

30 November 2023

Dr Tim Read MP  
Chair  
Integrity and Oversight Committee  
Parliament of Victoria  
**By email:** [ioc@parliament.vic.gov.au](mailto:ioc@parliament.vic.gov.au)

Dear Chair

### **Inquiry into the *Freedom of Information Act 1982 (Vic)***

I refer to your letter to the former Information Commissioner dated 7 September 2023, inviting the Office of the Information Commissioner (**OIC** to make a submission to the inquiry into the *Freedom of Information Act 1982 (Vic)* (**Victorian FOI Act**) being conducted by the Integrity and Oversight Committee of the Parliament of Victoria (the **Committee**).

#### **About the OIC**

OIC is an independent statutory body that reports to the Queensland Parliament. We have a role under each of the *Right to Information Act 2009 (RTI Act)* and the *Information Privacy Act 2009 (IP Act)* to both facilitate greater and easier access to government held information and assist agencies to safeguard personal information. Our functions include:

- assisting agencies to understand their obligations under the RTI and IP Acts
- conducting external reviews of information access decisions by agencies
- mediating privacy complaints against Queensland government agencies
- issuing guidelines on right to information and privacy best practice
- initiating right to information and privacy education and training; and
- monitoring, auditing and reporting on agency performance and compliance with the RTI Act and the IP Act.

#### **OIC's submission**

OIC notes the inquiry's terms of reference are relatively extensive. OIC does not propose to comment on each of those terms; our submission instead offers general observations drawn from our experience with a policy model premised on requiring information access applications as a last resort,<sup>1</sup> and which includes mechanisms for proactive and informal release of information.<sup>2</sup>

#### **Legislative policy model**

Firstly, OIC notes that the Victorian FOI Act is predicated on a 'pull' model of information access – where access is based on formal applications for access to information – rather than a 'push' model, under which such applications are regarded as an access avenue of last resort.

In 2009, following an independent review of Queensland's *Freedom of Information Act 1992* (known as the 'Solomon Report'),<sup>3</sup> Queensland shifted from a similar 'pull' model to a push model under the *Right to Information Act 2009 (RTI Act)*. The Solomon Report identified that information technology

<sup>1</sup> Term of reference 1, concerning '[t]he effectiveness of the Act's current policy model, which is based on formal requests for information, and other options available, including options utilised in other jurisdictions.'

<sup>2</sup> Term of reference 2, concerning '[m]echanisms for proactive and informal release of information, including the effectiveness of information publication schemes.'

<sup>3</sup> 'The Right to Information: Reviewing Queensland's Freedom of Information Act', report by the FOI Independent Review Panel, June 2008. Accessible at [https://www.rti.qld.gov.au/\\_data/assets/pdf\\_file/0019/107632/solomon-report.pdf](https://www.rti.qld.gov.au/_data/assets/pdf_file/0019/107632/solomon-report.pdf)

had advanced considerably since the advent of FOI laws in Australia generally and emphasised the importance of political support for recasting FOI legislation in the context of a whole of government strategic information policy and governance arrangement.<sup>4</sup> This highlighted the need for a cultural shift to remove what had been described as “...*perpetuating information asymmetries between the citizenry and the state*...”<sup>5</sup>

The RTI Act emphasises proactive and routine release of government-held information and maximum disclosure of such information unless that release would be contrary to the public interest. The RTI Act is explicitly premised on the principles that:<sup>6</sup>

- ‘right to information legislation is only 1 of a number of measures that should be adopted by government to increase the flow of information in the government’s possession or under the government’s control to the community’; and
- ‘Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.’

The above principles are reinforced by sections 4 and 19 of the RTI Act.

Section 4 expressly states that the Act ‘is not intended to replace or discourage the publication of information or the giving of access to documents otherwise than under this Act if the publication or giving of access can properly be done or is permitted or required to be done by law’.

Section 19 of the RTI Act, meanwhile, makes clear that information ‘may be accessed under administrative arrangements made by an agency...’.

