



Office of the Victorian Information Commissioner

Freedom of Information (FOI) Professional Standards Review

23 August 2024

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Acknowledgement of Country

At KPMG, we recognise Aboriginal and Torres Strait Islander peoples as First Peoples of this nation.

We recognise that Aboriginal and Torres Strait Islander history and cultures are inseparable from Australia's collective history and culture and is something we can all be proud of and celebrate.

We acknowledge the Traditional Owners of the land where we gather today and each day and pay respect to Elders past and present and to emerging community leaders. We also acknowledge the important role of Aboriginal and Torres Strait Islander people within Australian Retirement Trust and KPMG and the communities we work with.

We are proud that we live in the country with the world's oldest continuous living cultures, and we are playing our part to support Indigenous people to keep these cultures alive and vibrant.

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Sean Morrison
Information Commissioner, OVIC
121 Exhibition Street, Melbourne VIC 3000

23 August 2024

Freedom of Information (FOI) Professional Standards Review

Dear Mr. Morrison

KPMG was engaged by the Office of the Victorian Information Commissioner (**OVIC**) on 12 April 2024 to complete a review of the Freedom of Information (**FOI**) Professional Standards (**the Standards**) and prepare a report for the Information Commissioner and the Victorian Parliament's Integrity and Oversight Committee.

Our report is comprised of 4 sections, divided as follows:

- Executive Summary;
- Background;
- Detailed Findings; and
- Appendices.

We would like to take this opportunity to thank the stakeholders at OVIC and other agencies who participated in this review for their cooperation and assistance during the course of our work.

Thank you for the opportunity to assist you with this work. Should you wish to discuss any of the content in this report, please do not hesitate to call me on [REDACTED] or [REDACTED] on [REDACTED].

Yours sincerely

[REDACTED]
Partner, KPMG Risk Consulting

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Glossary

Table 1: Key Terms and Definitions

Term	Definition
AG Guidelines	Attorney General Guidelines
Engagement	Non-compliance with the Professional Standards
FAQ	Frequently Asked Questions
FOI	Freedom of Information
FOI Guidelines	Freedom of Information Guidelines by OVIC
IOC	Integrity and Oversight Committee
MoG	Machinery of Government
OAIC	Office of the Australian Information Commissioner
OVIC	Office of the Victorian Information Commissioner
PID Act	Public Interest Disclosure Act 2012
The Act	Freedom of Information Act 1982 (Vic)
The agencies	Victorian Public Sector Agencies
The Bill	Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024
The Standards	Freedom of Information Professional Standards
The Tribunal	Victorian Civil and Administrative Tribunal

1 Executive summary

Introduction

This report is issued in accordance with the Services Agreement dated 12 April 2024 with the Office of the Victorian Information Commissioner (OVIC).

Scope and procedures performed

Our approach contained five dedicated tasks which allowed KPMG to evaluate, identify and recommend areas for uplift and improvement which will assist OVIC and prescribed agencies to meet Freedom of Information (FOI) obligations.

- Task 1: OVIC related meetings, engagement, and document review;
- Task 2: Agency workshops, engagement, and document review;
- Task 3: Better practice and recommendations;
- Task 4: Report drafting; and
- Task 5: Finalisation.

KPMG performed the following over the period 12 April 2024 to 30 June 2024:

- Reviewed OVIC and agency specific policies, procedures, guidelines, OVIC training tools and investigation reports;
- Conducted a 2-hour workshop with OVIC stakeholders to understand various aspects of implementing the Act and Standards including what works well, challenges faced by OVIC, resources and tools available for agencies, and areas for uplift;
- Prepared and undertook 14 one-hour workshops with prescribed agencies that volunteered to be a part of this review;
- Conducted a desktop review of guidance from comparable interstate Commissioners as relevant to FOI to identify areas for improvement; and
- Prepared a draft deliverable for OVIC's consideration; and
- Issued a final report.

Summary of findings

Based on the above procedures, we identified various issues faced by OVIC and Victorian Public Sector Agencies (**the agencies**) in administering the *Freedom of Information Act 1982 (the Act)* and complying with the Standards as summarised below. Refer to Section 3 for the detailed findings:

Table 2: Summary of findings and recommendations

Theme	Finding	Recommendation
Agency barriers to compliance		
Substantial and unreasonable diversion of resources	<p>Agencies reported experiencing an increasing workload, in terms of quantum, complexity, and voluminousness of requests. This places additional pressure on the agencies' limited resources in processing requests in a timely manner, and in some cases, resulting in a backlog.</p> <p>Section 25A(1) of the Act enables agencies to refuse access to documents if they are satisfied that the work involved in processing the request would substantially <i>and</i> unreasonably divert resources of the agency</p>	<ol style="list-style-type: none">1. Update the Standards to provide for a staged information release scheme, where agreed with applicants, to improve access to information by minimising substantial and unreasonable impact of FOI requests on agency resources.

Theme	Finding	Recommendation
	<p>from its other operations. However, some agencies informed us that there is a degree of ambiguity around the application of section 25A and OVIC's expectations of what a substantial and unreasonable diversion of resources constitutes.</p> <p>Section 3 of our report explains that we do not consider updating the Standards to include mandated criteria for the assessment of 'substantial' and 'unreasonable' would be practical, compliant with the Act, or adequately address nuanced risks. Rather, consideration of what may minimise the likelihood of agencies denying access to information on the basis of section 25A can more reasonably be considered. Refer to Section 3.3.1 for details.</p>	
<p>Reliance on agency staff</p>	<p>Some agencies informed us that FOI teams experience delays in obtaining timely and effective responses from internal stakeholders.</p> <p>OVIC's FOI practice note on <i>Responsibilities of Victorian public sector staff under the FOI Act</i> explains the need for non-FOI agency staff to assist and support the FOI team in carrying out obligations under the Act. We identified that not all agencies were aware of the practice note and its contents fell short of advising public officers of exemptions, relevant risks, or repercussions as a result of non-compliance with the Act and the Standards. Refer to Section 3.3.2 for details.</p>	<p>2. Review resources for agencies and include information about:</p> <ul style="list-style-type: none"> • exemptions and important information to inform FOI staff, such as any relevant secrecy provisions; • reference to relevant provisions of the Code of Conduct for Victorian Public Sector Employees 2015 and Code of Conduct for Victorian Public Sector Employees in Special Bodies 2015 which are binding instruments under the Public Administration Act 2004 (Vic). <p>The updated resources shall be linked to the Standards and encouraged for perusal.</p>
<p>Third-party consultations</p>	<p>Agencies are required to consult with relevant third parties in response to FOI requests, depending on the nature of the information subject to review for release and the practicability. In certain instances, agencies are required to consult with multiple third parties which can result in delays. Agencies we spoke with noted that section 21(2)(a) of the Act provides for an extension of up to 15 days for consultations, however, neither the Act nor the Standards consider or set out the number of consultations that may be required to be made by the agency in this timeframe.</p> <p>Our discussions with agencies identified inconsistent practice in the application of third-party consultation and the redaction of names in documents subject to FOI requests.</p>	<p>3. Pending the outcome of the legislative amendment, consider updating resources to agencies to provide guidance on third-party consultations and the application of 'reasonably practicable.' This may include consideration of factors that influence the assessment of what constitutes 'reasonably practicable.'</p>

Theme	Finding	Recommendation
	<p>We note from our discussions with OVIC, that practicability may be impacted by a number of factors, including FOI resourcing.</p> <p>We further note that the <i>Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (the Bill)</i> is before the Legislative Council at the time of finalising this report. The Bill seeks to amend the term 'practicable' from third-party consultations to 'reasonably practicable.' Refer to Section 3.3.3 for details.</p>	
Resourcing	<p>Agencies are experiencing a significant increase in the number of FOI requests received in comparison to previous years. A vast majority of the agencies expressed concerns that FOI teams are not adequately staffed to handle the growing numbers of FOI requests, thereby impacting timeliness in responding to FOI requests.</p> <p>Although Professional Standard 9.1 requires the Principal Officer to ensure the agency is sufficiently resourced, most agencies have not been able to leverage this Standard to seek additional resources on account of various other factors such as budget constraints, a lack of suitably skilled candidates versed in FOI and the public interest in allocating resources to other front-line services.</p> <p>Addressing the issue of resourcing through revision of the Standards will likely not have a tangible impact. While the issue of resourcing is not easily solved, there is more scope to hold Principal Officers accountable and provide OVIC with increased insight into resourcing efforts. Refer to Section 3.3.4 for details.</p>	<p>4. OVIC to include an additional question on resourcing in the Professional Standards Self-Assessment Tool, to the effect of 'The Principal Officer has taken adequate steps to address resourcing constraints impacting compliance with the FOI Act and FOI Professional Standards' and require a descriptive response of actions taken. Questions may also be re-considered to place onus on the Principal Officer where required under the Act, as opposed to the agency. When an agency is asked to complete the Professional Standards Self-Assessment Tool in response to non-compliance with the FOI Act or the Standards, the completed tool should be signed by the Principal Officer and provided to OVIC.</p>
Noting and briefing processes	<p>The agencies opined that the Standards do not consider the multiple layers of internal approvals, briefings, and Ministerial noting, which tend to protract time frames.</p> <p>According to OVIC's FOI practice note '<i>Noting and briefing processes on freedom of information decisions</i>,' the briefing or noting process should be completed within four days or less to facilitate a decision being made within the statutory timeframe. However, the Standards presently do not prescribe a timeframe within which the noting process is expected to be completed. Pragmatically, this means that FOI teams often feel compelled to await a response from recipients of noting or briefings, such as Ministers or executives. A protracted response can impact the overall timeframe of handling an FOI request, despite no formal noting period. Further, awaiting a response may be perceived as a conflict in</p>	<p>5. OVIC to consider updating the Standards to require Principal Officers to set expectations for noting and briefings to support release of information within statutory timeframes. Guidance notes for the update should reflect the role of the Principal Officer in directing the noting and briefing process, rather than FOI officers directing senior personnel.</p>

Theme	Finding	Recommendation
	<p>independence requirements, noting the FOI officer with delegated authority to make an FOI decision must not be directed to make a particular decision under the Act.</p> <p>To address these risks, one agency informed us that information is released to the applicant after five days from providing a noting or brief to the Minister, regardless of whether the noting is acknowledged by the Minister.</p> <p>As the Premier has not adopted Standards that apply to Ministers, OVIC cannot unilaterally impose a timeframe under the Standards for which Ministers are to respond to a noting. Refer to Section 3.3.5 for details.</p>	
Release of information after review	<p>The Act or Standards do not prescribe a timeframe within which a document shall be released once a review decision of OVIC takes effect. We understand from OVIC that there have been instances wherein agencies have unduly delayed the release of a document, despite the review decision taking effect. Refer to Section 3.3.6 for details.</p>	<p>6. Add a Professional Standard requiring agencies to release documents to the applicant within a specific period e.g., 14 days, after expiry of all available appeal rights under the FOI Act.</p>
OVIC's functions and governance		
Enforcement and accountability	<p>Some agencies expressed a view that OVIC uses the Standards largely as a tool for monitoring, identifying and responding to non-compliance rather than as a mechanism to further the objectives of the Act and assist agencies in complying with their statutory obligations through an educational lens. They added that OVIC does not always consider the practical challenges faced by agencies such as resourcing issues or onerous applicants.</p> <p>In contrast, OVIC stakeholders advised that there are limited provisions within the Act and Standard to hold agencies accountable for any breach of the Standards. Refer to Section 3.4.1 for details.</p>	<p>7. In light of the newly appointed Information Commissioner, update OVIC's engagement strategy with a focus on educating agencies and collaborative communication.</p>
Search documentation	<p>We were advised by OVIC that agencies do not always provide details of searches conducted as required by the Act and Standards. We understand that this is due to the discretionary nature of the language used in the Standard which requires that the summary of searches is provided to the applicant but does not mandate the provision of detail.</p> <p>It was opined by an agency that as it currently stands, Standard 8.4(a) imposes an obligation on agencies that goes beyond the requirements of the Act. They advised that in order to comply with Standard 8.4(a) and provide a summary of searches, the agency may need to seek legal advice or further assistance from relevant staff before drafting an outcome letter to the applicant.</p>	<p>For noting.</p>

