push FOI systems] you really need well-designed systems that will bring up what needs to be or what can potentially be pushed out, and then you need systems that will allow that information to be checked to make sure it does not have stuff in it that should not be disclosed, which is a concern. If you cannot automate that in some way, or if there is no system for doing that, then there is going to be a lot of reluctance and a lot of hesitation in terms of putting stuff out there, so it needs to be easy.[168]

Associate Professor Johan Lidberg et al. agreed, noting:

> [P]ush FOI systems are only as effective as the discoverability of the information released … Information discoverability is closely connected to records management … Poor records management systems lead to poor information discoverability both internally for FOI officers, and externally once the information is released.[169]

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167 See, for example, OIC Qld, *Submission 16*, 30 November 2023, p. 5; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 2–6; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 15, Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 15–16.

168 See also Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 15.

169 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 2.

The Queensland Acting Information Commissioner also described the impact that poor record-keeping and information management practices can have on FOI culture in a push system, noting:

> [Many agencies hold] information [that] is spread across multiple sources … [including new and legacy databases. This makes] the ability to comprehensively and cohesively access [that information] … really difficult … [T]hat is a big barrier … [W]e would like to see agencies really demonstrably support open government, but when there is a burden of navigating multiple databases and the concern that you might have missed information and therefore have not given a complete picture, that can be quite overwhelming … [and agencies] might therefore opt for decisions that are restricted, that are conservative and that are perhaps less helpful for members of the public in an attempt to … try and manage the load and the burden of the work.[170]

3.3.1 Current practices

The Director and Keeper of Public Records, through the Public Record Office of Victoria (PROV), is responsible for issuing Standards[171] relating to record-keeping and information-management processes and practices across the Victorian public sector.[172] Compliance with these Standards is mandatory, and, as PROV has noted:

> If agencies fully comply with the requirements set out in … [PROV's] Standards … full and accurate records are created, discoverable and accessible, allowing applications under the FOI Act to be efficiently responded to.[173]

The Victorian Government has implemented the *Information Management Framework for the Victorian Public Service*[174] ('the Framework')—which applies to government departments and Victoria Police[175]—and a variety of supporting policies, standards, guidelines and tools.[176]

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170 Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, pp. 11–12.

171 See, for example, PROV, *PROS 19/05: Create, Capture and Control Standard*, Melbourne, August 2019; PROV, *PROS 19/06: Access Standard,* Melbourne, August 2019; PROV, *PROS 20/02: Storage Standard*, Melbourne, December 2020; PROV, *PROS 22/04: Disposal Standard*, Melbourne, May 2022; PROV, *PROS 23/01: Strategic Management Standard*, Melbourne, May 2023; PROV, *PROS 24/01: Operational Management Standard*, Melbourne, January 2024.

172 PROV, *Submission 9*, 22 November 2023, p. 1. See also *Public Records Act 1973* (Vic) ('*PR Act 1973* (Vic)') s 12.

173 PROV, *Submission 9*, 22 November 2023, p. 1.

174 Department of Premier and Cabinet (Victoria) ('DPC (Victoria)'), *Information Management Framework for the Victorian Public Service*, Melbourne, December 2016; OVIC, *Submission 55*, 15 January 2024, pp. 91–92.

175 DPC (Victoria), *Information Management Framework for the Victorian Public Service*, Melbourne, December 2016, p. 3; OVIC, *Submission 55*, 15 January 2024, p. 92.

176 See, for example, DPC (Victoria), *Information Management Policy for the Victorian Public Service*, Melbourne, August 2017; DPC (Victoria), *Information Management Governance Standard*, Melbourne, September 2017; DPC (Victoria), *Information Governance Guideline*, Melbourne, August 2017. See also OVIC, *Submission 55*, 15 January 2024, pp. 91–92.

IARs [177] are an important information- and data- management tool to support FOI because they help agencies and ministers to know what information they hold.[178] The *Information Management Governance Standard* (which applies to departments and Victoria Police), and Standard 2 of the Victorian Protective Data Security Standards (which applies to public sector agencies[179] and special bodies),[180] require agencies and ministers to implement IARs.[181]

3.3.2 Evaluation of current practices

The main criticisms of the current practices of Victorian agencies and ministers with respect to record-keeping for FOI include:

- the lack of statutory recognition of the interrelation between the *FOI Act 1982* (Vic) and the *Public Records Act 1973* (Vic) ('*PR Act 1973* (Vic)'), including the need for FOI legislation to clearly state the importance of agencies complying with their obligations under the *PR Act 1973* (Vic)[182]
- the PROV's weak compliance-monitoring and enforcement powers under the *PR Act 1973* (Vic)[183]
- the attitude of agencies to records management—specifically their failure to recognise its critical importance to their capacity to effectively and efficiently administer the FOI scheme[184]

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177 An information asset is 'a body of information, defined and practically managed so it can be understood, shared, protected and used to its full potential. Information assets support business processes and are stored across a variety of media and formats (i.e. both paper based as well as electronic material). Information assets have a recognisable and manageable value, risk, content and lifecycle. An information asset can be a specific report, a collection of reports, a database, information contained in a database, information about a specific function, subject or process'. An Information Asset Register 'is a tool that organisations can use to record collections of information (information assets) regardless of media or format … [that] helps identify what information resources exist across the organisation and provides stakeholders with an overview of the information assets under their care' (OVIC, *Practitioner guide: identifying and managing information assets*, v 2.0, Melbourne, November 2019, pp. 6, 17).

178 OVIC, *Submission 55*, 15 January 2024, p. 95.

179 A public sector agency broadly means public service bodies and entities, statutory and special bodies—see *Public Administration Act 2004* (Vic) ss 4, 5, 6.

180 The Victorian Protective Data Security Standards do not apply to councils, universities, public hospitals, public health services and ambulance services (*PDP Act 2014* (Vic) ss 84, 86).

181 OVIC, *Submission 55*, 15 January 2024, p. 95; DPC (Victoria), *Information Management Governance Standard*, Melbourne, September 2017, p. 2; OVIC, *Victorian Protective Data Security Standards: implementation guidance version 2.3*, v 2.0, Melbourne, February 2024, p. 12 (Standard E2.020).

182 PROV, *Submission 9*, 22 November 2023, p. 1; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 18 (Professor Paterson noted that '[p]resently, it is difficult [for PROV] to assess whether public officers are meeting their records-management objectives and standards, so there are no systematic mechanisms for investigating that to ensure that that is all happening').

183 PROV, *Submission 9*, 22 November 2023, p. 1. See also LIV, *Submission 22*, 4 December 2023, p. 4.

184 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 4–5.

- the complexities associated with the sheer volume and nature of information created in the digital age[185]
- non-centralised records management and information held in 'multiple formats .. software platforms and devices'[186]
- operating systems or databases that do not 'talk to each other'[187]
- non-compliance with best practice records-management principles and PROV protocols for document storage, retention and disposal[188]
- the non-digitisation of hard-copy records, especially historical paper records, which makes the search process time-consuming and resource intensive[189]
- the complexities and delay associated with searching for and retrieving hard-copy documents stored in off-site facilities run by third-party operators[190]
- ineffective systems and processes for facilitating timely search and retrieval of electronic documents[191]
- the use of 'outdated data management systems' resulting in reduced document search and extraction functionality; inadequate mapping of what information is retained and where it is held; and an over-reliance on time-consuming manual processes for searching for, identifying, extracting, reviewing and redacting records[192]

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185 For example, Dr Danielle Moon noted that, during the search phase, FOI practitioners regularly have to assess numerous iterations or drafts of a final document—Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 7–8.

186 MAV, *Submission 51*, 15 January 2024, p. 4 (quotation); Department of Education (Victoria), Response to Integrity and Oversight Committee questions on notice, 13 May 2024, pp. 2–3.

187 Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 13 March 2024, p. 15. Associate Professor Johan Lidberg elaborated that some FOI practitioners in the health sector reported having to navigate multiple hard-copy, first and second generation digital and cloud-based information systems that do not talk to each other (Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 16). See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 75–76, 95–96.

188 For example, improper preservation of information, such as storing files on computer desktops; non-compliance with proper processes for retaining and disposing of electronic records; and a 'lack of appropriate procedures for dealing with information created in new ways such as via meetings on conference software and collaborative working spaces like Google docs … [and] Microsoft 365' (Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 4). Professor Moira Paterson noted that 'a lot of decision-making occurs in … electronic informal contexts [for example, in messages exchanged in the MS Teams chat function during a work-related Teams meeting and] … [i]f you exclude that, then you are excluding a lot of really valuable information that sheds light on what the government is doing' (Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 17). See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 81–83, 103–104.

189 See, for example, Victoria Police, *Submission 24*, 7 December 2023, p. 7.

190 Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 4–5; Associate Professor Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 79–80, 83–84; 99–100.

191 For example, IT operating systems and software that do not allow for electronic records stored in a multitude of different or newer formats to be easily searched or extracted (Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, pp. 3–4).

192 LIV, *Submission 22*, 4 December 2023, p. 2.

- a lack of training in FOI culture and records-management skills[193]
- a lack of coordination between IT, administrative and FOI teams with respect to record-keeping systems and technology.[194]

A whole-of-government information management framework that supports FOI

For a third-generation FOI system to operate effectively, agencies and ministers must know what information they hold and be able to easily identify, locate and release information subject to FOI.[195]

Given that, in the digital age, the public expects to be able to engage with agencies online and to receive information electronically, digitising hard-copy records, including historical records, is also important.[196]

At an organisational level, information and data management should be appropriately resourced to ensure compliance with legislative, regulatory and operational requirements; co-ordinated through policies, procedures and practices; and embedded into all 'new systems and processes'.[197]

At a public sector level, there have long been calls for a Victorian whole-of-government information management framework to facilitate effective leadership on information and data management practices required to support FOI, and continuity in the way agencies and ministers categorise, store and manage government-held information.[198]

Currently, Victoria does not have an information management framework that applies to the whole public sector.[199]

OVIC's primary criticisms of the Framework and supporting documents are that they do not apply to the whole Victorian public sector,[200] are outdated,[201] and focused on

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193 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 4. See also SEMLS, *Submission 67*, 29 January 2024, p. 10.

194 For example, an agency's IT team making decisions about implementing new information-management systems without consulting the FOI team or ensuring there is appropriate technology in place so that information stored in new electronic formats can be searched and extracted—Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 4; Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 81–82.

195 OVIC, *Submission 55*, 15 January 2024, p. 89.

196 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 5; LIV, *Submission 22*, 4 December 2023, p. 4.

197 OVIC, *Submission 55*, 15 January 2024, p. 89. See also Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 5; Associate Professor Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 38, 48–49, 53–54, 78, 94–95, 101–104, 110, 115.

198 OVIC, *Submission 55*, 15 January 2024, p. 89. See also Parliament of Victoria, Economic Development and Infrastructure Committee, *Report of the Economic Development and Infrastructure Committee on the Inquiry into improving access to Victorian public sector information and data*, Melbourne, June 2009 (especially pp. 19–20); Victorian Auditor-General's Office (VAGO), *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015 (especially pp. 27–34).

199 OVIC, *Submission 55*, 15 January 2024, p. 92.

200 OVIC has noted that they only apply to 'Departments, Victoria Police, Cenitex, Service Victoria and Parks Victoria' (OVIC, *Submission 55*, 15 January 2024, p. 92).

201 OVIC has noted that the Framework and supporting documents have not been reviewed since their creation (OVIC, *Submission 55*, 15 January 2024, p. 92).

data-sharing rather than the public benefit in enhancing access to *all* government-held information.[202]

OVIC and others have suggested that a whole-of-government information-management framework—applicable to the entire Victorian public sector—is needed to support a third-generation FOI system.[203] Moreover, OVIC and others have explained that such a framework should:

- specify, as one of its primary aims, improving the accountability and transparency of government and public participation in government affairs and decision-making
- reinforce the obligations of agencies and ministers to ensure that all government-held information can 'easily be searched, extracted and accessed'[204]
- support the maximum disclosure of *all* kinds of government-held information rather than confining itself to data
- explain the meaning of commonly used terminology where meanings differ in an information-management or FOI context.[205]

The Committee agrees.

Regarding the content of the framework, OVIC highlighted that a best practice framework in the digital age will ensure that e-governance[206] and 'access-by-design'[207] principles are embedded into the information- and data-management processes of all agencies and ministers subject to FOI.[208] This can include requiring them to:

- create records relating to personal information with future access by the affected person in mind[209]

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202 OVIC, *Submission 55*, 15 January 2024, p. 92.

203 OVIC, in particular, observed that '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' (OVIC, *Submission 55*, 15 January 2024, pp. 30 (quotation), 90–93; LIV, *Submission 22*, 4 December 2023, pp. 2–5).

204 LIV, *Submission 22*, 4 December 2023, p. 4.

205 OVIC, *Submission 55*, 15 January 2024, p. 93.

206 E-governance means 'the public sector's use of the most innovative information and communication technologies to deliver citizens with improved services, reliable information and greater knowledge in order to facilitate access to the governing process and encourage deeper participation' (Elizabeth Tydd, 'AI, e-Governance and access to information: Why digital government must remain accountable to citizens', *The Mandarin*, 27 September 2022, <https://www.themandarin.com.au/201131-ai-e-governance-and-access-to-information-why-digital-government-must-remain-accountable-to-citizens> accessed 23 April 2024). See also OVIC, *Submission 55*, 15 January 2024, p. 93.

207 Access-by-design means 'designing policies, processes, and templates with [public] 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' (OVIC, *Submission 55*, 15 January 2024, p. 93). See also Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 8.

208 OVIC, *Submission 55*, 15 January 2024, p. 93.

209 For example, ensuring that records created with respect to time spent by children and young persons in institutional and out-of-home care are 'non-judgmental, accurate, detailed and more meaningful to Care Leavers in the future' (DFFH, *Submission 50*, 15 January 2024, p. 4). See also Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 9.

- create documents in such a way that they can easily be released to the public[210]
- use IT systems with features and functionality that enable them to create documents in a state of readiness for release, and quickly and easily identify, access and release documents subject to FOI[211]
- use an operating system capable of interfacing with all 'programs and systems' used by an agency to ensure that information that is accessed via different kinds of technology can be retrieved and extracted [212]
- assess the suitability for release of information recorded in their Information Asset Register[213]
- assess (and re-assess) the suitability for release of information at different stages of its lifecycle[214]
- ensure that privacy risks associated with the use of new technology are identified and mitigated.[215]

The Committee considers that it would be beneficial for the framework to address *how* decision-making interacts with technology in the digital age.[216]

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210 For example, writing for a public audience, siloing personal, sensitive or confidential information and preparing high-level summaries of documents unsuitable for release (OVIC, *Submission 55*, 15 January 2024, p. 94). Additionally, with respect to historical or voluminous records from multiple different sources, cataloguing, digitising, indexing and listing it in such a way that the public knows can easily identify what information is likely to meet their request needs, and FOI practitioners can easily search for it (Kirsten Wright, Program Manager, Find & Connect, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 20).

211 For example, public-release flagging of information stored in document-management systems or metadata throughout its life cycle, data segregation of exempt information under FOI legislation, data tagging, advanced search functionality, and digitisation and conversion of records into machine-readable formats (OVIC, *Submission 55*, 15 January 2024, p. 94).

212 For example, 'health agencies need access to technology that allow[s] them to view MRIs and X rays across a spectrum of data capsules such as Floppy Disk, CD-ROM, and Microfilm. Other agencies may have audio and/or video stored on different capsules such as VHS, Betamax, CD-ROMs and tape cassettes' (Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 4). See also Associate Professor Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 80–81.

213 OVIC, *Submission 55*, 15 January 2024, p. 94.

214 For example, when its 'protective marking' or classification is revised, or when it is created or entered into a document-management system, finalised or approved, or revised (OVIC, *Submission 55*, 15 January 2024, p. 94). See also Queensland Government, *Pre-determining the release status of information: ex ante decision making guideline*, v 3.0, Brisbane, February 2018.

215 For example, through the use of 'privacy impact assessment[s] and security risk assessment[s]' (OVIC, *Submission 55*, 15 January 2024, p. 101).

216 For example, IBAC (IBAC, *Submission 17*, 1 December 2023, p. 2) highlighted that technology used to improve the efficiency of FOI processes 'must not exclude humans from administrative decision making … to ensure that appropriate legal tests are applied before the disclosure of information … [and] appropriate accountability if disclosures are made erroneously'. The Victorian Ombudsman agreed, noting that 'ensuring humans are always the ultimate administrative decision-makers is a critical accountability measure' (VO, *Submission 60*, 22 January 2024, p. 2). Victoria Police also agreed, noting that, '[T]he use of technology to assist in FOI processes must also consider information security frameworks and implications arising from the use of internationally owned and located servers' (Victoria Police, *Submission 24*, 7 December 2023, p. 8). See also Victoria Elliott, Commissioner, IBAC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 11; Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 5; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, p. 9. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, p. 84.

Indigenous Data Sovereignty and Indigenous Data Governance

The Committee received evidence of the need for FOI legislation to recognise and embed Indigenous Data Sovereignty[217] (IDS) and Indigenous Data Governance[218] (IDG) principles.[219] As the Victorian Aboriginal Legal Service (VALS) explained:

> The concept of Aboriginal data sovereignty mandates that Aboriginal communities and Aboriginal Community Controlled Organisations (ACCOs) have a right to access and interpret information concerning Aboriginal individuals and communities, as well as the right to determine how the data is used and disseminated within mainstream society. The authority and control over such data not only ensures that the information is understood in its appropriate context, but is also beneficial to ACCOs to ensure that the services and programs provided meet the demand and needs of Aboriginal Communities.[220]

This will require consideration of how the Australian IDS Principles[221]—including the right of Aboriginal people to access, collect and interpret Indigenous Data[222] (ID) and determine the way in which such data is collected, managed, used and disseminated—is best enshrined in, and protected and facilitated by, FOI legislation (and a whole-of-government information management framework to support FOI).[223]

The Committee considers that the Victorian Government should—in consultation with ACCOs, Aboriginal leaders, practitioners and community members (including the Yoorook Justice Commission and VALS)—explore the feasibility of recognising and embedding IDS and IDG principles into a whole-of-government information-management framework and legislation establishing Victoria's new third-generation FOI system.

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217 Indigenous Data Sovereignty (IDS) is 'the right of Indigenous Peoples to own, control, access and possess data that derive from them, and which pertain to their members, knowledge systems, customs, resources or territories' (Yoorrook Justice Commission, *Information Sheet 4: Indigenous Data Sovereignty and Data Governance*, Melbourne, 2022, p. 1). See also VALS, *Submission 54*, 15 January 2024, p. 12.

218 Indigenous Data Governance (IDG) is 'the enactment of Indigenous Data Sovereignty and refers to the mechanisms that support Indigenous decision-making on how data are controlled, collected, interpreted, accessed, stored, and used' (Yoorrook Justice Commission, *Information Sheet 4: Indigenous Data Sovereignty and Data Governance*, Melbourne, 2022, p. 1). See also VALS, *Submission 54*, 15 January 2024, p. 13.

219 VALS, *Submission 54*, 15 January 2024, pp. 12–15.

220 Ibid., p. 12.

221 The IDS Principles are the right of First Peoples to: (1) data that is 'contextual and disaggregated (available and accessible at individual, community and First Nations levels) … [,] relevant and empowers sustainable self-determination and effective self-governance … [, and] protective and respects First Peoples' individual and collective interests'; (2) '[d]ata structures that are accountable to Indigenous Peoples and First Nations'; and (3) '[e]xercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure' (Maiam nayri Wingara in Yoorrook Justice Commission, *Information Sheet 4: Indigenous Data Sovereignty and Data Governance*, Melbourne, 2022, p. 2).

222 Indigenous Data is 'information, in any format, that is about Indigenous Peoples, knowledge systems, customs, resources or territories or that impacts Indigenous lives at the collective and/or individual level' (Yoorrook Justice Commission, *Information Sheet 4: Indigenous Data Sovereignty and Data Governance*, Melbourne, 2022, p. 1). See also VALS, *Submission 54*, 15 January 2024, p. 12.

223 VALS, *Submission 54*, 15 January 2024, p. 13.

This should include consideration of:

- the kinds of ID that can and should be published under the mandatory proactive release and additional proactive release mechanisms. The Committee notes VALS's view that there is a wide array of 'simple or routine' ID, some of which is currently released informally outside the *FOI Act 1982* (Vic), that can and should be published for the benefit of 'government accountability' and the public discussion on matters of importance to Aboriginal people[224]
- the ways in which data relating to Aboriginal people can be published to facilitate greater understanding of the issues affecting them[225]
- the need to empower the regulator to issue professional guidance on how entities subject to the FOI scheme are expected to embed IDS and IDG principles into their internal FOI and information-management policies, procedures and practices.[226]

Review of the *Public Records Act 1973* (Vic)

The Committee received evidence of the need for FOI legislation and professional standards to emphasise the importance to the success of the FOI system of effective record-keeping and information-management practices. This can be achieved through a number of measures. First, by ensuring that they are 'reflective of evolving technologies' and facilitate timely access to, and retrieval and redaction of, data. Second, by properly penalising 'serious breaches'[227] and serial non-compliance. And, finally, by encouraging agencies to report on their records management as part of their ordinary public performance reporting.[228]

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224 For example, VALS noted that 'data on unsentenced and sentenced Aboriginal people in corrections custody', which is of central importance to bail reform discussions in Victoria, can and should be published because the Department of Justice and Community Safety has described such data as 'simple or routine' and has released it informally outside the *FOI Act 1982* (Vic) (VALS, *Submission 54*, 15 January 2024, p. 17).

225 For example, VALS noted that 'bail data' that is currently published is 'not well desegregated … [and] does not reflect what behaviour a person who is remanded is accused of … [making it] hard to tell the story of what is happening from the data', and suggested that segregating data sets on health care received by Aboriginal people in custody 'would provide Victoria with some better understanding of what is actually happening and what the solutions are (Nerita Waight, Chief Executive Officer (CEO), VALS, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 39–40, 45).

226 VALS, *Submission 54*, 15 January 2024, p. 17. See also, Nerita Waight, CEO, VALS, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 39.

227 Professor Moira Paterson noted that the penalty under s 19(1) of the *Public Records Act 1973* (Vic) for the offence of removing, damaging or destroying a public record is significantly lower than in other Australian jurisdictions (Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 18).

228 Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 18. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 95–96, 110.

Legislative considerations

Publication of Information Asset Registers

There have long been calls for agency and ministerial IAR's to be published in Victoria.[229] OVIC suggests that this would ensure greater transparency, by improving public understanding of the nature and extent of agency and ministerial information holdings and the reasons why information is not released, while also making it easier for the public to identify the information they want to access.[230]

Preservation of public information in the digital age

The *PR Act 1973* (Vic), together with the standards, policies and guidelines issued by PROV, set minimum requirements for managing government-held information in Victoria.[231]

As Victoria increasingly transitions to digital government, OVIC emphasises government's responsibility to ensure that:

- information-management legislation is 'technology neutral' to enable it to adapt to new and emerging technologies[232]
- information-management standards and practices keep pace with changes in how information is created, captured, labelled, categorised, stored, preserved and accessed in the digital age—for example, capturing and preserving records created using new and emerging digital technologies,[233] and ensuring that information is labelled in such a way that it is discoverable by technology used to improve the efficiency of FOI processes[234]
- the public understands the government's and the wider public sector's use of emerging technologies, such as Artificial Intelligence (AI)[235] (including machine learning)[236]

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229 VAGO, *Access to public sector information: Victorian Auditor-General's report*, Melbourne, December 2015, pp. 9–11, 17–18. See also OVIC, *Submission 55*, 15 January 2024, pp. 95–96.

230 OVIC, *Submission 55*, 15 January 2024, p. 96.

231 Ibid.

232 Ibid.

233 This would include, for example—where the communications 'are created as part of, or for the purpose of' agency or ministerial duties—SMS, MMS, audio recordings, emails and other kinds of communications sent and received via private mobile phones and email accounts and encrypted instant-messaging software and applications (such as MS Teams and WhatsApp), noting that the definition of 'document' in s 5 of the *FOI Act 1982* (Vic) captures these kinds of records—OVIC, *Submission 55*, 15 January 2024, pp. 97 (quotation), 98.

234 For example, when using AI tools, ensuring that information is discoverable through the use of those tools (OVIC, *Submission 55*, 15 January 2024, pp. 101–102).

235 Artificial Intelligence (AI) 'refers to an engineered system that generates predictive outputs such as content, forecasts, recommendations or decisions for a given set of human-defined objectives or parameters without explicit programming. AI systems are designed to operate with varying levels of automation'. Machine learning 'are the patterns derived from training data using machine learning algorithms, which can be applied to new data for prediction or decision-making purposes'—Australian Department of Industry, Science and Resources (Australian DISR), *Safe and responsible AI in Australia: discussion paper* (*Discussion paper*), Canberra, June 2023, p. 5).

236 For example, explaining how and why these technologies are used; what information they can access, use or infer; and the impact and outcomes of their use—OVIC, *Submission 55*, 15 January 2024, p. 97.

- agencies and ministers are easily able to access, and provide public access to, records created or stored using outdated modes of technology.[237]

Information held by third-party contractors and subcontractors and private entities performing public functions

The Committee received evidence of the limitations in the coverage of the current FOI scheme established by the *FOI Act 1982* (Vic)[238]—specifically, the need to protect the public's right to access under FOI legislation information held by 'contracted service providers and sub-contractors' relating to government work,[239] and by private entities that receive public funding to perform public functions or provide public services.[240]

Problems can arise where, for example, private contractors (or their sub-contractors)—who are not subject to the FOI scheme—hold information in connection with government-contracted services not in the physical possession of the contracting agency.[241]

OVIC alerted the Committee to situations where such information has been found to be inaccessible by the public under FOI legislation because it is not held, or deemed to be held, by the relevant agency, including:

- where a government contract between an agency and a private contractor does not give the agency an 'immediate right to possession'[242] to documents held by the contractor in connection with the contract
- where an agency is not in physical possession of information held by a private contractor and cannot access it (for example, 'algorithm[s], software specification, source code or test suites'[243] for software created by a contractor under a government contract).[244]

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237 OVIC, *Submission 55*, 15 January 2024, pp. 96–97.

238 The *FOI Act 1982* (Vic) provides a right of access to documents held by agencies (as defined by the Act) and ministers (s 13). Under s 5 of the Act, an agency is defined as 'a department, council or prescribed authority', noting that a 'prescribed authority' is also defined in s 5 of the Act and reg 6 and sch 1 of the *Freedom of Information Regulations 2019* (Vic).

239 See, for example, OVIC, *Submission 55*, 15 January 2024, p. 98 (quotation); PROV, *Submission 9*, 22 November 2023, pp. 1–2; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 5, 10–11; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 3; Name withheld, *Submission 48*, 15 January 2024, pp. 21–22; Iain Anderson, ACT Ombudsman, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 16.

240 Liberty Victoria, *Submission 25*, 8 December 2023, pp. 10–11; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 2–3; Name withheld, *Submission 48*, 15 January 2025, pp. 21–22.

241 OVIC, *Submission 55*, 15 January 2024, pp. 98–99. See also PROV, *Submission 9*, 22 November 2023, p. 2.

242 OVIC, *Submission 55*, 15 January 2024, p. 98.

243 Ibid., p. 99.

244 OVIC, *Submission 55*, 15 January 2024, pp. 98–99. See also *'EC3' and Department of Jobs, Precincts and Regions* (Freedom of Information) [2022] VICmr 47; *O'Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100. In *O'Brien*, the algorithm used by the NSW Department of Communities and Justice (DCJ) to calculate base rent and rental subsidies had been sourced from a third-party contractor and was not accessible under FOI because it was neither held nor able to be accessed by the DCJ—OVIC, *Submission 55*, 15 January 2024, p. 99; Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 6.

The Commonwealth[245] and New South Wales[246] push jurisdictions, as well as the hybrid Tasmanian jurisdiction,[247] have sought to ensure that such information is subject to the FOI scheme.[248] There are no equivalent provisions in Victorian FOI legislation.[249]

However, as OVIC noted, there are limitations in the New South Wales approach due to its commercial-in-confidence protections.[250] OVIC's view is that:

> 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 …
>
> [Legislation] 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.[251]

The Committee agrees.

The Committee also received evidence of the wide array of public services[252] provided by not-for-profit and other private entities with public funding, not all of whom are subject to the FOI scheme.[253] It was highlighted that information held by such entities should be subject to FOI legislation, not least because they provide services to vulnerable populations and make decisions in connection with the provision of

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245 The Commonwealth approach requires, under *FOI Act 1982* (Cth) s 6C, government contracts to protect an agency's right to receive any document created by, or in the possession of, contracted service providers (or subcontractors) relating to the performance of the contract, where it is requested under FOI..

246 The NSW approach, *GIPA Act 2009* (NSW) s 121, enshrines an agency's right to access information held by a private contractor directly relating to the performance of services under a government contract, including information collected from the public in the course of providing services under the contract, as well as information received for the purpose of providing services under the contract, excluding information that would disclose a private contractor's 'financing arrangements, financial modelling, cost structure or profit margins', breach their statutory secrecy obligations, or place them at a current or future 'substantial commercial disadvantage in relation to the agency' is specifically excluded.

247 The Tasmanian approach, *Right to Information Act 2009* (Tas) s 8, provides a right of access to information held by a private entity 'funded by' a public authority, or 'performing a role' of a public authority, if it relates to the performance of a function of a public authority, the progress or evaluation of work or 'the expenditure of public funds'. See also Name withheld, *Submission 48*, 15 January 2024, p. 21.

248 OVIC, *Submission 55*, 15 January 2024, p. 99.

249 OVIC, *Submission 55*, 15 January 2024, p. 100. See also *FOI Act 1982* (Vic) s 5, which defines 'document of an agency' and 'official document of a Minister'. A 'document of an agency' is a defined as a document in the possession of an agency, whether created or received by the agency, but does not make provision for 'deemed possession', whereas a minster can be deemed to be in possession of document if they are entitled to access the document and it is not a document of an agency.

250 OVIC, *Submission 55*, 15 January 2024, pp. 99–100. The IPC NSW additionally noted that the distinction in the *GIPA Act 2009* (NSW), between 'the provision of contractual services' and 'services which inform government decision-making', creates barriers to access in certain circumstances, as demonstrated in *O'Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100 (IPC NSW, *Submission 12*, 27 November 2023, p. 5).

251 OVIC, *Submission 55*, 15 January 2024, pp. 99–100.

252 For example, 'housing, health, disability … and other social services' (Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 2).

253 Liberty Victoria, *Submission 25*, 8 December 2023, p.11; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, Melbourne Law School, University of Melbourne, 14 January 2024, p. 2.

those services which impact individual rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter').[254] It is also international best practice.[255]

This issue was touched on by the VO in the report of its investigation into the complaint-handling practices of the State's social housing sector.[256] In the report, the VO noted that public housing providers in the sector are subject to the *FOI Act 1982* (Vic) whereas community housing organisations (CHOs)—not-for-profit community housing providers operating with State and Federal funding—are not. This has created a disparity between public housing and community housing tenants with respect to their information-access and review rights.[257]

The VO expressed the view that, in order to address the disparity, the Act should be amended to ensure that CHOs are subject to the FOI scheme. However, the Committee notes that the community housing regulator, the Community Housing Industry Association Victoria, and CHO representatives expressed concern about not-for-profit entities being subject to the same 'controls' as government organisations and other public sector entities.[258]

While this is a complex issue of significant interest to the broader public, the Committee has not received sufficient evidence during the Inquiry to make a recommendation to the Victorian Government on it.

Nevertheless, the Committee considers that, in designing Victoria's new third-generation FOI push system, the Victorian Government should give consideration to the need for publicly funded private entities to be subject to the FOI scheme. In doing so, it will be important for the Government to consult widely with relevant stakeholders, and to avoid taking a blanket approach that may lead to unintended negative consequences, such as hardship for not-for-profit organisations.

Further, given that not all publicly funded not-for-profit and other private entities are subject to the Charter,[259] it will be important for Government, when making any changes to the scope of application of the FOI scheme, to consider whether there is a need for the definition of 'public authority' in the Charter to be amended.[260]

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254 Liberty Victoria, *Submission 25*, 8 December 2023, p. 11; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, Melbourne Law School, University of Melbourne, 14 January 2024, p. 2.

255 See Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 12 ('The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.').

256 VO, *Investigation into complaint handling in the Victorian social housing sector*, Melbourne, July 2022.

257 For example, 'data, policies and other information about their tenancies or complaints'—VO, *Investigation into complaint handling in the Victorian social housing sector*, Melbourne, July 2022, pp. 63 (quotation), 64.

258 VO, *Investigation into complaint handling in the Victorian social housing sector*, Melbourne, July 2022, pp. 63 (quotation), 64.

259 Not-for-profit entities are only subject to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') if they fall within the definition of 'public authority' in the Charter (see ss 4, 38).

260 As noted by the VO, the Charter 'requires "public authorities" to act compatibly with human rights and to give proper consideration to relevant human rights when making decisions'—VO, *Investigation into complaint handling in the Victorian social housing sector*, Melbourne, July 2022, p. 64 (quotation), 65. See also The Charter ss 4 (definition of 'public authority'), 38 ('[c]onduct of public authorities').

Need for whole-of-government technical capacity to support FOI

At the outset, the Committee agrees with Associate Professor Jennifer Beard that

> a rights-based, user-centred approach [is needed] to understand what people need, and how technology can support this, rather than the other way around.[261]

Submissions to the Inquiry emphasised the need, in the digital age, for agencies and ministers to have access to technology that facilitates the efficient release of information under the FOI scheme.[262] Investment in this kind of technology is especially crucial for agencies receiving a high volume of FOI requests, but it is not widely used by agencies in Victoria.[263]

OVIC and others flagged that Victoria should consider developing a whole-of-government FOI portal,[264] supported by new and emerging technology, to centralise the making of requests and the publication of agency and ministerial disclosure logs, IARs and information released through proactive and informal release mechanisms.[265] The Committee received evidence that effective record-keeping and information management is essential to the efficient operation of such portals.[266]

The Committee agrees with OVIC that there is significant public benefit in making it easy:

- to capture public sector-wide data on frequent requests
- for the public to see the kinds of information that are being released proactively and informally across the public sector
- for the public to see how FOI exemptions are being applied across the public sector and the kinds of information they relate to.[267]

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261 Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p, 8.

262 This includes technology that supports their capacity to search for, retrieve and provide access to, information requested or required to be published under FOI—for example, software and tools that allow agencies to automate processes for classifying and storing information in accordance with standard naming conventions (including metadata); audit the 'status and classification of business records throughout their lifecycle' (Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 5); search large tranches of digitised documents to identify relevant information (for example, document review and analytics software developed by 'e-discovery providers … [such as] Relativity and Law in Order, Sky Discovery and Nuix') (Lachlan Fitch, President, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 50); analyse 'the data and content of records' (Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 5); de-identify personal or other exempt information contained in records (including redaction or pixelation); retain and dispose of records in compliance with statutory time-frame requirements; and provide secure electronic access to information, such as 'time-limited Cloud portal[s]' (VO, *Submission 60*, 22 January 2024, p. 2). See also Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 6; OVIC *Submission 55*, 15 January 2024, p. 101; LIV, *Submission 22*, 4 December 2023, pp. 4–5.

