

# Freedom of Information Regulations 2019

Regulatory Impact Statement

February 2019

# Freedom of Information Regulations 2019 - Regulatory Impact Statement

This Regulatory Impact Statement (RIS) has been prepared to fulfil the requirements of the **Subordinate Legislation Act 1994** and to facilitate public consultation on the proposed Freedom of Information Regulations 2019. A copy of the proposed Regulations accompanies this RIS.

Public comments and submissions are invited on the proposed Regulations and in response to information provided in this RIS.

All submissions will be treated as public documents. Written comments and submissions should be forwarded no later than **5pm on Friday 15 March 2019** to:

Office of the General Counsel

Department of Premier and Cabinet

Level 2,

1 Treasury Place,

EAST MELBOURNE VIC 3002

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# List of Acronyms

Charter - **Charter of Human Rights and Responsibilities Act 2006**

Current Regulations – Freedom of Information Regulations 2009

DET- Department of Education and Training

DPC – Department of Premier and Cabinet

DPP - Director of Public Prosecutions

FMA - **Financial Management Act 1994**

FOI – Freedom of Information

FOI Act - **Freedom of Information Act 1982**

FRD - Financial Reporting Direction under the FMA

HR Act – **Health Records Act 2001**

IBAC - Independent Broad-based Anti-corruption Commission

OPA - Office of the Public Advocate

OPP - Office of Public Prosecutions

OVIC – Office of the Victorian Information Commissioner

PDP Act - **Privacy and Data Protection Act 2014**

PR Act - **Public Records Act 1973**

Proposed Regulations - Freedom of Information Regulations 2019

PROV - Public Record of Victoria

RIS – this Regulatory Impact Statement

RSPCA - Royal Society for the Prevention of Cruelty to Animals

VCAT - Victorian Civil and Administrative Tribunal

VET- vocational education and training

# Executive Summary

The draft Freedom of Information Regulations 2019 (the proposed Regulations), are similar to the existing regulations, the Freedom of Information Regulations 2009, which are due to sunset on 7 April 2019.

The proposed Regulations have three purposes:

- to prescribe a number of bodies as being subject to the **Freedom of Information Act 1982** (FOI Act);
- to exempt certain statutory office holders from freedom of information (FOI); and
- prescribe persons and bodies to which the Information Commissioner may refer matters.

The proposed Regulations update the list of prescribed bodies and removes redundant sections. The exempt statutory office holders are unchanged. The proposed Regulations also prescribes eight bodies that the Information Commissioner and Public Access Deputy Commissioner can refer parts of reviews or complaints to for further investigation if the matter falls within the jurisdiction of the agency. This list is substantially unchanged from the FOI Regulations 2009 except for the removal of two bodies that have been amalgamated or disbanded.

This RIS does not focus on the third purpose in great detail as the provisions in the FOI Act (supported by the proposed Regulations) relating to the persons and bodies to which the Information Commissioner may refer matters assist Victorians to ensure their matter is dealt with by the appropriate agency and do not impose a burden on prescribed agencies or the public.

## Nature of the problem

The effective operation of a representative democracy depends on the community being able to scrutinise, discuss and contribute to government decision-making. To do this, the public needs access to government-held information. The Victorian FOI Act facilitates access to such information.

The FOI Act provides the key means by which members of the public may seek access to documents held by the government. While government has some incentive to release information to the public, the FOI Act sets clear criteria for the release of documents to the public with limited and consistent exceptions. Providing the public with access to government information is an important mechanism for enhancing government accountability in a representative democracy.

The proposed Regulations, made under section 66 the FOI Act, replicate the current regulations. The proposed Regulations seek to prescribe bodies that are not automatically subject to FOI due to their structure as being subject to the FOI Act and exempt a limited number of statutory office holders from FOI. If the current regulations were allowed to expire then there would be no prescribed bodies subject to FOI and no exemptions of statutory office holders.

## Prescribed bodies

While the FOI Act provides that certain types of government entities are automatically subject to the FOI Act, there are other bodies which are established under statute with a public purpose which are directly or indirectly controlled by government, but which are not automatically subject to FOI due to their structure. Such bodies may be declared to be subject to the FOI Act by regulations made under

the FOI Act. If those bodies were not subject to FOI, then members of the public could seek personal information from them under privacy laws, but there would be no formal or consistent mechanism by which the public could seek a broader range of information.

A comparison of the bodies currently prescribed and the bodies prescribed in the proposed Regulations can be found in Table 1.

## Exempt office holders

By contrast, there are certain statutory offices which are automatically subject to the FOI Act, but which need to exercise their functions in an independent and confidential manner. In those cases, being subject to the FOI Act could impede the statutory office holder's functions by:

- undermining strong duties of confidentiality
- discouraging vulnerable people from providing information to the office holder; and
- weakening the perception around the independent exercise of the office holder's discretion.

## Objectives of the proposed regulatory measure

The objectives of the proposed Regulations are that:

- public bodies will be subject to appropriate levels of public openness and accountability,
- there is a well-understood mechanism for people to seek access to, and amendment of, personal information held by public bodies,
- people are provided with sufficient information to enable them to scrutinise government policies and decisions; and
- the provision of information does not risk compromising the integrity, confidentiality and independent of the role of certain statutory office holders.

## Proposed measure

### Prescribed bodies

The proposed Regulations prescribe a number of bodies as being subject to the FOI Act. These bodies are broadly categorised as:

- *Boards, committees and panels* - these are bodies which have a range of functions, including registering and regulating the conduct of certain professions, independent review of certain decisions of other government organisations and providing advice to government,
- *Denominational hospitals*, which provide public hospital services to the community and are subject to a range of governmental controls over their operations and expenditure,
- *TAFE Institutes*– these bodies provide technical and further education services to the public,
- *Other organisations*, which include the Royal Society for the Prevention of Cruelty to Animals (RSPCA) and Yooralla – these are not-for-profit organisations which provide services to the community.

These bodies are prescribed under the current Regulations (see Table 1 for a comparison of bodies currently prescribed and those prescribed under the proposed Regulations). Most of the amendments

are to recognise that over the last ten years, a number of government bodies have ceased to exist, or have changed their name and/or structure.

These bodies have been prescribed due to the way in which they are regulated or funded by the Victorian government. They are effectively part of the structure of government. Without the proposed Regulations, they would not be subject to FOI and the public would not be able to seek a broad range of documents from them as they can from other similar government bodies. This would be a serious gap in government accountability mechanisms.

Three water companies, City West Water, South East Water and Yarra Valley Water, were prescribed in the FOI Regulations 2009. They have been removed in the proposed Regulations due to amendments made in 2012 to the **Water Act 1989**. These amendments changed the nature of the corporations, meaning they are now automatically subject to the FOI Act.

The proposed Regulations also prescribes eight bodies that the Information Commissioner and Public Access Deputy Commissioner can refer parts of reviews or complaints to for further investigation if the matter falls within the jurisdiction of the agency. This list is substantially unchanged from the FOI Regulations 2009 except for the removal of two bodies that have been amalgamated or disbanded.

## Exempt office holders

The proposed Regulations exempt three statutory office holders from the FOI Act:

- The Solicitor-General
- The Director of Public Prosecutions; and
- The Public Advocate.