The ‘push’ intent of the RTI Act is given additional substance through explicit legislative expression of a pro-disclosure bias,<sup>7</sup> and expressed practically through the requirement that agencies implement both publication schemes<sup>8</sup> and disclosure logs.<sup>9</sup> The proactive disclosure approach not only increases accountability and transparency, but also helps build trust in government and, correctly implemented, should also mitigate the need for formal applications for access. It is Queensland’s experience that this legislative policy model results in comparatively lower numbers of access requests being made to agencies and Ministers overall. The 2021-22 Annual Report on the operation of the RTI Act and IP Act shows that in the 2021-22 reporting period, Queensland agencies and Ministers received 16,909 access applications.<sup>10</sup> Applications over the same period in Victoria, on the other hand, totalled 43,978:<sup>11</sup> a substantially larger number which would not appear to be explained by population size alone.<sup>12</sup>

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<sup>4</sup> Solomon Report, page 4.

<sup>5</sup> Solomon Report, page 15.

<sup>6</sup> Preamble to the RTI Act, clauses 1(h) and 2.

<sup>7</sup> See for example section 44 of the RTI Act.

<sup>8</sup> Being a scheme under which an agency publishes the classes of information it holds, and the terms on which it will make that information available: section 21 of the RTI Act.

<sup>9</sup> Currently sections 78-78B of the RTI Act (to be renumbered sections 78A-78B of the RTI Act, as a consequence of the *Information Privacy and Other Legislation Amendment Act 2023* (Qld) discussed below).

<sup>10</sup> Queensland Department of Justice and Attorney-General, ‘*Right to Information Act 2009 and Information Privacy Act 2009 Annual Report*’, accessible at [5722T2100-2AF0.pdf \(parliament.qld.gov.au\)](https://www.parliament.qld.gov.au/5722T2100-2AF0.pdf), page 9. The figure reported on this page – 16,979 – includes both information access and applications made by individuals to amend information, under the IP Act. Figure 2 on the following page, however, discloses that 70 IP Act amendment applications were made in 2021-22. OIC has therefore subtracted this latter figure from the former to calculate the number of access applications received by Queensland agencies and Ministers in 2021-22. This figure also includes access applications made under the IP Act – the existence of a separate right of access in this latter Act is discussed further below.

<sup>11</sup> Office of the Victorian Information Commissioner (OVIC), Annual Report 2021-22, page 102. Accessible at <https://ovic.vic.gov.au/wp-content/uploads/2022/09/OVIC-Annual-Report-2021-22-Digital.pdf>.

<sup>12</sup> The 2021 Census recorded the number of usual residents of Queensland at 5.2 million (<https://www.abs.gov.au/articles/snapshot-qld-2021>), and 6.5 million for Victoria (<https://www.abs.gov.au/articles/snapshot-vic-2021>). Per capita, applications under Queensland’s ‘push’ model are made at a rate of 3 applications for every 1,000 usual residents. The application rate in Victoria is more than double, at 7 applications per 1,000 usual residents. Noting that correlation does not equal causation – and that the right to make an application under state information access laws is not restricted to residents – this is nevertheless a marked difference in application rate.

OIC's 2019 report '*10 years on: Queensland government agencies' self-assessment of their compliance with the Right to Information Act 2009 (Qld) and the Information Privacy Act 2009 (Qld)*'<sup>13</sup> further suggests that the shift to a push model has yielded tangible results. Beginning in 2010 (ie, the year following passage of the RTI Act), OIC conducted a series of agency self-assessment surveys to gauge agency progress towards, relevantly, adopting a push model to maximise information disclosure. Agencies were asked whether information they held was '*released proactively and informally, and are formal applications a last resort?*' The initial self-assessment in 2010 saw a positive response rate of only 56%. By 2016, that figure had grown to 73%. While the 2018 self-assessment saw a decline in positive responses to 67%,<sup>14</sup> this latter figure nevertheless represents a substantial improvement on the 'baseline' 2010 data.

As borne out by these statistics, the RTI Act initiated a cultural shift across agencies as a whole, rather than just in relation to their information management practices and procedures. It took some time for many agencies to change from an approach where secrecy and confidentiality were the default setting to one where the starting assumption is disclosure and, from OIC's point of view, this process continues even now. Generally, it is OIC's experience that maintaining and reinforcing a 'push model' requires ongoing focus. In this regard, OIC has found that engagement at senior levels to promote and establish cultural norms within agencies has been most effective. In these conversations, making the business case in favour of greater transparency in terms of public sector performance, productivity, policy implementation and outsourcing<sup>15</sup> is often persuasive.