263 OVIC, *Submission 55*, 15 January 2024, p. 101. This view was supported by other evidence received by the Committee, for example Western Health, who noted that they would need additional funding in order to 'utilise the consumer-focused capability of the EMR [Electronic Medical Record system] .. [such a releasing information] through patient portals' (Western Health, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, p. 2). See also ALA, *Submission 28*, 21 December 2023, pp. 6–7; Lachlan Fitch, President, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 50.

264 The ACT's Open Access Information portals are an example of this, and, as the ACT Ombudsman noted, have made it easier for the public to find and search for information released proactively by agencies because it is published in the one place (Iain Anderson, ACT Ombudsman, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, pp. 15–16).

265 OVIC, *Submission 55*, 15 January 2024, p. 102; Victorian Bar, *Submission 57*, 15 January 2024, p. 8.

266 Lachlan Fitch, President, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 50.

267 OVIC, *Submission 55*, 15 January 2024, p. 102.

AI and emerging technologies

The Committee received evidence of the complexity of government transparency with respect to its use of emerging technologies like AI.[268] As the University of New South Wales's (UNSW) Business School Regulatory Laboratory and Allens Hub for Technology, Law and Innovation (UNSW Allens Hub) explained in their submission to the Commonwealth Department of Industry, Science and Resources' discussion paper 'Safe and responsible AI in Australia':

> Transparency is a concept that many people are agitating for, but the crucial questions are what is rendered transparent, to whom, how and in which contexts.[269]

The Committee considers that the *what* and the *how* are particularly important in considering any major legislative reform of the Victorian FOI scheme because AI has changed the landscape of what is clearly identifiable as government-held information and how such information is created and stored.

Take, for example, information held about a person in an AI large language model,[270] which is 'diffuse' in a way that information contained in a document is not.[271] Professor Bennett Moses described such information as 'probabilistic[272] relationships to concepts in a really complicated giant parameterised graph'.[273] It is also the case that the way in which a large language model makes inferences about information held about a person is different to the way a human does. This means that inferred information created by a large language model is not contained within a document and is 'difficult to disentangle from the larger model'.[274] As Professors Bennett Moses and Walsh explained:

> As government increasingly relies on deep learning, large language models and other kinds of artificial intelligence, the question of what is required to allow individuals to access 'their own personal information' will become more difficult to answer because government will have access to extensive, often inferred, information about individuals that is not held in a 'document'.[275]

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268 Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, pp. 2–3; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 8–12.

269 UNSW Business School Regulatory Laboratory (UNSW Reg Lab) and UNSW Allens Hub for Technology, Law and Innovation (UNSW Allens Hub), *Submission 273*, submission to Australian DISR, *Supporting responsible AI discussion paper*, 26 July 2023, p. 13, quoted in Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 2. Note: The extract from *Submission 273*, which is quoted on pp. 2–3 of *Submission 21* to the Integrity and Oversight Committee's Inquiry, is quoted throughout the discussion under 'AI and emerging technologies' in this chapter as *Submission 21*.

270 A large language model 'is a type of generative AI that specialises in the generation of human-like text'—Australian DISR, *Discussion paper*, p. 5. ChatGPT is an example of a large language model (Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 2).

271 Professor Lyria Bennett Moses and Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 2.

272 AI large language models are 'probabilistic' in the sense that 'they will never give you the same output in response to the same query'—Professor Lyria Bennett Moses, Director, UNSW Allens Hub, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 24.

273 Professor Lyria Bennett Moses, Director, UNSW Allens Hub, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 22.

274 Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 2.

275 Ibid., p. 2.

With respect to the *what*, Professor Bennett Moses explained how the information that the public wants to know about human versus AI government decision-making differs greatly. When an individual makes a government decision, the public generally neither wants nor is entitled to know personal information about that individual if it is unconnected with the reasons for the decision. However, when it comes to AI systems used in government decision-making, the public wants to know a lot more about the characteristics of the decision-maker; that is, how those systems operate.[276]

Given that, as government's use of AI technology increases, information will be generated and held in much more diffuse ways than the current concept of 'documents' in the *FOI Act 1982* (Vic) envisions, Professor Bennett Moses expressed concern that this will have a detrimental impact on the public's FOI rights over time.[277]

Professor Bennett Moses suggested that the public has a right to transparency around the government's use of AI systems (that is, when they are being used), and the government's use of AI-generated information in government decision-making, including diffuse information which only relates to a person probabilistically.[278]

Professor Bennett Moses also suggested that when considering how best to protect and facilitate the public's right to government-held information generated or inferred by AI, it is helpful to think about how to enable the public to query:

- what information is held about them
- what associations government is making about them
- how decisions affecting them are made.[279]

Additionally, they considered it important to understand how the different kinds of relationships an agency can have with AI generated or inferred data can impact their obligation to provide it to the public; for example:

- they have access to data about a person but have not accessed it (in the sense of querying, analysing or processing it)
- they have accessed or processed data about a person (that is, '[t]hey have done something with data … in some context')
- they have control over the data (for example, they decide what data is held in a database and are the proper receiving entity for requests to amend data held in the database)
- they have physical possession of 'the media on which the data is stored' (for example, an on-site server).[280]

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276 Professor Lyria Bennett Moses, Director, UNSW Allens Hub, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 23.

277 Ibid., p. 24.

278 Ibid.

279 Ibid., pp. 24–25.

280 Ibid., pp. 25, 26 (quotation).

With respect to the *how*, UNSW Allens Hub has suggested that government should be prohibited from misleading the public with respect to its use of AI technology and automation, and therefore must be transparent with the public about:

- AI-generated content and decision-making
- machine interactions
- the rationale behind decision-making systems affecting the public
- the 'logic behind government systems that make decisions affecting them'
- how systems have been tested and evaluated
- the 'nature and quality of training data used'[281]
- the underlying assumptions of a system.[282]

This was echoed by the New South Wales Acting Information Commissioner, who suggested that the public's right to query and challenge government decisions affecting them—including querying whether technology used or relied on in the decision-making process is 'operating as it should'—needs to be protected by FOI legislation.[283]

The Committee notes, however, that UNSW Allens Hub does not recommend implementing 'uniform transparency requirements across sectors' to improve transparency.[284] However, it does recommend the use of AI model cards[285] with respect to government's use of generative AI,[286] including requiring AI-related government third-party supplier contracts to include model card provisions.[287]

As noted by Professor Bennett Moses and the IPC NSW, public-sector audits of 'automated decision-making and AI systems' used by government, and scans of the

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281 This is particularly important given the evidence received by the Committee regarding how organisational bias and culture can impact the development of training data itself, which in turn will affect the outcomes generated by an AI system (Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, p. 9).

282 Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, pp. 2–3. See also Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 5.

283 Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 6.

284 Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 3.

285 An AI model card is 'a human-readable document that provides critical information about a machine learning model. It is used to help people understand how the model works, its limitations, and its potential biases'. Model cards usually contain information such as the '[m]odel name and version … type of machine learning model, such as a neural network, large language model, decision tree, or support vector machine … the types of data that the model can take as input and the types of data that it produces as output … the data that was used to train the model … [that] can be used to assess the model's performance on different types of data … how the model was evaluated … [that] can be used to assess the model's performance on different tasks … [and] any known limitations and biases in the model … [that] can be used to help users interpret the model's results and to make informed decisions about its use' (Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 3).

286 'Generative AI models generate novel content such as text, images, audio and code in response to prompts' (Australian DISR, *Discussion paper*, Canberra, June 2023, p. 5).

287 UNSW Allens Hub, *Discussion paper*, p. 13, quoted in Professor Lyria Bennett Moses and Professor Toby Walsh, UNSW, *Submission 21*, 1 December 2023, p. 3.

AI regulatory landscape, can help determine how transparency can be facilitated.[288] The Committee agrees, and notes that in considering how legislation establishing Victoria's new third-generation push FOI system can be responsive to government's use of AI and emerging technologies, the Victorian Government should take account of the recommendations of the IPC NSW in its report *Scan of the Artificial Intelligence regulatory landscape—information access and privacy*:

i. ensure mandatory proactive disclosure of the use of AI

ii. ensure that open access information includes a statement of use, and a description of the operation of the AI

iii. expand information access rights under government contracted services to AI used for government decision-making

iv. include the use of AI as a factor in favour of disclosure of information.[289]

3.3.3 Recommended reforms

The Committee endorses many of OVIC's recommendations in its submission to the Inquiry with respect to Terms of Reference 4 and 5,[290] and makes additional recommendations to give effect to its views as described in Section 3.3.2 above.

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288 Professor Lyria Bennett Moses, Director, UNSW Allens Hub, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 23 (quotation); IPC NSW, *Submission 12*, 27 November 2023, pp. 6–7. See also, Ombudsman NSW, *The new machinery of government: using machine technology in administrative decision-making—a special report under s 31 of the* Ombudsman Act 1974, Sydney, November 2021; IPC NSW, *Scan of the Artificial Intelligence regulatory landscape—information access and privacy*, Sydney, October 2022.

289 IPC NSW, *Submission 12*, 27 November 2023, p. 6. See also IPC NSW, *Scan of the Artificial Intelligence regulatory landscape—information access and privacy*, Syndey, October 2022, p. 17.

290 See OVIC, *Submission 55*, 15 January 2024, pp. 13–14.

RECOMMENDATION 40: That the Victorian Government develop and implement a whole-of-government information-management framework ('framework')—applicable to all agencies, ministers and government-held information subject to the FOI scheme—to support Victoria's new third-generation 'push' FOI system.

That the framework:

- embed the purposes and benefits of a third-generation FOI system, including:
  - specifying, as a primary aim, improving the accountability and transparency of government and public participation in government affairs and decision-making
  - supporting the maximum disclosure of government-held information.
- embedding e-governance and access-by-design principles into the information- and data-management processes and practices of all agencies and ministers
- requiring agencies and ministers to record and publish information relating to the use of Artificial Intelligence and automated decision-making
- requiring agencies and ministers to use technology to facilitate the efficient release of information under the FOI scheme.

RECOMMENDATION 41: That legislation establishing Victoria's new third-generation 'push' FOI system give effect to the key recommendations of the Information and Privacy Commission New South Wales in its report *Scan of the Artificial Intelligence regulatory landscape—information access and privacy* with respect to the government's use of Artificial Intelligence (AI), namely that government:

- ensure mandatory proactive disclosure of the use of AI
- ensure that open access information includes a statement of use, and a description of the operation of the AI
- expand information access rights under government contracted services to AI used for government decision-making
- include the use of AI as a factor in favour of disclosure of information.

RECOMMENDATION 42: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies and ministers to:

- maintain an Information Asset Register (IAR)
- record in their IAR whether information can be, or has been, released to the public (and under which statutory release mechanism)
- publish a public version of their IAR on their website.

RECOMMENDATION 43: That legislation establishing Victoria's new third-generation 'push' FOI system ensure that information created by or in the possession of third-party government contractors and sub-contractors is accessible under the FOI scheme. This should be facilitated by giving agencies and ministers an immediate right of access to such information.

RECOMMENDATION 44: That legislation establishing Victoria's new third-generation 'push' FOI system ensure that private entities that receive public funding to perform public functions or provide public services are subject to the FOI scheme.

RECOMMENDATION 45: That the Victorian Government explore the feasibility of implementing a mandatory training and education program for all public sector employees or FOI practitioners on Victoria's new third-generation 'push' FOI system.

RECOMMENDATION 46: That the Victorian Government explore the feasibility of implementing a mandatory records-management and data-governance training and education program for all Victorian FOI practitioners.

RECOMMENDATION 47: That the Victorian Government, in consultation with the Public Record Office of Victoria (PROV), review record-keeping and information-management requirements under the *Public Records Act 1973* (Vic), as well as the PROV's compliance monitoring and enforcement powers under the Act, to ensure their adequacy to support Victoria's new third-generation 'push' FOI system.

RECOMMENDATION 48: That legislation establishing Victoria's new third-generation 'push' FOI system include specific reference to its interrelatedness with the *Public Records Act 1973* (Vic), and require agency and ministerial compliance with record-keeping and information-management obligations under the *Public Records Act 1973* (Vic).

RECOMMENDATION 49: That the Victorian Government explore the feasibility of implementing a centralised whole-of-government FOI portal, supported by new and emerging technology, to centralise the making of requests and the publication of agency and ministerial disclosure logs and Information Asset Registers under Victoria's new third-generation 'push' FOI system, as well as information released through proactive and informal release mechanisms.

RECOMMENDATION 50: That the Victorian Government explore the feasibility of:

- using technology, including Artificial Intelligence and automated decision-making, to facilitate the efficient administration of a third-generation FOI system.
- using technology to assist with embedding access-by-design principles into information-management processes and practices across the public sector.

In making this recommendation, the Committee recognises the importance of human supervision and oversight of any use of such technology, including the involvement of human decision-makers.

RECOMMENDATION 51: That the Victorian Government—in consultation with Aboriginal Community Controlled Organisations, Aboriginal leaders, practitioners and community Members (including the Yoorook Justice Commission, Victorian Aboriginal Community Controlled Health Organisation and Victorian Aboriginal Legal Service)—explore the feasibility of recognising and embedding Indigenous Data Sovereignty and Indigenous Data Governance principles into a whole-of-government information management framework and in legislation establishing Victoria's new third-generation 'push' FOI system.

3.4 Conclusion

FOI in Victoria needs a complete overhaul.

There are systemic problems with the functioning of Victoria's FOI scheme which arise principally from structural deficiencies in the access model that need to be addressed through a new, third-generation FOI Act.

This chapter has outlined what is required of a best practice access model in the digital age and the record-keeping and information-management practices required to effectively support that model.

The Committee has made recommendations to the Victorian Government to facilitate Victoria's transition from a pull to a push FOI system that prioritises and facilitates proactive disclosure and informal release of government-held information and makes formal FOI requests a last resort for obtaining access to information.

The Committee has also made recommendations to ensure that agency and ministerial record-keeping and information-management practices are fit-for-purpose to support the new FOI system, including by accommodating how information is created, stored and accessed in the digital age.

Chapter 4
Efficiency

4.1 Introduction

Processes for public access to information under FOI legislation should be 'simple, practical and clear'; capable of being understood by the general public; easy for practitioners to understand and follow; and require and facilitate the quick and fair processing of requests and the independent and timely review of refusal decisions.[1]

While the Committee acknowledges that some processes under the *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') are working well in practice, it is clear that the formal access regime under the Act is unnecessarily complex, administrative and procedural, and that the public and FOI practitioners alike have difficulty navigating it.[2]

Furthermore, given the chronic and systemic delays experienced by applicants with respect to the processing of FOI requests and review of FOI decisions, it is important to consider whether the FOI scheme is the most efficient and effective way of providing access to personal and health information in Victoria.

Victoria's FOI system also needs to reckon with the 'information-rich governments' of the digital age.[3] The *FOI Act 1982* (Vic) did not envision the sheer volume of information that would be created by agencies in the digital age and how this would impact the breadth of FOI requests and agencies' capacity to respond to them in a timely way. As Dr Danielle Moon highlighted:

> [O]ne of the misconceptions is that because of the digital information age it should be easy to just type in a search to a records management system and get the information back and send it on – and you should be able to do that – but the flip side of the information age is that now, compared to when the FOI Act was originally introduced in 1982, the amount of documentation is huge. So you have got someone that is just looking for the background to a particular policy change – they might actually want an answer to a question – but what you have got perhaps is 10 drafts of an email with 10 different responses from different people and they have to work out which of those emails have been included in a previous chain and all of that kind of stuff; there is just an enormous amount of stuff. And then you have Word documents where they are the same document but 10 different people have put comments on 10 different versions.

1 Office of the Victorian Information Commissioner (OVIC), *Submission 55*, 15 January 2024, p. 149.

2 Ibid.

3 Hon Mary-Anne Thomas (Leader of the House, Minister for Health, Minister for Health Infrastructure, Minister for Medical Research), Parliamentary Debates (Hansard), 60th Parliament, 20 June 2023, p. 2217.

> In theory all of those documents need to be released so that you can have all the comments. So, it takes them a long time …[4]

This operational reality needs to be reflected in the features of the new push FOI system, by, among other things, providing greater flexibility in the way that information can be requested and provided under FOI legislation and positioning the informal release mechanism as a first port of call for personal and health information. Equally important, is the need for new processes under the formal release mechanism—such as provisions dealing with the scoping and re-scoping of requests, voluminous requests and vexatious applicants—to be fit-for-purpose in the digital age.

The Committee has recommended that the current access model under the *FOI Act 1982* (Vic) be completely dismantled and replaced with a new third-generation 'push' FOI system. While the Committee considers that the new Right to Information Act should retain some of the features and processes of the *FOI Act 1982* (Vic), there are areas requiring significant legislative reform.

This chapter canvasses the processes that should be overhauled as part of the legislative reform agenda, as well as the additional regulatory powers needed to ensure that the system functions as it should, and that agencies administer the FOI scheme effectively and efficiently. The chapter also sets out a way forward to address the limitations of the current access model with respect to personal and health information.

4.2 Effectiveness of processes under the Act

4.2.1 Current processes under the Act: an overview

Part III of the *FOI Act 1982* (Vic) establishes the access regime under the formal release mechanism. The public has an enforceable right of access to documents of agencies and official documents of ministers, as defined by the Act, other than exempt documents.[5] There is no prescribed form for requests other than that they must be made in writing and contain sufficient information to enable the recipient agency to identify the documents sought.[6] Agencies are obliged to assist applicants to make their request valid, for example, by re-scoping the request if it is unclear or too broad. Agencies can also transfer a request to another agency where that agency holds the documents sought or has functions that are more closely connected with the subject-matter of the documents sought.[7]

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4 Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 7–8.

5 *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') ss 13–14.

6 *FOI Act 1982* (Vic) s 17(1)–(2).

7 *FOI Act 1982* (Vic) ss 17(3)–(4), 18, 25A(6).

Requests must be accompanied by payment of an application fee, noting that agencies can waive the fee if it would cause hardship.[8] A range of access charges can be imposed by agencies under the Act, with exceptions, such as for routine requests. These charges can be waived, for requests for personal or health information, if the applicant is experiencing significant financial hardship.[9] Charges for certain kinds of requests are limited to copying costs and costs associated with preparation of transcripts or other documents for the purposes of providing access.[10]

The Act establishes a 30-day statutory time frame for the processing of requests. In limited circumstances, the time frame can be extended, for example, with the consent of the applicant or where third-party consultation is required or with the consent of the applicant. Certain actions required to be taken under the Act 'stop the clock' on the processing time frame, such as enquiries with an applicant to make a request valid.[11] Agencies are also protected from having to process certain kinds of requests, for example repeat or voluminous requests.[12]

Any exempt or irrelevant material must be deleted or redacted from documents to which access is granted and an applicant must elect to receive partial copies of the documents sought in order for them to be released.[13] Agencies can provide access to information in a variety of ways, including by providing a copy of the documents sought to the applicant; making them available for inspection; arranging for an applicant to hear audio sounds or see visual images; providing a transcript; or creating a document to provide access to information that is not available in discrete form in its original format.[14] Agencies can also defer access to information sought in a request that is intended to be presented to Parliament, a council or otherwise released to the press.[15]

Only a responsible minister, principal officer of an agency, or officer with decision-making authority delegated by the minister or principal officer, can decide a request.[16] A decision not to provide access to a document, or part of a document, falling within the scope of a request must be accompanied by written reasons. The information that must be provided is prescribed and includes a requirement to inform the applicant of their review rights in relation to the decision.[17]

Applicants have a right to request the correction or amendment of personal information contained in a document released under the Act if they consider it is

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8 *FOI Act 1982* (Vic) s 17(2A)–(2B).

9 *FOI Act 1982* (Vic) s 22.

10 For example, for requests for personal or health information, requests made by Victorian Members of Parliament, or requests for documents of public interest or benefit. See *FOI Act 1982* (Vic) s 22(1)(h).

11 Victoria Police, *Submission 24*, 7 December 2024, p. 10 (quotation); *FOI Act 1982* (Vic) ss 21, 22(3)–(6), 25A(6)–(7).

12 *FOI Act 1982* (Vic) ss 24A, 25A.

13 *FOI Act 1982* (Vic) s 25.

14 *FOI Act 1982* (Vic) ss 19, 23.

15 *FOI Act 1982* (Vic) s 24.

16 *FOI Act 1982* (Vic) s 26.

17 *FOI Act 1982* (Vic) s 27.

inaccurate, incomplete, out of date or would give a misleading impression.[18] If the request is refused by the agency (or minister), they also have a right to apply to the Information Commissioner and the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision. Similar to some second-generation push jurisdictions, applicants can request that a written notation prepared by them—setting out why they believe the information is incomplete, incorrect, out of date or misleading, and, if applicable, the information required to complete or bring the document up to date—be attached to the record at issue. However, unlike those jurisdictions, in Victoria there is a higher bar for an applicant to exercise this right, given that their request for correction of amendment of the document at issue must first have been refused by the agency *and* VCAT. This is because applicants in those jurisdictions do not have a right of review through the tribunal.[19]

Part VI of the Act establishes the review mechanisms in respect of agency (and ministerial) decisions on requests. Applicants have a right of review to OVIC if dissatisfied with particular kinds of agency decisions, including refusal of access and refusal to process decisions.[20] The Information Commissioner is required to make a fresh decision on review applications.[21] Applicants and respondent agencies can apply to VCAT for review of certain kinds of decisions of the Information Commissioner, including a review decision.[22] The Act establishes statutory time frames for making review applications to OVIC and VCAT and for the Information Commissioner deciding review applications.[23] A consequence of agencies failing to decide a request, or of the Information Commissioner failing to decide a review application within the statutory time frames, is that the applicant can apply directly to VCAT for review of a 'deemed refusal' decision.[24] This is explained in further detail in Section 4.2.2 of this chapter, below.

Finally, Part VIA of the Act establishes the Office of the Victorian Information Commissioner's (OVIC) complaints function. Applicants can complain to OVIC on a variety of matters, including delays in agencies deciding requests and the adequacy of their searches for documents captured by the scope of a request.[25] OVIC has a range of powers available to it to resolve complaints informally, through conciliation, or through its investigation function.[26]

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18 *FOI Act 1982* (Vic) pt V (especially ss 39–42).

19 *FOI Act 1982* (Vic) ss 46–47, 49A(2), 50(3B). See also *Freedom of Information Act 1982* (Cth) ('*FOI Act 1982* (Cth)') ss 48–51B; *Privacy and Personal Information Protection Act 1988* (NSW) ('*PPIP Act 1988* (NSW)') s 15.

20 *FOI Act 1982* (Vic) s 49A.

21 *FOI Act 1982* (Vic) s 49P.

22 *FOI Act 1982* (Vic) pt VI, div 3 (especially s 50).

23 *FOI Act 1982* (Vic) ss 49B, 52.

24 *FOI Act 1982* (Vic) s 53.

25 *FOI Act 1982* (Vic) s 61A.

26 *FOI Act 1982* (Vic) ss 61GB, 61H, pt VIB (especially s 61O).

4.2.2 Evaluation of the processes

What is working well

OVIC suggested that the following processes in the *FOI Act 1982* (Vic) either comply with international best practice and/or are working well in practice, and should be retained in legislation establishing Victoria's new third-generation push FOI system:

- legal persons can make an FOI request[27]
- applicants are not required to give reasons for making an FOI request[28]
- applicants are not required to identify themselves[29] (except when applying for personal or health information)[30]
- FOI requests must be in writing but there is no prescribed form[31]
- FOI requests must contain sufficient information as is 'reasonably necessary' for agencies and ministers to identify the information requested[32]
- agencies and ministers must assist applicants to make a valid FOI request or refer them to another agency or minister that may hold the information requested[33]
- agencies and ministers must consult with applicants to make an FOI request valid, including to enable them to identify the information requested[34]

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27 OVIC, *Submission 55*, 15 January 2024, p. 161; *FOI Act 1982* (Vic) s 13; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 4 ('Everyone (including non-citizens and legal entities) has the right to file requests for information.').

28 OVIC, *Submission 55*, 15 January 2024, p. 161; *FOI Act 1982* (Vic) s 17; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 13 ('Requesters are not required to provide reasons for their requests.').

29 The Committee notes that if a vexatious applicant provision is introduced, as is recommended in this chapter, there will need to be a statutory mechanism for identifying persons who are the subject of vexatious applicant declaration application, to facilitate the effective operation of the provision.

30 FOI applicants for personal or health information are ordinarily requested, on privacy grounds, to confirm their identity: OVIC, *Submission 55*, 15 January 2024, p. 161; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 14 ('Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).').

31 OVIC, *Submission 55*, 15 January 2024, p. 161; *FOI Act 1982* (Vic) s 17(1); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 15 ('There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.'). See also Name withheld, *Submission 48*, 15 January 2024, p. 32.

32 OVIC, *Submission 55*, 15 January 2024, p. 161; *FOI Act 1982* (Vic) s 17(2).

33 OVIC, *Submission 55*, 15 January 2024, p. 161; *FOI Act 1982* (Vic) s 17(3); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicators 16 ('Public officials are required to provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.'), 17 ('Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.').

34 OVIC, *Submission 55*, 15 January 2024, p. 162; *FOI Act 1982* (Vic) s 17(4); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 16.

- agencies and ministers must decide FOI requests within clear statutory time frames, with extensions of time permitted in certain circumstances[35]
- agencies and ministers are required to provide access to information in a form requested by an applicant, limited by clear and reasonable objections (for example, 'protection of the record, infringement of copyright and unreasonable interference with the operations of the agency')[36]
- there are 'no limitations' on an applicant's use of information released in response to a formal FOI request.[37]

Legislative reform considerations

The Committee received extensive evidence of the areas of the *FOI Act 1982* (Vic) that should be front of mind with respect to the legislative reform agenda for Victoria's new FOI system. They are as follows.

Statutory definition of 'agency'

The *FOI Act 1982* (Vic) applies to agencies and ministers.[38] Departments, councils and prescribed authorities are classified as agencies for the purposes of the Act and are defined within the Act.[39] The Committee received evidence that the complexity of the statutory definitions of 'department', 'council' and 'prescribed authority'—including the need to refer to other legislation to interpret them—creates unnecessary confusion for FOI applicants about what entities are, and are not, subject to the FOI scheme.[40]

It was suggested that the current statutory definition of 'agency' be replaced with a broader term, 'public authority', with a 'catch-all' centralised definition of the kinds of entities that are subject to the FOI scheme, rather than listing them. Further, that it be worded in such a way that applicants and FOI practitioners can easily identify whether an entity is subject to the FOI scheme.[41]

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35 OVIC, *Submission 55*, 15 January 2024, p. 162; *FOI Act 1982* (Vic) s 21; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicators 21 ('Public authorities are required to respond to requests as soon as possible.'), 22 ('There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).'), 23 ('There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.').

36 OVIC, *Submission 55*, 15 January 2024, p. 162 (quotation); *FOI Act 1982* (Vic) s 23 (especially (2)–(3)); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 20 ('Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g., to protect a record).').

37 OVIC, *Submission 55*, 15 January 2024, p. 162; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 27 ('There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally-protected copyright over the information.').

38 *FOI Act 1982* (Vic) s 13.

39 See *FOI Act 1982* (Vic) s 5(1); *Public Administration Act 2004* (Vic) ss 4, 10, 16(1); *Local Government Act 2020* (Vic) s 3(1); *Freedom of Information Regulations 2019* (Vic) reg 6, sch 1. This is similar to the Commonwealth approach (see *FOI Act 1982* (Cth) ss 4(1), 11).

40 Name withheld, *Submission 48*, 15 January 2024, pp. 20–21.

41 Ibid., pp. 20 (quotation), 21, 26, 62.

The Committee agrees and considers that the Victorian Government should, in legislation establishing Victoria's new third-generation push FOI system, find a simpler and more streamlined way of explaining what entities are subject to the FOI scheme. This would also involve consideration of the kinds of private entities that should be subject to the FOI scheme and how they are to be classified in FOI legislation.[42]

Acknowledgement of requests

Section 17 of the *FOI Act 1982* (Vic) sets out the requirements for making a formal FOI request, but does not include a requirement for agencies (and ministers) to provide written acknowledgement of receipt of a valid request. As OVIC noted, best practice FOI legislation requires such acknowledgement to be given within a reasonable time frame.[43]

The Committee considers that the New South Wales approach—which requires a written acknowledgement to be given within 5 business days after receipt of a formal request, and specifies the matters that must be addressed in the acknowledgement—should be followed.[44] The matters listed in OVIC's FOI Guidelines, with respect to the form of written acknowledgements of valid requests, should be prescribed in FOI legislation for this purpose.[45]

Assistance to applicants

Agencies (and ministers) are obliged to assist applicants to make a valid FOI request.[46] OVIC suggested that the obligation be made explicit in legislation; that is, to take reasonable steps to enable a prospective applicant to make a written FOI request if they are unable do so due to disability or disadvantage (for example, illiteracy).[47] This was supported by other evidence received to the Inquiry.[48] OVIC additionally suggested

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42 See the discussion under 'Information held by third-party contractors and subcontractors and private entities performing public functions' in Section 3.3.2 in Chapter 3.

43 OVIC, *Submission 55*, 15 January 2024, pp. 149–150; Name withheld, *Submission 48*, 15 January 2024, p. 16. See also Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 18 ('Requesters are provided with a receipt or acknowledgment upon lodging a request within a reasonable timeframe, which should not exceed 5 working days.').

44 OVIC, *Submission 55*, 15 January 2024, pp. 149–150; Name withheld, *Submission 48*, 15 January 2024, pp. 16–17; *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act 2009* (NSW)') s 51.

45 These matters are: (1) the 'date the request became valid'; (2) the 'due date for notifying the applicant of a decision on the request'; (3) the 'terms of the request'; and (4) 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'—OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 47 [1.70]. See also OVIC, *Submission 55*, 15 January 2024, p. 150.

46 *FOI Act 1982* (Vic) s 17(3)–(4).

47 OVIC, *Submission 55*, 15 January 2024, p. 155. As OVIC noted, this amendment would support best practice principles for FOI legislation. See Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 17.

48 See, for example, Name withheld, *Submission 48*, 15 January 2024, p. 32.

that the obligation be broadened to encompass the provision of information in an accessible format for the applicant.[49] The Committee agrees.

Scoping and re-scoping of FOI requests

The significant volume of information created in the digital age inevitably leads to broader FOI requests and an increasing reliance by agencies on the voluminous requests processing exception. In this operating environment, it is vital that FOI practitioners be legislatively required and supported to take a proactive role in assisting applicants to appropriately scope their requests at the outset, and, where necessary, to re-scope their requests to ensure they can be processed in a timely way.

While the Committee strongly supports the retention of existing scoping and re-scoping provisions, which, as OVIC has noted, are working well in practice, it recognises the administrative burden and delay associated with the re-scoping of requests. A multi-faceted approach is therefore needed to deter unnecessarily broad requests, including:

- appropriate legislative protections for agencies (such as robust scoping and re-scoping, voluminous documents and vexatious applicant provisions)
- effective FOI practitioner training on the scoping and re-scoping of requests in different agency settings to ensure they provide high-quality assistance to applicants
- public education and guidance on the importance of scoping their requests in a way that will ensure timely processing
- clear agency-specific guidance for the public on how applicants can best scope their requests (including requests received under the informal-release mechanism) to ensure timely processing.

Transfer of requests

Section 18 of the *FOI Act 1982* (Vic) permits agencies (and ministers) to transfer an FOI request if the documents specified in the scope of a request are held by another agency or their subject-matter is 'more closely connected with the functions of another agency'.[50] OVIC suggested that part of a request is not transferable under this provision, meaning that multiple agencies cannot split the processing of a request.[51] Others suggested that whether or not the provision allows for partial transfer of a

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49 OVIC, *Submission 55*, 15 January 2024, p. 155. As OVIC noted, this amendment would support best practice principles for FOI legislation. See Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 9 ('Principle 5: Processes to facilitate access … [p]rovision should be made to ensure full access to information for disadvantaged groups, for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness.').

50 *FOI Act 1982* (Vic) s 18(2); OVIC, *Submission 55*, 15 January 2024, p. 156.

51 OVIC, *Submission 55*, 15 January 2024, p. 156.

request is unsettled.[52] What is clear is that the current provision does not clearly and unequivocally allow for partial transfer of a request, which has resulted in inconsistent interpretation of the provision by agencies and VCAT.[53]

Given the frequency with which changes to the structure and function of government organisations occur, OVIC suggested that a transfer provision permitting partial transfer of requests would allow greater flexibility.[54] This was supported by other submissions to the Inquiry.[55] The Committee additionally notes that FOI legislation in the second-generation Commonwealth, New South Wales and Queensland push jurisdictions clearly and unambiguously permits the partial transfer of requests.[56]

The Committee agrees with OVIC that the New South Wales approach—which allows for transfer of part of an FOI request by permitting agencies to split an FOI request into 'two or more' requests for the purpose of transfer—should be followed.[57]

The Committee also received evidence of the need for the strict transfer and notification requirements under s 18 of *FOI Act 1982* (Vic) to provide greater flexibility for agencies with complex organisational structures. The Victorian Legal Services Board and Commissioner (VLSBC) noted that it operates as one agency, but comprises two separate legal entities. The VLSBC frequently receives FOI requests addressed to both entities that are only intended for one entity. As the VLSBC explained, the strict wording of the current provision would result in perverse outcomes if followed—for example, the FOI practitioners, who work for both entities, would either need to reject the request as a 'misaddressed application'; artificially 'transfer' the request from one entity to the other (meaning, to themselves); or consult with the applicant to readdress or reframe their request to make it valid.[58]

The Committee agrees with the VLSBC that the current arrangements create unnecessary work and confusion for the public and are not in keeping with the spirit of the legislation.[59] The Committee considers that the transfer provision should be amended to provide greater flexibility in this respect, without allowing agencies to avoid responsibility for addressing the request.

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52 Name withheld, *Submission 48*, 15 January 2024, pp. 33–34; Victorian Bar, *Submission 57*, 15 January 2024, p. 11.

53 The Victorian Bar, for example, suggested that the dicta on the splitting issue in the Court of Appeal's decision in *Chopra v Department of Education and Training* [2019] VSCA 298 was at odds with the Supreme Court's decision in *McKechnie v Victorian Civil and Administrative Tribunal & Anor* [2020] VSC 454, resulting in confusion and inconsistent interpretation of s 18 of the *FOI Act 1982* (Vic)—Victorian Bar, *Submission 57*, 15 January 2024, p. 11. See also Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 3.

54 OVIC, *Submission 55*, 15 January 2024, p. 156.

55 See, for example, Name withheld, *Submission 48*, 15 January 2024, pp. 33–34; Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 3.

56 See Name withheld, *Submission 48*, 15 January 2024, pp. 33–34; *FOI Act 1982* (Cth) s 16; *GIPA Act 2009* (NSW) s 44; *RTI Act 2009* (Qld) s 38.

57 OVIC, *Submission 55*, 15 January 2024, p. 156; *GIPA Act 2009* (NSW) s 44(2).

58 Victorian Legal Services Board and Commissioner (VLSBC), *Submission 15*, 29 November 2024, p. 6 (quotation); Fiona McLeay, Commissioner, VLSBC, public hearing, 18 March 2024, *Transcript of evidence*, p. 24.

