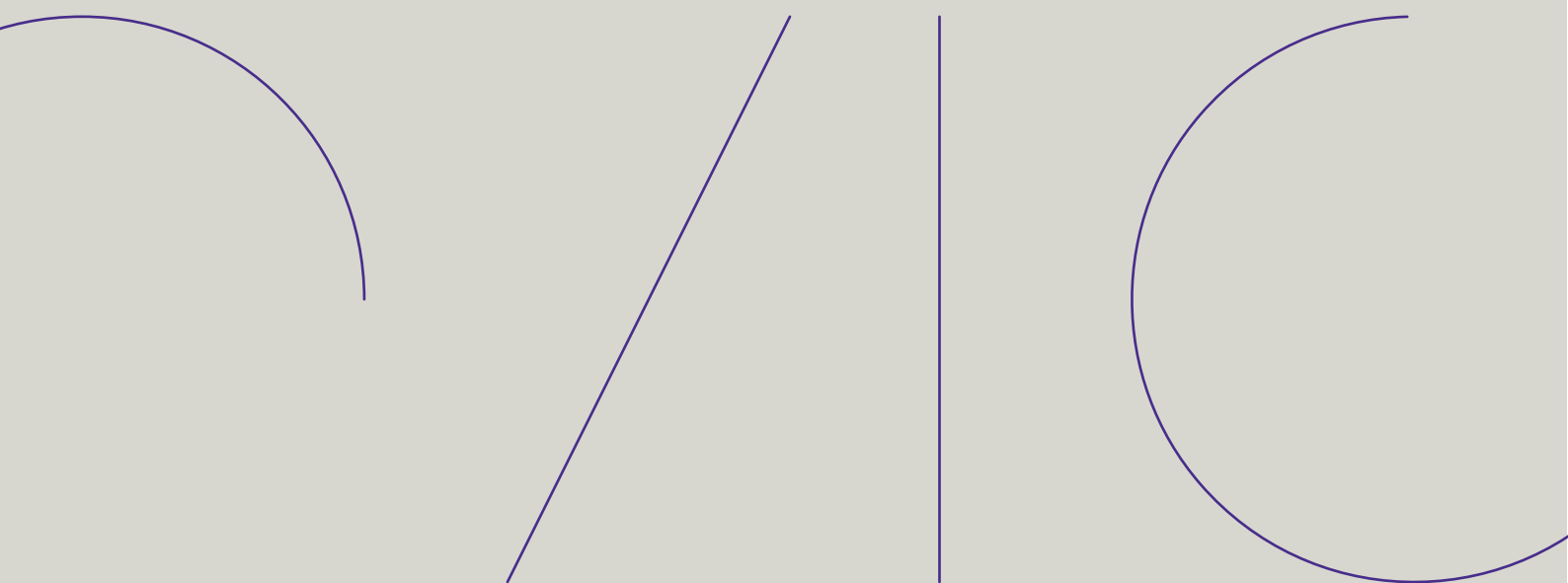




## **IMPEDIMENTS TO TIMELY FOI AND INFORMATION RELEASE**

Own-motion investigation under section 61O of  
the *Freedom of Information Act 1982 (Vic)*

PP no. 270, Session 2018–21



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# COMMISSIONER'S FOREWORD

Trust must be at the core of the relationship between the people and their government. Government earns trust when its actions are transparent and open to public scrutiny, especially when that scrutiny is inconvenient or feels uncomfortable. Government loses trust when it does the opposite.

To help ensure transparency, the *Freedom of Information Act 1982 (Vic)* provides Victorians with a legally enforceable right to access information held by government. To be effective, decisions made under the Act must reflect the intent of Parliament as expressed in the object of the Act. My office's independent oversight role provides assurance in this regard. However, decisions must also be made and acted upon in a timely way. Delay can cause information to lose currency, accuracy, relevance and impact.

In February 2020, my office published *The State of Freedom of Information in Victoria: Five Years in Review 2014 - 2019*. That report found that a growing proportion of freedom of information decisions were subject to delay, with the percentage of decisions made on time declining from 95% to 79%. This is a concerning trend that must be arrested and reversed. To that end, I undertook this investigation to examine the causes of delay in freedom of information in Victoria.

My investigation found different causes of delay at the five agencies I investigated. These fall into three broad categories.

1. **Demand and process.** In a digital society, agencies collect and retain more information than ever. Citizens are engaged in issues of public interest and make more requests for information. Resourcing for the freedom of information function in agencies has not always kept up and processes for dealing with the workload are not necessarily optimal.
2. **Culture and attitude.** The culture within an agency and the attitude of its officers can significantly influence the speed with which agencies make decisions and release information. Some agencies appear to prioritise the protection of information from inappropriate release above other goals, such as timeliness. One way the prioritisation of confidentiality over public disclosure results in delay is an unwillingness by one agency to make decisions on the release of particularly sensitive information until the responsible minister formally notes the agency's decision before it is made. While it may be appropriate to brief a minister on the imminent disclosure of sensitive information so that they may respond to subsequent public or media enquiries in an informed manner, this must not cause delay.
3. **Legislative limitations.** Various provisions of the Act contribute to delays. Victoria was the first Australian state to introduce freedom of information legislation in 1982, but the Act no longer provides an optimal legislative scheme for the timely disclosure of information held by government. While the Act has been subject to various amendments, it has not been substantially reformed in nearly 40 years.

This report makes 16 specific recommendations to address the above findings, which the five agencies have committed to implement. It further recommends a wide-ranging review of the FOI Act to reflect modern public administration and the digital environment.

I acknowledge the assistance of the five agencies that were the subject of my investigation, each of which engaged openly and constructively with my office. I thank them and trust that they, and other public sector agencies in the state, will consider my findings and recommendations in the interests of upholding the information rights of all Victorians.

**Sven Bluemmel**

*Victorian Information Commissioner*

1 September 2021

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## EXECUTIVE SUMMARY

1. On 15 September 2020, the Victorian Information Commissioner (**Commissioner**) commenced an investigation under Part VIB of the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) to identify factors contributing to delay in the release of government-held information in Victoria under the FOI Act.
2. The Commissioner commenced the investigation in response to numerous complaints about delayed FOI decisions, and after noting that the proportion of FOI decisions made on time in Victoria had declined in recent years. During the 2014-15 financial year, 95% of FOI decisions were made on time. In 2019-20, only 79% were made on time. Other Australian state and territory governments, and the Commonwealth government, also experienced a decline in timeliness over this period.
3. The Commissioner's investigation examined the causes of delay at five Victorian agencies subject to the FOI Act: two departments, a local council, a public health service provider, and Victoria Police.

### Factors contributing to delayed information release

4. The investigation identified several factors contributing to delayed information release in Victoria:
  - resourcing and efficiency issues
  - FOI performance reporting and monitoring
  - inadequate engagement with FOI applicants
  - briefing of agency executives and ministers on topical FOI requests made to agencies
  - legislative impediments to timely decision making.
5. The importance of each of these factors varied between agencies, and not all factors were relevant to each agency. The Commissioner made findings in relation to the causes of delay at each agency and made recommendations directed at addressing those causes.
6. To address the broader issue of delay, and ensure the FOI Act is fulfilling its object of the timely and cost effective provision of information to the public, the Commissioner recommends a comprehensive review of the FOI Act.<sup>1</sup> Such a review should inquire into the operation of the public access to information scheme under the FOI Act in Victoria and how the scheme and FOI Act can be modernised and harmonised with contemporary notions of government transparency and accountability, drawing on best practice in other Australian jurisdictions and internationally.

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<sup>1</sup> Recommendation 17.

## Causes of delay at each agency and recommendations

7. The Commissioner identified different levels of delay and contributing factors at each of the five agencies and made recommendations to each.

### Victoria Police

8. Victoria Police receives the most FOI requests of any agency in Victoria. Despite this, between 2013 and 2017, and for most of 2019, Victoria Police had no overdue FOI requests open at the end of any month. However, at times when the resources of the FOI Division did not keep pace with its workload or were diverted elsewhere, delays and backlogs occurred.
9. Victoria Police now has a very large backlog of FOI requests, caused primarily by staffing levels of the FOI unit relative to its workload, and changes to work arrangements in response to the COVID-19 pandemic. Because of this backlog, all FOI applicants are currently experiencing considerable delays. Victoria Police currently advises applicants that FOI request are delayed by an average of 14 weeks. While the development of a backlog in the circumstances of the COVID-19 pandemic is understandable, the current level of delay must be addressed. This level of delay effectively deprives FOI applicants, who need prompt access to information, of their FOI rights.
10. The Commissioner considers the only way that Victoria Police can address its backlog is by applying significant additional resources to its FOI Division to address this backlog. At the same time, Victoria Police should consider conducting a review of its information release processes to ensure that it is providing access to information as efficiently as it can.
11. The Commissioner recommends that Victoria Police apply a substantial increase to the staffing level of its FOI team to deal with its backlog,<sup>2</sup> and provide regular progress reports to the Commissioner and the Minister for Police and Emergency Services.<sup>3</sup> The Commissioner also made recommendations to Victoria Police directed at improving its communication with FOI applicants,<sup>4</sup> and enhancing its document collection and information release procedures.<sup>5</sup>

### Department of Transport

12. The Department of Transport (**DOT**) was formed in 2019 as an amalgamation of three agencies (known as ‘machinery of government’ changes). The combination of three large agencies into one, together with the portfolio responsibilities of a newly created department, presented significant challenges for its FOI team, including integrating teams and systems, and developing relationships with colleagues across the newly formed department. These challenges were a minor contributor to delay, but appear to have generally been managed well by DOT.

---

2 Recommendation 1.

3 Recommendation 2.

4 Recommendation 3 and 6.

5 Recommendation 4 and 5.



13. The most significant contributor to delay in FOI decision making is its ministerial and executive briefing and noting processes. FOI decision makers at DOT currently allow for time for the relevant minister and senior executives to 'note' or comment on topical FOI requests before a decision will be made by the agency. On some occasions, these processes have taken a total of more than 200 days, causing unacceptable delay for applicants. Despite the briefing and noting issues, and machinery of government changes, DOT's FOI decision making timeliness has improved since it was established. This speaks to the effectiveness of other aspects of its FOI practice.
14. The Commissioner recommends DOT substantially revise its ministerial noting process, and develop new performance measure for use by its FOI team.<sup>6</sup>

### **Department of Justice and Community Safety**

15. Prior to 2017, the Department of Justice and Community Safety (**DJCS**) completed more than 90% of its requests on time. However, from 2017 onwards its performance declined, with only 40% of decisions made on time in the 2019-20 financial year.
16. From 2017, amendments to the FOI Act increased the work involved in processing many FOI requests, while reducing the processing period under section 21 of the FOI Act from 45 to 30 days. This occurred at the same time as the number of requests received by DJCS was substantially increasing. The FOI unit had to deal with more requests, more quickly, and with the same resources. As a consequence, fewer requests were completed in the statutory processing period.
17. Since 2020, DJCS has made a concerted effort to improve the timeliness of its FOI decision making. This included a clear direction from the Secretary of DJCS that timely FOI was important, and the initiation of an FOI reform project. Part of the FOI reform project included supporting the FOI unit with additional staff resources. While DJCS reports that its timeliness has begun to improve, it should monitor this closely.
18. The Commissioner recommends that DJCS monitor its timeliness performance following its FOI reform project,<sup>7</sup> and identify mechanisms to improve communications with FOI applicants about corrections-related FOI requests, many of which are made by prisoners seeking access to documents concerning their personal affairs information.<sup>8</sup>

## **Alfred Health**

19. The Commissioner investigated Alfred Health because its reported timeliness performance decreased significantly between 2018 and 2020. However, the Commissioner found that the statistics reported to the Office of the Victorian Information Commissioner (**OVIC**) for those years were inaccurate due to errors in Alfred Health's FOI case management statistics.
20. Although Alfred Health is now working to improve its case management system, this error should have been identified earlier, when Alfred Health's apparent performance deteriorated. Alfred Health is exploring ways to make more information available to its patients outside FOI request, through changes to its online patient portal. This is likely to reduce the FOI team's workload, and therefore improve Alfred Health's timeliness.
21. The Commissioner recommends that Alfred Health review the suitability of its case management system,<sup>9</sup> provide more regular internal reports to its executive about FOI,<sup>10</sup> and better utilise the FOI extension of time provisions.<sup>11</sup>

## **Frankston City Council**

22. Frankston City Council is a relatively small FOI agency, handling fewer than 30 FOI requests each year. However, since 2016-17, it made less than half of its FOI decisions in time.
23. The Commissioner identified that this was caused by several factors, including the complexity of some requests, fluctuating workloads, and over reliance on a single individual to make FOI decisions. Council deals with a high proportion of requests for information informally. While this is to be encouraged as it is likely to provide better outcomes for applicants, it can have the perverse consequence of making Council's performance appear worse than it is when FOI figures are looked at in isolation.
24. The Commissioner recommends that council identify and support an additional decision maker,<sup>12</sup> develop revised key performance indicators for its FOI performance,<sup>13</sup> and record information about access requests being responded to outside FOI.<sup>14</sup>

## **Agency response to recommendations**

25. Each of the five agencies has committed to implement the recommendations directed at it. The agencies' responses are set out in full at the end of this report.

# BACKGROUND

## The FOI Act

26. The object of the FOI Act is to create a general right of access to information, limited only by exceptions and exemptions necessary to protect essential public interests, privacy, and business affairs.<sup>15</sup>
27. The Victorian Parliament intends that the FOI Act should be interpreted to further this object and to promote, promptly and at the lowest reasonable cost, the disclosure of information.<sup>16</sup> This commitment to promptness is further highlighted in section 16(1) which requires agencies and ministers to administer the FOI Act ‘with a view to making the maximum amount of government information promptly and inexpensively available to the public’.
28. There are approximately 1,000 agencies<sup>17</sup> in Victoria with obligations under the FOI Act, including government departments, statutory authorities, public hospitals, and councils. The FOI Act also applies to the official documents of ministers.
29. Agencies are required to make their decisions on FOI applications within the timeframes set out in section 21 of the FOI Act.

## Other information access pathways

30. FOI is not the only way that people can access government-held information in Victoria. There are other Victorian legislative schemes that provide for the release of information. This report does not look at any of those mechanisms. Agencies can also release information informally or proactively. Sometimes these mechanisms can provide quicker access to information.
31. Proactive release involves an agency making information or documents publicly available, on its own accord without someone making an information access request. Proactive release complements and is consistent with agencies’ obligations under the FOI Act to make the maximum amount of government information available to the public promptly and inexpensively.
32. Informal release involves an agency receiving an information access request and releasing the requested information or document, either in full or in part, outside the FOI Act. This is also known as administrative release. Informal release can be a simpler and more efficient process for an agency than responding to a request under the FOI Act, reduce the need for formal access requests, and provide agencies with flexibility in how they deal with requests for government information.

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15 Section 3(1) of the FOI Act.

16 Section 3(2) of the FOI Act.

17 Agency means a department, council or a prescribed authority under section 5 of the FOI Act.

33. The FOI Act provides for informal release under section 16(2), which notes that nothing in the FOI Act should prevent an agency from providing a person with access to documents outside the Act, where it is possible and lawful to do so.
34. Further, the FOI Professional Standards (**Professional Standards**)<sup>18</sup> require an agency to consider whether a document in its possession, requested under the FOI Act, can properly be provided outside the Act, and if so, facilitate access or otherwise advise how an applicant can access the document. This is consistent with OVIC's efforts to encourage agencies to adopt proactive and informal information release wherever this can properly be done.

## The legislative timeframe under the FOI Act

35. Section 13 of the FOI Act provides every person with a legally enforceable right to obtain access to a document of an agency or an official document of a Minister other than an exempt document.<sup>19</sup>
36. For a request to be valid under section 17 of the FOI Act, it must be in writing, provide sufficient information as is reasonably necessary to identify the documents requested and also include an application fee (noting the fee can be reduced or waived). Agencies are required to assist applicants to make a valid request.<sup>20</sup>
37. Once an agency receives a valid request, the 'clock starts ticking' for the agency to decide the request at the beginning of the next calendar day.<sup>21</sup> This means, under section 21(1)(a) of the FOI Act, that applicants must be notified of a decision as soon as practicable, but no later than 30 days after receiving a valid request.
38. The 30 days includes all calendar days. This means weekends, public holidays, and any closedown periods – not just business or weekdays. If the due date for a decision falls on a weekend or public holiday, it moves to the next business day.<sup>22</sup>
39. The current 30-day timeframe has been in place since 1 September 2017.<sup>23</sup> Prior to then, FOI requests had to be completed in 45 days.

## Extensions of time

40. The 30-day timeframe may be extended where third party consultation is required or by agreement with the applicant.
41. Section 21(4) requires applicants to be notified in writing of extensions to a timeframe. When providing written notification, Professional Standard 3.2 requires agencies to detail the particular reasons for an extension and advise the applicant by how many days the due date is being extended.

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18 Issued by the Information Commissioner under Part IB of the FOI Act.

19 Note: Part III does not apply to certain documents (section 14) and some documents are not subject to the FOI Act

20 Sections 17(3) and 17(4) of the FOI Act; Professional Standard 2.4.

21 Section 44(1) Interpretation of Legislation Act 1984 (Vic).

22 Section 44(3) Interpretation of Legislation Act 1984 (Vic).

23 Following amendments contained in the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Vic).

42. Section 21(2)(a) allows an agency to extend the initial 30-day timeframe by up to 15 days if third party consultation is required under sections 29, 29A, 31, 31A, 33, 34 or 35. Under Professional Standard 3.1, an agency may only extend the 30-day timeframe where third party consultation is being undertaken or will be undertaken. That is, an agency is not entitled to an extension where consultation is considered, but subsequently not undertaken. An extension under section 21(2)(a) can only be used to extend the 30-day timeframe once.
43. Section 21(2)(b) allows the 30-day timeframe to be extended by up to 30 days at a time with the applicant's agreement. Under section 21(3), an agency may seek agreement from an applicant for an extension any number of times.
44. Multiple extensions of time can only be sought in the following manner:
  - a single extension of up to 15 days for consultation in the first instance under section 21(2)(a), followed by any number of additional extensions of up to 30 days with an applicant's agreement under sections 21(2)(b) and 21(3); or
  - an extension of up to 30 days with the applicant's agreement in the first instance, under section 21(2)(b), followed by any number of additional extensions of up to 30 days with the applicant's agreement under sections 21(2)(b) and 21(3).
45. If an agency extends the timeframe with the applicant's agreement in the first instance, it should not, at a later stage, further extend the timeframe in order to undertake third party consultation.

### **Other changes to the timeframe**

46. The timeframe can also be paused, reset or waived.
47. The timeframe for making a decision pauses on the day a notice is given to an applicant under section 25A(6) – where an agency intends to refuse to process a request as it would substantially and unreasonably divert the resources of the agency and invites the applicant to consult to narrow the scope of the FOI request. The timeframe for making a decision resumes the day after the applicant confirms a revised or altered request (section 25A(7)).
48. Where an agency requires payment of an access charges deposit in accordance with sections 22(3) and 22(4):
  - the timeframe for making a decision stops when the applicant is notified about payment of a deposit for access charges
  - the timeframe for making a decision resets to 'day one' of the 30-day timeframe, the day after the applicant pays the deposit (section 22(5)).
49. Section 22(6) allows an agency and applicant to discuss practicable alternatives for altering the request, including reducing an access charge in exchange for the applicant waiving, conditionally or unconditionally, compliance with the 30-day timeframe to process the request. Any agreement under section 22(6) should be recorded and confirmed in writing.

### When is an FOI decision ‘in time’?

50. In this report, an FOI decision is said to be ‘in time’ where the timeframe in section 21 of the FOI Act is met, including any extensions of time or other changes to the timeframe. Where this deadline is not met, the request is said to be ‘out of time’. For a more detailed description of how timeframes for FOI requests are calculated, see OVIC’s ‘Practice Note 8 – Timeframes and extensions of time when processing an access request’.