These offices have unique characteristics within the Victorian government managing large amounts of confidential information and have been exempt from FOI for at least 30 years.

**Table 1: Comparison of bodies prescribed and exempt under the FOI Regulations 2009 and FOI Regulations 2019**

	FOI Regulations 2009	FOI Regulations 2019
Prescribed bodies	TAFE institutes created under section 3.1.11 of the <b>Education and Training Reform Act 2006</b>	TAFE institutes created under section 3.1.11 of the <b>Education and Training Reform Act 2006</b>
	The denominational hospitals listed in Schedule 2 to the <b>Health Services Act 1988</b>	The denominational hospitals listed in Schedule 2 to the <b>Health Services Act 1988</b>
	Appeal Costs Board	Appeal Costs Board
	City West Water Limited A.C.N 066 902 467	Disciplinary Appeals Boards
	Board of Examiners for Legal Practitioners	Electoral Boundaries Commission
	Council of Legal Education	Firearms Appeals Committee
		Food Safety Council

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Disciplinary Appeals Boards	Land Tax Hardship Relief Board
Electoral Boundaries Commission	Medical Panels
Firearms Appeals Committee	Mental Health Tribunal
Food Safety Council	Merit Protection Boards
Land Tax Hardship Relief Board	Professional Boxing and Combat Sports Board
Medical Panels	Public Records Advisory Council
Mental Health Review Board	Racing Victoria within the meaning of the <b>Racing Act 1958</b>
Merit Protection Boards	Royal Society for the Prevention of Cruelty to Animals
Professional Boxing and Combat Sports Board	Victoria Grants Commission
Psychosurgery Review Board	Victorian Legal Admissions Board
Public Records Advisory Council	Victorian Legal Services Board
Racing Appeals Tribunal	Victorian Multicultural Commission
Racing Victoria within the meaning of the <b>Racing Act 1958</b>	Victorian Veterans Council
Royal Society for the Prevention of Cruelty to Animals	WorkCover Advisory Committee
South East Water Limited A.C.N 066 902 547	Yooralla Society of Victoria
Victoria Grants Commission	
Victorian Council of the Arts	
Victorian Multicultural Commission	
Victorian Veterans Council	
WorkCover Advisory Committee	
Yarra Valley Water Limited A.C.N 066 902 501	
Yooralla	
Young Farmers' Finance Council	

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Exempt Bodies	The Solicitor-General	The Solicitor-General
	The Director of Public Prosecutions	The Director of Public Prosecutions
	The Public Advocate	The Public Advocate

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## Costs and benefits of the proposed measure and groups in society who may be affected

The proposed Regulations affect three groups in society, namely, the:

- bodies which are prescribed as being subject to FOI;
- offices that are exempt from FOI; and
- general public.

In relation to the prescribed bodies, the costs of the proposed Regulations are the costs borne by bodies themselves in complying with the FOI Act. These costs have two elements:

- the publication of information about the body's operations, structure and functions as required by Part 2 of the FOI Act, and
- the processing of FOI requests.

Most of the prescribed bodies in the proposed Regulations are required to publish information by means other than FOI, such as by the **Financial Management Act 1994**. Therefore, the costs of the publication requirements of Part 2 of the FOI Act are likely to be incremental.

There is little information on the cost involved in the processing FOI requests. Therefore the costs provided in this RIS are estimates only.

### Estimated costs

In 2017-2018, prescribed agencies received 1,615 FOI requests and the costs of processing these FOI requests were estimated to be, on average, \$372, for a total of \$625,844 in staffing costs.<sup>1</sup> There would be additional costs to prescribed bodies which are subject to review of their FOI decisions by the Victorian Civil and Administrative Tribunal (VCAT). There was one appeal lodged with VCAT in 2017-2018 about a decision by a prescribed body.

DPC considers that these costs are outweighed by the benefits to the public in ensuring that:

- the prescribed bodies are subject to appropriate levels of accountability and transparency;
- people have a well understood mechanism to seek access to their own information, as well as to other information held by government; and
- people are provided with sufficient information to enable them to scrutinise government policies and decisions.

In the case of the exempt offices, the proposed Regulations exempt only those offices which have unique functions within the Victorian government where the offices have strong obligations of confidentiality or require strong independence around the exercise of their discretions. The proposed Regulations impose a cost on the public in that they cannot access documents held by those offices under FOI.

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<sup>1</sup> Staffing costs for agencies varied greatly, see Table 4.

## Other means of achieving the objectives are inappropriate

### Prescribed bodies

The other means of meeting the objectives that were considered for prescribed bodies were:

- remaking the regulations but excluding a group of bodies – TAFE institutes (who have the highest processing costs for FOI requests) – from the regulations;
- voluntary compliance with the FOI Act.

These options were not selected as they do not sufficiently meet the objectives of the regulatory measure set out above.

DPC considers the proposed Regulations best meets the objectives of enhancing government openness and accountability and citizen participation, because ensuring that the prescribed bodies are subject to FOI provides a formal means for members of the public by which they may seek access to personal and non-personal information. The option which excludes the twelve TAFES, which are government entities and regulated, would create a gap in accountability if they were not subject to FOI. The option involving voluntary compliance with FOI would not appropriately meet the objectives as there would be no consistent regime for enabling the public to seek access to information held by prescribed bodies.

In the absence of FOI, people may seek access to their personal information through privacy laws. However, FOI is a well settled and understood means by which people may seek access to personal information. It is also government policy that FOI be the primary means of seeking access to personal information held by government bodies. Therefore it is DPC's view that the proposed Regulations meet the objective of providing people with access to their personal information and provide the most consistency across the regime.

### Exempt office holders

The other options considered in relation to exempt offices were:

- remaking the expiring regulations with no changes to exempt offices;
- exempt additional bodies; and
- providing for partial exemption from the FOI Act.

These options were not selected as the proposed Regulations better balance the objective of enhancing the independence and integrity of officeholders against the object of government openness and accountability. The proposed Regulations exempt only a limited number of offices which have unique functions within the Victorian government.

While certain documents of office holders may be exempt from FOI under the option of a partial exemption, DPC considers this option provides unnecessary complexity to the regulations and costs to the office holders and so would not adequately meet the objective of enhancing the independence and integrity of office holders. A similar concern exists in relation to the base case of no regulation as this would require offices to process FOI requests in accordance with existing exemptions under the FOI Act.

# Introduction

The Freedom of Information Regulations 2009 are the principal regulations made under the **Freedom of Information Act 1982** (FOI Act). The proposed Regulations are intended to replace the Freedom of Information Regulations 2009, which sunset on 7 April 2019.

Section 5 of the **Subordinate Legislation Act 1994**, requires that all statutory rules made in Victoria expire ten years after coming into force (with some limited exceptions), unless they are revoked at an earlier date. This is to ensure that regulations are regularly reviewed and that any unnecessary regulations are automatically revoked.

The proposed Regulations have three functions:

- to prescribe bodies in the regulations so that they become subject to FOI;
- to exempt certain statutory office holders from complying with FOI; and
- prescribe persons and bodies to which the Information Commissioner may refer matters.

