



Office of the Victorian  
Information Commissioner

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## Right to Know Day 2019 - City of Kingston forum

**Speaker:** Sven Bluemmel, Information Commissioner

**Date:** Thursday 26 September 2019

**Time:** 12:00pm – 12:30pm

**Location:** City of Kingston, Cheltenham

### Introduction

Good afternoon everyone, my name is Sven Bluemmel and I am Victoria's inaugural Information Commissioner.

First, I would like to acknowledge the Traditional Owners of the land on which we are meeting. I pay my respects to their Elders past, present and emerging, and the Elders of other communities who may be here today.

I would like to thank the City of Kingston for extending this invitation to speak to you today.

My office – the Office of the Victorian Information Commissioner, or OVIC – is the primary regulator for information privacy, information security and freedom of information in Victoria, administering both the *Privacy and Data Protection Act 2014* and the *Freedom of Information Act 1982*.

It is therefore my great pleasure to be here in celebration of Right to Know Day, a day marked around the world by raising awareness of the community's right to access government-held information.

It is often said that information is the lifeblood of society. In my view, having access to information is as crucial to citizens' ability to participate meaningfully in society as other important rights, such as the right to freedom of expression or the right to vote.

Right to Know Day is therefore about more than the right of access. It reinforces the importance of open and accountable government as the foundation of a democratic society; and the need for transparency to build trust in government, facilitate greater public participation and scrutiny, and support better decision-making.

Today I will be talking about why government openness is important; the state of FOI in Victoria; and what my office is doing to facilitate the release of information and to support agencies in their FOI work.

## **Why openness is important**

To begin with, I would like to talk more broadly about why openness is so important, whether through FOI or other instruments.

We have a number of mechanisms available to scrutinise and keep our executive accountable – from parliamentary oversight to judicial review. Another mechanism is freedom of information.

Now there is little doubt that information is a valuable asset, particularly in this digital age. It brings power to those who control it, and the conditions under which individuals and groups are entitled to access and control information affect how our institutions function.

Therefore, a key function of FOI is to help level the playing field and redistribute the balance of power by protecting the public's right to access information. It equips citizens, the media, advocacy groups and others with the information that allows them to scrutinise the decisions and actions taken by government.

It also ensures that citizens have the necessary information to enable them to make meaningful and informed decisions about the policies and candidates they vote for.

Openness of information is vital and a key pillar of government accountability and, importantly, the long-term health of our democracy. Our freedom of information legislation recognises that government is designed to serve its citizens, not the other way around. Government does not exist for its own benefit, but to serve and govern for the public good.

Of course, ensuring open and accountable government through FOI or other mechanisms is not always as easy or straightforward as we would like it to be. Like many other jurisdictions around the world, our FOI regime here in Victoria faces many different challenges, some of which I will go into now.

## **FOI in Victoria**

As I have just touched on, Victoria's FOI Act is a key mechanism for accessing information held by the Victorian government. It provides individuals with the right to access documents held by State government agencies, statutory authorities, public bodies and, of course, local government.

The Act was created to promote openness, accountability and transparency in the public sector, with its object being to extend as far as possible the community's right to access documents in the possession of the Victorian Government.

However, this is not an absolute right. Rather, the Act states that this right of access is limited only by exceptions and exemptions necessary for the protection of essential public interests, and the private and business affairs of persons to whom the information relates.

Importantly, the Act does contain a number of exemptions to account for situations where the public interest in transparency is outweighed by other valid interests, such as the protection of personal privacy, or preservation of the integrity of legal proceedings.

In releasing information under freedom of information, agencies – including local councils – must balance different public interests while promoting government accountability and transparency, and all within the legislative obligations set out in the Act.

This is by no means an easy feat, with the freedom of information regime in Victoria facing some critical challenges since it was first introduced in 1982.

One of the most significant challenges is the sheer volume of requests made to government agencies. In the 2017-18 financial year, there were approximately 39,000 requests made, almost an 8% increase over the previous year. This compares to the 4,700 requests made in 1984-85, a few years after the Act came into effect.

Anecdotally, it seems requests are also increasing in scale and complexity, perhaps as a consequence of the vast amount of information and data that governments now generate and hold.

Interestingly, Victoria receives the highest number of requests of all states and territories. This can, perhaps in part, be attributed to the fact that we have a 'pull model' of FOI that requires individuals to make a request for information, making the release of that information largely reactive.

In contrast, some other states have adopted a 'push model', in which government bodies are expected to proactively and routinely release information to the public independently of FOI-based information access and disclosure regimes.

While Victoria does not adopt this model by default under the FOI Act, my office strongly supports the release of information outside of the Act wherever possible. I will touch on this shortly.

Another challenge that agencies face in administering the Act is the reduction of timeframes to process a request from 45 to 30 days, the result of amendments to the Act in September 2017.

These amendments also introduced additional mandatory consultation and notification requirements in certain circumstances, with agencies reporting in our 2017-18 Annual Report that these requirements have significantly increased administrative workloads.

