

Submission form for the Proactive and Informal Release of Information in the Victorian Public Sector Discussion Paper

About this form

The Office of the Victorian Information Commissioner (**OVIC**) is seeking agencies' views on its discussion paper on proactive and informal release of information in the Victorian Public Sector.

OVIC encourages agencies to use this form when making a submission. This form contains space to provide comments on the questions listed in the discussion paper, and space for other general feedback.

More information on the proactive and informal release discussion paper can be found on OVIC's website www.ovic.vic.gov.au.

Collection of personal information

You are not required to provide any personal information in order to make a submission to OVIC's discussion paper. All fields on this form relating to personal information are optional. Where you choose to provide personal information, OVIC may use it to provide you consolidated feedback on the submissions we receive, seek clarification on your submission or follow up with you where you have indicated you wish to be involved further in OVIC's work. If you choose to provide personal information, we ask that you do not include this information anywhere other than the designated fields on this form.

If you choose to make your submission by email, we may be able to identify you from your email address. If you prefer to remain anonymous, you can post your submission to OVIC.

OVIC will not disclose your personal information without your consent, except where required to do so by law. You may contact OVIC to request access to any personal information you have provided to us by emailing enquiries@ovic.vic.gov.au.

For further information on how OVIC handles personal information, please review our privacy policy [here](#).

Publication of submission

OVIC intends to publish submissions received on the discussion paper but will not do so without prior consent. Please indicate below whether you would like your submission to be made public in full, public with personal information removed, or not made public.

Please indicate below if this submission can be published:

| | | | | | |
|--------------------------|-----------------|-------------------------------------|---|--------------------------|----------------|
| <input type="checkbox"/> | Publish in full | <input checked="" type="checkbox"/> | Publish but do not include personal information | <input type="checkbox"/> | Do not publish |
|--------------------------|-----------------|-------------------------------------|---|--------------------------|----------------|

Information about who is making this submission

All fields below are optional.

| | |
|--------|--|
| Name: | |
| Email: | |

If you are making this submission on behalf of an agency or organisation please identify below.

| | |
|------------------------|------------------------------|
| Agency / Organisation: | Sex Work Law Reform Victoria |
|------------------------|------------------------------|

This submission is made by a:

| | | | |
|--------------------------|---|-------------------------------------|---------------------------------------|
| <input type="checkbox"/> | Public sector agency subject to the FOI Act | <input checked="" type="checkbox"/> | Private organisation / Not for profit |
| <input type="checkbox"/> | Public sector agency outside of Victoria | <input type="checkbox"/> | Member of the public |
| <input type="checkbox"/> | Member of Parliament | <input type="checkbox"/> | Other |

Participating in future work with OVIC

A reason for seeking submissions on the discussion paper is to identify future work for OVIC in relation to the proactive and informal release of information in the Victorian public sector.

Please indicate below if you would be interested in participating in future OVIC work, events, or provide additional information to OVIC regarding proactive and informal release in your agency.

If you are interested in being involved in OVIC's work further, please provide your name and contact details in the fields above so we can contact you.

- I am interested in participating in a future OVIC event (for example, a roundtable discussion on proactive and informal release).
- I am interested in being involved in future OVIC work in relation to proactive and informal release.
- I am willing to provide additional information about my agency's proactive and informal release practices (for example, a proactive and/or informal release policy).

Completing this form

To complete this template, insert your response to individual questions, or provide general comments on proactive and/or informal release in the space provided.

Submitting this form

Submissions must be provided to OVIC by **5pm, Thursday 9 April 2020**. You can make a submission by:

- **Emailing** your submission to policyteam@ovic.vic.gov.au
- **Posting** your submission to:
Policy team
Office of the Victorian Information Commissioner
PO Box 24274
Melbourne VIC 3001

| |
|---|
| Do you have any overall comments on the Proactive and Informal Release of Information in the Victorian Public Sector Discussion Paper? |
| |

| Do you have any comments on specific questions listed in the discussion paper? | | |
|---|-----------------|-----------------|
| <i>Question No.</i> | <i>Question</i> | <i>Comments</i> |
| | | |
| | | |
| | | |
| | | |

Press tab in this box to insert additional rows as needed

SWLRV

Safety. Equality. Justice.