This RIS does not focus on the third purpose in great detail as the provisions in the FOI Act (supported by the proposed Regulations) relating to the persons and bodies to which the Information Commissioner may refer matters assist Victorians to ensure their matter is dealt with by the appropriate agency and do not impose a burden on prescribed agencies or the public.

## Background

### The Freedom of Information Act

The FOI Act encourages government accountability and transparency by establishing a framework for people to seek access to government documents. The key objective of the FOI Act is to provide people with a right to seek access to documents which are held by government departments and other government agencies.<sup>2</sup> People's right to access documents under the FOI Act is limited only by exemptions and exceptions which are necessary to protect:

- essential public interests; or
- the private and business affairs of peoples whose information is held by the government.<sup>3</sup>

The other important objective of the FOI Act is to require government bodies to make information available to the public about their operations and about the rules and practices that affect the public in their dealings with government agencies.<sup>4</sup> These requirements assist people to have a sufficient understanding of the documents held by government so that they are able to better frame FOI requests.

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<sup>2</sup> FOI Act, section 13.

<sup>3</sup> FOI Act, section 3(1).

<sup>4</sup> FOI Act, section 3(1)(a).

Any discretionary powers in the FOI Act are intended to be exercised so that they facilitate and promote the disclosure of information.<sup>5</sup>

The FOI Act sets out the substantive mechanisms for the operation of FOI in Victoria. The application fee for an FOI request is set out in section 17(2A) of the FOI Act, while the charges for processing an FOI request (for example, charges for photocopying and searching for documents) are set out in the Freedom of Information (Access Charges) Regulations 2014. These regulations are not considered in this document.

The key component Parts of the FOI Act are summarised in the Table below.

By contrast, the proposed Regulations do not contain substantive provisions relating to the operation of FOI or for the setting of fees. This is because the proposed Regulations simply make various bodies subject to, or offices exempt from, the FOI Act. The way FOI requests are processed and the related fees and charges are taken as given when assessing the costs and benefits of the proposed Regulations and other options in this RIS.

**Table 2: Key Parts of the FOI Act**

Publication of documents and information	Part 2 requires that information about the structure and operations of agencies, as well as any internal rules, policies or other documents that affect the way that government decision making affects the public, to be published.
Access to documents	Part 3 sets out the regime by which people may seek access to documents held by government, including: <ul style="list-style-type: none"> <li>▪ the time within which an FOI request must be processed</li> <li>▪ the basis for charging people for seeking access to documents under FOI; and</li> <li>▪ the form in which access to documents may be provided.</li> </ul>
Exempt documents	Part 4 outlines the types of documents which may be exempted from disclosure under the FOI Act. These include: <ul style="list-style-type: none"> <li>▪ cabinet documents (section 28)</li> <li>▪ documents affecting national security, defence or internal relations (section 29A)</li> <li>▪ internal working documents which would disclose opinions or recommendations for the purposes of deliberation, where their release is not in the public interest (section 30)</li> <li>▪ law enforcement documents (section 31) and IBAC documents (section 31A)</li> <li>▪ documents affecting legal proceedings (section 32)</li> <li>▪ documents affecting personal privacy, where disclosure would be unreasonable (section 33)</li> <li>▪ documents relating to trade secrets and business affairs (in the</li> </ul>

<sup>5</sup> FOI Act, section 3(2)

	<p>latter case, where disclosure would expose the business unreasonably to disadvantage) (section 34)</p> <ul style="list-style-type: none"> <li>▪ documents containing material obtained in confidence (section 35)</li> <li>▪ documents where disclosure is contrary to public interest (section 36); and</li> <li>▪ documents that are protected from disclosure by another Act (section 38).</li> </ul>
Amendment of personal records	Part 5 sets out the mechanism for a person to seek amendment of documents containing personal information.
Review of decisions	Part 6 sets out review mechanisms, for example, the circumstances where the Information Commissioner or VCAT can review decisions of an agency to release or not release a document.
Complaints	Part 6A empowers the Information Commissioner to receive complaints about the actions taken by agencies or Ministers under the FOI Act.
Investigations	Part 6B empowers the Information Commissioner to conduct, on his/her own motion, an investigation in relation to the performance or exercise (or failure or purported performance or exercise) of a function or obligation, under the FOI Act, by an agency or principal officer.
Annual FOI Report	Part 7 of the FOI Act contains miscellaneous provisions, including a requirement for the Information Commissioner to prepare a report about the operation of the FOI Act annually.

## Other legislation

Other legislation which to some extent overlap with the requirements of the FOI Act are the **Privacy and Data Protection Act 2014** (PDP Act), the **Health Records Act 2001** (HR Act), the **Public Records Act 1973** (PR Act) and the **Financial Management Act 1994** (FMA).

## Privacy and Data Protection Act and Health Records Act

The PDP Act regulates the privacy of people's personal information (excluding health information) which is handled by government bodies. It includes a regime by which people may seek access to, and correction of, personal information held by bodies to which the PDP Act applies. The HR Act sets out a similar regime in relation to health information which applies to the public and private sectors in Victoria.

It is important to note that when the PDP Act and HR Act were introduced, the FOI Act was already a settled mechanism by which people could seek access to documents containing personal information. The second reading speech for the PDP Act states that:

'In Victoria, the Freedom of Information Act already provides a right of access to documents held by government. The bill does not propose to make changes to this method of access or to superimpose another access right over it. Accordingly, in the case of documents held by public sector agencies, the Freedom of Information Act will continue to be the only method of access.'<sup>6</sup>

A similar view was expressed in relation to the HR Act.<sup>7</sup>

Thus, it has been the government's intention that the FOI Act remains the primary mechanism for people to seek access to, and correction of, personal and non-personal information held by government bodies in order to retain consistency.

## Public Records Act

The FOI Act provides enforceable rights of access to government documents, requires agencies to publish specified information about their activities and records and provides a procedure for applicants to request the amendment of their personal information.

The PR Act makes possible the effective exercise of these rights and requirements by regulating information management within the Victorian public sector and imposing restrictions on the disposal and destruction of records. Both the Keeper of Public Records and the Public Record of Victoria (PROV) 'facilitate sound records management in the public sector by establishing records management standards and assisting agencies to better manage their records'<sup>8</sup>.

The PR Act requires government agencies to keep full and accurate records of their activities, transactions and decisions so that records in the custody of agencies are maintained in good order and condition. Those records, known as 'public records', are evidence of actions undertaken by agencies and are created and maintained for as long as they are required. Public records provide accountability for actions of government, information for planning and decision-making and evidence of rights and responsibilities. The emphasis of the PR Act is on the retention of significant records, as opposed to those that are ephemeral. It also provides a mechanism for access to older government records as the FOI Act does not provide rights of access to documents created before 5 July 1978 (or in the case of local council documents, to documents created before 1 January 1989) unless the documents relate to an applicant's personal affairs.<sup>9</sup> This complements the FOI Act.

## Financial Management Act

The FMA overlaps with the FOI Act to some extent as it also requires bodies to publish certain information about their structure and operations. The purposes of the FMA generally are:

- to improve the financial administration of the public sector;
- to make better provision for the accountability of the public sector; and
- to provide for annual reporting to Parliament on the operations and financial statements of public sector bodies.

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<sup>6</sup> *Victorian Parliamentary Hansard* (Legislative Assembly) 26 May 2000, page 1907, available at [www.legislation.vic.gov.au](http://www.legislation.vic.gov.au).