## THE STATE OF FOI TIMELINESS IN VICTORIA AND AUSTRALIA

51. Increasing FOI workload and the incidence of delayed FOI decision making is a common issue in most Australian jurisdictions.

### FOI in Victoria

52. The FOI Act has been in operation in Victoria since 1983. In the first month of its existence, 492 requests were made.<sup>24</sup> Since then, the number of FOI requests has steadily increased with 40,951 requests received in the 2019-20 financial year.
53. As described above, section 21 of the FOI Act requires that an agency take all reasonable steps to notify an applicant of their decision, regarding access to information, within 30 days after the day on which a valid request was received. In Victoria, the time is set to 30 calendar days, plus extensions.
54. FOI decision making in Victoria has become less timely in recent years. The most significant reduction in timeliness occurred in 2017-18 where Victoria’s timeliness dropped from 90% to 82%, an 8% decrease. This change in timeliness coincided with amendments to the FOI Act reducing the processing time from 45 to 30 days. The lowest rate in timeliness over the last six years was experienced in 2019-20, with 79% of decisions made in time.

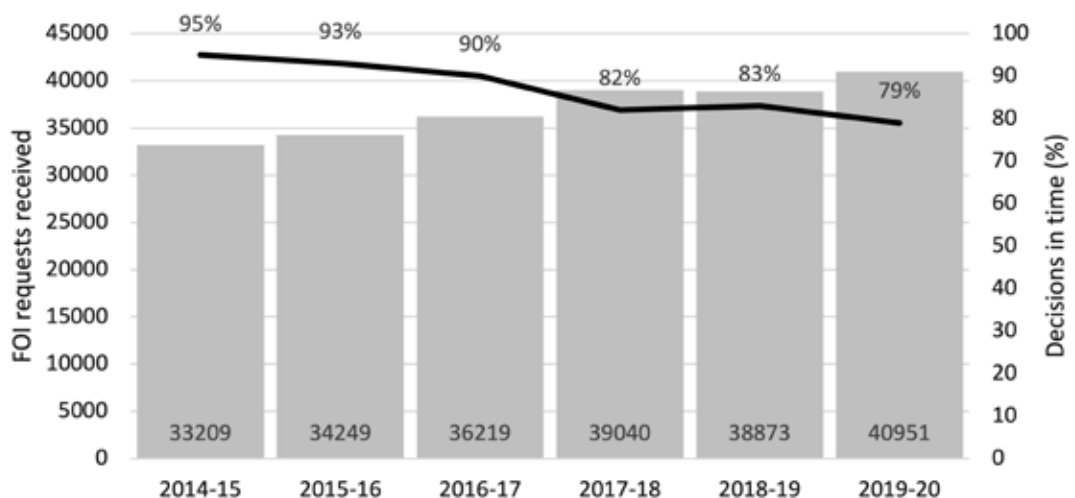


FIGURE 1: FOI REQUESTS RECEIVED, AND PROPORTION OF DECISIONS MADE IN TIME IN VICTORIA

24 Victoria Parliamentary Debates, Assembly Chamber, Session 1983-84, Vol 371, p 85.

55. Whilst delay in timely FOI decision making has increased in recent years, the issue of delay is not a new one. Delays in FOI have frustrated FOI applicants since the early years of the FOI Act's operation and has been raised regularly in parliamentary debates and elsewhere. For example:

*The honourable member for Ivanhoe and I have been pursuing this matter under the Freedom of Information Act by seeking copies of the contracts relevant to the project. My colleague, the honourable member for Ivanhoe, first sought access under the freedom of information legislation in July 1988, but do honourable members think he has those documents or is anywhere near getting them?*

*Now it is March 1990-more than eighteen months later-and in the next fortnight we have a case before the Administrative Appeals Tribunal. All that the honourable member for Ivanhoe has had in that time is cover-up and obfuscation-the opposite to any freedom of information.<sup>25</sup>*

56. When processing FOI requests, FOI officers must assess the application by weighing up a number of priorities and obligations. The objects of the Act include a right to access and a commitment to open government. When responding to specific FOI requests, these objects may need to be weighted up against considerations such as individual privacy, valid considerations of confidentiality of documents in certain contexts and others. This is not always straightforward. Whilst the Commissioner recognises that this task can present many challenges, delays in FOI decision making can have serious consequences. In cases of extensive delay, the passage of time can mean that an FOI applicant no longer has any use for the information they requested. In these cases, the FOI applicant has effectively had their right to access information denied.

## **Comparison to other Australian jurisdictions**

57. Victoria receives more FOI requests than any other state or territory in Australia. The only other jurisdiction with similar numbers of FOI requests is the Commonwealth, which received three more FOI requests than Victoria in 2018-19. Victoria had the third highest rate of applications per capita at 5.9 requests per 1,000 people in 2018-19.

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<sup>25</sup> Victorian Parliamentary Debates, Legislative Assembly, March-May 1990, Vol 397, p 210.

Number of requests under FOI legislation (or equivalent)								
	NSW	VIC	QLD	SA	WA	TAS	NT	CTH
2014-15	13176	33209	12363	11149	17557	965	755	35550
2015-16	14651	34249	12998	10746	16969	973	780	37996
2016-17	11194	36219	14088	11178	17306	1016	816	39519
2017-18	15567	39040	14814	10174	17258	873	932	34438
2018-19	16444	38876	14809	10485	19258	859	1029	38879

Number of requests per 1,000 people								
	NSW	VIC	QLD	SA	WA	TAS	NT	CTH
2014-15	1.7	5.6	2.6	6.6	6.8	1.9	3.1	1.5
2015-16	1.9	5.6	2.7	6.3	6.5	1.9	3.2	1.6
2016-17	2	5.7	2.9	6.5	6.7	2	3.3	1.6
2017-18	2	6	3	6	6.6	1.7	3.8	1.4
2018-19	1.9	5.9	2.9	6	7.3	1.6	4.3	1.5

FIGURE 2: NUMBER OF FOI REQUESTS RECEIVED BY JURISDICTION<sup>26</sup>

58. Each state's FOI legislation provides different deadlines. Some measure time in business days and others count calendar days. In most cases 20 working days is similar to 30 calendar days, except where public holidays occur. Therefore, in most cases NSW, VIC, SA, CTH, NT and TAS have comparable timeframes. QLD and WA have longer timeframes.

Jurisdiction	Statutory time frame
CTH	30 calendar days <sup>27</sup>
VIC	30 calendar days <sup>28</sup>
NSW	20 working days <sup>29</sup>
WA	45 calendar days <sup>30</sup>
QLD	25 business days <sup>31</sup>
NT	30 calendar days <sup>32</sup>
SA	30 calendar days <sup>33</sup>
TAS	20 working days <sup>34</sup>

FIGURE 3: STATUTORY PROCESSING PERIODS IN DIFFERENT AUSTRALIAN FOI JURISDICTIONS

26 From Information and Privacy Commission NSW (2020) 'Dashboard and metrics on the public's use of FOI laws'. Available online at: <https://www.ipc.nsw.gov.au/information-access/open-government-open-data/ashboard>.

27 Section 15(5)(b) *Freedom of Information Act 1982* (Cth).

28 Section 21(a) of the FOI Act.

29 Section 57(1) *Government Information (Public Access) Act 2009* (NSW).

30 Section 13(3) *Freedom of Information Act 1992* (WA).

31 Section 18(1) *Right to Information Act 2009* (Qld).

32 Section 19(1) *Information Act 2002* (NT).

33 Section 14(2) *Freedom of Information Act 1991* (SA).

34 Section 15(1) *Right to Information Act 2009* (Tas).



59. According to data collected from the last five years, NSW, WA and NT have higher percentages of decisions made within statutory timeframes than Victoria. In the last two years, Victoria's timeliness performance has been similar to the Commonwealth.

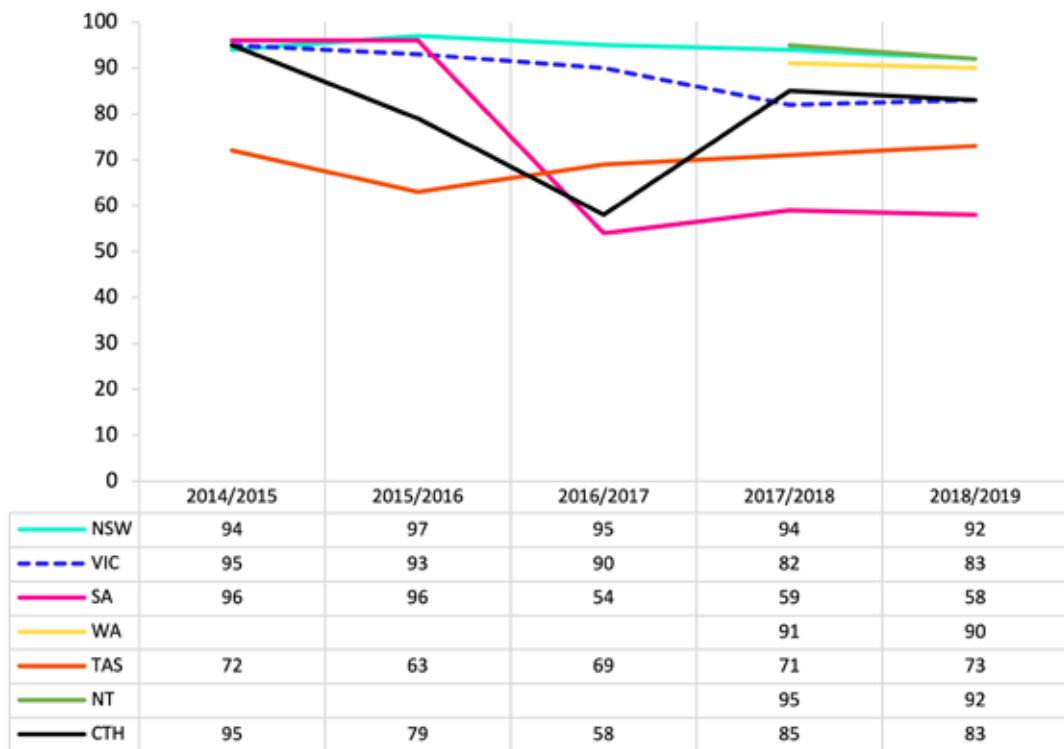


FIGURE 4: PERCENTAGE OF FOI DECISIONS MADE IN STATUTORY TIMEFRAMES: AUSTRALIAN FOI JURISDICTIONS<sup>35</sup>

35 From Information and Privacy Commission NSW (2020) 'Dashboard and metrics on the public's use of FOI laws'. Available online at: <https://www.ipc.nsw.gov.au/information-access/open-government-open-data/dashboard>.

## OWN-MOTION INVESTIGATION

60. On 15 September 2020, the Commissioner commenced an own motion investigation to identify impediments to timely FOI decision making and information release in Victoria.<sup>36</sup>
61. The objective of the investigation was to examine the FOI practices of five Victorian agencies to identify the factors contributing to delayed FOI decision making and information release at those agencies, and to make findings and recommendations to improve the timeliness of FOI decision making at those agencies and across Victoria generally.

### Power to conduct own motion investigation

62. Section 6I of the FOI Act outlines the functions of the Commissioner under the FOI Act. Section 6I(e) gives the Commissioner the power to conduct investigations under Part VIB of the FOI Act. Part VIB of the FOI Act includes section 61O which provides the Commissioner with the power to conduct an investigation on his or her own motion.
63. Section 61O provides that the Commissioner may, on the Commissioner's own motion, conduct an investigation in respect of:
  - the performance or exercise of a function or obligation, under the FOI Act, by an agency or principal officer
  - the failure to perform or exercise a function or obligation, under the FOI Act, by an agency or principal officer; or
  - the purported performance or purported exercise of a function or obligation, under the FOI Act, by an agency or principal officer.

### Decision to conduct investigation

64. Failing to make a decision on an FOI request within the statutory timeframe under the FOI Act is a failure to perform an obligation under the FOI Act.
65. The Commissioner decided to conduct an investigation on his own motion after observing that the most common reason for FOI complaints to OVIC under Part VIA of the FOI Act was delay.
66. The Commissioner was also concerned that in 2018-19, 18% of FOI decisions were made outside the statutory timeframe and that Victoria's rate of timeliness was lower than that of WA, NT, and NSW and equal to the Commonwealth.

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<sup>36</sup> OVIC (15 September 2020) 'Information Commissioner launches investigation into timeliness of freedom of information in Victoria'. Available online at <https://ovic.vic.gov.au/mediarelease/information-commissioner-launches-investigation-into-the-timeliness-of-freedom-of-information-in-victoria/>.

67. To identify agencies of focus for the investigation, the Commissioner reviewed OVIC complaint and review files as well as performance statistics reported by the agencies to OVIC under sections 64 and 64B of the FOI Act. The Commissioner also invited members of the public to share their experiences of delayed FOI decision making, and considered all submissions received.
68. The Commissioner considered the number of FOI requests received by each agency, and the timeliness of their FOI processing. The Commissioner also considered the nature of each agency's work, with the intention of selecting a range of different types of agencies.
69. The Commissioner selected the following five agencies as subjects of the investigation:
  - Victoria Police
  - Department of Justice and Community Safety
  - Department of Transport
  - Alfred Health
  - Frankston City Council.

## **Conduct of own motion investigation**

70. On 15 September 2020, the Commissioner commenced the investigation under section 61O of the FOI Act.
71. The Commissioner wrote to the agencies subject to the investigation on 21 October 2020 to advise of the commencement of the investigation and to request information about their FOI practices and a sample of FOI processing files.
72. On 22 January 2021, after reviewing the material provided by agencies, the Commissioner requested interviews with FOI staff at each agency, including at least the manager of the FOI team and one FOI practitioner. The purpose of the interviews was to:
  - obtain an understanding of each agency's FOI operations
  - gather opinions about factors contributing to delay in FOI, and possible solutions
  - discuss issues that the investigation team identified in the material provided by the agencies.
73. The interviews commenced in early February and concluded at the beginning of March.
74. The interviews were conducted by video conference due to remote working arrangements implemented in response to the COVID-19 pandemic.
75. Between two to four staff were interviewed at each agency, depending on the size of the agency's FOI operations. Interviews were undertaken for a period of approximately two hours for each interviewee.

76. On 26 March 2021, the Commissioner wrote to all five agencies seeking written submissions. The request for submissions included follow up questions from the interviews and, in some cases, requests for further documents.
77. The Commissioner and OVIC reviewed the submissions and records of the interviews and drafted a report of findings and recommendations.
78. In June 2021, the Commissioner met with the principal officer (the secretary or CEO), or a senior representative of the principal officer, of each agency. These meetings were to discuss the potential findings and recommendations relevant to the specific agency and the Victorian public sector generally.
79. In July 2021, the Commissioner developed a draft report of investigation and provided relevant sections to each agency for comment. The report was then finalised for tabling in Parliament.
80. The OVIC investigation team was led by Annan Boag, Assistant Commissioner Privacy and Assurance, and consisted of Isobel Duffy, Bruce Rego, Tessa Micucci and Evelyn Platanos.

## **Information considered**

81. In developing this report, the Commissioner and OVIC considered the following documents and information:
  - a sample of five FOI files from each of the agencies including three that were processed outside statutory timeframes, one file involving consultation and one file processed within 30 days
  - policies, procedures and manuals related to FOI and other information release processes for each agency
  - documents recording staffing levels, team structures, and use of contractors by agencies over the 2017-18, 2018-19 and 2019-20 financial years
  - instruments of delegation for FOI decision making
  - descriptions of the information, software and case management systems used by agencies
  - details of FOI training undertaken by FOI staff
  - copies of internal reports tracking and monitoring the FOI performance of the agency
  - template letters used by agencies
  - information gathered in interviews with agency staff
  - written submissions from the five agencies
  - statistical information provided to OVIC by agencies in annual returns
  - additional statistical information provided by the agencies during the investigation.

# VICTORIA POLICE

## KEY POINTS

- Victoria Police receives the most FOI requests of any agency in Victoria. Despite this, for two extended periods of time Victoria Police managed its workload such that it had no overdue requests open at the end of any month. However, at times when the resources of the FOI Division did not keep pace with its workload or were diverted elsewhere, delays and backlogs occurred.
- Victoria Police now has a very large backlog of FOI requests, caused by staffing levels of the FOI unit relative to its workload, and changes to work arrangements in response to the COVID-19 pandemic. Because of this backlog, all FOI applicants are currently experiencing considerable delays. Victoria Police currently advises applicants that FOI requests are delayed by an average of 14 weeks. While the development of a backlog in the circumstances of the COVID-19 pandemic is understandable, the current level of delay must be addressed. This level of delay effectively deprives FOI applicants, who need prompt access to information, of their FOI rights.
- The Commissioner considers the only way that Victoria Police can address its backlog is by applying significant additional resources to its FOI Division to address this backlog. At the same time, Victoria Police should consider conducting a review of its information release processes to ensure that it is providing access to information as efficiently as it can.

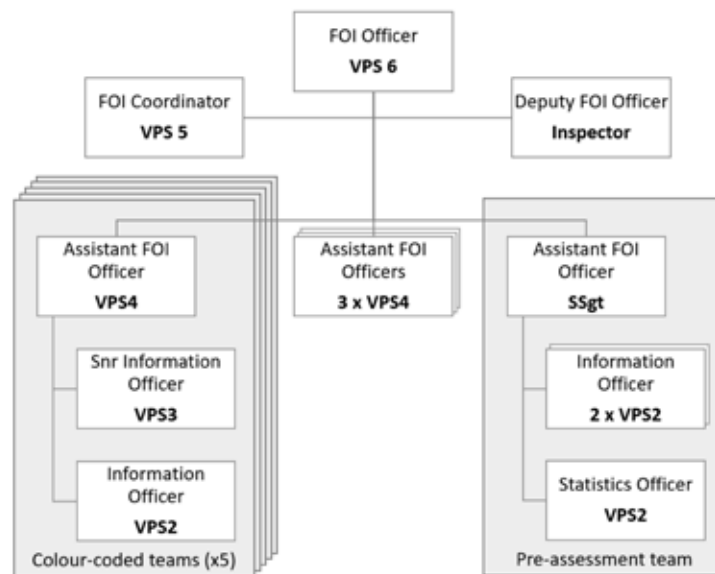
## Background

82. Victoria Police is the primary law enforcement agency in Victoria. It operates under the *Victoria Police Act 2013 (Vic)* and its object is to provide a safe, secure and orderly society, by serving the community and upholding the law. As of June 2021, Victoria Police had approximately 22,000 employees, consisting of 16,500 police officers, 1,450 protective services officers, 400 police custody officers, and 3,550 Victorian public service employees.<sup>37</sup>
83. Victoria Police receives the most FOI requests of any agency in Victoria. It received 4,095 FOI requests in 2019-20, which was approximately 10% of all FOI requests made in Victoria that year. 81% of requests received by Victoria Police in 2019-20 were for access to documents that included the FOI applicant's own personal information.
84. At full capacity, Victoria Police's FOI division is comprised of 26 full-time equivalent staff, being one VPS 6, one VPS 5, one Inspector, eight VPS 4, one Senior Sergeant, five VPS 3 and nine VPS 2 staff. The division is led by the FOI Officer (VPS 6), who is an authorised decision maker under section 26 of the FOI Act. The Deputy FOI Officer (Inspector) and the FOI Coordinator (VPS 5) are also authorised to make FOI decisions for Victoria Police. A fourth specialist decision maker makes decisions on medical related FOI requests.

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<sup>37</sup> Victoria Police (2021) 'Victoria Police Employees by Location, June 2021'. Available online at <https://www.police.vic.gov.au/police-number-region>.