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Policy Team
Office of the Victorian Information Commissioner
PO Box 24274
Melbourne VIC 3001
By email: policyteam@ovic.vic.gov.au

28 April 2020

Dear Policy Team,

Sex Work Law Reform Victoria Inc. (SWLRV) is a non-partisan not for profit organisation lobbying for the legal rights of sex workers in Victoria.

Like other human rights and lobby groups, SWLRV relies on obtaining access to government documents via FOI processes in order to assist in the progress of the organisation's vision.

We appreciate this opportunity to contribute to the Office of the Victorian Information Commissioner's consultation into the Proactive and Informal Release Discussion Paper.

Sincerely,



On behalf of Sex Work Law Reform Victoria Inc.

Executive Summary

We recommend training senior level management within agencies to foster a positive and transparent FOI culture, which facilitates the informal release of documents. This is because we believe the most significant barrier to the informal release of documents to be a lack of a positive FOI culture within agencies. We provide a case study highlighting a marked lack of positive FOI culture.

Our perspective on factors affecting proactive/informal release of information

We will comment on the following aim of the discussion paper:

- better understand the factors that affect how agencies proactively and/or informally release information and identify how OVIC can better support and assist agencies

The discussion paper primarily seeks submissions from public sector agencies about their policies and procedures pertaining to their proactive release of information. There is an implied assumption in the discussion paper's questions for public sector agencies that such agencies are in some way interested in overcoming barriers, or willing to proactively release information and documents.

We suggest this may not always be the case. In 2019 Monash University published "*The Culture of Administering Access to Government Information and Freedom of Information in Victoria Pilot Study May–August 2019 (Monash University Pilot Study)*", which aimed to capture the culture of administering the Victorian *Freedom of Information Act 1982* (Vic) and the Victorian information access system overall. In its executive summary, the study identified significant obstacles to realising a positive FOI culture, which could not be overcome without the support of senior agency management:

The crucial role of senior agency management — all interviewees were unanimous that the public service agency leadership is more important for a positive FOI culture than the political leadership of the agency. This is the most important finding in the study;¹

We would like to highlight a case study of one public sector agency which demonstrates that without a positive FOI culture within senior agency management, it is unlikely there will be much progress on proactive and informal release of information. In this case, the Agency refused an FOI request. This was subsequently contested at VCAT, where the Agency's refusal was overturned. The Agency then went on to work with the Victorian government in a consultative role, drafting clauses of a bill exempting similar documents from FOI laws. The bill subsequently passed.

Case Study: The Department of Justice and Community Safety and the sex industry

The Department of Justice and Community Safety (the 'Department') is, amongst other things, responsible for regulating Victoria's sex industry via the administration of the *Sex Work Act 1994* (Vic). The Department holds sensitive documents relating to sex workers

¹ Johan Lidberg, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria: Pilot Study May–August 2019* (Report, 2019) (emphasis in original) 5.

and the sex industry. Amnesty International considers criminalisation of sex work, (which persists under current Victorian law), to constitute a breach of sex workers' human rights.² Gaining access to documents held by the Department may shed light on the extent of these human rights breaches and is therefore of great interest to sex workers' rights activists.

Freedom of information has long been recognised as serving the public interest by allowing individuals and groups to discover and scrutinise policy making decisions. As early as 1979, a Senate committee report outlined why FOI was important - it enhanced the transparency of policy making, administrative decision making, and government service delivery.³

VCAT overturns Department's decision to refuse access

In 2017 and 2018, the Department received a number of FOI requests seeking access to documents relating to Victoria's regulation of sex work. None of the documents were released via informal release channels. The documents were, however, eventually released via formal FOI channels. Some of the requests were reviewed by OVIC, others were reviewed by VCAT.

Our case study relates to a particular 2017 request which was refused by the Department. The Department's decision was reviewed by VCAT ('2018 VCAT case').⁴ The Department hired a specialist law firm to represent them during a one-day contest hearing. The Department called two witnesses, one from senior agency management: The Registrar of the Business Licensing Authority. In 2018 VCAT made an order which overturned the Department's decision to refuse access. The documents initially sought were eventually released to the applicant.

