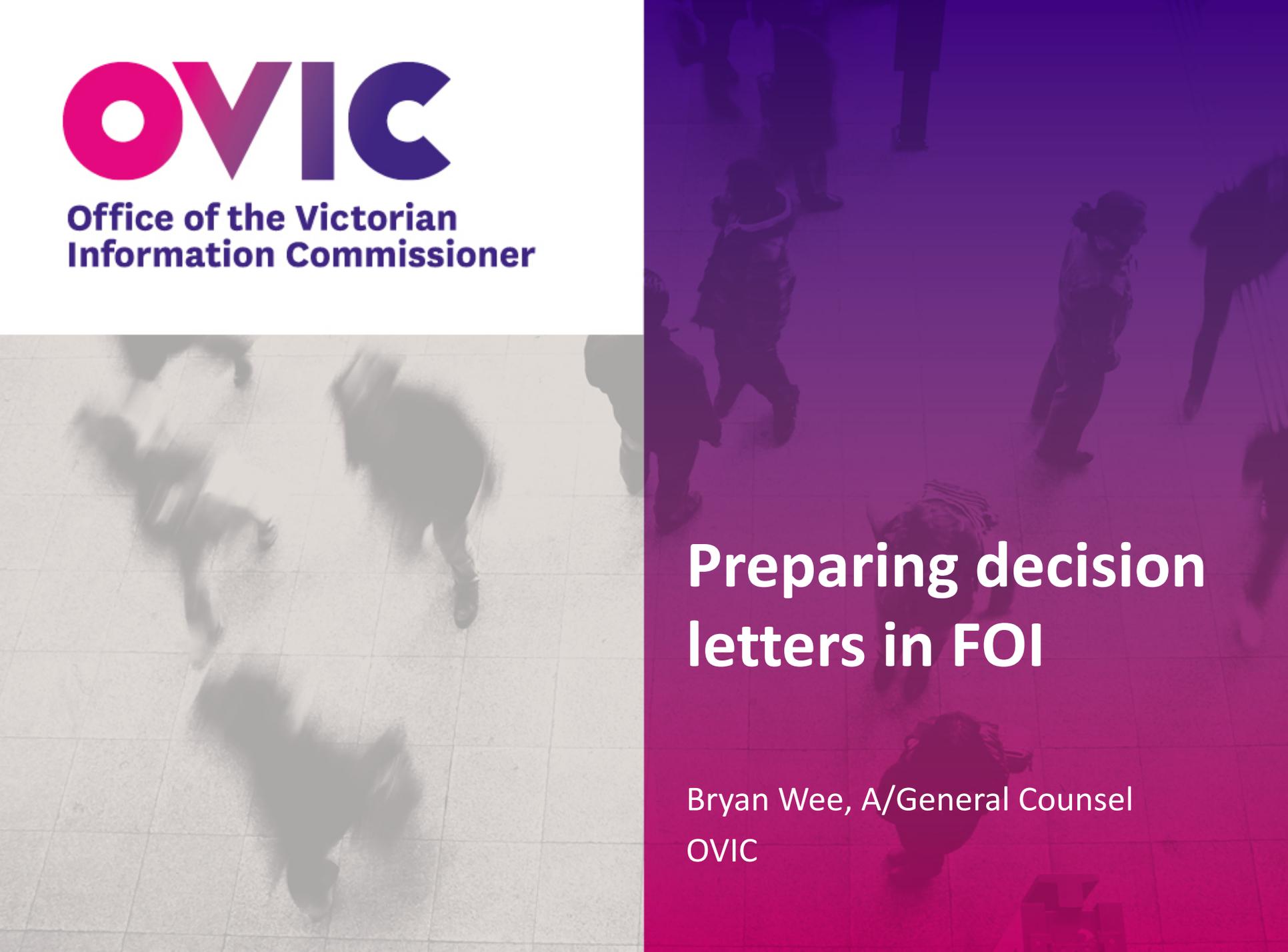




**Office of the Victorian
Information Commissioner**

A background image showing a blurred crowd of people walking on a paved surface, overlaid with a purple-to-pink gradient. The people are out of focus, creating a sense of movement and a busy public space.