Below its leadership group, the division is split into a pre assessment team and five colour-coded teams of three staff, each of which is led by a VPS 4 and supported by a VPS 2 and 3. The pre-assessment team consists of a team leader with a team of three VPS 2 staff assisting. Within the colour-coded teams, the VPS 2 staff search, collect, and sort documents captured by FOI requests, the VPS 3 staff manage consultation with third parties, and the VPS 4 staff assess the documents and write the decision letter. There are also three VPS 4 staff that do not have a team reporting to them that assist with various aspects of the FOI process.



**FIGURE 5: ORGANISATIONAL STRUCTURE OF VICTORIA POLICE FOI DIVISION**

85. In November 2020, when Victoria Police provided information to OVIC about its staffing level, five positions were vacant, including one of the colour coded teams where all positions were vacant.
86. Victoria Police has consistently received the highest number of FOI requests of any agency in Victoria for at least the last thirty years.<sup>38</sup> Over the last six years, it has received between 2800 and 4100 requests annually. The largest jump in the number of requests occurred from 2016-17 to 2017-18 when the number of requests increased from 3366 to 4006 a jump of 640 requests or 19% in one year.
87. According to statistics reported annually to OVIC, Victoria Police's timeliness performance remained relatively stable for a three-year period from 2014-15 to 2016-17, with 75-78% of decisions made in time. Since then, the timeliness of Victoria Police has declined. From 2017-18 onwards, Victoria Police made less than half of its FOI decisions within time each year. This compares to an average of approximately 80% across all FOI agencies.

38 OVIC 'Annual reports'. Available online at See <https://ovic.vic.gov.au/about-us/annual-reports/>.

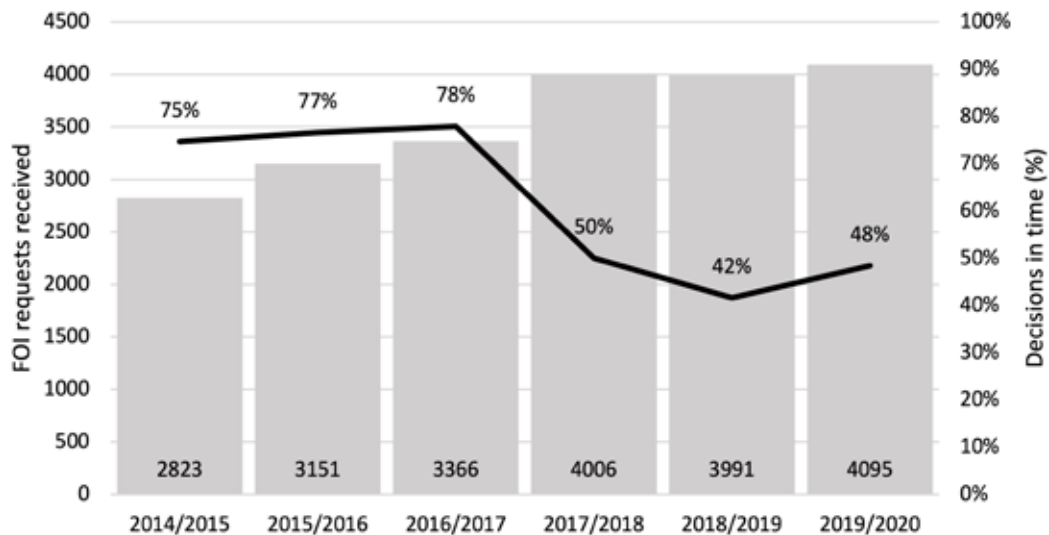


FIGURE 6: FOI REQUESTS RECEIVED, AND PROPORTION OF DECISIONS IN TIME: VICTORIA POLICE

## Impediments to timely FOI

88. Victoria Police informed OVIC that the ‘single most important factor in the timely processing of FOI requests is the staffing levels of the FOI division.’<sup>39</sup> Other factors it referred to as contributing to delay included:
- the increasing number and complexity of requests
  - the number of and experience of FOI staff
  - FOI staff being assigned to other, non-FOI-related tasks
  - Victoria Police members not responding to requests for documents from the FOI team promptly
  - the impact of the 2017 amendments to the FOI Act which shortened the timeframes for processing FOI requests and introduced the requirement to consult
  - external events, in particular COVID-19.
89. The Commissioner considered that the main factor contributing to delay in FOI at Victoria Police was resourcing in the FOI division. At times when the FOI division has more staff relative to the amount of work it needed to do, it processed requests more quickly.
90. Another factor was the impact of remote working prompted by COVID-19, and the impact it has had on Victoria Police’s paper-based FOI processes. Due to restrictions imposed by the COVID-19 pandemic, the FOI division had to work remotely. Its reliance on business processes involving hardcopy documents prior to 2020, and the time taken to transition from hard copy to electronic after the team began working remotely, contributed to a large backlog of FOI requests.

39 Letter from Victoria Police to OVIC, 23 April 2021.

As of May 2021, FOI applicants were being advised by Victoria Police of delays of on average 14 weeks before Victoria Police began processing their requests.

91. While the Commissioner found resourcing to be the primary cause of delayed FOI decision making and document release at Victoria Police, it was not the only cause. The Commissioner noted other barriers to prompt FOI decision making, including dated information systems and paper-based processes and delays in receiving documents and information from other Victoria Police staff in handling FOI requests.
92. Victoria Police’s FOI processes appear focussed on protecting sensitive information from disclosure as a higher priority than promoting the prompt release of information. Its procedures are detailed and provide numerous points at which information can be protected from improper disclosure. Given the subject matter of Victoria police’s work, a degree of caution about releasing sensitive information is warranted. However, not all FOI requests received by Victoria Police are equally complex, and adopting the same process and degree of caution for all FOI requests appears to slow the processing of requests. Victoria Police may wish to consider adopting a triage process to allow non-sensitive requests to proceed through simpler processes. To reduce the overall burden on its resources and considering the increasing number of FOI requests, Victoria Police might also consider whether other categories of information can be provided to applicants informally or released proactively.

**Resourcing**

93. Victoria Police informed OVIC the ‘single most important factor in the timely processing of FOI requests’ is the resourcing of its FOI Division. Victoria Police explained there have been three instances of significant backlogs over the last decade or so which are all attributable to inadequate staffing relative to the team’s workload.
94. Victoria Police provided OVIC with information about the number of received, active and overdue FOI requests at the end of each month, from January 2008 to April 2021. Victoria Police has experienced a steady increase in the amount of FOI requests received per month, since at least 2008. This is shown in the following chart.

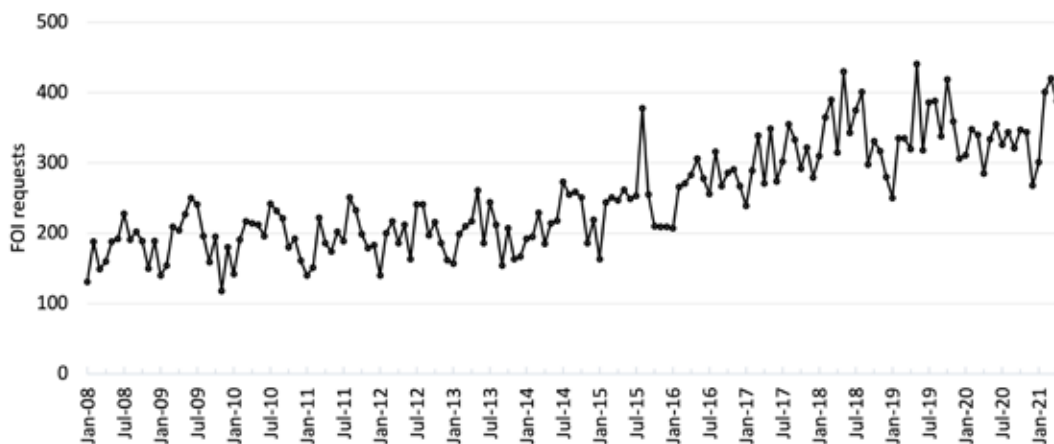


FIGURE 7: FOI REQUESTS RECEIVED PER MONTH: VICTORIA POLICE (JAN 2008 TO APR 2021)



95. The next figure shows the number of requests completed by Victoria Police every month, together with the number of outstanding requests. The figure shows that there were two periods where Victoria Police had no overdue FOI requests on the last day of each month.<sup>40</sup> It also shows four occasions on which there was a substantial backlog of requests.

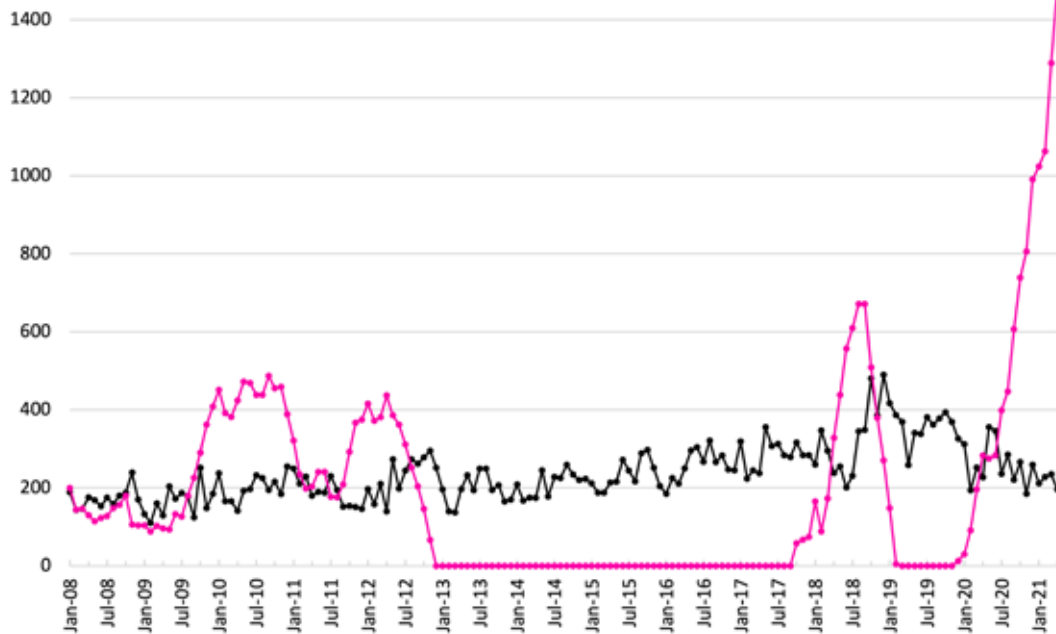


FIGURE 8: REQUESTS CLOSED PER MONTH AND NUMBER OVERDUE AT END OF MONTH: VICTORIA POLICE (JAN 2008 TO APR 2021)

96. Victoria Police considered resourcing issues to have caused its earlier backlogs. The first spike in overdue FOI requests occurred from mid-2009. Victoria Police’s FOI staff were seconded to help with the response to the Black Saturday bushfires in 2009. This spike in overdue requests declined from mid 2011 when two additional staff were added to the FOI division, and further in 2013 when the team’s size increased again, and its current structure was put in place. An extended period of timely FOI decision making was sustained until 2017, when changes to the FOI Act reduced the FOI processing time and increased the amount of consultation required. This increased workload was not matched by increased resources, with many requests becoming overdue. The FOI Division later gained additional VPS 3 staff members, which allowed its backlog of overdue requests to be eliminated from early 2019.
97. The largest spike in overdue requests began at the start of 2020 and continues today as the largest backlog Victoria Police’s FOI Division has experienced. This spike was caused by inadequate staffing levels in the FOI unit relative to its workload, combined with the effect of need for Victoria Police to implement remote working arrangements due to

<sup>40</sup> Superficially, Figure 8 sits at odds with the statistics reported to OVIC annually, and outlined in Figure 6 above, which show that between 75% and 78% of FOI requests were completed on time in financial years 2015-16 – 2016-17. However, Figure 8 does not show all overdue requests, as it only records the number of outstanding requests open on a specified day: the last day of the month. Requests that were completed out of time, but were not yet out of time on the last day of the month, would not be shown in the overdue numbers in Figure 8. It was beyond the scope of the investigation to review historical FOI files of Victoria Police to reconcile these two sets of figures. However, this does highlight the need for consistent internal reporting across agencies, an issue discussed at the end of this report.

the COVID-19 pandemic. Victoria Police told OVIC that staffing levels during the period fluctuated due to staff leaving the organisation or taking unplanned or extended leave, competing organisational priorities as well as recruitment delays and freezes. Since July 2020, five of the eight VPS4 assessors within the FOI Division departed which placed additional pressure on the team. Victoria Police also reported delays in receiving responses to requests for information required to progress FOI requests from sworn members who had been redirected to assist with COVID-19 related duties and were physically relocated (meaning they did not have access to their hard copy records).

98. There is a clear connection between the resourcing of Victoria Police's FOI Division and the timeliness of its FOI decisions. The number of FOI staff available to process requests relative to the number of requests received at any given time has been the primary contributor to delayed FOI decision making at Victoria Police.
99. Something that is also apparent from this chart is that relatively small reductions in the number of requests completed each month (as occurred in 2008-09, 2011-12 and 2017-18) can quickly cause a large backlog of overdue FOI requests. For those backlogs to then be eliminated (as occurred in 2012-13 and 2018-19), significant increases in the number of requests completed per month were required, going substantially beyond the number of requests that were being completed each month before the backlog existed. This has implications for how Victoria Police's current backlog can be addressed.

#### **Victoria Police's current backlog of FOI requests**

100. Victoria Police had 1483 overdue FOI requests at the end of the period shown in the above chart, April 2021. Victoria Police informed OVIC that this number had grown in May to 1759 overdue FOI requests. In April 2021, Victoria Police was providing FOI applicants with an automated response to email enquiries that advised of substantial delay:

*If your enquiry is regarding the progress of a submitted request, please note this office is currently experiencing a significant increase in workload. As a result, there are delays in completing requests which is on average 14 weeks after the due date.*

101. Victoria Police told OVIC that it has several initiatives in place to reduce its current backlog:
  - filling all vacant positions in the FOI Division
  - triaging requests to identify applicants who are legally represented and contacting the lawyers to enquire whether access to documents on overdue requests is still required
  - conducting a more forensic analysis of requests at the pre-assessment stage to reduce over processing
  - additional staff specialisation, including staff dedicated to undertaking redactions on documents, and agency staff responding to applicant delay queries
  - bespoke email responses to advise applicants about delays, which would avoid the time involved in responding to applicant delay queries
  - the return of staff to the physical office.

102. These measures may assist. However, it is unlikely that these measures alone will result in a significant reduction of its backlog. Given the size of the backlog (1759 requests) and the number of requests Victoria Police is completing each month (217 on average in each of the first four months of 2021), it is certain that FOI applicants at the back of the queue will need to wait substantially longer than 14 weeks for their FOI request to be processed, unless Victoria Police can increase the rate at which it is finalising requests. If Victoria Police were to work through its backlog of overdue requests at its current rate of FOI request completion, it would take over 8 months for it to finalise those 1759 requests. The Commissioner also observes that the number of FOI requests completed each month, since mid-2020, appears to remain on a downward trend.
103. Given the size of the current backlog, the Commissioner considers that it is necessary for Victoria Police to engage a substantial number of additional staff to deal with the backlog of overdue requests. Given the complexity of Victoria Police's FOI workload, a surge of solely junior staff appears unlikely to be able to effectively address the backlog. The Commissioner suggests that additional staff be at an appropriate level of seniority that they can effectively manage all stages of the FOI process, including preparing decisions. Having dedicated resources to manage and reduce the backlog of overdue requests will ensure that decisions can be made quickly.
104. Because of the number of overdue requests, and the fact that the backlog is still growing, the Commissioner suggests that Victoria Police should be subject to continued oversight as it addresses its backlog, through regular reports to the Commissioner and to the Minister for Police and Emergency Services about its progress in addressing the backlog. The Commissioner recommends that these reports be made every six months and detail what steps Victoria Police has taken to manage the backlog of requests, and its progress in addressing the backlog. These reports should continue until the number of overdue requests is less than the number of requests Victoria Police is completing each month.
105. Whatever actions Victoria Police takes now, it appears inevitable that most FOI applicants will experience significant delays. This will undoubtedly cause inconvenience and distress for some applicants. While the backlog is in place, Victoria Police should provide information to FOI applicants about the delay they will experience, its causes, and their rights to seek review of a deemed FOI refusal decision. Victoria Police has advised that it provides an apology to FOI applicants in its FOI decision letters. To provide a meaningful apology or explanation will require insight, empathy and care.

**Recommendation 1:** Victoria Police should substantially increase the staffing resources of its FOI team to deal with the backlog caused by COVID-19.

**Recommendation 2:** Victoria Police should provide a written report to the Information Commissioner and to the Minister for Police and Emergency Services every six months about its progress in dealing with the backlog of overdue FOI requests, until the backlog is addressed.

**Recommendation 3:** Victoria Police should provide information to current and prospective FOI applicants about the extent and causes of delayed FOI, and provide an apology for delay, where appropriate. This information should be provided with a view to offering accountability, transparency and empathy.

### **Paper-based processes and aging information systems**

106. OVIC examined a sample of FOI files processed by Victoria Police in 2019. OVIC observed that those files were processed in hard copy in addition to being tracked in a case management system.<sup>41</sup> OVIC noted that the procedure that was used to process these requests involved several steps that relied on hardcopy documents, including reviewing documents for exemptions, and physically passing paper files from one staff member to the next.
107. Most of the Victorian public sector was directed to work from home from March 2020 due to COVID 19. Victoria Police's FOI Division began working from home at that time. This prevented the team from having ready access to hardcopy documents and files. In preparation for working from home, Victoria Police's FOI Division reviewed and replaced its hard copy process with an electronic system in February and March 2020. It modified its current standard operating procedure to reflect a remote environment without access to hardcopy documents in electronic form. Those procedures replicated their previous hard copy procedures by creating electronic storage folders. However, the new procedures still relied on hardcopy documents in a small proportion of cases. For example, where documents were too large to email, Victoria Police FOI staff collected hard copy documents from police members at police stations near FOI staff members' homes.
108. Victoria Police uses a case management system called 'FOI Manager' to process and track FOI requests. This database, developed for Victoria Police in 2005, tracks applicant request details, documents search activity (where and when searches were undertaken and responded to), details of correspondence sent, the outcome (release in part, full or denied, exemptions used, pages released, charges levied), due dates, review details and processing notes. During interviews and in its submissions to OVIC, Victoria Police described FOI Manager as adequate, but outdated. Victoria Police explained FOI Manager requires manual intervention to provide accurate statistics. For example, the old 45-day timeframe to process FOI requests is programmed into the database, and it requires a staff member to manually change the timeframe to 30 days. Victoria Police noted the need for manual intervention, while not being the major factor, increases the time taken to process requests.

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41 Since early 2020, Victoria Police has processed FOI requests electronically. The files OVIC examined predated its electronic processing system.

109. OVIC considered Victoria Police’s use of paper-based systems and its FOI case management system contributed to delays, particularly when the FOI Division moved to remote working arrangements in response to the early stages of the COVID-19 pandemic. However, Victoria Police addressed this issue by moving to a digital approach to managing FOI requests. Many of Victoria Police’s processes have now been digitised, and a new FOI case management system was rolled out on 3 May 2021. Given the significant recent changes to how the FOI Division processes request, the Commissioner does not make any recommendations for changes to Victoria Police’s FOI procedures. However, the Commissioner considers it would be desirable for the effectiveness of its information release procedures generally to be reviewed. Such a review should not only consider Victoria Police’s FOI processes and team structures, but also examine other mechanisms Victoria Police uses to release information.

**Recommendation 4:** Victoria Police should conduct a general review of its information release processes, to ensure that it is providing access to information as efficiently as it can.

