

29 April 2024

Royce Millar  
Senior Journalist  
*The Age*

Sam White  
Editorial Counsel  
Nine

Sean Coley  
Manager, Integrity & Oversight Committee  
Parliament of Victoria

**BY EMAIL:** [REDACTED]

Dear Sean

This is a follow up letter to our 25 March in-person presentation to the Integrity and Oversight Committee about Freedom of Information.

We note the committee's advice that our follow up should focus on case studies from our newsrooms, highlighting our concerns about the current FOI system.

FOI is important to the media's crucial role of informing the community about government decisions and workings.

But sadly, FOI in Victoria is no longer fit for purpose. Most of our journalists believe the system is broken. Reform is long overdue.

The following are case studies that highlight some of the issues you asked us to comment on.

[theage.com.au](https://theage.com.au)

717 Bourke Street, Docklands VIC 3008

Nine

ABN 60 122 203 892

## **The kind of information that journalists request through FOI**

More often than not FOI is used to gather information that should be in the public domain as a matter of course - for example basic data and research about hospitals, schools, police and the costs and environmental risks of large public projects like the Suburban Rail Loop and the Commonwealth Games.

But because so much information is kept under wraps in Victoria, the media and the wider community are forced to use FOI.

## **Examples of information sought**

### ***Case study - Sea Level story January 2024 - Royce Millar and Ben Preiss***

In January *The Age* used FOI to publish important data based on CSIRO research around the impact of sea level rise in Port Phillip Bay. The story was heavily read and contributed positively to the ongoing development of policy around climate change and rising seas.

<https://www.theage.com.au/environment/climate-change/the-suburbs-most-under-threat-from-rising-seas-revealed-20240109-p5ew21.html>

### ***Case Study - Triple Zero January 2024 - Aisha Dow***

*The Age* via FOI revealed how a proportion of emergency police calls to triple zero took more than a minute to be answered, putting lives at risk.

<https://www.theage.com.au/national/victoria/hundreds-of-triple-zero-calls-left-waiting-despite-pass-for-agency-benchmarks-20240123-p5ezd6.html>Schools July 2023

### ***Case Study - Schools - July 2023 - Robyn Grace***

*The Age* used FOI to reveal that almost half of Victoria's public students attended a government school outside their allocated catchment zone, raising questions about the relevance of the enrolment model and whether it ought to be reformed.

<https://www.theage.com.au/national/victoria/students-snubbing-school-zones-amid-calls-to-scrap-outdated-model-20230721-p5dqbc.html>

**Case Study** - COVID cases, June 2023 - Henrietta Cook

Health reporter Henrietta Cook used FOI to reveal that at least 659 Victorians had died after catching COVID-19 while being treated for other conditions in hospital

<https://www.theage.com.au/national/victoria/a-death-sentence-more-than-600-people-die-after-catching-covid-in-hospital-20230621-p5di7x.html>

**Case Study** - Catholic Church story, Feb 2018 - Royce Millar, Ben Schneiders, Royce Millar

In 2018 *The Age* broke a major story revealing that the Catholic Church in Australia held at least \$30 billion in assets, raising questions about the church's claim that it could not afford to compensate victims of sexual abuse. It was the first such revelation of the church's wealth anywhere in the world. Information for the story was sourced through months of painstaking FOI negotiations with almost 40 local councils.

<https://www.theage.com.au/national/victoria/hundreds-of-triple-zero-calls-left-waiting-despite-pass-for-agency-benchmarks-20240123-p5ezd6.html>

**Examples of how statutory exemptions are applied. Insights re options for protecting against misuse/inconsistent application/overreliance on statutory exemptions**

One of our major concerns is that we're too often denied the information we seek. Release of government information should be the norm rather than the exception, and unfortunately that's not the case.

One of the major problems is what we regard as the inconsistent application of the many exemptions used by the government to withhold information.

Journalists complain that government reasons for denying information are often unclear and/or inconsistent, contradictory and sometimes just weird. They are also overly technical.

[theage.com.au](https://www.theage.com.au)

717 Bourke Street, Docklands VIC 3008

ABN 60 122 203 892

☐☐☐Nine

Our journalists and lawyers have long noted problems and inconsistencies in the use of:

- *The personal privacy exemption (Section 33)*

Some agencies regularly rely on this exemption as a means of declining access to an entire document, whereas others will just redact names and personal information and release the balance of the document. Approaches are inconsistent.

- *The “public interest” override*

This is problematic for lots of reasons. It is applied inconsistently. Sometimes there is a focus on the interest in public disclosure, but other times that seems to be largely ignored in favour of other interests.

- *The Cabinet document exemption (Section 28)*

This exemption is broadly worded which means it can be applied to a wide range of documents. Just about any government document can be viewed as somehow contributing to a Cabinet process.

One example of this exemption being applied to resist release of information that should be made public is the Commonwealth Games example outlined further below.

We believe there should be routine, proactive release of as many Cabinet documents as possible, as is the case in New Zealand and, now, in Queensland.

