

**Submission
No 25**

**INQUIRY INTO THE OPERATION OF THE FREEDOM OF INFORMATION
ACT 1982**

Organisation: Liberty Victoria

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8 December 2023

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Submission in relation to the Inquiry into the *Freedom of Information Act 1982 (Vic)*

1. Liberty Victoria is grateful for the opportunity to make this submission in relation to the inquiry into the *Freedom of Information Act 1982 (Vic)* (**FOI Act**).¹
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

¹ Liberty Victoria acknowledges and thanks volunteers Yvonne Kushnir, Stacey Kern and Sophie-Anne Bart for their generous time and support in the preparation of this submission.

Freedom of information – a fundamental human right

3. Freedom of information (**FOI**) is a fundamental human right in itself, and a touchstone for all other rights and freedoms exercised by individuals within a functioning democratic society. At its core, FOI affords individuals with the opportunity to scrutinise the actions and decisions of government and its administration. When operating properly, FOI provides for meaningful accountability and improves public confidence in government.
4. The concept of FOI was first recognised by the United Nations General Assembly as “fundamental” in December 1946² and, in 1948, the right was enshrined in article 19 of the *Universal Declaration of Human Rights*:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

5. The right is also echoed in article 19 of the International Covenant on Civil and Political Rights (**ICCPR**), adopted in 1966.
6. In Victoria, the right finds expression in section 15 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**):
 - (1) Every person has the right to hold an opinion without interference.
 - (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by that person

² United Nations General Assembly, *Calling of an International Conference on Freedom of Information*, GA Res 59(1), UN Doc A/RES/59(1), 65th plen mtg, 14 December 1946.

- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.
7. The right finds similar expression under section 16 of the *Human Rights Act 2004 (ACT)* and section 21 of the *Human Rights Act 2019 (Qld)*.
8. The importance of FOI cannot be understated. Members of a democratic society participate in public affairs by “exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves” and, importantly, exercising their right to vote.³ The ability of individuals to freely express themselves, assemble and associate supports this participation. To ensure the full enjoyment of this right, there must be “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives”.⁴
9. Two implications arise from this, subject to well-defined limitations. Firstly, there should not be censorship on the press and other media which facilitates free comment on public issues. Secondly – and more relevantly for this submission – there should not be a restraint on material which may inform public opinion, particularly that held by government.
10. In 2000, the Special Rapporteur on Freedom of Opinion and Expression appointed by the United Nations Commission on Human Rights set out principles which FOI frameworks should follow:⁵
 - a. Freedom of information legislation should be guided by the principle of maximum disclosure.
 - b. Public bodies should be under an obligation to publish key information.

³ United Nations Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev 1/Add 7, 12 July 1996, [8].

⁴ *Ibid*, [25].

⁵ Frank La Rue, *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/17/27, 20 April 2010, [30]–[31].

- c. Public bodies must actively promote open government.
 - d. Exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests.
 - e. Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.
 - f. Individuals should not be deterred from making requests for information by excessive costs.
 - g. Meetings of public bodies should be open to the public.
 - h. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
 - i. Individuals who release information on wrongdoing (i.e. whistle-blowers) must be protected.
11. Liberty Victoria endorses these principles and considers that them to be informative to any reform of the Victorian FOI scheme.
12. A further guiding principle to any reform should be the concept of open government. This concept promotes the fair, effective and efficient delivery of government services, ensures transparency and accountability in government, and improves citizen participation by in government decision-making. The right to access information is central to this concept. In 2015, the Australian Government became a member of the Open Government Partnership. By becoming a member of OGP, the Australian government committed to introducing legislation which enshrine these open government principles. While this commitment may not bind the State of Victoria, Victoria should similarly seek to enshrine those principles.

Issues and recommendations in relation to current Victorian FOI scheme

13. The FOI Act was enacted in 1982. It has had few major revisions since that time. Liberty Victoria considers the following aspects of the scheme can be improved to modernise the Victorian FOI scheme and enhance human rights protections within this State.
- a. Addressing complicated request processes by encouraging proactive publication and adopting informal requests;
 - b. Addressing increased demands by adopting 'pull' model;

- c. Addressing lengthy delays in processing;
 - d. Expanding FOI scheme to private bodies which perform public functions; and
 - e. Strengthening the purpose of the FOI scheme by improving terminology.
14. For ease of reference, the term 'FOI body' is used to refer to agencies or Ministers required to comply with the FOI Act.