Theme	Finding	Recommendation
	<p>To balance concerns raised by OVIC and that of agencies, we propose that section 8.4 remains as is. This does not negate an agency's obligation to retain records of searches in accordance with Standard 6.1. Refer to Section 3.4.2 for details.</p>	
<p>Review timelines</p>	<p>Some agencies suggested amendment of the Standards to impose timeframes for OVIC in the handling complaints or reviews, noting time delays. We have not made a recommendation on this basis noting that the Act specifies that the Standards relate to the conduct of agencies performing functions under the Act, rather than OVIC as a regulator. Refer to Section 3.4.3 for details.</p>	<p>For noting.</p>
<p>OVIC's access to documents exempt from access, or falling outside the FOI Act</p>	<p>We identified from agencies, a potential misalignment on OVIC's authority to access documents which the agency or Minister consider exempt under the Act or fall outside the Act. While a section of the agency stakeholders interviewed expressed a view that OVIC may not have the legislative authority to access such documents, OVIC opined that they may access these documents to determine whether the document is subject to the FOI Act or exempt from disclosure.</p> <p>The question of OVIC's jurisdiction is further complicated by the risk of agencies 'overreaching' an exemption and suggesting that documents are exempt when in fact they are not.</p> <p>We have not sought to assess the legislative basis upon which OVIC can or cannot access documents falling outside the FOI Act. It is however apparent that there is a lack of clarity in the application of FOI law in this regard. Refer to Section 3.4.4 for details.</p>	<p>8. Where appropriate, consider seeking a statutory declaration or attestation from the agency's Principal Officer or Minister attesting to why a document is not subject to the FOI Act, where such provisions may apply. In exceptional circumstances and where there is reasonable cause, OVIC may seek access to relevant documents to determine whether the documents are subject to the FOI Act or exempt from disclosure.</p>
<p>Self-Assessment Tool</p>	<p>Common themes gathered from our discussions with agencies on the effectiveness and improvement areas in relation to the Self-Assessment Tool are:</p> <ul style="list-style-type: none"> • The Self-Assessment tool follows a one size fits all approach which may not be the most effective method to measure an agency's maturity; • The Self-Assessment tool is lengthy and time-consuming with 91 statements to be answered; and • Some of the questions/statements were considered to be aspirational and the agencies asserted that these did not have a nexus to the requirements stipulated under the Act or Standards. <p>We note that data obtained through completion of the Self-Assessment tool is</p>	<p>9. Review the FOI Self-Assessment Tool to enable collection of qualitative data through free text responses, in addition to quantitative data through set response options. Questions with free text fields should be worded to encourage agencies to reflect on nuanced experiences in FOI, challenges, and anonymised case examples. The length and scalability of the tool should also be considered depending on the agency and its exposure to FOI requests.</p> <p>10. OVIC to consider mandating completion of the FOI Self-Assessment Tool for agencies who</p>

Theme	Finding	Recommendation
	limited. There is no adequate provision in the Tool for agencies to reflect and elaborate on any specific concerns faced by them, with the Tool providing statements to which the agency is able to rate as 'yes,' 'in progress,' 'identified' and 'no.' Refer to Section 3.4.5 for details.	receive more than a specified number of FOI requests over a specified period.
Notification of decision – OVIC reviews	As per the practice followed by OVIC, a delay complaint can only be resolved or closed once the agency has made a decision on the applicant's request. We understand that in some instances, OVIC is not notified of the decision being made by the agency and resultantly the delay complaint remains open and unresolved. Refer to Section 3.4.6 for details.	11. Implement a new Professional Standard that requires agencies to notify OVIC of a decision made in relation to a delay complaint known to the agency. Notification to OVIC should be made by the agency within 7 days of the decision being made.
Notification of decision – Tribunal reviews	<p>We understand that OVIC's reporting obligations require them to report to Parliament on the number of reviews by the Victorian Civil and Administrative Tribunal (the Tribunal) under Section 50(3D). OVIC explained that they are currently reliant on information from the agencies under Section 50(3F) to fulfill their reporting requirements to the Parliament, however, such information is not provided to OVIC by the agencies promptly.</p> <p>The Integrity and Oversight Committee's (IOC) report into the performance of Victorian integrity agencies, tabled in November 2023, recommended legislative amendments to enable OVIC to obtain review application data held by the Tribunal. The recommendation was under review by the Victorian Government at the time of finalising this report. Should the IOC's recommendation be supported, a change in legislation will facilitate the release of information by the Tribunal, to OVIC directly, without the need to await agency reporting. Refer to Section 3.4.6 for details.</p>	For noting.
Information on delays	OVIC currently has two major information sources on agency delays, namely complaints by applicants and OVIC's annual report survey. The data available to OVIC is restricted and requires uplift to facilitate decision making, monitoring and trend identification by OVIC. Refer to Section 3.4.7 for details.	<p>12. OVIC to amend questions in the annual survey to also require agencies to report on:</p> <ul style="list-style-type: none"> a) the number of decisions that were made after a delay of 100 days or more; and b) the maximum delay period for any one matter during the financial year.
OVIC resources and engagement		
Training and resources	OVIC's educational resources were generally viewed positively and important to FOI staff knowledge, continued practice improvement and OVIC performing an educational role,	13. To improve training and resources, OVIC may consider:

Theme	Finding	Recommendation
	<p>rather than purely a regulatory function. Agencies noted:</p> <ul style="list-style-type: none"> • OVIC had scaled back some of the advanced training sessions designed for experienced FOI staff during the Covid-19 pandemic and these have not been reinstated; • OVIC's training sessions are currently voluntary and there are no mandatory/obligatory sessions; • OVIC's online Frequently Asked Questions (FAQ) is generic and does not delve into entity-specific scenarios; and • The introductory new starter training sessions conducted by OVIC are only on two specific days of the week, which is not suitable for part time employees. <p>We note that the FOI Act does not provide OVIC with the power to legally mandate training and therefore onus is on Principal Officers to ensure staff attend available training sessions. Refer to Section 3.5.1 for details.</p>	<p>a) reinstating training sessions for experienced FOI practitioners with course content tailored to specific sectors or categories of agencies, with a focus on emerging issues and recent case studies;</p> <p>b) monitoring and strongly encouraging FOI training attendance for FOI staff in specific circumstances, including consideration of refresher training where there are legislative changes, amendments to the Standards and/or significant decisions made in VCAT that impact the application of the Act or Standards;</p> <p>c) updating its FAQ webpage with more detailed, practical, and entity-specific content which can be effectively leveraged by agencies, or include guidance to redirect agencies to the appropriate resources; and</p> <p>d) delivering new starter training across various forums and on varying days.</p>
Engagement	<p>Agencies informed us that in recent times their engagement with OVIC has been predominantly restricted to communication as part of a complaint, review process or investigation undertaken by OVIC. Agencies advised:</p> <ul style="list-style-type: none"> • OVIC's response to queries sent to OVIC's generic enquiries email was considered to be inconsistent with regards to timeliness; • The email responses from OVIC are occasionally generic in nature; and • It would be beneficial for each of the agencies to have a dedicated point of contact at OVIC. <p>OVIC informed us that an Agency FOI Information Service is also available to agencies for free and tailored guidance from experienced OVIC staff. Refer to Section 3.5.2 for details.</p>	14. OVIC to update its agency engagement strategy to highlight and promote awareness around the various communication channels available to the agencies.
Other areas for uplift		
Applicant awareness	The majority of stakeholders from participating agencies informed us that there is limited awareness amongst applicants about the Standards and the Act. It was discussed that while applicants' awareness of the Standards	15. OVIC to consider updating its existing resources or developing a fact sheet for agencies to provide to applicants, summarising key

Theme	Finding	Recommendation
	<p>or the Act may not be critical, increased awareness may manage applicants' expectations of the FOI process and inform them of their review and complaint rights. Refer to Section 3.6.1 for details.</p>	<p>aspects of the Standards and the Act, such as informing applicants of timeframes, the requirement to refine requests at times, exemptions that may apply and complaint and appeal rights.</p> <p>16. OVIC may consider adding a Standard requiring agencies to notify applicants of their complaint rights at the end of the statutory period of 30 days or at the end of any extended timeframes (as agreed upon under the relevant sections of the Act) if the decision has not been made by the agency within such timeframes.</p>
<p>Acknowledgement of request</p>	<p>There is currently no requirement under the Act or the Standards for an agency to acknowledge the receipt of a request or to acknowledge that the request is valid and has been accepted. This is in contrast to the requirement in other FOI jurisdictions which require the agencies to notify applicants about the receipt or validity of their request. Refer to Section 3.6.2 for details.</p>	<p>17. OVIC consider mandating the acknowledgement of all FOI requests within 10 days. An acknowledgement may be a system generated email, depending on how the FOI request was submitted.</p>
<p>Waiver of fee – Time limit</p>	<p>There is currently no time limit within which agencies are expected to decide on a request by the applicant for a waiver of the application fee. The Freedom of Information Guidelines by OVIC (FOI Guidelines) clarify that a request is not considered valid until the agency or Minister decides on an application for a fee waiver or reduction. Therefore the 30-day timeframe for agencies to make a decision on a request does not commence until the agency makes a decision about the fee waiver or reduction. Refer to Section 3.6.3 for details.</p>	<p>18. It is recommended that OVIC adds a new Standard requiring agencies to decide on a request for waiver or seek further information from an applicant in support of their request for a fee waiver or reduction, within a specified timeframe so as to ensure that agencies do not delay the decision on waiver of the fee and subsequent release of information to the applicant.</p>
<p>Waiver of fee – Basis for decision</p>	<p>We understand that the agencies use their discretion on a case-by-case basis to assess hardship for waiver of application fees and access charges, in line with the FOI Guidelines. While some agencies insist on documentary evidence such as a healthcare or concession card, some agencies do not insist on the applicant providing any such documentary evidence, leading to potential inconsistencies in the assessment of hardship across agencies. Refer to Section 3.6.3 for details.</p>	<p>19. OVIC to update the Standards to reflect 'hardship' in relation to application fees as beyond financial impact in line with the FOI guidelines and consider if existing OVIC guidance on assessing and deciding hardship for application fee or access charge waivers requires updating.</p>
<p>Transfer of requests – Partial transfers</p>	<p>The Act or Standards do not provide for partial transfer of requests to other agencies, which is in contrast to other FOI jurisdictions. We note that this may be an impediment to the release of information to applicants. However, we also note that permitting partial transfers</p>	<p>For noting.</p>

Theme	Finding	Recommendation
	<p>may increase the administrative burden on agencies if consolidated requests pertaining to multiple other agencies are received. This may also risk evasion of additional application fees by the applicant. Nonetheless, the current legislation is not practical in circumstances where documents on one topic may be retained by more than one agency. Any amendments to the current regime should consider the practical application of partial transfers for all parties, including consideration of resourcing and fees. Refer to Section 3.6.4 for details.</p>	
<p>Transfer of requests – Timeframe</p>	<p>The Act or Standards do not specify a timeframe within which an agency shall transfer requests to the appropriate agency. In case an agency transfers a request after a period of 14 days, the agency to which the request is transferred may be disadvantaged as the 30-day time frame for making a decision commences at the end of the 14th day, which may in turn delay the release of information to the applicant. Refer to Section 3.6.4 for details.</p>	<p>20. OVIC to add a new Standard requiring agencies to transfer the request to another relevant agency, where applicable to the nature of the request, within 14 days of receiving the original request.</p>
<p>Transfer of requests – Notification of transfer</p>	<p>The Act is not specific as to whether an agency is required to inform an applicant of a decision to transfer a request to another agency, noting the decision to transfer is discretionary. OVIC's FOI guidelines, however, clarify that an agency may inform the applicant of the decision to transfer the request to another agency, however, this is not a binding requirement and may result in poor communication or a lack of transparency in the process. It also does not align with the intent of the Act in supporting availability of information to the public about government processes. Refer to Section 3.6.4 for details.</p>	<p>21. OVIC to add a new Standard requiring agencies to notify an applicant within 14 days if the agency has used its discretion to transfer the applicant's request to another agency. The guidelines should be updated to align with application of the new Standard.</p>
<p>Informal or administrative access</p>	<p>Some of the agencies expressed a view that despite the Standards and OVIC's practice notes supporting the release of information outside the Act, OVIC does not always reflect this in practice. The agency stakeholders explained that there have been instances wherein the applicants could have been better assisted under other channels of release.</p> <p>OVIC stakeholders considered that a new Standard requiring agencies to obtain an applicant's consent when referring a request under an alternative release channel, outside of the Act, needs to be implemented. The core rationale for obtaining consent is to ensure that that the applicant is advised whether or not the alternative release channel has review rights if access to documents is denied or only released in part. Refer to Section 3.6.5 for details.</p>	<p>22. OVIC to consider amending Standard 1.2 to require agencies to notify the applicant about the impact of releasing information outside the Act, including where appeal rights are denied, and obtain written consent from the applicant for the same.</p>

