Office of the Victorian Information Commissioner

Inquiry into the Freedom of Information Act 1982 (Vic)

Executive summary

1. Victoria needs a complete overhaul of its access to information (**ATI**) law framework, to provide better outcomes to the public by enhancing transparency, and to Victorian agencies by making it easier and less costly to provide access to information.

2. Victoria's ATI legislation and framework is fundamentally outdated. A new Act with a new policy model is needed to achieve better outcomes. Taking a further piecemeal approach, or tinkering around the edges of the FOI Act, will not achieve this.

3. The current legislative framework is contributing to high volumes of FOI requests, increasing delays in providing decisions, high volumes of reviews and complaints to OVIC and to the Victorian Civil and Administrative Tribunal (**VCAT**), decreasing number of decisions granting access to information, and increasing costs to government and the justice system.

4. Each of these issues present separate and compounding barriers to timely and cost-effective access to information, resulting in significant delays for the public and burdening workloads for agencies. The issues are symptoms of a poorly functioning information access system caused by a range of factors, including:

    a. the policy model of the FOI Act, which uses a 'pull' method for accessing information and has limited mechanisms for proactive and informal release of information;

    b. unnecessary procedural and administrative processes that make the FOI Act complex for the public to navigate and agencies and Ministers to administer;

    c. the lack of an overarching framework or standard which must be met before access to a document may be refused, exemptions which deem documents absolutely exempt, inconsistent public interest tests, and provisions in other pieces of legislation (such as secrecy provisions and exclusions from FOI) which undermine the object of the FOI Act;

    d. the inconsistent and piecemeal approach of prior legislative amendments over the past 40 years that have added to the complexity of administering the FOI Act; and

    e. information management practices and policies that do not consider access-by-design or access to information.

5. To help address these, OVIC makes 77 recommendations in its submission relating to the FOI Act's policy model, mechanisms for proactive and informal release, information management, use of technology, purpose and principles of the FOI Act, and processes under the FOI Act.

6. This Executive Summary provides an overview of the recommendations made in the submission.

A new ATI law with a new policy model to replace the FOI Act

7. Victoria has a first-generation, 'pull', model of information access. This means that in most cases, an individual must make a formal request for access under the FOI Act to a document held by an agency or Minister. This model of access has not been revisited since the FOI Act was first introduced in 1982.

8. A 'pull' model of access no longer reflects how the right to information should be exercised, both within Australia and internationally. The best way to give effect to the right to access government-held information is to 'push' information to the public (such as proactively and informally), while still retaining a 'pull' mechanism, but positioned as a last resort.

9. Victoria should replace the FOI Act with a modern, third-generation, access to information law (**a ATI law**), that:

    a. uses plain language, simple processes, and minimal procedural requirements;

    b. adopts a 'push' model of access, requiring and authorising the proactive and informal release of information, and positioning formal requests as a last resort;

    c. implements the purposes and principles of a good ATI law;

    d. is fit for purpose in the digital age; and

    e. retires the phrase 'freedom of information' in favour of modern access to information language.

Recommendations 1 and 2

Authorised proactive and informal release

10. To implement the proposed new 'push' model, a new ATI law should have four authorised access pathways:

    a. **Authorised mandatory proactive release**:

    Agencies and Ministers should be required to proactively publish key information about the agency or Minister and key categories of documents of significant public interest.

b. **Authorised proactive release of additional information**:

A new ATI law should authorise the general release of information proactively, outside of any mandatory proactive release requirements. This assists an agency or Minister to publish more than what is required, which can help with managing FOI workloads.

c. **Authorised informal release**:

A new ATI law should clearly and specifically authorise the informal release of information. This would provide greater flexibility in administering the law (such as by providing access to information informally, outside a new ATI law, in response to a request for information), and would allow agencies and Ministers to set up access schemes for commonly requested information.

d. **Authorised formal release, with a disclosure log**:

Processes for formal release are outlined below. A new ATI law should also include a requirement for agencies and Ministers to maintain a disclosure log, with legislative principles which require information in disclosure logs to be easy to find and use, up-to-date, and useful. A new ATI law should also require agencies and Ministers to consider whether the information released in response to a formal request, can be released proactively (rather than listed on a disclosure log only).

11. The method and form of access under the proactive release pathways should, as much as possible, be guided by principles rather than prescription. The principles should require agencies and Ministers to publish information in a way that is practical, timely, easy to find, accessible, and presented in a way that is capable of being understood and accessible. Information should be available for free and published online where possible (for proactive release). If information cannot be provided for free, it should be provided at the lowest reasonable cost.
12. There should be clear protections for agencies and Ministers who provide access to information under these pathways in good faith.
13. There should be greater reporting and oversight of proactive and informal release pathways.