Overly formalistic request processes

15. The FOI Act gives people the right to request access to government-held information. The objective is essentially to create a general right of access to information in documentary form in the possession of FOI bodies, limited only by exceptions and exemptions necessary to protect public interest and the private and business affairs of persons.⁶
16. In summary, the FOI system in Victoria process operates by requiring an individual to make a request in writing.⁷ The written request must be specific about the documents being requested. This includes specifying the type of documents sought, the date range of documents, where the documents might be located and, where possible, noting documents which may not be relevant. Individuals must pay a fee when making this request.
17. FOI bodies may refuse a request which does not meet the above formal requirements. Where a request does not satisfy these formal requirements, the FOI body is required to assist a person to comply with the formal requirements. If, after providing the applicant with a reasonable opportunity of consultation, there is still non-compliance with the formal requirements, the FOI body has the discretion to refuse to act on the request.
18. This approach effectively promotes form over substance. As noted above, FOI schemes should be guided by principles of maximum disclosure and open government, and refusing access to public information based only on limited public interest grounds. An insistence on complying with formal requirements runs counter to those principles. It may also have a discriminatory effect on some individuals. For example, a person may have language difficulties or experience a disability which inhibits their ability to effectively make a request.

⁶ *Freedom of Information Act 1982*, s 3.

⁷ *Freedom of Information Act 1982*, s 17.

19. Therefore, Liberty Victoria recommends that FOI requests should be accepted in any form and should not be refused only on the basis that any formal requirement has not been met. Furthermore, Victoria should adopt an informal requests process similar to those found in other jurisdictions.⁸

Recommendation:

- Remove the ability of FOI body to refuse FOI requests which do not satisfy all formal requirements.
- Enable (and encourage) informal requests to be accepted by FOI bodies.

Increasing demand and delays in responding

20. Presently, the FOI scheme in Victoria is being swamped with requests.
21. Data from the Office of the Victorian Information Commission (**OVIC**) published in 2022 shows that agencies are being overwhelmed with FOI requests. In 2020–2021, agencies received 42,249 requests – more than any other Australian jurisdiction. The sheer volume of requests has impacted not only the efficiency in decision making regarding documents to be released, with a large number of FOI bodies failing to meet timelines, but also contributed to FOI bodies relying on exceptions effectively to reduce their workloads.⁹ This in turn denies people the right to access information in a timely and efficient manner.
22. In Liberty Victoria’s view, there are two proactive ways this surge in demand could be addressed.
23. Firstly, Liberty Victoria considers that the surge in FOI requests may correlate with a lack of transparency in government before decisions are made. FOI requests are, in many cases, reactive to decisions that have been made or actions taken which affect an individual. Thus, a proactive way to reduce FOI requests is to impart sufficient information at an early stage to enable individuals within the community to understand proposed decisions and, if desired, engage in public debate. Put differently, adequate

⁸ See e.g., *Freedom of Information Act 2015* (ACT), s 8; *Government Information (Public Access) Act 2009* (NSW), s 8; *Right to Information Act 2009* (Qld), s 19.

⁹ Office of the Victorian Information Commissioner, *The State of Freedom of Information in Victoria: a special look at FOI in Victoria from 2019 to 2021* (April 2022), 12–13.

community consultation and opportunities to comment in government decision-making processes should reduce the number of FOI requests.

24. Relatedly, the FOI scheme should be changed from a 'pull' model to a 'push' model.
25. As one of Australia's oldest FOI schemes, Victoria's FOI Act adopts a pull model. In other words, the scheme relies principally on an individual making a formal request to a FOI body for the release of information – or be 'pulled' out of government.
26. This can be contrasted with legislation elsewhere in Australia which have endorsed a 'push' model – where agencies are encouraged or required ('pushed') to proactively release information to the public rather than permit discretionary access.
27. The *Right to Information Act 2009* (Qld) (**Qld RTI Act**) adopts a 'push' model. The Preamble to that Qld RTI Act provides that "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." This intention is reflected in Chapter 2 of the Act which obliges agencies to publish certain public documents, thus obviating the need for a FOI request in many cases.
28. Similarly, in New South Wales, section 6 of the *Government Information (Public Access) Act 2009* (NSW) (**NSW GIPA Act**) requires that 'open access information' must be published unless there is an overriding public interest reason for not doing so.
29. Finally, in the Australian Capital Territory, Part 4 of the *Freedom of Information Act 2015* (ACT) (**ACT FOI Act**) requires that 'open access information' be published subject to public interest exceptions.
30. In addition to proactive publication requirements, these schemes provide for informal request processes as discussed above. Such a process minimises the need to comply with the strictures of a formal FOI request.
31. In Liberty Victoria's view, introducing proactive publication requirements and informal requests would obviate the need to make a FOI request in many cases. This in turn would ease the pressure on FOI officers, enabling them to focus on requests which require the genuine balancing of competing public interests. It would have the added benefit of promoting a culture within government which views information to be a public asset available to all except in limited circumstances.

