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28 November 2023

Hon Dr Tim Read MP

Chair

Integrity and Oversight Committee

Inquiry into the operation of the Freedom of Information Act 1982

Parliament House, Spring St

EAST MELBOURNE VIC 3002

Dear Minister Read

Inquiry into the Freedom of Information Act 1982 (Vic)

Thank you for the opportunity to make a submission to the Inquiry into the *Freedom of Information Act 1982* (Vic) (**'Vic FOI Act'**). In response to the terms of reference, I would like to draw your attention to some key differences between the Victorian and ACT FOI schemes and some of the challenges faced in the ACT.

Key differences between the Victorian and ACT FOI schemes

Open access information

The *Freedom of Information Act 2016* (ACT) (**ACT FOI Act**) is designed to make information held by the Government more accessible to the community than it has ever been before. Formal access applications for information should be a last resort, with information being published proactively wherever possible.¹

The ACT FOI Act establishes an open access information regime, which requires ACT government agencies to publish certain information routinely without the need for a formal application to be made.²

¹ [Explanatory Statement](#), Freedom of Information Bill 2016 (ACT) 3.

² [Freedom of Information Act 2016 \(ACT\)](#) (**ACT FOI Act**) s 24.

This includes policy documents, reports, budget papers and agency disclosure logs, unlike the Victoria scheme which is limited to certain functional information.³

The ACT Government maintains an open access information portal⁴ and an open data portal⁵ to provide a centralised, searchable interface for access to information. In 2022–23 at least 6,199 decisions to publish open access information in full were made by ACT government agencies and ministers.⁶

Any person may apply to the ACT Ombudsman to review a decision to make or not make open access information publicly available.⁷

The public interest test

The ACT FOI Act provides every person with a statutory right of access to government information.⁸ Similar to the Vic FOI Act, the ACT FOI Act has an express pro-disclosure bias.⁹ A respondent may decide an access application by refusing to give access to certain information because the information is 'contrary to the public interest information'.¹⁰

Information is taken to be 'contrary to the public interest information' if:¹¹

- it is taken to be contrary to the public interest to disclose under Schedule 1 (subject to exceptions), or
- disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.

³ ACT FOI Act s 23; see [Freedom of Information Act 1982 \(Vic\)](#) s 7.

⁴ ACT Government, [Open Access Information](#).

⁵ ACT Government, [Open Data Portal](#).

⁶ ACT Ombudsman, [Freedom of Information Annual Report 2022–23](#).

⁷ ACT FOI Act sch 3.

⁸ *Ibid* s 7.

⁹ ACT FOI Act s 9; see *Freedom of Information Act 1982 (Vic)* s 16.

¹⁰ ACT FOI Act s 35(1)(c).

¹¹ *Ibid* s 16.

To complete the public interest test, decision-makers must take the following steps:

- identify any factor favouring disclosure that applies in relation to the information including any factor mentioned in Schedule 2, section 2.1
- identify any factor favouring nondisclosure that applies in relation to the information including any factor mentioned in Schedule 2, section 2.2
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest, and
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

For example, where an applicant requests access to their own personal information, the decision-maker can consider the fact that the information is the personal information of the applicant as a factor favouring disclosure for the purpose of the public interest test.¹²

Importantly, certain factors must not be taken into account for the purpose of the public interest test, including that release could cause embarrassment to the government or the applicant's identity, circumstances, and reasons for seeking access to the information (unless the information requested is personal information of another party).¹³

Access to personal information

The objects of the ACT FOI Act include to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government

¹² Ibid sch 2, s 2.1(b).