<sup>7</sup> *Victorian Parliamentary Hansard* (Legislative Assembly) 23 November 2000, page 1908, available at [www.legislation.vic.gov.au](http://www.legislation.vic.gov.au).

<sup>8</sup> Auditor-General (Vic) March 2008 report, *Records Management in the Victorian Public Sector*, at page 1.

<sup>9</sup> *Freedom of Information Act 1982* (Vic), s 67.

Where a body is subject to the FMA, it is required to fulfil a range of requirements such as keeping proper financial accounts, risk management requirements, audit requirements, financial reporting, annual reporting to Parliament and responding to Ministerial requests for information. A body may be directly subject to the requirements of the FMA or it may be indirectly subject to those requirements because it is controlled by another organisation which is subject to the FMA.

The FMA applies to:

- a public statutory authority
- a State business corporation or State body within the meaning of the **State Owned Enterprise Act 1992**; and
- a body, office or trust body established by or under an Act or enactment or established by the Governor in Council or Minister and that is declared by the Minister for Finance in the Government Gazette to which Part 7 of the FMA applies.

The interaction between the FOI Act and the FMA is further explored in relation to the evaluation of the options for prescribed authorities in this RIS.

## Policy considerations underlying the FOI Act

When the FOI Act was introduced in 1982, three key objectives were identified:

- accountability of government through openness to public scrutiny
- the ability of people informed about government policies to participate in policy making and in government itself; and
- the right of individuals to know what information is contained in government information about themselves.

Each of these three premises is discussed below.

### Openness and accountability

Australia is a representative democracy, where people have ultimate control over the government through the election of members of Parliament.<sup>10</sup> In these circumstances, the government can be thought of as the agent of the people, acting on the people's behalf.<sup>11</sup> The effective operation of the government requires that people are able to scrutinise government decision making and the use of government funds and resources.

There are various ways that the executive government may be held to account, such as through judicial oversight and through the scrutiny of Parliament and Parliamentary Committees. However, as the government acts on behalf of the people, the people have a direct interest in scrutinising the government's operations and decision-making.<sup>12</sup>

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<sup>10</sup> Australian Law Reform Commission, Report 77, *Open Government: A review of the Federal Freedom of Information Act 1982*, Chapter 2.

<sup>11</sup> Shapiro, SA and Steinzor RI, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, available at [www.law.duke.edu](http://www.law.duke.edu).

<sup>12</sup> Ibid.

In order to perform this function, people require information.<sup>13</sup> There are a variety of ways in which people may seek information about the government. For example, people can seek information from their local Member of Parliament or can review government annual reports and reports of Parliamentary Committees. People can seek information directly from government entities through sources such as the Internet.

While government is making more information available than ever before, the FOI Act plays an important role in openness and accountability by giving people a formal avenue by which to seek information which the government may not otherwise disclose, and if necessary, have the government's decision to withhold information reviewed by a court or tribunal.

## Participation in Government

Access to government information gives citizens an opportunity to better participate in government processes.<sup>14</sup> While FOI does not establish formal participation processes, it requires government organisations to publish information about their structure and functions. The publication of information under Part 2 of the FOI Act gives people an understanding of government and acts as a starting point by which people may interact with the government. By interacting with government, people can make their views known. This not only informs government decision making, but is also an important part of the democratic process as it provides people with a means of controlling their own affairs and those of the society in which they live.<sup>15</sup>

## Access to personal information

Government can hold a great deal of personal information about individuals. Often that information directly affects people's rights, obligations and responsibilities. People may have little choice about providing their information to government for a diverse range of purposes (for example, to obtain a driver's licence, to pay fines, to license a business, to obtain concessions, or to obtain a working with children check). In these circumstances, it is important that people have the ability to seek access to their personal information, and if necessary, to correct information that is inaccurate, out-of-date or misleading. This is a means of ensuring openness and accountability of the government as well as providing people with a means of controlling their own affairs.

## Charter of Human Rights – Freedom of expression

The **Charter of Human Rights and Responsibilities Act 2006** (the Charter) sets out how the Victorian government must treat its citizens and contains 20 rights that reflect the four basic principles of:

- freedom;
- respect;
- equality; and

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<sup>13</sup> Australian Law Reform Commission, Report 77, *Open Government: A review of the Federal Freedom of Information Act 1982*, Chapter 2.

<sup>14</sup> Paterson, M, *Freedom of Information and Privacy in Australia, Government and Information Access in the Modern State* (Lexis Nexis, 2005), page 12.

<sup>15</sup> Ibid pages 12,13.

- dignity.

The Charter has a strong focus on promoting a culture of human rights in the public sector by requiring that:

- new legislation and regulations be assessed for compatibility with the Charter;
- public sector authorities act compatibility with the Charter and take the Charter into account when making decisions; and
- respect for human rights be a public sector value and be included in the public sector Code of Conduct.

The Charter contains a right of freedom of expression. This right includes the right to seek, receive and impart information and ideas of all kinds. The right of freedom of expression therefore supports and strengthens people's right to access information from government entities using FOI. However, the Charter also recognises that there is a balance between the provision of information to the public and other interests by attaching special duties and responsibilities to the right of freedom of expression. These special duties and responsibilities require that the right be subject to lawful restrictions which are reasonably necessary to respect the rights and reputation of others and for the protection of national security, public order, health or morality. More generally, rights in the Charter may be limited where lawful and reasonable, and where the imposition on the human right is demonstrably justified in a free democratic society, based on human dignity, equality and freedom.

## Use of FOI in Victoria

FOI is widely used in Victoria as a means of accessing government information.

The FOI Act applies to 'agencies' which are defined in the FOI Act to mean:

- government departments;
- local councils; and
- bodies referred to as prescribed authorities. Prescribed authorities may fall automatically under the FOI Act or may be prescribed in the regulations. These are discussed further below.

Some parts of the FOI Act also apply to official documents of Ministers.

According to the OVIC's Report on the operation of the FOI Act (part of their 2017-2018 Annual Report), there are approximately 1,000 Victorian government entities which are subject to FOI.<sup>16</sup> The number of FOI requests has steadily risen every year since the Act's inception. In the 2017-2018 reporting year, Victorian government entities received over 39,000 FOI requests. This represents an increase of 7.9% from 2016-2017 and is the highest number of reported FOI requests in a single year. Prescribed bodies received 4.1% of the total number of FOI requests.

In 2017-2018, access to documents was provided to applicants in part or in full in 96.1% of all access decisions. That is, only 3.9% of all access decisions made resulted in the FOI applicant receiving no documents. Applicants were granted access to all documents requested in 65.8% of cases.

Around 85% of FOI requests are made to the 30 largest government entities, including Victoria Police, Ambulance Victoria, Metropolitan Fire and Emergency Services Board, DET, the Department of Health and Human Services, the Department of Justice and Community Safety, VicRoads, the

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<sup>16</sup> Office of the Victorian Information Commissioner, Annual Report 2017-2018, page 54.

Transport Accident Commission, the Victorian WorkCover Authority and a number of hospitals. In 2017-2018 reporting year, 19 of the top 30 agencies were public hospitals and 79% of requests to these agencies were for personal information, meaning that health records are commonly sought using FOI.