Government consults with Department to draft bill eroding FOI access

Following its unsuccessful attempt to refuse access to documents, the Registrar of the Business Licensing Authority was consulted by the Victorian government to draft a number of clauses of a bill amending the *Sex Work Act 1994* (Vic), so that certain documents held by the Department would be exempt from the FOI Act. The types of documents to be exempt from FOI were the same types of documents eventually provided to the applicant following the *2018 VCAT case*. Throughout the process of drafting the bill, the government did not consult with sex worker groups, claiming that 'sex workers' lives were being put at risk' and that there was a need to 'make sure that the sex workers' safety was protected rather than wasting time'.⁵

On 11 September 2019, the Victorian government introduced the *Consumer Legislation Amendment Bill 2019* (Vic) (the 'Bill') to the Legislative Assembly. The Bill eventually passed into law, with little debate or scrutiny of the clauses seeking to erode FOI access to certain documents.

² *Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers* (Policy, POL 30/4062/2016, 26 May 2016) 10 < <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>>.

³ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information* (Report, 1979) 21–2.

⁴ *Roberts v Department of Justice and Regulation (Review and Regulation)* [2018] VCAT 1560 ('2018 VCAT case').

⁵ Victoria, *Parliamentary Debates*, Legislative Council, 28 November 2019, 4508 (Adem Somyurek) ('*Parliamentary Debates*, 28 November 2019').

Two clauses at the very end of the Bill (clauses 100 and 101) sought to amend the *Sex Work Act 1994* (Vic) in order to exempt certain documents from FOI laws.⁶ In doing so, the government sought to reduce access to certain documents pertaining to the sex industry. During the Bill's second reading the Minister for Consumer Affairs made this clear:

Finally, the Bill amends the Sex Work Act 1994 to clarify that information contained on the register of exempt sex work service providers is only to be made available in accordance with the requirements of section 24 of that Act and is not to be accessible via freedom of information applications.⁷

The Minister for Local Government also made it clear that the FOI changes sought were the result of a VCAT case relating to sex work:

The genesis of this [bill] was a VCAT case. There was an FOI request put in. The request was denied, and that application went subsequently to VCAT...⁸

The Minister indicated that the privacy of sex workers was at risk,

What VCAT found put that privacy at risk⁹

What did VCAT find? In the *2018 VCAT case*, Senior Member A Dea, found:

There was insufficient evidence that the....[request] would directly or indirectly reveal personal affairs information.¹⁰

And that:

I am not satisfied that it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents.¹¹

The Senior Member made no reference to sex workers' privacy being put at risk, sex workers' lives being put at risk, or sex workers' safety being jeopardised. However, she did consider the issue of sex worker's privacy, but found insufficient evidence it would be compromised by releasing the requested information. Absent consultation with all the various sex worker groups in Victoria or with information technology or data analysis experts, it is unclear what evidence supported the Minister's view that sex workers' lives were being put at risk by release of the requested information.

Relevance of this case study

This case is an example of what can happen when senior management of an agency fail to develop a positive culture of FOI. It is important for OVIC to recognise that leadership in public service agencies is vitally important to creating a positive FOI culture. A positive FOI culture is required for agencies to voluntarily and proactively release documents.

⁶ *Consumer Legislation Amendment Bill (Vic) 2019 ss 100–1*.

⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 2019, 3339 (Marlene Kairouz).

⁸ *Parliamentary Debates*, 28 November 2019 (n 5) 4508 (Adem Somyurek).

⁹ *Ibid*.

¹⁰ *2018 VCAT case* (n 4) [85].

¹¹ *Ibid* [123].

Recommendations

Our recommendations largely mirror the findings and recommendations of the *Monash University Pilot Study*, with a focus on training staff at senior management level.

Recommendation 1

OVIC should rank and make public a league table of the various agencies, identifying by name those which score higher on key indicators of positive FOI culture.

Recommendation 2

OVIC should prioritise training and professional development for FOI staff. Where OVIC is aware that particular agencies have particularly negative FOI cultures, OVIC should prioritise and direct its resources to those agencies.

Recommendation 3

OVIC should focus its FOI education and information advocacy efforts on the senior management level rather than the ministerial level.

Recommendation 4

Based on the findings of the *Monash University Pilot Study*, the senior management team of agencies should be included in the subsequent comprehensive study.