¹³ Ibid s 17(2)-(3).

information.¹⁴ Importantly, government agencies are authorised to release information in response to an informal request.¹⁵

The intention of the FOI Act is not to discourage government agencies or ministers from publishing or giving access to government information (including contrary to the public interest information).¹⁶ We note the ACT has a low rate of formal access applications per capita (estimated 2.8%). ACT Government agencies and ministers received 1,301 access applications in the 2022–23 financial year.¹⁷

The ACT FOI scheme is designed to provide government information freely and with flexibility in administrative processes to enable more efficient processing of requests.¹⁸ For example, agencies may at any time contact the applicant to clarify the scope of the application (a clarification request).¹⁹ In certain circumstances, the agency may suspend the processing of the application until the applicant responds and not deal further with the application if it has been suspended for 6 weeks or longer.²⁰

Government agencies and ministers must also consider any statement in the application of the applicant's views on the public interest in disclosing the government information applied for.²¹

Combined with the pro-disclosure bias, generally it is in the public interest to release a person's own information back to them. Having regard to the objects of the ACT FOI Act to promptly release the maximum amount of information and the resourcing involved in processing an access application, government agencies and ministers are encouraged to provide access to personal information outside of the ACT FOI Act.

¹⁴ Ibid s 6(f).

¹⁵ Ibid s 8.

¹⁶ Ibid s 10.

¹⁷ ACT Ombudsman, Freedom of Information Annual Report 2022–23, page 7.

¹⁸ See Chief Minister, [Freedom of Information \(Accessibility of Government Information\) Statement \(No.1\)](#).

¹⁹ ACT FOI Act s 34(3).

²⁰ Ibid s 34(4)–(7).

²¹ Ibid s 37.

Access to health information – digitalisation of health records

The ACT FOI Act does not apply to information held in a health record under the *Health Records (Privacy and Access) Act 1997* (ACT) (**Health Records Act**).²²

The ACT Government has introduced a new territory-wide electronic medical records system (Digital Health Record – DHR) which records all interactions between a person and ACT Public Health Services.²³

The availability of health information from a range of providers using the same integrated system is expected to reduce the need for formal applications under the Health Records Act, noting individuals will also be able to obtain information from the My DHR website or mobile app.

This is an example of how information management practices and procedures across government can facilitate efficient and timely access to health information. However, caution should be exercised to ensure all members of the community have the same capability to access information, for example by providing access in the form requested by the person.²⁴

Experience with timeliness and the increasing volume of information held by government

In our role as ACT Ombudsman, we have observed that the use of formal access applications to seek access to personal information has created a significant backlog of applications for the Community Services Directorate (CSD).

In some circumstances, CSD holds sensitive personal information of individuals who have had reason to engage with CSD for a significant period of time, resulting in high volumes of information (up to 17,000 pages in some instances).

²² Ibid s 12.

²³ ACT Health Directorate, [Digital Health Record](#) (2 May 2023).

²⁴ See ACT Ombudsman, [submission to Inquiry into the Freedom of Information Amendment Bills 2022](#), page 4.

In the circumstances of these individuals, such as having been in care for extended periods of time, requests for personal information held by CSD often involve the assessment of sensitive or protected information and joint personal information of several third parties.

Noting the volume and sensitive nature of the information sought, and to achieve consistency, applications are processed by the same FOI officer within CSD. Another challenge for CSD is that records may be held in physical form and require digitisation.

Generally, government agencies and Ministers are able to respond to access applications within an average processing time of 30 working days.²⁵ However, CSD has an average processing time of 131 working days.²⁶

Recent amendments to the ACT FOI Act allow government agencies to seek extensions of time up to a total of 24 months if the applicant agrees and the respondent agrees to deal with the application progressively. For some of the large and complex requests, applicants wait over several years to obtain access to the entirety of their personal information.

Our Office receives more applications for an extension of time from CSD than any other respondent. In one instance, our Office gave up to 611 working days for CSD to deal with an application, subject to conditions including to release information in stages.

We observe that CSD does not generally charge fees or refuse to deal with applications on the ground it would be an unreasonable and substantial diversion of resources, ensuring vulnerable members of the public are able to access their personal information even though it creates a significant resourcing burden on CSD.

We have engaged with CSD about the delay in allocating applications to an FOI officer for processing, which in some cases was more than 12 months. CSD has reviewed its FOI processes and have already implemented changes to address the backlog, including the funding of 12 permanent FOI officers and a new registry process.