#### **Obtaining assistance from other Victoria Police staff**

110. During interviews, Victoria Police told OVIC there is often a delay in receiving documents back from sworn members, which in turn leads to a delayed FOI decision. In its submissions, Victoria Police noted the nature of its work means there will always be a ‘tension between addressing major issues and performing more routine duties’.
111. For example, Victoria Police explained to OVIC that numerous documents, including diaries and notebooks, are physically held by members, and members work at various locations, meaning it is necessary to contact members individually to gain access to documents. Victoria Police noted members receive nine weeks’ leave per annum in addition to rostered days off. In addition, members may be on leave or attending off site training and there is a greater probability of them not being in the workplace when a document search request is received. Victoria Police noted that this is a unique systematic issue that is not evident in most other agencies in that members are often ‘less likely to be at their desk’ to be able to promptly respond to requests for documents requested under FOI.
112. Victoria Police noted document search requests are electronically copied to a members’ Officer in Charge to assist with more timely action. Further, it told OVIC the FOI Division Inspector intervenes if there are delays at the document search stage to ensure that members understand their responsibilities and the timeframes involved.
113. OVIC considered that difficulties in obtaining documents from other Victoria Police staff, particularly sworn members, is a factor contributing to delay at Victoria Police. This appears to be an unavoidable issue in the short term given the nature of Victoria Police’s work. However, in the long term, the FOI Division’s work will be made easier when Victoria Police digitises more categories of documents.

Although the FOI Division has procedures to follow-up delayed responses to search requests at the officer level, OVIC considers that further escalation may be warranted. As such, OVIC suggests that the senior executives that oversee the FOI Division engage with their executive counterparts elsewhere in the organisation when the FOI Division encounters instances of extended or systemic delay.

**Recommendation 5:** The members of Victoria Police’s leadership group that oversee the FOI Division should engage directly with their executive colleagues to address cases of significant or systemic delay in responses to FOI requests.

### **Communication with FOI applicants and extensions of time**

114. While working from home since early 2020, Victoria Police’s FOI staff have not routinely communicated with FOI applicants by telephone. While Victoria Police sometimes tries to discuss the scope of FOI requests and negotiate extensions of time with applicants, the Commissioner observed opportunities for better communication.
115. The Commissioner encourages agencies to regularly communicate with applicants in a meaningful way, not only to assist applicants in making a valid request and manage expectations but also to enhance overall trust and transparency in the FOI process. Delay can have potential emotional and psychological impact on an individual. The Commissioner considers there is an opportunity for Victoria Police to improve the quality of communications with current and future applicants.
116. Victoria Police has included information about delays in processing FOI requests due to the COVID-19 pandemic on its website and has developed an automated email response advising applicants of estimated delays. Victoria Police does not provide updates to FOI applicants while their FOI request is awaiting allocation to an FOI officer. The Commissioner acknowledges that providing updates to FOI applicants would take time. However, the Commissioner considers there is merit in communicating with applicants in a way that acknowledges the current challenges of Victoria Police’s FOI Division, is transparent in disclosing anticipated delays while being empathetic to the potential emotional and psychological impacts of such delays.
117. The FOI Division’s pre-assessment team checks that FOI requests are valid in accordance with section 17 of the FOI Act and logs them in FOI Manager. The file is then given to one of the colour-coded processing teams. OVIC observed that this appears to be an efficient process and that the backlog or bottleneck is not occurring at the pre-assessment stage. However, OVIC learnt that sometimes issues around validity arise at a later stage, for example when a VPS 4 staff member was assessing the documents and drafting the FOI decision. OVIC observed an opportunity for the pre-assessment team to engage more directly with applicants to assist them in making their request valid as well as clarifying the scope of the request.

118. This is also consistent with an agencies' obligations under the FOI Professional Standards and in particular, standard 2.4 which provides:

*An agency that receives a request that is not valid, must take reasonable steps to notify the applicant of the following information within 21 days of receiving the request:*

*(a) why the request is not valid;*

*(b) provide reasonable assistance or advice to the applicant about how to make the request valid; and*

*(c) advise the applicant that the agency may refuse to comply with the request if it does not comply with section 17 of the Act.*

119. While the FOI Act allows for 30 days to process FOI requests, it also allows for extensions of time. An extension under section 21(2)(b) of the FOI Act allows the 30-day timeframe to be extended by up to 30 days at a time with the applicant's agreement. Under section 21(3), an agency may seek agreement from an applicant for an extension any number of times. Victoria Police said it seeks extensions of time from applicants where appropriate under section 21(2)(b) as soon as possible. It added these extensions of time are recorded in the FOI Manager database and advised to applicants in writing. However, Victoria Police told OVIC that recently it made a policy decision not to seek extensions of time because the FOI Act only allows for a further 30 days and it is 'counterproductive to seek approval' to an extension 'that is not going to be met'. Utilising the extensions of time provisions of the FOI Act ensure regular contact with the applicant, as well as the agency making its FOI decision within the statutory timeframe.
120. OVIC understands Victoria Police's rationale around asking applicants for a 30-day extension that is not going to be met only benefits the agency while, as stated by Victoria Police, 'risking the further annoyance of the applicant'. However, the extensions of time provisions in the FOI Act have a specific purpose, and that purpose includes regularly consulting with applicants and ensuring timely FOI. In any event, OVIC considers applicants generally appreciate regular contact and transparency.

**Recommendation 6:** Victoria Police should consider how it can communicate more effectively with FOI applicants about the status of FOI requests, including seeking extensions where appropriate.

# DEPARTMENT OF TRANSPORT

## KEY POINTS

- The Department of Transport (**DOT**) was formed in 2019 as an amalgamation of three agencies (known as ‘machinery of government changes’). The combination of three large agencies into one, together with the portfolio responsibilities of a newly created department, presented significant challenges for its FOI team. These included integrating teams and systems, and developing relationships across the newly formed department. These challenges were a minor contributor to delay in FOI processing by DOT, but appear to have generally been managed well by DOT.
- The most significant contributor to delayed FOI decision making at DOT is its ministerial and executive briefing and noting process. FOI decision makers at DOT currently provide time for senior executives and ministers to ‘note’ or comment on topical FOI requests before a decision is made. On some occasions, this noting process has taken more than 200 days, causing unacceptable delay.
- Despite the briefing and noting issues and machinery of government changes, DOT’s FOI timeliness has improved compared to its predecessor agencies. This speaks to the effectiveness of other aspects of its FOI practice.

## Background

121. DOT was established on 1 January 2019. From July 2019, it was expanded to incorporate VicRoads and Public Transport Victoria (**PTV**). DOT now has approximately 4,000 staff who manage and coordinate the Victorian road system and public transport system, promote road safety, and provide driver licence and vehicle registration services. DOT manages transport operators including Metro Trains Melbourne, Yarra Trams, V/Line and the SkyBus, and is the head of a portfolio of agencies including the Major Transport Infrastructure Authority, Suburban Rail Loop Authority and Transport Safety Victoria.
122. In the 2019-20 financial year, DOT received approximately 1500 FOI requests, placing it in the top 10 agencies in Victoria as measured by number of requests. DOT’s FOI function is performed by its Privacy and Information Access Team which consists of 13 staff, who undertake both FOI and privacy work. The team consists of a director, one manager, two senior FOI and privacy officers, six FOI and privacy officers, two administrative support officers, and one contractor. The full-time equivalent (**FTE**) of the unit is 11.2. DOT estimates that approximately 4.5 FTE staff are dedicated to privacy and 6.7 FTE are dedicated to FOI.
123. DOT classifies FOI requests that it receives as ‘topical’ or ‘non-topical’. Topical requests are those that are more likely to be of wide public interest, subject to media or political discussion, or are otherwise sensitive. They include requests made by journalists and parliamentarians. Non-topical requests are those which are likely to be of interest



primarily to the person making the request, which includes most requests for an applicant’s own personal information. In the 2019-20 financial year, DOT classified 109 requests as topical (7.5% of requests) and 1352 as non-topical (92.5% of requests).

124. Figure 9 shows the total FOI requests received by DOT and its predecessor agencies and departments<sup>42</sup> over the last six financial years.

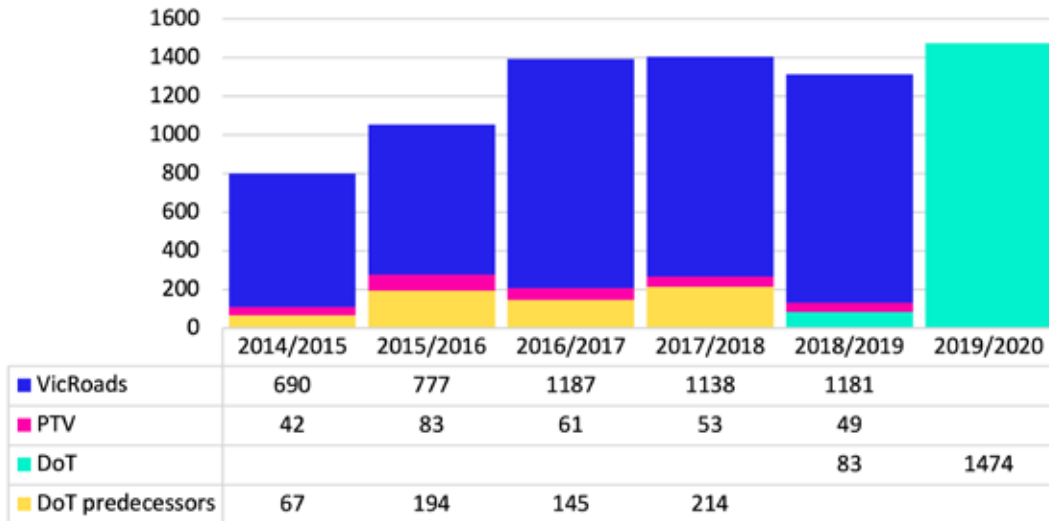


FIGURE 9: NUMBER OF FOI REQUESTS RECEIVED BY VICROADS, PTV, DOT AND PREDECESSOR DEPARTMENTS

125. Figure 10 shows the proportion of FOI requests that DOT and its predecessor agencies finalised within statutory time limits during the last six financial years. Most of these figures were drawn from statistics those agencies lodged with OVIC under section 64B of the FOI Act, but the most recent timeliness figures were provided by DOT during the investigation. Due to an error in how timeliness was being recorded within DOT during 2019-20, DOT resubmitted revised figures for that year on 21 May 2021. The below diagram incorporates the corrected figures provided by DOT.

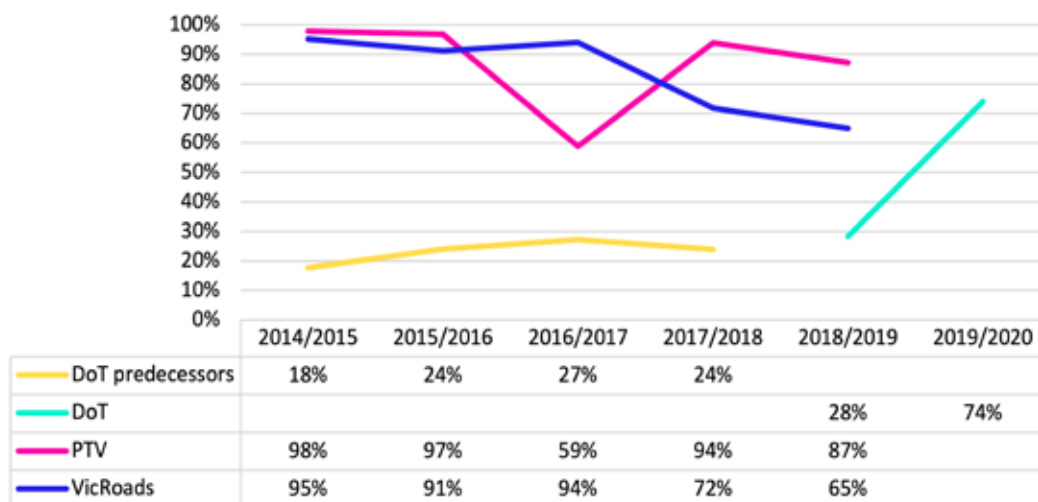


FIGURE 10: PROPORTION OF FOI DECISIONS MADE IN TIME BY VICROADS, PTV, DOT AND PREDECESSOR DEPARTMENTS

42 DOT’s predecessor departments were, for 2014-15, the Department of Transport, Planning and Local Infrastructure, and for 2015-16 to 2017-18 the Department of Economic Development, Jobs, Transport and Resources.

126. In the five years to 2018-19, DOT and its predecessor departments achieved low levels of timeliness, with between 18% and 28% of FOI decisions being made in time. In contrast, PTV and VicRoads achieved relatively high levels of performance.
127. DOT achieved a large improvement in its performance between the 2018-19 and 2019-20 financial years, with the proportion of decisions made within time limits increasing from 28% to 74%. This improvement can, in part, be explained by the incorporation of VicRoads into DOT from July 2019. VicRoads historically processed a much larger number of FOI requests than DOT, and a high proportion of these requests were completed on time. However, it does not explain all of the improvement. Counting all the decisions made by DOT, VicRoads and PTV in 2018-19 together, the three agencies collectively made 64% of all FOI decisions in time. DOT's timeliness performance in 2019-20 of 74% of decisions made in time therefore represents an improvement of 10% compared to the previous year, when the three agencies were operating separately. While this is still slightly less than the Victoria wide average of 79% of decisions made in time, it is a substantial improvement in a year when the Victoria-wide average declined.

## **Impediments to timely FOI**

128. DOT advised OVIC of several impediments to meeting statutory timeframes. These included:<sup>43</sup>
- the high workload of DOT arising from its responsibility from 1 January 2019 to manage a single integrated transport system, and a transport portfolio with numerous member agencies
  - the Victorian Government's ambitious and extensive suite of transport policies and initiatives, which are of significant topical interest, which leads to more complex FOI requests
  - machinery of government changes causing searches for documents to become more complex: 'FOI requests made to DOT [are] no longer confined to the program areas of one predecessor agency but [are] required in respect of possible document holdings of the whole department and across the range of systems and repositories involved'
  - difficulties arising from combining multiple FOI teams, including different processes for low volume and topical requests (DOT) versus high volume and mostly non-topical request (VicRoads), with challenges relating to 'processes, reporting, IT systems, team structure and staffing'.

### **Topical and non-topical FOI requests**

129. DOT's timeliness improved dramatically from 28% in 2018-19 to 74% in 2019/20. As noted above, the main (but not only) contributor to this improvement was the incorporation of VicRoads into DOT from July 2019 because VicRoads received substantially more FOI requests than DOT and completed most of those FOI requests on time.
130. DOT informed OVIC that VicRoads' FOI timeliness performance was better because its work consists of a higher proportion of non-topical requests. In contrast, DOT and its

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43 Submission from DOT to OVIC, 24 March 2021, p 1-3.

predecessor departments received a higher proportion of topical requests. OVIC examined DOT's timeliness performance in 2019-20 within its different predecessor agency subject areas, and between 'topical' and 'non topical' requests.

	<b>VicRoads</b>	<b>PTV</b>	<b>DOT</b>
<b>Topical</b> FOI request decisions	21	19	69
<b>% completed within time</b>	<b>10%</b>	<b>74%</b>	<b>43%</b>
<b>Non-topical</b> FOI request decisions	1252	22	78
<b>% completed within time</b>	<b>75%</b>	<b>100%</b>	<b>90%</b>

**FIGURE 11: DOT TIMELINESS PERFORMANCE 2019-20, BY PREDECESSOR AGENCY AND TOPICAL/NON-TOPICAL STATUS**

131. As shown in these figures, whether an FOI request is topical or not provides a strong indicator of whether it will be delayed. This is unsurprising given the nature of topical FOI requests. Topical FOI requests are more likely to involve subject matters that an agency and its stakeholders will regard as sensitive. It is therefore more likely to require external consultation under sections 33, 34 and 35, as well as informal internal consultations with other agency staff. It also means it will be more likely that the exemption provisions in the FOI Act may apply to these documents. As a result of these factors, topical requests are more likely to take longer to be finalised. DOT, and other agencies, noted to OVIC that it is very difficult to complete a topical request within the 30 days provided by the FOI Act given the consultation needed to make a well-informed decision. It may be that 30 days is insufficient time to process a complex or voluminous FOI request, and this issue is discussed further at the end of the report.
132. However, at DOT, delays did not appear to be limited to complex and voluminous topical FOI requests. Delays were clearly exacerbated by DOT's ministerial and executive noting processes, which caused substantial and avoidable delays for some FOI requests that OVIC examined.

### **Ministerial and executive noting processes**

133. Prior to commencing this investigation, OVIC had received an increase in complaints about delayed FOI requests at DOT. OVIC observed that many of these requests involved delay at the 'ministerial noting' stage of the FOI process.
134. Ministerial noting is a practice many large agencies carry out. Noting typically means bringing sensitive FOI requests, and the agency's intended decision, to the attention of the relevant minister shortly before a decision is made. It is a practice that is reflected in Guidelines that were issued by the Attorney General in December 2009, which provide agencies with a suggested workflow for handling FOI requests.<sup>44</sup> The Guidelines were issued in response to a recommendation by the Victorian Ombudsman to guide FOI decision makers. While they did not have legal force, OVIC understands that departments and many agencies acted in accordance with them.

<sup>44</sup> Attorney-General of Victoria (2009) 'Attorney-General Guidelines on the Responsibilities and Obligations of Principal Officers and Agencies'.

The Guidelines have largely been replaced by Professional Standards and practice notes issued by OVIC.

135. The Guidelines said:

*Where a decision relates to a Minister's portfolio and/or where a Minister could be asked by the media or in Parliament to comment or explain about the response to the request or the contents of the documents once disclosed, or they are sensitive in any way, the agency is to provide a brief to the Minister. ...*

*Importantly, this requirement to brief is not a request for permission to disclose documents that the FOI officer has already decided ... should be disclosed. ... It is not the responsibility of the FOI officer to follow up the Ministerial office if no response to the brief is received by the proposed finalisation date.*

136. To understand the impact of Ministerial noting at DOT, it is necessary to examine where it fits into DOT's FOI process generally. DOT's FOI process consists of six stages. The first three stages are completed for all FOI requests (topical and non-topical). The final three stages apply only to topical requests. The six stages are:

- scoping
- search
- assessment
- risk and communications assessment (only for topical requests)
- briefing preparation (only for topical requests)
- ministerial noting (only for topical requests).

137. In the scoping stage, the FOI unit explores the scope of the request with the FOI applicant and obtains advice from internal business units on whether the request is clear and not too onerous to process. At the search stage, the relevant business units conduct searches for documents and provide them to the FOI unit. At the assessment stage, the FOI unit reviews the relevant documents to determine whether they are to be released in accordance with the provisions of the FOI Act.

138. DOT described the final three stages that are relevant to its noting process as follows:

*The Risk Assessment stage of the department's process requires advice endorsed by an accountable executive concerning the risks associated with the planned release. This step provides assurance that any issues raised by the program area have been sufficiently addressed, that the area is aware of the planned release, and also informs media advice.*

*In line with previous advice from the Attorney-General in 2009, Ministers are provided with an opportunity to 'note' decisions on topical requests – those requests where a decision relates to a Minister's portfolio and/or where a Minister could be asked*

by the media or in Parliament to comment or explain the decision or the contents of the documents once disclosed. This is facilitated by a briefing process, wherein the Minister's office notes the response to the request.

To assist in appropriately informing Ministers concerning the department's decision and assist their ability to respond, noting briefs are accompanied by an endorsed Risk Assessment and Communications Advice. Creation of that advice provides assurance to the Deputy Secretary reviewing the Ministerial briefing, that the program area for which they are responsible has responded appropriately to the FOI request. It provides assurance to the Minister that the agency has thoroughly considered the decision, as well as assisting the Minister's ability to respond.