Any person may seek access to a non-exempt document under FOI. In seeking documents under FOI, people do not have to identify whether they belong to a particular group, nor do they have to give a reason for seeking the documents. Therefore, detailed statistics are not recorded about the users of FOI, nor about the use of documents obtained under FOI.

It is likely that FOI applicants seek documents under FOI for a variety of purposes. In relation to documents containing personal information, these purposes may include:

- to see what information government holds about them— such information may be obtained for no subsequent purpose;
- to seek correction of incorrect or misleading information that a government body may hold about them; or
- to seek information to understand the experience they have had with government or to obtain information about their treatment to pursue other remedies, such as legal action.

People may seek documents containing non-personal information:

- as a basis for questioning the government's policies, actions, expenditure or projects;
- to understand why the government has taken certain actions; or
- to seek information as a basis for another course of action, such as legal action.

## Nature of the Problem

### Prescribed bodies

The problem which the proposed Regulations is seeking to address is ensuring that members of the public are able to access information which is held by government. This is a means of ensuring appropriate government accountability and transparency.

As discussed above, the FOI Act applies to most government bodies automatically, and some additional bodies referred to as prescribed authorities. A 'prescribed authority' is generally:

- a body corporate established for a public purpose by an Act;
- an unincorporated body created by a Minister or by the Governor in Council; or
- persons performing the duties of an office established by an Act.<sup>17</sup>

The definition of 'prescribed authority' covers a range of bodies which vary in size and complexity from large organisations such as VicRoads, public hospitals, the Transport Accident Commission and the Country Fire Authority, through to small organisations such as local cemetery trusts. Such bodies are automatically subject to FOI because they fall within the definition of a prescribed authority under the FOI Act.

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<sup>17</sup> FOI Act s 5.



However, there are bodies which are effectively part of the government, but because of their structure, do not fall automatically within that definition. The FOI Act provides for such bodies to be required to comply with FOI by being prescribed in the regulations. The authority to make such regulations comes from sections 5(1) and 66 of the FOI Act.

There are two criteria in section 5(1) of the FOI Act for a body to be prescribed in the regulations. These are that the bodies (incorporated or unincorporated) are either:

- established by or under an Act, or
- supported directly or indirectly by government funds or some other form of assistance or over which the State government is in a position to exercise control.

These criteria are included as FOI is intended to only be applied to public bodies.

## The risks of not prescribing bodies

As discussed above, the key purpose underlying the FOI Act is to promote government openness and accountability.

Government holds more information about its own actions than does the public. Government has some incentive to reveal information to the public. For example, where government has made improvements to processes, providing information to the public is likely to increase public support for its policies and programs. However, there are no clear incentives for government to release information in a systematic or consistent way, particularly where the release of information may cause embarrassment to government. As a result, the public may not have complete information to enable them to make decisions about government's behaviour, including the development of policies, and the expenditure of tax revenue. This is particularly the case as a number of the bodies to be prescribed make decisions that directly affect people's lives, either professionally or personally. Thus, setting clear criteria for the release of information to the public by government, with limited and consistent exceptions, improves the probability of government being accountable for its actions, and improves the public's capacity to scrutinise government, and to participate in public life.

## Access to personal information

In the 2017-2018 reporting year, personal requests (for example, requests for a person's own information by the person themselves or their agent) comprised 73.0% of all FOI requests. In 2016-2017, this figure was 65.41%.

If the proposed Regulations were not made, the bodies which are currently prescribed in the expiring regulations would continue to be subject to the PDP Act and HR Act (if they deal with health information).<sup>18</sup> This means that people could apply under those Acts for access to their personal and health information.

From an applicant's perspective, there are some differences between seeking access to information under privacy laws rather than under FOI.

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<sup>18</sup> The only exceptions to this are the RSPCA and Yooralla, whose privacy policies indicate that they are subject to the *Privacy Act 1988* (Cth), rather than to the PDP Act. The Privacy Act contains similar provisions in relation to the access and correction of personal information to the PDP Act.

The first is that under the PDP Act and HR Act applicants would not have to pay an application fee for seeking access to their information. This compares to a \$28.40 application fee for FOI requests. However, an applicant may be required to pay charges for seeking access to health information. The maximum charges are prescribed in the Health Records Regulations 2012. A comparison of charges under the HR Act and the FOI Act is included at Attachment 1. The costs are generally similar except the HR Act does not include a prescribed charge for search time. The PDP Act does not have prescribed charges, but allows for reasonable charges to be levied for the processing of an access request.<sup>19</sup>

The second difference relates to review mechanisms. A person may complain to the Health Complaints Commissioner or the Information Commissioner if they are refused access to their health information or personal information, respectively. Each Commissioner may conciliate complaints and in addition, the Health Complaints Commissioner has the power to make a ruling. If not satisfied with the outcome, the person may then seek review of the decision by VCAT. Under the FOI Act, a person who is not satisfied with an agency's decision may apply to the Information Commissioner for review of the agency's decision. More information about the powers of the Information Commissioner are discussed under 'Compliance and Enforcement' below.

The mechanisms for review under privacy and FOI regimes are similar in that they are both designed to be relatively simple and inexpensive for members of the public.

If agencies were subject to privacy laws, rather than to FOI, it is likely that they would need to have similar processes in place to identify documents and to process requests for access. Therefore, it is likely that the costs of processing requests for personal information under privacy laws would be similar to the costs of processing such requests under FOI.

However, as the bodies which have been prescribed in the FOI regulations are part of government, not prescribing them in the future would go against the government's intention that FOI should remain the means by which people seek access to their personal and health information which is held by government. Making the bodies subject to FOI also means that people have a consistent process which they can follow to seek access to personal and other types of information.

## Access to non-personal information

As discussed above, people may seek any kind of document under FOI. While the majority of all FOI requests are for documents categorised as containing personal information, the remainder of documents sought relate to non-personal information. For example in the 2016-2017 reporting year, 34.59% of all requests were non-personal.<sup>20</sup> In 2017-2018, this figure was 27.0%.<sup>21</sup>

Even in the case of hospitals, people seek documents containing information other than their own personal medical records. For example, St Vincent's Hospital Melbourne receives the most FOI requests of all the bodies prescribed in the FOI Regulations. The breakdown between personal and non-personal requests for St Vincent's Hospital is set out in Table 3.<sup>22</sup>

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<sup>19</sup> A similar situation exists under the *Privacy Act 1988* (Cth).

<sup>20</sup> Office of Victorian Information Commissioner, Annual Report 2017-18, page 56

<sup>21</sup> Ibid.

<sup>22</sup> See Attachment 5 for the number of personal and non-personal FOI requests for prescribed bodies.

**Table 3: St Vincent’s Hospital, personal and non-personal requests**

	Personal requests	Non-personal requests
2017-18	940	34
2016-17	966	22
2015-16	750	115
2014-15	765	99
2013-14	780	106

The method of categorising personal and non-personal requests may explain the apparently significant fall in non-personal requests. In compiling statistics for the Annual Report, agencies are requested to categorise as personal requests those which are made by an applicant or their agent (such as a solicitor) for personal documents about the applicant. Requests for other kinds of documents are categorised as non-personal requests. Where a request has elements of a personal and a non-personal request, agencies are requested to categorise the request according to whether it is primarily a personal or a non-personal request. This is left to the agency’s discretion. There is no information available on the extent to which a request may include elements of a personal or non-personal request, therefore it is not known to what extent the personal requests mentioned above would also contain elements that are non-personal.