### Recent reforms to Queensland's RTI framework

Over time, reviews of the RTI Act have identified various technical issues impeding the timely and efficient operation of the Act's information access mechanisms.<sup>16</sup>

One of these is duplicate rights of access. The 2009 RTI reforms also saw enactment of the IP Act, which included a separate, dedicated right of access for individuals seeking access to their own personal information.

A dedicated right of access to personal information was intended to simplify and expedite the information application process.<sup>17</sup> Instead, duplicated access rights under both the RTI and IP Acts has been found to be confusing to applicants and burdensome on agencies called to distinguish under which Act to process a given application.<sup>18</sup>

Similarly, the RTI Act's requirement that valid applications be in an approved form<sup>19</sup> was '*criticised as unnecessarily bureaucratic*,<sup>20</sup> while recommendations were made to liberalise other key elements of the pro-disclosure model reflected in the RTI Act, being disclosure log and publication scheme obligations.<sup>21</sup>

The above issues have all recently been addressed by the *Information Privacy and Other Legislation Amendment Bill 2023 (IPOLA Bill)*.<sup>22</sup> Among other reforms, this legislation:

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<sup>13</sup> Report No. 5 to the Queensland Legislative Assembly for 2018-9, June 2019. Accessible at: [https://www.oic.qld.gov.au/\\_data/assets/pdf\\_file/0007/39517/report-10-years-on.pdf](https://www.oic.qld.gov.au/_data/assets/pdf_file/0007/39517/report-10-years-on.pdf)

<sup>14</sup> A decline we observed was disappointing: page 12.

<sup>15</sup> For research in this regard in 2012 and 2015, see papers released as part of the '*Transparency Occasional Paper Series*', which was a joint initiative of the OIC and the Australia and New Zealand School of Government (ANZSOG) at <https://www.oic.qld.gov.au/publications/research/transparency-occasional-paper-series>.

<sup>16</sup> For an overview of issues of this kind, and proposals to address each, see the Department of Justice and Attorney-General's June 2022 'Consultation Paper – Proposed Changes to Queensland's Information Privacy and Right to Information Framework,' ('**Consultation Paper**'), accessible at <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/7326cb08-a3da-451c-8c48-dc08ea9dcc6d/consultation-paper-proposed-changes-qld-ip-rti-framework.pdf?ETag=f9671bcc9b57d55cc316d1c803234761>.

<sup>17</sup> Consultation Paper, page 36.

<sup>18</sup> As above, citing the 2017 'Report on the Review of the Right to Information Act 2009 and Information Privacy Act 2009' (**Review Report**).

<sup>19</sup> Rather than in writing, as is the case in most other Australian jurisdictions.

<sup>20</sup> Consultation Paper, page 37, citing the 2017 Review Report.

<sup>21</sup> On both issues, see the discussion at pages 56-57 of the Consultation Paper.

<sup>22</sup> Which was passed by the Queensland Parliament yesterday, 29 November 2023.

- consolidates rights of access into the RTI Act only;
- abolishes the requirement for applicants to use a prescribed form;<sup>23</sup>
- simplifies the concept of the 'processing period' in which agencies or Ministers must deal with an access application, therefore allowing for simpler calculation of processing timeframes;<sup>24</sup> and
- relaxes disclosure log<sup>25</sup> and publication scheme requirements, conferring, as regards the latter, licence on agencies to publish '*significant, accurate and appropriate information about the agency on whichever website is most relevant*'.<sup>26</sup>

These refinements may be worth bearing in mind, should the Committee otherwise consider recommending a move towards a pro-disclosure 'push' model in Victoria. This is particularly relevant because OVIC reports<sup>27</sup> high levels of information requests from private individuals, which is similar to the experience in Queensland.<sup>28</sup>

### Proactive release of Cabinet documents

A further information access initiative the Committee may wish to consider is the adoption of a proactive publication scheme for Cabinet documents. The introduction of such a scheme in Queensland – under which Cabinet documents would be released and published online – was recommended by Professor Peter Coaldrake in his June 2022 report '*Let the sunshine in, Review of culture and accountability in the Queensland public sector*'.<sup>29</sup>

The Queensland Government accepted Professor Coaldrake's recommendations,<sup>30</sup> including this proposal. Provisions providing a legislative footing for this scheme form part of the package of reforms in the IPOLA Bill noted above.<sup>31</sup>

### Resourcing

Finally, the effectiveness of any information access scheme is, as the Committee no doubt appreciates, contingent upon adequate resourcing for both agencies and any regulatory oversight body.<sup>32</sup> As the Final Report on the Independent Strategic Review<sup>33</sup> of OIC noted earlier this year, Queensland government agencies require '*adequate resourcing ...to ensure that a culture of openness is actually delivered on a day to day basis, year in and year out.*' The reviewer went on to note that OIC should be '*resourced to a measure that ensures that it is able to continue to exhibit its existing high degree of professionalism in the performance of its functions*'. OIC would imagine

<sup>23</sup> Section 24 of the RTI Act.