More broadly, there has been criticism about the way the FOI Act in Victoria is administered, from a 2012 report by the Victorian Auditor-General pointing to the 'Victorian public sector's systemic failure' to support the public's 'right to timely, comprehensive and accurate information', to recent media reports highlighting a 'culture of secrecy' in Victoria's FOI regime.

This is also something we at OVIC have experienced first-hand in our work conducting FOI reviews and complaints; for example, at times we see agencies taking an overly technical approach to interpreting the Act, or misusing exemptions to avoid releasing information.

Organisational culture also presents a different type of challenge to FOI. Apart from the operational aspect of administering the Act, some agencies hold the view that FOI impedes good policy-making because the prospect of disclosure 'chills' the policy-making process.

That is, if the work and decisions of public servants or council officers are exposed to the community, those public servants will stop providing the frank and fearless advice on which good government depends, for fear of that advice being released to the public.

However, I think this view is inconsistent with the integrity of our public service and the intelligence of the community. Indeed, I would say that generally, FOI promotes the opposite – that the prospect of release drives and is an incentive to diligence, impartiality, and professionalism.

In other words, if a public servant knows that their work may be scrutinised, they will be more likely to want to do their best.

Local governments also face a unique challenge. As the closest level of government to the public, they have a very direct relationship with residents, and balancing this can sometimes be difficult when a decision is perceived to be detrimental or adverse to a member or section of the community. Moreover, councils often do not have the same resources as larger agencies – I am sure some of you here wear two or more hats as part of your role.

The challenges that I have described contribute to a perception that Victoria is lagging behind other states when it comes to freedom of information. This can undermine the community's trust and engagement with the government and can have an adverse impact on government accountability and transparency.

It is imperative that our information access scheme here in Victoria is robust and meets the objects of the Act, for the reasons that I've mentioned today: to promote openness and accountability, facilitate greater public participation and support decision making, amongst others.

Specifically, it is OVIC's vision that by working with us, agencies can provide improved outcomes for applicants in terms of timeliness, convenience and informality.

In particular, we want to see more information proactively released through other mechanisms, with FOI used as a last resort. One example of such a mechanism is the Victorian Government's open data policy, which aims to enable public access to government data via the DataVic platform, an open data directory.

The purpose of the DataVic Access Policy is to enable public access to government data to support research and education and enhance evidence-based decision making – values that complement those of Right to Know Day and the objects of the FOI Act. Of course, this needs to be done while respecting individuals' privacy.

### **Facilitating information release**

So far, I have spoken about the challenges facing FOI in Victoria, and while there is certainly more work to do to improve public access to information, I am positive that this is something that agencies and OVIC can achieve together.

We want to encourage a culture in organisations that makes it easier to do the right thing in providing access to government information. One way that agencies can do this is by identifying other methods to provide access outside of the Act, without the need for individuals to make a formal request.

The Act provides for informal release under section 16(2), which notes that nothing in the Act should prevent an agency from providing a person with access to the documents they seek outside the Act – even exempt documents – where it is possible and otherwise lawful to do so. Again, I would encourage agencies to have respect for individuals' privacy at the front of their minds in making such decisions.

Informal release offers several benefits in addition to making information available to the public promptly and inexpensively. It can be a simpler and more efficient process than responding to a request under the Act; it can reduce the need for an FOI request; and it can provide agencies with flexibility in how they respond to requests for government information.

OVIC's experience has been that informal release can improve outcomes for the community, as intended by the FOI Act and Parliament, and enable agencies to better focus their FOI resources.

We therefore encourage FOI practitioners – and importantly, their managers and executives – to approach requests for information with the mindset of *'Can we facilitate access without going through the FOI process?'*

This will involve engaging and communicating directly and meaningfully with the individuals making the request, to understand what information is being sought and whether it can be provided outside the FOI Act.

Of course, there will be requests that are complex, involve high stakes, and require a fine balancing of different public interests. In matters such as this, the FOI access regime and external review processes will be the appropriate avenue – indeed, this is what they are designed for.

However, the vast majority of requests continue to be made by members of the public, for access to their own information. While these types of requests are not without their complexity, the statistics demonstrate that there are considerable gains to be made by agencies proactively identifying opportunities for 'routine' or 'administrative' release.

Where a request does go through the formal FOI process, we continue to encourage agencies to adopt a more flexible, and less technical approach.

Many agencies do approach the Act with a view to releasing information reasonably, but there are still others that attempt to find loopholes and adopt an overly technical approach to the Act, which only serves to undermine government transparency and accountability. The end result of this is decreased trust in our public institutions. This is not where we want to go.

### **Proactive release**

Another effective way to achieve the objects of the FOI Act is to release information proactively. For example, agencies may consider proactively releasing policy or other non-sensitive documents by publishing them on their website. Or, there may be repeated requests for certain documents or information, indicating they are of general interest to the public and if appropriate, should be publicly available. I recognise that many local governments already publish a lot of useful information proactively, and this is commendable.

My office supports and encourages proactive release schemes where appropriate, and I am confident that as with informal release, proactive release can similarly lead to positive outcomes and significant benefits, not only for agencies but also the wider community.

Of course, proactively providing the public access to government information depends on agencies first understanding and then being able to properly manage the information they hold.