59 VLSBC, *Submission 15*, 29 November 2024, p. 6.

Statutory time frames for deciding requests

Agencies (and ministers) are generally required to decide an FOI request within 30 calendar days after receiving it, which OVIC noted is international best practice.[60] This period can be extended by up to 15 calendar days, if third parties are required to be consulted on the release of the documents requested,[61] or, with the consent of the applicant, by up to 30 calendar days.[62] OVIC and others favoured the retention of the current statutory time frames for deciding requests.[63] The Committee agrees.

Under s 26 of the *FOI Act 1982* (Vic), FOI requests may be decided by the principal officer of an agency, an agency officer with delegated authority, or the responsible minister. OVIC and others reported that decision-making delays occur within some agencies and ministerial offices due to their internal noting and briefing processes—that is, a requirement for the principal officer, executive leadership, other business units within the organisation, or minister, to note or be briefed on an intended decision on an FOI request before it is made. Presently, the Act does not permit an extension of time for internal agency or ministerial noting and briefing processes. OVIC's position on the issue is that internal practices relating to the processing of FOI requests must facilitate timely decision-making under the Act and that the statutory time frames should not be extended to accommodate them.[64] This view is supported by independent research.[65] The Committee agrees.

The Committee received evidence of the difficulties encountered by agencies in meeting the current statutory time frames, particularly with respect to FOI requests involving voluminous documents or complex assessments.[66] There was support expressed for the introduction of a statutory mechanism for dealing with such requests, similar to the Commonwealth's approach to the issue in s 15AB[67] of the *FOI Act 1982* (Cth).[68]

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60 *FOI Act 1982* (Vic) s 21(1); OVIC, *Submission 55*, 15 January 2024, p. 156; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 9 ('Principle 5: Processes to facilitate access … [t]he law should provide for strict time limits for the processing of requests … [of] no more than one month.').

61 See *FOI Act 1982* (Vic) ss 29(2), 29A(1D), 31(5)–(6), 31A(2), 33(2B)–(3A), 34(3), 35(1A)–(1B).

62 *FOI Act 1982* (Vic) s 21(2).

63 OVIC, *Submission 55*, 15 January 2024, p. 157; Australia's Right to Know (ARTK), *Submission 27*, 14 December 2023, p. 3; Nine, Response to Integrity and Oversight Committee questions on notice, 13 May 2024, p. 2.

64 OVIC, *Submission 55*, 15 January 2024, p. 156; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 8–9; OVIC, *Noting and briefing processes on freedom of information decisions*, Melbourne, June 2021, pp. 1–2.

65 See Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 24–25, 96–97, 100, 110.

66 See, for example, VLSBC, *Submission 15*, 29 November 2023, p. 5; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2024, p. 8; Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Municipal Association of Victoria, *Submission 51*, 15 January 2024, pp. 3–5; Latrobe City Council, *Submission 69*, 8 March 2024, pp. 2–4.

67 Under ss 15(5)(b) and 15AB of the *FOI Act 1982* (Cth), an agency (or minister) may apply to the Information Commissioner for a 30-day extension to the ordinary 30-day statutory time frame for deciding an FOI request, for voluminous or complex requests.

68 See VLSBC, *Submission 15*, 29 November 2023, p. 5; OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 61O of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021 p. 64.

OVIC suggested that these concerns can be ameliorated by:

- transitioning to a third-generation push FOI system
- implementing civil and criminal liability protections for FOI practitioners with respect to the informal release mechanism
- streamlining the consultation requirements in ss 29, 29A, 31, 31A, 33, 34, and 35 of the *FOI Act 1982* (Vic)
- requiring agencies to have information-management systems that are fit-for-purpose to support a push FOI system[69]
- requiring agencies to properly staff their FOI teams so as to administer the FOI scheme in a timely way
- implementing statutory sanctions for conduct contrary to the spirit and intent of FOI legislation[70]
- empowering OVIC to audit, and make enforceable recommendations with respect to, agencies' internal processes for responding to and deciding FOI requests.[71]

The Committee also received evidence of the desirability of transitioning from calendar days to business days with respect to all statutory time frames in FOI legislation.[72] It was suggested that the reliance in the *FOI Act 1982* (Vic) on calendar days results in lost processing time for agencies and can result in shorter processing times for some FOI requests due to public holidays and annual shut-down periods.[73] The Committee notes that the second-generation push jurisdictions are divided on this issue, with the Commonwealth retaining calendar days, while New South Wales and Queensland have transitioned to business days. However, it is clear that the modern approach is to use business days and that it is favoured by FOI practitioners.[74] The Committee agrees.

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69 For example, maintaining an Information Asset Register and embedding 'access-by-design' principles—OVIC, *Submission 55*, 15 January 2024, p. 157.

70 For example, deliberately delaying a decision on an FOI request or influencing an FOI practitioner to decide a request in a way that is 'contrary to the requirements' of FOI legislation (OVIC, *Submission 55,* 15 January 2024, p. 157). Other submissions received to the Inquiry were supportive of a stricter sanctions regime. The Victorian Bar, for example, lamented that, in proceedings before VCAT, where the Tribunal considers that an agency officer has committed a 'breach of duty' or 'misconduct' in administering the *FOI Act 1982* (Vic), it is only empowered to report the wrongdoing to the principal officer, responsible minister or council, as the case may be, as well as the Information Commissioner (*FOI Act 1982* (Vic) s 61 (quotation); Victorian Bar, *Submission 57*, 15 January 2024, pp. 10–11). See also The Centre for Public Integrity, *Submission 37*, 11 January 2024, p. 4.

71 OVIC, *Submission 55*, 15 January 2024, p. 157. The regulator's powers with respect to the proactive release mechanisms in the *GIPA Act 2009* (NSW), for example, empower the Information and Privacy Commission NSW (IPC NSW) to conduct 'targeted audits … to respond to systemic risks' identified through its FOI complaints and review function, as well as 'agency-specific audits', the results of which are published (Sonia Minutillo, Acting Information Commissioner, IPC NSW, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 3).

72 See, for example, MAV, *Submission 51*, 15 January 2024, p. 5; Name withheld, *Submission 48*, 15 January 2024, p. 8; Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 1; Latrobe City Council, *Submission 69*, 8 March 2024, p. 3.

73 Name withheld, *Submission 48*, 15 January 2024, p. 8; Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 1.

74 See Name withheld, *Submission 48*, 15 January 2024, pp. 8–9; Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 27, 53, 110. See also *FOI Act 1982* (Cth) (especially s 15); *GIPA Act 2009* (NSW) (especially s 57, sch 4, s 1); *RTI Act 2009* (Qld) s 18.

Repeat requests

Section 24A(1) of the *FOI Act 1982* (Vic) empowers agencies (and ministers) to refuse to process a repeat FOI request.[75] The conditions for exercising the refusal are that: (1) the applicant has previously made an FOI request to the agency (or their predecessor); (2) the request seeks the same information as the previous request;[76] (3) the agency refused the previous request and VCAT affirmed the refusal decision; and (4) the applicant does not have 'reasonable grounds' for making the new request.[77]

The s 24A provision was introduced through 1993 amendments to the *FOI Act 1982* (Vic).[78] At the time, it was seen a necessary measure to protect against the significant drain on resources caused by FOI applicants harassing agencies and the independent tribunal[79] by making repeated requests and review applications with respect to previously decided matters.[80]

The Committee received evidence that the requirement in s 24A(1)(b) of the Act—that VCAT must have affirmed the agency's refusal decision in the previous related FOI request—sets a high bar for use of the s 24A(1) exception and fails to adequately protect agencies from particular kinds of repeat applications.[81] OVIC and others reported that the exception is rarely used in practice because the vast majority of agency refusal decisions are not considered by VCAT.[82] Name withheld observed that the s 24A(1)(b) requirement has resulted in agencies frequently processing repeat FOI requests and issuing the same refusal decision as the original request, because the original refusal decision was not the subject of a VCAT review application.[83] This is an unnecessary administrative burden.

There needs to be an effective mechanism for protecting agencies from processing repeat requests.[84] The Committee agrees with OVIC that the New South Wales approach—which empowers an agency to refuse to process an FOI request seeking

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75 Section 24A(1) of the *FOI Act 1982* (Vic) also applies to requests made under pt V of the Act for 'correction or amendment' of an agency's or minister's records.

76 This encompasses an FOI request seeking the same information in a different form or format to a previously decided request (Name withheld, *Submission 48*, 15 January 2024, p. 35 (citing *Smeaton v Victorian Work Health Cover No 2* [2015] VCAT 453)).

77 *FOI Act 1982* (Vic) s 24(1) (quotation); OVIC, *Submission 55*, 15 January 2024, p. 116; Name withheld, *Submission 48*, 15 January 2024, p. 35; Victorian Bar, *Submission 57*, 15 January 2024, p. 5.

78 *Freedom of Information (Amendment) Act 1993* (Vic) s 8.

79 Then, the Administrative Appeals Tribunal, now the Victorian Civil and Administrative Appeals Tribunal (VCAT).

80 Hon Jan Wade MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 52nd Parliament, Autumn session 1993, Legislative Assembly, 7 May 1993, pp. 1737–1738.

81 For example, FOI requests previously 'considered and determined in the 'pre-Tribunal' stage' and repeat FOI requests for information previously sought in connection with discontinued or dismissed VCAT proceedings (Victorian Bar, *Submission 57*, 15 January 2024, p. 6 (quotation); OVIC, *Submission 55*, 15 January 2024, p. 116; Name withheld, *Submission 48*, 15 January 2024, pp. 35–36; Victorian Ombudsman (VO), *Submission 60*, 22 January 2024, pp. 4–5).

82 OVIC, *Submission 55*, 15 January 2024, p. 116; Name withheld, *Submission 48*, 15 January 2024, p. 35.

83 Name withheld, *Submission 48*, 15 January 2024, p. 35.

84 Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 66–71.

information 'substantially the same' as a request previously decided by the agency where there are 'no reasonable grounds for believing' a different decision would be made, or where the applicant makes a request for information previously released by the agency under FOI—should be followed.[85]

Voluminous requests

Where an agency or minister is satisfied that the work involved in processing an FOI request would divert the agency's resources from the performance of its other functions, or interfere with the performance of the minister's functions—to a substantial and unreasonable degree—they can, subject to certain conditions,[86] refuse to process the request under s 25A(1) of the *FOI Act 1982* (Vic).[87]

The s 25A(1) exception 'sets a very high threshold' that is 'difficult to meet'.[88] As OVIC explained, the provision is intended to be used in 'clear and limited circumstances' because it is a significant curtailment of the right of access and is contrary to the principle of maximum disclosure.[89] The provision was introduced to the *FOI Act 1982* (Vic) through 1993 amendments to the Act.[90] It was designed to strike a balance between the competing public interests in maximum disclosure of government-held information and the efficient administration of government.[91] At the time, it was described as a necessary measure to protect agencies against the 'severe disruption' caused by the small number of 'voluminous requests' received by agencies.[92]

Consistent with this narrow interpretation, the Committee received evidence that VCAT decisions affirming s 25A(1) refusal decisions have generally involved FOI requests where an agency's estimate of the number of documents captured by the scope of the request is in the 'tens of thousands' or of the number of hours to process the request is 'over one year'.[93]

What constitutes a 'substantial and unreasonable' diversion or interference is not defined in the Act. Section 25A(2) of the Act sets out the factors that agencies and

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85 OVIC, *Submission 55*, 15 January 2024, p. 116; *GIPA Act 2009* (NSW) s 60(1)(b), (b1).

86 In deciding whether the s 25A(1) exception applies, an agency or minister is required to: consider prescribed matters which are designed to assist with estimating the workload that would be involved in processing the request; notify an applicant of the agency's or minister's intended use of the exception; assist the applicant to re-submit the FOI request in an acceptable form; and provide a reasonable opportunity for the applicant to consult on the issues raised. Agencies and ministers are also prohibited from taking account of certain factors, such as the reason for the request. See *FOI Act 1982* (Vic) s 25A(2)–(4), (6). See also OVIC, *Submission 55*, 15 January 2024, p. 119; VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 1.

87 *FOI Act 1982* (Vic) s 25A(1).

88 Victorian Government Solicitor's Office (VGSO), *Submission 13*, 29 November 2023, p.2.

89 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 135 (quotation); OVIC, *Submission 55*, 15 January 2024, p. 118. See also VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 2.

90 OVIC, *Submission 55*, 15 January 2024, p. 118; *Freedom of Information (Amendment) Act 1993* (Vic) s 9.

91 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 135 [1.9]. See also *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 [48].

92 Hon Jan Wade MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 52nd Parliament, Autumn session 1993, Legislative Assembly, 7 May 1993, p. 1738. See also OVIC, *Submission 55*, 15 January 2024, p. 118.

93 VGSO, *Submission 13,* 29 November 2023, p. 3; *Cainfrano v Director General, Premier's Department* [2006] NSWADT 147 [51].

ministers must have regard to in deciding whether the s 25A(1) exception applies to an FOI request. These factors are 'non-exhaustive' and are 'relevant to estimating the work involved in processing a request'.[94]

OVIC has issued comprehensive guidance on decision-making with respect to the s 25A(1) exception.[95] This includes guidance on factors relevant to determining whether the diversion or interference would be 'substantial',[96] specifically, the:

- nature and size of the agency;
- level of resourcing allocated to FOI processing;
- number of other FOI requests on hand, and whether requests received are increasing or decreasing; or
- number of employees who may help process the request, and their other responsibilities.[97]

It also includes guidance on factors, set out in VCAT decisions,[98] relevant to determining whether the diversion or interference would be 'unreasonable', including:

- whether the terms of the request offer a sufficiently precise description to allow the agency to locate the documents sought within a reasonable time and with reasonable effort;
- the public interest in disclosure of documents relating to the subject matter of the request;
- whether the request is a reasonably manageable one, giving due but not conclusive regard to the size of the agency and the extent of its resources usually available for dealing with FOI requests;
- the estimated number of documents covered by the request, the number of pages and the amount of officer time and salary cost;
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant had taken a co-operative approach in revising the application;
- the statutory time limit under the Act for making a decision;

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94 OVIC, *Submission 55*, 15 January 2024, p. 119.

95 See OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, pp. 131–157; OVIC, *Professional Standards: issued by the Information Commissioner under Part IB of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, December 2019, pp. 10–11. See also VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 4.

96 As the VGSO highlighted, 'substantial' has been held to mean 'more than "merely nominal"' (VGSO, *Submission 13*, 29 November 2023, p. 2 (quotation); *Re A and Department of Human Services* (1998) 13 VAR 235 [247]).

97 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 142 [1.45], quoted in VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 3.

98 As the VLSBC noted, these factors were set out in *The Age Company Pty Ltd v CenITex* (Review and Regulation) [2013] VCAT 288, [43]–[45] (VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 3).

- the degree of certainty that can be attached to the documents and processing time estimates, and whether there is a real possibility that the processing time may exceed the estimate;
- whether the applicant is a repeat[99] FOI applicant.[100]

The Committee notes that these factors are similar to the factors required to be considered by Tasmanian agencies relying on the equivalent exception in the *Right to Information Act 2009* (Tas).[101] Tasmanian FOI legislation is more comprehensive than Victorian legislation in this respect.

OVIC favoured the retention of the s 25A(2) factors in the *FOI Act 1982* (Vic), but suggested the inclusion of additional factors, such as agency size and resourcing, as well as the statutory time frame for deciding the request (excluding any extensions that may be available under the Act).[102]

With respect to the factors that must be excluded from decision-making under s 25A(1), specified in s 25A(3)–(4) of the Act, VCAT suggested that the adequacy of an agency's consultation with an applicant under s 25A(6)[103] should be added to the excluded factors, because it overshadows the 'substantive issue'—that is, whether processing the request would substantially and unreasonably divert an agency's resources.[104] The Committee agrees.

If an FOI applicant is dissatisfied with an agency's (or minister's) refusal decision under s 25A(1) of the Act, they can apply to OVIC for a review of the decision.[105] If OVIC determines that the s 25A(1) exception was improperly relied on, it can direct the agency or Minister to process the FOI request.[106] If the applicant or respondent agency is dissatisfied with OVIC's review decision, they can apply to VCAT for review of the Information Commissioner's decision.[107] VCAT is similarly empowered to direct

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99 This includes consideration of whether there are active related FOI requests and the recent FOI history of the applicant—VGSO, *Submission 13*, 29 November 2023, pp. 3–4; Victorian Bar, *Submission 57*, 15 January 2024, p. 6 (citing *Secretary, Department of Treasury and Finance v Kelly* (2001) 4 VR 595, [46], [51]); VCAT, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 6 (citing *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1236).

100 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 143 [1.49] (citing *The Age Company Pty Ltd v CenITex* (Review and Regulation) [2013] VCAT 288, [43]–[45]) (quotation); VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, p. 2–4.

101 See *Right to Information Act 2009* (Tas) s 19(1)(c), sch 3. See also VGSO, *Submission 13*, 29 November 2024, pp. 2–4; Name withheld, *Submission 48*, 15 January 2024, pp. 38–39; VLSBC, Response to Integrity and Oversight Committee questions on notice, 21 May 2024, pp. 4–5.

102 OVIC, *Submission 15*, 15 January 2024, p. 119. See also VGSO, *Submission 13*, 29 November 2023, pp. 2–4.

103 This sub-section requires an agency (or minister) to give written notice to the applicant of its intention to use the s 25A(1) exception, inviting them to consult on re-scoping the request to remove the grounds for refusal under s 25A(1) and assisting them to do so, explaining why processing the request would cause a substantial and unreasonable diversion of the agency's resources, and affording the applicant a 'reasonable opportunity' to consult—OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, pp. 146–147 [1.55].

104 VCAT, Response to Integrity and Oversight Committee questions on notice, p. 6.

105 *FOI Act 1982* (Vic) s 49A(1).

106 *FOI Act 1982* (Vic) ss 49F, 49P.

107 *FOI Act 1982* (Vic) s 50(1)(b), (3D). This is separate to the 'deemed refusal' provision in s 49J of the Act (see especially (1)(a), 2(a), (3)–(4)), where, if the Information Commissioner fails to decide a review application within the statutory or agreed time frame, they are taken to have made a refusal decision for the purposes of the applicant applying to VCAT under s 50(1)(b) of the Act.

an agency to process the FOI request if satisfied that the s 25A(1) exception does not apply to it.[108]

However, VCAT observed that it rarely overturns a review decision of the Information Commissioner confirming an agency refusal decision under s 25A(1). Consequently, it questioned the utility of providing, to FOI applicants, a right of review to VCAT with respect to OVIC s 25A(1) review decisions.[109] OVIC did not advocate for a change of this kind. The Committee considers, as a matter of fairness, that the right of review by VCAT, of both applicants and agencies, should be preserved.

While intended to be used rarely, in practice OVIC and others observed an increasing reliance by agencies (and ministers) on the s 25A(1) exception, especially since the introduction in 2017 of the third-party consultation requirements in the *FOI Act 1982* (Vic).[110] Currently, when deciding whether the s 25A(1) exception applies to a request, agencies can have regard to the work likely to be involved with respect to the third-party consultation requirements.[111] OVIC reported that this has led to perverse outcomes, for example where an agency will refuse to process a request under s 25A(1) on grounds that consulting with affected third-parties, while practicable, would be too onerous.[112]

OVIC suggested that legislative amendment is required to ensure that the s 25A(1) exception is used only when 'actually necessary rather than to avoid processing a request'.[113] OVIC's view is that the provision be amended to:

- require agencies to process a request if the public interest favouring disclosure of the information sought outweighs the s 25A(2) factors[114]—that is, a statutory presumption favouring the processing of the request with a 'public interest override'[115]
- prohibit agencies (and Ministers) from using the s 25A(1) exception on grounds that the third-party consultation would likely be an unreasonable diversion of resources. Rather, where consultation is likely to be too onerous, agencies ought not be required to consult on grounds that it would be unlikely to be reasonably practicable to do so.

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108 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 5.

109 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 5.

110 OVIC noted that use of the s 25A exception increased by 332% in the period 2014/15–2022/23 (OVIC, *Submission 55*, 15 January 2024, p. 118). See also LIV, *Submission 22*, 4 December 2023, pp. 6–7; ARTK, *Submission 27*, 14 December 2023, p. 4; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 34–35; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, p. 5.

111 *FOI Act 1982* (Vic) s 25A(2)(b). See also OVIC, *Submission 55*, 15 January 2024, p. 119.

112 OVIC, *Submission 55*, 15 January 2024, p. 119.

113 Ibid.

114 This is similar to the NSW approach, which requires agencies to have regard to 'the public interest and the importance of the information to the applicant, such as whether the applicant is seeking the information to exercise their rights under any other Act or law' (Name withheld, *Submission 48*, 15 January 2024, p. 38 (quotation); Victorian Aboriginal Legal Service (VALS), *Submission 54*, 15 January 2024, pp. 20–21; *GIPA Act 2009* (NSW) s 60(3A)–(3B)).

115 There was support for this approach expressed in other submissions received to the Inquiry. See, for example, VALS, *Submission 54*, 15 January 2024, pp. 20–21.

- include, in the s 25A(2) factors, an agency's size and resourcing, as well as the statutory time frame for processing the request.[116]

While the Committee agrees, it considers that the decision-making factors set out by OVIC with respect to determining what is 'substantial' and 'unreasonable', listed above, should be prescribed in the s 25A(2) factors. That is, that the Victorian Government should take a hybrid approach to reforming s 25A(2)—adopting the New South Wales approach with respect to the public interest override and the Tasmanian approach with respect to providing a more comprehensive list of decision-making factors for the guidance of agencies and ministers.

OVIC additionally suggested the introduction of statutory measures to deter principal officers and Ministers from deliberately under-resourcing their FOI function.[117] For example, OVIC suggested a requirement for agencies to review the adequacy of their FOI resourcing if their capacity to process requests is frequently constrained by the resourcing of their FOI function.[118] Presently, OVIC's FOI Guidelines require agencies (and ministers) to review the adequacy of their FOI resourcing if they are consistently unable to decide requests within the statutory time frame.[119] However, given OVIC's weak enforcement powers, the Committee notes that this alone has been insufficient to address processing delays more broadly, as well as systemic delays within particular agencies.

The Committee agrees and considers that this is particularly important.

The Committee received evidence that understaffing of FOI teams is a persistent issue. There was also strong support for agencies being adequately funded to administer the FOI scheme in a timely manner, and for stronger enforcement of agency obligations with respect to resourcing to their FOI function.[120]

The Committee also received evidence of the significant disparity in workloads between FOI practitioners working at high-volume agencies compared with other agencies more broadly. As OVIC noted, in 2022/23, 30 agencies received 84% of all FOI

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116 OVIC, *Submission 55*, 15 January 2024, pp. 119, 120 (quotation).

117 Ibid., p. 120.

118 Ibid.

119 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 136 [1.16]; OVIC, Response to Integrity and Oversight Committee questions on notice, 28 May 2024, p. 3.

120 See, for example, Disability and Discrimination Legal Service, *Submission 7*, 13 November 2023, p. 2; Office of the Information Commissioner Queensland (OIC Qld), *Submission 16*, 30 November 2023, pp. 4–5; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2024, pp. 3–5, 8; Law Institute Victoria (LIV), *Submission 22*, 4 December 2024, p. 8; Liberty Victoria, *Submission 25*, 8 December 2023, p. 10; ALA, *Submission 28*, 1 December 2023, pp. 7–8; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 12–17, 21–22; MAV, *Submission 51*, 15 January 2024, pp. 3, 6; VALS, *Submission 54*, 15 January 2024, pp. 7–8; The Australia Institute, *Submission 61*, 18 January 2024, p. 1; South-East Monash Legal Service Inc (SEMLS), *Submission 67*, 29 January 2024, pp. 7–8, 10; Latrobe City Council, *Submission 69*, 8 March 2024, p. 3; Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 11; Suzette Jefferies, Assistant Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 12; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 53; Wayne Gatt, Secretary, The Police Association Victoria (TPAV), public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 1–2. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 8–9, 23, 27, 38, 48–49, 53–54, 78, 94–95, 101–104, 110, 115.

requests made in Victoria. FOI decision-makers working in these high-volume agencies decide, on average, 173.2 requests per person per annum, compared with the average across all agencies, which is 62.02 requests.[121]

The Committee received evidence of the need for greater statutory guidance on what 'substantial' and 'unreasonable' means in the context of the s 25A(1) exception.[122] It was suggested that the current phrasing of the provision is opaque, resulting in 'confusion and uncertainty' about the applicability of the exception.[123]

The Victorian Government Solicitor's Office (VGSO) reported that, in its experience, agencies generally have an 'unsophisticated' understanding of the circumstances in which the exception applies.[124] This view was supported by evidence received from OVIC of the rising number of s 25A(1) refusal decisions and the rising proportion of those decisions that are overturned on review by the Information Commissioner.[125]

VCAT, the VLSBC and the VGSO proposed the introduction of a statutory definition of 'substantial and unreasonable' diversion or interference—whether by reference to a minimum threshold of 'operator hours to process the request'[126] or the 'number of documents' captured by the scope of the request.[127] It was suggested that this would ensure that agencies are not dedicating resources to preparing s 25A(1) refusal decisions where reliance on the exception is ill-founded.[128]

The Committee agrees, recognising that this is a challenging task and will require significant stakeholder consultation to set right and ensure that it does not encourage 'formulaic assessments' by agencies.[129]

The Committee also received evidence of the need for a statutory mechanism for refusing multiple requests received by an agency (or minister) from the same FOI applicant, where the cumulative impact of processing those requests would be a 'substantial and unreasonable' diversion or interference within the meaning of the s 25A(1) exception.[130]

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121 OVIC, *Submission 55*, 15 January 2024, p. 32.

122 See, for example, VGSO, *Submission 13*, 29 November 2023, pp. 2–3; Dr Danielle Moon, Lecturer, Macquarie law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, pp. 4–5.

123 VGSO, *Submission 13*, 29 November 2023, p. 2 (quotation); Dr Danielle Moon, Lecturer, Macquarie law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, pp. 4–5.

124 VGSO, *Submission 13*, 29 November 2023, p. 2.

125 OVIC, *Submission 55*, 15 January 2024, pp. 118–119.

126 There would also be the option of including an objective mechanism for calculating operator hours—similar to the United Kingdom approach—by applying a 'standardised cost per hour for specified activities, and an upper costs limit', such as determining whether an agency holds the information requested and locating, retrieving and extracting the information (Dr Danielle Moon, Lecturer, Macquarie law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, pp. 5 (quotation), 6).

127 VGSO, *Submission 13*, 29 November 2023, p. 3 (quotation); Fiona McLeay, Commissioner, VLSBC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 23; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6.

128 VGSO, *Submission 13*, 29 November 2023, p. 3.

129 Such as agencies imposing a threshold limit 'on the number of responsive folios that will automatically trigger a practice refusal' under s 25A(1) of the *FOI Act 1982* (Vic)—Victorian Bar, *Submission 57*, 15 January 2024, p. 7.

130 VGSO, *Submission 13*, 29 November 2023, pp. 3–4; VLSBC, *Submission 15*, 29 November 2023, p. 5; Fiona McLeay, Commissioner, VLSBC, public hearing, Melbourne, 18 March 2024, p. 21. See also MAV, *Submission 51*, 15 January 2024, p. 5; Latrobe City Council, *Submission 69*, 8 March 2024, p. 3.

The Committee notes that the s 25A(1) exception can already be used in connection with multiple requests. OVIC's FOI Guidelines state that 'multiple requests may be treated as a single request for the purpose of deciding if section 25A(1) applies', provided there is a 'clear connection' between them.[131] This includes situations where requiring an agency to process the requests separately would permit the applicant to circumvent the protections in the s 25A(1) exception.[132] The Committee considers that the 25A provision should make specific reference to this fact for the avoidance of doubt and uncertainty.

Agencies (and ministers) issuing a s 25A(1) refusal decision must provide reasons for their decision in accordance with s 27 of the *FOI Act 1982* (Vic).[133] The Victorian Bar reported that, in its experience, s 25A(1) refusal decisions frequently fail to specify:

- estimates of the time it would take an agency to gather the information captured by the scope of the FOI request and prepare it for release;
- how estimates provided were calculated, including whether 'digital search tools and methods'[134] were used
- what 'technical solutions' were considered and 'why they cannot be adopted' to process the request.[135]

It was suggested that these kinds of matters should be prescribed for the purpose of giving notice of a s 25A(1) refusal decision, to ensure 'greater transparency' for applicants. Additionally, this was suggested to deter agencies from using the s 25A(1) exception to avoid processing requests that should be processed in the digital age.[136] The Committee agrees.

Batch limits on requests

The Committee received evidence of agencies imposing page limits on FOI requests, with subsequent requests for additional pages only able to be made after each new request is decided.[137] This practice, known colloquially as imposing 'batch limits' on requests, is neither supported by OVIC nor specifically authorised by the *FOI Act 1982* (Vic). It is contrary to the spirit and intent of FOI legislation.[138]

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131 For example, requests made by the same applicant; requests seeking documents relating to the 'same subject matter'; and requests made around the same time as each other (OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 137 [1.23]–[1.24]).

132 OVIC, *Freedom of Information Guidelines: Part III—access to documents*, Melbourne, December 2023, p. 137 [1.24].

133 Victorian Bar, *Submission 57*, 15 January 2024, p. 7.

134 For example, use of IT systems with advanced search capability or IT teams (Victorian Bar, *Submission 57*, 15 January 2024, p. 7).

135 Victorian Bar, *Submission 57*, 15 January 2024, pp. 7, 8 (quotation).

136 Ibid., pp. 7, 8 (quotation).

137 ALA, *Submission 28*, 21 December 2023, pp. 6 –7, 10–11; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 51.

138 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 24–25; OVIC, Response to Integrity and Oversight Committee questions on notice, 28 May 2024, pp. 1–2.

Submissions and other evidence received to the Inquiry described the adversity experienced by FOI applicants as a result of this practice, for example the difficulties and delay associated with having to make multiple FOI requests. Additionally, the unfairness to accused persons forced to obtain, under subpoena, information that is critical to their defence of criminal proceedings was referred to.[139]

The Committee notes that there may be instances where, following an assessment of the applicability of the s 25A(1) exception to an FOI request, an agency may, in consultation with the applicant, be able to narrow the scope of the request—so as to limit the number of pages sought—to ensure that the request is not refused under the exception and can be processed.[140]

However, the s 25A(1) exception requires a careful case-by-case assessment to be made, and does not permit a blanket approach to be taken to FOI requests. OVIC has previously taken regulatory action in respect of agencies imposing batch limits on requests as a matter of course, including action to prevent them from processing requests 'in a rigidly sequential manner'.[141]

Despite this—provided that the assessment and consultation requirements with respect to the s 25A(1) exception are met in each case—OVIC has permitted some agencies to temporarily process requests 'in 500-page batches' as a means of facilitating timely FOI decision-making during periods of resourcing challenges.[142]

The Committee is concerned by this. Not only does the 500-page batch limit fall well below the threshold that VCAT considers to be an appropriate use of the s 25A(1) exception, the approach has been used since late 2022, indicating that it is not a 'temporary' measure. The Committee considers that this situation perfectly illustrates why a statutory definition of 'substantial and unreasonable' diversion or interference is needed, as well as clear statutory requirements and enforcement powers with respect to agencies' resourcing their FOI function.

Obviously exempt documents

Ordinarily, agencies and Ministers are required to process an FOI request before making a refusal decision. This involves locating, identifying and examining documents captured by the scope of the request, as well as providing a written refusal decision stating the exemption(s) that apply to each document, or category of document, and the reasons why they apply.[143]

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139 ALA, *Submission 28*, 21 December 2023, pp. 9–11; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 47, 51.

140 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 24–25; OVIC, Response to Integrity and Oversight Committee questions on notice, 28 May 2024, pp. 1–4.

141 OVIC, Response to Integrity and Oversight Committee questions on notice, 28 May 2024, pp. 2 (quotation), 3.

142 Ibid., p. 2.

143 OVIC, *Submission 55*, 15 January 2024, p. 120.

Section 25A(5) of the *FOI Act 1982* (Vic) empowers agencies and ministers to refuse to process an FOI request for documents that are obviously exempt under the Act. The preconditions for exercising the refusal are that: (1) it is clear from the scope of the request that all documents captured by it are exempt documents; and either (2) there would be no obligation to provide 'partial access'[144] to documents captured by the scope of the request; or (3) the applicant has indicated, either in the request or in consultation with the agency or Minister, that they do not want to receive partial access to the documents sought.

OVIC explained that the s 25A(5) exception was intended to empower agencies and Ministers to avoid the futile work of processing FOI requests for obviously exempt documents. However, the provision is only intended to be used 'in clear and limited circumstances' given that it is a significant curtailment of the right of access and is contrary to the principles of maximum disclosure, transparency and procedural fairness. This is because agencies and Ministers are neither required to identify the documents captured by the scope of the request, nor the particular grounds on which they are exempt. They are also not required to assist the applicant to amend the scope of the request to enable it to be processed.[145]

OVIC expressed concern about agencies' increasing reliance on the s 25A(5) exception. OVIC reported that, in 2022/23, the provision was used 484 times, which is an almost five-fold increase from 2014/15. This increase is disproportionate to the rise in the volume of FOI requests received over that period.[146] There are, additionally, worrying indications that agencies are improperly using the exception. For example, OVIC highlighted that s 25A(5) decisions represented 11% of all FOI review applications received by OVIC in 2020/21, part of an upwards trend since 2018/19. Additionally, OVIC varied, on average, 28% of all s 25A(5) decisions subject of an FOI review application[147] in 2020/21–2022/23.[148]

OVIC's view is that the s 25A(5) exception 'does not strike the right balance between promoting access to government-held information and safeguarding against the misuse of the FOI Act' and, consequently, should be repealed.[149] The Committee agrees, noting that FOI legislation in the second-generation Commonwealth, New South Wales and Queensland push jurisdictions does not contain an equivalent provision.[150]

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144 See the discussion below under 'Partial access' in Section 4.2.1 in this chapter.

145 OVIC, *Submission 55*, 15 January 2024, pp. 120, 121 (quotation).

146 Ibid., p. 121.

147 This does not include FOI review applications relating to s 25A(5) decisions that OVIC resolved informally (for example, where an agency voluntarily agreed to make a fresh decision on the FOI request with which the applicant agreed) (OVIC, *Submission 55*, 15 January 2024, p. 121).