Theme	Finding	Recommendation
Clarification of requests	The Standards prescribe a timeframe of 21 days within which the agency is expected to notify the applicant and provide assistance to make the request valid. However, there is currently no prescribed time limit within which agencies are required to seek any subsequent clarifications that may be required to make the request valid, after the first notification. This has resulted in circumstances where any subsequent contact with the applicant to make a request valid, is protracted and unreasonable without breaching the 30-day timeframe set out in the Act for release of information since the 30-day period is paused when the applicant is first notified by the agency. Refer to Section 3.6.6 for details.	23. OVIC to consider adding a Standard requiring agencies to notify applicants of any further clarifications requirements to make the request valid within a specific time frame.
Amendment of personal information	According to Section 45 of the Act, the provisions of Section 27 to provide reasons for a decision applies to amendment requests when an agency decides to not amend a document in accordance with a request. OVIC explained that the requirements of Section 27 with respect to requests for amendment of personal records is currently ambiguous. Specifically, there is insufficient guidance on providing a decision that delineates between elements of the request that are accepted by the agency and elements that are denied and why. Refer to Section 3.6.7 for details.	24. OVIC to update the Standards to require that as part of a decision letter for document amendment requests, agencies shall identify what amendments and notations have been made to the document as per the request and what amendments and notations have not been made to the document and why.
Preliminary view on complaints	<p>According to Section 49I of the Act, an agency has an obligation to assist OVIC in conducting a <i>review</i> under Part VI of the Act. Similarly, under section 61E of the Act, an agency must cooperate with OVIC in dealing with a <i>complaint</i> under Part VIA of the Act.</p> <p>However, it was noted that Professional Standard 10.2 supports Section 49I with regards to reviews but is silent on Section 61E in reference to complaints.</p> <p>OVIC considers that inclusion of complaints in Standard 10.2 would support quicker resolution of complaints if agencies have regard to OVIC's preliminary view and seek to act on this, thereby being able to resolve a complaint without further involvement of OVIC. Refer to Section 3.6.8 for details.</p>	25. OVIC to amend Standard 10.2 to include complaints, in addition to reviews.
Extensions under Section 21(2)(a)	Section 21(2)(a) enables an agency to extend the period for making a decision by 15 days if a third-party consultation is required to be made by the agency under the relevant sections of the Act. Standard 3.1 further explains that an agency must not extend time under Section 21(2)(a) unless a third-party consultation is being undertaken or will be undertaken.	26. OVIC to amend Standard 3.1 to make it clear that a time extension only applies in instances where the agency has notified the applicant in writing of their intention to extend timeframes under Section 21(2)(a) of the Act.

Theme	Finding	Recommendation
	<p>OVIC explained that Standard 3.1 is often misinterpreted by members of the public as applying to every request that becomes overdue, whereas the intention of the Act and the Standard is to ensure that the extensions only apply when an agency notifies an applicant of such extension in writing. Refer to Section 3.6.9 for details.</p>	
<p>Notice under 25A(6) – Timeframe for subsequent notifications</p>	<p>Professional Standard 5.1 requires an agency to take reasonable steps to notify an applicant under section 25A(6) of the Act of its intention to refuse a request under section 25A(1) within 21 days of receiving a valid request. There is currently no timeframe prescribed under the Standards for any subsequent notifications under section 25A(6), after the applicant has responded to the first notice.</p> <p>Any delays in subsequent notifications by agencies do not breach the 30-day timeframe set out in the Act for release of information since the 30-day period is paused when the applicant is first notified in line with Section 25A(6) and only restarts when the request is considered valid by the agency. Refer to Section 3.6.10 for details.</p>	<p>27. OVIC to amend Standard 5.1 to require agencies to issue subsequent notifications, if any, under Section 25A(6) within 14 days of the applicants' response to the first notification under the section.</p>

2 Background

2.1 Introduction

The Freedom of Information (**FOI**) Professional Standards (**the Standards**) have been developed in accordance with section 6U of the *Freedom of Information Act 1982* (Vic) (**the Act**). Section 6U of the Act enables the Information Commissioner (**IC**) to develop standards in relation to the conduct, administration, and operations of Victorian Public Sector Agencies (**the agencies**) in performing their functions under the Act, and for processing FOI requests under the Act. The Standards were introduced by Office of the Victorian Information Commissioner (**OVIC**) in December 2019 and contain 33 standards based on 10 themes.

As per section 6W of the Act, the Principal Officer¹ of an agency and any officer or employee of the agency concerned in the operation of the Act must comply with the Standards in performing their functions under the Act. Further, the Principal Officer of an agency must ensure that any officer or employee of the agency concerned in the operation of the Act complies with the Standards and that all officers and employees of the agency are informed about the requirements of the Standards. The Standards, however, currently do not apply to Ministers, although as per section 6Y of the Act, the Premier, by notice published in the Government Gazette, may adopt professional standards (either wholly or with modifications) to be applied to Ministers.

According to the FOI Guidelines released by OVIC (**FOI Guidelines**), the purpose of the Standards is to ensure the Act is administered by agencies consistently with:

- the Act's object – to extend as far as possible the right of the community to access information in the possession of an agency subject to the Act; and
- Parliament's intention – that the provisions of the Act are interpreted so as to further its object, and any discretions conferred by the Act are to be exercised as far as possible to facilitate and promote the prompt disclosure of information at the lowest reasonable cost.

Section 6X of the Act requires the Standards to be reviewed by the Information Commissioner at least once in every 4-year period. As per OVIC's FOI Guidelines, reviewing the Standards helps to ensure they continue to be fit for purpose and up to date, and provides the opportunity to:

- revisit the policy basis for the Standards and consider whether they are still required or if they need to be amended or repealed;
- consider and introduce new Professional Standards;
- update the Standards in response to any amendments to the Act where necessary; and
- review the Standards for readability, usability, and clarity.

Accordingly, OVIC has engaged KPMG to perform a review of the Standards. This is the first review of the Standards since their inception.

At the time of conducting this review, the *Inquiry into the Operation of the Freedom of Information Act 1982* was well underway, with the Terms of Reference for the inquiry being endorsed by the Legislative Assembly on 20 June 2023. The inquiry is expected to examine a wide range of issues including the effectiveness of the Act in its current form. Any recommendations made within this report are on the basis of the current iteration of Standards, as aligned to the current Act.

2.2 Scope and procedures

Scope of review

The purpose of this work was to assist OVIC in the review of the Standards. Specifically, the scope of the review included the following:

- undertake an independent review of the Standards;
- engage with external stakeholders;

¹ Principal Officer means in relation to a department, the person employed as or performing the duties of the Department Head within the meaning of the *Public Administration Act 2004*, per the *Freedom of Information Act 1982*.

- undertake an assessment of the:
 - level of agency knowledge and understanding of and engagement with the Standards, including any barriers to compliance with the Standards;
 - effectiveness of OVIC’s resources and education provided to agencies in relation to the Standards, including the Professional Standards Framework within the FOI Guidelines and the FOI Professional Standards Self-Assessment tool;
- prepare a report on the effectiveness of the Professional Standards, outlining the findings and recommendations for any amendments to the Standards; and
- present a summary of the key findings and recommendations for any amendments to the Standards at a meeting of the OVIC Executive and senior staff.

Procedures performed

KPMG performed the following procedures as part of this review:

1. A two-hour FOI workshop with relevant stakeholders at OVIC to gather information in relation to the operation of the Standards, including:
 - barriers to compliance;
 - what works well with the Standards;
 - challenges in the administration of the Standards;
 - effectiveness, practicality, adequacy, and relevance of the Standards;
 - role of the Standards in achieving the objectives of the Act;
 - resources and tools designed by OVIC for the agencies;
 - governance mechanisms and assurance activities carried out by OVIC, and
 - practical considerations for the uplift of the Standards.
2. KPMG conducted one-hour workshops with external stakeholders from 14 Victorian public sector agencies (**the agencies**) to obtain feedback and information in relation to the Standards including:
 - type and volume of FOI requests;
 - nature of applicants and applicants’ understanding of the Standards
 - agency level of knowledge of the Standards;
 - barriers to compliance;
 - what works well with the Standards;
 - effectiveness, practicality, adequacy, and relevance of the Standards;
 - role of the Standards in achieving the objectives of the Act;
 - resources and tools designed by OVIC for the agencies, and
 - internal FOI processes, governance structures, and monitoring activities;
 - practical considerations for the uplift of the Standards

Participation in agency workshops was voluntary, through invitation by OVIC. OVIC’s initial request for participation was sent out to 37 prescribed agencies which covered Victorian government departments, local government councils, health corporations, water corporations, TAFE and universities, and statutory authorities. Out of the 37, 16 agencies volunteered to participate and 14 were selected for participation in the workshops on the basis of their experience in interacting with the Act and the sector they represent. A TAFE or university did not volunteer to participate as part of this review. The list of agencies covered as part of this review is given in Table 3 below:

Table 3: Agencies covered as part of this review

No.	Agency	Agency Type
1	[REDACTED]	Government Department
2	[REDACTED]	Government Department
3	[REDACTED]	Government Department
4	[REDACTED]	Government Department
5	[REDACTED]	Government Department
6	[REDACTED]	Government Department

No.	Agency	Agency Type
7	[REDACTED]	Government Department
8	[REDACTED]	Local Government
9	[REDACTED]	Water Corporation
10	[REDACTED]	Health Corporation
11	[REDACTED]	Health Corporation
12	[REDACTED]	Health Corporation
13	[REDACTED]	Statutory Authority
14	[REDACTED]	Statutory Authority

For further information on the agency stakeholder workshops, please see **Appendix A**.

- Review of the Standards, FOI Guidelines, OVIC's practice notes, annual reports, and other publicly available information.
- Review of OVIC's internal policies, procedures, resources, and tools, including the Self-Assessment tool.
- Review of past OVIC investigation reports including the VicForests investigation report and OVIC's own-motion investigation into the impediments to timeliness.
- Review of agency documents including internal policies, procedures, guidelines, information sheets, and completed Self-Assessment tools provided for review. For further information on the agency documentation review, please see **Appendix B**.
- Sample review of submissions made in relation to the inquiry by the Victorian Parliament's Integrity and Oversight Committee into the current FOI laws in the state.
- Consultation with the [REDACTED] Office of the Australian Information Commissioner (**OAIC**) to understand OAIC's experience of working with the Commonwealth agencies on FOI matters to identify any best practice recommendations relevant to the Standards.

2.3 Limitations

The Standards are a prescribed instrument under the Act and are intended to facilitate administration of and compliance with the Act. In this regard, KPMG's recommendations are limited to the authorising environment enabled by the Act and cannot contradict or impose changes within the Standards which are not supported by the Act. The Act was formed in 1982, and while the current version in force has been subject to amendments, it is nevertheless dated. The Act is currently under review through the *Inquiry into the Operation of the Freedom of Information Act 1982*. It is noted that any amendments to legislation as a result of the inquiry may take time to implement.

Due to the voluntary nature of participation in this review, the TAFE and university sector was not represented in agency workshops, having not responded to OVIC's invitation.

Of the 14 agencies who participated, only 9 consented to providing KPMG with internal FOI policies and procedures as relevant to this review. Refer to Appendix A for details.

Disclaimer

This report has been prepared solely for the purposes set out in the Scope section of this report and is not to be used for any purpose not contemplated in the Services Agreement dated 12 April 2024. In that context, it is understood that this report may be considered by OVIC for publication on its website. Other than our responsibility to OVIC, neither KPMG nor any member firm or employee of KPMG undertakes responsibility arising in any way from reliance placed by a third-party on this report. Any reliance placed by a third-party is considered the third-party's sole responsibility.

This report has been prepared to assist OVIC with a review of the FOI Professional Standards and is limited by the provisions of the *Freedom of Information Act 1982 (Vic)*. The procedures performed to inform this report were not designed to identify all areas for uplift in the FOI Professional Standards. The review has been performed based on information provided by agencies, who participated in the review on a voluntary basis, and information provided by OVIC during consultations, and does not consider the internal FOI operations of the agencies or OVIC in their entirety. Any projections, findings or recommendations are subject to review of the current Professional Standards at the time of drafting this report and do not reflect changing conditions or proposed amendments to the Freedom of Information Act.