Recommendations 3 to 16

Making it easier for individuals to access their personal and health information

14. A new ATI law should make it easier for individuals to access their own personal and health information. Individuals should be able to access their information under the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) and the *Health Records Act 2001* (Vic) (**HR Act**) in addition to under the new ATI law.
15. Access provisions under the PDP Act and the HR Act should be amended to make the process easier and simpler for individuals to use and for agencies to administer.

16. The informal release pathway, outlined above, would enable agencies and Ministers to provide efficient and timely access to personal and health information, with protections from civil and criminal liability for disclosures made in good faith.

Recommendations 17 to 20

Whole-of-government information management and embedding access-by-design

17. Good information management and recordkeeping is essential for providing access to information. There should be a whole-of-government information management framework in Victoria that considers public access to all public sector information and embeds safe and secure access-by-design. Agencies and Ministers should design policies, processes, and templates with access in mind, empower staff to write for release, and to continuously identify information for release when carrying out public functions.

18. Agencies and Ministers should have to maintain an information asset register, and record whether information can be or has been made publicly available under the new ATI law and how. Consideration should be given to requiring agencies and Ministers to publish their information asset registers. The aim of this is to enhance transparency by enabling the public to understand the extent of, and nature of, the agency's or Minister's document holdings, and improve visibility and public understanding of the documents not approved for public release.

Recommendations 21 to 25

Using technology to increase disclosure of information

19. The use of technology should be explored to make it easier for individuals to access information and easier and quicker for agencies and Ministers to provide access to information. This includes exploring the:

    a. possibility of a centralised whole-of-government access to information portal, disclosure log and information asset register;

    b. safe use of machine assisted technology to help improve the timeliness of responding to formal access requests; and

    c. use of technology to implement access-by-design into information management practices and processes.

20. Technology can make providing access to information more efficient, including by helping to implement access-by-design into internal processes and practices. Any use of technology must also be done safely, with privacy and security in mind.

Recommendations 26 to 28

Implementing the purpose and principles of a good ATI law

21. The FOI Act, in its current form, does not meet the purposes and principles of a good ATI law. For example, it does not support the maximum possible amount of information being made available to the public quickly and at the lowest cost, nor does it ensure exceptions and exemptions are clearly and narrowly drawn. The limited 'push' mechanisms in the FOI Act also creates a barrier to realising the benefits of proactive and informal release.

Creating a clearer presumption in favour of access

22. A new ATI law should have a clear, plain language objects clause that includes a presumption in favour of the maximum disclosure of information, and clarifies Parliament's intention for proactive and informal release pathways to be used first and for formal requests to be a last resort.

Recommendation 29

Ensure the new ATI law applies to all documents

23. The substantive definition of 'document' has not been updated since 1982, when computers were not used by the public service. Digital transformation has contributed to information-rich governments, and advances in technology have changed how governments store and provide access to information. Not only does government create significantly more documents today compared to the 1980s, the format of documents and where and how they are stored has also changed significantly.

24. A new ATI law should ensure it applies to all types of records and storage mediums used by government, including electronic files. It should capture all types of records and storage mediums used by contemporary government.

Recommendations 30 to 33

Strengthen an agency's or Minister's ability to refuse repeat requests, deal with vexatious applicants, and refuse voluminous requests

25. There are several exceptions that can assist an agency or Minister to avoid spending unnecessary FOI resources on one applicant. This includes provisions for repeat requests, vexatious applicants, and voluminous requests.

26. A new ATI law should have an exception to the right of access for repeat requests. The FOI Act has such a provision, however it is difficult to satisfy and, in practice, it is hardly used. Simplifying the provision would assist agencies and Ministers to refuse repeat requests where appropriate.

27. A new ATI law should also have a provision for VCAT to declare an applicant vexatious.

28. A new ATI law should retain the exception for an agency or Minister to decide not to process a request if to do so would be a substantial and unreasonable diversion of resources. However, the exception requires amendments to clarify what factors can be considered and should include a presumption in favour of processing the request with a public interest override. Further, agencies and Ministers should not be permitted to rely on this exception solely because of consultation with third parties.

Recommendations 34 to 37

A new three step test for refusing access

29. A new ATI law should replace the exemptions, currently in Part IV of the FOI Act, with 'limited exceptions' to cover the reasons an agency or Minister may refuse access to information under a formal request. The limited exceptions should be subject to a new three part test in considering whether to refuse access to information.