148 OVIC, *Submission 55*, 15 January 2024, p. 121.

149 Ibid.

150 Ibid.

Streamlining consultation provisions

The third-party notification and consultation requirements in ss 29, 29A, 31, 31A, 33, 34, and 35 of the *FOI Act 1982* (Vic) were introduced through 2017 amendments to the Act.[151] Where the interstate communications, national security, law enforcement, IBAC, personal privacy, trade secrets or confidential communications exemptions potentially apply to a document sought in an FOI request, these consultation provisions require agencies (and ministers) to seek the views of affected third parties on disclosure in deciding whether the document is exempt.[152]

The 'practicability' threshold for consulting with third parties is expressed differently across the consultation provisions. OVIC noted, for example, that the consultation requirements under ss 29, 29A, 31, 31A, and 34 of the *FOI Act 1982* (Vic) must be met 'if practicable', whereas consultation under ss 33 and 35 of the Act is not required if it is 'not practicable'. Agencies must also make third-party notifications under ss 33, 34 and 35 of the Act whether or not it is practicable to do so.[153]

The main criticisms of the current notification and consultation provisions in the *FOI Act 1982* (Vic) include that

- they have significantly increased agency FOI workloads[154]
- they are resource-intensive and time-consuming to comply with in practice and contribute to agency delays in deciding FOI requests[155]
- it is difficult for agencies to determine when to consult given the complex wording of the provisions and their differing thresholds[156]
- the lack of general discretion to consult results in agencies taking a strict approach to interpreting the provisions in practice, as does the lack of legislative clarity on what the terms 'if practicable' and 'not practicable' mean in different contexts.[157]

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151 *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Vic) ss 12, 13, 14, 15, 16, 18–19.

152 OVIC, *Submission 55*, 15 January 2024, p. 157; *FOI Act 1982* (Vic) ss 29, 29A(1)–(1D), 31(1), (5), 31A, 33(1), (2B), 34(1), (3), 35(1)–(1A). See also Hon Martin Pakula MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 58th Parliament, First session 2016, Legislative Assembly, 23 June 2016, p. 2870.

153 OVIC, *Submission 55*, 15 January 2024, p. 158; *FOI Act 1982* (Vic) ss 29(2), 29A(1D), 31(5)–(6), 31A(2), 33(2B)–(2C), (3), 34(3), (3A), 35(1A)–(1C).

154 See, for example, VGSO, *Submission 13*, 29 November 2024, p. 4; VLA, *Submission 18*, 1 December 2023, p. 2; MAV, *Submission 51*, 15 January 2024, p. 3; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21.

155 See, for example, Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 8; Western Health, *Submission 31*, 28 December 2024, p. 3; Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 20–21; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 14;

156 For example, OVIC reported that agencies are confused about the meaning of phrases like 'if practicable' and 'unless practicable' (OVIC, *Submission 55*, 15 January 2024, p. 158).

157 For example, OVIC noted that most agencies view the consultation provisions as an obligation to consult with *all* third parties, regardless of the number of parties involved or their anticipated views on a matter. This can be an extremely resource-intensive exercise, noting that some agencies 'handle documents with hundreds of third parties involved' (OVIC, *Submission 55*, 15 January 2024, pp. 158, 159 (quotation)). See also Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2024, p. 8; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, pp. 20–21; Johan Lidberg et al., *The culture of administering access to government information and Freedom of Information in Victoria Part II: final report*, Monash University, Melbourne, June 2021, pp. 29, 51.

OVIC suggested that the same threshold for consultation should apply across all consultation provisions.[158] The Committee agrees.

OVIC further suggested that FOI legislation should prevent agencies and ministers from refusing to process an FOI request on grounds that complying with the statutory consultation requirements would substantially and unreasonably divert its resources. Rather, OVIC argues that that agencies and ministers be given greater discretion and flexibility under such provisions not to consult.[159] The Committee agrees.

The Committee considers that the New South Wales approach—which requires agencies to take 'reasonably practicable' steps to consult with third parties and to only consult with those parties that 'may reasonably be expected to have concerns about the disclosure of information'—should be followed.[160] This kind of flexibility and discretion was supported by other evidence received to the Inquiry.[161] It is also more consistent with the approach taken to third-party privacy when releasing information under the *PDP Act 2014* (Vic).[162] As OVIC has previously noted:

> Such an approach would remove the requirement to consult with third parties who are merely named in a document but could not reasonably be expected to be concerned about the release of their personal information, such as the names of public servants that appear in documents in the ordinary course of their duties.[163]

The Committee therefore proposes a third-party consultation model that would:

- retain third-party consultation requirements for information captured by the ss 29, 29A, 31, 31A, 33, 34 and 35 exemptions, with the same consulting threshold across the board
- only require agencies (and ministers) to consult with third parties if it is reasonably practicable to do so *and* the affected party would reasonably be expected to be concerned about the disclosure of the information in question
- discourage agencies from relying on the s 25A(1) voluminous requests exception due to consultation requirements.

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158 OVIC, *Submission 55*, 15 January 2024, p. 159.

159 Ibid.

160 OVIC, *Submission 55*, 15 January 2024, p. 159; *GIPA Act 2009* (NSW) s 54. The Committee notes that the Commonwealth and Queensland push jurisdictions take a similar approach. See *FOI Act 1982* (Cth) s 27A; *RTI Act 2009* (Qld) s 37.

161 See, for example, Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 8; Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Professor Moira Paterson, Faculty of Law, Monash University, public hearing, Melbourne, 12 March 2024, pp. 20–21; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 13–14. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, p. 110.

162 Noting that organisations must consider whether 'providing access would have an *unreasonable* impact on the privacy of other individuals' (emphasis added). See *Privacy and Data Protection Act 2014* (Vic) ('*PDP Act 2014* (Vic)') sch 1 (Information Privacy Principles—IPP) 6.1(b).

163 OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 61O of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021 p. 64.

While supportive of agencies having greater flexibility and discretion in when and how they consult, the Committee does not consider that this should come at the expense of the privacy protections for non-executive public servants in the *FOI Act 1982* (Vic). The Committee considers that, with respect to identifying information of public servants in the performance of their duties, the current protections in the FOI legislation are more robust than those in privacy legislation.[164]

Indeed the Committee received evidence that the existing privacy protections in FOI legislation do not go far enough to protect the privacy and safety of public servants, particularly for non-executive staff working in 'smaller communities',[165] or named in documents sought in non-personal FOI requests where their identification is 'inconsequential to the subject matter'.[166] As Latrobe City Council explained:

> … Council officer safety has been of increasing concern as documents, once released, can be shared electronically. Publication of correspondence and documents on social media is common in our council area, and in the internet age, people are easier to locate and potentially be harassed.[167]

This sentiment was shared by MAV, who reported that:

> Certain councils report instances where local activist groups publish decisions letters and documentation on social media, raising safety concerns, particularly in small communities where council officers are more easily identifiable.[168]

Relaxing the third-party consultation requirements in FOI legislation does not have to erode the existing privacy protections for public servants. Instead, the Government should give careful consideration to how best to identify when it will be inappropriate for identifying (and other personal) information of public servants, particularly lower-level staff, to be disclosed. This can be addressed in FOI legislation and through regulatory guidance and standards issued by OVIC. FOI legislation, for example, could define what is 'unreasonable' or include criteria for assessing it.[169] Alternatively, noting that much will turn on the circumstances of a particular FOI request, whether the request is for personal or non-personal information may have bearing on what is unreasonable in the circumstances.

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164 While the concept of personal information is differently expressed in Victorian privacy and FOI law, it is broadly defined. Privacy legislation refers to 'personal information' whereas FOI legislation refers to 'information relating to the personal affairs of any person'. See *PDP Act 2014* (Vic) s 3; *FOI Act 1983* (Vic) s 33; OVIC, *Freedom of Information Guidelines: Part IV—exempt documents*, Melbourne, March 2024, pp. 155–158. Under privacy legislation, access to the personal information of another can be refused if disclosure 'would pose a *serious threat* to the life of health of' any person or 'have an *unreasonable impact* on the privacy' of another (*PDP Act 2014* (Vic) sch 1 (IPP 6.1) (emphasis added)). Whereas, access to such information under FOI legislation can be refused if it 'would involve the *unreasonable disclosure*' of the personal affairs information of another. In determining what is 'unreasonable', agencies *must* take into account whether disclosure: 'would, or would be reasonably likely to, *endanger* the life or physical safety of any person'; would '*increase the risk to a person's safety* from family violence' (where the applicant 'is alleged to pose a risk of committing family violence'); or would '*increase the risk to the safety* of a child or group of children') (emphasis added) (*FOI Act 1982* (Vic) s 33(1), (2A), (2AB), (2AC)).

165 Latrobe City Council, *Submission 69*, 8 March 2024, p. 4. See also MAV, *Submission 51*, 15 January 2024, p. 4.

166 MAV, *Submission 51*, 15 January 2024, p. 4.

167 Latrobe City Council, *Submission 69*, 8 March 2024, p. 5.

168 MAV, *Submission 51*, 15 January 2024, p. 4.

169 See Latrobe City Council, *Submission 69*, 8 March 2024, p. 5.

The Committee recognises that professional standards or FOI guidelines will be necessary to provide guidance on how these new legislative changes should be interpreted.[170] The Committee considers that it would be beneficial for such standards or guidelines to require agencies—particularly those dealing with documents involving hundreds of third parties or those regularly dealing with the same third-party consultees or kinds of consultees—to develop:

- internal policies regarding the kinds of information regarding which, under the consultation provisions, internal consultees (for example, staff of an agency or contractors or external consultants hired to perform work for an agency), do *not* need to be consulted; and
- Memoranda of Understanding with external consultees on the kinds of information that they do *not* need to be consulted on under the consultation provisions.

A further aspect is that, under the new FOI system proposed by the Committee, the majority of FOI requests will be processed through the informal-release mechanism. The statutory exemptions and third-party consultation requirements that will apply to requests processed through the formal-release mechanism will not apply to requests processed under the informal-release mechanism. Agencies will have flexibility to redact or remove information that they are not prepared to release informally, with the consent of the applicant, or else the request will be dealt with under the formal-release mechanism.[171] Privacy considerations, which will vary depending on the type of agency and the nature of the information sought, will therefore necessarily form part of agencies' informal-release policies.

Partial access

Often a document captured by the scope of an FOI request contains irrelevant or exempt information. In such cases, partial access to the document can be granted, whereby an 'edited copy' of the document is provided to the applicant with the irrelevant or exempt information removed or redacted.[172]

Agencies and ministers are required, under s 25 of the *FOI Act 1982* (Vic), to remove or redact irrelevant and exempt information from a document for the purpose of providing partial access. However, they are only required to provide an edited copy of a document if the applicant has indicated that they want to receive edited copies of documents sought in the request.[173] This is not international best practice, which requires all non-exempt information captured by the scope of a request to be released to the applicant.[174]

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170 For example, guidance on how to determine when consultation is required and with whom—OVIC, *Submission 55*, 15 January 2024, p. 159.

171 See the discussion under 'Evaluation of current mechanisms' in Section 4.3.3 in this chapter.

172 OVIC, *Submission 55*, 15 January 2024, p. 160 (quotation); *FOI Act 1982* (Vic) s 25.

173 OVIC, *Submission 55*, 15 January 2024, p. 160; *FOI Act 1982* (Vic) s 25(c).

174 OVIC, *Submission 55*, 15 January 2024, p. 159; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, p. 7 ('Principle 4: Limited scope of exceptions … [b]odies should only withhold the specific information that is exempted in documents or records and provide redacted versions of the remainder of the material.').

OVIC criticized this aspect of the provision, noting that it

- has resulted in agencies not releasing documents with minor redactions in them because an applicant has not indicated that they want to receive edited copies of documents
- increases agencies' FOI workloads because they are required to explain to applicants the nature and effect of the provision
- disadvantages FOI applicants at the outset, and is confusing for them to understand, which can cause them to act against their interests.[175]

The Committee considers that the Commonwealth approach—which requires agencies to provide an edited copy of a document to an applicant if reasonably practicable, unless the applicant has indicated that they do not want to receive it—should be followed.[176]

With respect to irrelevant information contained in a document captured by the scope of a request, OVIC suggested that, rather than requiring agencies and ministers to delete irrelevant information for the purposes of providing partial access, they should have discretion to do so. OVIC's view is that this would support the principle of maximum disclosure, and encourage agencies and ministers to release information that may give 'greater context' to the document, or aid the applicant's understanding of it.[177]

The Committee agrees and considers that the Queensland approach—which permits but does not require agencies or ministers to delete irrelevant information—should be followed.[178]

Presently, section 25 of the *FOI Act 1982* (Vic) authorises agencies and ministers to make 'such deletions' as are necessary to provide partial access to a document.[179] OVIC suggested that, in order to keep pace with government's use of new and emerging technologies,[180] it would be better to require agencies and ministers to provide partial access without disclosing exempt information, rather than focusing on *how* they should remove exempt information.[181] The Committee agrees.

Statutory time frame for deciding review applications

The Information Commissioner is generally required to decide FOI review applications within 30 days. The statutory time frame can be extended by agreement with the applicant.[182] The Information Commissioner can be required to undertake any

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175 OVIC, *Submission 55*, 15 January 2024, p. 160.

176 OVIC, *Submission 55*, 15 January 2024, p. 160; *Freedom of Information Act 1982* (Cth) ('*FOI Act 1982* (Cth)') s 22(1)(d), (2).

177 OVIC, *Submission 55*, 15 January 2024, pp. 159, 160 (quotation).

178 See *RTI Act 2009* (Qld) s 73(2). See also OVIC, *Submission 55*, 15 January 2024, p. 160.

179 *FOI Act 1982* (Vic) s 25(b).

180 For example, 'pixelation and editing of CCTV footage' (OVIC, *Submission 55*, 15 January 2024, p. 160).

181 OVIC, *Submission 55*, 15 January 2024, pp. 160–161.

182 *FOI Act 1982* (Vic) s 49J.

number of activities in deciding a review, which can include inviting and reviewing submissions from the applicant and respondent agency on the issues in dispute; making preliminary inquiries with the parties to determine the issues in dispute and the prospect of resolution by agreement; undertaking significant engagement with a respondent agency on the issues in dispute; inspecting documents over which an exemption is claimed; and directing a respondent agency to conduct a further search for documents.[183]

The Committee received evidence that the current time frame is difficult to meet for OVIC and agencies and should be extended to 60 days.[184] The Committee agrees that it would be prudent for the Victorian Government to consider extending the review period.

Statutory time frame for appealing a review decision of the Information Commissioner

If the Information Commissioner makes a fresh decision on a review application—for example, granting access to documents that an agency had originally refused to release—the agency has 60 days to appeal the decision to VCAT, if the documents at issue relate to the ss 33, 34 or 35 exemptions in the *FOI Act 1982* (Vic), or 14 days in all other matters.[185] Given the complexity of these matters, agencies generally seek independent legal advice on the prospects of success of, and the public interest in, a VCAT appeal.

The Committee received evidence that the practical effect of the 14-day time frame is that agencies often make the review application to VCAT, while still deciding whether to proceed with the appeal, and later withdraw it once they have time to properly consider their position.[186] This is inefficient and creates unnecessary work for VCAT. It was suggested that the 14-day time frame be extended to 30 days.[187] The Committee agrees that it would be prudent for the Victorian Government to consider extending the 14-day appeal period for agencies.

OVIC's functions and powers

The Committee received evidence of the additional regulatory powers and functions that are necessary to support the effective and efficient operation of Victoria's new third-generation push FOI system. The Committee considers that these areas should be

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183 *FOI Act 1982* (Vic) pt VI div 1 (especially ss 49H–49I, 49K–49KA). See also Name withheld, *Submission 48*, 15 January 2024, p. 52.

184 Or 40 business days, noting that the Committee has recommended that all statutory time frames in the *FOI Act 1982* (Vic) be converted from calendar days to business days in legislation establishing Victoria's new third-generation push FOI system (Name withheld, *Submission 48*, 15 January 2024, p. 52).

185 *FOI Act 1982* (Vic) s 49P (especially (2), (4)(b)), 50(3D), 52(9).

186 Victoria Police, *Submission 24*, 7 December 2023, pp. 12–13; Name withheld, *Submission 48*, 15 January 2024, pp. 54–55.

187 Victoria Police, *Submission 24*, 7 December 2023; pp. 12–13, 15; Name withheld, *Submission 48*, 15 January 2024, pp. 54–55; Susan Middleditch, Deputy Secretary, Corporate and Regulatory Services, Victoria Police, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 26.

front of mind with respect to this aspect of the legislative reform agenda for Victoria's new FOI system. They are as follows.

FOI professional standards

Under pt IB of the *FOI Act 1982* (Vic), the Information Commissioner has power to issue binding professional standards on agencies' performance of their functions under the Act and administration of the FOI scheme.[188] This power does not extend to ministers.[189] The Committee received evidence that the Information Commissioner's power to issue professional standards should extend to ministers, similar to the Commonwealth, New South Wales and Queensland push jurisdictions.[190] The Committee considers that it would be prudent for the Victorian Government to consider extending the Information Commissioner's power to issue FOI professional standards to ministers.

Delegation of power to decide review applications

OVIC suggested that the Information Commissioner and Public Access Deputy Commissioner be permitted to delegate to senior staff their power to decide an FOI review application and make a 'fresh decision' on the original FOI request.[191] This is currently prohibited by the *FOI Act 1982* (Vic),[192] but OVIC suggested that it is necessary to facilitate timely decision-making on review applications given the high volume of applications received.[193]

The Committee agrees, noting that the Information Commissioner and Public Access Deputy Commissioner are struggling to decide FOI review applications in a timely manner.[194] The Committee considers that, rather than simply removing the prohibition on delegating the power, the Victorian Government should give consideration to:

- the types of persons that should be able to exercise delegated authority to decide FOI review applications—for example, persons with the necessary expertise and security clearance to decide such applications; and
- the kinds of FOI review applications that should be able to be decided by persons with delegated authority—for example, 'routine and straightforward'[195] applications as opposed to the most serious or complex matters, or matters involving documents with the highest protective markings.

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188 *FOI Act 1982* (Vic) ss 6U–6X.

189 *FOI Act 1982* (Vic) ss 6Y–6Z; OVIC, *Submission 55*, 15 January 2024, p. 155.

190 Name withheld, *Submission 48*, 15 January 2024, pp. 28–29; *FOI Act 1982* (Cth) s 93A; *GIPA Act 2009* (NSW) ss 4 (definition of 'agency' includes ministers), 12, 14–15, 17, 22, 66; *RTI Act 2009* (Qld) s 132.

191 OVIC, *Submission 55*, 15 January 2024, p. 162; *FOI Act 1982* (Vic) ss 6I(2)(d), 49P(1).

192 OVIC, *Submission 55*, 15 January 2024, p. 162; *FOI Act 1982* (Vic) s 6R(1)(b), (4)(a).

193 OVIC, *Submission 55*, 15 January 2024, p. 162.

194 See the discussion in Section 3.1 in Chapter 3 of this report.

195 OVIC, *Submission 55*, 15 January 2024, p. 162.

Documents subject to review applications

OVIC suggested that, for the purpose of deciding FOI review applications, it be permitted to make copies of the documents at issue. That is, documents in respect of which an agency or minister has claimed an exemption under ss 28, 29A, 31 or 31A of the *FOI Act 1982* (Vic). Presently, OVIC is only permitted to inspect such documents at agency or ministerial offices, or, on request, by secure electronic means. It cannot make or retain copies.[196] This is because of the high-security nature of the documents, given that the provision relates to the interstate communications, national security, law enforcement and IBAC exemptions.

OVIC further suggested that removing the current restrictions will improve its efficiency in deciding FOI review applications because it ordinarily 'prepares marked up copies of documents subject to review to indicate the Commissioner's decision' which 'helps the agency or Minister to provide access to additional information' in accordance with OVIC's review decision.[197]

The provision permitting inspection by secure electronic means was introduced through 2021 amendments to the Act.[198] It was part of a broader set of measures designed to foster flexible information-sharing between agencies to enable them to maintain operational efficiency in the wake of the unique challenges presented by the COVID-19 pandemic.[199]

The Committee notes that the kinds of documents captured by the s 63D(4) provision are documents likely to have the highest protective markings, such as 'Cabinet documents, IBAC documents and national security and law-enforcement documents'.[200] In that context, the Committee considers that the ability to inspect a document is quite a different matter from being able to copy it. They raise very different information-security concerns.

The Committee is satisfied that OVIC has robust information-management and security procedures, processes and practices in place to minimise the risk of improper disclosure of confidential and sensitive information held by it.[201] The Committee also notes that international best practice requires the regulator to have power to 'review classified documents' for the purpose of performing its functions.[202]

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196 OVIC, *Submission 55*, 15 January 2024, p. 163; *FOI Act 1982* (Vic) s 63D (especially (2)–(5)).

197 OVIC, *Submission 55*, 15 January 2024, p. 163.

198 *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 147. See also *FOI Act 1982* (Vic) s 63D(4)–(5).

199 Hon Melissa Horne MP (Minister for Ports and Freight, Minister for Consumer Affairs, Gaming and Liquor Regulation, Minister for Fishing and Boating) Second Reading Speech, Parliamentary Debates (Hansard), 59th Parliament, First session, Legislative Assembly, 18 February 2021, pp. 442–444, 446–447.

200 Ibid., p. 447.

201 Parliament of Victoria, Integrity and Oversight Committee (IOC), *Performance of the Victorian integrity agencies 2021/22*, Melbourne, November 2023, pp. 86–89.

202 Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 41 ('The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.').

However, the Committee considers that OVIC's desire to streamline processes for receiving information subject to FOI review applications does not outweigh any security concerns that agencies and ministers may have with respect to the proposed change. Consequently, in the absence of evidence of the views of key stakeholders on this matter, or of OVIC's consultation with these stakeholders on its recommendation, the Committee is not inclined to support it.

Enforceable decision-making

Presently, the *FOI Act 1982* (Vic) provides that an FOI review decision of the Information Commissioner 'has the same effect as a decision of the agency or Minister'.[203] However, other jurisdictions have gone further, with provisions requiring agency and ministerial compliance with a regulator's review decision, and the ability to apply to the court for an order directing compliance.[204]

OVIC suggested that it be given appropriate powers to ensure that agencies (and ministers) take appropriate action in response to its FOI review decisions, subject to their right of appeal to VCAT.[205] This is consistent with international best practice, which requires the regulator to be empowered to make 'binding decisions'.[206] The Committee agrees.

VCAT review application data

The Committee previously reported on the need for the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) ('*VCAT Act 1988* (Vic)') to be amended to enable VCAT's FOI review application data to be shared with OVIC. The Committee made a recommendation to this effect.[207] The Committee notes that OVIC and VCAT support this recommendation.[208] VCAT suggested that any such legislative amendment include a requirement for the data to be de-identified by VCAT (and OVIC in its public reporting on such matters), to ensure compliance with privacy requirements in the *VCAT Act 1988* (Vic) and the *Privacy and Data Protection Act 2014* (Vic) ('*PDP Act 2014* (Vic)').[209] The Committee agrees.

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203 *FOI Act 1982* (Vic) s 49P(2).

204 See, for example, *FOI Act 1982* (Cth) ss 55N, 55P. See also OVIC, *Submission 55*, 15 January 2024, p. 163.

205 OVIC, *Submission 55*, 15 January 2024, p. 163.

206 Information and Privacy Commission NSW (IPC NSW), *Key features of Right to Information legislation*, Sydney, April 2019, p. 13 (quotation); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 42.

207 Parliament of Victoria, IOC, *Performance of the Victorian integrity agencies 2021/22*, Melbourne, November 2023, pp. 75–77.

208 OVIC, *Submission 55*, 15 January 2024, p. 167; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 11.

209 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 11.

The Committee notes that this recommendation is 'under review' by the Victorian Government and will be considered further in the context of the Committee's broader recommendations in this Inquiry.[210]

Vexatious applicants

There was widespread support expressed in submissions and other evidence received to the Inquiry for an effective statutory mechanism for dealing with vexatious FOI applicants.[211] Unlike FOI legislation in the second-generation Commonwealth, New South Wales and Queensland push jurisdictions,[212] the *FOI Act 1982* (Vic) does not contain a dedicated vexatious applicant provision.[213] As the Victorian Bar highlighted, this makes Victoria's FOI system 'vulnerable to abuse'.[214]

Presently, VCAT has power to make an 'extended litigation restraint order' in relation to FOI applicants.[215] However, the power is designed to deal with vexatious litigants more broadly, rather than vexatious FOI applicants specifically, and can only be exercised to restrain a person from continuing or commencing VCAT proceedings.[216] VCAT has only exercised this power once with respect to an FOI applicant.[217]

The Committee received evidence of the small proportion of FOI applicants who severely impact agencies' FOI resourcing by making numerous requests of a 'repetitive, persistent and complex nature over an extended period'.[218] VCAT similarly observed that a significant part of its FOI workload is spent dealing with a small number of applicants who make numerous requests to agencies as well as numerous review applications to the Tribunal, despite often having been unsuccessful in previous VCAT proceedings. By way of example, VCAT highlighted that one such applicant had made 116 FOI applications to the Tribunal between 2016–2024.[219]

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210 Department of Justice and Community Safety (DJCS), *Victorian Government response to the recommendations made to it by the Integrity and Oversight Committee in its report,* Performance of the Victorian integrity agencies 2021–22, Melbourne, 29 May 2024, p. 1.

211 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 116–117; VLSBC, *Submission 15*, 29 November 2023, pp. 5–6; Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2023, p. 7; LIV, *Submission 22*, 4 December 2023, p. 7; Name withheld, *Submission 48*, 15 January 2024, pp. 36–37; Victorian Bar, *Submission 57*, 15 January 2024, pp. 5–7, 10; VO, *Submission 60*, 22 January 2024, pp. 4–10; Associate Professor Johan Lidberg, Head of Journalism and Media Innovation, Monash University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 21; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 9–11. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 39, 62; 66–71, 110.

212 See *FOI Act 1982* (Cth) ss 89K–89N; *GIPA Act 2009* (NSW) s 110; *RTI Act 2009* (Qld) ss 114–115.

213 OVIC, *Submission 55*, 15 January 2024, p. 116; Name withheld, *Submission 48*, 15 January 2024, p. 36.

214 Victorian Bar, *Submission 57*, 15 January 2024, p. 5.

215 *Vexatious Proceedings Act 2014* (Vic) pt 3 (especially ss 16–17, 24–25); VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 10.

216 *Vexatious Proceedings Act 2014* (Vic) pt 3; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 10.

217 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 10 (citing *Victorian Civil and Administrative Tribunal v Smeaton* [2017] VCAT 659).

218 See, for example, OVIC, *Submission 55*, 15 January 2024, p. 116 (quotation); LIV, *Submission 22*, 4 December 2024, p. 5; VO, *Submission 60*, 22 January 2024, pp. 4–5; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 16–17.

219 VCAT Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 9.

These FOI applicants have a significant impact on the timely processing of requests by agencies more generally. The Committee agrees with OVIC, and others, that there needs to be an effective mechanism for dealing with vexatious applicants in Victoria's new third-generation push FOI system,[220] noting that there have long been calls for the introduction of such a mechanism in Victoria's FOI legislation.[221]

Generally speaking, there are two different approaches for dealing with the issue. First, the Information Commissioner can be empowered to declare a person a vexatious FOI applicant on the application of one or more agencies, similar to the Commonwealth and Queensland approach. Second, the tribunal can be empowered to make an order restricting a person from making an FOI request without leave of the tribunal, similar to the New South Wales approach.[222]

The Committee notes that the common features of the Commonwealth and Queensland approaches are:

- the Information Commissioner can make a vexatious FOI applicant declaration on the application of an agency or minister, or on the Commissioner's own initiative[223]
- the grounds for making a declaration are prescribed, and include repeated requests for information or amendment of records or applications for internal or external review of FOI decisions; by the same applicant or applicants acting in concert; and which are manifestly unreasonable or an abuse of process (such as harassment or intimidation of FOI practitioners, unreasonable interference with an agency's operations, or improper use of FOI legislation to circumvent restrictions on access to information imposed by a court)[224]
- affected persons are provided with an opportunity to make written or oral submissions before a declaration is made in relation to them[225]
- the effect of the declaration is that agencies and ministers can refuse to process requests for information or amendment of records or internal review applications received from declared vexatious applicants unless they are made with the written consent of the Information Commissioner. Additionally, the regulator can refuse to consider FOI review applications received from declared vexatious applicants.[226]
- the Information Commissioner can vary or revoke the declaration on the application of the affected person or on the Commissioner's own initiative[227]

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220 OVIC, *Submission 55*, 15 January 2024, pp. 116–117; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 16–17.

221 See, for example, VO, *Review of the Freedom of Information Act*, Melbourne, June 2006, p. 62; OVIC, *Impediments to timely FOI and information release: own-motion investigation under section 61O of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, September 2021 pp. 64–65.

222 OVIC, *Submission 55*, 15 January 2024, p. 117.

223 *FOI Act 1982* (Cth) s 89K; *RTI Act 2009* (Qld) s 114(1).

224 *FOI Act 1982* (Cth) s 89L; *RTI Act 2009* (Qld) s 114(2), (8).

225 *FOI Act 1982* (Cth) s 89L(3); *RTI Act 2009* (Qld) s 114(3).

226 *FOI Act 1982* (Cth) s 89M; *RTI Act 2009* (Qld) s 114(4)–(5).

227 *FOI Act 1982* (Cth) s 89K(1); *Acts Interpretation Act 1901* (Cth) s 33(3); *RTI Act 2009* (Qld) s 115.

- the Information Commissioner can publish the name of a declared vexatious FOI applicant and the reasons for the decision[228]
- the tribunal has power to review a vexatious applicant declaration made by the Information Commissioner.[229]

Whereas, the features of the New South Wales approach are:

- the tribunal can make a 'restraint order' on the application of an affected agency, the responsible minister, or the Information Commissioner[230]
- the grounds for making a restraint order are prescribed and include repeated FOI requests made within a two-year period by the same applicant or applicants acting in concert, and which lack merit (for example, where an agency decided the request by refusing to process it or by determining that it did not hold the information requested)[231]
- the matters to be considered by the tribunal in making a restraint order are prescribed and include such matters as whether the requests lacked merit or were frivolous, vexatious, misconceived or lacking in substance; and whether the applicant has engaged in conduct designed to achieve a wrongful purpose or harass, or cause delay or detriment to an agency[232]
- the tribunal has flexibility to make a declaration for a certain period of time; and to restrict the terms of declaration to a specific agency or agencies, a certain number of requests, or to particular kinds of information[233]
- the effect of a restraint order is that the subject of the order is not permitted to make an FOI request without leave of the tribunal.[234]

OVIC, and others, favoured the second, New South Wales, approach, that is, that VCAT be empowered to declare a person a vexatious applicant on the application of an agency.[235] It was suggested that VCAT was the 'most appropriate body' to consider such applications because of its ability to conduct hearings and 'take evidence under oath or affirmation'.[236] OVIC contended that the first, Commonwealth and Queensland, approach restricts an affected person's ability to be 'fully heard' because the matter is decided 'on the papers'.[237]

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228 *RTI Act 2009* (Qld) s 114(6).

229 *FOI Act 1982* (Cth) s 89N; *RTI Act 2009* (Qld) s 121.

230 *GIPA Act 2009* (NSW) s 110(1), (5). Submissions received to the Inquiry were supportive of a public register of declared vexatious FOI applicants. See, for example, Victorian Bar, *Submission 57*, 15 January 2024, pp. 6–7.

231 *GIPA Act 2009* (NSW) s 110(1)–(2).

232 *GIPA Act 2009* (NSW) s 110(5A).

233 *GIPA Act 2009* (NSW) s 110(3).

234 *GIPA Act 2009* (NSW) s 110(1).

235 See, for example, OVIC, *Submission 55*, 15 January 2024, p. 117; Victorian Bar, *Submission 57*, 15 January 2024, pp. 6–7; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 17.

236 OVIC, *Submission 55*, 15 January 2024, p. 117.

237 Ibid.

VCAT disagreed, noting that it would be unlikely to make a declaration in a 'sufficiently timely' manner to efficiently address the ongoing impact to agencies and OVIC of vexatious FOI applicant conduct.[238] As VCAT explained, this is because:

- the Tribunal, being 'bound by the rules of natural justice',[239] would be required to hold a hearing before making a declaration, which would increase its workload and contribute to delays
- given the limited pool of Tribunal members able to hear FOI matters, and the nature of vexatious FOI applicants, it is highly likely that a declaration application would be allocated to, and decided by, a member who had previously made unfavourable decisions on FOI review applications made by the person the subject of the declaration application. This would increase the likelihood that the person would request that the presiding member be recused or that the Tribunal to be reconstituted,[240] and any such requests would contribute to delays
- the requirement for declared vexatious FOI applicants to seek leave of the Tribunal to make further FOI requests would increase VCAT's workload and contribute to delays in FOI cases more broadly.[241]

The Committee notes that VCAT favoured the first approach, and was supportive of the Tribunal having power to conduct a merits review of a vexatious applicant declaration made by the Information Commissioner.[242] The Committee agrees.

The Committee is not persuaded by OVIC's arguments in support of Victoria's adoption of the second approach.

The Committee received extensive evidence of VCAT's high FOI workload,[243] the current difficulties it is facing with respect to deciding FOI review applications in a timely manner,[244] and the impact of the significant delays experienced by applicants.[245]

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238 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 9, 10 (quotation).

239 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 10; *Victorian Civil and Administrative Tribunal Act 1988* (Vic) ('*VCAT Act 1988* (Vic)') s 98(1)(a) (quotation).

240 *VCAT Act 1988* (Vic) s 108.

241 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 10.

242 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 10–11. See also VO, *Submission 60*, 22 January 2024, p. 5.

243 As at March 2024, VCAT had a backlog of 220 'pending FOI cases' (VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 2).

244 Since 2023, due to a range of factors, VCAT has been routinely adjourning FOI review applications to 'a date to be fixed'. The only FOI cases progressed and decided during this time have been the small proportion of cases determined to be 'high priority', such as those involving Federal or State Members of Parliaments, information impacting other court or tribunal proceedings, or information of 'significant public interest'. While 22 additional members were appointed to VCAT in December 2023–2024, and VCAT intends to be in a position to start 'progressing FOI cases from around October 2024', it will have a significant backlog of FOI cases to clear, in addition to dealing with new incoming FOI review applications, which will continue to impact its timeliness in finalising FOI cases into the immediate foreseeable future—VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, pp. 2–3.

245 See, for example, Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 21–22, 36–38; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, p. 2; Victorian Bar, *Submission 57*, 15 January 2024, p. 10; Royce Millar, Senior Reporter, *The Age*, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 8–9; Sam White, Editorial Counsel, Nine Publishing, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 12–13; Nine, Response to Integrity and Oversight Committee questions on notice, 29 April 2024, pp. 8–9; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 31–32.

The Committee also received evidence that most respondent agencies are legally represented in VCAT FOI cases.[246]

The Committee considers that requiring VCAT to decide applications for a vexatious applicant declaration, in the first instance, would be unnecessarily complex, time-consuming and expensive. Further, affected agencies or Ministers would likely have to wait much longer for the application to be decided, than if it were decided by the Information Commissioner, with no means of addressing ongoing vexatious FOI applicant conduct in the interim. These factors could deter use of the vexatious FOI applicant provision.

With respect to OVIC's concern about an affected person's ability to be heard, the Committee considers that the Commonwealth and Queensland approach provides sufficient protections and flexibility. The Committee additionally notes that the Information Commissioner has the power to take evidence under oath or affirmation in connection with its investigation function.[247] The Committee considers that if the Information Commissioner were empowered to decide declaration applications in the first instance, the Victorian Government could consider granting the Commissioner an equivalent power to take evidence under oath or affirmation in connection with that function.