Records are not kept about the kinds of non-personal requests that people may make. As discussed above, people may make an FOI request to access any document that is held by a government entity. In general terms, the kinds of documents that prescribed entities might hold include:

- Minutes of Committee or Board meetings
- Documents which explain how decisions are made by the body
- Receipts, invoices and other documents that indicate how the body spends its funds
- Letters and reports in relation to the body’s operations
- Policy and procedure manuals and guidelines.

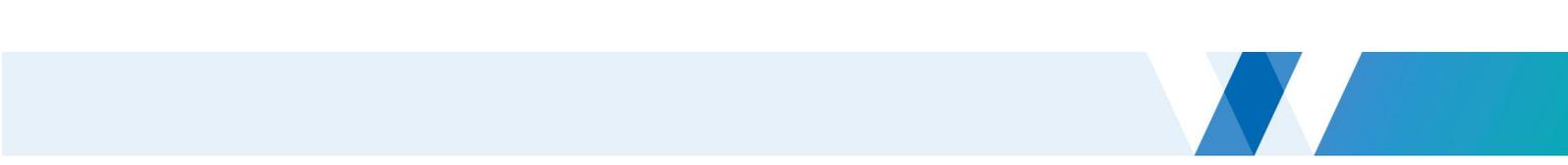
In the absence of the proposed Regulations, people would have no formal means of seeking such non-personal documents from the prescribed bodies.

## Exempt Offices

As outlined above, the key aim of the FOI Act is to create a general right of access to documents held by a variety of government bodies. This general right of access is limited only by exceptions and exemptions necessary to protect essential public interests, or a person’s private or business affairs. Framing the FOI Act in this way balances other public interests with the public’s right to access documents.

As part of this, the FOI Act specifically excludes certain types of bodies and functions from its operation, including:

- Courts or staff of the courts in relation to the exercise of the court’s judicial functions
- Certain bodies such as Royal Commissions and school councils.



Section 5(3) of the FOI Act also provides that a person is not to be taken to be a prescribed authority by virtue of holding, or performing the duties of a 'prescribed office'. This provision (in conjunction with the regulation making power in section 66 of the FOI Act) operates to exempt individuals who are statutory office holders from the FOI Act if they are prescribed in the regulations. For example, the Director of Public Prosecutions (DPP) is currently prescribed in the regulations as an office holder who is exempt from FOI.

Removing such office holders from the scope of FOI was contemplated by Parliament with the inclusion of these provisions. It should be noted that the exemption is intended to apply only to an individual who holds a statutory office and not to the organisation headed up by that person. For example, the exemption for the DPP only applies to the DPP and not to the Office of Public Prosecutions (OPP).

These exemptions recognise that there are certain types of office holders which, due to the nature of their functions, need to be able to exercise their functions in an independent and confidential manner. While the classes of documents which some offices produce are by their nature confidential and may be exempt from FOI, the uncertainty that may exist in relation to some of the documents necessitates the prescription of the office pursuant to section 5(3) of the FOI Act.

The risk of not prescribing such statutory office holders as exempt from FOI is that their independence and confidentiality could be compromised. As the nature of the problem in relation to exempt offices is specific to each particular office, it is considered in more detail under the options for exempt offices below.

## Desired Objectives

There are two parts to the proposed Regulations – one that prescribes certain bodies, the other which exempts certain statutory office holders from FOI.

These two parts seek to balance various objectives. The following reflect the underlying objectives of the proposed Regulations:

- that public bodies are subject to appropriate levels of public openness and accountability;
- that there is a well-understood mechanism for people to seek access to, and amendment of, personal information held by public bodies;
- that people are provided with sufficient information to enable them to scrutinise government policies and decisions; and
- that the provision of information does not risk compromising the integrity, confidentiality and independence of the role of certain statutory office holders.

As the two parts of the proposed Regulations are quite distinct, the evaluation of the options in relation to each part is discussed separately.

# Evaluation of Options

Section 10 of the **Subordinate Legislation Act 1994** requires that a RIS consider other practicable means of achieving the desired objective besides the proposed Regulations, including regulatory and non-regulatory options, together with an assessment of costs and benefits of those options and the reasons why means other than regulation are not appropriate.

## Part 1 - Prescribed Bodies

### Base case - do not prescribe any bodies

According to the Victorian Guide to Regulation, the base case needs to be identified for comparison purposes (for example, what are the potential costs and benefits compared to the situation where the proposed approach is not adopted). For sunseting regulations, the base case is the scenario of there being no regulation.<sup>23</sup>

Therefore, the base case is not to prescribe any bodies in the regulations as being subject to the FOI Act. This means that only bodies which fall automatically within the definition of agency in the FOI Act would be subject to FOI.

#### ***Costs of allowing the current Regulations to expire***

The bodies that have been prescribed in the regulations are bodies which are considered to be part of the structure of the Victorian government.

As outlined under the 'Nature of the Problem' above, the costs of not prescribing these bodies are likely to be social costs to the public in that there would be no mechanism for seeking access to documents containing non-personal information held by those entities. This creates a gap in accountability for entities that are part of the government. It would be contrary to the government's stated policy, discussed above under 'Policy underlying the FOI Act', to maintain FOI as the primary mechanism for accessing personal and health information held by government bodies.

Without the regulations, government could lack flexibility about the way in which government bodies are established or structured. There are numerous ways to structure government bodies, with the most appropriate structure reflecting considerations other than FOI. To the extent that not prescribing any bodies would lead to concerns about information access, then FOI considerations might then begin to influence how these bodies are structured. In contrast, the regulations allow for flexibility as they allow for bodies to be prescribed, if they fit certain broad criteria, even if their structure does not automatically bring them within the definition of agency within the FOI Act. Parliament clearly contemplated allowing for this flexibility by making provision in the FOI Act for bodies to be prescribed by regulation.

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<sup>23</sup> Victorian Guide to Regulation, 2016, page 19.

## **Benefits of allowing the current Regulations to expire**

Without the regulations, bodies would not have to publish information or process FOI requests for non-personal information. The relevant bodies would still incur costs associated with providing personal and health information requested through the PDP Act and the HR Act respectively. These costs are further explored under Option One – proposed Regulations below.

## **Option One – remake the current regulations with minor modifications**

Option One (the proposed Regulations) is retain the situation under the current Freedom of Information Regulations 2009 with minor modifications. The proposed Regulations prescribe an updated list of bodies that are currently listed in the regulations. The approach of prescribing bodies in regulations is used in other Australian jurisdictions including the Commonwealth and New South Wales.<sup>24</sup>

The proposed Regulations will replace the Freedom of Information Regulations 2009 with minor modifications. Most of the amendments are to recognise that over the last ten years, a number of government bodies have ceased to exist, or have changed their name and/or structure. As a result of these changes, the proposed Regulations update the list of prescribed bodies (see Table 1).

A copy of the proposed Regulations accompanies this RIS.