- *Internal working documents (Section 30).*

Again, this exemption is applied widely and inconsistently. It seems to allow some agencies the ability to refuse access to a very wide range of documents, where similar documents might be released by a different agency.

Other exemptions we believe have been misused to block release of documents include:

- *Documents containing material obtained in confidence (Section 35)*
- *Documents relating to trade secrets etc (Section 34)*
- *Law enforcement documents (Section 31)*

**Case study - Commonwealth Games, July 2023 - Clay Lucas**

In July last year, shortly before the government announced the cancellation of the Commonwealth Games, Lucas FOI'd 12 different departments and agencies about Victoria's hosting of the games.

Of the 12 requests, none were granted in full. Partial access was granted to some documents, most of which were already in the public domain.

Lucas received multiple requests for extensions of time and, nine months later, he is still receiving requests for extensions from the two main departments involved - Jobs and Transport and Planning. Where access to the Commonwealth Games information was denied in full the exemptions cited were that various documents:

- Contained extracts from Cabinet-related document - s 28(1)(c)
- included a brief to a Minister on an issue to be considered by Cabinet - s 28(1)(ba)
- Would disclose Cabinet deliberations - s 28(1)(d)
- Were internal working documents and their release would be contrary to the public interest - s 30(1)
- Would divulge sensitive commercial information of third parties - s 34(1)(b)
- Would divulge sensitive commercial information of an agency - s 34(4)(a)(ii)

Documents of this kind are only of interest if they are released in a timely manner.

## **Case Study - West Gate, July 2023 - Annika Smethurst**

Acting on a tip about safety concerns, *The Age* State editor Annika Smethurst FOI'd the Transport Department on advice and briefs to the Roads Minister about the safety and ongoing works on the West Gate bridge.

She was refused access on multiple grounds including that the relevant documents:

- Contained information relating to the 'personal affairs' of a person - (Section 33)
- Referred to 'critical infrastructure resilience' - Section 29A(1B) noting the national security risks of releasing information about the West Gate bridge.

## **Politicisation of FOI**

FOI decisions are supposed to be made by independent FOI officers. But most reporters are sceptical that this is how the system really works.

Reporters have noted a trend of communications staff - especially those in the Premier's Media Unit - quizzing them about their FOI requests.

## **Case study - FOI 'wastes' government time**

One of our senior reporters has reported being questioned by a government communications officer about FOIs she had submitted, including about the "angle" of her story and what she was "really" looking for.

The same *Age* reporter was made to feel bad recently when an agency accused her of being on a 'fishing expedition' and wasting the agency's valuable time.

## **Case Study - Sea Level Rise**

[theage.com.au](https://theage.com.au)

717 Bourke Street, Docklands VIC 3008

Nine

ABN 60 122 203 892

In some cases it also appears governments use media FOI requests to their advantage.

We mentioned above the release of the sea level rise data for Port Phillip Bay in January. Reporters were surprised that soon after they lodged that FOI they received an unusually positive response from FOI officers stressing the agency's intention to release the information within the statutory 30 day deadline.

In fact the government timed an announcement to coincide with the publication of a story based on the report released to *The Age* through FOI.

## **Further confusion**

Other reasons for denying release of documents often seem to defy common sense.

Examples include the denial of documents because their release may encourage "unnecessary public debate" or because "disclosure would be likely to inhibit frankness and candour". We have multiple examples of both.

### **Case Study** - *Education Dept balancing for and against release, June 2023* - Adam Carey

In April, 2023, *The Age* education editor Adam Carey FOI'd the education department about a study of teaching literacy in Victorian primary schools,

Carey received a decision on June 19, 2023 granting access in part to two documents but which redacted most of the report's findings, and all of its recommendations.

The department's FOI manager found that while disclosure would "inform debate on a matter of public importance" and "contribute to innovation and the facilitation of research", "disclosure would be likely to inhibit frankness and candour in the making of communications".

**Case study** - *The City of Melbourne and “personal crusades”, Feb 2024 - Clay Lucas*

Recently our colleague Clay Lucas was denied information by the City of Melbourne about one of Melbourne’s most important heritage buildings on the grounds he was running a “particular personal crusade”.

Commentary like this is extremely unhelpful. Firstly, it maligns the journalist’s work. Secondly, and more importantly, the journalist’s intention in making the FOI request should be irrelevant to the decision-maker.

**Delays**

For the media, almost as important as the release of the information itself is that release occurs in a timely manner. Information is of little use to the public if it is out of date and irrelevant.

OVIC statistics show that the number of FOI decisions made on time is declining fast.

**Case study** - *Victoria Police, March 2024 - Michael Bachelard*

Last month senior *Age* journalist Michael Bachelard was informed by Victoria Police FOI officers that there was now an average wait for a response of 36 weeks after the due date.

**Experience of VCAT**

Worse still are the resulting delays experienced at OVIC and VCAT with both agencies simply unable to cope with the surging number of complaints and applications.

