

Date: Monday 19 February 2024

Location: Microsoft Teams

Attendees: Joanne Kummrow, Public Access Deputy Commissioner, OVIC (Chair)

Penny Eastman, Assistant Commissioner, Public Access Reviews and Regulation, OVIC (Secretariat)

Anique Owen, Assistant Commissioner, Privacy Guidance and Dispute Resolution, OVIC

Andrew Mariadason, Legal Counsel – Manager Medico-Legal Services, The Royal Melbourne Hospital

Alex Henderson, Manager, FOI, Department of Education and Training

Andrew Weston, Manager, Freedom of Information (FOI), Department of Transport

Cameron Montgomery, Executive Manager Safety Governance and Risk, City of Ballarat

Delilah Nichols, Senior Privacy & FOI Advisor, Transport Accident Commission (TAC)

Lisa Scholes, Manager FOI, Department of Families, Fairness and Housing

Monica Barnes, Manager FOI and Privacy, Country Fire Authority

Paul Pittorino, Senior Manager FOI, Department of Justice and Community Safety

Peter Gannoni, Senior Governance Officer, City of Melbourne

Robin Davey, Manager, FOI Division, Victoria Police

Raffaella Di Maio, FOI Lead, University of Melbourne

Guests: Emma Stephens, Senior Policy Officer, OVIC

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Meeting opened at 2:00pm

Welcome

Alex Henderson (Department of Education) and Delilah Nichols (TAC) welcomed.

OVIC thanked members for providing their feedback to the Reference Group Annual Survey reflecting on 2023; noting these responses help shape the content for meetings in 2024 to ensure they are as beneficial as possible.

Agenda Items

1. Apologies

Shantelle Ryan, Assistant Commissioner Public Access Operations and Compliance, OVIC

Rebecca Cato / Jude Hunter, FOI & Privacy, WorkSafe Victoria

Felicity Wright, Information & Privacy Manager, TAC – Delilah Nichols attending for TAC

2. Previous Meeting Minutes

Confirmed – All members confirmed minutes of 20 November 2023

3. Action Items

Nil

4. Announcement of new Victorian Information Commissioner

Sean Morrison has commenced as the new Victorian Information Commissioner.

Most recently, Sean was the Executive Director, Legal, Privacy and Integrity at the Department of Health, the inaugural General Counsel at the Department of Government Services and was appointed as the Special Investigator in 2023, before that office was wound down.

Sean previously led the Victorian Government's legal response to the Mental Health Royal Commission, the Aged Care Royal Commission and the Commonwealth Disability Royal Commission.

He has significant experience with leading the legal aspects of major Victorian Government legislative reforms, including the *Health Legislation Amendment (Information Sharing) Act 2023*, which created the first information-sharing regime for the Victorian public health system, the *Voluntary Assisted Dying Act 2014*, and the *Prevention of Family Violence Act 2018*.

See <https://www.premier.vic.gov.au/upholding-integrity-public-sector-information>

5. Summary of OVIC's submission to the Integrity and Oversight Committee's inquiry into the FOI Act

On Monday 15 January 2024, OVIC made a submission to the Victorian Parliament's Integrity and Oversight Committee (the **Committee**) for consideration in response to the Committee's current Inquiry into the operation of the FOI Act.

Emma Stephens, an OVIC Senior Policy Officer, who was instrumental in the drafting of this submission, provided a high level overview of the submission, including summarising some of the key recommendations of likely interest to members advising:

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- OVIC’s submission includes 77 recommendations made across 168 pages, and an Executive Summary, in response to the Inquiry’s eight Terms of Reference.
- Overall, we recommended that Victoria replace the FOI Act with a modern, third generation, access to information law. The submission emphasised that any new law should:
 - be drafted in plain language,
 - adopt simple processes and minimal procedural requirements,
 - be fit for purpose in the digital age,
 - retire the phrase ‘freedom of information’ in favour of modern access to information or ATI language; and
 - implement the purposes and principles of a best practice ATI law.
- We recommended the new ATI law adopt a push model of access, requiring and authorising the proactive and informal release of information, and positioning formal requests as a last resort.
 - This includes four authorised access pathways, including mandatory proactive release of certain information, proactive release of additional information, informal release, and formal release.
 - We recommended clear protections from civil liability in defamation, breach of confidence, and criminal liability for officers who provide access to information under these pathways in good faith. Currently, the FOI Act only protects those who provide access to information in good faith in response to a formal request. OVIC’s submission recommends extending these protections to proactive release and informal release.
- The submission argues that authorising proactive and informal release will help to decrease the need for formal requests for information, saving time and costs for both agencies and the public. For example, this model will make it easier to release an individual’s own personal or health information informally.
- We recommended including legislative principles to guide the proactive release of information. For example, information and documents should be published in a way that is practical, timely, clear, easy to find, capable of being understood and accessible to members of the public, and there should be an obligation to facilitate public awareness of the availability of the agency’s or Minister’s information.
- We recommended replacing the exemptions in the FOI Act with limited exceptions to cover the reasons an agency or Minister may refuse access to information.
- We recommended that these limited exceptions reflect international best practice, by ensuring they are subject to a three part test in considering whether to refuse access to information.

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- Under the three part test:
 - Step 1 requires that exceptions only protect legitimate interests, which are clearly and narrowly defined and listed in the ATI law (for example privacy, law enforcement, national security, commercial interests, public safety and the effectiveness and integrity of government decision-making processes);
 - Step 2 is a harm test, requiring an agency or Minister to demonstrate that there would be substantial harm to the legitimate interest, if the information were disclosed; and
 - Step 3 is a public interest override, meaning that where the public interest in favour of disclosure of the information outweighs the harm caused by its disclosure, the information should be released.
- The aim of the three-part test is to ensure the ATI law gives proper effect to the community's right to access government held information, which itself is a core feature of the human right to freedom of expression found in Article 19(2) of the ICCPR.
- We recommended removing the exception in 25A(5), which currently allows an agency to refuse a request without searching for documents on the grounds that the documents requested are obviously exempt.
- In relation to Cabinet documents, we recommended introducing a proactive Cabinet document release scheme, based on the New Zealand model, and recently enabled in Queensland. We also recommended narrowing the cabinet documents exemption and reducing the overall time limit on releasing Cabinet documents from 10 years to 5 years.
- In relation to fees and charges, we recommended that requests for an applicant's own personal and health information be free. For all other requests, we recommend reducing and fixing the application fee, so that it does not increase.
- We also recommended that access charges should only be for legitimate costs incurred in providing access to documents. Charges should not be required for searching for documents, creating a document, or supervising inspection of a document.
- For third party consultation, we recommended simplifying requirements and making them more consistent, to create a consistent threshold for deciding when third party consultation is required.
- Regarding OVIC's powers, functions, and independence, we made several recommendations, including:
 - enabling the Information Commissioner and the Public Access Deputy Commissioner to delegate the power to make a fresh decision to an OVIC staff member
 - the power to prepare guidelines which must be considered by agencies when interpreting the legislation

- protecting the Commissioners and OVIC staff for acts done in good faith in accordance with the Act, and
- enhancing and protecting OVIC's independence by not requiring OVIC to report to a government department, and having the Victorian Parliament set OVIC's budget.

Q & A session held, along with group discussion about the inquiry and the potential impact of OVIC's recommendations if they were reflected in subsequent legislation reform.

NB: Following the meeting, the IOC published submissions to its inquiry into the operation of the FOI Act, including OVIC's submission (Submission No 55) on its website. You can find published submissions [here](#).

6 Agency Updates

Discussion had on current difficulties recruiting to vacant positions around the sector and the continued high volume of FOI requests being received. Several members advised they were currently recruiting for roles ranging from VPS2 to VPS6.

One member noted recent progress made through a combination of additional ongoing staffing, engaging with an external provider to assist with processing FOI requests and prioritisation strategies. This member advised their agency was exploring potential options around automated document redaction software and would share more information with the group as this project progresses.

OVIC Policy and Operational Update

- Privacy

OVIC is aware that the use of ChatGPT, and other generative AI tools, is widespread across the Victorian public service, and has concerns about how these tools are being used – particularly where personal and sensitive information is being input, as this practice contravenes the Information Privacy Principles (IPPs).

Members attention was directed to OVIC's recent public statement made pursuant to section 8C(1)(f) of the *Privacy and Data Protection Act 2014 (Vic)* (**PDP Act**) regarding the use of ChatGPT by public sector employees. This [statement](#) highlights that:

- VPS organisations must ensure staff and contracted service providers do not use personal information with ChatGPT.
- ChatGPT must not be used to formulate decisions, undertake assessments, or used for other administrative actions that may have consequences for individuals, for example, evaluations, assessments, or reviews.