The Committee considers that it will be important for OVIC to be properly funded to perform this new function in a timely and efficient manner, for the benefit of agencies and ministers and non-vexatious FOI applicants more broadly.

Finally, the Victorian Ombudsman (VO) suggested that the language used in the provision should move away from the traditional term 'vexatious' and focus instead on 'the behaviour' rather than 'the applicant'.[248] The Committee agrees.

Power to enter premises

The Committee also received evidence of the need for the Information Commissioner to have a power to enter the premises of an agency for the purposes of inspecting a document subject to a review application. It was suggested that this is international best practice.[249] The Committee notes that the *FOI Act 1982* (Vic) makes provision for the Information Commissioner to receive documents subject to a review, including the ability to inspect them on site.[250] However, the Committee considers that the Victorian Government could give consideration to providing the Information Commissioner with

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246 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 7.

247 *FOI Act 1982* (Vic) s 61ZE.

248 VO, *Submission 60*, 22 January 2024, p. 4.

249 Name withheld, *Submission 48*, 15 January 2024, p. 53; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 41.

250 *FOI Act 1982* (Vic) pt VII div 2 (especially ss 63D, 61ZB).

a power to enter premises and inspect documents in connection with an investigation under FOI legislation, similar to the Commonwealth and New South Wales.[251]

Other matters

OVIC suggested that it be given the necessary powers and functions to regulate agency and ministerial compliance with legislation establishing Victoria's new third-generation push FOI system. Including that such legislation—

- empower the Information Commissioner to issue guidelines and professional standards on FOI legislation, including on how provisions should be interpreted[252]
- require agencies and ministers to have regard to guidelines issued by the Information Commissioner when performing functions or exercising powers under FOI legislation[253]
- empower the Information Commissioner to impose sanctions[254] for serious or serial agency and Ministerial non-compliance[255] and make binding[256] 'structural recommendations'[257]

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251 See *FOI Act 1982* (Cth) ss 77–78; *Government Information (Information Commissioner) Act 2009* (NSW) s 26.

252 OVIC suggested that this will facilitate consistent FOI decision-making across agencies (OVIC, *Submission 55*, 15 January 2024, p. 163). Such provisions appear in FOI legislation in some push jurisdictions. The Queensland Information Commissioner, for example, has power to issue guidelines on a range of prescribed matters, including the 'interpretation and administration' of the Act; the way that the public interest test should be applied; external review processes; processes for 'vexatious applicant' declarations; 'procedural, technical and sector specific issues' under the Act; matters that should be addressed in the reasons for a decision; and 'best practice' guides for information publication schemes and disclosure logs (*RTI Act 2009* (Qld) s 132).

253 See, for example, *FOI Act 1982* (Cth) ss 9A, 93A. The Australian Information Commissioner can issue guidelines on the information publication scheme, the public interest test factors, and decision-making on FOI requests). See also OVIC, *Submission 55*, 15 January 2024, p. 163.

254 A variety of sanctions were suggested in submissions received to the Inquiry, including, for example, a 'penalty regime' (Victorian Bar, *Submission 57*, 15 January 2024, p. 10).

255 Noting that, presently, OVIC can only monitor, rather than enforce, agency and ministerial compliance with the FOI Professional Standards (*FOI Act 1982* (Vic) s 6I(2)(c)). OVIC indicated that this results in 'substantial or systemic breaches' being addressed through, for example, public reporting on non-compliance in OVIC's annual and other reports. While fear of public embarrassment can encourage compliance, the Committee is not persuaded that a monitoring power is sufficient, in and of itself, to bring about the kind of cultural change needed to support Victoria's transition to a third-generation push FOI system (OVIC, *Submission 55*, 15 January 2024, p. 164 (quotation); Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 12–17, 21–22).

256 Noting that, currently, the Information Commissioner only has power to make 'advisory' recommendations in connection with the investigation of an FOI complaint and is not empowered to take any action in respect of an agency's refusal to accept, or take action to implement, any such recommendations, other than to publicly report on such matters. It is also international best practice for the regulator to be empowered to make binding decisions, which extends to the power to make binding recommendations (Name Withheld, *Submission 48*, 15 January 2024, p. 58 (quotation); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 42; *FOI Act 1982* (Vic) ss 61L(1), 64(2)(i), (4)).

257 For example, to provide additional staff training or improve its information-management systems and practices (OVIC, *Submission 55*, 15 January 2024, p. 164). There was also broad support in evidence received to the Inquiry for more effective regulatory powers to deal with serial agency and ministerial non-compliance with the *FOI Act 1982* (Vic) and FOI Guidelines and Professional Standards, including empowering the Information Commissioner to make binding recommendations, as well as a stricter sanctions regime—see, for example, Disability Discrimination Legal Service, *Submission 7*, 13 November 2023, pp. 1–2; The Centre for Public Integrity, *Submission 37*, 11 January 2024, p. 4; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 12–17, 21–22; Name withheld, *Submission 48*, 15 January 2024, p. 58; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, pp. 2–3; VALS, *Submission 54*, 15 January 2024, pp. 7–9; Victorian Bar, *Submission 57*, 15 January 2024, pp. 10–11; Name withheld, *Submission 64*, 24 January 2024, pp. 2–3; SEMLS, *Submission 67*, 29 January 2024, pp. 10–11; Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 13; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, p. 5; Dr Catherine Williams, Research Director, The Centre for Public Integrity, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 2–3.

- empower the Information Commissioner and Public Access Deputy Commissioner to give an enforceable direction to an agency or minister to release information to an applicant under the formal release mechanism in a particular format or by a particular method[258]
- empower the Information Commissioner and Public Access Deputy Commissioner to give an enforceable direction to an agency or minister to decide an FOI request within a certain time frame[259]
- extend the legal protections in s 62 of the *FOI Act 1982* (Vic)[260] to the Information Commissioner and Public Access Deputy Commissioner with respect to FOI review decisions made under s 49P of the Act[261] (and persons with delegated authority to make such decisions)
- protect the Information Commissioner, Public Access Deputy Commissioner and OVIC staff from civil and criminal liability with respect to the good-faith performance of their functions or the exercise of their powers under FOI legislation.[262]

The Committee agrees, noting that more effective mechanisms must be introduced to ensure that agencies prioritise their compliance with their statutory obligations under FOI legislation.[263]

With respect to statutory sanctions, OVIC suggested that it is international best practice for FOI legislation to contain offence provisions for wilfully destroying or obstructing access to information.[264] Presently, the *FOI Act 1982* (Vic) does not contain equivalent provisions, though OVIC's FOI Professional Standards prohibit persons

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258 This was supported by other submissions received to the Inquiry. The ALA, for example, suggested that FOI applicants be empowered to make requests 'for digital material only' (ALA, *Submission 28*, 21 December 2023, p. 6).

259 Noting that the IOC previously recommended that OVIC be granted the power to require an agency or minister to make a decision regarding an FOI request by a certain date—see Parliament of Victoria, IOC, *Performance of the Victorian integrity agencies 2021/22*, Melbourne, November 2023, pp. 72–75. This recommendation is 'under review' by the Victorian Government and will be considered further in the context of the Committee's broader recommendations in this Inquiry. See DJCS, *Victorian Government response to the recommendations made to it by the Integrity and Oversight Committee in its report,* Performance of the Victorian integrity agencies 2021–22, Melbourne, 29 May 2024, p. 1. There was broad support in evidence received to the Inquiry for the Information Commissioner being empowered to require agencies (and ministers) to decide an FOI request within a certain time frame, and, additionally, for an effective penalty regime for dealing with agency and ministerial non-compliance with statutory time frames. See, for example, LIV, *Submission 22*, 4 December 2024, pp. 6–8; Liberty Victoria, *Submission 25*, 8 December 2023, p. 10; ARTK, *Submission 27*, 14 December 2023, pp. 2–3; ALA, *Submission 28*, 21 December 2023, p. 6; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 3–4; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, p. 3; VALS, *Submission 54*, 15 January 2024, pp. 7–9, 18; Victorian Bar, *Submission 57*, 15 January 2024, p. 10; Name withheld, *Submission 64*, 24 January 2024, pp. 1–3; SEMLS, *Submission 67*, 29 January 2024, pp. 10–11.

260 Section 62 of the *FOI Act 1982* (Vic) protects agencies and ministers from liability for defamation or breach of confidence with respect to their release of information under the Act.

261 Noting that an FOI review decision of the Information Commissioner under s 49P of the *FOI Act 1982* (Vic) 'has the same effect as a decision of the agency or Minister' (see s 49P(2)).

262 OVIC, *Submission 55*, 15 January 2024, pp. 164–165.

263 Associate Professor Johan Lidberg et al., Monash University, *Submission 20*, 1 December 2024, p. 9.

264 OVIC, *Submission 55*, 15 January 2024, p. 148; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 6–7 ('Principle 3: Promotion of open government'); Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 50 ('Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.').

from directing an FOI decision-maker to decide an FOI request in particular way.[265] OVIC and others suggested that these offences be codified in FOI legislation.[266]

OVIC suggested that the New South Wales approach—which has offence provisions for destroying, concealing or altering government-held information to prevent disclosure under the FOI scheme,[267] improperly influencing or directing an FOI decision-maker to decide an FOI request contrary to the requirements of FOI legislation,[268] and deciding an FOI request contrary to the requirements of FOI legislation[269]—should be followed.[270] The Committee agrees.

The Committee also received evidence that additional offence provisions should be introduced for gaining access or attempting to gain access to the personal information of another person by misleading or deceptive conduct.[271] This supports other evidence received to the Inquiry of the need to deter family violence perpetrators from using the FOI scheme to further harm or intimidate their victims.[272] The Committee agrees, noting that FOI legislation in the New South Wales and Queensland second-generation push jurisdictions contains equivalent provisions,[273] and that the current provision in the *FOI Act 1982* (Vic) does not specifically address this issue.[274]

OVIC also suggested that legislation establishing Victoria's third-generation push FOI system should ensure that the Public Access Deputy Commissioner has the ability to perform the same functions and exercise the same powers as the Information Commissioner with respect to access to information, such as the power to conduct FOI investigations.[275] This is similar to the New South Wales approach.[276]

Presently, the Public Access Deputy Commissioner can exercise any function conferred on the Information Commissioner except those under the *PDP Act 2014* (Vic) and

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265 OVIC, *Professional Standards: issued by the Information Commissioner under Part IB of the* Freedom of Information Act 1982 *(Vic)*, Melbourne, December 2019, p. 14 (Standard 8.1); OVIC, *Submission 55*, 15 January 2024, p. 148. See also *FOI Act 1982* (Vic) s 26.

266 OVIC, *Submission 55*, 15 January 2024, p. 148; Name withheld, *Submission 48*, 15 January 2024, pp. 58–61; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 44–46; Dr Catherine Williams, Research Director, The Centre for Public Integrity, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 2–3; Royce Millar, Senior Reporter, *The Age*, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 8; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 30–31.

267 *GIPA Act 2009* (NSW) s 120.

268 *GIPA Act 2009* (NSW) s 117–118.

269 *GIPA Act 2009* (NSW) s 116.

270 OVIC, *Submission 55*, 15 January 2024, p. 148.

271 Including use of forged documents, such as a forged authority to act on a person's behalf (Name withheld, *Submission 48*, 15 January 2024, pp. 60–61). See also Victorian Bar, *Submission 57*, 15 January 2024, pp. 10–11.

272 See, for example, VLA, *Submission 18*, 1 December 2023, pp. 3–5; Victorian Bar, *Submission 57*, 15 January 2024, p. 8; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, pp. 18–19.

273 See *GIPA Act 2009* (Vic) s 119; *RTI Act 2009* (Qld) s 176.

274 Section 33(2AB)(c) of the *FOI Act 1982* (Vic) provides a basis for an agency (or minister) to refuse access to a document relating to the personal affairs of any person if the applicant is a person of concern or poses a risk of committing family violence and the FOI decision-maker considers that disclosure would 'increase the risk to a primary person's safety from family violence'. However, the exemption—which is focused on the risk to safety of the person to whom the information sought relates, rather than the motivation of an applicant in making the request—is not well placed to deal with the nefarious motivations of an applicant who makes a request for the purpose of intimidating or harassing another person.

275 OVIC, *Submission 55*, 15 January 2024, p. 164; *FOI Act 1982* (Vic) ss 6H(1)(b), 6I(1)(e), 6R(2).

276 See *Government Information (Information Commissioner) Act 2009* (Vic) s 13.

ss 6I(1),[277] 6R,[278] 6S[279] and 63G[280] of the *FOI Act 1982* (Vic).[281] The only powers and functions that the Information Commissioner cannot delegate to the Public Access Deputy Commissioner, apart from the power of delegation itself, are the powers to employ staff and engage contractors, to make a fresh decision when deciding an FOI review application, to make recommendations in connection with an FOI complaint, and to report to Parliament on OVIC's performance and other matters.[282]

The Committee considers that the Public Access Deputy Commissioner should be able to exercise the Information Commissioner's power to decide FOI review applications without the need for an instrument of delegation.[283]

The Committee further considers that the current restrictions on the Information Commissioner's ability to delegate their powers and functions under ss 6Q,[284] 61L[285] and pt VII[286] of the *FOI Act 1982* (Vic) are reasonable and appropriate.[287] As the Head of the organisation, these matters are properly within the Information Commissioner's domain. The retention of these restrictions is also important given that OVIC has suggested it be empowered to impose sanctions for serious or serial agency and ministerial non-compliance, and to make binding recommendations. Further, in the absence of evidence from OVIC regarding how such amendments would increase its efficiency, the Committee is not inclined to support them.

With respect to the other powers and functions that the Information Commissioner can delegate to the Public Access Deputy Commissioner, including the power to develop and review professional standards and conduct FOI investigations, the Committee's view is that the delegation requirements should be retained.[288] As the person with ultimate responsibility for the internal management of OVIC's funding, these requirements are reasonable and appropriate, and similar to the requirements in other push jurisdictions.[289]

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277 Under the *FOI Act 1982* (Vic), the Information Commissioner's powers to: employ staff and engage contractors (ss 6I(1)(a), 6Q); develop and review FOI professional standards (s 6I(1)(b), pt IB); report to Parliament on OVIC's performance and other matters (s 6I(1)(c), pt VII dv 3); advise the minister on the operation or administration of the Act (s 6I(1)(d); conduct investigations (s 6I(1)(e), pt VIB); and investigate certain public interest complaints (s 6I(1)(f)).

278 The Information Commissioner's power to delegate their functions and powers under the *FOI Act 1982* (Vic) to the Public Access Deputy Commissioner, with exceptions.

279 The Information Commissioner's power to issue directions to the Public Access Deputy Commissioner and OVIC staff relating to the performance of functions under the *FOI Act 1982* (Vic).

280 The Information Commissioner's power to commence proceedings for an offence against the *FOI Act 1982* (Vic).

281 *FOI Act 1982* (Vic) s 6H(1).

282 *FOI Act 1982* (Vic) s 6R(1) (see also ss 6Q, 6R(2), 49P, pt VIA (especially s 61L), pt VII div 3).

283 This will require the repeal of ss 6R(1)(b), (4)(a), 6S(a) of the *FOI Act 1982* (Vic).

284 The Information Commissioner's power to employ staff and engage contractors.

285 The Information Commissioner's power to make recommendations to an agency the subject of an FOI complaint in connection with the complaint.

286 The Information Commissioner's functions to report to Parliament on OVIC's performance and other matters under pt VII div 3.

287 *FOI Act 1982* (Vic) s 6R(1)(a), (c)–(d).

288 See *FOI Act 1982* (Vic) s 6R (see also 6I(1)(b)).

289 See, for example, *Australian Information Commissioner Act 2010* (Cth) ss 11(4), 25(1).

VCAT reviews

Standing to apply

If an agency (or the Information Commissioner) makes a decision to release a document under ss 33, 34 or 35 of the *FOI Act 1982* (Vic),[290] an affected third party that did not consent to the release can apply to VCAT for a review of the decision.[291]

Who has standing to apply for a VCAT review can be complicated by machinery of government[292] (MoG) changes. A situation can arise where a 'primary agency' has possession and control of information of a 'legacy agency' because it is connected with the new functions of the primary agency. Where such information is captured by the scope of an FOI request to the primary agency, it would ordinarily be required to consult with the legacy agency on release, but may have different views on release. The primary agency, for example, may not wish to appeal a review decision of the Information Commissioner to release the information, whereas the legacy agency does.[293]

The Department of Health and others suggested that FOI legislation needs to clarify that a legacy agency has standing to apply to VCAT for a review decision of the Information Commissioner to release information held by a primary agency, as an affected third party, if the documents at issue were created by the legacy agency or relate to their previous functions prior to MoG changes.[294] The Committee agrees.

Parties to proceedings

The Information Commissioner is empowered to decide an FOI review application by making a 'fresh decision' on the original FOI request. This decision has the same effect as the original decision of the agency (or minister).[295] A review decision made under s 49P of the *FOI Act 1982* (Vic) can include, for example, a decision affirming the agency's original refusal or deferral of access decision. It can also include a decision that differs from the agency's original decision on the FOI request, such as a partial or full access decision where the agency refused access to the information sought. The parties to an FOI review application to OVIC (that is, the FOI applicant and the respondent agency) can apply to VCAT for review of the Information Commissioner's review decision.[296]

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290 These provisions contain the personal privacy, trade secrets and material obtained in confidence exemptions to disclosure.

291 *FOI Act 1982* (Vic) ss 33–35, 50(3)–(3AC); OVIC, *Freedom of Information Guidelines: Part VI—review of decisions*, Melbourne, January 2024, p. 90 [1.34].

292 Machinery of government changes 'refer to the reallocation of functions and responsibilities between departments and ministers' (Department of Treasury and Finance Victoria, *Victorian public sector operating manual on machinery of government changes*, Melbourne, February 2020, p. 2).

293 Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 3 (quotation); Name withheld, *Submission 48*, 15 January 2024, pp. 55–56.

294 Name withheld, *Submission 48*, 15 January 2024, pp. 55–56; Department of Health (Victoria), *Submission 68*, 27 February 2024, p. 3.

295 *FOI Act 1982* (Vic) s 49P(1) (quotation), (2).

296 *FOI Act 1982* (Vic) s 50(1), (3D).

VCAT suggested that the following amendments are needed to ensure greater clarity:

- in respect of a VCAT review application made by the original FOI applicant under s 50(1)(b)[297] or (c)[298] of the *FOI Act 1984* (Vic), stating that the respondent to the proceeding is the relevant agency
- in respect of a VCAT review application made by an agency (or minister) under s 50(3D)[299] of the *FOI Act 1982* (Vic), stating that the respondent to the proceeding is the original FOI applicant.[300]

The Committee agrees.

'Adequacy of search' jurisdiction

OVIC has the power to deal with complaints about a decision of an agency (or minister) that a document sought in an FOI request does not exist or cannot be located, colloquially known as 'adequacy of search complaints'.[301] The Information Commissioner also has power to direct an agency to conduct a further search for documents when dealing with an FOI complaint or review.[302]

FOI applicants cannot apply directly to VCAT for review of an agency decision that 'documents do not exist or cannot be located'. However, where an FOI applicant applies to VCAT for review of a deemed refusal decision—and the respondent agency subsequently issues a 'documents do not exist or cannot be located' decision before the review is heard or decided by the Tribunal—a question arises as to whether the Tribunal can review the adequacy of the agency's search in that context. The Committee notes that the issue has been well-litigated and that VCAT's position is that, in this limited circumstance, the Tribunal can consider 'whether or not there are documents relevant to a request' and, if it considers appropriate, order an agency to conduct a further search.[303]

The Committee received evidence of the need for FOI legislation to clarify this[304]—that is, that VCAT cannot consider the adequacy of an agency's search except in respect of the Tribunal's review of a deemed refusal decision where a 'documents do not exist

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297 This provision permits the applicant—with respect to the FOI request to the agency and the FOI review application to OVIC—to apply to VCAT for review of a decision of the Information Commissioner to refuse access to information sought in the original FOI request.

298 This provision permits the applicant—with respect to the FOI request to the agency and the FOI review application to OVIC—to apply to VCAT for review of a decision of the Information Commissioner to defer access to information sought in the original FOI request.

299 This provision permits the respondent agency or minister to an FOI review decision of the Information Commissioner to apply to VCAT for a review of that decision.

300 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 5.

301 *FOI Act 1982* (Vic) s 61A(1)(a), (ba).

302 *FOI Act 1982* (Vic) ss 49KA, 61GA.

303 OVIC, *Freedom of Information Guidelines: Part VI—review of decisions*, Melbourne, January 2024, p. 116 [1.14]–[1.17] (quotation); VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6 (citing *Chopra v Department of Education and Training* [2019] VSCA 298; *McKechnie v Victorian Civil and Administrative Tribunal & Anor* [2020] VSC 454; *Davis v Department of Health* [2021] VCAT 1490; *Chopra v Victorian Institute of Teaching* [2023] VCAT 903).

304 Victorian Bar, *Submission 57*, 15 January 2024, p. 11; VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6.

or cannot be located' decision is made by an agency before the review is heard or decided.[305] The Committee agrees.

Deemed refusal decisions

Where an FOI applicant applies to VCAT for review of a deemed refusal of their request, the respondent agency (or minister) often issues a decision on the request before the application is heard and decided by the Tribunal. In these circumstances, the Tribunal can, at the request of the applicant, extend its review to encompass the actual decision.[306]

A question then arises as to whether VCAT should review the deemed or the actual decision, or both. As VCAT and OVIC noted, while the Tribunal reviews both decisions, in practice, it 'necessarily focuses on the "actual" decision because the deemed decision is academic',[307] and the actual decision 'outlines the exemptions that the agency or Minister claims'.[308] The Committee notes that the matter has been well-litigated.[309]

VCAT suggested that FOI legislation clarify that, in the above circumstances, the actual decision is automatically joined to the Tribunal's review, without the need for the applicant's consent, and that the Tribunal is to review the actual decision for the purpose of deciding the review.[310] This view was supported by other evidence received to the Inquiry.[311] The Committee agrees.

OVIC's funding and other matters

OVIC is one of the key integrity bodies in Victoria, along with the Independent Broad-based Anti-corruption Commission (IBAC), VO, Victorian Auditor-General's Office (VAGO) and Victorian Inspectorate (VI).

While the IBAC Commissioner, Ombudsman, Auditor-General and Victorian Inspector are independent officers of Parliament, the Information Commissioner is not.[312] However, the Information Commissioner and Public Access Deputy Commissioner are

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305 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6.

306 *FOI Act 1982* (Vic) s 53(5).

307 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6.

308 OVIC, *Freedom of Information Guidelines: Part VI—review of decisions*, Melbourne, January 2024, p. 116 [1.15].

309 OVIC, *Freedom of Information Guidelines: Part VI—review of decisions*, Melbourne, January 2024, p. 116 [1.15]–[1.17] (citing *Re Corrs Pavey Whiting and Byrne and Department of Health* (1987) 14 ALD 239, 240; *Cashman & Partners v Department of Human Services & Health* (1995) 61 FCR 301, 30; *Davis v Department of Premier and Cabinet* (Review and Regulation) [2022] VCAT 254).

310 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 6.

311 Victorian Bar, *Submission 57*, 15 January 2024, pp. 11–12.

312 See Victorian Public Sector Commission (VPSC), *Parliament—independent officers of parliament*, January 2023, <https://vpsc.vic.gov.au/about-public-sector/victorias-system-of-government/parliament/#heading5> accessed 23 June 2024. See also *FOI Act 1982* (Vic) s 6C; *Constitution Act 1975* (Vic) ss 94B, 94E; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('*IBAC Act 2011* (Vic)') s 19; *Victorian Inspectorate Act 2011* (Vic) ('*VI Act 2011* (Vic)') s 17.

'not subject to the direction or control of the Minister when performing duties and functions, and exercising powers under the Act'.[313] The Information Commissioner is also 'not subject to direction' with respect to the exercise of the Commissioner's employment powers under the Act.[314]

The Information Commissioner's and Public Access Deputy Commissioner's remuneration is set by the Governor in Council on the Attorney-General's recommendation, with input by the Department of Justice and Community Safety (DJCS), and is 'not subject to independent or periodic review'.[315]

OVIC is a statutory body within DJCS, in the portfolio of the Attorney-General, who is the responsible minister for the *FOI Act 1982* (Vic).[316] This means that OVIC's budget is allocated by DJCS rather than Parliament, meaning it is 'subject to cuts to or savings imposed by … [DJCS] to its budget'. OVIC is also required to report to DJCS on its performance.[317] In contrast, since 1 July 2020, IBAC, the VO and the VI have 'receive[d] funding appropriations directly from Parliament', which, once received, they directly control.[318]

OVIC and others expressed concern about the effect of these arrangements on its independence and the transparency of its operations,[319] and OVIC suggested that:

- it have similar funding and performance reporting arrangements to the other key integrity bodies; and
- the remuneration of the Information Commissioner, Public Access Deputy Commissioner, and Privacy and Data Protection Commissioner 'be reviewed and set by' the Victorian Independent Remuneration Tribunal (VIRT).[320]

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313 OVIC, *Freedom of Information Guidelines: Part IA—Office of the Victorian Information Commissioner*, Melbourne, May 2023, p. 9 [1.7] (quotation); Hon Jacinta Allen, Premier, *General Order dated 2 April 2024—Attorney-General*, <https://www.vic.gov.au/general-order-dated-2-april-2024> accessed 23 June 2024; OVIC, *Submission 55*, 15 January 2024, p. 165; *FOI Act 1982* (Vic) s 6B(3).

314 OVIC, *Freedom of Information Guidelines: Part IA—Office of the Victorian Information Commissioner*, Melbourne, May 2023, p. 16 [1.11] (quotation); OVIC, *Submission 55*, 15 January 2024, p. 165; *FOI Act 1982* (Vic) ss 6E, 6Q; *Public Administration Act 2004* (Vic) ss 15, 16, 20.

315 OVIC, *Submission 55*, 15 January 2024, p. 165 (quotation); *FOI Act 1982* (Vic) ss 6F, 6L.

316 OVIC, *Freedom of Information Guidelines: Part IA—Office of the Victorian Information Commissioner*, Melbourne, May 2023, p. 9 [1.8]; Hon Jacinta Allen MP, Premier, *General Order dated 2 April 2024—Attorney-General*, <https://www.vic.gov.au/general-order-dated-2-april-2024> accessed 23 June 2024; OVIC, *Submission 55*, 15 January 2024, p. 165.

317 OVIC, *Submission 55*, 15 January 2024, p. 165.

318 OVIC, *Submission 55*, 15 January 2024, p. 166. See also *IBAC Act 2011* (Vic) ss 167–170A; *Ombudsman Act 1973* (Vic) ss 24A–24E; *VI Act 2011* (Vic) ss 90A–90E.

319 See Name withheld, *Submission 48*, 15 January 2024, pp. 27–28.

320 OVIC, *Submission 55*, 15 January 2024, p. 166 (quotation); OVIC, *Submission 55A*, 31 July 2024, p. 5.

The Committee previously reported on the difficulties that can arise with respect to OVIC's current funding arrangements,[321] and notes that they do not meet international best practice.[322]

Given OVIC's status as one of the key integrity bodies, and in the interests of transparency and public perception of the agency's independence, the Committee considers that it would be beneficial for the Victorian Government to review whether the position of Information Commissioner should be made an independent officer of Parliament. Additionally, the Committee considers it would be valuable for the Government to review whether the agency should be given budgetary independence, similar to IBAC, the VO, and the VI.

In any such review, it will be important for the Government to consider the concerns expressed by IBAC, the VO and VAGO about their current funding arrangements, noting that they have jointly called for their funding to be decided by an independent tribunal rather than Parliament.[323] The Committee previously reported on the VO's concern about the uncertainty of the current funding mechanism, including its reliance on Treasurer's Advances to cover shortfalls in budgetary allocations.[324]

The Committee further considers that it would be beneficial for the Victorian Government to review whether the remuneration of the Information Commissioner and Public Access Deputy Commissioner should be set by VIRT rather than the Governor-in-Council. In this regard, the Committee notes that while the remuneration of the IBAC Commissioner, Ombudsman, Auditor-General and Victorian Inspector is similarly determined by the Governor-in-Council in Victoria,[325] the remuneration of the Australian Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner is set by a remuneration tribunal, as is the remuneration of the New South Wales Information Commissioner.[326]

Periodic review of FOI legislation

The Committee received evidence of the importance of FOI legislation being reviewed regularly to ensure that processes for administering the FOI scheme are fit-for-purpose

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321 Due to changes imposed by DJCS to OVIC's 2023/24 and 2024/25 base funding, OVIC was unable to conduct a review of the FOI Professional Standards in 2023 that it was statutorily required to conduct and was also required to commence a restructuring process under the Victorian Public Service Enterprise Agreement (Parliament of Victoria, IOC, *Performance of the Victorian integrity agencies 2021/22*, Melbourne, November 2023, pp. 90–91).

322 See Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 39 ('The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.'). See also Name withheld, *Submission 48*, 15 January 2024, pp. 27–28.

323 See Independent Broad-based Anti-corruption Commission (IBAC), the VO and Victorian Auditor-General's Office, *Budget independence for Victoria's Independent Officers of Parliament*, Melbourne, October 2022, especially pp. 12–20.

324 Parliament of Victoria, IOC, *Performance of the Victorian integrity agencies 2021/22*, Melbourne, November 2023, pp. 161–162.

325 *IBAC Act 2011* (Vic) ss 20, 24; *Ombudsman Act 1973* (Vic) s 5; *Constitution Act 1975* (Vic) s 94A; *VI Act 2011* (Vic) ss 18, 21.

326 See *Australian Information Commissioner Act 2010* (Cth) s 17; *Remuneration Tribunal Act 1973* (Cth) s 7(3); *Government Information (Information Commissioner) Act 2009* (NSW) s 6; *Statutory and Other Offices Remuneration Act 1975* (NSW) ss 11, 21, sch 1.

and are not resulting in unintended or undesirable outcomes.[327] The Committee agrees, noting the important insights and benefits that have flowed from periodic reviews of push systems,[328] and that, in contrast, FOI legislation in the Commonwealth, New South Wales and Queensland push jurisdictions only requires non-recurring reviews.[329]

OVIC suggested that legislation establishing Victoria's new third-generation push FOI system be reviewed 'every four years', while others suggested a five-year recurring review period.[330] The Committee considers that four years after the commencement of the new legislation, an operational review should be conducted of the implementation of the new FOI system, following which, there should be five-yearly recurring strategic reviews.[331]

4.3 Provision of information: time and costs

4.3.1 Time and costs involved in provision of information

The Committee received extensive evidence of the chronic and systemic delays experienced by FOI applicants at every level of Victoria's FOI system—with agencies (and ministers) deciding requests and with OVIC and VCAT deciding review applications.[332] The Committee additionally received evidence of the flow-on impacts of these delays[333]—increasing numbers of FOI 'delay' complaints[334] to OVIC and

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327 OVIC, *Submission 55*, 15 January 2024, pp. 9, 47; Name withheld, *Submission 48*, 15 January 2024, pp. 9–10.

328 See, for example, Parliament of Australia, Legal and Constitutional References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023 (especially pp. ix–xii); Peter Coaldrake, *Let the sunshine in: review of culture and accountability in the Queensland public sector*, Brisbane, June 2022 (especially pp. 91–94).

329 Name withheld, *Submission 48*, 15 January 2024, pp. 9–10. See also, *FOI Act 1982* (Cth) s 93B; *GIPA Act 2009* (NSW) s 130; *Right to Information Act 2009* (Qld) ('*RTI Act 2009* (Qld)') s 183.

330 OVIC, *Submission 55,* 15 January 2024, p. 47 (quotation); Name withheld, *Submission 48*, 15 January 2024, pp. 9–10.

331 The Committee notes that this is similar to the approach recommended in Queensland's Solomon Review. See FOI Independent Review Panel, *The right to information: reviewing Queensland's Freedom of Information Act*, Brisbane, June 2008, pp. 321, 326.

332 See, for example, VLA, *Submission 18*, 1 December 2024, pp. 1, 6–7; LIV, *Submission 22*, 4 December 2024, pp. 4, 6–8; Liberty Victoria, *Submission 25*, 8 December 2023, pp. 4–6, 8–10; ALA, *Submission 28*, 21 December 2023, pp. 5–11; ARTK, *Submission 27*, 14 December 2023, pp. 2–3; Nine, *Submission 29*, 22 December 2023, pp. 2–4; William Summers, *Submission 30*, 27 December 2023, p. 2–4; Find & Connect Web Resource, *Submission 36*, 10 January 2024, pp. 2, 5, 7; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 1, 3; Melbourne Press Club, *Submission 41*, 14 January 2024, p. 1; Jordan Brown et al., *Submission 49*, 15 January 2024, pp. 12–17, 21–22; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, pp. 2–3; Victorian Bar, *Submission 57*, 15 January 2024, pp. 9–11; The Australia Institute, *Submission 61*, 18 January 2024, pp. 6–12; Name withheld, *Submission 64*, 24 January 2024, pp. 1–2; SEMLS, *Submission 67*, 29 January 2024, pp. 5–9; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 13–14; Lachlan Fitch, President, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 46, 49, 52; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 47, 51; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16; Jordan Brown, freelance journalist, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 27; Nine, Response to Integrity and Oversight Committee questions on notice, 29 April 2024, pp. 8–9; Nine, Response to Integrity and Oversight Committee questions on notice, 13 May 2024, p. 2.

333 See, for example, OVIC, *Submission 55*, 15 January 2024, pp. 31–36; Victorian Bar, *Submission 57*, 15 January 2024, pp. 9–10; The Australia Institute, *Submission 61*, 18 January 2024, pp. 14–15. See also the discussion in Section 3.1 in Chapter 3 of this report.

334 Under s 61A(1) of the *FOI Act 1982* (Vic), an FOI applicant can complain to OVIC about an agency's delay in deciding the request—that is, the agency's failure to comply with statutory time frames applicable to the processing of the request. This is known as a 'delay' complaint.

increasing numbers of FOI review applications to VCAT in respect of 'deemed refusal' decisions[335] of agencies and OVIC.

4.3.2 Evaluation of time and costs involved

The main criticisms with respect to the time and cost of obtaining access to government-held information under the *FOI Act 1982* (Vic) are:

- the inability of agencies to manage the increasing workload associated with the extremely high volume of FOI requests received in Victoria
- the declining timeliness of agency decision-making with respect to FOI requests
- the high number of FOI complaints and reviews to OVIC and its timeliness in finalising complaints and deciding reviews
- the increasing volume of FOI review applications to VCAT and its timeliness in deciding reviews
- the significant and increasing costs of administering the FOI scheme.[336]

These matters are discussed further in Chapter 3.[337]

Legislative reform considerations—fees and charges

Application fee

Section 17 of the *FOI Act 1982* (Vic) requires applicants to pay a fee for making a formal FOI request, which can be waived or reduced on hardship grounds.[338] As OVIC noted, the application fee is $31.80, indexed annually.[339]

The application fee and access charges were introduced through 1993 amendments to the *FOI Act 1982* (Vic).[340] At the time, they were described as necessary to ensure

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335 Under ss 49J(1)–(2), 50(1)(b), (ea) and 53(1) of the *FOI Act 1982* (Vic), where an agency has failed to decide an FOI request for access to information or amendment of records within the statutory or agreed time frame, or where the Information Commissioner has failed to decide an FOI review application within the statutory or agreed time frame, the agency is deemed to have issued a refusal decision or, as the case may be, the Information Commissioner is deemed to have issued a review refusal decision, empowering the FOI applicant to apply to VCAT to review the deemed decisions. This is known as a 'deemed refusal'. See also OVIC, *Freedom of Information Guidelines: Part VI—review of decisions*, Melbourne, January 2024, p. 114 [1.7]–[1.9] (see also pp. 43–44, 82–90, 113–114)' after '[1.9]'.

