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## Leadership in Information Rights in Victoria - The National Public Sector Managers and Leaders Conference

**Speaker:** Sven Bluemmel, Information Commissioner

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### Introduction

Good afternoon everyone and thank you to Antony and the organisers of this year's Public Sector Managers & Leaders Conference for allowing me the opportunity to speak to you today.

I would like to start by acknowledging the Wurundjeri people of the Kulin Nations as the Traditional Custodians of the land on which we are meeting today. I would also like to pay my respects to their Elders, past and present, and the Elders from other communities who may be here with us today.

I am delighted to be here to speak with you as Victoria's inaugural Information Commissioner. Some of you may ask "what is an Information Commissioner and why do we need one?" Well, many of you will no doubt be familiar with the concept of an "Information Minister". This is usually a role in a fundamentally undemocratic and totalitarian regime whose role it is to ensure that the people don't have access to any information. Or, more accurately, to ensure that the people only have access to the information that suits the undemocratic and totalitarian regime.

I am pleased to say that my role is, in many ways, the complete opposite.

The Office of the Victorian Information Commissioner, or OVIC, has combined oversight of FOI, privacy, and data protection. It combines the functions of the previous Office of the Commissioner for Privacy and Data Protection and the Office of the Freedom of Information Commissioner.

The establishment of OVIC signals a new direction for engagement with public sector agencies and entities to assist them in information management issues and to help drive systemic and cultural change.

To quote from the second reading speech of the Bill that ultimately established OVIC:

*The creation of this new office will provide more proactive and integrated FOI, privacy and data protection leadership in Victoria, particularly by driving the cultural shifts necessary to improve the way government manages and provides access to information.*

It also means we can build a consistent regulatory approach across all three areas.

I am assisted in my role by two Deputy Commissioners appointed by the Governor. Sally Winton is the Public Access Deputy Commissioner responsible for Freedom of Information. Rachel Dixon is the Privacy and Data Protection Deputy Commissioner. Together, Sally, Rachel and I are supported by about 50 staff.

The theme for this year's conference is "The ever-changing face of Leadership". I would like to address this theme by referencing OVIC's role in providing leadership, oversight and guidance in the evolving space of information rights.

## Information Rights in the Modern World

I will start by exploring the role and importance of information rights in the modern world. It is tempting to see information rights as one of those first world luxuries to which we can only afford to pay any attention because, for most of us, our basic survival needs of food, shelter and the like are met. And this is true. However, a similar argument applies to many rights that we hold dear as being hallmarks of a free and fair modern society. This includes rights to freedom of expression and religion, the right to a fair trial, equality before the law and protection from torture or inhuman treatment. I don't think that anybody would seriously argue that these rights are not important.

Most of you will, of course, recognise the rights I have just listed as being enshrined in the Victorian Charter of Human Rights and Responsibilities. A further right enshrined in the Charter is the right to privacy.

All of this is a recognition that information rights matter to us as individuals and as a society. That is not to say that these rights are unconditional or absolute. But we all know that an impulsive tweet or a regrettable photo on social media can have lasting effects on a person's reputation and future opportunities. I am immensely grateful that my own teenage years, which were not universally characterised by calm and impeccable judgment, occurred at a time before social media and the surveillance devices that we all carry in our pockets became ubiquitous.

I do not think it an understatement to say that information rights are as important to an individual's ability to participate meaningfully in our modern society as are the right to freedom of expression or, for adult citizens, the right to vote.

## An Overview of Information Rights in Victoria

What, then, is the current state of information rights in Victoria? To answer this question, I will turn to each of the three domains of information rights under my office's remit.

Starting first with information privacy. Like most, but not all, Australian jurisdictions, Victoria has legislation that requires State and local government agencies to adhere to a set of Information Privacy Principles, or IPPs, when collecting, storing, using, disclosing or destroying personal information about individuals. In our case, these obligations are enshrined in the *Privacy and Data Protection Act*.

This is complemented by Commonwealth legislation that imposes similar obligations on Commonwealth government agencies and much of the private sector throughout Australia. Importantly, this legislation allows for an independent body to hear and resolve disputes about interferences with a person's privacy. In Victoria, my office fulfils that function.