Inputting personal and sensitive information into ChatGPT is a contravention of the Information Privacy Principles (IPPs), and may cause significant harm to individuals whose information is used.

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The considerations outlined in this statement should also be observed when utilising other forms of genAI.

If an organisation becomes aware that personal information has been used with ChatGPT it should treat the occurrence as an information security incident and notify OVIC immediately. OVIC can be contacted by submitting an [Incident Notification form](#) through OVIC's website or via enquires@ovic.vic.gov.au.

Members are encouraged to contact OVIC's Privacy Guidance Team with any questions about the use of ChatGPT, or other generative artificial intelligence tools, via email at privacy@ovic.vic.gov.au for tailored guidance on the considerations for adoption and use.

Members were also alerted to an increase in privacy complaints and data breaches relating to:

- b. The overcollection of personal information, in particular:
 - Where individuals provide information unsolicited, noting once you collect information, whether unsolicited or not – you have obligations under the IPPs. This means you should inform the individual of how you may use it and take steps to protect it.

OVIC encourages organisations to consider whether you actually need the information. If you don't need it, call it out and let the individual know it's not required and that you'll delete it.

- c. Disclosing more personal information than required to fulfill a certain request, action or function.

If your organisation has received a request for personal information from another organisation, reasonable steps should be taken to ensure only the minimum amount of information necessary to fulfill that request is disclosed. It's important to consider the purpose of the request, the power authorising it (and how specific it is in relation to what information should be disclosed) and what information is required to address the question asked, or request made. If unsure, organisations should clarify with the requesting organisation what information is required to ensure there is no over disclosure.

- Reviews, Complaints, Professional Standards

Members advised that the OVIC's [FOI Guidelines](#) project is almost complete, with the final sections to be published shortly. OVIC will advise members once all chapters have been published in their entirety and likely ask for assistance to help with promote of the Guidelines within relevant agencies. The launch of the FOI Guidelines will also result in some of OVIC's

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Practice Notes being retired as the content will be in the Guidelines. Members thanked for their contributions to this project through the consultation process.

Members notified of Victoria' global Right to Information (RTI) Rating of 77 out of 148. The RTI Rating programme, founded by Access Info Europe (AIE) and the Centre for Law and Democracy (CLD), seeks to provide advocates, reformers, legislators and others with a reliable tool for comparatively assessing the overall strength of a legal framework for FOI or RTI.

Further operational updates not provided due to time constraints – see data at attachment 1.

7 Other Business (ALL)

OVIC will be in contact with members to seek further views on the form of this meeting. Additional responses to the annual survey also welcome.

Meeting closed: 03:00pm

Next meeting scheduled meeting: **27 May 2024** 2-3PM.

Complaints:

As at 19 February 2024, OVIC had 191 complaints open.

Between 1 July 2023 and 31 January 2024, OVIC:

- Received 448 complaints (compared to 361 for the same time period in 2022/23; representing a 24% increase in complaints received); and
- Finalised 456 complaints (compared to 397 for the same time period in 2022/23; representing a 15% increase in complaints finalised).

Most complaints received were from members of the public and related to delays in agency decision making (72%).

For the 456 complaints that OVIC finalised:

- 241 complaints were resolved informally;
- 204 complaints were either not accepted or dealt with to the fullest extent and dismissed in the absence of agreement from the complainant; and
- 11 complaints were out of jurisdiction.

Reviews, including Informal Resolution:

As at 19 February 2024, OVIC had 181 reviews open.

Between 1 July 2023 and 31 January 2024, OVIC:

- Received 330 reviews (compared to 302 for the same period in 2022/23; representing a 9% increase in reviews received); and
- Finalised 304 reviews (compared to 277 for the same period in 2022/23; representing a 10% increase in reviews finalised).

For the 304 reviews finalised:

- 205 reviews resulted in a formal review decision by a Commissioner (of these, around 60% of OVIC decisions differed from the agencies' decision, and directed more information be released);
- 70 reviews were informally resolved and were either dismissed with agreement after a fresh decision or withdrawn by the applicant;
- Remainder either not in jurisdiction or dismissed.