336 OVIC, *Submission 55*, 15 January 2024, pp. 31–36.

337 See the discussion in Section 3.1 in Chapter 3 of this report.

338 *FOI Act 1982* (Vic) s 17(2A)–(2B).

339 OVIC, *Submission 55*, 15 January 2024, p. 150. See also *FOI Act 1982* (Vic) s 17(2A); *Monetary Units Act 2004* (Vic) ss 4, 5, 7.

340 OVIC, *Submission 55*, 15 January 2024, p. 151; Name withheld, *Submission 48*, 15 January 2024, p. 11; *Freedom of Information (Amendment) Act 1993* (Vic) s 6.

applicants were 'genuinely interested in obtaining and paying for' the information they requested.[341] The impetus for the fees and charges was the perceived need:

- for the processing of FOI requests to be 'conducted on as near a cost-recovery basis as was feasible having regard to the nature and character of the activity'
- for fees to 'reflect the workload required to process the request'
- to deter applicants from making 'large scale but not voluminous requests or embarking on fishing or research expeditions'
- to deter applicants from requesting more information than they need
- to deter the non-collection of documents requested under FOI by applicants.[342]

The true cost of administering the *FOI Act 1982* (Vic) is not offset by the cost-recovery fee structure in the Act. As OVIC highlighted, Victorian agencies spent over $21 million administering the FOI scheme in 2022/23, recouping just over $2 million through application fees and access charges. This is part of a long-term trend, indicating that access charges are not an effective mechanism for recouping the costs of administering FOI legislation in Victoria.[343]

OVIC's view is that there should not be any application fee for access to personal and health information under FOI legislation or under the *HR Act 2001* (Vic) and *PDP Act 2014* (Vic).[344] This view was shared by many others in their submissions to the Inquiry.[345] The Committee agrees.

OVIC endorsed the retention of a nominal application fee for non-personal FOI requests under the formal release mechanism, similar to the New South Wales approach.[346] In this respect, the Committee received evidence of the administrative burden to agencies created by the annual indexation of the application fee under the *FOI Act 1982* (Vic).[347]

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341 Hon Jan Wade MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 52nd Parliament, Autumn session 1993, Legislative Assembly, 7 May 1993, p. 1738. See also *Freedom of Information (Access Charges) Regulations 2014* (Vic) (especially reg 6).

342 Hon Jan Wade MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 52nd Parliament, Autumn session 1993, Legislative Assembly, 7 May 1993, p. 1738.

343 OVIC, *Submission 55*, 15 January 2024, pp. 36, 152, 154; OVIC, *The state of Freedom of information in Victoria: a special look at FOI in Victoria from 2019 to 2021*, Melbourne, April 2022, p. 19. See also, MAV, *Submission 51*, 15 January 2024, p. 3.

344 OVIC, *Submission 55*, 15 January 2024, pp. 18, 151.

345 See, for example, Health Complaints Commissioner (HCC), *Submission 26*, 12 December 2023, p. 1; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 2–3; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 3–4; Name withheld, *Submission 48*, 15 January 2024, pp. 10–11; SEMLS, *Submission 67*, 29 January 2024, pp. 8–10.

346 OVIC, *Submission 55*, 15 January 2024, p. 151; *GIPA Act 2009* (NSW) s 41(1)(c).

347 For example, the workload associated with 'yearly updates to all websites and paraphernalia with new pricing structures each 1 July' and the payment of incorrect fees at 'around 1 July each year' when the application fee changes (Name withheld, *Submission 48*, 15 January 2024, pp. 10, 11 (quotation)).

There was widespread support expressed for the abolition of the application fee altogether.[348] With respect to the potential benefits, it was suggested that abolishing the fee would:

- accord with best practice FOI legislation[349]
- support FOI as a 'human right'[350]
- ensure that the public are not 'unreasonably deterred' from making FOI requests[351]
- support timely access to government-held information under FOI by dispensing with resource-intensive fee payment and waiver processes[352] that can add to agencies' administrative burden with respect to the FOI scheme and cause delays.[353]

The Committee considers that the Commonwealth approach, where there is no application fee for making an FOI request under the formal release mechanism, should be followed.[354]

Access charges

Section 22 of the *FOI Act 1982* (Vic) and the *Freedom of Information (Access Charges) Regulations 2014* (Vic) permit agencies and ministers to impose access charges related to the processing of FOI requests and the provision of information in response to requests. This includes such things as time spent searching for documents within the scope of requests, supervising applicants' inspection of documents released in response to a request, and the creation of documents under s 19[355] of the Act.[356]

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348 See, for example, LIV, *Submission 22*, 4 December 2023, p. 8; William Summers, *Submission 30*, 27 December 2023, pp. 2–4; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 2–3; Melbourne Press Club, *Submission 41*, 14 January 2024, p. 1; Name withheld, *Submission 48*, 15 January 2024, pp. 10–11, 62; VALS, *Submission 54*, 15 January 2024, pp. 8, 11, 21–22; Jordan Brown, Response to Integrity and Oversight Committee questions on notice, 23 April 2024, pp. 6–7; Mahalia McDaniel, Research Officer, The Centre for Public Integrity, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 2; Nerita Waight, Chief Executive Officer (CEO), VALS, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 43–44.

349 OVIC, *Submission 55*, 15 January 2024, p. 150; Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 24 ('It is free to file requests.'); Name withheld, *Submission 48*, 15 January 2024, p. 10.

350 OVIC, *Submission 55*, 15 January 2024, p. 150.

351 OVIC, *Submission 55*, 15 January 2024, pp. 29, 151 (quotation). See also Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023, p. 100.

352 For example, the work involved in 'chasing fees, producing receipts, processing refunds, seeking evidence for fee waiver', as well as in 'calculating and notifying applicants of access charges', and the costs associated with maintaining 'online portals to allow for online secure transactions' (Name withheld, *Submission 48*, 15 January 2024, p. 10).

353 OVIC, *Submission 55*, 15 January 2024, p. 150; Name withheld, *Submission 48*, 15 January 2024, pp. 10–11. See also Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023, p. 100.

354 See *FOI Act 1982* (Cth) ss 15, 29; *Freedom of Information (Charges) Regulations 2019* (Cth) sch 1; Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, Canberra, December 2023, pp. 66–68.

355 If information requested by an applicant is not held in discrete form by an agency, s 19 of the *FOI Act 1982* (Vic) empowers the agency to produce a document containing the information in discrete form for the purpose of responding to the FOI request (for example, the creation of a transcript of a sound recording).

356 See *FOI Act 1982* (Vic) s 22 (especially (1)(a), (c), (d)); *Freedom of Information (Access Charges) Regulations 2014* (Vic) regs 6–7, sch. See also OVIC, *Submission 55*, 15 January 2024, p. 152.

It has long been suggested that access charges are an important means of 'controlling and managing demand' for information requested through the FOI scheme.[357] The Committee received evidence that high charges can potentially 'undermine the objects' of FOI legislation by deterring access.[358]

The Committee considers that empowering agencies to deal with repeat, voluminous and vexatious FOI requests is a more effective and transparent way of managing demand for information.[359]

There was support expressed for the abolition or reduction of access charges under the *FOI Act 1982* (Vic).[360]

As OVIC noted, best practice FOI legislation requires information to be provided at 'no or low cost'.[361] In practice, this means that access charges should be limited to the actual cost of reproducing and delivering information,[362] and that a set number of pages should be provided for free.[363] OVIC suggested that these two kinds of access charges should be retained because they may deter vexatious FOI requests and assist agencies in managing voluminous requests, but that all other access charges under the *FOI Act 1982* (Vic) be abolished.[364] This view was consistent with other evidence received to the Inquiry suggesting that access charges should be limited to strike the right balance.[365] The Committee agrees.

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357 See, for example, OAIC, *Review of charges under the* Freedom of Information Act 1982 *(Vic): report to the Attorney General*, Canberra, February 2012 quoted in Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, p. 1 (quotation); Hon Jan Wade MP (Attorney-General), Second Reading Speech, Parliamentary Debates (Hansard), 52nd Parliament, Autumn session 1993, Legislative Assembly, 7 May 1993, p. 1737; Parliament of Australia, The Senate Legal and Constitutional Affairs References Committee, *The operation of Commonwealth Freedom of Information (FOI) laws*, December 2023, pp. 66–68. See also LIV, *Submission 22*, 4 December 2023, p. 8; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, p.1.

358 See, for example, Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, p. 1 (quotation); Nine, *Submission 29*, 22 December 2023, p. 3; Dr Reuben Kirkham, *Submission 53*, 15 January 2024, p. 1; Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 7; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 16–17.

359 Dr Danielle Moon, Lecturer, Macquarie Law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, p. 1.

360 See, for example, The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 2–3; Melbourne Press Club, *Submission 41*, 14 January 2024, p.1; Name withheld, *Submission 48*, 15 January 2024, pp. 11–12; VALS, *Submission 54*, 15 January 2024, p. 8; Nerita Waight, CEO, VALS, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 43–44; Royce Millar, Senior Reporter, *The Age*, Nine, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 12.

361 OVIC, *Submission 55*, 15 January 2024, p. 152 (quotation); Name withheld, *Submission 48*, 15 January 2024, pp. 10–12. See also Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 10–11 ('Principle 6: Costs').

362 This would not include, for example, costs associated with searching for, inspecting and preparing for release, documents within the scope of an FOI application (OVIC, *Submission 55*, 15 January 2024, p. 152). See also Name withheld, *Submission 48*, 15 January 2024, pp. 11–12.

363 OVIC, *Submission 55*, 15 January 2024, p. 152; OVIC, *Submission 55*, 15 January 2024, p. 152. See also Centre for Law and Democracy, *Global Right to Information Rating*, n.d., <https://www.rti-rating.org/country-data/by-indicator> accessed 19 June 2024, Indicator 25 ('There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and that a certain initial number of pages (at least 20) are provided for free.'); Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 10–11 ('Principle 6: Costs').

364 OVIC, *Submission 55*, 15 January 2024, p. 152.

365 Dr Danielle Moon, Lecturer, Macquarie law School, Macquarie University, Response to Integrity and Oversight Committee questions on notice, 19 March 2024, p. 3.

OVIC's view is that there should be no access charges for requests for personal and health information under the formal release mechanism in FOI legislation or under the *HR Act 2001* (Vic) and *PDP Act 2014* (Vic).[366] This view was shared by many others in their submissions to the Inquiry.[367] The Committee agrees.

OVIC emphasised the need to retain an independent right of review of agency decisions regarding access charges.[368] Currently, the Information Commissioner only has power to review an agency refusal to waive or reduce an access charge. Applicants can apply directly to VCAT for a review of agency access charges, but only if OVIC has certified that the matter is of sufficient importance to consider. OVIC suggested that, to streamline the review process, applicants should be able to apply to the Information Commissioner for review of an agency decision with respect to access charges.[369] Others agreed.[370] The Committee also agrees, noting that such applications are rare.[371]

Fee reduction or waiver

Section 17(2B) of the *FOI Act 1982* (Vic) provides a discretionary power to reduce or waive the application fee if it would cause hardship to an FOI applicant, while s 22 limits the access charges that can be imposed for certain kinds of requests[372] and prescribes circumstances in which access charges must be waived.[373] OVIC criticised the lack of general discretionary power to reduce or waive the application fee and access charges, and the complex, technical and restrictive wording of s 22 of the Act.[374]

OVIC recommended that the current fee reduction and waiver provisions in ss 17(2B) and 22 of the *FOI Act 1982* (Vic) be replaced with a general discretionary power to reduce, waive or refund any application fee or access charge under Victoria's new third-generation push FOI system. The Committee agrees, noting that this will only apply to access charges since the Committee has recommended that the application fee be abolished.

It was suggested that this general discretionary power should be supported by FOI Guidelines, issued by OVIC, providing guidance on how agencies and ministers

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366 OVIC, *Submission 55*, 15 January 2024, pp. 18, 150–153.

367 See, for example, IBAC, *Submission 17*, 1 December 2024, pp. 2, 4–5; VLA, *Submission 18*, 1 December 2023, pp. 3, 6; The Centre for Public Integrity, *Submission 37*, 11 January 2024, pp. 2–3; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 3–4; Name withheld, *Submission 48*, 15 January 2024, pp. 10–12.

368 For example, a refusal to waive or reduce an access charge, a decision to impose a charge or the calculation of a charge—OVIC, *Submission 55*, 15 January 2024, p. 154.

369 OVIC, *Submission 55*, 15 January 2024, p. 154. See also *FOI Act 1982* (Vic) ss 49A(1)(c), 50(1)(g).

370 Name withheld, *Submission 65*, 28 January 2024, pp. 3, 6–8.

371 VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 8.

372 Section 22(1)(h) of the *FOI Act 1982* (Vic) restricts the kinds of access charges that agencies can impose on requests: for information of interest or benefit to the broader public; by members of the Victorian Legislative Council or Legislative Assembly; and for personal information. The only access charges that can be imposed on these kinds of requests are costs associated with reproducing documents, creating transcripts and creating documents under s 19 of the Act.

373 Under the *FOI Act 1982* (Vic) s 22(1)(g), (i), agencies must waive access charges for routine requests for access, and must also waive certain access charges for requests for personal information by applicants experiencing severe financial hardship (such as reproduction and delivery costs, and costs associated with arranging the viewing of documents by applicants or the creation of documents under s 19 of the Act). See also OVIC, *Submission 55*, 15 January 2024, p. 153.

374 OVIC, *Submission 55*, 15 January 2024, p. 153.

should exercise the discretionary power, including the circumstances in which access charges should be waived.[375] The Committee agrees, noting that there was support, in other evidence received to the Inquiry, for a statutory waiver mechanism providing clear guidance on decision-making with respect to the waiver provisions, and a straightforward, standardised threshold for qualifying for the waiver. The Committee agrees with the South-East Monash Legal Service that legal aid clients should qualify for the waiver in all circumstances.[376]

4.3.3 Access to personal and health information

The majority of FOI requests received by agencies under the *FOI Act 1982* (Vic) are for personal and health information, comprising 68.8% of all requests received by Victorian agencies in 2022/23.[377] This is consistent with the longer-term trends.[378]

Requests for health information comprise the majority of personal and health information-related requests. Of the 30 agencies that received approximately 84% (40,537) of all FOI requests made in Victoria in 2022/23, 20 (over 66%) were health sector agencies, and over 50% of those requests (20,668) were for the applicant's own health information.[379]

The health sector consistently has the highest rate of 'full access' decisions by agencies in Victoria. In 2022/23, health sector agencies granted full access to information requested by applicants in 84.4% of all FOI requests received, whereas full access decisions by emergency services agencies, government agencies and statutory authorities represented, respectively, only 40%, 36% and 26.3% of their total FOI decisions.[380]

While the percentage of full access decisions by agencies across the health sector has declined in recent years,[381] the high rate of such decisions strongly indicates that a significant portion of the FOI requests for health information currently received under the *FOI Act 1982* (Vic) could be processed through alternative statutory release schemes or under the informal release mechanism in Victoria's new third-generation push FOI system.[382]

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375 Ibid.

376 See, for example, VALS, *Submission 54*, 15 January 2024, pp. 8, 11, 22; SEMLS, *Submission 67*, 29 January 2024, pp. 6, 8–11; Latrobe City Council, *Submission 69*, 8 March 2024, p. 4; Nerita Waight, CEO, VALS, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 43–44.

377 OVIC, *Submission 55*, 15 January 2024, p. 83; OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 111.

378 On average, between 2014/15 and 2022/23, requests for personal and health information comprised 69% of all requests received by Victorian agencies—OVIC, *Submission 55*, 15 January 2024, pp. 83–84; OVIC, *Annual report 2022–23*, Melbourne, September 2023, pp. 111, 117.

379 OVIC, *Submission 55*, 15 January 2024, p. 83; OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 117.

380 OVIC, *Submission 55*, 15 January 2024, p. 84; OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 114.

381 Between 2018/19–2022/23, full access decisions as a proportion of total FOI decisions made by health sector agencies declined from 91.8% to 84.4% (OVIC, *Annual report 2022–23*, Melbourne, September 2023, p. 114).

382 OVIC, *Submission 55*, 15 January 2024, p. 84.

Current mechanisms for accessing personal and health information

In Victoria, personal and health information can be accessed via a variety of pathways, including:

- the informal[383] and formal release mechanisms in the *FOI Act 1982* (Vic)[384]
- the statutory release scheme for health information held by private health service organisations in the *Health Records Act 2001* (Vic) ('*HR Act 2001* (Vic)')[385] and the statutory release mechanism in the *Health Services Act 1988* (Vic)[386]
- the statutory release mechanism for personal information in the *PDP Act 2014* (Vic)[387]
- alternative statutory release schemes for particular kinds of personal information, for example, the statutory release scheme for WorkSafe claims information in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (*'WIRC Act 2013* (Vic)') ('WIRC scheme').[388]

Evaluation of current mechanisms

There was widespread support expressed in submissions and other evidence received by the Inquiry for informal release of personal and health information, particularly with respect to agencies receiving a high-volume of requests for such information.[389]

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383 Including administrative release schemes established by agencies under the informal release mechanism in the *FOI Act 1982* (Vic) for the release of particular kinds of information, such as Traffic Accident Reports by Victoria Police—see *FOI Act 1982* (Vic) s 16; OVIC, *Submission 55*, 15 January 2024, pp. 52, 87–88. See also the discussion in Sections 3.2.1 and 3.2.2 of Chapter 3 regarding the informal release mechanism in the *FOI Act 1982* (Vic).

384 *FOI Act 1982* (Vic) s 17 (see also s 13).

385 The *Health Records Act 2001* (Vic) ('*HR Act 2001* (Vic)') regulates the disclosure of health information under the Health Privacy Principles (HPP). Access to health information—as defined by the Act and held by organisations subject to the Act—can be requested by individuals under HPP 6, except information held by organisations subject to the *FOI Act 1982* (Vic) that can only be required to be released or corrected in accordance with that Act. Organisations subject to the *HR Act 2001* (Vic) are also permitted, under sch 1, HPP 2.2(b), to informally release health information to an individual with their consent (OVIC, *Practice note: release of health records held by Victorian public sector agencies*, Melbourne, November 2022, pp. 2–3; *HR Act 2001* (Vic) ss 3, 5, 16, 19, pt 5, pt 6, sch 1 (HPP 2, 6); OVIC, *Submission 55*, 15 January 2024, p. 85; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 1).

386 Under s 141(3)(a) of the *Health Services Act 1988* (Vic), agencies subject to the Act are permitted to release a person's 'health records' with their 'express or implied consent' or the consent of their 'senior next of kin' if they have died (OVIC, *Practice note: release of health records held by Victorian public sector agencies*, Melbourne, November 2022, p. 2).

387 The *PDP Act 2014* (Vic) (ss 13, 14, 18, sch 1 (IPP 6)) regulates the disclosure of personal information under the IPPs, and organisations subject to the Act must release personal information held about an individual on request, subject to statutory exemptions.

388 See *Workplace Injury Rehabilitation Compensation Act 2013* (Vic) ('*WIRC Act 2013* (Vic)') s 9; WorkSafe Victoria, *Submission 33*, 9 January 2024.

389 See, for example, VLA, *Submission 18*, 1 December 2023, pp. 2–3, 7; Liberty Victoria, *Submission 22*, 8 December 2024, pp. 5–6; Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 1–2, 4–11; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, pp. 3–4; Victorian Bar, *Submission 57*, 15 January 2024, p. 8; Iain Anderson, ACT Ombudsman, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 19; Dr David Solomon AM, public hearing, Melbourne, 12 March 2024, *Transcript of evidence*, p. 3; Emrys Nekvapil SC, barrister, Victorian Bar, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 17; Fiona McLeay, Commissioner, VLSBC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 20–21.

The Committee notes that, generally speaking, Victorian agencies are not resistant to providing personal and health information informally,[390] but are, however, deterred by the complex legislative environment and the inadequate legal protections for informal release.[391]

OVIC suggested that current access arrangements in Victoria do not support informal release of personal and health information.[392]

Specifically, the informal release mechanism in s 16 of the *FOI Act 1982* (Vic) does not effectively authorise and support public health services to establish 'administrative access schemes'[393] for the provision of health information outside the formal release mechanism in the Act.[394]

Further, provisions in the *HR Act 2001* (Vic)[395] and *PDP Act 2014* (Vic)[396] prevent agencies subject to the FOI scheme, including public health service organisations, from dealing with requests for personal and health information using the more flexible release mechanisms in those Acts. This has the effect of making the formal release mechanism in the *FOI Act 1982* (Vic) the primary mechanism for accessing, correcting and amending personal and health information in Victoria.[397]

OVIC and others suggested that the formal release mechanism in FOI legislation should not be the primary means by which members of the public access their personal and health information, because this approach leads to a high volume of requests, is costly, is inefficient, and adversely impacts the 'personal autonomy' of those seeking access to such information.[398]

OVIC supports a legislative arrangement that would make it easy and efficient for the public to access their personal and health information through Victoria's new

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390 For example, public health services already provide information like hospital discharge summaries, informally, outside the *FOI Act 1982* (Vic) (Western Health, *Submission 31*, 28 December 2023, p. 3; Peninsula Health, *Submission 38*, 12 January 2024, p. 1; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 11–12; Western Health, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, p. 2). See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, pp. 59, 98, 108.

391 OVIC, *Submission 55*, 15 January 2024, p. 85.

392 Ibid., p. 84.

393 That is, schemes for releasing particular kinds of information under the informal release mechanism in FOI legislation, or outside FOI legislation, for example, under privacy legislation (OIC Qld, *Guidelines: administrative release of information*, 2 August 2022, <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/proactive-disclosure/administrative-release-of-information> accessed 7 June 2024).

394 For example, 'for providing access to a person's hospital patient file without requiring a formal FOI request' (OVIC, *Submission 55*, 15 January 2024, pp. 48 (quotation), 84). See also the discussion in Sections 3.2.1 and 3.2.2 in Chapter 3 of this report regarding the informal-release mechanism in s 16 of the *FOI Act 1982* (Vic).

395 Under s 16 of the *HR Act 2001* (Vic), sch 1, HPPs 5.2 and 6—relating to openness and access to and correction of health information—do not apply to health information captured by the *FOI Act 1982* (Vic), and the procedures under the *FOI Act 1982* (Vic) for accessing and requesting corrections to such information must be followed.

396 Under s 14 of the *PDP Act 2014* (Vic), sch 1, IPP 6—relating to access to and correction of personal information held by agencies—does not apply to personal information captured by the *FOI Act 1982* (Vic), and the procedures under the *FOI Act 1982* (Vic) for accessing and requesting corrections to such information must be followed.

397 OVIC, *Submission 55*, 15 January 2024, pp. 48, 84; OVIC, *Submission 55A*, 31 July 2024, p. 6.

398 OVIC, *Submission 55*, 15 January 2024, pp. 84 (quotation), 85; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 4.

third-generation push FOI system.[399] Agencies would be authorised and supported to deal with requests predominantly through the informal-release mechanism, and to establish administrative access schemes for the purposes of releasing information through this mechanism.[400] OVIC has recommended that the formal-release mechanism should be positioned as a last resort for access to personal and health information in Victoria, but nonetheless retained in order to preserve the public's enforceable formal-access and review rights.[401]

OVIC proposed that 'access to personal and health information be regulated under one legislative instrument'—Victoria's new third-generation push FOI system.[402] In practice, this will mean that personal and health information held by agencies will be accessed under the informal and formal release mechanisms in FOI legislation, rather than through the current fragmented access arrangements.[403]

OVIC considers that this streamlined approach is the most efficient in terms of roll-out, implementation, training, regulatory guidance, education and oversight. OVIC also suggested that it will be easier for the public to 'understand and exercise their rights'.[404] Moreover, giving agencies greater flexibility in how they process requests under FOI legislation, will, in OVIC's view, harness the benefits of existing alternative statutory access schemes for personal and health information—such as those under the *HR Act 2001* (Vic) and *PDP Act 2014* (Vic)—by making it easier, simpler and quicker to request and release information.[405]

This proposed arrangement will be similar to the Queensland approach when recent legislative reforms, transferring the access rights under the *Information Privacy Act 2009* (Qld) to the *Right to Information Act 2009* (Qld), take effect.[406] These legislative reforms have been introduced to remedy problems experienced with Queensland's original treatment of personal and health information when it transitioned to a second-generation push FOI system. In transitioning to this push system, Queensland created a separate access scheme for personal and health information under its health and privacy legislation, which had similar processes, statutory exemptions and review rights to the FOI scheme. The Committee received evidence that this approach, implemented with the intention of simplifying and expediting the request process, did not have the desired effect in practice.[407]

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399 OVIC, *Submission 55A*, 31 July 2024, pp. 1–3, 6.

400 OVIC, *Submission 55*, 15 January 2024, pp. 6, 84; OVIC, *Submission 55A*, 31 July 2024, pp. 1–3, 6; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, p. 18; LIV, *Submission 22*, 4 December 2023, p. 4; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, pp. 3–4.

401 OVIC, *Submission 55*, 15 January 2024, pp. 84–86.

402 OVIC, *Submission 55A*, 31 July 2024, p. 3.

403 Ibid., pp. 1, 3, 6.

404 Ibid., pp. 1, 3.

405 Ibid., p. 6.

406 OIC Qld, *Submission 16*, 30 November 2024, pp. 3–4; Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 10.

407 Noting that the duplicate access schemes were 'found to be confusing to applicants and burdensome on agencies called to distinguish under which Act to process a given application' (OIC Qld, *Submission 16*, 30 November 2024, p. 3 (quotation); Stephanie Winson, Acting Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 10; Suzette Jefferies, Assistant Information Commissioner, OIC Qld, public hearing, Melbourne, 26 February 2024, *Transcript of evidence*, p. 10).

New South Wales has also preserved access and review rights with respect to most personal information in the formal-release mechanism in the *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act 2009* (NSW)'). However, personal information is routinely requested and released under health and privacy legislation in that State.[408] Similar to OVIC's proposal, under the *GIPA Act 2009* (NSW) personal information is generally released through the informal-release mechanism, with the formal-release mechanism used only as a last resort.

While the Committee received evidence that this approach has resulted in New South Wales agencies receiving significantly fewer formal requests for personal information than Victorian agencies,[409] it should be noted that health information is *not* accessed under FOI legislation in New South Wales.[410]

OVIC endorsed the following approach to access to personal and health information under Victoria's new third-generation push FOI system:

- that the public's right to request a correction or amendment of personal and health information under the *FOI Act 1982* (Vic), *PDP Act 2014* (Vic) and *HR Act 2001* (Vic)[411] be consolidated in the *PDP Act 2014* (Vic)[412]
- that the public's enforceable access and review rights under the formal-release mechanism in FOI legislation be preserved (while the formal-release mechanism is positioned as a last resort for requesting and providing access to personal and health information—that is, for the most contentious requests)
- that agencies be authorised, strongly encouraged and supported to release personal and health information through the informal-release mechanism in FOI legislation[413]
- that legislative mechanisms be introduced to facilitate the following matters to do with the processing of requests under the informal-release mechanism:
  - that, if an agency (or minister) is not prepared to release certain information to an applicant, they be permitted, *with the consent of the applicant*, to redact or remove such information from information that is released informally

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408 OVIC noted that, in NSW, personal and health information 'can be requested under … health and privacy legislation, at no cost or for a fee … with no procedural requirements, limited reasons for refusal … [and must be provided] without excessive delay or expense' (OVIC, *Submission 55*, 15 January 2024, p. 84). See also *Health Records and Information Privacy Act 2002 (NSW)* (*'HRIP Act 2002* (NSW)') s 72, sch 1 (HPP 7); *PPIP Act 1998* (NSW) ss 14, 66A.

409 Noting that, in New South Wales, requests for personal information comprise only 46% of total FOI requests received under the formal release mechanism (OVIC, *Submission 55*, 15 January 2024, pp. 84–85).

410 See IPC NSW, *Fact sheet—accessing your health information in NSW*, Sydney, June 2023.

411 See *FOI Act 1982* (Vic) pt 5; *PDP Act 2014* (Vic) pt 5 (especially div 1, 2), sch 1 (IPP 6); *HR Act 2001* (Vic) sch 1 (HPP 6).

412 OVIC also recommended simplifying and streamlining the 'correction' provisions in the *HR Act 2001* (Vic) (sch 1, HPP 6) and *PDP Act 2014* (Vic) (sch 1, IPP 6) to remove unnecessary formality and technical barriers, and make them easier for the public to navigate. OVIC noted, for example, that IPP 6 in the *PDP Act 2014* (Vic), relating to access to and correction of personal information, is 'three pages' compared to NSW's equivalent privacy principle, which is 'one sentence' (OVIC, *Submission 55*, 15 January 2024, p. 86; *PDP Act 2014* (Vic) sch 1 (IPP 6); *PPIP Act 1998* (NSW) s 14). See also OVIC, *Submission 55A*, 15 January 2024, pp. 2–5.

413 Noting that agencies would still need to comply with the IPPs and the *PDP Act 2014* (Vic) when releasing information under an administrative-access scheme established under the informal release mechanism in Victoria's new third-generation push FOI system. This includes the exemptions to the release of information under that Act—see OVIC, *Submission 55*, 15 January 2024, p. 87; *PDP Act 2014* (Vic) sch 1 (especially IPP 6).

  - that, in withholding certain information from informal release, agencies not be required to establish grounds for a statutory exemption or to apply the three-part test (that is, the recognised exemptions to disclosure that will apply to information requested under the formal-release mechanism)
  - that there be no external right of review of a decision of an agency to redact or remove certain information from information informally released to an applicant
  - that, where the applicant does *not* consent to an agency redacting or removing certain information to facilitate informal access, the request be automatically reclassified as a request under the formal mechanism, without the need for the applicant to 'resubmit their request'
  - that an applicant have the right to make a complaint to OVIC about an agency's handling of a request processed under the formal mechanism[414]
- that decision-makers be protected from civil and criminal liability with respect to their good-faith release of personal and health information under the informal and formal release mechanisms.[415]

The Health Complaints Commissioner (HCC) largely endorsed this approach, and was particularly supportive of an arrangement that would authorise and support health services organisations to provide information informally, through administrative access schemes established under the informal-release mechanism in FOI legislation.[416]

OVIC and the HCC also considered that the Health Privacy Principles (HPPs) in the *HR Act 2001* (Vic) and the Information Privacy Principles (IPPs) in the *PDP Act 2014* (Vic) should be consolidated in the *PDP Act 2014* (Vic) under the oversight of OVIC. The Committee notes that, in Victoria, the HCC currently regulates health information and administers the HPPs, while OVIC regulates personal information and administers the IPPs.[417]

The HCC suggested that there would be 'significant benefit' in having 'legislation governing access to personal health information in the public and private sectors' overseen by one regulator, including simplified and streamlined regulation and consumer processes.[418]

OVIC agreed and explained its position as follows. First, Victoria is the only Australian jurisdiction that regulates personal and health information 'under a dual system, with

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414 OVIC, *Submission 55A*, 31 July 2024, pp. 1, 2 (quotation).

415 OVIC, *Submission 55*, 15 January 2024, pp. 84, 86–87; OVIC, *Submission 55A*, 31 July 2024, p. 2; Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, pp. 18–19.

416 HCC, *Submission 26*, 12 December 2023, p. 3; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, pp. 1, 3.

417 OVIC, *Submission 55A*, 31 July 2024, pp. 2–5; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 3.

418 HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 3.

two sets of principles, two legislative instruments and two regulators'.[419] Second, organisations have similar statutory obligations under the IPPs and HPPs.[420] Third, the current arrangement creates administrative inefficiencies given the need for organisations to deal with OVIC and the HCC in respect of substantially similar principles. It is also confusing for the public when exercising their complaint rights and can lead to perverse outcomes, such as the double-handling of privacy complaints.[421] Finally, it neither supports nor facilitates the establishment of information-sharing schemes between organisations for personal *and* health information. This is because, while organisations can depart from or modify the IPPs in certain circumstances, they do not have this flexibility with respect to the HPPs.[422]

Due to FOI exemptions in the *HR Act 2001* (Vic), health information held by public health services organisations is accessed via the *FOI Act 1982* (Vic), while health information held by private health services organisations is accessed under the *HR Act 2001* (Vic) in accordance with HPP 6.[423]

The Committee received evidence of the difficulties caused by Victoria's current fragmented approach to accessing health information. As Western Health noted, the complexity of some health services arrangements[424] creates public confusion about when to apply for access under the *FOI Act 1982* (Vic) or the *HR Act 2001* (Vic), and can require applicants to make multiple requests to different organisations under different legislative access regimes—each with their own processes, processing time frames and review channels.[425]

The Committee received conflicting evidence from health sector agencies and others on whether the current access arrangements should be retained or access streamlined in one piece of legislation. Some favoured the 'protections' and 'rigour' of the processes

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419 Noting that: privacy principles in the Commonwealth, Tasmanian and Northern Territory jurisdictions cover both health and personal privacy, overseen by a single regulator; Queensland will soon follow suit, when recent legislative reforms consolidating the health-related National Privacy Principles and the State's IPPs take effect in 2025; the Australian Capital Territory and New South Wales jurisdictions have separate HPPs and IPPs, overseen by a single regulator; and Western Australia—which does not currently have a legislative framework for the protection of health and personal information—is currently considering regulating it under a single system with one regulator, similar to the Commonwealth, Tasmanian and Northern Territory approach (OVIC, *Submission 55A*, 31 July 2024, pp. 3 (quotation), 4).

420 OVIC highlighted, for example, the significant overlap in principles governing the 'collection, use and disclosure, quality, security and retention, openness, access and correction, use of unique identifiers, rights to anonymity and transborder data flows' of personal and health information under the IPPs and HPPs (OVIC, *Submission 55A*, 31 July 2024, p. 3).

421 OVIC explained, for example, that, currently, a complaint about a single privacy incident involving both personal and health information needs to be made to both OVIC and the HCC, given that OVIC can only consider issues arising under the IPPs and the HCC can only consider issues arising under the HPPs (OVIC, *Submission 55A*, 31 July 2024, p. 5).

422 Under the *PDP Act 2014* (Vic), when it comes to 'information usage arrangements, public interest determinations and temporary public interest determinations', organisations have flexibility to 'modify or depart from complying with one or more IPP's for a specified act or practice, where there is a substantial public interest in do so'. There are no equivalent provisions in the *HR Act 2001* (Vic), meaning that organisations cannot depart from the HPPs. This has created a regulatory 'gap' which, to date, has sought to be bridged by 'piecemeal' legislative reform (OVIC, *Submission 55A*, 31 July 2024, p. 5).