The Victorian *Privacy and Data Protection Act* also establishes the Victorian Protective Data Security Framework, or VPDSF. That framework requires agencies to comply with 18 Victorian Protective Data Security Standards that have been endorsed by the Special Minister of State. Starting in August this year, and every two years thereafter, agencies will need to provide a high level Protective Data Security Plan to my office, together with an attestation on behalf of the head of the agency about the agency's protective data security activities.

Finally, the *Freedom of Information Act* provides a public right of access to documents held by State and local government agencies, statutory authorities and other public bodies. This is not an absolute right, but is subject to a number of exemptions to account for those situations where, in the opinion of Parliament, the public interest in transparency is outweighed by other valid interests such as the protection of personal privacy. Again, the legislation allows for my office to undertake independent reviews of agency decisions as to whether particular documents are exempt from disclosure or not.

As I have already noted, last year the Victorian Parliament passed legislation that made substantial changes to the oversight of freedom of information, privacy and data protection. From 1 September last year, all

three domains are now administered and overseen by my office. Those changes also provide my office with substantial additional powers, especially in relation to my review of agency FOI decisions.

### **My Office's Regulatory Philosophy**

As an independent regulator with substantial legislative powers, much will depend on how we go about our work and what agencies can expect from our approach.

My vision for OVIC is to be a regulator that engages constructively with agencies to achieve the legislative outcomes that have been entrusted to us by Parliament – while maintaining our independence and impartiality.

I want to ensure that agency practices in privacy, data protection and information access are consistently improving, ensuring that Victoria's approach to handling information is as robust as possible.

The way I foresee doing this is to make it as easy as possible for agencies to do the right thing.

While a regulatory body has an important statutory role to play, it's my intention that our engagement with government and agencies is focussed on support, guidance, and constructive feedback. I am pleased to say that, so far, agencies are seeking our views on early drafts of new legislation regarding privacy impacts, and agencies are self-reporting suspected data breaches to the Office to seek advice on how to respond. OVIC welcomes the opportunity to work with Victorian agencies in a positive and collaborative manner and it has been encouraging to see the agencies that we have worked with regard us as an enabler for their objectives, rather than as a regulator who delights in punishing them when they do something wrong.

However, to work, this kind of regulatory approach does place some demands on how agencies deal with us.

We will be as collaborative a regulator as agencies allow us to be. Agencies that are open with us about their issues will find in us a regulator that works with them to help find a solution. For agencies that are responsive to our needs we will make allowance for the challenges they will invariably face from time to time.

However, if we encounter concealment, delaying tactics, and the use of technical arguments to defend the indefensible – I will use my statutory powers to call out these practices for what they are.

The approach we want to take is about collaboration and capability development. So it is up to agencies which version of this regulator they will be working with. And to agencies that are unsure how we may respond to how their organisation plans to deal with a certain issue – I encourage them not to send us a letter in a month's time but to call us up today and work it through with us.

### **OVIC's Vision for FOI, Privacy and Data Protection in Victoria**

Let me turn now to how this may all look in five years' time if we do it well, starting with freedom of information.

In summary, through government agencies working with OVIC, there will be improved outcomes for applicants under the FOI Act in timeliness, convenience and informality. More information will be proactively released, other information will be released upon informal request and the FOI process will be used as a last resort only.

Professional standards developed by OVIC will provide clear guidance for agencies. OVIC will provide the highest quality of training and guidance to agencies, as well as assistance to members of the public. This will be done without charge.

In short, a culture will develop where it gets easier and easier to do the right thing in providing access to information held by government. Or, looking at it from another angle, it will get harder and harder to do the wrong thing. And, if one does choose to do the wrong thing, it will be just about impossible for an agency to defend that choice.

That is the vision. Our current challenge is to find a way of achieving it with our available resources. Of course, that is a challenge that we all face.

### Facilitating Information Release

Let me dig a bit deeper.

OVIC is working to ensure that the process of obtaining access to information is as easy to navigate as possible for individuals and agencies.

My impression is that while the majority of agencies are approaching the FOI Act with a view to releasing as much information as possible, some agencies are still devoting considerable effort to finding loopholes and adopting technical approaches to avoid their obligations under the FOI Act or delay reviews by my Office.

I encourage agencies to adopt a more flexible, less technical approach to the FOI Act.

There are significant gains to be made by agencies proactively identifying opportunities for 'routine' or 'administrative' release regimes.