Recommendation:

- Adopt a 'push' model which encourages or requires publication of information as a matter of course.

Lengthy delays

32. Coupled with the increase in FOI requests is the delay by agencies in processing those requests.
33. Presently, a FOI body must review and determine whether an FOI request should be granted. If a request which meets the formal requirements is received, the request must be processed between 30 to 45 days from the date of the request. Consent from the applicant is required for an extension of time.
34. The OVIC reports¹⁰ that between 2019 and 2021, FOI bodies made 80.43% of decisions within time. This represents a decline of around 8% from 2014 to 2019. The vast majority of complaints made to OVIC about FOI requests related to delays in agencies making FOI decisions within time. The OVIC specifically referred to complaints received about Victoria Police. The reasons for the backlog of over 2,000 FOI requests at Victoria Police was said to be attributable to insufficient resources, the increased number of FOI requests, and the impact of COVID-19.
35. The failure to process requests within time (or within a reasonable time shortly thereafter) can have real world consequences. Liberty Victoria has been provided with anecdotes which are consistent with OVIC's findings. The below case study is one such recent example.

Jason's story

In late May 2023, Jason* (name changed) made a FOI request to Justice Health to obtain documents relating to a psychiatric assessment and examination conducted while he was in custody. This information was potentially relevant to explore the defence of mental impairment in relation to some matters and, in relation to other matters, a referral to the Assessment and Referral Court (**ARC**) within the Magistrates'

¹⁰ Office of the Victorian Information Commissioner, *The State of Freedom of Information in Victoria: a special look at FOI in Victoria from 2019 to 2021* (April 2022), 13–14.

Court, a specialist therapeutic list to assist the rehabilitation of persons with mental illness and/or cognitive impairment by addressing the underlying causes of offending behaviour and improve their overall health and wellbeing.

On the day after the request was made, Justice Health acknowledged receipt and sought an extension of time for 30 days. Jason consented to that request.

Despite follow-up requests in August 2023 which noted Jason's next court hearing was scheduled for early September 2023, FOI officers were unable to provide a timeframe for when a decision would be made.

The delay in obtaining material from Justice Health contributed to several adjournments of Jason's court case. The uncertainty in how his case would resolve caused distress to Jason and lead to a deterioration in his mental health. He subsequently became transient and failed to attend a court hearing. In turn, this resulted in a warrant for his arrest being issued.

The documents subject to the FOI request were ultimately released in late October 2023, five months after the date of the request and three months beyond the consented extension period.

36. The above case study highlights how delays in processing FOI requests can affect an individual's human rights in other ways. In Jason's story, the delay arguably affected his fair trial rights including his right to adequate time and facilities to prepare his defence and his right to be tried without unreasonable delay. The ongoing need for adjournments of his case also arguably resulted in the deprivation of his liberty for longer than was necessary. Finally, the inability to access therapeutic programs to address his mental health issues may have also infringed his right to equality without discrimination. Each of these rights are enshrined in the Charter.
37. It is, therefore, concerning that the Victorian Government has announced in recent days that it proposes to cut the number of FOI officers across government agencies.¹¹ At a time when more resources are needed to respond to FOI requests and process backlogs, such cuts are counter-productive.

¹¹ Royce Millar, 'Budget cuts to hamper FOI oversight: information chief', *The Age* (3 December 2023): <<https://www.theage.com.au/politics/victoria/budget-cuts-to-hamper-foi-oversight-information-chief-20231202-p5eoj1.html>>.