Further information about each body's functions, under which Act the body operates, examples of key government accountability mechanisms to which the body is subject and the Department and Minister which has responsibility for the body is set out at Attachment 2.

Given that these bodies are effectively part of the Victorian government, it would be a serious gap in the government's accountability framework if they were not subject to FOI.

The FOI Act requires compliance by the prescribed bodies with two main requirements.

One is the requirement to make information publicly available about the agency and its operations and policies affecting the public under Part 2 of the FOI Act.

The other is the necessity to have a system in place for dealing with FOI requests. These requirements impose potential costs on the bodies which are subject to FOI. The benefits of FOI therefore accrue mainly to the public.

## **Requirement to make information available**

Part 2 of the FOI Act requires agencies to publish a range of information about their functions and operations. For example, section 7 of the FOI Act requires that the responsible Minister of each agency publish details of:

- the agency's organisation, functions and powers;
- the categories of documents in the agency's possession, procedures for obtaining access to those documents and the identity of the officer who handles requests for access; and

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<sup>24</sup> *Government Information (Public Access) Regulation 2009 (NSW); Freedom of Information (Prescribed Authorities, Principal Offices and Annual Report) Regulations 2017 (Cth).*

- the agency's relationship with outside bodies and persons.

The above information would usually be provided in the agency's annual report, or the annual report of a department which is responsible for the agency. In practice, it may also be provided on an agency's website.

Section 8 of the FOI Act requires each agency to make available (for inspection or purchase) copies of documents setting out the agency's policies and procedures for making decisions or recommendations that affect members of the public.

In the 2017-2018 reporting year, 17% of agencies provided details to OVIC about their efforts to 'implement the spirit and intention of the FOI Act'.<sup>25</sup>

The OVIC reports that 93 agencies provide reading room facilities. The need for physical reading rooms is declining with more information being stored and shared digitally.

The Assistant Treasurer gives directions under the FMA which require disclosures in the annual reports of departments and other public bodies. For example, Financial Reporting Direction (FRD) 22H Standard Disclosures in the Report of Operations (the Direction), issued by the Assistant Treasurer (previously the Minister for Finance) under the FMA sets out the requirements for public bodies in relation to disclosure of general and financial information relating to an entity's operation and performance. These overlap with some of the requirements of Part 2 of the FOI Act, particularly in reporting on the objectives, functions, powers and duties of the body and a summary of activities, the nature and range of service provision and the organisation of the body. A comparison between the requirements under the Direction and Part 2 of the FOI Act is set out at Attachment 3.

While there is a high degree of overlap between these requirements, there are some differences. One of the key differences is that the FOI Act requires that agencies annually produce an index of available documents. The Direction does not require this, but it does require an entity to produce details of any publications about itself and how those publications can be obtained.<sup>26</sup> Therefore, there may still be some overlap between the indexing requirement in the FOI Act and the publication requirement of the Direction, meaning that agencies would still have similar reporting requirements even if the proposed Regulations were not made

Most of the bodies set out at Attachment 2 are either directly or indirectly subject to the FMA and so would be required to follow the Direction. Therefore, even if they were not subject to FOI, due to the overlap between the FOI requirements and the FMA requirements, they would be required to produce a significant proportion of information that would also satisfy the requirements of the FOI Act.

Accordingly, while there may be a cost in meeting some of the requirements of Part 2 of the FOI Act, this is considered to be a low cost for the bodies that are subject to the FMA and the Direction. There could be a cost to an agency in preparing an index of documents, but it is likely that the costs involved would not be significant. Many agencies now publish information on the internet as a matter of course which allows people to search for information and reduces the need to have an index of documents. For those bodies that are not subject to the FMA, there may be some cost in meeting the publication requirements of Part 2 of the FOI Act. However, even those organisations make information available in annual reports and/or on the Internet. For example, Yooralla is not subject to the FMA, but

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<sup>25</sup> OVIC, Annual Report 2017-2018, page 62.

<sup>26</sup> Financial Reporting Direction (FRD) 22H Standard Disclosures in the Report of Operations, s 5.19

produces a financial report in accordance with the requirements of the **Corporations Act 2001** (Cth) and Australian Accounting Standards, and publishes a great deal of information on its website.<sup>27</sup> No information is available on how much the incremental costs in complying with Part 2 of the FOI Act are likely to be in these circumstances but, as discussed above, it is likely that they would not be significant.

The benefit in publishing the information required by Part 2 of the FOI Act is enhanced transparency, leading to better accountability and ability for people to participate government. For the bodies that are prescribed in the proposed Regulations, the costs of publishing information under FOI are also likely to be incremental, either because as discussed in relation to costs they are subject to the FMA, or they already publish a great deal of information about their structure and operations as a matter of course.

## Processing FOI requests

While the publication requirements under Part 2 of the FOI Act are important, the more significant costs and benefits of complying with the FOI Act lie in the processing of FOI requests. Cost estimates for agencies in this RIS are for processing of FOI requests.

### *Average cost of processing an FOI request*

There is little information available about the true costs to agencies of processing FOI requests. In addition, it would be difficult to accurately quantify these costs because:

- they vary considerably depending on the complexity of the request;
- a number of bodies prescribed in the regulations have very few, if any, FOI requests;
- there is a wide variation in the size and resources of the bodies prescribed;
- agencies vary as to whether they have full-time or part-time FOI officers, or require outside agencies to assist with FOI requests; and
- a portion of the cost of processing FOI requests is opportunity cost rather than financial cost. Opportunity cost is the cost of alternative activities forgone. Activities which cannot be undertaken or must be delayed by giving priority to FOI requests will vary depending on the body and on the situation at the time of the request. This is particularly the case where the officer processing the FOI request has other duties besides FOI. In such a case, the opportunity costs may arise where services are not able to be delivered as efficiently as usual due to the time taken to process FOI requests.

A FOI request generally necessitates time spent by officials who are:

- directly involved in handling FOI requests (such as an FOI officer, FOI support staff and supervisory staff), or
- indirectly involved with a request because it deals with documents which are prepared within their area of the body.

In some cases, it also subsequently involves officials assisting OVIC in a review of the agency's decision or preparing for hearings on an FOI application before VCAT. On average over the last 5 years in regard to decisions by prescribed bodies, there have been an annual average of 7 reviews

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<sup>27</sup> See <https://www.yooralla.com.au/>

completed by OVIC, 8 complaints finalised by OVIC and less than 1 appeal to VCAT (see Attachment 4).

There is a large variety in the complexity of FOI requests. An FOI request could involve a high volume of documents and/or legal advice to assist with the response to the request. If a request involves an appeal to VCAT, the direct and indirect costs can increase dramatically. An appeal adds legal costs and case preparation to the agency's cost depending on the complexity of the case. It is uncertain how much in legal costs would be incurred by the FOI applicant.

In the 2017-2018 reporting year, there were 15 complaints and 11 reviews to OVIC with 1 appeal lodged with VCAT for decision by prescribed bodies. Appeals to VCAT and associated costs can vary depending on the life of the VCAT appeal and if the matter goes to a hearing. A breakdown of the number of reviews by OVIC and VCAT in relation to the prescribed bodies is shown at Attachment 4. On average, 0.06% of requests were subject to an appeal to VCAT.