Nothing in the FOI Act intends to discourage agencies from publishing or giving access to documents outside of the FOI Act. In fact section 16 provides for making the maximum amount of information available to the public promptly and inexpensively.

With the proliferation of digital records, it is timely for OVIC to work with agencies to encourage them to develop their digital information management systems so that they appropriately identify, value, manage and consider access to information at the time of its collection or generation. This holds enormous potential benefits for agencies, including enabling agencies to be more responsive to formal and informal requests for access, to better leverage the value of that information, and to demonstrate their commitment to being open and accountable.

There is scope for agencies to provide more comprehensive and detailed information about their information holdings, and to encourage applicants to seek access without making a formal FOI request, where it is appropriate to do so.

My experience has been that this will improve outcomes for the community, as intended by the FOI Act and the Parliament, and enable agencies to better focus their FOI resources.

### Expanded training and resources

Looking next at training and resources.

We see OVIC as having a major role in providing regular general and tailored face-to-face training to agency officers on FOI and privacy administration, exemptions and administrative decision making.

OVIC already has a range of regular forums, training and education and agency guidance materials to assist agencies to improve their practice at an agency level.

We are currently working on enhancing our suite of online training, including webinars, e-modules and information resources, such as fact sheets and e-bulletins, and to make them available free of charge.

## Development of Professional Standards

Another of my key priorities will be the development of and consultation on new Professional Standards under Part IB of the FOI Act.

The purpose of Professional Standards is to ensure greater public access to government held information, by providing agencies with clarity, and making them accountable for acting consistently with the pro-disclosure object of the FOI Act.

Principal officers will be directly responsible for ensuring that all of their staff, not just FOI officers and units, are aware of and comply with the Professional Standards. This significant amendment recognises that access to information held by Victorian agencies is a shared responsibility.

I consider the Professional Standards will be a useful tool to improve administrative FOI practices by giving agencies clarity and guidance. The precise topics to be covered by the Standards, and their content, will be determined over time and will be informed by consultation with agencies.

In the FOI space, OVIC too needs to work smarter to meet increasing demands on our Office. OVIC has seen a 40% increase in the number of applications for review and complaints to our Office in 2016-17 on the three previous years. This has continued into the current financial year.

Our Office is implementing a range of measures to improve the timeliness and efficacy of our external review and complaints process.

These measures include a greater focus on informal resolution and early finalisation of review and complaint matters through direct and prompt engagement between OVIC, applicants and agencies. To date, this has resulted in a significant reduction in the number of files progressing through to a formal review or complaint. Those matters that are proceeding to a formal decision are, more often than not, being narrowed in scope, and are informed by better information about what has motivated a particular request for access – resulting in better decisions.

We are also reducing the length and complexity of our Notices of Decision, wherever possible, so that applicants and agencies receive a decision and access to information or their review rights without undue delay.

## **Information Privacy**

I now move to the vision for information privacy.

Agencies' obligations under the *Privacy and Data Protection Act* need to be considered in light of the immense value of personal information to government and the private sector alike.

Much of the most valuable data that government has access to contains personal information of individuals. Used appropriately, this information enables government agencies to make informed decisions and provide better policy and service responses to the issues of the day.

The Productivity Commission's Report on Data Availability and Use, which was released in March last year, highlighted that the majority of the data held by Australian government agencies is not being fully utilised.

But there is another side to the coin – it can't just be about what we as government agencies can get from the information.

Upholding the privacy of an individual's personal information is paramount for a number of important reasons.

1. Privacy, as I have already mentioned, is recognised as a human right, including under the *Victorian Charter of Human Rights and Responsibilities*.
2. There are significant economic and social benefits in establishing strong relationships based on transparency and trust with the public.
3. People need to feel secure in the knowledge that government and the public sector are handling their information appropriately. That confidence, in turn, builds the social licence given to Government to undertake these activities as the public has trust in the public sector's stewardship of their personal information.
4. Finally, the Information Privacy Principles, while based on privacy, are in effect just good and respectful information management practices, which when in place assist a more structured approach to information management.

A challenge for any organisation, whether public or private, is knowing how to reap the social and economic benefits of all of this information while establishing strong privacy and security protections.

Technology further enhances this challenge. It creates new uncertainties around how personal information is to be handled in accordance with privacy law. This is evident through big data, Internet of Things devices, artificial intelligence and block chain technology.