The services provided in connection with this engagement comprise an advisory engagement, which is not subject to assurance or other standards issued by the Australian Auditing and Assurance Standards Board and, consequently no opinions or conclusions intended to convey assurance have been expressed.

The findings in this report are based on a qualitative study and the reported results reflect a perception of OVIC and the agencies but only to the extent of the sample surveyed.

No warranty of completeness, accuracy or reliability is given in relation to the statements and representations made by, and the information and documentation provided by, stakeholders consulted as part of the process.

No reliance should be placed by OVIC on additional oral remarks provided during the presentation unless these are confirmed in writing by KPMG.

KPMG have indicated within this report the sources of the information provided. We have not sought to independently verify those sources unless otherwise noted within the report. To facilitate open discussion during agency workshops, KPMG has not attributed specific commentary or evidence to individuals or departments. This report has been prepared based on common themes that were identified during the stakeholder consultation process supplemented by KPMG's review of documentation provided by OVIC and the agencies.

KPMG is under no obligation in any circumstance to update this report, in either oral or written form, for events occurring after the report has been issued in final form.

KPMG has not sought legal advice on the findings and recommendations made in this report, noting that it is beyond the scope of KPMG's engagement. Legal advice relating to findings and recommendations is to be considered by OVIC where OVIC deem appropriate, unless expressly agreed otherwise and in writing.

3 Detailed findings

3.1 Overview

Office of the Victorian Commissioner (OVIC) and Victorian Public Sector Agencies (the agencies) stakeholders reported a significant increase in the number of FOI requests received by agencies in the current financial year, 2023-24. Review of OVIC's annual report also identified a growth in the volume of requests received by agencies over the last three financial years, as summarised in Table 4 below:

Table 4 - OVIC Annual Report 2022 – 2023 - FOI Requests by year

Financial Year	No. of FOI Requests
2020-21	42,249
2021-22	43,978
2022-23	48,117

The requests are generally classified into topical and non-topical. Non-topicals relate to requests for personal information of an individual or group of individuals, whereas topical requests cover broader public sector information such as policies, statistics, budgets, project status, legislative and policy reform, and government decisions. Topical requests are typically made by Members of Parliament, media, lobbyist groups, project stakeholders or members of the public who are acting on behalf of a lobby group. On the other hand, non-topical requests are generally made by members of the public or their representatives such as a law firm, insurance company, advocate, or family members in relation to a deceased person. In 2022-23, personal information represented 69% of the total requests, while the remaining 31% pertained to non-personal requests.

It may be noted that the classification of requests can vary across agencies and the quantum of each category of requests is determined by the agency in question, the services, or portfolios it is responsible for and the type of information it holds. For example, agencies in the health sector receive an overwhelming majority of non-topical requests such as requests for personal medical records, whereas agencies such as the Department of Premier and Cabinet and the Major Transport Infrastructure Authority received more topical requests in relation to the workings of their agency and government projects.

We understand agencies accept the majority of valid FOI requests received, with documents being released in full, or in part. At times, a request may not be accepted where it is deemed invalid, or an application fee has not been paid.

There are also instances where a request is accepted but is not processed, or information is not released. This is generally based on relevant provisions under the *Freedom of Information Act 1982 (the Act)*, including requests which may result in an unreasonable diversion of resources, requests for exempt documents, or availability of alternative streams for release of information such as a statutory release scheme or informal release.

As per OVIC's annual report for the year 2022-23, OVIC recorded 367 instances of non-compliance with the Professional Standards (engagement) across 83 agencies. The most common Professional Standards engagements during the year, which accounted for around 63% of the total Professional Standards engagements in 2022-23 related to:

- **Professional Standard 10.3:** 147 instances of non-compliance were recorded in relation to this Standard which prescribes that an agency must respond to a request for documents or information by, or on behalf of, a Commissioner within requested or agreed timeframes.
- **Professional Standard 8.2:** 52 instances of non-compliance were recorded in relation to this Standard which requires an agency to explain its reasons why an exemption or exception applies and to address each limb of an exemption or exception.
- **Professional Standard 2.4:** 33 engagements were recorded in relation this Standard to which prescribes that an agency that receives a request that is not valid must take reasonable steps to notify an applicant within 21 days of receiving the request why the request is not valid, provide reasonable assistance and advise the request may be refused.

Professional Standards engagement data obtained from OVIC for February 2024 and March 2024 revealed that 60 instances of non-compliance were recorded during this period and the most commonly breached Professional Standards appeared to be consistent with the pattern noted in 2022-23. We understand that the engagement data published by OVIC is based on review requests and complaints received from applicants, in addition to any instances

of self-reporting by agencies. On that basis, we acknowledge that the statistics captured by OVIC may not be reflective of all actions and decisions made by agencies.

3.2 What works well

Agencies generally found the Standards to be a useful tool in upholding the objectives of the Act and providing tangible information on implementation of the Act. Some of the key positive observations noted from the agency workshops are that the current Standards:

- Are succinct and concise, making them a useful point of reference for FOI staff to understand and interpret;
- Provide a mechanism for agency FOI staff to seek improved quality and timely responses from other areas of the agency who hold the requested information, noting the binding nature of the Standards;
- Set clear expectations and clarify certain ambiguities within the Act, particularly around timeframes for clarifying requests, information to be included in the decision letter and the extent of document searches;
- Set a tangible basis for agencies to design and develop internal policy and procedure documents; and
- Assist agencies in dealing with a variety of matters and scenarios that they deal with on a day-to-day basis.

While the general feedback from the agencies was that the Standards have had a positive impact, areas which continue to present a challenge or present an opportunity for uplift have been detailed in the sub-sections below based on themes.

3.3 Agency barriers to compliance

Section 21 of the Act requires an agency or Minister to take all reasonable steps to enable an applicant to be notified of a decision on a request as soon as practicable but not later than 30 days after the day on which the request is received by or on behalf of the agency or Minister, unless otherwise extended under the relevant provisions of the Act.

According to OVIC's annual report for the financial year 2022-23, agencies reported that 79% of requests were processed within the requirements of section 21 of the Act, whereas the remaining 21% of requests were processed outside of the statutory timeframes. This is also reflected in the relatively high proportion of complaints received by OVIC on account of delays in making a decision. Of the 651 FOI complaints received by OVIC during 2022-23, 452 complaints pertained to agency delays in making FOI decisions within statutory or agreed timeframes.

Review of OVIC's Own-Motion Investigation Report on impediments to timely FOI and information release, published in July 2021, noted that this issue was investigated by OVIC, and recommendations were made to the five participating agencies to better comply with the timeframes and reduce backlog of FOI requests.

Based on OVIC retained data, our workshops with agencies and review of agency documentation (where provided), we identified challenges faced by agencies in complying with various requirements of the Act and Standards and contributing to the delay and non-compliance with prescribed timeframes. In the following sub-sections, we have detailed our findings from agency discussions and have set out recommendations for OVIC to uplift Standards, amend associated resource material, enhance data obtained by OVIC and seek legislative clarification.

3.3.1 Substantial and unreasonable diversion of resources

During discussions with agency stakeholders, we were informed by the majority of agencies that they are experiencing a significant increase in the number of FOI requests in the current financial year as compared to prior years. It was understood that in addition to the increasing workload, these requests are also occasionally voluminous or complex in nature, thereby placing additional pressure on the agencies' limited resources in processing other requests in a timely manner, resulting in a backlog. This, we understand, is further exacerbated by the sensitive nature of these requests, which requires agencies to review the information in detail in order to redact any potentially sensitive information prior to releasing the information to the applicant. As per OVIC's annual report for financial year 2022-23, agencies reported 6,649 requests outstanding as at 30 June 2023, up from 5,838 outstanding requests at the end of the previous financial year.

Section 25A(1) of the Act enables agencies to refuse access to documents if they are satisfied that the work involved in processing the request would substantially *and* unreasonably divert resources of the agency from its other

operations. In determining whether a request may be refused under section 25A(1) of the Act, agencies, as per a non-exhaustive list provided under section 25A(2), shall have regard to the resources that would have to be used for:

- identifying or locating the documents;
- in deciding whether to grant or refuse access;
- examining the documents;
- consultations;
- making a copy or edited copy of the documents; and
- notifying any interim or final decision on the request.

However, some agencies informed us that there is a degree of ambiguity around the application of section 25A of the Act and the Standards could be improved to provide additional insight into OVIC's expectations of what a substantial and unreasonable diversion of resources constitutes. Agencies advised that diversion of resources on the basis of voluminous and complex requests will differ based on:

- resourcing in the FOI team;
- age and location of the potential records;
- corporate knowledge of staff involved in locating requested documents;
- resourcing in the team(s) that holds the requested documents;
- the number of people to be consulted; and
- the extent of redactions and sensitivity of the documents.

In accordance with case law, we note that the onus is on agencies to establish what amounts to a substantial and unreasonable diversion of resources². OVIC's FOI guidelines clarify that an agency must establish the requirements of section 25A and that this section is intended to 'apply in clear and limited circumstances' and is designed to balance the right of a person's access to information in line with the Act and the agency's ability to effectively deliver its other operations. Section 1.45 of the FOI guidelines provide factors relevant to determining whether the diversion of resources would be 'substantial', including:

- nature and size of the agency;
- level of resourcing allocated to FOI processing;
- number of other FOI requests on hand, and whether requests received are increasing or decreasing; or
- number of employees who may help process the request, and their other responsibilities.

Section 1.49 of the FOI guidelines highlight VCAT's considerations when determining whether diversion of resources would be 'unreasonable':

- the description of the request and whether it is a sufficiently precise description to allow the agency to locate the documents sought within a reasonable time and with reasonable effort;
- the public interest in disclosure of documents relating to the subject matter of the request;
- whether the request is a reasonably manageable one, giving due but not conclusive regard to the size of the agency and the extent of its resources usually available for dealing with FOI requests;
- the estimated number of documents covered by the request, the number of pages and the amount of officer time and salary cost;
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant had taken a co-operative approach in revising the application;
- the statutory time limit under the Act for making a decision;
- the degree of certainty that can be attached to the documents and processing time estimates, and whether there is a real possibility that the processing time may exceed the estimate; and
- whether the applicant is a repeat FOI applicant (with the exception of media or a Member of Parliament).

One agency provided us with a matrix it uses to determine FOI request complexity. The matrix facilitates consideration of resource diversion, in addition to supporting internal reporting around FOI workload. It was noted that the number of requests received by an FOI team do not always equate to resource demand, with one complex FOI request sometimes taking a similar time to address as three requests. The matrix provides a complexity score for each FOI request, on the basis of the following criteria:

- program areas involved;
- estimated number of pages or documents to be released;
- number of consultations to be made;

² *McIntosh v Victoria Police* [2008] VCAT 916

- clarifications from the applicant, and
- internal approvals or consultations required.

While we understand that some agencies are seeking a provision relating to the number of hours, the number of documents and the size of the FOI team to simplify their assessment of substantial and unreasonable diversion of resources, providing this in the Standards risks unintended consequences of:

- failing to take into account other factors, such as those presented in sections 1.45 and 1.49 of the FOI guidelines, which will vary based on the agency, point in time and nature of the request; and
- impeding the objective of the Act to extend, as far as possible, the right of the community to access information in the possession of the Victorian Government and other relevant agencies.

On this basis, we do not consider updating the Standards to include mandated criteria for the assessment of substantial and unreasonable would be practical, compliant with the Act, or adequately address nuanced risks. Rather, consideration of factors that reduce the frequency of agencies applying section 25A can be considered. Part 3 of Office of the Australian Information Commissioner (**OAIC**) FOI guidelines enable agencies to provide information to applicants in stages, with consent of the applicant, where the request relates to a large number of documents. This allows agencies to balance resourcing constraints by limiting the need to access, review, consult on and redact all documents upfront for complex or voluminous matters. It also provides applicants with more confidence that their request is being considered in full and increases the likelihood of information being released without the need to apply exemptions.

Recommendation 1: Update the Standards to provide for a staged information release scheme, where agreed with applicants, to improve access to information by minimising substantial and unreasonable impact of FOI requests on agency resources.