139. During the investigation, at OVIC's request DOT examined FOI files for a small sample of topical FOI requests.<sup>45</sup> OVIC also reviewed a subset of that sample of files. DOT and OVIC noted how long these requests had been at each stage in DOT's FOI process. While this was only a small sample, consisting of nine requests in total, it provides an indication of where delays can occur in DOT's FOI process. The results of this survey are presented below.

Stage	Average duration	Minimum duration	Maximum duration
Scoping	10 days	0 days	27 days
Search	26 days	0 days	52 days
Assessment	24 days	0 days	77 days
<b>Total – processing stages</b>	60 days	-	-
Risk assessment and communications	31 days	8 days	71 days
Briefing preparation	52 days	4 days	248 days
Ministerial noting	54 days	8 days	245 days
<b>Total – risk assessment and noting</b>	136 days	-	-

FIGURE 12: DURATION OF EACH FOI PROCESSING STAGE FOR A SAMPLE OF TOPICAL FOI REQUESTS HANDLED BY DOT IN LATE 2019

140. The actions in the final three stages of DOT's FOI process involve identifying and managing risks and communications issues arising from each FOI request, and informing relevant stakeholders (ministers and agency executives). These three stages are not required by the FOI Act. They were completed sequentially and together took 136 days on average in this small sample of files. In contrast, the first three stages of the FOI process were completed much more quickly, within 60 days on average. The first three stages are the only actions that an agency must complete when processing an FOI request.

45 DOT examined all FOI requests that were finalised or received in the month of September 2019, a date selected by OVIC to allow comparison with other information gathered during the investigation that related to that month. Only topical FOI requests were reviewed because non-topical requests did not involve the risk assessment, briefing or noting stages.

141. DOT told OVIC that it would not finalise a topical FOI request or release documents until the conclusion of the ministerial noting process. Until a minister had noted the relevant briefing document, the FOI decision would not be made.
142. This is not consistent with DOT's obligations under the FOI Act and the Professional Standards. Professional Standard 8.1 states that an FOI Officer must make their decision on an FOI request independently and that they cannot be directed to decide in a particular manner. The FOI Act states that government agencies must notify an FOI applicant of their decision as soon as practicable, but no later than 30 days after receiving a valid FOI request. There is no provision in the FOI Act for the time for an agency to finalise an FOI decision to be paused or extended for consultation with, or noting by, a minister or other stakeholder.<sup>46</sup> Agencies have a legal duty to finalise FOI decisions within the statutory timeframe. This is not affected by any delay due to a noting process.
143. DOT's process of waiting for a response from the minister before making a request was different to other agencies OVIC examined during this own-motion investigation. Both DJCS and Victoria Police provide noting briefs to their ministers for topical requests. However, as part of those briefings, DJCS and Victoria Police advise their ministers when the FOI decision will be made, even if no response is received. Such an approach avoids the possibility of a delayed response from the minister's office holding up an FOI decision.
144. DOT advised that in some cases the noting process involves active engagement between the minister's office and DOT, with the minister's office providing information essential for DOT to make a well-informed decision. However, OVIC did not observe any correspondence between FOI decision makers and the ministers' offices in the sample of files it reviewed. In any event, the FOI Act does not provide additional processing time for any such engagement to occur. Parliament's intention, in not providing additional time to decision makers for this sort of consultation, is clear. Agencies need to conduct these consultations within the 30 days provided by the FOI Act. Should DOT wish to consult with its ministers on an FOI request (as opposed to simply informing them of a request), this would need to happen at an earlier stage in the FOI process. DOT would also have to follow Professional Standard 8.1.
145. Ministerial noting and associated assessment and briefing processes are a significant contributor to FOI delay at DOT. DOT's current noting process is not consistent with its obligations under the FOI Act and Professional Standards. DOT should change its FOI process to eliminate noting and associated assessment processes, or at least conduct them in a much shorter period, and not await responses from ministers or other stakeholders before making FOI decisions.

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46 Excluding certain categories of persons who may wish to claim a document is exempt: for example, the Act provides an additional 15 days to consult with third parties whose personal affairs information is contained in a document subject to an FOI request.

146. OVIC suggests that DOT provide clear guidance to its FOI staff that they should not await ministerial or executive noting before finalising an FOI decision. While DOT may continue providing briefings to ministers and agency executives about topical FOI requests to allow them to respond in an informed manner to the disclosure of documents, these briefings should be for information only and should inform the recipient of when a decision will be made, regardless of whether the recipient replies to the briefing.
147. DOT should refer to OVIC's 'Procedural Practice Note 23 – Noting and Briefing Processes on Freedom of Information Decisions' which says that to avoid delay in noting processes, noting (if it is done at all) should be completed within four days or less, and that any brief that requires an FOI decision to be noted should state the decision will be made by the due date, regardless of whether it has been noted. It is not appropriate for DOT to delay making an FOI decision while waiting for their minister or any other interested stakeholder to note the decision.

**Recommendation 7:** DOT should ensure FOI decision makers do not delay the finalisation of an FOI decision due to executive or ministerial noting processes.

#### **Impact of machinery of government changes**

148. DOT identified the restructure of the department as a contributor to delay.
149. OVIC agreed that the FOI team had faced considerable challenges due to the department's restructure. The amalgamation of the three predecessor entities expanded DOT's portfolio which has had a subsequent impact of increasing the number and scope of documents that could be requested from the Department through FOI.
150. DOT stated that the greater involvement of VicRoads staff in processing of topical FOI requests placed pressure on the processing of high volume, non-topical FOI requests received by the VicRoads workstream. DOT developed its FOI staff to increase their capabilities in processing FOI requests across the integrated Department, rather than limiting staff to operational silos based on the predecessor entities.
151. OVIC noted the significant planning and preparation required to provide an effective and integrated FOI service. Additionally, OVIC recognises the DOT FOI unit has had to co-ordinate the relevant integration-related initiatives and activities in addition to its regular operations of processing FOI requests. Generally, OVIC was impressed by how quickly and smoothly the three FOI teams at DOT had been integrated. As noted above, DOT improved its performance from 2018-19 to 2019-20 following the integration of the three agencies.
152. OVIC considers that while DOT's FOI unit faced challenges in integrating the three predecessor agencies' FOI functions, it managed this well.

## Engagement with FOI applicants and informal resolution

153. During the interviews, DOT staff explained that FOI officers proactively communicate with applicants early in the FOI process to seek clarification, where necessary and appropriate. This leads to a further refinement or narrowing of the scope of FOI requests. DOT staff stated the purpose of these applicant engagements is to gain an understanding of:
- the FOI request
  - what specifically the applicant is seeking access to
  - what specific documents DOT need to search for
  - what the applicant wishes to achieve by accessing the documents and if this can be achieved in another way.
154. DOT staff stated that, where appropriate, FOI applicants are contacted by telephone which enables the FOI Officer to build a working relationship with the applicant and helps to obtain the relevant contextual or background information that can assist in the finalisation of the FOI request. DOT staff stated that their primary focus is to ‘create better decisions and treat every applicant in a fair and engaging manner’. This is commendable and needs to be consistently reflected in practice.
155. DOT staff also stated that these engagements with applicants also result in the informal resolution of some FOI requests. However, in its written submission, DOT said that it did not hold statistics on the number of FOI requests that were informally resolved. This is because most of such FOI requests do not reach the FOI unit as they are not valid FOI requests or because they can be resolved locally by the relevant business unit. OVIC recommends that DOT captures data on its efforts to informally resolve FOI requests.

**Recommendation 8:** DOT should record the number of requests to its FOI unit that are dealt with administratively, and include those numbers in reports from the FOI unit to DOT management.



# DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

## KEY POINTS

- Prior to 2017, the Department of Justice and Community Safety (**DJCS**) completed more than 90% of its requests on time. However, from 2017 onwards its performance declined.
- From 2017, amendments to the FOI Act increased the work involved in processing many requests, while reducing the processing period from 45 to 30 days. This occurred at the same time as the number of requests received by DJCS was substantially increasing. The FOI unit had to deal with more requests, more quickly, and with the same resources. As a consequence of the reduced processing period, fewer requests were completed in time.
- Since 2020, DJCS has made a concerted effort to improve the timeliness of its FOI decision making. This included a clear direction from the Secretary of DJCS that timely FOI was important, and the initiation of an FOI Reform project. Part of the FOI Reform project included supporting the FOI unit with additional staff resources. While DJCS reports that its timeliness has begun to improve, it should monitor this closely.

## Background

156. DJCS oversees the justice and community safety services of the Victorian Government. It manages the development and implementation of a range of laws, regulations, and policy in areas across its portfolio (such as in gaming and emergency management), and is responsible for ensuring that all elements of the justice and community safety system are working efficiently and effectively. DJCS employs more than 10,000 people and is comprised of 11 policy, program and corporate groups including: Corrections and Justice Services; Aboriginal Justice; Youth justice; Regulation, Legal and Integrity; and Police, Fines and Crime Prevention.<sup>47</sup>
157. In 2019-20, DJCS received the 13th highest number of FOI requests of any agency in Victoria and the third highest of any government department, at 1317 FOI requests.
158. The FOI unit at DJCS is managed by an Assistant Director in the Corporate Governance and Support Division. The FOI unit has two arms: FOI Requests and FOI Operations. FOI Requests is responsible for processing requests, while FOI Operations coordinates OVIC reviews and complaints, VCAT matters, reporting and maintaining the FOI case management system. The FOI Requests team has 19 staff divided into two teams and is overseen by an FOI manager. The two teams each have a VPS 5 team leader, and each team has 6 members consisting of VPS 3 and VPS 4 employees. There are also two VPS 5 senior FOI requests advisers.

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<sup>47</sup> DJCS (2020) 'Annual Report 2019-20'.

159. The bulk of FOI requests received by DJCS (89% in 2019-20) relate to corrections, prisons, and parole. DJCS receives a relatively small volume of ‘topical’ FOI requests – that is, requests likely to be of wide community interest or subject to external scrutiny. In 2019-20, it received 89 topical requests (6.8% of all FOI requests) which included 35 FOI requests from members of parliament (2.7% of all FOI requests) and 32 FOI requests from journalists or news media (2.4% of all FOI requests).
160. Over the last six years, DJCS and its predecessor agencies received between 600 and 1400 requests annually. The number of requests received annually has steadily increased by between 10-20% each year. Despite this steady growth in request numbers, DJCS’s predecessor agencies processed between 90-100% of decisions in time over three financial years from 2014-15 to 2016-17. During the 2017-18 financial year the proportion of requests processed in time dropped to 49%, a 42% drop in timeliness on the previous financial year. This was then followed by reported timeliness of 57% in 2018-19 and 40% in 2019-20. The average time it took DJCS to finalise FOI requests has fluctuated over the last four years, with its average time to finalise requests being 36.4 days in 2016-17, 42.4 days in 2017-18, 33.2 days in 2018-19 and 44.4 days in 2019-20.

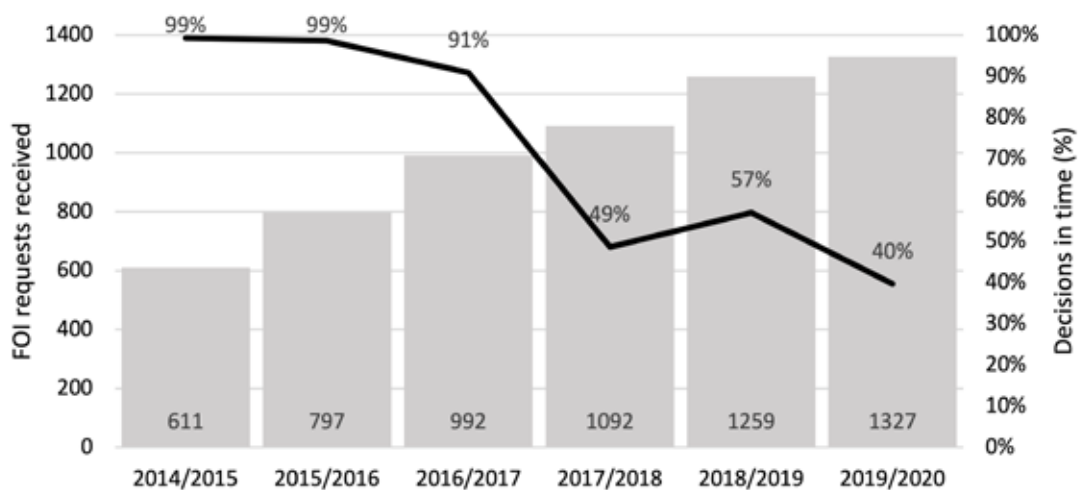


FIGURE 13: FOI REQUESTS RECEIVED, AND PROPORTION OF DECISIONS MADE IN TIME: DJCS AND PREDECESSOR DEPARTMENTS

## Impediments to timely FOI

161. DJCS informed OVIC of the following factors contributing to delayed FOI:
- an annual increase in the number of FOI requests received by DJCS
  - an increase in the size and complexity of FOI requests covering documents across many different business areas
  - the confidentiality and sensitivity of Corrections Victoria documents limiting opportunities to handle matters informally and quickly
  - increasing workload in the FOI Operations Team, including taking on the Whole of Victorian Government FOI leadership coordination in early 2020, resulted in less capacity to redirect team resourcing to the FOI Requests Team during peak periods

- competing urgent priorities in business areas across the Department, for example, parts of the Department are also engaged in operational responses to various emergencies, including bushfires, COVID-19, storms and floods.
162. OVIC sought to identify what factors contributed to the decline in FOI timeliness. As discussed, below, the primary cause of the decline in DJCS's timeliness performance appears to have been the reduction of the statutory processing period in 2017 from 45 to 30 days, combined with an increase in FOI requests received.
163. There were also several secondary factors that OVIC observed contributed to delayed FOI at the Department, including the complexity and sensitivities associated with corrections-related FOI requests, and the impact of departmental growth and restructures.
164. DJCS advised OVIC that, following directions from its Secretary in May 2020, the FOI unit had embarked on a range of initiatives aimed at improving various aspects of its FOI performance. This included the allocation of additional staffing resources (included in the figures above). DJCS told OVIC that because of these changes it had cleared its backlog of overdue FOI requests at the end of October 2020. In 2020-21, DJCS made 66% of its FOI decisions in time.

#### **More requests, more quickly, with the same resources**

165. DJCS noted that changes in the statutory timeframes in September 2017 had a significant impact on the timeliness of its FOI decision-making. Prior to September 2017, the FOI Act allowed agencies a period of 45 days to finalise FOI decisions.<sup>48</sup> Following these amendments, agencies are required to finalise FOI decisions within 30 days, plus a further 15 days if external consultation is required. Prior to the changes to the FOI Act, DJCS performed well in terms of the number of requests it processed within statutory timeframes.
166. In the lead up to the September 2017 legislative changes, DJCS undertook a review of its FOI processes. The findings of this review were finalised in October 2016. This review recommended that DJCS required a further 3 to 5.5 FTE to allow it to maintain a high proportion of on-time FOI decisions within the new timeframe. Due to temporary restrictions on hiring new staff, DJCS did not recruit the additional staff recommended by the review.
167. At the same time as statutory processing times were shortened, DJCS's FOI workload was increasing, as shown in Figure 13 above. The combination of these two factors, without additional resources being dedicated to FOI, inevitably caused the proportion of requests being completed by DJCS on time to decline.
168. The Commissioner considered this to be the primary cause of the decline in DJCS's FOI timeliness performance since 2017.
169. DJCS advised OVIC that in May 2020 the Department sought to improve its FOI performance. This led to the 'FOI Reform Project' which included a suite of activities and projects that were aimed at clearing overdue FOI requests; improving engagement

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48 Section 8 of the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Vic).

and communication with stakeholders; revising FOI case management processes; and improving the quality of decisions. The FOI unit hired four ongoing staff members and one non-ongoing staff member. DJCS advised that this resulted in the clearing of the topical FOI requests backlog in June-July 2020, and this was followed by the clearance of the non-topical FOI request backlog in October 2020.

**Recommendation 9:** DJCS should continue to monitor its timeliness performance following the implementation of the FOI reform project.

### **Departmental growth and restructure**

170. DJCS also said that its growth and re-structures contributed to delayed FOI. When business units are created within or introduced into DJCS's portfolio, the FOI unit explained that it has to educate new staff on DJCS's FOI-related processes and procedures. It also needs to build relationships and keep up to date with internal changes to business units as well as stay abreast of key contact points or persons within the various business units.
171. The FOI Unit also noted that any changes to the DJCS's size and portfolio are not immediately reflected in a proportional increase to the FOI unit's resources. Prior to obtaining additional resources, the FOI unit needs to demonstrate the additional work generated by the incoming FOI requests and it needs to build a business case to justify the need for the additional FTE. Accordingly, DJCS is unable to proactively acquire additional resourcing for its FOI unit to reflect changes to its size and portfolio. For this reason, resourcing lagged increased workload for a substantial period, causing delays.

### **Corrections-related FOI requests**

172. Most of the FOI requests processed by DJCS are requests from, or on behalf of, incarcerated persons. In 2019-20, this was 89% of FOI requests received. DJCS told OVIC that these requests are often large, with applicants seeking their entire corrections record, and can involve practical difficulties such as files that exist only in hardcopy formats.
173. In its submission, DJCS discussed the secrecy provision in section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) that prohibits the disclosure of 'personal or confidential information' with penalties attaching to the unauthorised release of such information. Section 104ZX of the *Corrections Act* defines 'personal or confidential information' to include information that falls within a broad range of information categories. In assessing the relevant documents, DJCS's FOI officers must ensure that they do not inadvertently release any information that might fall within the above categories of information as it would result in a breach of the secrecy provisions in the *Corrections Act*.

174. DJCS additionally advised that an accidental or inadvertent disclosure of corrections information could have significant negative consequences, potentially affecting the good order and day-to-day operation and functions of prisons. DJCS said that '[k]nowledge is power in the prison environment' and there is significant risk that information can be misused in a way that could impact on the lives, health or physical safety of prisoners, staff or the wider community. For these reasons, DJCS told OVIC that it takes a cautious and deliberative approach when handling FOI request for corrections files.
175. OVIC reviewed a sample of four corrections files provided by DJCS. In reviewing those files, OVIC observed that in three of the four files, the FOI officers took between 26 and 29 days to assess the relevant corrections-related document and to draft a final decision. This period was marked by apparent inactivity on the relevant files, which DJCS advises was due to the files awaiting allocation from the FOI unit's file banking system. It appeared that this period was the single largest contributor to delay for the sample of files OVIC reviewed.
176. DJCS informed OVIC that its policy is to communicate with prisoners only in writing. OVIC's experiences in managing FOI review and complaints matters demonstrates that speaking to FOI applicants (including prisoners) by telephone can often result in productive engagements that result in the narrowing of the scope of an FOI review application or informal resolution of complaints. Similarly, if DJCS staff were to correspond with prisoners by telephone, then this could potentially introduce efficiencies to the processing of FOI requests relating to corrections-related matters.
177. DJCS has developed a fact sheet for staff and prisoners to assist them to better understand their rights under the FOI Act as well as providing information on the types of documents available to them outside the FOI Act. Prisoners should be directed to these resources to provide them with a better understanding of what they can obtain without making an FOI request and thereby decrease the numbers of FOI requests made.
178. The Commissioner acknowledges that there are significant operational challenges which make it difficult for FOI staff to make telephone calls to prisoners. Nonetheless, the Commissioner suggests that DJCS should explore mechanisms to communicate with incarcerated FOI applicants about the terms of corrections-related requests. This may involve using additional communication channels, such as telephone for certain requests, or it may involve provided additional guidance to applicants about which categories of information are available within and outside FOI, and how these applications are assessed. DJCS should also seek to identify categories of documents that can be provided to prisoners outside the FOI Act.