30. The three part test should:

    a. only protect recognised legitimate interests, which should be clearly and narrowly defined and listed in the ATI law;

    b. be subject to a substantial harm test (i.e., disclosure would cause substantial harm to the legitimate aim); and

    c. be subject to a public interest override.

31. The limited exceptions should also set out irrelevant considerations that an agency or Minister cannot consider in refusing access to information (for example, protecting the government from embarrassment or exposure of wrongdoing).

32. The operation of the three part test would assist to provide access to more information, by narrowly drawing the exceptions, requiring there to be substantial harm if the information was released, and providing a mechanism for an agency or Minister to provide access to the information where there is a strong public interest in doing so.

33. A new ATI law should also promote and enhance access to information, by:

    a. removing conclusive certificates;

    b. removing the exception in section 25A(5), which enables an agency or Minister to refuse a request without processing it where the documents requested are obviously exempt;

    c. introducing an administrative proactive release scheme for Cabinet documents, similar to the New Zealand model;

    d. narrowing the Cabinet exception to include documents that are prepared for the sole or substantial purpose of submission to Cabinet or one of its Committees, and were actually submitted to the Cabinet and its committees. The Cabinet exemption should apply to documents that disclose deliberations of Cabinet rather than a decision of Cabinet; and

    e. reducing overall time limits on Cabinet documents and internal working documents from 10 years to five years.

Recommendations 38 to 58

Improving processes in the new ATI law for formal access

34. OVIC's submission identifies several areas that could be improved in the context of processing formal requests. There are also some areas that should be retained in a new ATI law. For example, the current time frame in which agencies and Ministers must provide a decision to the applicant (30 days) should be retained, including options to extend the time frame.

Fees and charges

35. Requests for an applicant's own personal or health information should be free. Consideration should be to reduce the application fee to a nominal amount which does not increase in line with indexation.

36. Any charges for access should only be for legitimate cost incurred. Charges should no longer be required for the time spent searching for documents, creating a document, or supervising an applicant's inspection of a document. Access charges should be set out in a new ATI law or regulations and be limited to actual costs of reproduction (such as providing a photocopy of a document).

37. A new ATI law should also contain a general discretion for an agency or Minister to waive or reduce any fees under the law. Currently, agencies and Ministers may reduce or waive the application fee if the application is experiencing hardship. However, access charges (under section 22 of the FOI Act) cannot be reduced or waived unless the type of applicant or type of information falls within a specified category. The current limits on reducing and waiving fees does not align with the object of the FOI Act, which includes to provide access to information at the lowest reasonable cost.

Recommendations 59 to 64

Assisting applicants

38. A new ATI law should retain the requirement to provide reasonable assistance to applicants in making a formal request. This includes assisting an applicant to reduce their request to writing where they may not be able to (for example, because of a disability).

39. The requirement to provide assistance could be broadened to include a requirement to advise an applicant as to whether or not information is publicly available and if so, how the applicant may access the information. Further, the requirement to provide assistance should include assisting an applicant to receive the requested information in a form that is accessible to the applicant.

Recommendations 65 and 70

Simplifying third party consultation

40. Third party consultation creates additional administrative work, adding to FOI workloads and can lead to delays in processing formal requests. The language used in the FOI Act around third party consultation thresholds is inconsistent and confusing, making it difficult to determine when it is practicable to consult.

41. A new ATI law should include simple and uniform third-party consultation requirements to make it clearer when agencies and Ministers must consult with third parties. This should help with creating a consistent threshold for determining when third party consultation is required, and should assist with reducing the administrative workload caused by consultation.

Recommendation 68

OVIC's powers and functions

42. OVIC's submission makes several recommendations regarding OVIC's powers and functions, to help ensure OVIC continues to be an effective regulator. This includes:

    a. enabling the Information Commissioner and the Public Access Deputy Commissioner to delegate the power of making a fresh decision to a member of OVIC staff;

    b. making OVIC review decisions legally binding and enforceable;

    c. the power to direct an agency or Minister to provide access to a document in a particular format;

    d. the power to prepare guidelines on the ATI law which must be considered by agencies and Ministers when interpreting the legislation;

    e. ensuring powers and functions in the new ATI law apply to both the Information Commissioner and the Public Access Deputy Commissioner (including the power to conduct an investigation);

    f. ensuring OVIC has appropriate powers to regulate compliance with the new ATI law, including the power to impose sanctions;

    g. providing the Information Commissioner, Public Access Deputy Commissioner and OVIC staff with protection for acts done in good faith in accordance with the Act; and

    h. enhancing and protecting OVIC's independence by amending to whom OVIC reports on its performance and how OVIC receives its funding.

Recommendations 71 to 77