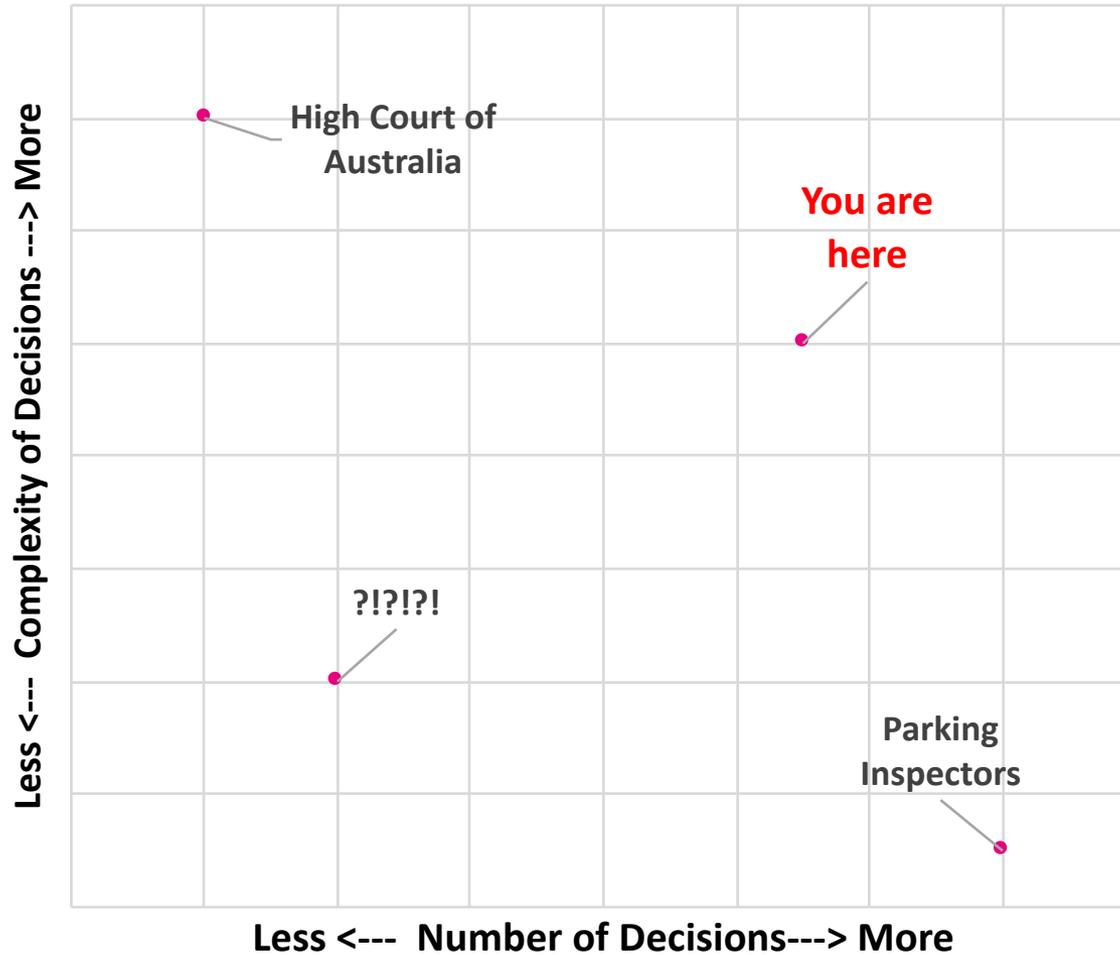
Preparing decision letters in FOI

Bryan Wee, A/General Counsel
OVIC

Good decisions – transparency, accountability and consistency

- A good decision shows the applicant that they have been heard and you have considered the relevant issues.
- A good decision explains government processes that are usually complex and confusing for a person.
- A good decision helps the person get over the emotion – anger or frustration – to then examine the process logically.
- A good decision can save you the process of appeal/review.
- A good decision protects you.
- A good decision promotes the goals of the justice system through “therapeutic jurisprudence”.

Nature of FOI decisions



Nature of FOI applicants

- FOI has a high proportion of self-represented litigants (SRLs). A Monash University study found the two most prevalent issues dealing with SRLs are:
 - SRLs lack legal skill, ability and understanding in often complex areas.
 - SRLs lack objectivity – individual perspective, not public policy, perspective.
- FOI applicants likely had negative dealings with the agency and are disgruntled because of:
 - Refusal or cancellation of application, licence or permit.
 - Unsuccessful in a job application or commercial tender.
 - Something is not right in government.