3.3.2 Reliance on agency staff

Some agencies informed us that mandatory application of the Standards, as a legal instrument under the FOI Act, has at times provided a mechanism for FOI staff to drive timely responses from other areas of the agency who hold information relevant to the request. The 'Application' section of the Standards notes that the 'Standards apply to every Victorian agency subject to the Act.'

Other agencies indicated that FOI teams experienced delays in obtaining a timely and effective response from internal stakeholders, regardless of the mandatory application of the Act or the Standards. In some instances, turnover of staff within the agency was seen as impacting awareness of obligations under the Act and Standards, with increased compliance by staff who had previous exposure to FOI requests.

OAIC advised that to increase public officers' understanding of FOI obligations, it has issued a fact-sheet³ containing a broad overview of the legislative requirements and the steps to be taken when an FOI request is received. This fact-sheet sets out key considerations for non-FOI staff and informs them of their responsibilities in assisting FOI staff and the agency in complying with its statutory obligations. The key topics covered by OAIC's fact-sheet include:

- What happens after an agency receives an FOI request;
- What happens if agency staff are asked to find documents requested under the FOI Act;
- Request for agency staff's views on whether documents should be released;
- Providing views on the sensitivity on documents;
- Documents that are unlikely to be exempt;
- Reasons that cannot be taken into account in deciding whether documents are exempt;
- Reasons why documents may be exempt; and,
- OAIC contact details for any queries that the agency staff may have with regard to the process.

OVIC's FOI practice note on *Responsibilities of Victorian public sector staff under the FOI Act* explains the need for non-FOI agency staff to assist and support the FOI team in carrying out the obligations under the Act. Our discussions with agencies identified that not all agencies were aware of the practice note. In reviewing the content in the practice note, it is limited and does not include reference to exemptions. While there should be a strong presumption on release of information, inclusion of exemption provisions may assist in educating non-FOI staff about section 25A and other information they may need to inform FOI staff of, such as documents that are subject to secrecy provisions.

³ <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/guidance-on-handling-a-freedom-of-information-request/checklists,-handouts-and-templates/fact-sheet-for-freedom-of-information-practitioners-to-give-to-staff>

As it stands, the practice note includes the requirement to conduct a thorough and diligent search to capture all relevant documents, including *'you must ensure that you provide your FOI officer with all relevant documents, whether digital or hard copy, including rough notes and any other working documents that you have kept.'* The practice note does not have regard to section 25A(5) which provides for refusal to grant access, *without* having identified all the documents in relation to the request, where specific parameters apply.

Agencies informed us that further strengthening of the Standards to give the agency's FOI staff additional authority or repercussions for non-compliance would increase accountability to drive improved timely and efficient responses from other areas within the agency. OVIC's own-motion investigation report into timeliness also noted that one of the participating agencies had sighted similar concerns as an impediment to timely release of FOI decisions.

Action in response to non-compliance with the Standards is limited by the Act. OVIC's powers extend to conducting an own motion investigation or receiving and dealing with a complaint.

We note that public officers subject to the Act are simultaneously bound by the Code of Conduct for Victorian Public Sector Employees 2015 and the Code of Conduct for Victorian Public Sector Employees in Special Bodies 2015 which are binding instruments under the Public Administration Act 2004 (Vic). Section 5.6 of the Code of Conduct for Victorian Public Sector Employees 2015, *Compliance with Legislation*, states:

Public sector employees ensure they are aware of and comply with all legislation relevant to the performance of their duties.

Similarly, the Code of Conduct for Victorian Public Sector Employees 2015 states:

Public sector employees are required to familiarise themselves and act in accord with the Code of Conduct. The Code of Conduct is binding on those employees to whom it applies and a contravention of it may constitute misconduct.

Recommendation 2: Review resources for agencies and include information about:

- exemptions and important information to inform FOI staff, such as any relevant secrecy provisions;
- reference to relevant provisions of the Code of Conduct for Victorian Public Sector Employees 2015 and Code of Conduct for Victorian Public Sector Employees in Special Bodies 2015 which are binding instruments under the Public Administration Act 2004 (Vic).

The updated resources shall be linked to the Standards and encouraged for perusal.

3.3.3 Third-party consultations

Agencies are required to consult with relevant third parties in response to FOI requests, depending on the nature of the information subject to review for release and the practicability. In certain instances, agencies are required to consult with multiple third parties which can result in delays. Agencies we spoke with noted that section 21(2)(a) of the Act provides for an extension of up to 15 days for consultations, however, neither the Act nor the Standards consider or set out the number of consultations that may be required to be made by the agency. We were informed that it would be useful to have an acknowledged number of consultations that the 15-day extension applies to. However, due to limitations of the Act, we are unable to make a recommendation for amendment to the Standards in this regard. Specifically, the 15-day extension, without consent of the applicant, currently applies under the Act regardless of the number of consultations to be made. The Act provides for an extension period of up to a maximum of 30 days, if agreed by the applicant. Section 21(3) allows for an extension of no more than 30 days, with agreement of the applicant, any number of times.

According to Professional Standard 7.2 *'If an agency determines it is not practicable to notify and seek the views of a third-party, it must keep a record of why it is not practicable.'* The agencies expressed that the Standards be amended to be more directive in terms of what may be considered practicable by OVIC, as there is currently some level of ambiguity in determining OVIC's expectations in this regard. It was understood that the agencies currently use their judgement in determining the practicability of making certain consultations.

An agency in the Health sector advised that the agency does not redact information of staff members as it would be impracticable to consult with all staff members and other third parties mentioned in their records, especially while responding to voluminous medical record requests. They added that this practice is followed by multiple other agencies in the Health sector. On the other hand, another agency informed us that since it is not always possible to consult with all the persons mentioned in the documents, all names are redacted prior to release of the information as part of a standard practice. A further agency stated that where a number of names are detailed in requested documents, names of non-public officers are redacted and only public officers who are of sufficient seniority to be named on an agency's organisational structure would remain unredacted. Senior public officers are not consulted as

a general practice, even if their name is disclosed. All agencies agreed that contact and personal information of parties other than the applicant would be redacted from documents.

Our discussions with agencies identified inconsistent practice in the application of third-party consultation and the redaction of names in documents subject to FOI requests. We were informed that further guidance on the relationship between consultation and naming of individuals would be useful to minimise ambiguity and promote consistency in approach across the public sector.

We note from our discussions with OVIC, that practicability may be impacted by a number of factors, including FOI resourcing.

We further note that the *Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (the Bill)* is before the Legislative Council at the time of finalising this report. The Bill seeks to amend the term 'practicable' from third-party consultations to '*reasonably practicable*.'

Recommendation 3: Pending the outcome of the legislative amendment, consider updating resources to agencies to provide guidance on third-party consultations and the application of '*reasonably practicable*'. This may include consideration of factors that influence the assessment of what constitutes '*reasonably practicable*.'

3.3.4 Resourcing

During discussions with agency stakeholders, it was understood that agencies are experiencing a significant increase in the number of FOI requests received in comparison to previous years. A vast majority of the agency stakeholders expressed their concerns that the agencies' FOI teams are not adequately staffed to handle the growing numbers of FOI requests, thereby impacting timeliness in responding to FOI requests.

It was further noted that although Professional Standard 9.1 requires the Principal Officer to ensure the agency is sufficiently resourced to meet its statutory obligations under the Act, the Standards do not define or assist the agency in determining how many resources are considered to be sufficient. Further, most agencies have not been able to leverage this Standard to seek additional resources on account of various other factors such as budget constraints, a lack of suitably skilled candidates versed in FOI and the public interest in allocating resources to other front-line services.

The agencies' FOI teams rely on their experienced staff members to train up new staff, however, they expressed that this may not be possible on a consistent basis due to the growing volume of requests being handled by experienced FOI staff and the general lack of resources. We also note that as workload increases, the risk to staff retention increases. We have not made a recommendation with regards to the number of resources required. Tangible outcomes to improve resourcing are contingent on factors external to the Standards. The Standards already seek to impress the importance of necessary resources, procedures, and training to meet obligations of the Act. Our recommendation therefore focuses on OVIC's role as a regulator in assessing the adequacy of Principal Officers implementing Professional Standard 9.

At present, OVIC may request an agency to complete a Professional Standards Self-Assessment Tool in response to a complaint or review. With regards to resourcing, the Self-Assessment tool asks for a response to '*Your agency regularly assesses the resourcing of its FOI unit with reference to the number of FOI requests received and their complexity.*' There is scope to broaden this and provide OVIC with better insight into resourcing efforts, particularly when the complaint relates to delays.

Recommendation 4: OVIC to include an additional question on resourcing in the Professional Standards Self-Assessment Tool, to the effect of '*The Principal Officer has taken adequate steps to address resourcing constraints impacting compliance with the FOI Act and FOI Professional Standards*' and require a descriptive response of actions taken. Questions may also be re-considered to place onus on the Principal Officer where required under the Act, as opposed to the agency. When an agency is asked to complete the Professional Standards Self-Assessment Tool in response non-compliance with the FOI Act or the Standards, the completed tool should be signed by the Principal Officer and provided to OVIC.

3.3.5 Noting and briefing processes

The agencies opined that the Standards do not consider the multiple layers of internal approvals, briefings, and noting processes which the agencies are required to complete, which tends to protract time frames. During our discussions with some of the larger agencies with Ministerial reporting, we were informed that the process for Ministerial noting and briefings at times delayed the release of information to FOI applicants. This is because most of the agencies

generally do not release documents or make a final decision without an acknowledgement of the noting or briefing from the relevant Minister.

Ministerial noting is a process followed by large agencies and is intended to bring any sensitive requests which may attract public scrutiny to the notice of the relevant Minister prior to making a decision. The noting process may also be important to the identification of risk, which the authorised officer or agency may otherwise be unaware of. The Attorney-General's guidelines (**AG Guidelines**) on the responsibilities and obligations of Principal Officers and agencies, issued in December 2009, set out the requirement of Principal Officers to brief a Minister on such requests, five days prior to the proposed finalisation.

The Standards, which have formally replaced the AG Guidelines, do not prescribe timelines within which the noting process is expected to be completed. However, according to OVIC's FOI practice note on *Noting and briefing processes on freedom of information decisions*, the briefing or noting process should be completed within four days or less to facilitate a decision being made within the statutory timeframe. This includes noting by a Minister, executive, or another agency business unit. The practice note also encourages agencies to design internal policies that enable the agency to meet its statutory obligations under the Act.

The independence of a decision maker is also an important consideration in the development of internal agency policies. OVIC's practice note explains that the noting and briefing process is meant to bring the decision to the attention of the individual for visibility and is not a request for permission, endorsement, or direction to make a particular decision. This aligns with Standard 8.1: *'An authorised officer must not be directed to make a particular decision under the Act, when properly exercising their statutory decision-making power.'* An authorised officer refers to the responsible Minister of the agency, Principal Officer of the agency or an FOI officer with delegated authority. It should be noted that in the majority of instances explained to us by the agencies, the Minister is not the authorised officer for the purpose of making a decision under the Act because the Minister does not hold the information in question. Rather, the agency's interaction with the Minister is either through the consultation process or by noting. The Act's intent is to ensure that decisions are made independently and are not swayed by political influence. Noting that Principal Officers of state government departments report to their relevant Minister(s), and that delegated decision makers are typically non-executive FOI officers, consulting with or advising a Minister of a decision may be perceived as a conflict with independence requirements.

One agency informed us that as per the process followed by them, information is released to the applicant after five days from providing a noting or brief to the Minister, regardless of whether the noting is acknowledged by the Minister. This is undertaken to manage timeliness and to promote independence of the authorised officer making the FOI decision. In a similar vein, our recommendation seeks to address the issues Ministerial and other noting and briefing processes can create with time delays, in addition to independence through placing an onus on agencies to proceed with the implementation of an authorised officer's decision within a specified timeframe.

As the Premier has not adopted Standards that apply to Ministers, OVIC cannot unilaterally impose a timeframe under the Standards for which Ministers are to respond to a noting.

Recommendation 5: OVIC to consider updating the Standards to require Principal Officers to set expectations for noting and briefings to support release of information within statutory timeframes. Guidance notes for the update should reflect the role of the Principal Officer in directing the noting and briefing process, rather than FOI officers directing senior personnel.

3.3.6 Release of information after review

Section 49P(4) of the Act prescribes timeframes after which a review decision by OVIC to release a document takes effect, based on the nature of the document and applicable review rights to VCAT. The Act however does not prescribe a timeframe within which the document shall be released once the review decision of OVIC takes effect.