In January we were told that VCAT had essentially put all FOI matters on hold indefinitely due to a lack of members trained to hear such matters.



# THE AGE

INDEPENDENT. ALWAYS.

The effect of the delays at OVIC and VCAT is that FOI applicants have no real choice but to accept long delays, and extensions sought, by agencies.

We thank you for the opportunity to present to the committee and look forward to a major overhaul of FOI in Victoria to help improve the public's right to access information.

Yours Sincerely,

Royce Millar and Sam White.

[theage.com.au](http://theage.com.au)

717 Bourke Street, Docklands VIC 3008

 **Nine**

ABN 60 122 203 892



13 May 2024

Mr Sean Coley  
Committee Manager  
Integrity and Oversight Committee  
Parliament House  
East Melbourne VIC 3002

By email: [ioc@parliament.vic.gov.au](mailto:ioc@parliament.vic.gov.au).

**Nine's response to further questions of regarding the Inquiry into the *Freedom of Information Act 1982 (Vic)* (Inquiry)**

We refer to your email dated 3 May 2024 in relation to further questions from the Integrity and Oversight Committee (**Committee**) on freedom of information (**FOI**) laws that were taken on notice. Specifically, the Committee sought Nine's further submission on:

1. the Cabinet documents exemption, including where the line might be drawn on that exemption; and
2. the potential benefits and drawbacks of a tiered system for prioritising the processing of FOI applications, favouring media-related requests.

Nine provides the following further information.

**1. Cabinet documents exemption**

Nine believes the scope of the Cabinet in confidence exemption is too wide and in some circumstances allows the withholding of information that could and should be publicly available.

We acknowledge the policy justification for the cabinet in confidence exemption and understand that in some circumstances Cabinet confidentiality is appropriate, including to allow and encourage frank discussion and debate among Cabinet members.

However, Nine notes positive reforms in other jurisdictions that have made Cabinet workings more transparent while protecting confidentiality where appropriate.

Unlike Victoria for example, New Zealand's Official Information Act does not exempt Cabinet documents.

Instead, it requires that information be made available unless there are good reasons to withhold it, including: conventions protecting ministerial responsibility and for the 'frank expression of opinion' by or between ministers and between ministers and public servants. The effect of this system is that it places the onus on the FOI entity to establish the "good reasons for withholding" information. <sup>1</sup>

---

<sup>1</sup> New Zealand Official Information Act

We note also that in mid-2022, the Queensland Government vowed to implement recommendations by the Coaldrake Review, including the establishment of a policy requiring certain Cabinet documents to be pro-actively disclosed (subject to reasonable and defined exceptions).

Nine supports the removal of the absolute exemption for Cabinet documents and for decisions on disclosure to be made on a case-by-case basis.

We believe an approach similar to that in New Zealand would better accord with the objectives of the FOI Act and government commitment to transparency and integrity.

## 2. Tiered system

Nine does **not** formally advocate for a tiered system of FOI. Rather, it considers the existing 30 day time limit<sup>2</sup> for responses to FOI requests is reasonable and appropriate when complied with.

Unfortunately, however, as we have outlined in earlier submissions, Nine's experience is that the 30 day time limit is regularly not met, leading to unreasonable and extended delays. For that reason, we consider the Committee's priority should be for FOI entities to respond within the 30 day time limit, rather than overhauling this aspect of the system.

If the Committee is of the view that the 30 day time limit is unworkable given the number of FOI requests that are being made and the scope of information sought, then a tiered system might allow FOI entities to better manage resources by triaging and prioritising applications based on the urgency of the application.

To assist the Committee, below are some ideas for how a tiered system to FOI might operate, in the event the Committee found that such a system is appropriate:

1. At the time of making an FOI request, the applicant identifies themselves as being one of the following categories:
  - a. An individual or their legal representative seeking information about themselves for the purpose of a legal action that is subject to a statutory imposed limitation period; or
  - b. An individual seeking information about themselves for any other purpose; or
  - c. A journalist seeking information for the purpose of public interest news reporting; or
  - d. An individual or organisation seeking information for any purpose other than those outlined in (a), (b) or (c).

---

<sup>2</sup> Section 21 of the FOI Act.

2. The FOI entity must respond to the application within the time limit specified (possible time limits are referred to in the table below), or seek a reasonable extension of time that is rationally connected to the scope of the information sought.
3. If the FOI entity does not respond to the application within the time limit specified and an extension is not granted by the FOI applicant, the FOI decision is a “deemed refusal”, and can be the subject of an application for review under existing review mechanisms (i.e. review to the OVIC or review to the VCAT).

### **Possible time limits for responses to different tiers of FOI applications**

<b>Category of FOI applicant</b>	<b>Time limit</b>
Individual seeking information for legal proceedings	15 days
Individual seeking information about themselves	45 days
Journalist seeking information for public interest reporting	30 days
Individual or organisation seeking information for any other purpose	60 days