OVIC has been working with agencies to address this in a number of ways, including promoting the use of Information Asset Registers as an important tool for identifying, valuing, and managing risks to an agency's information assets.

There are already some great examples of proactive release schemes in Victoria, such as the DataVic platform I mentioned earlier which allows agencies to make non-sensitive information publicly available.

However, I believe there is greater scope for schemes such as this to increase the amount of non-personal information available to the public, and thereby reduce reliance on FOI.

While both informal and proactive release will require agencies to reconsider their approach to releasing information and open government, this is something that OVIC will fully support and assist agencies to achieve.

### **Professional Standards**

I would now like to turn to one of the key pieces of work we have done in the FOI space in the last few months to support agencies in administering the FOI Act in way that is consistent with the objectives set by Parliament, namely the FOI Professional Standards. These were gazetted, tabled in Parliament and will come into effect on 2 December.

The Standards clarify, build on, modernise and set a minimum standard for how agencies administer the Act. Importantly, the standards aim to promote greater public access to information, in keeping with the values of Right to Know Day.

They also aim to make the FOI process more accessible and compatible with community expectations and modern technology. This is crucial, as our digital world today is very different to the one in which the Act was first introduced almost 40 years ago now.

We need to make sure that access to information is not hindered by this shift to a digital world. My office will continue to work on developing guidance materials to assist agencies in implementing and meeting their obligations under the standards.

We will also be hosting an information session on the standards in October, to give agencies the opportunity to discuss the standards with us and to let agencies know what OVIC will be doing to support them.

If you are interested in finding out more about the standards, you can visit the OVIC website at [www.ovic.vic.gov.au](http://www.ovic.vic.gov.au), or follow us on Twitter @OVIC\_AU for updates on the standards and other areas of our work.

### **Training, education and awareness**

I will now cover my office's training, education and awareness activities.

One key initiative that my office undertakes to support agencies in their FOI work is to provide free high-quality training to agency staff. Our training aims not only to assist agencies with processing FOI requests, but also to provide meaningful guidance which enables agencies to administer the FOI Act in a way that is consistent with its objects.

These free training sessions are held regularly, so if you are interested, I highly recommend visiting our website or getting in touch with us to register for a session or to find out more. I am pleased to say that these sessions sell out regularly, which demonstrates to me that agencies want and need this FOI training.

My office also holds lunchtime seminars as part of our Information Access Series – in these sessions, my staff present on different aspects of the FOI Act and OVIC's processes, such as particular sections of the Act or working with us on reviews and complaints. Please feel free to register your interest with us or tune in to our Twitter feed where they are live streamed.

### **Publication of FOI decisions**

Earlier this year from 1 July, we also began publishing de-identified review decisions made by my office on our website and AustLII.

This is an important part of my function as Information Commissioner to promote understanding and acceptance by agencies and the public of the FOI Act and its object, as well as to promote transparency of OVIC's regulatory role and ensure consistency in decisions.

### **Right to Know week**

Finally, I would just like to briefly mention the resources and events that my office organised to celebrate this year's Right to Know Day.

Throughout the week we have published various materials on our website, including blog posts containing top tips for agencies and applicants when processing and making an FOI request.

We also held a public forum on Tuesday exploring community attitudes towards FOI and whether these are at odds with how the FOI Act is administered today. We were joined by special guests from across the FOI space for what was a really interesting and insightful panel discussion, a recording of which is available online via our Twitter page.

A new three-minute video for applicants on 'how to lodge an FOI request' was also released earlier this week. It is available on our website and I would encourage you to share this with applicants to inform them about the freedom of information process and likely timeframes.



We have also published a report on a project that my office conducted in collaboration with Monash University, researching the cultural and procedural barriers to information release under the FOI Act. We've written a blog post on this report, which is published on our website along with the report itself.

I encourage you all to have a read of this report or blog post if you can – it provides a really valuable insight into the state of FOI in Victoria today.

## **Conclusion**

To finish, I would just like to bring together some of the key themes that I have spoken about today.

We are at a time of increasing public distrust in government and its institutions, and now more than ever, we need to find ways to build and enhance public trust in government and its institutions – and maintaining the public's right to access information is one way to do this.

In light of the challenges currently facing FOI in Victoria, agencies should look to informal and proactive release regimes as legitimate and highly desirable avenues for disclosure of information. These processes outside of the FOI Act offer many benefits for agencies, and importantly, they facilitate the increase of government information available to the public.

Of course, agencies will need to consider the appropriate avenue for access in each particular instance. However, where possible, I strongly encourage agencies to make use of these informal and proactive mechanisms – often they are the easiest way for the public to gain access to information, and for the agency to provide it.

Government agencies need to think of themselves not as owners of information, but as custodians. And as its custodians, we have a responsibility to make sure that the right information is available to the right people, at the right time, and via the right avenues.

Thank you once again to the City of Kingston, and to all of you here for joining me as we celebrate Right to Know Day 2019.

I encourage you all to continually promote the values of Right to Know Day as you go about your work – facilitating access to government, and local government information, and promoting government openness and accountability. Every one of us can, and must, make a positive difference.

Thank you.