

Sir Rupert Hamer Records Management Awards 2018 - Keynote

Speaker: Sven Bluemmel, Information Commissioner

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Introduction

Distinguished guests, ladies and gentlemen, good evening. It is a privilege to be here for the Sir Rupert Hamer Records Management Awards, particularly in such esteemed company.

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. The Orwellian "Ministry of Truth" comes to mind.

I am pleased to say that my role is, in many ways, the complete opposite. I am also pleased to say that Victoria does not have a Ministry of Truth.

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. In this regard, my office will work closely with the Public Records Office of Victoria as the work of our two organisations is highly complementary.

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.

What do FOI, privacy and data protection have to do with public records and records management? A great deal, as it turns out. I'm sure the audience assembled here tonight will not be at all surprised by that. Let me explore that relationship now.

Information Rights in the Modern World

I will start by looking at 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.

The Role of Public Records

The link between those three domains and public records will already be apparent. The *Public Records Act*, and the work of the Public Records Advisory Group and the Public Records Office of Victoria are a vital foundation to all of the information rights I have mentioned.

Good record keeping will respect and support privacy rights while poor record keeping will do the opposite.

When it comes to freedom of information, granting access to government documents is only possible if those documents exist and are accessible. Witness the 1982 episode “the Skeleton in the Cupboard” from that classic public sector training resource called “Yes Minister” where, upon being told by Sir Humphrey Appleby that certain documents being sought by a newspaper could not be provided as they were lost in the floods of 1967, Minister Hacker asks whether 1967 was a particularly bad winter. Sir Humphrey famously replied that “No, [it was] a marvellous winter. We lost no end of embarrassing files.”

While the particular example is amusing, the point is entirely serious. Good government requires accountability. Accountability requires transparency. Transparency requires good recordkeeping.

But accountability is not the only reason for good recordkeeping. I would like to touch on a few more reasons, each powerful in their own way.

In a historical context, archives in particular can be profoundly moving. During a recent holiday, my family and I visited the National Archives in Washington DC. Under the watchful eye of security, and through display cases that were no doubt bulletproof, we saw the Declaration of Independence, the US Constitution and its first ten amendments, known as the Bill of Rights. Even my daughter, who could have been forgiven for asking why she wasn’t born into the normal kind of family that goes to Disneyland on its holidays instead of touring civic institutions, seemed to sense that she was in the presence of something very important.

Of course we need not travel half way around the globe to be moved by documents that changed the world. Canberra is home to one of only two exemplifications of Magna Carta held outside the United Kingdom. Closer to home, I have been given a personal tour of the wonderful treasures held in the Victorian archives collection under the care of Justine Heazlewood, our Public Records Office Director and Keeper of Public Records here in Victoria. These archives tell the story of Victoria and its people, in all its messy humanness.

Imagine if public servants of years past had not kept good records. We would all be poorer for it.

But records are not just about being able to study the past. At a big picture level, strategic decisions are best made by taking into account high quality information. Information to support a decision on transport infrastructure may include demographic information, historical and current traffic data, citizen preferences, biodiversity surveys, geotechnical data and the like. Information about the success or otherwise of similar previous projects will also be invaluable. After all, it is said that those who fail to learn from history are doomed to repeat it.

Similarly, bringing together information from multiple sources has the potential to multiply its value. This can be used to make better planning decisions but also to prevent or minimise the potential for harm to vulnerable members of our society. Recent examples of such efforts in Victoria include the sharing of information between agencies to prevent family violence or to identify and protect children at risk of serious harm.

On a very personal level, access by those who have left institutional care to records about their experience can be tremendously important to those individuals. I was privileged enough to be in the audience when Commissioner Andrew Murray, of the Royal Commission into Institutional Responses to Child Sexual Abuse, delivered the 2016 Geoffrey Bolton Lecture at the State Records Office of Western Australia. The title of his lecture was “Children In Need: Why Records are Central to Identity and Justice”. The lecture is powerful, it is readily available online and I commend it to anybody with an interest in the importance of records.

In his lecture, Commissioner Murray focussed strongly on the importance of individual identity. He stated that “If those in care lose identity, and they later search for identity, then they will search for records. The search for one leads to the search for the other.”

I know that the Department of Health and Human Services here in Victoria is well aware of this need and has, for quite some time and indeed since before the establishment of the Royal Commission, been actively working towards a system of allowing appropriate access to care leaver records.

In my work as Information Commissioner, I see the importance of records to real people every day. But this importance can come about in ways that are seemingly contradictory. In the FOI jurisdiction, I see the benefits that can come from disclosure. In the privacy and data protection jurisdictions, I see the risks of inappropriate disclosure.

But it is my strong opinion that these risks and benefits can usually be reconciled. This requires an open mind, a willingness to engage with complex issues and a collaborative approach.

OVIC’s regulatory approach

To this end, my office is aiming 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 is 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 my 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 that delights in punishing them when they do something wrong.

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.

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 knowingly 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. However, I am very pleased to say that this week's State Budget has furnished my office with the resources to establish OVIC as an effective and proactive regulator in this space.

I will now highlight some of the key initiatives that we propose to pursue.

Facilitating Information Release

On facilitating information release, 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 is 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.

In the FOI space, OVIC too needs to work smarter to meet increasing demands on our Office. We have 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.

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 government 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. I need only say the words Facebook and Cambridge Analytica to highlight this. While those are high-profile recent examples, they are certainly not alone.

Technology further enhances the privacy 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. Very topical in this space is the use of biometrics such as facial recognition.

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.

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 refocused 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.

Closing remarks

In closing, just in case it is not already obvious from my remarks, let me say that records are important. They are the lifeblood of society and are vital to transparency, accountability and personal identity. If we manage records well, we have the ability to deliver good government. If we manage records poorly, we do not.

Tonight, we will celebrate excellence in this important area and all finalists and winners deserve our thanks and praise. Congratulations to all.

Thank you.