²⁵ Ibid page 12.

²⁶ Ibid.

We bring this example to the Committee's attention to highlight the difficulty of providing information in a timely and efficient manner, while also releasing the maximum amount of information in response to formal applications.

Yours Sincerely,

Iain Anderson
ACT Ombudsman

Comparison Table – Victorian and ACT FOI Schemes

Legislation	<u>Freedom of Information Act 1982 (Vic)</u>	<u>Freedom of Information Act 2016 (ACT)</u>
Right of access	General right of access – limited only by exceptions and exemptions necessary for protection of essential public interests and private and business affairs of persons whose information is collected and held by agencies (s 13).	Provide right of access to government information (s 7). Access may be refused if information is contrary to the public interest information (see s 16).
Proactive release	Section 7 requires an agency (including a local council) to publish information summarising its organisation, functions, the categories of documents it holds, other public bodies it supports (for example, committees of management, cemetery trusts, and boards), and how FOI requests can be made.	Government agencies and Ministers must make open access information publicly available unless the information is contrary to the public interest information (s 24). Open access information includes a disclosure log (record of access applications dealt with by respondents) (s 28). If information is not made available, a statement setting out why the information is contrary to the

		public interest information must be published (subject to exceptions) (ss 24(2)-(3)).
Entities information is available from	Government agencies incl. Departments, Local councils, Universities, Police, 'Prescribed authority' = body corporate established for a public purpose per the Act or body unincorporated by the Governor in Council or by a Minister = any other body, whether incorporated or unincorporated, declared by the regulations Blanket exemption for documents created by the Bureau of Criminal Intelligence	Government agencies (s 15), Administrative unit Statutory office-holder and staff, Territory authority (excluding judicial council, law society), Territory instrumentality, Territory-owned corporations, territory-owned corporations, subsidiary of a Territory-owned corporation, Office of the Legislative Assembly, Officers of the Legislative Assembly, Supreme Court, Magistrates Court, ACT Civil and Administrative Appeals Tribunal, Board of inquiry, Judicial commission, Royal commission, Government Ministers (s 14) (excludes information relating to a Minister's personal or political activities / created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly).