**Recommendation 10:** DJCS should identify mechanisms to improve communications with FOI applicants about corrections-related requests, and consider whether there are any other categories of information that can be provided without an FOI request.

## **Other observations**

179. OVIC also observed other practices of DJCS's FOI unit that did not contribute to delay but rather that assisted DJCS to manage its FOI workload in a timely manner.

### **Ministerial briefing and noting processes**

180. During interviews with members of the DJCS FOI requests team, the ministerial noting process was discussed. DJCS explained that the purpose of its ministerial noting process is to inform the minister's office of a proposed FOI decision and that it works collaboratively with ministerial offices to ensure that requests for noting are actioned within the required timeframes. DJCS explained that its FOI unit advises the relevant minister's office when a decision is ready to be made and the documents have been prepared, and informs the office when the decision will be made – ordinarily 4 working days from when the briefing is provided.
181. The day before the decision is due, a courtesy reminder is sent to the minister's office advising that the decision is due the next day. If no response is received by close of business on the noting due date, the decision is made, and the applicant is informed. The minister's office is also informed of the decision. If the minister's office raises questions or comments about the proposed decision, the department responds during the allocated noting period or as quickly as is practicable.
182. OVIC considered that DJCS's noting process was not delaying FOI decision-making.

### **Use of section 25A(1) to negotiate the scope of FOI requests**

183. DJCS staff advised they use section 25A(1) (the ability to refuse requests that would substantially and unreasonably divert the agency's resources) to negotiate the scope of FOI requests when dealing with FOI applicants. DJCS provided an example where its staff used the mandatory section 25A(6) consultation process to clarify or narrow the scope of the FOI requests by particular terms of imprisonment; a narrowed time period; or a particular incident or category of documents. DJCS also stated that it rarely makes final decisions that refuse to process FOI requests and that most refusals under section 25A(1) arise when FOI applicants do not respond to an invitation to consult under section 25A(6). If the applicant does respond on a later date, then DJCS processes it as a new FOI request.
184. In the files reviewed by OVIC, DJCS used section 25A(1) as a tool to successfully narrow the scope of the FOI requests to documents that are pertinent to the applicant's interest or particular dispute. DJCS provided practical suggestions to applicants about narrowing the scope of their requests so that DJCS could process it, and communicated through various channels (in writing, over the phone, and by email) with applicants to discuss scope. This process appeared to be assisting DJCS and applicants to develop request scopes that minimised delay while still providing access to the information.

## **DJCS's operational processes**

185. DJCS has several processes in place to efficiently process incoming FOI requests. During interviews DJCS noted that it has a prioritisation system to ensure that FOI applicants who only submit one request at a time are not disadvantaged by other FOI applicants who lodge multiple requests simultaneously. DJCS has established protocols for prioritising requests when multiple requests are made by a single applicant. This process involves DJCS negotiating with the applicant to process the multiple requests in a sequential order where the priority elected by the applicant. While this means that DJCS does not meet the statutory timeframe for these requests, it considers that it allows it to achieve a more timely service overall.
186. Another mechanism used to finalise simple or small-scale requests is the 'express tray'. This is a system where FOI requests involving less than 50 pages are identified and allocated to FOI officers for prompt finalisation. This allows the agency to provide its FOI officers with files of varying complexity and volume. It also provides FOI officers a respite from dealing with large or complex requests some that involve sensitive and challenging content and material.
187. The Commissioner notes that mechanisms such as the express tray and prioritisation provide opportunities for agencies to finalise simple requests and avoid the building of a backlog of overdue FOI requests.
188. During interviews, DJCS advised OVIC that all FOI officers are decision-makers, and they sign their own FOI decisions. In the event an FOI officer is managing a complex or topical FOI request, then the FOI decision is escalated to a manager for finalisation.

# ALFRED HEALTH

## KEY POINTS

- The Commissioner investigated Alfred Health because its reported timeliness performance decreased significantly between 2018 and 2020. However, the Commissioner found that the statistics reported to OVIC for those years were inaccurate due to errors in Alfred Health's FOI case management statistics.
- Although Alfred Health is now working to improve its case management system, this error should have been identified earlier, when Alfred Health's apparent performance deteriorated.
- Alfred Health is exploring ways to make more information available to its patients outside FOI requests, through changes to its online patient portal. This is likely to reduce the FOI team's workload, and therefore improve Alfred Health's timeliness.

## Background

189. Alfred Health operates hospitals in Melbourne, Caulfield and Sandringham. It is established as a Public Health Service under section 65P of the *Health Services Act 1988* (Vic).
190. Alfred Health receives the second highest number of FOI requests of any agency in Victoria, with approximately 2600 FOI requests received in 2019-20. Most requests that Alfred receives are from patients and former patients seeking access to documents that relate to their medical treatment. Almost half of these are from insurance or legal firms acting on behalf of the patient, with the remainder received directly from the patient. The number of requests that Alfred Health has received each year remained relatively stable during the last six years, ranging from 2400-2700 requests.
191. The FOI team at Alfred Health consists of a manager and three staff. The team is comprised of one permanent full-time FOI officer, one non-ongoing full time FOI officer and one administrative assistant who spends 50% of their time on FOI. The Manager of Legal Support Services oversees the team. The FOI team provides a support role rather than a decision making role: FOI decisions are made by the unit head in charge of the area that each FOI request relates to, who is usually a medical practitioner.
192. Section 64B of the FOI Act requires agencies to provide information to the Commissioner for the purpose of compiling information on FOI for OVIC's annual report. Some of the types of information required include the number of FOI requests received each year; the number of decisions made where information was not provided and the exemptions that were applied; the name and designation of each officer at the agency with decision making authority; charges collected by the agency or minister; and details of any difficulties encountered by the agency in administering the FOI Act. As with all agencies, Alfred Health submitted annual reports to OVIC each year. However, Alfred advised OVIC that the data was inaccurate from 2018-19 onwards.



193. According to the figures Alfred Health reported to OVIC, the proportion of decisions made in time was between 99-100% in the years 2014-15 to 2017-18. This timeliness figure declined to 77% in 2018-19 and then to 39% in 2019-20. Alfred Health told OVIC that the reported figures for 2018-19 and 2019-20 were incorrect due to problems in Alfred Health's case management system, and that it had achieved a higher level of timeliness. OVIC was unable to determine what proportion of requests were completed in time, as Alfred Health could not extract accurate statistics for previous years from its case management system.

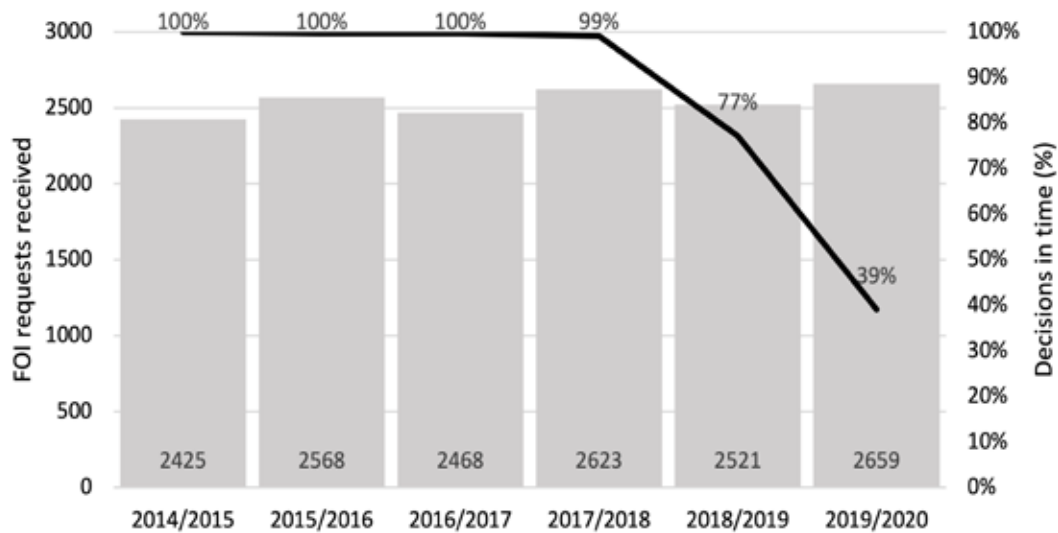


FIGURE 14: NUMBER OF FOI REQUESTS RECEIVED, AND REPORTED PROPORTION OF DECISIONS IN TIME: ALFRED HEALTH

## Impediments to timely FOI

194. Alfred Health told OVIC that several factors contributed to delayed FOI decision making:

*The review of our processes has confirmed the challenges we faced were multi-factorial. The change in legislative requirement for a response in 30 days rather than 45 days presented a challenge, particularly following the introduction of our electronic medical record. Inefficiencies in our processes were revealed, as previously detailed, within our medical records management system (MRMS). The time stamp functionality and ability to run accurate reports, were two key factors leading to duplication of work and an inability to accurately review each applications progress in respect to the 30-day requirement.*

195. Given Alfred Health was unable to provide accurate information to OVIC about its historical FOI performance it was difficult for OVIC to draw conclusions about what factors had contributed to delay. However, OVIC observed a number of issues that may have contributed to delay.

### FOI case management systems

196. In late August 2020, shortly before Alfred Health was notified by OVIC of this investigation, it had identified that its FOI data was inaccurate. The issue was detected following a request for more staff in the FOI team due to the apparent decline in timeliness performance,

which resulted in a review of FOI statistics and activity. After being notified of the investigation, Alfred Health advised OVIC that it was unable to provide accurate reports or statistics in relation to its FOI performance for the entirety of both 2018-19 and 2019-20.

197. Alfred Health referenced several issues causing inaccuracies in the FOI data during this two-year period. The first issue related to the clock function in the FOI case management system used by the health service. Purpose-built FOI case management systems often have a 'clock' function inbuilt to allow an FOI officer to track the 30-day period and pause the clock for processes such as consultation to be undertaken. Following the September 2017 amendments to the FOI Act, the processing period for an FOI request changed from 45 to 30 days. Despite the amendments to the FOI Act, the 'clock' in Alfred Health's case management system was not updated to reflect the new 30-day timelines. This impacted on FOI timeliness as the clock was set to a period fifteen days longer than the FOI Act permitted, therefore making it difficult for FOI officers to accurately track FOI requests.
198. Another way in which Alfred Health's FOI case management system did not support timely FOI decision making was due to the loss of the 'pause' function. Alfred Health confirmed in its submissions that the system lost the ability to pause the clock. Alfred Health provided an example of how the issues with the functionality of the pause feature impacted on its FOI operations and timeliness. It noted that the inability to pause the clock meant that time would start for all FOI requests regardless of whether they were valid. This meant that where an application was not valid due to non-payment of the application fee, lack of required ID or any other reason, the clock would still run, causing apparent delayed FOI decisions which may not have been had the pause function operated.
199. Alfred Health also reported during interviews that the processing time in its FOI management system was unable to be extended on requests. Where certain consultation was required or the FOI applicant agreed, an agency is entitled to extend the processing period by 15 or 30 days. Due to the inability of Alfred Health's information system to record these extensions, the clock would continue to run in the FOI case management system even where an extension was permitted due to consultation.
200. Alfred Health advised that these system issues were exacerbated by the departure of an experienced FOI staff member who was familiar with the system and had various workarounds in place to generate more accurate reports. This staff member departed before a replacement was able to be trained in the workarounds that were being used.
201. Alfred Health has done significant work since late 2020 to address these issues. After identifying the problems with the case management system in August 2020, Alfred Health created a project group and commenced work to review its FOI processes and systems. This has led to changes in the case management system in February 2021 to reflect the current statutory timeframe in the FOI Act.
202. Whilst the case management system has received some upgrades, it is now more than 10 years old. Alfred Health staff told OVIC in interviews that the case management system was no longer fit for purpose. Since then, the case management system has been optimised, and Alfred Health advise that it does support current requirements.

The improvements made to the case management system have gone part way to addressing the issues, but Alfred Health told OVIC that part of the scope of its FOI improvement project was to explore the optimum operating functions to potentially put forward a business case for a new platform.

**Recommendation 11:** Alfred Health should review the ongoing suitability of its case management system and its ability to undertake the functions required for accurate management and monitoring of FOI requests.

### Reporting and monitoring FOI performance

203. Another issue that was identified during the investigation related to the reporting of FOI statistics to Alfred Health's executive. OVIC sought to understand how the FOI team's performance was reported and monitored, and why the issues in its case management system were not detected at an earlier time.
204. Alfred Health informed OVIC that its case management system was unable to produce accurate reports. As a result of this, the FOI officer created and maintained an Excel spreadsheet to keep track of the status and number of Alfred Health's FOI requests. With around 2600 requests each year, maintaining a spreadsheet to track the FOI requests created further work for the FOI Officer with an estimated 4-5 hours per week required to update it.
205. Monthly FOI reports had historically been sent to the Alfred Health's financial services unit. However, there was a gap in reporting for 14 months preceding September 2020 during which reports were not being provided outside the FOI unit.
206. Alfred Health advised that in addition to these monthly reports, it provided annual reports to its executive for inclusion into the Alfred Health's annual report. The information provided in Alfred Health's annual report includes the number of requests, applications granted in full and in part, access denied, and the number of requests not finalised. Reporting on an annual basis to executive means that there is little visibility of the FOI team's ongoing performance and operation during a financial year. It also did not include reporting on timeliness.
207. OVIC considered that the lack of accurate or regular reports to stakeholders outside the FOI team allowed the issues apparent in Alfred Health's FOI performance statistics to persist for longer than they would have if the team's performance had been more closely monitored. OVIC recommends that FOI performance statistics should be included in regular reports to Alfred Health's executive. This reporting could be included in Alfred Health's existing regular clinical governance report, or another regular report.

**Recommendation 12:** Alfred Health should provide regular internal reports to management and executive regarding the status of FOI requests, including measures of timeliness.

### **Use of extension of time provisions**

208. An extension of time of 15 days can be sought where consultation is required or by 30 days where the applicant agrees. An extension of time by agreement under section 21(2) (b) may also be sought more than once, if necessary, provided the applicant agrees to the extension. Extensions of time by agreement with the applicant have not been sought by the FOI unit.
209. The use of provisions of the FOI Act to extend the timeframe by agreement may assist applicants to keep abreast of the status of their FOI request and assist agencies to ensure they have sufficient time to process an FOI request. This may be particularly helpful to agencies when dealing a large or complex requests.
210. According to section 22(5) of the Act, the 30-day time frame resets when a deposit for an access charge is received. This means that the clock resets to day one on receipt of the access charge deposit. Alfred Health noted in its submissions that it did not apply this provision to any of its FOI requests because its information system did not have the functionality to record this.
211. Alfred Health noted that it has not employed either of the previously noted legislative mechanisms to assist in managing time frames for FOI requests. By using these mechanisms Alfred Health will be able to improve the proportion of FOI requests it completes on time, and better communicate with applicants about the status of their FOI requests.

**Recommendation 13:** Alfred Health should use the extension of time provisions in the FOI Act in appropriate cases.

### **Difficulties in recruiting experienced staff**

212. Alfred Health noted that changes to the FOI team had impacted on FOI processing in the last few years. It highlighted the resignation of a highly experienced FOI coordinator in 2018. According to Alfred Health, the incoming FOI coordinator had not been able to receive a detailed handover of the FOI systems used to process and manage FOI applications. Due to the lack of handover for the newly appointed FOI coordinator, all FOI applications were registered in the case management system regardless of whether they were valid, thereby prematurely starting the clock in some cases. Alfred Health also noted in its response that it believes this issue to be a major contributing factor to the extended FOI processing times.

213. In 2020, a new Director of Medical Services with experience in managing FOI processes took over supervision of the legal support services team, including the FOI unit, and initiated a project to improve the team's processes and capabilities. The team's FOI performance now appears to be improving.

## **Other Observations**

### **Release of information outside the FOI Act**

214. When dealing with requests for information, Alfred Health noted during interviews that FOI officers seek to engage with the applicant to narrow the scope of requests. This generally involves calling the applicant early in the process to discuss what is involved and seeking to narrow the scope, where possible.
215. Alfred Health's FOI guidelines state that the FOI Act does not prevent access to some documents where there is no FOI request, and notes that Alfred Health has some discretion as to whether to require an applicant to lodge an FOI request.
216. Alfred Health outlined some alternative approaches to information sharing outside of the FOI process. It outlined several streams for the provision of information for various categories of information seekers, including health practitioners and patients.
217. Alfred Health shares certain types of health information with medical practitioners through a dedicated health information service. This service has an established workflow and fields non-urgent and urgent requests from 7am to midnight. The types of information that are routinely provided to health practitioners in this space include discharge summaries, investigation results (including pathology and radiology), psychology assessments and outpatient correspondence. Alfred Health noted that as many as 17,453 documents were released through this process in 2019-20 and 20,743 in 2018-19.
218. Another means of providing health information outside the FOI Act is via the My Health Record portal managed by the Australian Government, and Alfred Health's own patient portal. Alfred Health is developing its patient portal to allow patients to access their own medical records directly, without the need for an FOI request.
219. The Commissioner encourages Alfred Health to continue expanding the functionality of systems like its patient portal, which can provide people with access to information outside a formal FOI request. While the FOI Act provides a crucial legislative right of access to information that is not otherwise available, online self-serve mechanisms like the patient portal can provide more timely information access for individuals, while reducing the workload of Alfred's FOI unit. This furthers the FOI Act's objective of promoting access to information promptly and at the lowest reasonable cost.

# FRANKSTON CITY COUNCIL

## KEY POINTS

- Frankston City Council (**Council**) is a relatively small FOI agency, handling fewer than 30 FOI requests each year. However, since 2016-17, it made less than half of its FOI decisions in time.
- This was caused by several factors, including the complexity of some requests, fluctuating workloads, and over reliance on a single individual to make FOI decisions.
- Council deals with a high proportion of requests for information informally. While this is to be encouraged as it is likely to provide better outcomes for applicants, it can have the perverse consequence of making Council's performance appear worse than it is when FOI figures are looked at in isolation.

## Background

220. Council is one of 79 Victorian local government authorities constituted under the *Local Government Act 2020* (Vic). With a budget of \$239 million and 968 staff, it serves 143,000 residents of south-east Melbourne.<sup>49</sup>
221. Council's FOI operations are small, as measured by the number of FOI requests it receives. Over the last five years, it received between 15 and 26 FOI requests a year. Most of the requests relate to individuals' interactions with Council. The most common subject of FOI requests in 2019-20 was animal management, however the subject matter of FOI requests varies from year to year. Other common topics include town planning, building enforcement, maternal and child health, infrastructure management, CCTV and the enforcement of local laws.
222. Several Council staff are involved in FOI processing, including Council's FOI and Privacy Coordinator, the Manager of Governance and Information, two business support officers and Council's Principal Legal Advisor.