Statutory requirements for FOI decisions

27 Reasons etc. to be given

- (1) Where, in relation to a request for access to a document of an agency or an official document of a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the agency or

Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall—

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;
- (b) where the decision relates to an agency, state the name and designation of the person giving the decision;
- (c) where access is given to a document in accordance with section 25 state that the document is a copy of a document from which exempt or irrelevant matter has been deleted;
- (d) inform the applicant of—
- (i) his right to apply for a review of the decision;
 - (ii) the authority to which the application for review should be made; and
 - (iii) the time within which the application for review must be made;
- (da) where the decision relates to a refusal to grant access to a document containing health information on the ground referred to in section 36 of the **Health Records Act 2001**, inform the applicant of the time within which—
- (i) a written notice may be given under section 38(1) of the **Health Records Act 2001** nominating a health service provider for the purposes of Division 3 of Part 5 of that Act;
 - (ii) an application for a review of the decision may be made under Division 1 of Part VI of this Act;
 - (iii) an application for conciliation may be made under Division 2 of Part VI of this Act;
- (db) where the decision relates to a refusal to grant access to a document containing health information on a ground other than the ground referred to in section 36 of the **Health Records Act 2001**, inform the applicant of the time within which—
- (i) an application for a review of the decision may be made under Division 1 of Part VI of this Act;
 - (ii) if applicable, an application for conciliation may be made under Division 2 of Part VI of this Act;
- (e) where, in the case of a decision of an agency or a Minister, the decision does not relate to a request for access to a document that if it existed would be, an exempt document under section 28, 29A, 31 or 31A but the decision is to the effect that the document does not exist or cannot, after a thorough and diligent search, be located, inform the applicant of his right to complain to the Information Commissioner.
- (2) In a notice under subsection (1), an agency or Minister—
- (a) is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document;
 - (ab) is not required to confirm or deny the existence of any document, if confirming or denying the existence of that document would involve the unreasonable disclosure of information relating to the personal affairs of any person for the reason that it would increase the risk to a primary person's safety from family violence;
 - (b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the decision in terms which neither confirm nor deny the existence of any document.



Best Practice FOI Decision Making (Some Road Safety Advice)

OVIC



Big picture - specific statutory matters to include

- Your name and authority to make the decision.
- If section 25 redactions are applied, state copy documents are provided.
- Right of appeal, contact details of authority OVIC and time to appeal.
- Right to complain if the decision is that the document does not exist or cannot be located.
- Certain things also not required to be included: 27(2).

Statutory guidance for the decision

Section 27(1)(a) of the FOI Act tells us what the an FOI decision needs to contain by way of reasons:

“the findings on any material questions of fact, referring to the material on which those findings were based and the reasons for the decision”

Content of FOI decisions

- Summary of the decision at the beginning.
- **Summary of the applicant's request including variations and agreed time frames.**
- **Searches conducted to locate documents and what types of documents were found.**
- Any consultation and how it affects the time frame.
- Your decision about each document, or part of the document.
- Relevant sections of the FOI Act that apply, particularly exemptions.
- Evidence and findings of facts that support the decision including the submissions and other material used to make the decision, particularly in relation to the **public interest**.
- Why it was not practicable to make deletions or redactions.
- Outstanding charges to be paid before release.

Understanding the request

Summary of the applicant's request including variations and agreed time frames.

Is everyone is on the same page? Document these in your decision.

- Changes or narrowing of an FOI request.
- Timing issues:
 - Clarification of a request (section 17).
 - Extension(s) agreed with applicant.
 - Third party consultations.
 - Consultations about voluminous requests.
 - Deposits on access charges.
- Technical matters clarified with applicant and business area.

Understanding the request

One of the real benefits for me from the judicial training programs I have attended has been to learn about “reflective listening”. That is, as you know, **the technique of summarising and repeating back to the litigant the substance of the argument which has just been put. I have found it of particular assistance with self-represented litigants (but it can also be very helpful with long-winded counsel!).**

Summarising the argument confirms, to the litigant, in perhaps the best possible way, **that you have been listening carefully and that you have understood his/her concerns. It also provides an opportunity for the judge to acknowledge the litigant’s sense of grievance.** At the same time, using this technique can save a good deal of hearing time. Once the litigant has confirmed that you have correctly understood the argument, you **are better able to dissuade them from making the same argument four or five more times.**

Justice Maxwell, President Court of Appeal, Supreme Court of Victoria, from “Therapeutic Jurisprudence: First Steps in the Supreme Court” – Address to the AIJA Conference in 2010.