We understand from OVIC that there have been instances wherein agencies have unduly delayed the release of a document even after the prescribed time period has passed and OVIC's review decision comes into effect, thereby resulting in delayed availability of the document to the applicant.

Recommendation 6: Add a Professional Standard requiring agencies to release documents to the applicant within a specific period, e.g., within 14 days after expiry of all available appeal rights under the FOI Act.

3.4 OVIC's functions and governance

3.4.1 Enforcement and accountability

Some agencies expressed a view that OVIC uses the Standards largely as a tool for monitoring, identifying and responding to non-compliance rather than as a mechanism to further the objectives of the Act and assist agencies in complying with their statutory obligations through an educational lens. This opinion was based on their experience from working with OVIC over the course of time and some of the key aspects sighted by the agencies are summarised below:

- OVIC does not always consider the practical challenges faced by the agencies such as resourcing issues or onerous applicants. An agency explained that, in one instance, they were dealing with a complex political matter around the time of a senior public official's resignation. The agency stated that it advised OVIC of the situation and reasons for the delay. We understand OVIC recorded an engagement against the agency as a breach against the Standards following an 8-month delay.
- Some of the agencies believed that the messaging and communication from OVIC relating to instances of possible non-compliances is not considerate of factors beyond the control of FOI officers or non-compliance that is relatively minor in nature.
- Extension requests are not always positively received by OVIC, although the request may have been made based on reasonable grounds. Agencies advised that OVIC is generally responsive to the first extension request but does not usually support time extension requests beyond this.

Pursuant to section 61(2)(c) of the Act, OVIC is required to monitor compliance with the Standards. As a regulator, OVIC is relatively limited in what it can impose as a result of non-compliance to the Standards. As per the FOI Guidelines, breach of the Standards may be classified into a:

- minor or technical breach; or
- a more substantial, persistent, or systemic breach.

Based on review of the Standards and discussions with OVIC stakeholders, we understand that there are limited provisions within the Act and Standards to hold agencies accountable for any breach of the Standards. The action OVIC may take would be based on the type of breach. While minor breaches are dealt with using educational and informal tools, OVIC may take formal action in the event of a substantial, persistent, or systemic breach which can include OVIC:

- making recommendations under section 61L of the Act in response to a complaint;
- conducting an own motion investigation into a breach of the Standards;
- notifying an agency's Principal Officer of a formal finding made against an agency for failure to comply;
- reporting on the breach in OVIC's Annual Report as an educative tool for other agencies;
- requiring agencies to undertake certain actions in relation to its non-compliance with a view to assisting future compliance;
- closely monitoring an agency's performance and compliance with the Standards for a specified period of time; or
- deciding to refer the matter to another body to investigate depending on the facts of the case.

As it stands, OVIC's interactions with agencies on a case related basis are restricted to the handling of complaints about the agency and reviews of agency decisions. OVIC has limited insight into what works well with the Standards and challenges faced by the agencies in complying with them. Some of the agencies added that the only time the Standards are brought to their attention is when there is non-compliance.

To balance OVIC's role as a regulator, holding agencies accountable and agencies' concern about use of the Standards as an enforcement tool, there is perhaps an opportunity to broaden OVIC's insight in the experience of agencies. The recommendation in the section below titled 'Engagement' may facilitate this, in addition to the below recommendation.

Recommendation 7: In light of the newly appointed Information Commissioner, update OVIC's engagement strategy with a focus on educating agencies and collaborative communication.

3.4.2 Search documentation

Where a requested document cannot be located or does not exist, Standard 8.4 requires an agency to include in the written notice of decision, a summary of searches undertaken by the agency to locate the document. The Standard further states:

(a) where a search is conducted, provide a summary of the searches undertaken for the document, which may include:

- i. the locations searched by the agency;*
- ii. the method or type of searches undertaken; and*
- iii. where applicable, the key words used in the searches.*

During discussions with OVIC, we were advised that agencies do not always provide details of locations searched, method or type of searches, and key words used in searches as part of the summary of searches where an agency cannot locate a document. We understand that this is due to the discretionary nature of the language used in the Standard which requires that the summary of searches be provided to the applicant, but does not mandate the provision of detail, noting the search summary 'may' include specified details, rather than 'must'.

OVIC explained that it is important for agencies to provide all the available details of the searches as required by the Standard 8.4 to ensure that the applicant is aware of the thorough nature of searches and to promote good decision making, transparency and accountability.

It was opined by an agency that as it currently stands, Standard 8.4(a) imposes an obligation on agencies that goes beyond the requirements of the Act. They advised that in order to comply with Standard 8.4(a) and provide a summary of searches, the agency may need to seek legal advice or further assistance from relevant staff before drafting an outcome letter to the applicant. It was noted that this ultimately does not change the outcome for the applicant but does impact timeliness of the agency's response to the applicant and timeframes on the broader team's FOI workload.

To balance concerns raised by OVIC and that of agencies, we propose that section 8.4 remains as is. This does not negate an agency's obligation to retain records of searches in accordance with 6.1 in the event that a complaint is made to OVIC, or a decision is subject to review. Standard 6.1 provides for documented evidence of a thorough and diligent search, as mandated by the Act, in addition to appropriate record keeping should the matter proceed to a complaint or appeal.

3.4.3 Review timelines

A common theme identified from the discussions with the agencies was around the time taken by OVIC in dealing with reviews and complaints. They explained that while there are timeline requirements within the Act and the Standards for agencies to comply with, there were instances where OVIC is involved in the handling of a complaint or a review and take several months to finalise their decision. Some agencies questioned whether the scope of the Standards requires expansion to include mechanisms to monitor the functioning and timeliness of OVIC as a regulator.

Section 6U of the Act specifies that the Standards may be developed relating to 'the conduct of agencies in performing functions under the Act and the administration and operation of the act in relation to agencies. The legislative intent of the Standards is not to impose requirements on OVIC. That said, OVIC understood the frustration experienced by agencies as a result of complaint and review time delays.

3.4.4 OVIC's access to documents exempt from access, or falling outside the FOI Act under FOI jurisdiction

Sections 28 to section 38 under Part IV of the Act contains provisions relating to documents exempt under the Act. This includes a wide range of exemptions including, but not limited to, documents exempt on account of them being a cabinet in confidence document, document relating to IBAC, documents affecting legal proceedings, and documents to which secrecy provisions of enactments apply.

The discussions with stakeholders across the agencies identified a potential misalignment on OVIC's authority to access documents which the agency or Minister consider to be exempt under the Act or fall outside the Act by the agencies. While a section of the agency stakeholders interviewed expressed a view that OVIC may not have the

legislative authority to access such documents, OVIC opined that they may access these documents to determine whether the document is subject to the Act or exempt from disclosure.

We understand when OVIC undertakes a review pertaining to the non-release of any exempt documents, the agencies are at times expected to provide these documents to OVIC to assess whether the documents are in fact covered by an exemption under the Act. In one instance, we were informed by two agencies that OVIC asked the agencies to provide documents covered by the Public Interest Disclosure Act (**PID Act**) as part of its review. Section 78 of the PID Act notes that the FOI Act does not apply to public interest disclosure documents.

We were also advised that similar misalignments between OVIC and agencies existed with regards to OVIC accessing cabinet documents and documents subject to secrecy provisions, in particular as relevant to Indigenous persons. We note that section 61ZC of the FOI Act enables OVIC to access information subject to secrecy provisions, with exception of documents related to the PID Act and the Independent Broad-based Anti-Corruption Commission Act. We have not sought to assess the legislative basis upon which OVIC can or cannot access documents falling outside the Act. It is however apparent that there is a lack of clarity in the application of FOI law in this regard.

The question of OVIC's jurisdiction is further complicated by the risk of agencies 'overreaching' an exemption and suggesting that documents are exempt when in fact they are not. For example, an employee who requests emails pertaining to their disciplinary outcome may be refused access to the information if a Public Interest Disclosure assessment or investigation is underway. In this scenario, a blanket exemption may not apply to all disciplinary related emails.

Recommendation 8: Where appropriate, consider seeking a statutory declaration or attestation from the agency's Principal Officer or Minister attesting to why a document is not subject to the FOI Act, where such provisions may apply. In exceptional circumstances and where there is reasonable cause, OVIC may seek access to relevant documents to determine whether the documents are subject to the FOI Act or exempt from disclosure.

3.4.5 Self-Assessment Tool

OVIC has designed a Self-Assessment tool to assist Victorian public sector organisations under the Act to measure their adherence to, and compliance with the Standards. The Self-Assessment tool is used on a voluntary basis by the agencies or is requested to be completed by OVIC in response to a review or complaint investigation.

A majority of the agencies found the Self-Assessment tool to be a useful mechanism to assess the maturity of their FOI processes. One agency mentioned that they incorporated elements of the Self-Assessment tool into their internal FOI process improvement plan. Common themes gathered from our discussions with agencies in relation to the Self-Assessment tool are set out below:

- The Self-Assessment tool follows a one size fits all approach and this may not be the most effective method to measure an agency's maturity considering the variety of agency types and specific challenges facing each agency type. Further, agency stakeholders explained that this may not be suitable to capture the efforts or assess the maturity of some of the smaller agencies;
- Some agencies have never completed the Self-Assessment tool, either voluntarily or as part of a review/investigation, despite having been through multiple reviews/investigations with OVIC;
- Some agencies found the Self-Assessment tool to be lengthy and time-consuming with 91 statements to be answered, although only 10 statements are mandatory; and
- Some of the questions/statements were considered to be aspirational and the agencies asserted that these did not have a nexus to the requirements stipulated under the Act or Standards.

With regards to the use of data obtained through completion of the Self-Assessment tool, we note that it is limited insofar as enabling a root cause analysis through qualitative data. There is no adequate provision in the Self-Assessment tool for agencies to reflect and elaborate on any specific concerns faced by them, with the Self-Assessment tool providing statements to which the agency is able to rate as 'yes,' 'in progress,' 'identified' and 'no.'

Recommendation 9: Review the FOI Self-Assessment Tool to enable collection of qualitative data through free text responses, in addition to quantitative data through set response options. Questions with free text fields should be worded to encourage agencies to reflect on nuanced experiences in FOI, challenges, and anonymised case examples. The length and scalability of the tool should also be considered depending on the agency and its exposure to FOI requests.

Recommendation 10: OVIC to consider mandating completion of the FOI Self-Assessment Tool for agencies who receive more than a specified number of FOI requests over a specified period.

3.4.6 Notification of decision

OVIC reviews

OVIC explained that they receive a high volume of complaints from applicants in relation to agencies making a decision beyond the statutory timeframe of 30 days. As per the practice followed by OVIC, a delay complaint can only be resolved or closed once the agency has made a decision on the applicant's request. We understand that in some instances, OVIC is not notified of the decision being made by the agency and resultantly the delay complaint remains open and unresolved. We note that this is impractical and an unnecessary diversion of OVIC resources. OVIC receiving agency decisions made on open complaints will assist OVIC to resolve cases more efficiently and also provide OVIC with a more accurate view of the number of open complaints to be dealt with.

Recommendation 11: Implement a new Professional Standard that requires agencies to notify OVIC of a decision made in relation to a delay complaint known to the agency. Notification to OVIC should be made by the agency within a specific timeframe e.g., 7 days of the decision being made.

Tribunal reviews

Section 50(3D) enables an agency or Minister to apply to the Victorian Civil and Administrative Tribunal (**the Tribunal**) for a review of a decision by OVIC under section 49(P). As per section 50(3F) agencies are also required to notify OVIC in writing as soon as practicable of an application for review under section 50(3D). Neither the Act, nor the Standards currently prescribe a timeframe within which the agency is required to notify OVIC under section 50(3F).

We understand that OVIC's reporting obligations require them to report to Parliament on the number of reviews by the Tribunal under section 50(3D). OVIC explained that they are currently reliant on information from the agencies under section 50(3F) to fulfill their reporting requirements to the Parliament. However, we were informed that there are instances wherein notifications by agencies to OVIC under section 50(3F) are delayed or not made, resulting in incomplete and inadequate data for OVIC to report on.