423 HPP 6 'obliges private sector organisations who hold health information about a person to give them access to their health information on request, subject to certain exceptions and the payment of fees. Mandatory and discretionary refusal grounds in response to an access request are set out in the HR Act' (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 1 (quotation); Peninsula Health, *Submission 38*, 12 January 2024, pp. 1, 3).

424 For example, '[s]ome consumers are public patients treated in private hospitals under contracted services arrangements … [whereas others] attend a hospital operated by a public health service … where the service provider is another on-site public health service' (Western Health, *Submission 31*, 28 December 2023, p. 2).

425 Western Health, *Submission 31*, 28 December 2023, p. 2. See also SEMLS, *Submission 67*, 29 January 2024, p. 9.

in the formal release mechanism in the *FOI Act 1982* (Vic),[426] while others favoured the processes in the *HR Act 2001* (Vic).[427] Some favoured a transition to one access regime for all health information (that is, information held by all public, private and community health organisations within the health sector),[428] while others were sceptical that an arrangement of this kind would facilitate timelier release of health information.[429]

At the outset, the HCC suggested that the inadequacies of the access arrangements under the *FOI Act 1982* (Vic) 'apply equally' to those under the *HR Act 2001* (Vic).[430] Further, the HCC observed that many private health services[431] do not properly understand their access obligations under the *HR Act 2001* (Vic) and do not have adequate systems in place for processing requests for information under that Act.[432]

The benefits of the access arrangements for health information under the *FOI Act 1982* (Vic) over the *HR Act 2001* (Vic) were said to be:

- the familiarity of public health services with the processes under the *FOI Act 1982* (Vic)[433]
- the mechanisms in the *FOI Act 1982* (Vic) that permit agencies to consult with and assist applicants to re-scope their FOI request[434]
- the stronger privacy, internal working documents, information communicated in confidence, and legal professional privilege exemptions in the *FOI Act 1982* (Vic),[435] noting that there are 'sound public policy, public interest, and safety and wellbeing reasons' for them[436]

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426 Peninsula Health, *Submission 38*, 12 January 2024, pp. 2–3; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 4, 7 (quotation).

427 Western Health, *Submission 31*, 28 December 2023, p. 2.

428 Western Health, *Submission 31*, 28 December 2023, p. 3; Western Health, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, p. 2. See also, LIV, *Submission 22*, 4 December 2023, p. 4; Associate Professor Jennifer Beard, Melbourne Law School, University of Melbourne, *Submission 40*, 14 January 2024, p. 4; Victorian Bar, *Submission 57*, 15 January 2024, p. 4.

429 Peninsula Health, *Submission 38*, 12 January 2024, pp. 3–4.

430 For example, the HCC observed that a review of the *HR Act 2001* (Vic) has not been conducted since its introduction, and, consequently, that it 'has not kept pace with advances in health care delivery, with community expectations and with the transition to a largely digital environment' (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2).

431 The HCC noted that many private health services are 'small businesses or sole proprietors' (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2).

432 HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2.

433 Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 10–11.

434 Peninsula Health, *Submission 38*, 12 January 2024, pp. 2–3; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 6; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 14.

435 For example, information received in confidence from a patient's next of kin which is sought and used to inform their clinical care; clinicians' contact with government agencies, such as Child Protection, in connect with their mandatory reporting obligations; and protection of draft documents and documents created for an internal investigation (Peninsula Health, *Submission 38*, 12 January 2024, p. 2; Andrew Mariadason, Legal Counsel and Manager, Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 4, 7–8; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 12–14; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 3).

436 Peninsula Health, *Submission 38*, 12 January 2024, p. 2. See also Johan Lidberg et al., *The culture of implementing Freedom of Information in Australia*, Monash University, Melbourne, June 2024, p. 59.

- the narrower and more straightforward exemptions in the *FOI Act 1982* (Vic),[437] which require less detailed assessments of documents captured within the scope of a request than is required under the *HR Act 2001* (Vic)[438]
- the straightforward charge-calculation provisions in the *FOI Act 1982* (Vic) and *Freedom of Information (Access Charges) Regulations 2014* (Vic), as well as the Act's stronger charge-waiver provisions[439]
- the greater flexibility in the statutory time frames for processing requests under the *FOI Act 1982* (Vic)[440]
- the more streamlined review processes in the *FOI Act 1982* (Vic).[441]

The benefits of the access arrangements for health information under the *HR Act 2001* (Vic) over the *FOI Act 1982* (Vic) were said to be:

- the 'consumer-focused' framework for access to information in the *HR Act 2001* (Vic), which is better tailored to the diverse groups that use health services[442]
- the 'plain language' drafting of the access to information provisions in the *HR Act 2001* (Vic) that make it easier for the public to understand and for organisations to explain[443]
- the clear guidance provided in the *HR Act 2001* (Vic) with respect to who can access a person's health information on their behalf[444]
- the absence of an application fee[445]
- the flexibility for organisations to redact exempt information without needing to consult with affected persons[446]

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437 Noting that the mandatory and discretionary exemptions in the *HR Act 2001* (Vic) were described by the HCC as 'overly complex and not well understood' by private health services organisations (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2).

438 Peninsula Health, *Submission 38*, 12 January 2024, p. 3.

439 Noting that the HCC frequently deals with disputes about access charges under the *HR Act 2001* (Vic), whereas complaints of this kind to OVIC and VCAT under the *FOI Act 1982* (Vic) are rare (VCAT, Response to Integrity and Oversight Committee questions on notice, 20 March 2024, p. 8; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2).

440 Noting that the *HR Act 2001* (Vic) has a 45-day statutory time frame for processing requests, whereas the *FOI Act 1982* (Vic) permits extensions on time in specified circumstances, or with the consent of the applicant (Peninsula Health, *Submission 38*, 12 January 2024, p. 3; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 14).

441 Noting that under the *HR Act 2001* (Vic), where a health service issues a refusal decision in respect of a request for health information, on grounds that disclosure would seriously threaten the applicant's life or health, the applicant may nominate a separate health service to review the ground for refusal in the first instance or make a complaint to the HCC. The applicant can also make a complaint to the HCC if the reviewing health service affirms the initial refusal decision. If dissatisfied with the HCC's decision on the complaint, the applicant can, in certain circumstances, apply to VCAT to hear the complaint (*HR Act 2001* (Vic) ss 18, 26, div 3 (especially ss 36–38, 42), pt 6 (especially ss 45, 74); Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 14).

442 Western Health, *Submission 31*, 28 December 2023, p. 2.

443 Western Health, *Submission 31*, 28 December 2023, p. 2 (quotation); Western Health, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, p. 2.

444 Peninsula Health, *Submission 38*, 12 January 2024, p. 3.

445 HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 2.

446 Noting that there are no statutory third-party consultation requirements under the *HR Act 2001* (Vic) (Western Health, *Submission 31*, 28 December 2023, p. 2; Peninsula Health, *Submission 38*, 12 January 2024, pp. 2–3; Trudy Ararat, Chief Legal Officer, Peninsula Health, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 13).

- anecdotal patient feedback that the processes under the *HR Act 2001* (Vic) are viewed positively, as facilitating access[447] to information, whereas the processes under the *FOI Act 1982* (Vic) are viewed negatively, as 'confusing and difficult' to understand and frustrating and delaying access[448]
- a statutory time frame for processing requests that is easier for the public to understand, provides a clear time line for access, and is of greater practical relevance to applicants than under the *FOI Act 1982* (Vic)[449]
- the public's right, under HPP 11, to request their health information be shared with another health service provider.[450]

The Committee agrees with OVIC and the HCC that the Victorian Government should consolidate the HPPs and IPPs into the *PDP Act 2014* (Vic) under the regulation of OVIC. If the HPPs and IPPs are consolidated, it may also be prudent to set out the Information Commissioner's functions and powers in an independent Act, similar to the approach taken in the Commonwealth and New South Wales second-generation push jurisdictions.[451]

The Committee considers that OVIC's proposed access arrangement for personal and health information relates to organisations already subject to the FOI scheme. Were it intended to apply to private health services organisations—which currently provide access to health information under the *HR Act 2001* (Vic) and are *not* subject to the FOI scheme—it is not well-developed. In particular, OVIC did not provide the Committee with evidence of stakeholder consultation with private health services organisations on the prospect of their being incorporated into the FOI scheme and providing access to health information under Victoria's new third-generation push FOI system.[452] Similarly, the HCC, in its evidence to the Inquiry,[453] did not express a firm position on whether private health services organisations should be subject to the FOI scheme for the purposes of providing access to health information. In the absence of any evidence received to the Inquiry on this particular aspect, including from affected parties, the Committee is not prepared to recommend the repeal of the access provisions under the *HR Act 2001* (Vic) as they relate to private health sector organisations.

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447 Western Health, *Submission 31*, 28 December 2023, p. 2.

448 HCC, *Submission 26*, 12 December 2023, p. 1 (quotation); Western Health, *Submission 31*, 28 December 2023, p. 2. The HCC observed that '[t]he inability of the public to easily access health and personal information may lead to complaints about a health service … being made to the HCC. Complaints made to the HCC about health services improve the provision of safe, affordable, and ethical health services while also protecting the public from providers who fail to meet these standards … It is therefore in the public interest to ensure that the FOI Act does not unnecessarily impede the public's right to access health and personal information' (HCC, Submission 26, 12 December 2023, pp. 1–2).

449 Western Health, *Submission 31*, 28 December 2023, p. 2; Western Health, Response to Integrity and Oversight Committee questions on notice, 28 March 2024, p. 2. See also *HR Act 2001* (Vic) s 34(2).

450 Noting that there is no equivalent right in the *FOI Act 1982* (Vic) (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, p. 1).

451 See Name withheld, *Submission 48*, 15 January 2024, p. 6. See also *Australian Information Commissioner Act 2010* (Cth); *Government Information (Information Commissioner) Act 2009* (NSW).

452 The Committee received evidence from the HCC that the size and resourcing of private health services organisations vary considerably (from, for example, 'small businesses or sole proprietors' to larger entities), as does their capacity to process requests for access under the *HR Act 2001* (Vic) (HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024, pp. 2 (quotation), 3).

453 HCC, *Submission 26*, 12 December 2023; HCC, Response to Integrity and Oversight Committee questions on notice, 26 June 2024.

Therefore, the Committee agrees that OVIC's proposed access arrangement for personal and health information should be adopted in Victoria's new third-generation push FOI system *for organisations currently subject to the FOI scheme*. When designing the informal and formal release-mechanisms in Victoria's new third-generation push FOI system, it will be important for the Victorian Government to have regard to the evidence received to the Inquiry from the HCC and other health sector agencies on the benefits and drawbacks of the current access arrangements for health information under the FOI scheme and *HR Act 2001* (Vic), detailed above.

The Committee also considers that OVIC's complaints jurisdiction with respect to requests handled under the informal-release mechanism should be restricted to agencies' systemic compliance with their statutory obligations under the mechanism. This non-compliance would include failure to: implement or comply with policies and procedures for the informal-release mechanism; comply with guidelines issued by the Information Commissioner on the informal-release mechanism; or treat an informal request as a formal request when an applicant has refused to consent to the redaction or removal of certain information to allow it to be released informally. Consequently, the Committee does not consider that the complaint mechanism for requests handled under the informal-release mechanism should mirror the complaint mechanism for requests handled under the formal-release mechanism or the existing FOI complaint provisions in the *FOI Act 1982* (Vic).

Alternative access scheme for WorkCover claims information

The Committee received evidence of the need to address the duplication of access rights to WorkCover claims information under the *FOI Act 1982* (Vic) and the *WIRC Act 2013* (Vic). The access-to-information scheme under the *WIRC Act 2013* (Vic) has its own processes and time frames for dealing with requests and external review mechanisms, and is administered by WorkSafe agents and self-insurers with specialised knowledge of WorkCover claims. As WorkSafe Victoria explained, the WIRC scheme is more responsive to claimants' information access needs, given that it is less formal (with no requirement for a request to be made in writing and no application fees or access charges), contains fewer exemptions and does not discourage the processing of voluminous requests.[454]

The duplication of access rights under the schemes has resulted in WorkSafe having to respond to FOI requests that should be dealt with by WorkSafe agents under the WIRC scheme, and in applicants making FOI complaints or review applications to OVIC in respect of FOI requests referred for processing and decided under the WIRC scheme before exercising their review rights under that scheme.[455] This impacts on WorkSafe's timeliness in processing non claims-related FOI requests. Consequently, WorkSafe

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454 WorkSafe Victoria, *Submission 33*, 9 January 2024, pp. 2–4; Jude Hunter, Senior Legal Counsel and Manager, Freedom of Information and Privacy, WorkSafe Victoria, 18 March 2024, *Transcript of evidence*, pp. 34–35.

455 WorkSafe Victoria, *Submission 33*, 9 January 2024, pp. 4–5; Jude Hunter, Senior Legal Counsel and Manager, Freedom of Information and Privacy, WorkSafe Victoria, 18 March 2024, *Transcript of evidence*, pp. 35–36, 38.

suggested that claims information that can be accessed under the WIRC scheme be exempt from FOI legislation.[456] OVIC endorsed this approach.[457] The Committee agrees.

Access arrangements for child welfare records

The Committee received evidence of the need for FOI legislation to be more responsive to the needs of particular groups in accessing particular kinds of information. Find & Connect Web Resource, and others, for example, were critical of the access arrangements for 'child welfare records'[458] under the *FOI Act 1982* (Vic).[459]

It was suggested that the formal-release mechanism in the *FOI Act 1982* (Vic) is not responsive to the needs of applicants seeking access to child welfare records.[460] Specifically, that the consultation requirements and statutory exemptions applicable to such information—including agencies' often 'inconsistent and haphazard' approach to applying them—as well as significant delays in the provision of information under the Act,[461] cause material harm to applicants.[462]

There was strong support in submissions and other evidence received to the Inquiry for an arrangement that would permit

- proactive release of non-personal child welfare-related administrative information, including the kinds of records held by agencies that they will release[463]
- requests for child welfare records, and requests for amendment or correction of information contained in such records, to be processed informally through an administrative access scheme[464]

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456 WorkSafe Victoria, *Submission 33*, 9 January 2024, pp. 5–7.

457 Sean Morrison, Information Commissioner, OVIC, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 19.

458 Child welfare records include 'ward of the state records, admission and discharge registers, Children's Court records, psychologist and social worker file notes, medical files, education files, adoption and fostering records, photographs (of children, staff and institutions), correspondence files and payment and child endowment records', and administrative records, such as 'records about the licensing, management and running of homes and institutions' (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 3). See also Centre for Excellence in Child and Family Welfare, *Submission 39*, 12 January 2024; Mackillop Family Services, *Submission 45*, 15 January 2024; Department of Social Work, University of Melbourne, *Submission 56*, 15 January 2024; Care Leavers Australasia Network (CLAN), *Submission 59*, 18 January 2024.

459 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 1 (see also pp. 2, 4–7, 9, 11).

460 People seek access to their child welfare records for a variety of reasons, such as 'for the purposes of constructing their personal and family identities; for mental well-being and recovery from adverse childhood experiences; to undertake family tracing and family reunions where possible; and to be able to pursue legal actions and compensation for historical abuse and be included in redress schemes such as the upcoming Victorian Historical Forced Adoptions and Historical Care Leavers Redress Schemes' (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 11).

461 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 5, 6 (quotation).

462 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 5–6; CLAN, *Submission 59*, 18 January 2024, pp. 4–5; Kirsten Wright, Program Manager, Find & Connect, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 16–17, Department of Families, Fairness and Housing (Victoria) (DFFH), *Submission 50*, 15 January 2024, pp. 3–4.

463 It was suggested that this will help manage applicants' expectations, provide them with a greater understanding of the information they seek and result in appropriately scoped requests (Find & Connect, Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 7; CLAN, *Submission 59*, 18 January 2024, pp. 5–6; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 18, 20).

464 Whether under the informal release mechanism in FOI legislation or the *PDP Act 2014* (Vic).

- a coordinated approach to be taken by agencies to providing access to child welfare records[465]
- requests for child welfare records to be processed under the formal mechanism in FOI legislation only as a last resort.[466]

It was suggested that an administrative access scheme for child welfare records should adopt the processes in the Australian Department of Social Services's (ADSS) best practice guidelines for providing access to records to Forgotten Australians and Former Child Migrants, which is recognised best practice in Australia.[467]

It was further suggested that an administrative access scheme of this kind would:

- facilitate a more flexible and applicant-centred approach to the processing of requests for child welfare records that is responsive to the needs and priorities of individual applicants
- authorise and encourage agencies to take a less rigid and 'risk-averse' approach to releasing information affecting the personal privacy of others,[468] including the provision of minimally redacted information of critical importance to Care Leavers[469]
- empower agencies to take a proactive and flexible approach to dealing with 'right of reply' requests[470]
- promote timelier release of information,[471] including by dispensing with onerous third-party consultation requirements under the *FOI Act 1982* (Vic)[472]

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465 Noting that many child welfare records are held by DFFH, DJCS, and the Department of Health, and these agencies don't communicate with one another with respect to providing access to such records (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 3; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 19–20).

466 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 7–9; DFFH, *Submission 50*, 15 January 2024, pp. 3–4.; CLAN, *Submission 59*, 18 January 2024, pp. 5–6.

467 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 1–2, 6–8; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 16. See also Australian Department of Social Services (ADSS), *Access to records by forgotten Australians and former child migrants: access principles for records holders & best practice guidelines in providing access to records*, Canberra, June 2015.

468 It was suggested that in NSW, for example—where statutory child welfare records are released under the release mechanism in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) rather than under the *GIPA Act 2009* (NSW)—a lot more information is released to applicants that would be redacted in Victoria under the statutory exemptions in the *FOI Act 1982* (Vic) (Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 18).

469 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 8 (quotation); Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 17–18, 21.

470 A 'right of reply' is a request for annotation, correction or addition to child welfare records, noting that often, such records were 'never written with the thought that the child, now adult, would ever access them' and contain language that is 'highly distressing … judgmental and demanding … about the Care Leaver, their family, and the situation of their childhood' (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 7, 9 (quotation); DFFH, *Submission 50*, 15 January 2024, pp. 4–5).

471 Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, p. 7.

472 Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 17–18.

- permit and facilitate the prioritisation of urgent requests[473]
- permit applicants to have input into how they receive their records.[474]

The Department of Families, Fairness and Housing (DFFH), which receives a high number of requests for child welfare records in Victoria, was supportive of an administrative access scheme that would allow such information to be released informally.[475] Presently, DFFH processes such requests under its Care Leaver Records Access policy.[476] The Policy contains guiding principles on how requests should be processed under the *FOI Act 1982* (Vic), including the need for FOI decision-makers to take a pro-disclosure and maximum-release approach to deciding requests.[477]

The Committee considers that FOI legislation which authorises and encourages agencies, like DFFH, to establish administrative access schemes under the informal release mechanism will allow them greater flexibility to respond effectively and efficiently to such requests.[478] This should be supported by appropriate guidance issued by OVIC.[479] The Committee's view is that this kind of arrangement is preferable to establishing an alternative statutory release scheme in child protection legislation, such as in the *Children, Youth and Families Act 2005* (Vic).[480]

The Committee notes that a significant proportion of out-of-home care is provided by non-government contractors, not all of whom are subject to the FOI scheme. Presently, access to child welfare records held by such entitles is provided under the *PDP Act 2014* (Vic).[481] The Committee considers that it would be prudent for the Victorian Government to explore the feasibility of making such contractors subject to the FOI scheme to ensure that Care Leavers' enforceable access and review rights under FOI legislation are secured with respect to child welfare records.

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473 For example, for the purpose of applying to a redress scheme (Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 19).

474 Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 19.

475 DFFH, *Submission 50*, 15 January 2024, pp. 3–4.

476 See DFFH, *Care Leaver Access to Records Policy*, Melbourne, February 2021. See also DFFH, *Submission 50*, 15 January 2024, pp. 3–4.

477 DFFH, *Submission 50*, 15 January 2024, p. 3.

478 Care Leavers Australasia Network (CLAN) observed that informal release of child welfare records, by creating a more 'informal basis for decisions about release of records', would promote and facilitate a 'less risk-averse' and more flexible approach to decision-making about the release of such records. CLAN additionally observed that the processes for handling and deciding requests for child welfare records in ADSS's Best Practice Guidelines strongly support, and are suited to, informal release (CLAN, *Submission 59*, 18 January 2024, p. 5).

479 The IPC NSW, for example, has issued guidance on FOI decision-making with respect to child welfare records—see IPC NSW, *Information Access Guideline 8: Care Leavers' access to their out-of-home care records*, Sydney, May 2023; CLAN, *Submission 59*, 18 January 2024, p. 5.

480 Noting that child welfare records can be accessed under child protection legislation in NSW, Queensland and South Australia (DFFH, *Submission 50*, 15 January 2024, p. 4).

481 Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 20.

Administrative access schemes for certain kinds of information

The Committee received evidence of the many kinds of personal and health information that would be suitable for release under administrative access schemes established under the informal release mechanism in Victoria's new third-generation push FOI system (or health and privacy legislation), for example—

- child welfare records,[482] including records needed to support Victorian Redress Scheme applications[483]
- legal client files[484]
- mental health records[485]
- prisoner health records[486]
- police employee mental health records held by Victoria Police[487]
- motor vehicle accident reports and investigations records held by Victoria Police[488]
- personal information needed to determine the source of identity compromise and misuse.[489]

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482 To ensure, for example, that the informal release of such information aligns with the ADSS's *Access to records by forgotten Australians and former child migrants: access principles for records holders & best practice guidelines in providing access to records*, Canberra, June 2015 (Find & Connect Web Resource, University of Melbourne, *Submission 36*, 10 January 2024, pp. 1–2, 6–8; Kirsten Wright, Program Manager, Find & Connect Web Resource, University of Melbourne, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, pp. 16–20; ALA, *Submission 28*, 21 December 2023, p. 6).

483 Noting that requests connected with redress applications are generally made by the affected person's legal representative; seek access to particular kinds of information rather than access more broadly; and need to be processed in a timely way (DFFH, *Submission 50*, 15 January 2024, p. 4).

484 To ensure, for example, that the informal release of such information aligns with professional obligations under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (VLA, *Submission 18*, 1 December 2023, p. 3). See also Fiona McLeay, Commissioner, VLSBC, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, pp. 20–21.

485 To ensure, for example, that the informal release of such information aligns with the principles in pt 1.5 of the *Mental Health and Wellbeing Act 2022* (Vic) and especially the '[s]upported decision making' principle in s 19. See VLA, *Submission 18*, 1 December 2023, p. 7.

486 To ensure that accused persons have timely access to information—in a manner that does not place them at a forensic disadvantage with respect to the prosecution—that is critical to their representation in criminal proceedings, such as information relevant to their fitness to be tried; a mental impairment defence; or sentencing submissions in mitigation (Liberty Victoria, *Submission 25*, 8 December 2023, pp. 8–9; ALA, *Submission 28*, 21 December 2023, pp. 9–10; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 51).

487 ALA, *Submission 28*, 21 December 2023, p. 8; TPAV, *Submission 19*, 1 December 2023, pp. 2–3; Wayne Gatt, Secretary, TPAV, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 1–2.

488 Noting that Victoria Police already provides some information pertaining to motor vehicle accidents informally, and that approximately 30% of the FOI requests received by Victoria Police in 2022/23 related to motor vehicle accidents (Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 51; Susan Middleditch, Deputy Secretary, Corporate and Regulatory Services, Victoria Police, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 25).

489 Identity Care, *Submission 47*, 15 January 2024, pp. 1, 3.

The Committee considers that such schemes would also allow agencies to prioritise the processing of certain requests, such as requests made by applicants at a disadvantage or those 'seeking urgent access to justice'.[490]

OVIC supports agencies having flexibility under Victoria's new third-generation FOI system to establish 'informal release access schemes'—that is, administrative access schemes established under the informal-release mechanism—to facilitate the timely release of personal and health information.[491] However, it envisions an arrangement in which there are clear guard rails with respect to such schemes, to ensure consistency of approach and avoid agencies devising their own access and review rights that do not accord with the spirit and intent of FOI legislation. As OVIC explained, it is keen to

> avoid a situation where legislative reform leads to the creation of multiple legislative and administrative access schemes, each with different mechanisms and rules for processing requests, determining what is to be released and withheld, and varying access to review rights. This situation would be confusing for members of the public to navigate, and complex to regulate.[492]

The Committee considers that these concerns can be adequately addressed by giving the Information Commissioner the power to issue binding guidelines on the requirements of administrative access schemes established under the informal-release mechanism. Additional reassurance in this respect can be gained by providing OVIC with regulatory powers to monitor and enforce non-compliance.

4.4 Recommended reforms

The Committee endorses many of OVIC's recommendations in its submission to the Inquiry with respect to Terms of Reference 3 and 7,[493] and makes additional recommendations to give effect to its views as described in Sections 4.2.2, 4.3.2 and 4.3.3 of this chapter, above.

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490 For example, mental health information that is critical to a person's representation in Mental Health Tribunal proceedings, such as treatment history and progress and evidence supporting clinical assessments and recommendations contained in expert reports; Child Protection records that are critical to a juvenile's representation in criminal proceedings; and health information of Victoria Police employees that is critical to a review of a decision of the Police Medical Officer with respect to an employee's fitness for duty (VLA, *Submission 18*, 1 December 2023, pp. 5 (quotation), 6, 8; TPAV, *Submission 19*, 1 December 2024, pp. 2–3; SEMLS, *Submission 67*, 29 January 2024, pp. 6–7; Jeremy King, Member, Victoria Branch, ALA, public hearing, Melbourne, 18 March 2024, *Transcript of evidence*, p. 51; Wayne Gatt, Secretary, TPAV, public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, pp. 2–3).

491 OVIC, *Submission 55*, 15 January 2024, p. 87.

492 OVIC, *Submission 55A*, 31 July 2024, p. 6.

493 See OVIC, *Submission 55*, 15 January 2024, pp. 12, 17–20.

RECOMMENDATION 52: That legislation establishing Victoria's new third-generation 'push' FOI system retain the existing functions and powers of the Information Commissioner and Public Access Deputy Commissioner in the *Freedom of Information Act 1982* (Vic), including their powers to undertake reviews and handle complaints; provide advice, education and guidance to agencies, ministers and the public; issue professional standards; and conduct investigations. Additionally, the Committee recommends that their delegation powers be retained.

RECOMMENDATION 53: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system retain the following features of the *Freedom of Information Act 1982* (Vic) with respect to requests:

(i) legal persons can make a request, are not required to identify themselves (except when applying for personal or health information) or provide reasons for the request, and are not limited in their use of information released in response to a request

(ii) there is no prescribed form for requests but they must be in writing and contain sufficient information to enable agencies and ministers to identify the information sought

(iii) agencies and ministers must assist applicants to make a valid request, consult with them to make a request valid, and refer them to another agency or Minister that may hold the information requested

(iv) agencies and ministers must decide FOI requests within 30 days, with extensions of time permitted in certain circumstances

(v) agencies and ministers must take reasonable steps to provide access to information in a form or format requested by, or accessible to, an applicant, limited by clear and reasonable objections (for example, protection of the record, infringement of copyright and unreasonable interference with the operations of the agency).

RECOMMENDATION 54: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system empower the Information Commissioner and Public Access Deputy Commissioner to give an enforceable direction to an agency (or minister) to release information to an applicant in a particular format or by a particular method.

RECOMMENDATION 55: That legislation establishing Victoria's new third-generation 'push' FOI system retain agency and ministerial reporting requirements in the *Freedom of Information Act 1982* (Vic) subject to any needed amendments to remove outdated items.

RECOMMENDATION 56: That legislation establishing Victoria's new third-generation 'push' FOI system simplify and streamline the definition of the entities subject to the FOI scheme.

RECOMMENDATION 57: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to assist a prospective applicant to make a written request if they are unable to do so due to disability or disadvantage (for example, illiteracy).

RECOMMENDATION 58: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system require agencies and ministers to acknowledge receipt of a valid FOI request in writing within five business days and that the content of the written acknowledgement be prescribed.

RECOMMENDATION 59: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a provision, modelled on s 44(2) of the *Government Information (Public Access) Act 2009* (NSW), permitting partial transfer of a request to another agency or minister.

RECOMMENDATION 60: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system provide exceptions to the strict transfer and notification requirements under s 18 of the *Freedom of Information Act 1982* (Vic) for agencies with complex organisational structures.

RECOMMENDATION 61: That all statutory time frames in legislation establishing the formal release mechanism in Victoria's new third-generation 'push' FOI system refer to business days rather than calendar days.

RECOMMENDATION 62: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a repeat requests exception, modelled on s 60(1) of the *Government Information (Public Access) Act 2009* (NSW), empowering an agency (or minister) to refuse to deal with a request (in whole or in part) if:

(i) the agency decided a previous request for information substantially the same as the information sought in the request and there are no reasonable grounds for believing that the agency would make a different decision on the request to the previous decision; or

(ii) the applicant has previously been provided with access to the information under the FOI scheme.

RECOMMENDATION 63: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a voluminous requests exception that:

(i) empowers agencies (and ministers) to refuse to deal with a request if doing so would substantially and unreasonably divert an agency's resources from the performance of its other operations, or substantially and unreasonably interfere with the performance of the minister's functions, and there is no overriding public interest to process the request

(ii) contains a presumption in favour of processing the request

(iii) prescribes the factors that agencies (and ministers) must take into account in determining whether the exception applies, by codifying the Information Commissioner's and the Victorian Civil and Administrative Tribunal's existing guidance on determining what is 'substantial' and 'unreasonable'

(iv) prescribes a statutory threshold definition of 'substantial and unreasonable' diversion or interference

(v) prohibits reliance on the exception on grounds that third-party consultation would likely be too onerous and provides flexibility for agencies not to consult in those circumstances

(vi) permits agencies to rely on the exception where the cumulative impact of processing multiple requests received from the same applicant would constitute a 'substantial and unreasonable' diversion or interference

(vii) prescribes the matters that must be contained in a 'refusal to process' decision relying on the voluminous requests exception.

RECOMMENDATION 64: That legislation establishing Victoria's new third-generation 'push' FOI system require agencies to adequately resource their FOI function and empower the Information Commissioner to direct agencies (and ministers) to review the adequacy of their FOI resourcing if their capacity to process requests is frequently constrained by the resourcing of their FOI function.

RECOMMENDATION 65: That the s 25A(5) exception in the *Freedom of Information Act 1982* (Vic) not be retained in legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system.

RECOMMENDATION 66: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system apply the same threshold for consultation across all third-party consultation provisions, modelled on s 54 of the *Government Information (Public Access) Act 2009* (NSW).

RECOMMENDATION 67: That—for the purpose of facilitating partial access to information—legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a provision, modelled in part on s 22(1)(d), (2) of the *Freedom of Information Act 1982* (Cth) and s 73(2) of the *Right to Information Act 2009* (Qld):

(i) requiring agencies (and ministers) to provide an edited copy of a document if reasonably practicable, unless the applicant has indicated that they do not want to receive it

(ii) requiring agencies to provide partial access without disclosing exempt information, rather than authorising them to make such deletions as are necessary to provide partial access

(iii) permitting, but not requiring, agencies to delete irrelevant information.

RECOMMENDATION 68: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system retain the Information Commissioner's power to decide an FOI review application under s 49P of the *Freedom of Information Act 1982* (Vic) and:

(i) extend that power to the Public Access Deputy Commissioner without the need for an instrument of delegation; and

(ii) empower the Information Commissioner and Public Access Deputy Commissioner to delegate, to senior staff, their power to decide an FOI review application, including the power to make a fresh decision on the original request.

RECOMMENDATION 69: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system empower the Information Commissioner to ensure that agencies (and ministers) take appropriate action to give effect to the Office of the Victorian Information Commissioner's FOI review decisions, subject to their Victorian Civil and Administrative Tribunal review rights.

RECOMMENDATION 70: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system extend the time frame specified in ss 49P(4)(b) and 52(9) of the *Freedom of Information Act 1982* (Vic) from 14 days to 30 days.

RECOMMENDATION 71: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system include a vexatious applicant provision, modelled on ss 89K–89N of the *Freedom of Information Act 1982* (Cth) and s 114 of the *Right to Information Act 2009* (Qld), empowering the Information Commissioner to make a vexatious FOI applicant declaration on the application of an agency or minister, or on the Commissioner's own initiative, with a right of review to the Victorian Civil and Administrative Tribunal.

RECOMMENDATION 72: That legislation establishing Victoria's new third-generation 'push' FOI system address Recommendations 4 and 5 in the Integrity and Oversight Committee's *Performance of the Victorian integrity agencies 2021/22* report.

RECOMMENDATION 73: That legislation establishing Victoria's new third-generation 'push' FOI system protect the Information Commissioner, Public Access Deputy Commissioner and Office of the Victorian Information Commissioner staff from civil and criminal liability with respect to their good-faith performance of their statutory functions and the exercise of their statutory powers.

RECOMMENDATION 74: That legislation establishing Victoria's new third-generation 'push' FOI system retain the legal protections afforded to agencies (and ministers) in s 62 of the *Freedom of Information Act 1982* (Vic), and extend those protections to the Information Commissioner and Public Access Deputy Commissioner with respect to their power to decide an FOI review application, as well as to persons with delegated authority to decide FOI review applications.

RECOMMENDATION 75: That legislation establishing Victoria's new third-generation 'push' FOI system empower the Information Commissioner to make binding recommendations in connection with an FOI complaint.

RECOMMENDATION 76: That legislation establishing Victoria's new third-generation 'push' FOI system empower the Information Commissioner to issue binding professional standards and guidelines on FOI legislation—including on how provisions should be interpreted—and require agencies (and ministers) to have regard to them when administering the FOI scheme.

RECOMMENDATION 77: That legislation establishing Victoria's new third-generation 'push' FOI system ensure the Information Commissioner is granted appropriate powers to regulate compliance with the legislation, and professional standards and guidelines issued under it, including empowering the Information Commissioner to impose sanctions for serious or serial agency and ministerial non-compliance with their statutory obligations under the FOI scheme.

RECOMMENDATION 78: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system:

(i) empower the Information Commissioner to make, vary and revoke a vexatious applicant declaration on the application of an affected agency (or minister) or on the Commissioner's own initiative

(ii) prescribe the grounds for making a vexatious applicant declaration—namely, repeat requests for information by the same applicant or applicants acting in concert which are manifestly unreasonable or an abuse of process

(iii) establish a right of review to the Victorian Civil and Administrative Tribunal in respect of a vexatious applicant declaration of the Information Commissioner.

RECOMMENDATION 79: That legislation establishing Victoria's new third-generation 'push' FOI system introduce offence provisions for:

(i) destroy, conceal or alter any record of government information for the purpose of preventing disclosure under FOI legislation

(ii) wilfully obstruct access to information under FOI legislation, including directing or improperly influencing an FOI decision-maker to decide a request contrary to the requirements of the Act

(iii) wilfully obstruct, hinder or resist the Information Commissioner, Public Access Deputy Commissioner or member of staff of the Office of the Victorian Information Commissioner, modelled on s 63F of the *Freedom of Information Act 1982* (Vic).