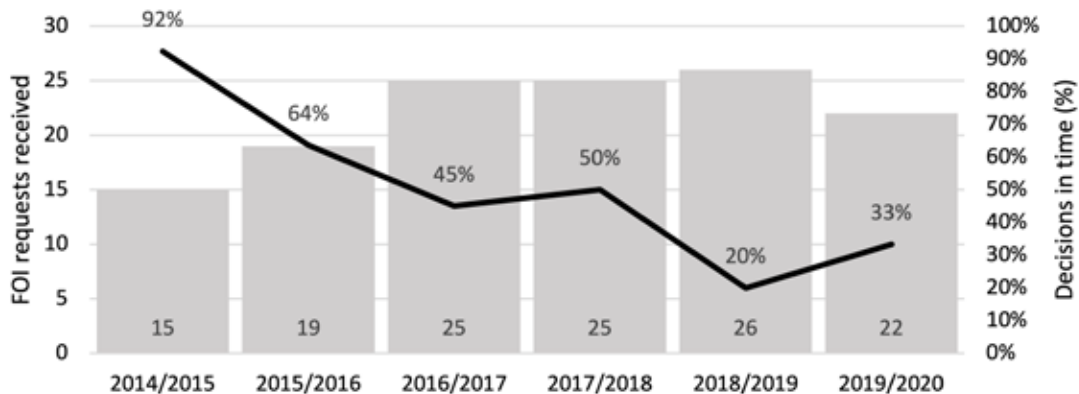


FIGURE 15: FOI REQUESTS RECEIVED, AND PROPORTION OF DECISIONS IN TIME: FRANKSTON CITY COUNCIL

49 Frankston City Council (2020) 'Annual Report 2019-20', p 17.

223. As shown in Figure 15, the proportion of FOI decisions made in time by Council has declined over the last six years. In 2014-15 Council processed 92% of decisions in time. However, since 2016-17, Council has processed no more than 50% of FOI decisions in time in any year.
224. OVIC chose to investigate Council's FOI practices due to the low proportion of requests it completed in time, and to understand issues that smaller agencies can experience when processing FOI requests.

### **Impediments to timely FOI**

225. Council identified several factors contributing to its low level of timeliness. These included:

- an increasing number of large and complex FOI requests
- requests becoming complicated by wider disputes between Council and FOI applicants
- complexity of searching for documents that related to a variety of local government services and were held on multiple information systems
- having a single FOI decision-maker who was not dedicated to FOI full time
- unpredictability of managing changing FOI workloads
- difficulty sourcing temporary staff with FOI expertise
- amendments to the FOI Act in 2017 that increased the work required to process requests
- challenges keeping up to date with case law and guidance on the interpretation of the FOI Act
- Council's practice of responding to requests outside of formal FOI processes
- an incorrect understanding of section 21 of the FOI Act, whereby FOI staff understood that Council was unable to seek an extension of time by agreement with the applicant under section 21(2)(b) where an extension of time for consultation under section 21(2)(a) had already been provided.

226. Based on OVIC's discussions with Council staff and a review of a small number of FOI files, OVIC agreed that all the factors identified by Council contributed, to some extent, to its level of timeliness. OVIC observed that many of these factors would be common to small agencies and to local government authorities.

227. OVIC considered four main factors that were specific to Council and appeared to be contributing to its performance. First, Council's ability to meet its FOI duties relied heavily on a single individual – the FOI and Privacy Coordinator. This role requires additional support. Second, key performance indicators for Council's FOI performance appear not to have been closely monitored by Council management and Councillors until very recently. This meant that its FOI performance was able to decline over several years without action being taken. Third, Council's FOI resources were diverted to a small number of unreasonably large FOI requests, that might have been refused (or revised to a smaller scope) via section 25A(1) of the FOI Act.

Finally, Council was impeded by an incorrect understanding of the operation of section 21 of the FOI Act, and the circumstances in which extensions of time could be sought from applicants.

228. In addition to these four factors, OVIC identified another factor that contributed to the appearance of delay at Council, but that likely improved the experience of FOI applicants. Council has an effective procedure in place to provide information to prospective FOI applicants informally, rather than through a formal FOI process. This is commendable and should be encouraged, as it provides prospective FOI applicants with quick, free, and informal access to information. However, it also has the perverse consequence of making Council's FOI performance, as measured by proportion of FOI requests completed on time, appear to be worse when viewed in isolation. With simple requests being dealt with outside the FOI Act, those left over are the more complex requests that take longer to complete.
229. Each of these factors is discussed below.

#### **Appropriate support for the FOI Coordinator**

230. Council indicated that several people were involved in handling FOI requests, including Council's FOI and Privacy Coordinator, the Manager of Governance and Information, two business support officers and Council's Principal Legal Advisor.
231. However, after speaking with Council staff about how FOI requests were processed in practice, OVIC learnt that primary responsibility for FOI processing rested with a single individual: the FOI and Privacy Coordinator. Council staff explained to OVIC that the FOI Coordinator was responsible for receiving and assessing all requests, for liaising with FOI applicants, and for making decisions on FOI requests. Although another Council employee was also authorised to make FOI decisions, Council told OVIC that this other employee did not do so in practice due to workload issues. Council's FOI Coordinator also held other responsibilities, including being Council's privacy officer.
232. Placing effective sole responsibility for FOI on a single individual will always cause difficulty when the individual needs to take leave, is required to complete other work, or is otherwise unavailable. This may in time affect the wellbeing of that individual if they feel unsupported or unable to take time off work. While it is appropriate for an agency like Council, handling only a small number of requests a year, to dedicate fewer staff to FOI than a larger agency, it is important that where there is only a single FOI officer that this individual is appropriately supported. Where a small agency has only a single FOI practitioner, the agency must identify an alternative person who can take over the handling of FOI requests when the primary FOI practitioner is away on leave, or otherwise unavailable.

**Recommendation 14:** Council should identify an individual who can serve as an alternative FOI decision maker and processor for times when the FOI Coordinator is unavailable. That person should be appointed as an authorised decision maker and be provided with sufficient training to allow them to complete an FOI request in the absence of the FOI Coordinator.



## Monitoring of FOI performance measures

233. As shown above, the timeliness of Council's FOI performance has declined over the last five years. As part of the investigation, OVIC examined reports of Councils' FOI performance in 2018-19 and 2019-20.
234. Council's FOI performance is reported quarterly to the CEO, councillors and to Council's Finance and Audit Committee. Reports have also recently been given to its CEO. OVIC reviewed reports for quarters 3 and 4 of the 2019-20 financial year, and an annual FOI summary report for 2019-20. These reports provided a narrative description of Council's FOI performance, covering matters including the number of requests received by Council, the type of information that was requested, and the outcomes of the requests (for example, whether documents were released). It described complaints and review applications made to OVIC and VCAT. The reports did not state the proportion of FOI requests completed in time or compare timeliness performance across different time periods. Council provided OVIC with a separate FOI KPI report table, but it was not clear how or if this information was provided in the quarterly reports to the CEO and councillors.
235. Council's FOI timeliness steadily declined between 2014-15 and 2018-19. Timeliness is a key measure of FOI performance, and OVIC suggests that it, and performance against other key measures, should be included in any internal reports designed to update agency executives about FOI performance. Had this information been included prominently in regular reports, Council may have had an opportunity to identify its declining timeliness performance and address it earlier.

**Recommendation 15:** Council should develop KPIs that can be consistently included in all internal reports to management and councillors about its FOI performance, including measures of timeliness.

## Large and complex FOI requests

236. Council told OVIC that the primary cause of delay experienced by Council was very large and complex FOI requests that required significant resources to process. Council also said that some applicants were challenging to work with and reluctant to clarify the terms of their requests. These difficult requests and applicants created backlogs, which caused delay for other applicants.
237. In an interview with OVIC, Council staff provided an example of an FOI request that illustrated this issue. A client of Council applied for access to all records held by Council that were about him or referred to him. This applicant had a long and fractious relationship with Council, and over several years had been in regular contact with many different Council business units. After Council realised the request would be extremely large, and that it would be difficult to identify all documents relevant to the request, the FOI team spoke to the applicant to understand what specific documents he needed and to narrow

his request. However, he refused to consider this, asserting that he had a legal right to access all documents. Council's FOI team processed the request. After many weeks of effort, during which time other FOI requests were held up, Council's FOI team had prepared multiple boxes of hardcopy documents as well as CCTV footage for release to the applicant. When the applicant attended Council's premises to view the footage and collect the boxes of documents, he allegedly told Council's FOI staff that 'he really didn't want anything, he just wanted to inconvenience Council'.

238. The FOI Act provides mechanisms to deal with requests that are unreasonably large or that are unclear. Under section 17, an FOI request is only valid if it provides 'such information concerning the document as is reasonably necessary' to allow the agency to identify the document. Section 25A(1) allows an agency to refuse a request if satisfied that the work involved in processing the request would substantially and unreasonably divert the agency from its other operations. These provisions give agencies an opportunity to manage requests that are unclear or unreasonable. Because they provide a basis for refusing a request, agencies can use them to negotiate with an applicant to devise a request scope that is manageable, but that still provides the applicant with the information they need. While it is commendable that Council seeks to provide a good service to all its FOI applicants, it appears that in doing so for some large request, it was causing delay for other applicants. OVIC considers that in the example provided by Council it could have made use of sections 17 and 25A(1) to manage its FOI workload.

### **Legislative impediments**

239. In interviews, Council staff told OVIC that they found implementing the 2017 amendments to the FOI Act while maintaining timely FOI to be very challenging. The 2017 amendments greatly expanded the circumstances in which Council had to consult with third parties, and in Council's opinion provided little discretion about whether to consult. Council noted that in processing one request they had to consider consultations with hundreds of third parties, which was cumbersome. Council said that the FOI Professional Standards, introduced in December 2019, addressed the practicability of consulting with third parties and that this was now less of an issue.
240. Council FOI staff explained to OVIC that until recently Council had understood that if an FOI processing timeframe was extended due to consultation under section 21(2)(a) of the FOI Act, then it could not be further extended with the agreement of the applicant under section 21(2)(b). This meant that there were occasions where FOI applicants were agreeable to Council taking longer to process an FOI request, but Council did not believe it could seek an extension. Council has revised its processes and now seeks an extension in these circumstances. This will likely lead to an improvement in Council's timeliness performance.

### **Information requests handled outside the FOI Act**

241. Council told OVIC that it considers the possibility of informal or administrative access for every request, and encourages the release of documents outside the FOI Act where possible.

242. When receiving a request, Council assesses if the information is publicly available or can otherwise be provided. Council explained that it engages with FOI applicants early to best understand what they seek and whether there is an alternative avenue rather than FOI to release information. If this is possible then, with the applicant's agreement, Council may provide the information informally, refer the applicant to that publicly available information or provide a summary letter that gives them the information they seek. Council then treats the request as withdrawn, and it is not recorded in the number of FOI requests completed on time. Council reported that a significant amount of time is spent understanding what the applicant seeks in their request and whether the requested information can be provided in a summary letter rather than through the formal FOI process.
243. In the first 9 months of 2020-21, Council's FOI staff received 70 requests for information or documents. More than half of these (39) were able to be dealt with without an information release decision, for example by referring the requestor to publicly available information or to another agency. Of the remaining 31, 16 were responded to under FOI and 15 were responded to by informal release of information or documents. As an example, Council referred to an occasion on which an FOI request was made for a document that was presented confidentially in a Council meeting. This document would likely have been found to be exempt had it been handled through FOI. However, Council was of the view that the original sensitivities on the document no longer applied, and the CEO formally revoked its confidential status. The document was then informally released. One of Council's FOI staff members suggested to OVIC that its approach to administrative access reduced the number of FOI requests it handled in total. This staff member observed that a neighbouring council, which had approximately 20% more residents than Frankston, received more than three times the number of FOI requests.
244. Providing a mechanism for informal and administrative access is a good thing from the perspective of FOI applicants, as it provides those applicants with faster, free, and informal access to information. However, it had the perverse consequence of making Council's FOI performance, as measured by proportion of FOI requests completed on time, appear worse when viewed in isolation. With simple requests dealt with outside the FOI Act, those left over were more complex and likely to take longer to complete. Council should be encouraged to provide proactive and administrative access wherever this can properly be done, but it should keep a record of the times that it does so to allow a full picture of the FOI unit's work to be seen by Council management.

**Recommendation 16:** Council should record the number of requests to its FOI unit that are dealt with administratively, and include those numbers in reports to councillors and its CEO so they have visibility of all the work the FOI unit is completing.

## COMMON IMPEDIMENTS TO TIMELY FOI

245. While the Commissioner investigated impediments to timely FOI at five agencies, he also identified common issues across those agencies that point to impediments to timely FOI in Victoria generally. Common factors that OVIC observed across the five agencies can be grouped into the following categories:

- resourcing and efficiency
- FOI performance reporting and monitoring
- engagement with FOI applicants
- briefing agency executives and ministers on topical FOI requests
- legislative impediments.

246. Each of these issues is discussed below. The Commissioner recommends that these issues should be considered as part of a broad-based review and subsequent amendment of the FOI Act. The FOI Act has not been subject to a thorough review since its passage in 1982. When it was passed it represented substantial and meaningful reform, but many FOI practitioners that OVIC met with during this investigation expressed an opinion that the FOI Act was now outdated and should be amended.

### Resourcing and efficiency

#### Fluctuating FOI workloads

247. Professional Standard 9.1(a) requires an agency to have the necessary resources in place to be able to meet the agency's obligations under the FOI Act, including being sufficiently resourced to receive and process requests within required statutory time.

248. However, FOI workloads fluctuate. This is especially pronounced for smaller agencies. This fluctuation presents a challenge in resource-planning. On one hand, agencies need to have sufficient staff available to handle peak FOI workloads within statutory timeframes. On the other hand, agencies need to ensure staff are not idle when FOI workload is lower. Frankston City Council provided an example of a single request that diverted its entire FOI processing capacity for over a month. This caused extensive delays for other applicants. Larger agencies also reported that they had difficulty matching workload with resources.

249. This issue is not amenable to an easy solution. Agencies may wish to consider identifying staff outside the core FOI team that can assist with FOI work in times of large workload. This might include legal personnel or customer service staff. This will also introduce an opportunity to upskill non-FOI staff in relation to the operation of the FOI Act. In the event of extended or unexpected staff absences in the FOI team, agencies will have alternative or reserve staff that they can call upon at short notice to ensure FOI requests are processed within statutory timeframes.

250. Agencies may also find it helpful to design the position descriptions of their FOI staff, so they are not working solely on FOI, but have other responsibilities. This was an approach adopted by DOT, whose FOI staff were also responsible for privacy management. This provides DOT with greater flexibility to deal with a fluctuating FOI workload.
251. At a more systemic level, agencies and OVIC should consider how to encourage staff secondments and other mechanisms to manage fluctuating work. Agencies with similar workloads or in the same portfolio might consider establishing FOI processing capabilities that can work across multiple agencies. OVIC encourages existing FOI communities of practice to discuss this issue.

### **Difficulties finding and retaining staff**

252. All the agencies we spoke to reported difficulties in finding and retaining appropriately skilled staff. This was often cited as a cause of delayed decision making. One FOI manager told OVIC that FOI is difficult and demanding work, and that many staff do not want to handle FOI requests for extended periods of time.
253. OVIC observed that when recruiting FOI staff, agencies are competing for a limited pool of applicants with FOI experience. This was particularly a concern for Victoria Police, which said that the size of its FOI team meant that it would 'often act as a recruitment pool for other agencies'.
254. When hiring staff for FOI roles, not all applicants will come with existing experience in processing FOI requests. There will always be a need for new people to learn how to manage FOI processes. OVIC suggests that agencies develop their FOI team structures in a way that allows a high proportion of positions to not require prior FOI processing experience. Agencies we met with were achieving this in different ways. DJCS indicated that it had some success engaging staff through its graduate recruitment program, and in hiring recent law graduates. Victoria Police developed a team structure that had designated roles for junior staff that did not require extensive experience or qualifications, which allowed them to learn on the job and progress within the team.
255. OVIC will seek to assist in addressing this issue by making it as easy as possible for someone with no experience in FOI to become a skilled practitioner. To this end, OVIC provides FOI training for new and existing FOI officers and will continue to develop resources to support FOI officers.
256. FOI communities of practice exist in some sectors, and can support the development of new FOI officers. One exists for large central agencies and another for local government. OVIC encourages agencies working in other sectors (for example, the health sector) to establish FOI communities of practice.

### **Case management information systems**

257. All but one of the agencies noted concerns about their FOI case management systems, and indicated that issues with these systems had either contributed to, or caused the

appearance of delay. The exception was Council, which said that it did not need a case management system due to its small size. However, the larger agencies required an information system to support them in monitoring FOI workflow, measuring statutory timeframes, assigning tasks, and generating reports.

258. Each of the agencies we met with (besides Council) had one or more bespoke information systems used to manage FOI requests. Each agency raised some concern about their system being either out of date, not fully fit for purpose, or poorly integrated with other systems. The most common concern was that these case management systems had not been updated to reflect changes to processing times (from 45 to 30 days) in 2017, or that they did not properly account for the FOI Act's extension of time provisions. This meant that agencies either were creating inaccurate FOI reporting (as was the case with Alfred Health) or had to implement time consuming workarounds.
259. All the bespoke FOI systems OVIC saw during the investigation had been developed or procured separately by agencies. Being designed to implement the same legislation, they were all designed to deliver similar functionality. The Commissioner observed that it may be inefficient for all of Victoria's hundreds of FOI agencies to independently develop or procure information systems that deliver similar functionality.
260. OVIC suggests that the Victorian Public Sector should consider either developing an FOI Case management system that agencies could elect to use, or establishing a panel of providers that offer FOI management software that is able to manage requests under the FOI Act 'off the shelf'. This would reduce duplication and inefficiency in procurement. One possible model is provided by NSW, in which a cloud-based tool is made available to all agencies for FOI case management and reporting under the *Government Information (Public Access) Act 2009*.<sup>50</sup>

## Monitoring FOI performance

### Monitoring of FOI performance within agencies

261. OVIC observed inconsistent practices between agencies with respect to how FOI performance was monitored, and how executive staff were briefed about the timeliness performance of their FOI units. In some cases (notably Alfred Health and Council), a lack of adequate reporting caused delay or allowed it to persist.
262. Alfred Health, Council, and DJCS all had extended periods in which their timeliness performance gradually declined. The Commissioner is concerned that insufficient monitoring of this decline in performance meant that it was not responded to promptly.
263. The former Attorney-General's FOI Guidelines<sup>51</sup> provide a list of statistics that departments and Victoria Police were expected to compile to monitor their performance under the

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50 Information and Privacy Commission NSW (2020), 'IPC GIPA Tool'. Available online at <https://www.ipc.nsw.gov.au/information-access/agencies/ipc-gipa-tool>.

51 Attorney-General of Victoria (2009) 'Attorney-General Guidelines on the Responsibilities and Obligations of Principal Officers and Agencies'.

FOI Act. However, there is no current guidance available for agencies to support them in monitoring their FOI performance internally.

264. The Commissioner considers that a standardised set of measures for internal FOI performance would provide a tool to assist agencies in identifying performance issues and addressing them earlier. It would also assist agencies to align their internal reporting with reporting to OVIC. OVIC will consult with agencies with a view to develop guidance on how they can measure and report their FOI performance internally.

### **Reporting of statistics to OVIC**

265. Each year, OVIC conducts an annual report survey that collects data on the administration and operation of the FOI Act by each agency and minister, including the number of FOI requests received as well as the time take to process FOI decisions.
266. During the investigation, OVIC identified that the statistics provided by Alfred Health and DOT contained errors. The statistics from Alfred Health were incorrect to such a degree that they could not be relied on. DOT also submitted incorrect figures for the 2018-19 financial year. Upon further enquiry, DOT provided more up-to-date statistics to accurately reflect its FOI operations.
267. The Commissioner considers that agencies would benefit from improved guidance from OVIC about how to report annual statistics to OVIC in a consistent manner. OVIC will consider developing improved instructions to agencies on submitting annual statistical returns to support them in this task.

## **Engagement with FOI applicants**

### **Communication with FOI applicants**

268. The Commissioner observed different levels of communication with FOI applicants between the agencies it investigated. Council and DOT both communicated early and openly with FOI applicants, using many different means of communication (including phone and email). Victoria Police and DJCS on the other hand were less likely to engage with applicants (for at least some categories of applicants), and were more likely to communicate through formal correspondence.
269. DOT and Council both told OVIC that interactions with FOI applicants at earlier stages of the FOI process assisted them in managing applicant expectations and providing more timely access to information. They reported that engaging with applicants enabled FOI staff to obtain background and context to the applicant's request. Where appropriate, this enabled FOI staff to consult with applicants to narrow the scope of the FOI request to documents or information that was critical to the applicant's interest. This could be provided more quickly to the applicant than a broadly worded request. They also noted that engaging with applicants could allow FOI staff to direct applicants to avenues other than FOI to access information where this was available.