<p>Exclusions</p>	<p>Courts and holders of a judicial office are not prescribed authorities, or part of a department, in relation to their judicial functions (s 6(a)).</p> <p>A registry or other office of a court, and the staff of those bodies, are not considered to be part of a department in respect of matters relating to the judicial functions of a court (s6(b)).</p> <p>Does not apply to documents in OVIC's possession to the extent that the document is the subject of, or discloses information relating to, an FOI review, complaint, or investigation (s 6AA).</p> <p>Not entitled to access document that is open to public to access where that access is subject to a fee or charge / available for purchase / available for public inspection or stored for preservation by the Public Record Office of Victoria (s 14).</p>	<p>Does not apply to information in a health record under the <i>Health Records (Privacy and Access) Act 1997</i> (ACT) (s 12).</p> <p>Does not apply to information accessible under the <i>Territory Records Act 2002</i> (ACT) / an accessible executive record / information subject to declarations or determinations (s 13).</p>
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<p>Determining release</p>	<p>Exempt documents: Cabinet documents (s 28); Documents containing matter communicated by any other State (s 29); Documents affecting national security, defence or international relations (s 29A); Documents of Court Services Victoria (s 29B); Internal working documents (s 30); Law enforcement documents (s 31); Documents relating to IBAC (s 31A); Documents affecting legal proceedings (s 32); Documents affecting personal privacy (s 33); Notice requirement where person is a child - document affecting personal privacy or information communicated in confidence (s 33A); Documents relating to trade secrets etc. (s 34); Documents containing material obtained in confidence (s 35); Disclosure contrary to the public interest (s 36); Certain documents arising out of companies and securities legislation (s 37); Documents to which secrecy provisions of enactments apply (s 38).</p>	<p>(1) Information taken to be contrary to the public interest under Schedule 1 (unless it identifies corruption, commission of an offence by a public official; or scope of law enforcement investigation has exceeded lawful limits): Information disclosure of which would be contempt of court or Legislative Assembly etc. (Sch 1, s 1.1); Information in possession of a court or tribunal (Sch 1, s 1.1A); Information in possession of integrity commission or inspector of the integrity commission (Sch 1, s 1.1B); Information subject to legal professional privilege (Sch 1, s 1.2); Information disclosure of which is prohibited under law (Sch 1, s 1.3); Sensitive information (Sch 1, s 1.4); Information in possession of auditor-general (Sch 1, s 1.5); Cabinet Information (Sch 1, s 1.6); Examinations under Australian Crime Commission (ACT) Act 2003 (Sch 1, s 1.7); Information in possession of human rights commission (Sch 1, s 1.8); Identities of people making disclosures (Sch 1, s 1.9); Information relating to requests to cost election commitments</p>
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		<p>(Sch 1, s 1.10); Information in electoral rolls and related documents (Sch 1, s 1.11); Information in possession of ombudsman (Sch 1, s 1.12); National, Territory or State security information (Sch 1, s 1.13); Law enforcement or public safety information (Sch 1, s 1.14); Information in possession of Inspector of Correctional Services (Sch 1, s 1.15); OR</p> <p>(2) Deciding whether disclosure of information would, on balance, be contrary to the public interest taking into account the factors set out in Sch 2.</p>
Guidance	<p>Professional Standards / Ministerial Professional Standards (Part IB).</p> <p>Guidelines (not legally binding).</p>	<p>Freedom of Information Guidelines issued under s 66.</p>
Third party consultation	<p>Agency or Minister must consult parties when determining whether certain information is an exempt document.</p>	<p>Respondent must take reasonable steps to consult relevant third parties before deciding to give access if: (a) some of all of the government information applied for is not contrary to the public interest information but; (b) disclosure of the information</p>

	<p>E.g. seek views of agency, authority or Minister in deciding whether a document would be contrary to the public interest and disclosure would prejudice relations between the State and the Cth or any other State or Territory (s 29); affecting national security, defence or international relations (s 29A); law enforcement documents (s 31); relating to IBAC (s 31A); affecting personal privacy (s 33); relating to trade secrets (s 34); containing material obtained in confidence (s 35).</p>	<p>may reasonably be expected to be of concern to a person or another entity other than the Territory (s 38).</p>
<p>Timeframe for dealing with applications</p>	<p>An agency or Minister must 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.</p> <p>Period may be extended by consultation (not more than 15 days); or with applicant agreement (not more than 30 days) but can ask any number of times (s 21).</p>	<p>A respondent to an access application must decide the application not later than 30 working days after the day of receiving the application (s 40).</p> <p>Period may be extended by third party consultation (15 working days - see s 38); clarification request under s 34(3) (no. of working days the applicant takes to respond); intention to refuse to deal consultation under s 46 (the consultation period); responding to fee estimate notice - see 106 (no. of working days the applicant takes to confirm / vary</p>

		application) / fee waiver under s 107; number of Christmas shutdown days (working days falling on 27, 28, 29, 30 or 31 December – see ss 40(3)).
Fees	A request must be accompanied by a fee of 2 fee units (may be waived or reduced) (ss 17(2B)). Charges for access to documents may apply (s 22). See - Freedom of Information (Access Charges) Regulations 2014 (Vic).	No fee for certain matters – personal information etc. (s 105). Respondent may give applicant a fee estimate payable for information provided in response to the application (s 106). Must waive fee in certain circumstances (s 107). See - Freedom of Information (Fees) Determination 2018 (ACT) .
Review / Complaints	Nil internal review. Information Commissioner review (s 49A). Victorian Civil and Administrative Tribunal review (s 50). Complaints may be made to Information Commissioner (s 61A).	Nil internal review. Ombudsman review (s 82). ACT Civil and Administrative Tribunal review (s 84). Complaints made by made to Ombudsman (s 69).