Alongside the technological issues, experience tells us that organisations are also grappling with more traditional privacy challenges that transcend technology. This includes information sharing, de-identification, and understanding the privacy obligations that carry through to outsourced service providers.

We are working towards facilitating closer working relationships with agencies to assist them in meeting their privacy obligations and assisting them to achieve their information sharing objectives in a privacy-enhancing way.

We want agencies to utilise us in planning their projects and building in privacy protections, and to seek our advice and assistance where required.

OVIC will facilitate more robust advice for agencies, and cement an integrated approach to information management across the public sector. When agencies seek privacy advice from OVIC, our response will not only be guided by privacy but will also be provided through a data protection and public access lens.

## **Data Protection**

When it comes to the vision for data protection, it will not surprise you that my focus is, again, on OVIC working with agencies to improve the level of practice within agencies. Note that I am expressly aiming for improvement, not perfection. The nature of data protection and the constantly evolving threat environment means that aiming for perfection is meaningless. Even if it could be done, today's perfection would be vulnerable tomorrow. And also note that I refer to improving *practice*, not just systems or technology.

My vision is that the Victorian Government effectively manages protective data security risks within the Victorian public sector. I see this being done through a risk based approach that is the hallmark of the Victorian Protective Data Security Framework.

The Framework seeks to encourage cultural change so that protective data security practices are reflected in everyday business operations, and all agency personnel take a shared responsibility. It has been developed to help public sector organisations manage protective data security risks by:

1. Identifying information assets
2. Assessing the value of information
3. Identifying and managing protective data security risks
4. Applying security measures
5. Enhancing their protective data security capability; and
6. Creating a positive security culture.

While OVIC aims to establish data security as an integral and natural element within an agency's information management culture, I recognise that a partnership approach to the roll out of the Framework and the Standards is critical to their success.

Following consultation with agencies, OVIC has refocussed its work in this area to develop a robust and consultative governance model to ensure we fully understand the sector's perspective as we implement the Framework and the Standards. My office's guidance material and reporting requirements placed on agencies will only lead to meaningful and positive change if those materials are respected as having been built on a solid foundation of recognising agency business realities. To ensure that this is the case, we need to talk to agencies. At all levels of their business. OVIC's data protection team has been doing exactly that.

## Leadership

What does all of this have to do with leadership? I would like to answer that by drawing out four key lessons that I have learnt so far.

The most important leadership lesson I have learnt in this space is the importance of being clear about *why* we do things. Why have privacy laws? Why have a legislated right of access to government information? Why have a whole of government approach to data protection? Why have an independent regulator? I believe that I touched on my answers to these questions earlier in my talk. But the leadership lesson for me is that OVIC's answers to these fundamental questions is vital if we are to make a difference.

The second lesson is that it is important to have a clear vision and to communicate that vision broadly. OVIC is currently working on a clear expression of our vision as part of our strategic planning process. Consistent themes are emerging strongly and I have touched on them already.

The third lesson is that our vision will not become reality without building trust in OVIC. As a regulator, building trust is a complex exercise. We need to be clear about what trust means in our particular context. For example, I want government to trust that OVIC will engage constructively with agencies in discharging its functions. But I do not want government to trust that OVIC will always do what government wishes. That would, of course, be inappropriate and erode trust with the community.

I would also like agencies to trust that OVIC will discharge its oversight and review functions fairly and exercise good judgment within the law.

Similarly, I would like the community to trust that OVIC acts independently of government and its agencies, and in accordance with the objects of our legislation. But that cannot mean that we will always find in favour of the member of the public who challenges an agency decision or makes a complaint. Instead, it means that the public trusts OVIC to make decisions based on merit without fear or favour, while affording

all parties the right to have their arguments heard by an impartial decision maker.

The final lesson is a more personal one. And that is that, in order to achieve good things, you have to work with good people. But having good people is of no use if they're not allowed to utilise their skills and judgment. If you're going to micro-manage everything your staff do, then you may as well save the taxpayer a whole bunch of money and do it all yourself.

### **Closing remarks and questions**

In closing, let me say that OVIC has a lot to do, but my colleagues and I are up for the challenge. We thrive on the opportunity to shape the best possible future for information rights in Victoria. We know why we are here, what we are trying to achieve and how we will go about it. We also trust that those in the audience representing Victorian State and local government agencies will work with us constructively and in an environment of mutual respect to help make it all a reality.

Thank you.