270. OVIC acknowledges that engagement and early communication will not be effective in all FOI requests. However, during the investigation OVIC observed that engagement and communication supported timely FOI decision making and information release. OVIC suggests that agencies should encourage their FOI staff to communicate regularly and openly with FOI applicants about their FOI requests.

### **Proactive and informal release**

271. Professional Standard 1.1 requires agencies to consider whether a requested document can be properly provided to the individual outside the FOI Act. Additionally, section 16(2) of the FOI Act recognises that nothing in the Act should prevent an agency from providing a person with access to documents outside the Act, where appropriate.

272. While FOI provides an important enforceable right to access information, the procedural steps and considerations in the FOI Act can impose complex and time-consuming administrative processes on agencies and applicants. For this reason, releasing information proactively and administratively is usually a more efficient process than responding to an FOI request. Some categories of documents that are particularly amenable to informal release are often processed by agencies under the FOI Act, such as:

- an applicant requesting ‘their own’ documents (such as documents they have lodged with the agency, or documents that are about them)
- an applicant requesting correspondence previously sent to the applicant
- documents with information relating to routine or non-sensitive functions or activities of the agency.

273. OVIC observed that all the agencies it investigated were providing information in response to requests outside the FOI Act where they considered that it was appropriate to do so. All the agencies considered that, where non-FOI information release is appropriate, it provides a timelier means for individuals to access information. However, agencies had different views about when it was appropriate to release information outside FOI.

274. Support from senior executives and agency heads is important to encouraging FOI and non-FOI staff to be transparent and provide information to the community. OVIC suggests that agency heads should encourage their organisations to find ways to provide information outside FOI processes where possible. OVIC intends to conduct an informal and proactive release project that will explore and seek to address barriers to information access outside FOI.

### **Briefing agency executive and ministers**

275. Some of the largest delays observed by OVIC in this investigation were caused by agencies providing interested stakeholders an opportunity to ‘note’ a proposed FOI decision before it was finalised.



276. Although OVIC did not see any evidence that these stakeholders were placing pressure on FOI decision makers to change their decision or withhold access to documents, in some cases the noting process itself caused substantial delays. This most often happened when an agency deferred finalising an FOI decision until its minister had ‘noted’ the decision.
277. The FOI Act provides additional time for consulting with certain third parties, such as people whose personal affairs information is in a requested document. However, it is clear that Parliament’s intention is that any consultation with other third parties (such as a minister) must occur within the 30 day period provided by section 21 of the FOI Act. The statutory timeframe in the FOI Act does not pause or extend for noting or briefing processes.
278. As discussed below, the time allowed for agencies to process complex FOI requests in Victoria is shorter than in some other jurisdictions. But agencies must design their FOI processes in a way that allows them to meet their legal obligation to complete FOI requests within the time provided in the Act. Some agencies, for example Victoria Police, have procedures in place designed to ensure that noting does not delay FOI decision making. OVIC suggests that to avoid delay in noting processes, noting (if it is done at all) should be completed within four days or less, and that any brief that requires an FOI decision to be noted should state the decision will be made by the due date, regardless of whether it has been noted.<sup>52</sup> It is not appropriate for agencies to delay making an FOI decision while waiting for their minister or any other interested stakeholder to note the decision.

## **Legislative impediments**

### **Documents otherwise available for access**

279. Under section 14(1)(b) of the FOI Act, certain documents that contain information ‘that is available for purchase’ are not subject to the FOI Act. However, the Act does not have similar provisions excluding information that is available for free. This creates a perverse incentive for agencies to not make information available for free, and instead to charge for access.
280. In a future review of the Act, Parliament should consider extending the reach of section 14(1) to include information that is available for free. This would encourage agencies to make more information available to applicants outside the FOI Act, for example through online self-serve systems that provide quicker access to information.

### **Mandatory consultations**

281. Some FOI practitioners OVIC met with told us that the consultation provisions in the FOI Act can cause delay. For example, Council described a situation where it needed to consult with more than a hundred third parties.

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52 OVIC (2021) ‘Procedural Practice Note 23 – Noting and Briefing Processes on Freedom of Information Decisions’. Available online at <https://ovic.vic.gov.au/freedom-of-information/practice-notes/ppn23/>.

282. OVIC considers that the current consultation provision is contributing to delay. The benefit of consulting every party named in a document does not appear to outweigh the burden imposed on agencies and the delay caused by FOI applicants in all cases.
283. In a future review of the FOI Act, Parliament may wish to consider amending the consultation provisions to ensure that consultation is only required where the FOI decision maker considers that the party to be consulted 'might reasonably wish to be expected to have concerns' if the document were released. This or a similar approach is adopted in section 27A of the Commonwealth FOI Act, section 37 of the Queensland RTI Act, and section 54 of the NSW GIPA Act. Such an approach would remove the requirement to consult with third parties who are merely named in a document but could not reasonably be expected to be concerned about the release of their personal information, such as the names of public servants that appear in documents in the ordinary course of their duties.

### **Statutory timeframes**

284. All the agencies involved in the investigation described difficulties in implementing the reduced processing timeframe introduced in 2017. Agencies told OVIC that while the 30-day timeframe was adequate for straightforward requests, it was insufficient for more complex requests that required detailed assessments or consultations.
285. Although agencies must design processes that allow them to achieve the timeline that Parliament has prescribed in section 21 of the FOI Act, OVIC is sympathetic to this concern. In Victoria, a very complex or voluminous request, that involved consultation with third parties must be completed in 45 days (30 days, plus 15 days for consultation). By way of comparison, a similar request under the Freedom of Information Act 1982 (Cth) could be completed in 90 days (30 days, plus 30 days for consultation, plus a possible 30-day extension granted by the Australian Information Commissioner for a request that was 'complex or voluminous' under section 15AB of that Act).
286. In a future review of the FOI Act, Parliament may wish to consider providing a mechanism for additional time to be provided to agencies to complete requests that are complex or voluminous. This could be modelled on section 15AB of the Freedom of Information Act 1982 (Cth), which allows the Australian Information Commissioner to provide additional time for agencies to process requests that are complex or voluminous. In deciding whether to provide additional time for these sorts of requests, Parliament could consider the feasibility of a proposed processing period, together with the impact that a reduced or extended processing period would have on affected FOI applicants. While the Commonwealth model may offer too much time for agencies to process large requests, granting some additional time to agencies to process the most complex requests would likely improve the timeliness of the Victorian FOI system as a whole.

### **'Vexatious' applicants**

287. In the course of interviews, agencies raised the fact that there is no mechanism within the FOI Act to deal with 'vexatious' FOI applicants: that is, applicants who have submitted numerous requests to an agency in circumstances where the agency considered the

requests were not made in good faith. OVIC observed that some agencies were spending a large amount of time dealing with FOI requests from a small number of applicants.

288. The Victorian Ombudsman recommended in 2006 that VCAT be given the power to declare a person to be a vexatious applicant with the effect that further requests by that person for access to documents under the FOI Act may be made only with the consent of VCAT.<sup>53</sup> The Commonwealth FOI Act and the Queensland RTI Act confer similar powers on the Information Commissioner of each jurisdiction to declare an applicant vexatious and impose limits on their right to access documents.<sup>54</sup>
289. In a future review of the Act, Parliament may wish to consider introducing a mechanism for managing vexatious applicants. However, the Commissioner considers that a decision that a person is a vexatious applicant should not be made by the agency that is responsible for handling that person's FOI request. Rather, the decision should be made by a third party (VCAT or the Commissioner) to ensure this significant curtailment of a person's right to access information is used sparingly.

### Modernised legislation

290. Many FOI practitioners told OVIC that they considered the FOI Act to be outdated, and that this contributed to delayed FOI decision making and information release. For example, a DJCS FOI officer commented that the language in the FOI Act reflects operational practices of the time the FOI Act was created, rather than now. The FOI Act makes references to 'documents'. However, with advancements in technology and changes in the way that public sector agencies operate there has been a move away from 'documents' and towards 'information'. This means it can be difficult to link information back to a specific document requested under the FOI Act. Staff at Council and Alfred Health remarked on the complexity of the FOI Act, and told OVIC that they thought it could be simplified.
291. The FOI Act has not been substantially reformed since it was enacted in 1982. To address the broader issue of delay, and ensure the FOI Act is fulfilling its object of the timely and cost-effective provision of information to the public, the Commissioner recommends a comprehensive review of the FOI Act. Such a review should inquire into the operation of the public access to information scheme under the FOI Act in Victoria and how the scheme and FOI Act can be modernised and harmonised with contemporary notions of government transparency and accountability, drawing on best practice in other Australian jurisdictions and internationally.

**Recommendation 17:** The Victorian Government should conduct a public, consultative, and wide-ranging review of the FOI Act, to update the Act to reflect modern public administration and the digital information environment.

53 Ombudsman Victoria (2006) 'Review of the Freedom of Information Act'.

54 Section 89K of the *Freedom of Information Act 1982* (Cth); section 114 of the *Right to Information Act 2009* (Qld).

## AGENCY RESPONSES

292. The Commissioner consulted with each of the agencies that were subject to the investigation and considered their views in finalising this report. As required by s 61R of the FOI Act, the Commissioner provided each agency an opportunity to comment on any adverse findings made in this report by providing a draft copy of the report to each agency's principal officer and inviting a response. The responses are set out below.

### Victoria Police



VICTORIA POLICE

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Chief Commissioner of Police

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Our Ref: FF-185786

Mr Sven Bluemmel  
Information Commissioner  
PO Box 2474  
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Dear Commissioner

**Investigation into timeliness of freedom of information in Victoria**

Thank you for the opportunity to comment on the draft report and respond to your recommendations.

Victoria Police fully supports the objectives of the *Freedom of Information Act 1982* including a right to access and open Government, and is committed to meeting its legislative obligations.

Victoria Police accepts all the recommendations arising from your investigation.

I have recently instituted a requirement of detailed monthly reporting from the FOI Division to my office in relation to the backlog, and support six-monthly reporting to both OVIC and the Minister for Police and Emergency Services.

Victoria Police FOI staff will engage with applicants in regard to the extent and causes of delayed FOI requests, including issuing apologies and seeking extensions where appropriate.

Earlier this year, all FOI staff were trained in Lean methodology to identify opportunities for continuous improvement. An ongoing project arising from this training was the identification of types of frequently sought information which might be more efficiently provided outside the FOI process. This project, which will use the additional functionality of the recently installed case management system, is ongoing. Additionally, senior staff will review the Victoria Police information release processes to ensure that access to information is provided as efficiently as possible, and to address cases of significant or systemic delay in response to FOI requests.

As the agency processing the largest number of FOI requests each year, Victoria Police looks forward to contributing to any review of the FOI Act.

Yours sincerely



Shane Patton APM  
Chief Commissioner

19 / 8 / 2021



Department of Transport

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Mr Sven Bluemmel  
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Office of the Victorian Information Commissioner  
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Dear Mr Bluemmel

**Investigation into impediments to prompt Freedom of Information (FOI) decision making and document release**

I refer to your letter of 10 August 2021, enclosing a copy of the final investigation report. Thank you for the invitation to provide a response. We acknowledge and welcome the findings of the report regarding the improvement in the Department of Transport's (DoT) overall performance in processing FOI requests.

The contribution of DoT to the investigation reflects our status as a new organisation working to deliver better outcomes and as one of the larger and more popular agencies for FOI requests, receiving more than 1,700 requests in 2020/21.

DoT was created on 1 January 2019 and merged with VicRoads and Public Transport Victoria (PTV) on 1 July 2019, to plan, build and operate an integrated transport system for Victoria. The Government has an ambitious and extensive suite of transport policies and initiatives that are of immense topical interest. That merger brought together the FOI units of the three former entities to create a single FOI unit with responsibilities across the whole of the newly formed DoT.

The unit's transition has encompassed review of processes, reporting, IT systems, team structure and staffing. It is pleasing to note the report's finding that DoT's overall timeliness of decision-making for 2019/20 was 10% better than for the preceding organisations in 2018/19.

The report contains two recommendations specific to DoT:

**Recommendation 7:** DOT should ensure FOI decision makers do not delay the finalisation of an FOI decision due to executive or ministerial noting processes.



We acknowledge and accept our responsibility for a more efficient noting process. A number of actions are underway to improve DoT's overall performance. They include improving FOI briefing materials provided by the department to Ministers Offices and early engagement with stakeholders to resolve any queries prior to the noting stage. DoT continues to address the causes of delay at all stages of the FOI process, including the noting stage.

Two recent initiatives which are aimed at improving timeliness of the FOI process are:

- A functional realignment of the Privacy and Information Access Branch, including the FOI team, into the Office of General Counsel. This will ensure closer alignment between the department's FOI and legal functions, which will assist in managing FOI timeliness.
- Upgrade of the FOI management system to improve workflow and reporting capability, to improve tracking of FOI request processing and delays across the organisation.

**Recommendation 8:** DOT should record the number of requests to its FOI unit that are dealt with administratively, and include those numbers in reports from the FOI unit to DOT management

In its activities, DoT works to encourage information release outside FOI, and will record numbers of requests finalised administratively. In general, releases outside FOI are made by the program areas, not the FOI Unit.

Yours sincerely



**Paul Younis**  
Secretary  
Department Of Transport

19<sup>th</sup> August 2021

# Department of Justice and Community Safety



## Department of Justice and Community Safety

Secretary

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Your ref: D21/14057

Mr Sven Bluemmel  
Information Commissioner  
Office of the Victorian Information Commissioner

By email: [Sven.Bluemmel@ovic.vic.gov.au](mailto:Sven.Bluemmel@ovic.vic.gov.au)

Dear Commissioner

I refer to your letter of 10 August 2021 providing me with the opportunity to respond to your investigation report into timeliness of freedom of information (FOI) in Victoria.

The Department of Justice and Community Safety (DJCS) is committed to the timely provision of information in compliance with the *Freedom of Information Act 1982 (Vic)*. The report addresses common factors and impediments contributing to delays in FOI timeliness that DJCS and all freedom of information agencies can use to inform further improvements in FOI decision making.

DJCS accepts and has implemented the two recommendations directed at its FOI decision making and information release. DJCS' response to these two recommendations is as follows.

No.	Recommendation	DJCS response
9.	<ul style="list-style-type: none"><li>DJCS should continue to monitor its timeliness following the implementation of the FOI Reform project</li></ul>	DJCS accepts this recommendation. DJCS has implemented improvement initiatives, including executive oversight of FOI performance via weekly reporting and regular meetings and will continue to monitor its timeliness
10.	<ul style="list-style-type: none"><li>DJCS should identify mechanisms to improve communications with FOI applicants about corrections-related requests, and consider whether there are any other categories of information that could be provided without an FOI request</li></ul>	DJCS accepts this recommendation. As noted by the Commissioner, DJCS has implemented several initiatives to assist prisoners in better understanding their rights under the FOI Act. FOI staff continue to work closely with Corrections Victoria Operations to identify and improve access to information both under and outside the FOI Act



Finally, I note that Recommendation 17 relating to a review of the *Freedom of Information Act 1982* (Vic) is a matter for consideration by Government and accordingly is not a matter to which DJCS can provide a specific response.

Yours sincerely



**Rebecca Falkingham**  
Secretary

18/08/2021

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Office of the Chief Executive  
Professor Andrew Way AM

**AlfredHealth**



17 August 2021

Mr Sven Bluemmel  
Victorian Information Commissioner  
Office of the Victorian Information Commissioner  
Via email - investigations@ovic.vic.gov.au

Dear Mr Bluemmel

### Investigation into timeliness of freedom of information in Victoria – response to recommendations

Thank you for the opportunity to respond to the recommendations made by your agency's investigation into the freedom of information process in Victoria.

Alfred Health welcomed the chance to work with your office through this investigation, while concurrently undertaking our own project to identify and implement improvement initiatives. As a result we have significantly strengthened our FOI processes achieving 100 per cent compliance with the 30-day statutory timeframe for Q4 of the 2020-21 financial year.

We accept all the recommendations your review identified to improve FOI processes at Alfred Health, and outline our response to each as follows:

- Recommendation 11 (In progress): Our FOI project working group has developed a functional brief and has engaged the health service's digital health team to review the current system and consider suitable long-term solutions.
- Recommendation 12 (Actioned): The performance of the FOI unit, including compliance against the statutory time frames, is now being included in the monthly clinical governance report to Alfred Health's Executive Committee.
- Recommendation 13 (Actioned): Feedback and education has been provided to the FOI team and the new manager to ensure that these provisions are utilised when indicated in line with the legislation.

If you have any questions, or would like to further discuss our approach to freedom of information requests, please contact me directly.

Yours sincerely

A handwritten signature in black ink that reads "Andrew Way".

**Andrew Way AM**  
Chief Executive



# Frankston City Council



## Frankston City Council

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17 August 2021

Mr Sven Bluemmel  
Information Commissioner  
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MELBOURNE VIC 3001

Sent by email only to: investigations@ovic.vic.gov.au  
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Dear Mr Bluemmel

### Investigation into timeliness of Freedom of Information in Victoria

I refer to your letter dated 10 August 2021 providing a copy of the draft report for your investigation into timeliness of Freedom of Information in Victoria and your invitation to provide a response for publication with the report.

Thank you for the opportunity to respond to the report and the recommendations for Council. Council accepts the three specific recommendations for our agency and has commenced implementation of each recommendation.

	Recommendation	Response
14	Council should identify an individual who can serve as an alternative FOI decision maker and processor for times when the FOI Coordinator is unavailable. That person should be appointed as an authorised decision maker and be provided with sufficient training to allow them to complete an FOI request in the absence of the FOI Coordinator.	An additional position is being created in the Governance and Information Department. The incumbent will be an authorised FOI decision maker and provide support to the FOI Coordinator.

Seaford » Frankston » Langwarrin » Karingal » Skye » Frankston South » Frankston North » Carrum Downs » Langwarrin South » Sandhurst

	Recommendation	Response
15	Council should develop KPIs that can be consistently included in all internal reports to management and councillors about its FOI performance, including measures of timeliness.	Council has KPI reporting in place for FOI performance. The KPIs will be expanded and reported consistently in internal reports about FOI performance.
16	Council should record the number of requests to its FOI unit that are dealt with administratively, and include those numbers in reports to councillors and its CEO so they have visibility of all the work the FOI unit is completing.	Data is currently maintained in relation to the number of access requests which are dealt with administratively. This will be included in all FOI reporting.

Council is committed to effectively meeting the needs of FOI applicants and complying with legislative requirements. It is acknowledged that steps need to be taken by our agency to improve timeliness for FOI decisions, however it is noted that the report also identifies common external factors impacting on the ability of all agencies to meet statutory timeframes.

While Council will work to improve its FOI timeliness performance using the learnings from the investigation process, it is pleasing to note that examples of positive practice by Council, such as effective administrative release processes, were also acknowledged in the report.

Council welcomes the acknowledgement of the common issues significantly affecting all agencies, such as the difficulties resourcing fluctuating FOI workloads and recruiting experienced FOI staff. The recommendation for a broad-based review and subsequent amendment of the *Freedom of Information Act 1982* is particularly welcomed. Legislative responses to some of the issues identified as common across agencies have the potential to streamline FOI processes, reduce the burden on agencies and provide better outcomes for FOI applicants.

I look forward to hearing further from your office about initiatives arising from your investigation.

If you wish to discuss this matter, please contact [REDACTED]

Yours faithfully



Phil Cantillon  
**CHIEF EXECUTIVE OFFICER**

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