The Integrity and Oversight Committee's (**IOC**) report on the performance of the Victorian integrity agencies, tabled in November 2023⁴ legislative amendments to enable OVIC to obtain review application data held by the Tribunal. This recommendation was under review by the Victorian Government at this time of finalisation of this report. Should the IOC's recommendation be supported, a change in legislation will facilitate the release of information by the Tribunal, to OVIC directly, without the need to await agency reporting.

3.4.7 Information on delays

OVIC currently has two major information sources on agency delays, namely complaints by applicants and OVIC's annual report survey. While not all instances of delays are reported by applicants to OVIC, OVIC's annual report survey requires agencies to provide information to OVIC on delays in release of information during the financial year. Review of OVIC's annual report survey questions on delays identified that agencies are specifically required to report on the number of decisions made within 45 days of being overdue and more than 46 days of being overdue.

Based on discussion with OVIC, we were advised of instances where delays extend significantly beyond 46 days overdue. As it stands, the current data collected from OVIC's annual report survey will not reflect the delays beyond 46 days. Having more complete data would facilitate better decision making, monitoring and trend identification by OVIC.

Recommendation 12: OVIC to amend questions in the annual survey to also require agencies to report on:

- a) the number of decisions that were made after a delay of 100 days or more; and
- b) the maximum delay period for any one matter during the financial year.

⁴ <https://www.parliament.vic.gov.au/49c21a/contentassets/519022e0ecce49fcb665111e35509f4a/performance-of-the-victorian-integrity-agencies-2021-22.pdf>

3.5 OVIC resources and engagement

3.5.1 Training and resources

As part of its regulatory role, OVIC undertakes various educational and advisory activities including in-person/online trainings, newsletters, and webinars to upskill the agencies' FOI staff on various requirements under the Standards and the Act. This includes introductory training for newly recruited FOI staff members to assist them in better understanding their role and the agencies' statutory responsibilities. The majority of feedback received from the agencies on the currently available resources and training initiatives was positive. Agencies believed that the content was usually relevant and covered key aspects of the Standards and Act as a whole. The discussions with the agencies identified some findings and uplift opportunities in relation to OVIC's resources and educational tools, as summarised below.

- We understand that OVIC had scaled back some of the advanced training sessions designed for experienced FOI staff during the Covid-19 pandemic and these training sessions have not been reinstated since. The agency participants believed that the assisted more senior and experienced FOI staff to better understand emerging issues and key intricacies in dealing with the Standards through practical guidance and detailed case studies.
- OVIC's training sessions are currently voluntary and there are no mandatory/obligatory sessions which means that certain FOI staff may not be adequately upskilled to deal with any recent changes or issues in the FOI space. Further, OVIC has not set out its expectations around how often refresher training needs to be undertaken by the agencies' FOI staff. One stakeholder informed us that they had not attended an OVIC session in five years.
- OVIC's online Frequently Asked Questions (**FAQ**) is generic and does not delve into entity-specific scenarios. Our review of OVIC's online FAQs⁵ for the Standards noted that it was last updated in September 2019 and contained only limited high-level information.
- The introductory new starter training sessions conducted by OVIC are only on two specific days of the week, i.e., Tuesdays and Thursdays. Some agencies employ part-time employees who may not work on Tuesdays and/or Thursdays, making it difficult for these persons to attend the introductory sessions.
- The Privacy Network events held by OVIC wherein attendees are able to review and discuss decisions made, express opinions on key matters, etc., is very useful however there is no such event in place for FOI purposes.

We note that the FOI Act does not provide OVIC with the power to legally mandate training and therefore onus is on Principal Officers to ensure staff attend available training sessions.

Recommendation 13: To improve training and resources, OVIC may consider:

- a) reinstating training sessions for experienced FOI practitioners with course content tailored to specific sectors or categories of agencies, with a focus on emerging issues and recent case studies;
- b) monitoring and strongly encouraging FOI training attendance for FOI staff in specific circumstances, including consideration of refresher training where there are legislative changes, amendments to the Standards and/or significant decisions made in VCAT that impact the application of the Act or Standards;
- c) updating its Frequently Asked Questions webpage with more detailed, practical, and entity-specific content which can be effectively leveraged by agencies, or include guidance to redirect agencies to the appropriate resources; and
- d) delivering new starter training across various forums and on varying days.

3.5.2 Engagement

The agencies informed us that in recent times their engagement with OVIC has been predominantly restricted to communication as part of a complaint, review process or investigation undertaken by OVIC. Agencies may

⁵ <https://ovic.vic.gov.au/blog/foi-professional-standards-faqs/>

occasionally reach out to OVIC for clarification or advice on the Act or Standards. We were advised that OVIC met with agencies on a more frequent and scheduled basis previously, but that this has declined since COVID.

The agencies informed us that they utilise the general phone line or email enquiries@ovic.vic.gov.au to contact OVIC. Some of the agency stakeholders had developed working relationships with specific OVIC staff or had pre-existing professional associations, noting the niche field of FOI, and preferred connecting with them directly in case of any need to engage with OVIC. The key takeaways in this regard from the discussion with the agency stakeholders to OVIC's agency engagement is summarised below:

- OVIC's response to queries sent to OVIC's generic enquiries email was considered to be inconsistent with regards to timeliness, but agencies acknowledged that this was possibly on account of resource constraints faced by OVIC;
- The email responses from OVIC are occasionally generic in nature and are not specific to the agency or issue at hand; and
- It would be beneficial for each of the agencies to have a dedicated point of contact at OVIC so they would be able to build a working relationship and ensures continuity while dealing with long-standing issues and reviews/complaints.

In addition to the general phone and email enquiry lines, OVIC has an Agency FOI Information Service which is an email service designed to provide Victorian public sector agency FOI Principal Officers free and tailored guidance from experienced OVIC staff.

Recommendation 14: OVIC to update its agency engagement strategy to highlight and promote awareness around the various communication channels available to the agencies.

3.6 Other areas for uplift

3.6.1 Applicant awareness

The majority of stakeholders from participating agencies informed us that there is limited awareness amongst applicants about the Standards and FOI legislation, with the exception of parliamentarians, media personnel, and law firms who may have a basic understanding. We note that the intent of the Standards, as per section 6U of the Act, relates to agency performance and administration.

It was discussed that while applicants' awareness of the Standards or the Act may not be critical, increased awareness may manage applicants' expectations of the FOI process and inform them of their review and complaint rights. Section 27 of the Act requires agencies to include the applicants' review rights as part of their decision on a request. This must include the authority to which the application for review should be made and the timeframe within which the application must be made. It is noted that this section only refers to inclusion of review rights of the applicant and does not refer to the rights of an applicant to make a complaint prior to a decision being made.

Under the current practice followed, there is no formal mechanism to inform applicants of the Standards, basic principles of the Act and importantly, their complaint or review rights earlier in the FOI process, resulting in a lack of transparency which may act as a detriment in achieving the objectives of the Act.

Recommendation 15: OVIC to consider updating its existing resources or developing a fact sheet for agencies to provide to applicants, summarising key aspects of the Standards and the Act, such as informing applicants of timeframes, the requirement to refine requests at times, exemptions that may apply and complaint and appeal rights.

Recommendation 16: OVIC may consider adding a Standard requiring agencies to notify applicants of their complaint rights at the end of the statutory period of 30 days or at the end of any extended timeframes (as agreed upon under the relevant sections of the Act) if the decision has not been made by the agency within such timeframes.

3.6.2 Acknowledgement of request

Professional Standard 2.4 requires an agency to notify an applicant within 21 days of receiving a request if the request is not valid. The notification shall also specify why the request is not valid and provide reasonable assistance or advice to the applicant about how to make the request valid.

There is, however, currently no requirement under the Act or the Standards that an agency needs to acknowledge the receipt of a request or to acknowledge that the request is valid and has been accepted. This is in contrast to the

requirement by OAIC wherein Commonwealth agencies are required to acknowledge the receipt of a request within 14 days of receipt. We also understand that as per *New South Wales' Government Information (Public Access) Act 2009*, an agency's decision as to the validity of an application must be notified to the applicant within 5 working days after the request is received.

Our recommendation seeks to balance the agencies' varying degree of administrative load in providing a response to applicants, while also ensuring an applicant's submission is acknowledged and potentially avoiding unnecessary follow-ups by the applicant. We were informed that some agencies acknowledge receipt of an FOI request as a matter of course, however this was not standard across all agencies.

Recommendation 17: OVIC to consider mandating the acknowledgement of all FOI requests within a reasonable time of receipt e.g., 10 days. An acknowledgement may be a system generated email, depending on how the FOI request was submitted.

3.6.3 Waiver of fee

Time limit

Section 17(2A) of the Act requires each request under the Act to be accompanied by an application fee of two fee units. However, section 17(2B) provides that an application fee may be waived or reduced, whether or not the fee has been paid if the payment of the fee would cause hardship to the applicant. The FOI guidelines further clarify the request is not considered valid until the agency or Minister decides on the request for fee waiver or reduction. Therefore the 30-day timeframe for agencies to make a decision on a request only commences upon this decision being made by the agency. It may be noted that there is currently no time limit within which agencies are expected to decide on a request by the applicant for a waiver of the application fee.

We gathered from discussions with OVIC that in the absence of a time limit for agencies to decide on a request for waiver of application fee, the agencies may delay the decision, circumventing the requirement to release information within 30-days and resulting in a delayed release of information to the applicants.

Recommendation 18: It is recommended OVIC adds a new Standard requiring agencies to decide on a request for waiver or seek further information from an applicant in support of their request for a fee waiver or reduction, within a specified timeframe so as to ensure that agencies do not delay the decision on waiver of the fee and subsequent release of information to the applicant.

Basis for decision

In addition to the application fee under section 17(2A), the Act provides for agencies to charge the applicants an access charge fee for running searches and retrieving the requested information under section 22 of the Act. The calculation of such access charges is governed by the Freedom of Information (Access Charges) Regulations 2014 and Subordinate Legislation (Freedom of Information (Access Charges) Regulations 2014) Extension Regulations 2024.

In line with the provisions under section 17(2B) of the Act for the waiver of application fee, the Act also contains provisions enabling the waiver of the access charge fee by agencies. As per section 22(1)(g) of the Act, an access charge shall be waived if the request is a routine request for access to a document. Additionally, as per section 22(1)(i) of the Act, the access charges shall be waived if the applicant is impecunious, and the request is for access to a document containing information relating to the personal affairs of the applicant.

The Act does not define the term 'impecunious,' however, the FOI guidelines clarify that this relates to financial hardship. The FOI guidelines further clarify that if an agency or Minister waived payment of the application fee based on hardship, an agency or Minister should also waive any access charges if the documents contain the applicant's own personal information. The guidelines further clarify that if an applicant paid the application fee, the agency or Minister should not take this as evidence that the applicant can pay access charges since an applicant may not be able to reasonably afford access charges, even though they paid the application fee. Although 'hardship' in the context of the access charges has been clarified by the FOI guidelines to be in relation to an applicant's financial position, the FOI guidelines explain that in the context of the application fee, the term 'hardship' has been interpreted to include any matter of appreciable detriment whether financial, personal, or otherwise.'

We understand from discussions with agencies that the agencies use their discretion on a case-by-case basis to assess hardship for waiver of application fee and access charges, in line with the FOI guidelines. While some agencies insist on documentary evidence such as a healthcare or concession card, some agencies do not insist on the applicant providing any such documentary evidence. This may lead to potential inconsistencies in the assessment

of hardship across agencies wherein an applicant may be required to pay the fees for some agencies but not the others.

Recommendation 19: OVIC to update the Standards to reflect 'hardship' in relation to application fees as beyond financial impact in line with the FOI guidelines and consider if existing OVIC guidance on assessing and deciding hardship for application fee or access charge waivers requires updating.

3.6.4 Transfer of requests

Partial transfers

Section 18 of the Act provides for transfer of requests by an agency to another when the documents requested are in the possession of another agency or the subject matter of the document is more closely connected with the functions of another agency. The Act, however, does not appear to specify if an agency can transfer a part of the request to another agency. According to the FOI Guidelines, the Act provides an agency or Minister with the power to transfer an entire request to another agency, not parts of a request. We note that this is impractical, particularly when requested documents are dated or created prior to Machinery of Government (**MoG**) changes when functions are split between agencies or the agency holding the documents no longer performs the function for which the documents relate.