Conducting searches

Searches conducted to locate documents

- Government is opaque to individuals.
- Almost half of complaints that OVIC receives complaints about inadequate searches.
- Details reassure an applicant, including:
 - **Who** - Case officers and review officers that you contacted and file numbers
 - **How** – What searches did you use
 - **Where** - TRIM or other database with search terms
 - **What** - Types of documents – emails, file notes, letters, reports etc.
- Protect yourself by your decision.

Conducting searches

What types of documents were found, or not found.

- Provide transparency
- Prepare a schedule of documents.
- When you cannot find a document!
 - Did you show where you looked?
 - Was there a specific policy, if so, identify or provide that policy.

Public interest



"I'm afraid releasing that information would not be in the public interest."

Public interest

FREEDOM OF INFORMATION ACT 1982 - SECT 11B Public interest exemptions-- factors

Public interest exemptions- Irrelevant factors

- (4) The following factors **must not be taken into account** in deciding whether access to the document would, on balance, be contrary to the public interest:
- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Public interest – questions to set out

1. What is the nature of the public interest test or consideration?

Public interest – Nature of public interest

	Positive test - “in the public interest”	Negative test - “contrary to the public interest”
<p>In addition to the test – Must be a type of information as well as meet a public test</p>	<ul style="list-style-type: none"> • s 31(2) Law enforcement documents (public interest exclusion) 	<ul style="list-style-type: none"> • s 30 – Internal working documents • s 29 – Prejudice state relations or confidence
<p>As part of the test – the public interest is weighed against relevant factors or gives context to the test</p>	<ul style="list-style-type: none"> • s 34(2) Commercial documents 	<ul style="list-style-type: none"> • s 35(1)(b) – Material received in confidence • s 36 key issues or negotiations

Public interest – Nature or public interest test

Exemptions subject to a public interest test or considerations and their context:

s 30 Internal working documents – and “disclosure would be contrary to the public interest.”

s 29 Commonwealth/State relations – disclosure would be “contrary to the public interest” because it would prejudice relations or divulge information communicated in confidence between Victoria and the Commonwealth or other States.

s 31 Law enforcement documents – Law enforcement document of a specific type where “it is in the public interest that access to the document should be granted under this Act”.

s 34 Trade secrets & commercial documents – “whether there are any considerations in the public interest in favour of disclosure which outweigh [competitive disadvantage] for instance, public interest in evaluating aspects of government regulation of corporate practices or environmental controls”.

s 35 Material obtained in confidence – disclosure would be “contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability ... to obtain similar information in the future.”

s 36 Disclosure contrary to the public interest

Public interest – questions to set out

1. What is the nature of the public interest test or consideration?
2. What are the relevant factors and facts (noting the differences in the tests)?
 - i. Factors favouring disclosure.
 - ii. Factors against disclosure.
 - iii. Other relevant factors - i.e. for section 34(2)(d) the competitive disadvantage to a business.

Public interest factors favouring disclosure

- Promote objects of the FOI Act including public participation in government process.
- Inform debate on a matter, particularly a matter of public importance.
- Promote effective oversight of public expenditure.
- Allow a person to access his/her own info.
- Inform the community of the government's operations.
- Reveal misconduct or negligent, improper or unlawful conduct.
- Reveal the reason for a government decision or enhance scrutiny of government decision making.
- Contribute to the administration of justice and the enforcement of criminal law.
- Contribute to innovation and the facilitation of research.
- Advance the fair treatment of individuals in accordance with the law in their dealings with agencies.
- Reveal environmental or health risks of measures relating to the public health and contribute to the protection of the environment.

Public interest factors against disclosure

- Prejudice the fair treatment of individuals where the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
- Prejudice security, law enforcement, public health or public safety.
- Impede the administration of justice generally, including procedural fairness.
- Impede the protection of the environment.
- Prejudice the competitive commercial activities of an agency.
- Harm the interests of an individual or group of individuals.
- Prejudice the effective of government testing or auditing procedures.
- Impede the flow of information a law enforcement or regulatory agency.
- Prejudice an agency's ability to obtain information in confidence.
- Prejudice the conduct of investigations, audits or reviews.
- Prejudice the management or function of an agency.

Public interest – questions to set out

1. What is the nature of the public interest test or consideration?
2. What are the relevant factors and facts (noting the differences in the test)?
 - i. Factors favouring disclosure.
 - ii. Factors against disclosure.
 - iii. Other relevant factors.
3. How do the factors weigh against each other?
 - i. Explain the your decision process in the context of the exemption.
 - ii. LOPP/FLOPP.

Similar approach can be taken with “reasonably likely” or “unreasonable” but there is jurisprudence to help with that.