38. In Liberty Victoria's view, the scheme should be strengthened in favour of disclosure. Fundamentally, timeframes are meaningless if not complied with by FOI bodies. Moreover, provisions which deem a FOI body to have refused a request if not made within time undermine the purpose of the FOI scheme. Indeed, in such cases, there is no need for the FOI body to have identified what public interest is said to override the presumption in favour of disclosure of government information.
39. In Liberty Victoria's view, there should be a presumption in favour of releasing documents unless a FOI body can explain, within the necessary time, what overriding public interest favours non-disclosure. It follows that there should be no deemed refusal of a request if a decision is not made within time. Fundamentally, this will require additional resources to process FOI requests. Given the importance of access to information in individuals being able to exercise their human rights, such funding is desirable.

Recommendations:

- Create a presumption in favour of release of information if a formal FOI request is made.
- Abolish provisions which deem a request is refused if a FOI body fails to comply with a FOI request within the prescribed time.
- Provide more resources to FOI bodies to process FOI requests.

Limited FOI bodies

40. As a signatory to the United Nations Guiding Principles on Business and Human Rights (**UNGP**), the Australian Government is committed to preventing and addressing business-related human rights harms. One of the key foundational principles enunciated in the UNGPs is that State parties must protect against human rights abuses within their territory or jurisdiction by third parties including business enterprises.
41. Today, many private bodies exercise functions of a public nature. Decisions by such bodies can affect an individual's human rights. For example, a decision by a registered community housing operator to evict a renter from social housing can affect that person's right to housing as is recognised under section 13 of the Charter. For this reason, the ability to access information held by businesses or non-governmental organisations

exercising public functions may be important to understand decision-making and vindicate any human rights breaches.

42. However, the Victorian FOI Act is limited in scope. FOI requests can only be made to a Minister or an ‘agency’ defined as a government department, local council or prescribed authority.¹²
43. This deficiency in the FOI scheme was recently highlighted by the Victorian Ombudsman in her recent investigation into complaint handling in the Victorian social housing sector.¹³ The investigation was triggered by the large number of complaints received by the Ombudsman’s office, most of which concerned complaints handling.
44. An issue considered by the Ombudsman concerned the inability of renters to make FOI requests of community housing organisations which are rental premises providers. In one example, the Ombudsman identified that a community housing provider’s policy relating to temporary absences was inferior to Homes Victoria’s equivalent policy. Given there was no recourse to the FOI Act, the policy was only obtained after a community legal centre’s “determination and persistence”.
45. The above demonstrates the challenges individuals may face in understanding the policies of essential service providers which may affect their rights in the absence of any requirement to publish policies or comply with requests for information.

Recommendation:

- Extend the FOI scheme to all private bodies offering public services or whose decisions have human rights implications.

Terminology

46. Finally, in Liberty Victoria’s view, the purpose of the FOI Act could be strengthened, including by improving the terminology used in the Act.
47. Presently, the FOI Act provides that “every person has a legally enforceable right to obtain access” to documents of an agency of Minister, subject to certain exemptions or exceptions.¹⁴ This affords individuals with a personal right to obtain access to

¹² *Freedom of Information Act 1982*, s 5(1) (definition of ‘agency’) and 13.

¹³ Victorian Ombudsman, ‘Investigation into complaint handling in the Victorian social housing sector’ (July 2022), [287]–[298].

¹⁴ *Freedom of Information Act 1982*, s 13.

information. The term 'freedom of information' may operate to obscure the content of that right.

48. Generally speaking, the terms 'right' and 'freedom' overlap. However, they are conceptually different. Rights refer to a person's entitlement to something which are generally protected and enforceable by law. Freedoms, on the other hand, refer to a person's capacity to do something freely without interference. As those freedoms may not necessarily be protected and enforceable by law, a right is often required to guarantee a freedom.
49. Adopting the term 'right to information', as is done in Queensland and Tasmania, may work to instil a culture of open government. Put differently, by having the word 'right' front and centre, it would be made clear to government that a person is entitled to receive information, rather than simply be free to request information which a FOI body may decide to withhold at their discretion.

Recommendation:

- Adopt language consistent with human rights, including changing name of regime from "freedom of information" to "right to information".

50. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Michelle Bennett, President of Liberty Victoria, or Gregory Buchhorn, General Committee Member, or the Liberty Victoria office at info@libertyvictoria.org.au.

Liberty Victoria
8 December 2023