RECOMMENDATION 80: That the Victorian Government review the desirability and feasibility of making the position of Information Commissioner an independent officer of Parliament.

RECOMMENDATION 81: That the Victorian Government review the desirability and feasibility of the Victorian Independent Remuneration Tribunal setting and reviewing the remuneration of the Information Commissioner and Public Access Deputy Commissioner.

RECOMMENDATION 82: That the Victorian Government review the desirability and feasibility of directly funding the Office of the Victorian Information Commissioner through Parliament's appropriation, similar to the funding arrangements of the Independent Broad-based Anti-corruption Commission, Victorian Ombudsman and Victorian Inspectorate.

RECOMMENDATION 83: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(1)(b) and (c) of the *Freedom of Information Act 1982* (Vic) and clarify that the respondent to the proceeding is the relevant agency.

RECOMMENDATION 84: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(3D) of the *Freedom of Information Act 1982* (Vic) and clarify that the respondent to the proceeding is the original FOI applicant.

RECOMMENDATION 85: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system preserve the review rights in s 50(3)–(3A) of the *Freedom of Information Act 1982* (Vic) and clarify that, where, as a result of machinery of government changes,

(i) a primary agency has possession and control of information of a legacy agency the subject of a review decision of the Information Commissioner; and

(ii) the primary agency would have a right to apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the Information Commissioner's decision under s 50 of the *Freedom of Information Act 1982* (Vic),

the legacy agency has standing to apply to VCAT as an affected third party.

RECOMMENDATION 86: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system clarify that, in a review conducted by the Victorian Civil and Administrative Tribunal of a deemed refusal decision of an agency, the Tribunal will, for the purpose of deciding the review, consider the actual decision of the agency.

RECOMMENDATION 87: That legislation establishing the review regime in Victoria's new third-generation 'push' FOI system clarify that the Victorian Civil and Administrative Tribunal cannot consider the adequacy of an agency's search for documents in connection with a request, except in respect of the Tribunal's review of a deemed refusal decision where a 'documents do not exist or cannot be located' decision is made by an agency before the review is heard or decided.

RECOMMENDATION 88: That legislation establishing Victoria's new third-generation 'push' FOI system include a statutory requirement for the Act to be reviewed four years after its commencement, and every five years thereafter.

RECOMMENDATION 89: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system ensure that there is no application fee.

RECOMMENDATION 90: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system ensure that no access charges are imposed for requests for personal or health information.

RECOMMENDATION 91: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system limit access charges for non-personal and non-health-related requests to the cost of copying and delivering the information sought, and ensure that the first 20 pages can be accessed free of charge.

RECOMMENDATION 92: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system contain a general discretion to waive, reduce or refund any access charges payable under the Act, supported by binding FOI Guidelines issued by the Information Commissioner on decision-making with respect to the fee-waiver provision (including a straightforward standardised threshold for qualifying for the waiver that includes legal aid clients).

RECOMMENDATION 93: That the Victorian Government, as part of the Treaty negotiations, consider how structural barriers to Aboriginal people and Aboriginal Community Controlled Organisations (ACCOs) accessing government-held information under the FOI scheme are best overcome.

RECOMMENDATION 94: That legislation establishing the formal-release mechanism in Victoria's new third-generation 'push' FOI system empower the Information Commissioner to review agency (and ministerial) decisions to impose an access charge and the quantum of such charges.

RECOMMENDATION 95: That the public's right to request a correction or amendment of personal information under the *Freedom of Information Act 1982* (Vic), *Health Records Act 2001* (Vic) and *Privacy and Data Protection Act 2014* (Vic) be consolidated in the *Privacy and Data Protection Act 2014* (Vic).

RECOMMENDATION 96: That the Victorian Government consolidate the Health Privacy Principles in the *Health Records Act 2001* (Vic) and the Information Privacy Principles in the *Privacy and Data Protection Act 2014* (Vic) in the *Privacy and Data Protection Act 2014* (Vic), under the regulation of the Office of the Victorian Information Commissioner.

RECOMMENDATION 97: That access to personal and health information be regulated under Victoria's new third-generation push FOI system, and that this access arrangement replace the existing fragmented access arrangements under FOI and health and privacy legislation.

RECOMMENDATION 98: That the public's enforceable access and review rights under the *Freedom of Information Act 1982* (Vic), with respect to personal and health information, be retained in legislation establishing the formal mechanism in Victoria's new third-generation 'push' FOI system, but positioned as a last resort for obtaining access to such information.

RECOMMENDATION 99: That legislation establishing Victoria's new third-generation 'push' FOI system authorise, strongly encourage and support agencies (and ministers) to release personal and health information through the informal-release mechanism as a first port of call, and establish, for that purpose, administrative access schemes for frequently requested information.

RECOMMENDATION 100: That legislation establishing Victoria's new third-generation 'push' FOI system protect FOI decision-makers from civil and criminal liability with respect to their good-faith release of information under the informal and formal release mechanisms.

RECOMMENDATION 101: That legislation establishing Victoria's new third-generation 'push' FOI system exempt from the FOI scheme information that can be accessed under the access to information regime established by s 9 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

4.5 Conclusion

This chapter has outlined how the processes for accessing information under the *FOI Act 1982* (Vic) should be reformed in legislation establishing Victoria's new third-generation push FOI system, and the regulatory powers required to effectively support the new access model.

The chapter has also outlined how access to personal and health information can be simplified and streamlined to improve efficiency, support timelier access, and ensure that it is only accessed under the formal-release mechanism in FOI legislation as a last resort.

The Committee has made recommendations to the Victorian Government to ensure that the processes for accessing government-held information are fit-for-purpose to support the new FOI system, and streamline the making and processing of requests for personal and health information.

Chapter 5
Conclusion

5.1 Freedom of Information in Victoria: from a 'pull' to a 'push' approach

This report began with a brief survey of the origins of modern Freedom of Information (FOI) legislation, which emerged in the United States in the 1960s as a response to wartime and Cold War secrecy, the rise of a consumer movement and the revitalisation of media scrutiny of government, though Sweden had these kinds of laws as early as 1766.[1]

When Victoria's *Freedom of Information Act 1982* (Vic) ('*FOI Act 1982* (Vic)') came into operation in 1983, it was itself an early and innovative development, at least among Westminster countries. The values and purposes invoked by Premier Cain when introducing the FOI Bill into Parliament of Victoria on 14 October 1982 still have relevance:

> Open government in the true sense is a central need in a democracy. People must have information to enable them to make choices about who will govern them and what policies the individuals or political parties they choose to govern, shall implement.
>
> Freedom of information is very closely connected with the fundamental principles of a democratic society ...[2]

And yet, the promise of the legislation remains unfulfilled.

Previous reviews of the FOI Act have shown that Victoria's FOI system has long been afflicted by a range of well-known problems, most of which persist, and have been the subject the Committee's attention and recommendations in this Inquiry. From the Victorian Parliament's Legal and Constitutional Committee review in 1989, to the Victorian Ombudsman's reviews in 2006 and 2011, and audits by the Victorian Auditor-General's Office (VAGO) in 2012 and 2015, many of the problems identified are familiar to members of the public, agencies and the Office of the Victorian Information Commissioner (OVIC) today. They include the heavy burden of formal FOI requests under the State's pull system; the lack of an overarching, statewide, information management framework; poor public sector record-keeping; insufficient and inadequate proactive disclosure and informal release of information; delays; overused

1 See Section 1.4.1 in Chapter 1 of this report.

2 Premier John Cain, Second Reading Speech, Parliamentary Debates (Hansard), 49th Parliament, Session 1982–83, Legislative Assembly, 14 October 1982, p. 1061.

and misused exemptions; challenges in accessing personal and health information; and dense, complex and confusing legislative provisions.[3] As VAGO concluded in 2012:

> Since FOI legislation was introduced 30 years ago, Victoria has gone from being at the forefront of FOI law and administration to one of the least progressive jurisdictions in Australia. Over time, apathy and resistance to scrutiny have adversely affected the operation of the Act, restricting the amount of information released. …
>
> The public's right to timely, comprehensive and accurate information is consequently being frustrated. The Victorian public sector's systemic failure to support this right is a failure to deliver Parliament's intent.[4]

Unfortunately, this account remains accurate. As OVIC told the Committee:

> [T]he FOI Act's 1982 pull model is no longer fit for purpose and requires a complete overhaul … The Act as currently drafted does not support a maximum amount of information being made available to the public in a timely and easy manner. The Act's out-of-date provisions do not align with how modern government operates, and the legislative drafting is technical and complex, making it hard for the public to understand and for agencies and ministers to administer.[5]

The Committee sought to evaluate the purpose, content, form and operation of the FOI Act against well-recognised international and regional laws and standards and the best practice principles distilled from them. The starting point of the evaluation was a discussion of the human right to information derived from the right to freedom of expression, which is reflected in the Victorian Constitution and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, the Committee also recognised that under international law the right to information is not absolute; it must be balanced against other human rights and important public interests.[6]

In advance of the evaluation of the Victorian FOI system, the Committee identified five guiding rationales to keep in mind when evaluating an FOI regime and devising improvements to it: transparency and accountability, participation, integrity, dignity, and knowledge and truth.[7]

More concretely, the Committee also made use of the Article 19 organisation's FOI best practice principles, which have been endorsed by the United Nations. Among them are the principles of maximum disclosure; proactive publication; commitment to open government; 'limited' 'exceptions' to the presumption of disclosure; and various process-based principles to help ensure fair, easy and affordable access to information.[8]

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3 See Sections 1.4.3–1.4.4 of Chapter 1 of this report.

4 Victorian Auditor-General's Office, *Freedom of information: Victorian Auditor-General's report*, Melbourne, April 2012, p. viii.

5 Sean Morrison, Information Commissioner, Office of the Victorian Information Commissioner (OVIC), public hearing, Melbourne, 25 March 2024, *Transcript of evidence*, p. 16.

6 *Constitution Act 1975* (Vic) s 94H; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(2)–(3). See also Sections 1.6.1 and 1.6.3 in Chapter 1 of this report.

7 See Section 1.6.2 in Chapter 1 of this report.

8 Section 1.6.3 in Chapter 1 of this report; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 7–8.

In Chapter 2, which addressed Terms of Reference (TOR) 1 and 6, the Committee began its wideranging examination of the current FOI Act's pull policy model, drawing on best practice principles and the experience of other jurisdictions, especially 'push' FOI systems (for example, the Commonwealth, Queensland and New South Wales) that prioritise proactive disclosure and informal release of information over formal requests.

From the evidence received and research undertaken, the Committee identified a range of defects with Victoria's current pull FOI system, including the burden of formal requests on agencies, increased review applications and complaints to OVIC as well as review applications to the Victorian Civil and Administrative Tribunal (VCAT), delays affecting applicants, and the cost of administration.[9]

In terms of the international standards and best practice principles, the current system does not foster maximum disclosure of information, including through proactive and informal release, and its exemptions are too broad and often used against the spirit of the right to information. The weight of evidence received by the Committee supported Victoria's move to a new, third-generation push FOI system.[10] The Committee nevertheless noted that several stakeholders[11] expressed concern that a move to a push system could result in an unhelpful loss of formality and 'rigour'[12] in the system, and increase the risk of unlawful or inappropriate release of information (compromising privacy, confidentiality and internal decision-making). However, the Committee considers that this concern can be addressed through well-designed limited exceptions in accordance with the best practice principles.[13] The Committee has therefore recommended that Victoria move from a pull to a push FOI system.

The question for the Committee then became whether the problems with the current system could be overcome by, at best, finetuning the current Act or, at worst, patching it up. Through this review, the Committee has found, as did Queensland and New South Wales in their earlier FOI reviews, that such an approach will not work.[14] Victoria's first-generation FOI cannot be repaired, or even renovated, to fit in with the third generation—it needs to be rebuilt from the ground up. The Committee has therefore recommended that the current Act be replaced by a new Right to Information Act, whose name clearly communicates the intended transformation of Victoria's FOI regime.[15]

Consistent with the push orientation of a new Act, the Committee has recommended a new objects (or purposes) provision that embodies and reflects the best practice principles, especially as they relate to the rationales of transparency, accountability,

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9 See Section 2.2 in Chapter 2 of this report.

10 See Section 2.2.1 in Chapter 2 of this report.

11 See Section 2.2.1 in Chapter 2 of this report.

12 Andrew Mariadason, Legal Counsel and Manager Medico-Legal Services, Royal Melbourne Hospital, public hearing, Melbourne, 13 March 2024, *Transcript of evidence*, p. 4.

13 Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 7–8; OVIC, *Submission 55*, 15 January 2024, p. 15.

14 See Section 2.2.2 in Chapter 2 of this report.

15 Section 2.2.2 in Chapter 2 of this report and Victorian Bar, *Submission 57*, 15 January 2024, p. 2.

participation and integrity.[16] And, in order to better encompass the nature of information in the digital age, the Committee has recommended a new, broad definition of recorded information, to be as technologically neutral as possible to accommodate inevitable developments in this area.[17]

The report then turned to the appropriateness of the exceptions (pt III) and exemptions (pt IV) in the current FOI Act. Rather than examine every provision in pts III and IV, line by line—which might have been warranted were the current Act to be repaired rather than replaced—the Committee evaluated the key provisions identified against international standards and best practice principles, with an eye on their treatment in a new push Act. Two of the critical best practice principles relevant to this undertaking were 'maximum disclosure' of information and the requirement that any authorised limited exceptions be 'narrowly drawn', interpreted and applied.[18]

Importantly, the Committee recommended that there be a range of limited exceptions in the new Act that are clearly identified, narrowly drawn and interpreted, and subject to a new three-part test in accordance with best practice. The test is underpinned by a presumption that favours disclosure of information, and which, if refusal of access is contemplated, requires an agency to demonstrate (1) that they are protecting a legitimate interest, (2) that they can establish that disclosure will cause substantial harm to that interest and, even so, (3) that this harm is not outweighed by a public interest in access. The Committee then explored the applicability of this new approach to a number of exemptions under the current Act and made recommendations for their operation as limited exceptions under the new Act.[19]

Chapter 3 addressed TORs 2, 4 and 5. The operational efficiency and effectiveness of the access regime under the *FOI Act 1982* (Vic) has been waning for some time, and the data strongly indicates that a new FOI access model in Victoria is warranted. The delays experienced by applicants with respect to the processing of their requests and review of agency decisions are chronic and systemic. Agencies, OVIC and VCAT are buckling under their ever-increasing FOI workloads, and urgent legislative reform is needed to address the problem.

The Committee explained why the current access model, including the existing proactive and informal release mechanisms in the *FOI Act 1982* (Vic), cannot be salvaged. As a 'relic of a bygone era'[20] it is not adaptable to international FOI best practice in the digital age, which promotes open government and maximum disclosure.

Accordingly, the Committee set out a way forward for the legislative reform agenda. The principal reform will be Victoria's transition to a best practice third-generation push FOI system with an access model comprising two proactive and two reactive

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16 See Section 2.3 in Chapter 2 of this report.

17 See Section 2.4 in Chapter 2 of this report.

18 Section 2.5 in Chapter 2 of this report; Article 19, *The public's right to know: principles on right to information legislation*, London, 2016, pp. 7–8.

19 See Section 2.5.3 in Chapter 2 of this report.

20 Victorian Bar, *Submission 57*, 15 January 2024, p. 1.

release mechanisms. This model will prioritise and facilitate the proactive disclosure and informal release of government-held information, and will position formal FOI requests as a last resort for obtaining access to such information.

Under the proactive release mechanisms, a lot of government information will be released without the need for the public to request it. Agencies and ministers will be required to publish prescribed information, including information of significant public interest. They will also be strongly encouraged and supported to publish other information wherever possible, such as non-personal information released to applicants through the informal and formal release mechanisms, and to continually reassess what information can be released proactively. This information will be published free of charge, in a practical, timely, easy-to-find and accessible fashion, and presented in a way that aids public understanding.

Regarding the reactive informal and formal release mechanisms, agencies and ministers will be strongly encouraged and supported to respond to requests for information informally, as a first port of call, and through the formal access regime only as a last resort. Agencies and ministers will also be protected from civil and criminal liability when releasing information in good faith. The Information Commissioner, Public Access Deputy Commissioner and OVIC staff will similarly be granted appropriate protections regarding the good-faith performance of their statutory functions and exercise of their powers.

Further, there will be a greater expectation of transparency and accountability with respect to agency and ministerial compliance with FOI legislation. Agencies and ministers will be required to keep and publish a disclosure log and Information Asset Register to improve the public's understanding of what information they hold and what information they will publish proactively and release on request. They will also be required to develop and publish a policy setting out their compliance with their statutory obligations under the various release mechanisms.

Crucial to the success of the new access model will be embedding a pro-release culture across the Victorian public sector as well as the information-management and record-keeping practices required to support a push FOI system.

Fostering a proactive release culture will be achieved through political, ministerial and executive leadership; plain-language drafting; appropriate regulatory powers, including monitoring, investigation, examination, audit and enforcement powers; sector-specific guidance and training; the roll-out of a whole-of-government information management framework; and adequate resourcing of agencies and ministers to enable them to comply with the framework and administer the FOI scheme well.

Victorian agencies' information-management and record-keeping practices are, on the whole, not fit-for-purpose to support FOI in the digital age. Improving them will require a whole-of-government approach. The starting point will be an overriding information management framework that sets out how agencies can ensure that the information they hold and create can be easily identified, accessed, searched, located, extracted and assessed for release. In this regard, especially, it will be important for the

framework to consider the impact of new and emerging technologies, such as Artificial Intelligence, on the way information is created, stored and accessed in the digital age.

Finally, data collection and reporting, especially on the proactive and informal release mechanisms, will be important in assessing the ongoing operational efficiency and effectiveness of the new access model.

Chapter 4 addressed the Inquiry's TORs 3, 7 and 8. Significant aspects of the processes in the access regime under the *FOI Act 1982* (Vic) are unnecessarily complex and difficult for FOI practitioners and the public to navigate. They are indicative of the problems than can result from piecemeal legislative reform.

Processes under Victoria's new third-generation push FOI system must be clear, simple, practical, easily understood and followed by the general public and FOI practitioners, and facilitate the timely processing of requests and review of agency decisions.

In pursuit of these objectives, the Committee set out the priorities for the legislative reform agenda with respect to the processes required to support the new access model.

The new FOI legislation will need to streamline the definition of entities subject to the FOI scheme, permit and authorise the partial transfer of requests, and ensure that statutory time frames are expressed in business days. Further, agencies and ministers will be better supported to avoid the unnecessary administrative burden of processing repeat requests, and given better statutory guidance on the applicability of the 'voluminous requests' processing exception. Finally, the streamlining of third-party consultation provisions will provide agencies and ministers with greater flexibility and discretion to consult, thereby reducing their workloads. There will also be stronger protections for agencies and ministers with respect to vexatious applicants, to ensure that they do not, to the detriment of other applicants, unfairly and unreasonably consume disproportionate FOI resources.

In line with international best practice, the application fee will be abolished and access charges limited to the costs of reproducing and delivering information to an applicant. The public will no longer be charged for accessing their own personal and health information.

Additional measures will be introduced to improve the efficiency of the external review mechanisms. For example, the Information Commissioner *and* Public Access Deputy Commissioner will have power to decide FOI review applications, and, where appropriate, to delegate that power to senior OVIC staff.

A further aspect of the reform agenda will be the need to assign to the Information Commissioner a suite of new regulatory powers to monitor and enforce agency and ministerial compliance with obligations under the new access model. This will include power to issue binding professional guidelines, standards and recommendations; to ensure that agencies take appropriate action in response to OVIC's FOI review decisions; and to impose sanctions for serious and serial agency and ministerial non-compliance.

Criminal offences will be introduced for destroying, concealing or altering government-held information to prevent disclosure under the FOI scheme; improperly influencing or directing a FOI decision-maker to decide a FOI requests contrary to the requirements of FOI legislation; deciding a request contrary to the requirements of FOI legislation; and gaining, or attempting to gain, access to another person's personal or health information by misleading and deceptive conduct. This will ensure that FOI decision-makers decide requests in a way that aligns with the spirit and intent of the new FOI legislation.

The chapter also set out a way forward to address the limitations of the current access model with respect to personal and health information. The Committee also explained why the formal release mechanism in the FOI scheme is not the most efficient and effective way of providing the public with access to their personal and health information, and recommended changes to ensure that such information can be accessed predominantly under the informal release mechanism in Victoria's new third-generation push FOI system, as a first port of call.

Agencies and ministers will also be strongly encouraged and supported to establish administrative access schemes under the informal-release mechanism in FOI legislation to facilitate the informal release of certain kinds of information, particularly personal and health information that is regularly requested but cannot be accessed under health and privacy legislation.

The Committee has made 101 recommendations to guide the introduction, building, administration and maintenance of a new FOI scheme in Victoria.

Adopted by the Integrity and Oversight Committee
Parliament of Victoria, East Melbourne
13 September 2024

Appendix A
About the Inquiry

A.1 Submissions

1	Linda Oliveira
2	Vito Guzzardi
3	Herschel Baker
4	Adam Clark
5	Kelvin Wong
6	Dr Brian Duggan
7	Disability Discrimination Legal Service
8	Save Albert Park Inc
9	Public Record Office of Victoria
10	Victorian Inspectorate
11	Confidential
12	Information and Privacy Commission NSW
13	Victorian Government Solicitor's Office
14	ACT Ombudsman
15	Victorian Legal Services Board and Commissioner
16	Office of the Information Commissioner, Queensland
17	Independent Broad-based Anti-corruption Commission
18	Victoria Legal Aid
19	The Police Association Victoria
20	Associate Professor Johan Lidberg, Professor Moira Paterson and Dr Erin Bradshaw
21	Professor Lyria Bennett Moses and Professor Toby Walsh
22	Law Institute of Victoria
23	Name withheld
24	Victoria Police
25	Liberty Victoria
26	Health Complaints Commissioner
27	Australia's Right to Know
28	Australian Lawyers Alliance
29	Nine
30	William Summers
31	Western Health
32	George Zekan
33	WorkSafe Victoria
34	Confidential
35	Elisa Woollard
36	Find and Connect Web Resource, The University of Melbourne
37	The Centre for Public Integrity
38	Peninsula Health
39	Centre for Excellence in Child and Family Welfare
40	Associate Professor Jennifer Beard
41	Melbourne Press Club
42	Family Victims of State Trustees
43	Individual Housing Providers' Association Inc.
44	Dr David Solomon AM
45	McKillop Family Services
46	Name withheld
47	Identity Care
48	Name withheld
49	Jordan Brown, Inner Melbourne Community Legal Centre, Police Accountability Project and Melbourne Activist Legal Support
50	Department of Families, Fairness and Housing
51	Municipal Association of Victoria
52	Confidential
53	Dr Reuben Kirkham

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54	Victorian Aboriginal Legal Service
55 55A	Office of the Victorian Information Commissioner (supplementary)
56	Department of Social Work, University of Melbourne
57	Victorian Bar
58	Confidential
59	Care Leavers Australasia Network
60	Victorian Ombudsman
61	The Australia Institute
62	Western Australia Police Force
63	Marion Attwater
64	Name withheld
65	Name withheld
66	Office of the Information Commissioner Western Australia
67	South-East Monash Legal Service Inc
68	Department of Health
69	Latrobe City Council

A.2 Public hearings

Monday, 26 February 2024

Davui Room, 55 St Andrews Place, East Melbourne

Name	Position	Organisation
Sonia Minutillo	Acting Information Commissioner	Information and Privacy Commission NSW
Stephanie Winson	Acting Information Commissioner	Office of the Information Commissioner, Queensland
Suzette Jefferies	Assistant Information Commissioner	Office of the Information Commissioner, Queensland
Iain Anderson	Ombudsman	ACT Ombudsman

Tuesday 12 March 2024

G6, 55 St Andrews Place, East Melbourne and via Zoom

Name	Position	Organisation
Dr David Solomon AM	–	–
Dr Danielle Moon	Lecturer	Law School, Macquarie University
Associate Professor Johan Lidberg	Head of Journalism and Media Innovation	Monash University
Professor Moira Paterson	Faculty of Law	Monash University
Professor Lyria Bennett Moses	Director of the UNSW Allens Hub for Technology, Law and Innovation	University of New South Wales

Wednesday 13 March 2024

G6, 55 St Andrews Place, East Melbourne and via Zoom

Name	Position	Organisation
Andrew Mariadason	Legal Counsel and Manager, Medico-Legal Services	Royal Melbourne Hospital
Trudy Ararat	Chief Legal Officer	Peninsula Health
Kirsten Wright	Program Manager	Find & Connect Web Resource The University of Melbourne

Monday 18 March 2024

Davui Room, 55 St Andrews Place, East Melbourne and via Zoom

Name	Position	Organisation
Dr Catherine Williams	Research Director	The Centre for Public Integrity
Mahalia McDaniel	Research Officer	The Centre for Public Integrity
Victoria Elliott	Commissioner	Independent Broad-based Anti-corruption Commission
Stacey Killackey	Executive Director – Legal, Assessment and Review and Compliance	Independent Broad-based Anti-corruption Commission
Emrys Nekvapil SC	–	Victorian Bar
Fiona McLeay	Board CEO and Commissioner	Victorian Legal Services Board and Commissioner
Susan Middleditch	Deputy Secretary Corporate and Regulatory Services	Victoria Police
Robin Davey	Manager, Freedom of Information Division	Victoria Police
Jude Hunter	Senior Legal Counsel and Manager of Freedom of Information and Privacy	WorkSafe Victoria
Rebecca Cato	Legal Counsel Freedom of Information and Privacy	WorkSafe Victoria
Nerita Waight	Chief Executive Officer	Victorian Aboriginal Legal Service
Patrick Cook	Head of Policy, Communications and Strategy	Victorian Aboriginal Legal Service
Lachlan Fitch	President, Victoria Branch Committee	Australian Lawyers Alliance
Jeremy King	Member, Victoria Branch Committee	Australian Lawyers Alliance

Monday, 25 March 2024

G6, 55 St Andrews Place, East Melbourne and via Zoom

Name	Position	Organisation
Wayne Gatt	Secretary	The Police Association Victoria
Royce Millar	Senior Reporter, The Age	Nine
Sam White	Editorial Counsel	Nine
Sean Morrison	Information Commissioner	Office of the Victorian Information Commissioner
Cara O'Shanassy	General Counsel	Office of the Victorian Information Commissioner
Jordan Brown	Freelance journalist	–

Monday, 24 June 2024

Davui Room, 55 St Andrews Place, East Melbourne and via Zoom

Name	Position	Organisation
Peta McCammon	Secretary	Department of Families, Fairness and Housing
Nicola Quin	Deputy Secretary, Corporate and Delivery Services	Department of Families, Fairness and Housing
Lisa Scholes	Manager, Freedom of Information Access	Department of Families, Fairness and Housing
Steven Piasente	Chief Executive Officer	Latrobe City Council

Appendix B
Cabinet documents exemption—comparison between Victoria and other Australian jurisdictions

Jurisdiction	Cabinet information exemption provisions	Exempt information	Non-exempt information
Victoria	*Freedom of Information Act 1982* (Vic) s 28	• official records of, or documents disclosing, Cabinet deliberations or decisions (unless officially disclosed) • documents prepared by, or on behalf of, ministers for the purpose of submission for consideration by Cabinet • documents prepared for the purpose of briefing ministers in relation to issues to be considered by Cabinet • drafts or copies of, or extracts from, exempt documents	• documents more than 10 years old • documents containing purely statistical, technical, or scientific material • documents by which Cabinet decisions are officially published
Commonwealth	*Freedom of Information Act 1982* (Cth) s 34	• official records of, or documents disclosing, Cabinet deliberations or decisions (unless officially disclosed) • documents created for the dominant purpose of submission for consideration by Cabinet *and* submitted, or proposed by a minister to be submitted, to Cabinet for consideration • documents created for the dominant purpose of briefing ministers on the above documents • drafts or copies of, or extracts from, exempt documents	• documents do not fall within the Cabinet exemption simply because they are attached to exempt documents • documents containing purely factual material • documents by which Cabinet decisions are officially published
New South Wales	*Government Information (Public Access) Act 2009* (NSW) s 14, sch 1 cl 2	• official records of Cabinet • documents prepared for the dominant purpose of submission for consideration by Cabinet (whether or not they are actually submitted) • documents prepared for the purpose of being submitted to Cabinet for Cabinet's approval (whether or not they are actually submitted or approved) • documents prepared after Cabinet deliberations or decisions disclosing information concerning them • documents prepared before or after Cabinet deliberations or decisions revealing ministerial positions recommended, considered, taken, or intended to be taken on a matter in Cabinet • preliminary drafts, parts or copies of, or extracts from, exempt documents	• documents more than 10 years old • documents do not fall within the Cabinet exemption simply because they are attached to exempt documents • documents consisting solely of factual material (unless they would reveal Cabinet decisions or determinations, or ministerial positions taken or intended) • documents approved for public disclosure by Premier or Cabinet

Jurisdiction	Cabinet information exemption provisions	Exempt information	Non-exempt information
Queensland	*Right to Information Act 2009* (Qld) s 48, sch 3 cls 1–2	• information created for the consideration of Cabinet (including for discussion, deliberation, noting with or without discussion, or decision, or consideration for any purpose including for information or to make a decision) • information disclosing consideration of Cabinet • information disclosure of which would prejudice the confidentiality of Cabinet considerations or operations • information created in the course of the State's budgetary processes • Cabinet submissions, briefing notes, agendas, minutes and decisions (or drafts thereof) • notes of Cabinet discussions (or drafts thereof)	• documents more than 10 years old • information officially published by decision of Cabinet • reports of factual or statistical information (unless they would reveal any considerations of Cabinet or prejudice the confidentiality of its considerations or operations)
Tasmania	*Right to Information Act 2009* (Tas) ss 26–27	• official records of, or documents disclosing, Cabinet deliberations or decisions (other than records by which Cabinet decisions are officially published) • records proposed by ministers for the purpose of being submitted to Cabinet for consideration • copies of the above exempt documents (or copies of parts thereof) • documents containing opinion/advice/recommendation prepared by, or on behalf of, ministers or a record of consultations/deliberations between public authorities and ministers in the course of, or for the purpose of, providing ministerial briefings in connection with official business and ministerial duties	• documents more than 10 years old • if documents were not created for the purpose of consideration by Cabinet, they do not fall within the Cabinet exemption solely because they were submitted, or proposed by a minister to be submitted, to Cabinet for consideration • if documents were not created for the purpose of ministerial briefing, they do not fall within the Cabinet exemption solely because they were submitted, or proposed to be submitted, to a minister for the purposes of ministerial briefing • documents containing purely factual information (unless they would disclose Cabinet deliberations or decisions) • Premier may voluntarily disclose information which is exempt under the s 26 (Cabinet information) exemption • Ministers may disclose information that is exempt under the s 27 (internal ministerial briefing information) exemption
Australian Capital Territory	*Freedom of Information Act 2016* (ACT) sch 1 s 1.6	• official records of Cabinet • documents revealing Cabinet deliberations (other than through the official publication of a Cabinet decision) • documents submitted, or proposed by ministers to be submitted, to Cabinet for consideration and created for that purpose • copies of, copies of parts thereof, or extracts from, exempt documents	• documents containing purely factual information (unless they disclose Cabinet deliberations that are not publicly known or Cabinet decisions that have not been officially published)

Jurisdiction	Cabinet information exemption provisions	Exempt information	Non-exempt information
Western Australia	*Freedom of Information Act 1992* (WA) sch 1 cl 1	• matter revealing deliberations or decisions of an Executive body • record (including agenda or minute) of deliberations or decisions of an Executive body • matter containing policy options or recommendations prepared for possible submission to an Executive body • matter disclosing communications between ministers on matters relating to government decisions and policy-making of a kind generally made or endorsed by an Executive body • matter prepared for the purpose of briefing ministers in relation to matters prepared for possible submission to an Executive body *or* the subject of inter-ministerial consultation on government decisions and policy making • drafts of proposed enactments • copies of, copies of parts thereof, or extracts from, exempt matter	• matter more than 10 years old • matter that is merely factual, statistical, scientific or technical (unless it would reveal deliberations or decisions of an Executive body that are not publicly known) • if matter was not created for the purpose of submission for consideration by an Executive body, it does not fall within the Cabinet exemption solely because it was submitted, or proposed to be submitted, to the Executive body for consideration
South Australia	*Freedom of Information Act 1991* (SA) sch 1 cl 1	• documents disclosing Cabinet deliberations or decisions • documents prepared for the purpose of submission to Cabinet (whether or not submitted to Cabinet), including preliminary drafts or copies of, copies of parts thereof, or extracts from such documents • briefing paper specifically prepared for a minister's use in relation to a matter submitted or proposed to be submitted to Cabinet	• documents more than 20 years old • documents do not fall within the Cabinet exemption simply because they are attached to exempt documents • documents containing merely factual or statistical information, including public opinion polling (unless they disclose Cabinet deliberations or decisions or relate to government commercial transactions being negotiated) • documents submitted to Cabinet by ministers in respect of which a minister has certified that Cabinet has approved the document for access under the *FOI Act 1991* (SA)

Jurisdiction	Cabinet information exemption provisions	Exempt information	Non-exempt information
Northern Territory	*Information Act 2002* (NT) ss 44–45	• information considered by an Executive body • information disclosing deliberations or decisions of an Executive body (other than information published in accordance with a decision of the Executive body) • record (including agenda or minute) of deliberations or decisions of an Executive body • information created for submission to and consideration by an Executive body (whether or not submitted to or considered by the Executive body) • information created for the purpose of briefing ministers in relation to matters to be considered by an Executive body • information disclosing communications between ministers about the making of a decision or the formulation of a policy of a kind generally made or endorsed by an Executive body • information created for the purpose of briefing ministers in relation to matters the subject of inter-ministerial consultation on the making of a decision or the formulation of a policy of a kind generally made or endorsed by an Executive body • drafts of exempt information • information disclosure of which would seriously damage the Territory's economy or prejudice the Government's ability to manage the economy • information disclosure of which would result in unfair benefit/detriment as a result of premature disclosure of government policy decisions relating to, among other matters, taxation, pricing, wages, government borrowing, and interstate or Commonwealth trade agreements	• documents more than 10 years old • information containing purely statistical, technical, scientific or factual material (unless it would disclose deliberations or decisions of an Executive body)

Source: *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1982* (Cth); *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas); *Freedom of Information Act 2016* (ACT); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1991* (SA); *Information Act 2002* (NT).

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Extract of proceedings

The Committee divided on the following question during consideration of this report.

Questions agreed to without division are not recorded in this extract.

Committee meeting—13 September 2024

Report adoption

Mr Ryan Batchelor MP moved that the Committee accept the revisions to the Cabinet documents section in Chapter 2, which removes the original draft text recommending the introduction of a proactive administrative release scheme for Cabinet documents, and that the result of the division be recorded in the report.

The Committee divided.

Ayes	Noes
Hon Kim Wells MP	Dr Tim Read MP
Mr Ryan Batchelor MP	Ms Rachel Payne MP
Ms Jade Benham MP	
Mr Dylan Wight MP	
Ms Belinda Wilson MP	

Resolved in the affirmative.