<sup>24</sup> Section 18 of the RTI Act.

<sup>25</sup> See new sections 78A and 78B of the RTI Act.

<sup>26</sup> Department of Justice and Attorney-General, 'Information Privacy and Other Legislation Amendment Bill 2023 - Briefing for the Education, Employment and Training Committee', page 22. Accessible at <https://documents.parliament.qld.gov.au/com/EETC-797A/IPOLAB2023-42A8/EETC%20briefing%20Redacted%20note%20-%20Information%20Privacy%20and%20Other%20Legislation%20Amendment%20Bill%202023%20-%2019%20October%202023.pdf>

Publication Scheme obligations are set out in section 21 of the RTI Act.

<sup>27</sup> OVIC Annual Report 2022-23, page 111. Accessible at <https://ovic.vic.gov.au/wp-content/uploads/2023/10/Ovic-Annual-Report-2022-23-Digital.pdf>.

<sup>28</sup> Queensland does not presently capture the type of applicant making an initial RTI information access request. OIC does, however, record the types of applicants who make applications to us for external review of agency and Ministerial decisions. Individuals made 89% of external review applications in the 2022-23 financial year: OIC Annual Report 2022/23, page 14 (accessible at [https://www.oic.qld.gov.au/\\_data/assets/pdf\\_file/0017/60308/OIC-Annual-Report-2022-23.pdf](https://www.oic.qld.gov.au/_data/assets/pdf_file/0017/60308/OIC-Annual-Report-2022-23.pdf)).

<sup>29</sup> Final Report, 28 June 2022, page 60. Accessible at <https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf>, page 63. The full text of the recommendation provides: '*The Department of Premier and Cabinet develop a policy requiring all cabinet submissions, agendas and decision papers (and appendices) to be proactively released and published online within 30 business days of a final decision being taken by Cabinet, subject only to a number of reasonable exceptions which should be outlined in the policy.*'

<sup>30</sup> See the 28 June 2022 statement of the Premier and Minister for the Olympics, the Honourable Annastacia Palaszczuk: <https://statements.qld.gov.au/statements/95531>.

<sup>31</sup> IPOLA Bill clauses 87 and 88, inserting new sections 18A and 21 into the RTI Act respectively.

<sup>32</sup> Such as, in the Victorian context, OVIC.

<sup>33</sup> Mr Dominic McGann, 'How to let more sunshine in', Strategic review of the Office of the Information Commissioner, 12 December 2022 (tabled in the Queensland Parliament on 31 January 2023 by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence). Accessible at: <https://documents.parliament.qld.gov.au/tp/2023/5723T23-F601.PDF> (accessed 15 November 2023). A strategic review of OIC is required to be conducted at least every five years: section 186 of the RTI Act.

comparable considerations obtain in Victoria, noting the Centre for Public Integrity's recent report highlighting the pernicious effect of insufficient resourcing of integrity agencies tasked with oversight of FOI regimes.<sup>34</sup>

More broadly, effective information management practices and processes are also vital to the health of any information access scheme. Relevant records need to be created or received and stored in such a way that targeted searches using appropriate terms across as small a number of different systems as possible can locate them. Advancements in technology can assist in this regard and reduce costs on agencies if implemented effectively.

## **Conclusion**

OIC again appreciates the opportunity to make a submission for the Committee's consideration.

If the Committee has any queries or requires further information in relation to this submission, please do not hesitate to contact us via [administration@oic.qld.gov.au](mailto:administration@oic.qld.gov.au), or telephone 07 3234 7373.

Yours sincerely



Stephanie Winson  
**Acting Information Commissioner**

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<sup>34</sup> <https://publicintegrity.org.au/wp-content/uploads/2022/09/FOI-Delay-and-Decay-Final.pdf>.