This is in contrast with federal legislation and OAIC's guidelines wherein Commonwealth agencies may transfer parts of a request to another relevant agency. Considering the broader objectives of the Act, it appears that the FOI Guidelines' interpretation of the Act may act as an impediment to the release of information to applicants. However, we also note that permitting partial transfers may increase the administrative burden on agencies if consolidated requests pertaining to multiple other agencies are received. This may also risk evasion of additional application fees by the applicant. Nonetheless, the current legislation is not practical in circumstances where documents on one topic may be retained by more than one agency. Any amendments to the current regime should consider the practical application of partial transfers for all parties, including consideration of resourcing and fees.

Timeframe

Section 18(3) of the Act deems the request to have been received by the receiving agency on the date the transfer is made or 14 days after the date of the original request received by the transferring agency, whichever is shorter. The Act was noted to be less stringent in comparison to the federal legislation as per which the request is deemed to have been received by the receiving agency on the date on which the request was originally received by the transferring agency.

The Act, however, does not specify a timeframe within which an agency shall transfer requests to the appropriate agency. In case an agency transfers a request after a period of 14 days, the agency to which the request is transferred may be disadvantaged as the 30-day time frame for making a decision commences at the end of the 14th day, which may in turn delay the release of information to the applicant.

Recommendation 20: OVIC to add a new Standard requiring agencies to transfer the request to another relevant agency, where applicable to the nature of the request, within a specific timeframe e.g., 14 days of receiving the original request.

Notification of transfer

With regard to transfer of requests by an agency receiving an FOI request to another agency, Section 18 of the Act states that:

"the agency to which the request is made may promptly transfer the request to the other agency and inform the person making the request accordingly."

The Act provides discretionary powers to the agency to transfer a request to the relevant agency but is not specific as to whether an agency is required to inform an applicant of a decision to transfer a request to another agency, noting the decision to transfer is discretionary. This is unlike section 16(4) of the federal legislation that specifically requires an agency making the transfer to inform the applicant of the transfer. OVIC's FOI guidelines, however, clarify that an agency may inform the applicant of the decision to transfer the request to another agency. We note that this is not a binding requirement and may result in poor communication and lack of transparency with the applicant. It also does not align with the intent of the Act in supporting availability of information to the public about government processes.

Recommendation 21: OVIC to add a new Standard requiring agencies to notify an applicant within 14 days if the agency has used its discretion to transfer the applicant's request to another agency. The guidelines should be updated to align with application of the new Standard.

3.6.5 Informal or administrative access

Some of the agencies expressed a view that despite the Standards and OVIC's practice notes supporting the release of information outside the Act, OVIC does not always reflect this in practice.

The agency stakeholders explained that there have been instances wherein applicants could have been better assisted under other channels of release such as a statutory release scheme or through an informal release. We understand that the reasons for the alternate channels being more beneficial to the applicant could vary and included instances wherein the request would be subject to fewer exemptions under an alternative release channel and are often quicker to process.

During discussion with OVIC's internal stakeholders, they considered that a new Standard requiring agencies to obtain an applicant's consent when referring a request under an alternative release channel, outside of the Act, needs to be implemented. The core rationale for obtaining consent is to ensure the applicant is advised on whether or not the alternative release channel has review rights if access to documents is denied or only released in part. This is also consistent with OAIC's requirement for agencies to obtain the applicants' consent prior to dealing with the request by way of administrative access and withdrawing the FOI request. According to OAIC's guidelines, if the applicant's consent is not obtained, the agency's or Minister's obligation to process the FOI request remains and the relevant statutory processing period applies.

Recommendation 22: OVIC to consider amending Standard 1.2 to require agencies to notify the applicant about the impact of releasing information outside the Act, including where appeal rights are denied, and obtain written consent from the applicant for the same.

3.6.6 Clarification of requests

As per section 17(3) of the Act, it is the duty of an agency or Minister to assist an applicant to make a request in a manner that complies with the Act. This is further clarified by Professional Standard 2.4 which states:

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.*

As noted above, the Standards prescribe a timeframe of 21 days within which the agency is expected to notify the applicant and provide assistance to make the request valid. However, there is currently no prescribed time limit for when agencies are required to seek any subsequent clarifications that may be required to make the request valid, after the first notification. This has resulted in circumstances where any subsequent contact with the applicant to make a request valid, is protracted and unreasonable. These instances do not breach the 30-day timeframe set out in the Act for release of information since the 30-day period is paused when the applicant is first notified in line with Professional Standard 2.4 and only restarts when the request is considered valid by the agency.

Recommendation 23: OVIC may consider adding a Standard requiring agencies to notify applicants of any further clarifications requirements to make the request valid within a specific time frame.

3.6.7 Amendment of personal information

Section 39 of the Act gives individuals or their next of kin the right to request an agency to amend a document containing the individual's or a deceased person's personal information, held by the agency, where the individual believes the document contains wrong or misleading information about them. The FOI guidelines explain that the purpose of this section is to ensure a document contains accurate information, and the information does not unfairly harm or misrepresent the claimant and ensure third parties reading personal information about the individual do not get the wrong impression.

According to section 45 of the Act, the provisions of section 27 to provide reasons for a decision applies to amendment requests when the agency decides to not amend a document in accordance with a request. OVIC explained that the requirements of section 27 with respect to requests for amendment of personal records is currently ambiguous. Specifically, there is insufficient guidance on providing a decision that delineates between elements of the request that are accepted by the agency and elements that are denied and why.

Recommendation 24: OVIC to update the Standards to require that as part of a decision letter for document amendment requests, agencies shall identify what amendments and notations have been made to the document as per the request and what amendments and notations have not been made to the document and why.

3.6.8 Preliminary view on complaints

According to section 49I of the Act, an agency has an obligation to assist OVIC in conducting a *review* under Part VI of the Act. Similarly, under section 61E of the Act, an agency must cooperate with OVIC in dealing with a *complaint* under Part VIA of the Act.

However, it was noted that Professional Standard 10.2 supports section 49I with regards to reviews but is silent on section 61E in reference to complaints. As per Professional Standard 10.2 *'An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review]*.

OVIC considers that the inclusion of complaints in Standard 10.2 would support quicker resolution of complaints if agencies have regard to OVIC's preliminary view and seek to act on this, thereby being able to resolve a complaint without further involvement of OVIC.

Recommendation 25: OVIC to amend Standard 10.2 to include complaints, in addition to reviews.

3.6.9 Extension under section 21(2)(a)

Section 21(2)(a) enables an agency to extend the period for making a decision by 15 days if a third-party consultation is required to be made by the agency under the relevant sections of the Act. Standard 3.1 further explains that an agency must not extend time under section 21(2)(a) unless a third-party consultation is being undertaken or will be undertaken. Section 29(4) requires an agency to notify the applicant in writing if the period for making a decision is extended under any of the subsections under section 21(2).

OVIC explained that Standard 3.1 is often misinterpreted by members of the public as applying to every request that becomes overdue, whereas the intention of the Act and the Standard is to ensure that the extensions only apply when an agency notifies an applicant of such extension in writing.

Recommendation 26: OVIC to amend Standard 3.1 to make it clear that a time extension only applies in instances where the agency has notified the applicant in writing of their intention to extend timeframes under Section 21(2)(a) of the Act.

3.6.10 Notice under section 25A (6)

Timeframe for subsequent notifications

Section 25A (1) of the Act allows an agency or Minister to refuse a request where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations or interfere with the performance of the Minister's functions. However, as per section 25A(6) of the Act, an agency cannot rely on section 25A(1) of the Act unless it has provided an applicant with a reasonable opportunity to consult with the agency, and as far as reasonably practicable, provided any information that would assist the applicant to make a request in a form that removes the ground for refusal.

With regard to the above, Professional Standard 5.1 requires an agency to take reasonable steps to notify an applicant under section 25A (6) of the Act of its intention to refuse a request under section 25A(1) within 21 days of receiving a valid request. There is currently no timeframe prescribed under the Standards for any subsequent notifications under section 25A (6), after the applicant has responded to the first notice.

During discussions with OVIC, we gathered that there have been instances wherein agencies have taken unreasonable timeframes for subsequent notifications under section 25A (6), which has resulted in delayed release

of information to the applicants. These instances do not breach the 30-day timeframe set out in the Act for release of information since the 30-day period is paused when the applicant is first notified in line with section 25A (6) and only restarts when the request is considered valid by the agency.

Recommendation 27: OVIC to amend Standard 5.1 to require agencies to issue subsequent notifications, if any, under section 25A (6) within 14 days of the applicants' response to the first notification under the section.

4 Appendices

List of appendices

Reference Appendix title

Reference	Appendix title
A	Information reviewed
B	Stakeholder workshops

Appendix A

Information reviewed

The 9 agencies who provided documentation are:

1. [Redacted]
2. [Redacted]
3. [Redacted]
4. [Redacted]
5. [Redacted]
6. [Redacted]
7. [Redacted]
8. [Redacted]
9. [Redacted]

Documents reviewed as part of this engagement are set out in the following table:

Category	Documents reviewed
Policies and procedures	<ul style="list-style-type: none">• Procedure for processing freedom of information requests;• Freedom of information requests prompt procedure;• Freedom of information complexity matrix form;• Freedom of information processing guidance procedure;• Application forms;• Freedom of information process and non-personal process maps;• Managing freedom of information requests guide;• Freedom of information handbook;• Freedom of information flowchart; and• Freedom of information procedure.
Internal reports	<ul style="list-style-type: none">• Freedom of information statistical charts;• Freedom of information monthly reports; and• Professional Standards Self-Assessment tool reports.
Factsheets	<ul style="list-style-type: none">• Amendments to records;• Exemptions; and• Making a freedom of information request.
Submissions via the Integrity and Oversight Committee in relation to FOI	<ul style="list-style-type: none">• Submission 9• Submission 1• Submission 16• Submission 17• Submission 37• Submission 48• Submission 55• Submission 66

OVIC provided documentation to be reviewed, this included the following:

Category	Documents reviewed
Annual reports	<ul style="list-style-type: none"> • OVIC annual report 2021 – 2022; and • OVIC annual report 2022 – 2023.
FOI Resources	<ul style="list-style-type: none"> • Regulatory action policy 2022; • Annual report survey questions; • FOI Act (Vic); • OVIC’s FOI Guidelines; • OVIC’s agency self-assessment tool • OVIC’s FOI practice notes; and • OVIC’s FOI Professional Standards: Frequently asked Questions
Investigations	<ul style="list-style-type: none"> • IOC – impediments to timely FOI and information release twelve months on report; • Own motion investigation report impediments to timely FOI and information release; and • Vic Forests investigation.
Professional Standards Procedures	<ul style="list-style-type: none"> • Professional standards procedure; • Professional standards potential changes; • Professional standards internal process flowchart; • Professional standards template letter AC to FOI manager proposed findings and actions; and • Professional standards template letter formal findings PADC to Principal Officer.
Professional Standards Engagement Boards	<ul style="list-style-type: none"> • Professional standards summary 2022 – 2023 agency; • Professional standards summary 2022 – 2023 type; • Professional standards summary February 24 agency and type; and • Professional standards summary March 24 agency and type.
Additional Resources	<ul style="list-style-type: none"> • Attorney general guidelines December 2009; and • OAIC FOI guidelines.

Appendix B

Stakeholder workshops

Agency	Category	Date	Agency Attendees
[REDACTED]	Government Department	08.05.2024	• [REDACTED]
[REDACTED]	Statutory Authority	09.05.2024	• [REDACTED] • [REDACTED]
[REDACTED]	Local Government	14.05.2024	• [REDACTED] • [REDACTED]
[REDACTED]	Statutory Authority	14.05.2024	• [REDACTED]
[REDACTED]	Government Department	15.05.2024	• [REDACTED] • [REDACTED]
[REDACTED]	Water Corporation	16.05.2024	• [REDACTED]
[REDACTED]	Government Department	20.05.2024	• [REDACTED] • [REDACTED] • [REDACTED] • [REDACTED]
[REDACTED]	Government Department	21.05.2024	• [REDACTED] • [REDACTED]
[REDACTED]	Government Department	21.05.2024	• [REDACTED] • [REDACTED]
[REDACTED]	Health Corporation	22.05.2024	• [REDACTED]
[REDACTED]	Government Department	28.05.2024	• [REDACTED] • [REDACTED]

Agency	Category	Date	Agency Attendees
[REDACTED]	Health Corporation	28.05.2024	• [REDACTED]
[REDACTED]	Government Department	29.05.2024	• [REDACTED]
[REDACTED]	Health Corporation	29.05.2024	• [REDACTED]

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