Even though it is difficult to fully assess the costs of processing FOI requests, it is possible to give some indicative costs. Based on data provided by agencies during OVIC's annual survey, the net average cost of an FOI request without a review/complaint with OVIC or appeal VCAT is \$372. The net costs to prescribed agencies are set out in Table 4.

Table 4 lists the total number FOI requests received for all the prescribed agencies, TAFE institutes and denominational hospitals in 2017-2018. It also lists the estimate of the staffing costs for processing the FOI requests provided by prescribed bodies. These costs are multiplied by an overhead cost multiplier of 1.75 to roughly account for the use of floor space, fixtures, information technology corporate overheads, etc.<sup>28</sup> This amount represents the direct costs to the bodies. Table 4 also includes all the fees and charges that prescribed bodies received for processing FOI requests. To calculate the estimated average net cost of processing an FOI request, the fees and charges received by agencies is subtracted from the cost to the bodies. This figure is then divided by the total number of FOI requests received to provide an estimate of the average net cost of processing an FOI request to prescribed bodies. The fees and charges received by agencies are included in the calculation because the FOI Act establishes a user charge or fee for service regime.<sup>29</sup>

Table 4 demonstrates the large variance in the costs of processing an FOI request (from a reported average of \$74 per request for denominational hospitals to \$8,699 for TAFE institutes). The costs vary depending on the nature of the organisation and type of requests they receive. The appeal to VCAT in the reporting year was against a decision made by a TAFE institute. TAFE institutes do not process as many requests which may also contribute to the costs by increasing processing time or requiring external legal advice. A breakdown of the number of requests received by the bodies in the proposed Regulations is at Attachment 5.

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<sup>28</sup> *Conducting a regulatory change measure: guide to assessing and calculating costs*, Department of Treasury and Finance

<sup>29</sup> See sections 17(2) and 22 of the FOI Act.

**Table 4: Estimated average cost of processing a FOI request without a review for prescribed bodies, 2017-2018**

Prescribed bodies	Total FOI requests received	Agency estimated staff costs with overhead cost multiplier	Fees and charges received by agencies from applicants	Estimated average processing costs for agencies without reviews <sup>^</sup>
All prescribed bodies	1,684	\$692,082	\$65,735	\$372
TAFE Institutes	17*	\$148,313	\$426	\$8,699
Denominational hospitals	1,540	\$174,169	\$59,702	\$74

\*There were 19 FOI requests but there was no data on staffing costs for two requests.

<sup>^</sup>The estimate is calculated by dividing the staffing costs minus the fees received by the number of FOI requests (to show net costs to agencies). Figures do not include the cost of a review/complaint with OVIC or appeal to VCAT. Agencies sometimes engage external providers to assist them to process FOI requests. Agencies do not report to OVIC on those expenses hence they have not been included in the cost.

The incremental cost of the proposed Regulations is equal to the cost of processing the non-personal requests as such costs would not be incurred in the absence of FOI. Based on a reported 82 non-personal FOI requests to prescribed agencies in 2017-2018, the estimated incremental cost of the proposed Regulations are set out in Table 5 below.

**Table 5: Estimated incremental cost of processing non-personal requests without a review, 2017-2018**

Prescribed bodies	Non-personal FOI requests	Percentage of FOI requests	Estimated total annual processing costs – non-personal requests
All prescribed bodies	82	5.1%	\$31,816
Denominational hospitals	55	3.6%	\$4,070
TAFE Institutes	13	6.8%	\$113,087

### ***Average fees and charges collected***

Another factor to be taken into account is that fees and charges may be recovered from the FOI applicant. The application fee at present is \$28.40. Application fees may be waived or reduced if the payment of the fee would cause hardship to the applicant.<sup>30</sup>

Agencies may also levy charges in relation to processing an FOI request as set out in the Freedom of Information (Access Charges) Regulations 2014. These charges include a:

- Charge for search time: \$21.70 per hour or part of an hour;
- Charge for supervising an FOI applicant who is inspecting documents: \$21.70 per hour (calculated per quarter hour);
- Charge for providing a black and white photocopy: 20 cents per A4 page;

<sup>30</sup> FOI Act, section 17(2B).

- Charge for making arrangements to hear or view sound or a visual image: the reasonable cost incurred by the agency in making these arrangements;
- Charge for making a written transcript of a recording available: the reasonable cost incurred by the agency in making these arrangements;
- Charge for providing a written document if information is not available in a discrete form: the reasonable costs incurred by the agency in providing the written document;
- Charge for providing an explanation of health information by a qualified health service provider: the reasonable cost incurred by the agency, not exceeding \$27.50 per quarter hour (or part thereof) or \$86.70, whichever is the lesser;
- Charge for providing an explanation of health information if the agency is not a qualified health service provider: the usual fee of the suitably qualified health service provider for a consultation of a comparable duration; and
- Charge for providing a summary of health information: reasonable cost incurred by the agency, not exceeding \$27.50 per quarter hour (or part thereof) or \$86.70, whichever is the lesser;

These charges apply to all agencies which process FOI requests and sets the maximum limit on the amount that agencies may charge an FOI applicant.

Statistics from OVIC in the 2017 - 2018 reporting period suggest that the total amount of applications fees and charges received by prescribed bodies was \$65,735.<sup>31</sup> Divided by the total number of requests in the period, this equates to an average of \$39.04 per request. This would mean approximately 1% of the cost of processing an FOI request is borne by the applicant and 99% is borne by the agency.

### **Costs to the public**

This option imposes a direct cost to the public in using FOI. As mentioned above, the current FOI application fee is \$28.40 per application and there is also a range of fees and charges which agencies may apply to FOI applications. Fees may be waived if the fees would be financial hardship on the applicant. See Table 4 for fees collected by prescribed agencies.

There is also costs on the public if a body is diverted from providing its core services to the public because it is processing FOI requests. As mentioned above, it is not easy to quantify these costs as there is no data readily available.

Aside from the fact that agencies may only charge the fees and charges set out in the *Freedom of Information (Access Charges) Regulations 2014*, there are also a number of safeguards in the FOI Act in relation to fees and charges:

- An agency may waive or reduce the application fee if payment of the fee would cause hardship to the applicant.<sup>32</sup>
- If in the agency's opinion, the charges are likely to be greater than \$50, the agency must notify the FOI applicant and inquire whether they wish to proceed with the request.
- There are mechanisms by which an applicant may seek review of charges. An FOI applicant may seek review of charges by VCAT where OVIC has certified that the matter is sufficiently important

<sup>31</sup> OVIC Annual Report 2017-2018, page 60

<sup>32</sup> FOI Act, section 17(2B).

for the Tribunal to consider.<sup>33</sup> VCAT may order that a charge be reduced or waived.<sup>34</sup> There is no information available on the number of reviews of charges conducted by VCAT each year, or on the cost of such reviews.

FOI fees and charges play a role in offsetting the costs to bodies of FOI to some degree. They are also intended to dissuade applicants from making insincere applications or from making large scale requests or embarking upon 'fishing' or research expeditions.<sup>35</sup>

### **Benefits to the public**

It is difficult to quantify the benefits to the public of having the prescribed bodies subject to FOI as these benefits are social benefits.

As discussed above, one of the key benefits of the FOI Act is to enhance government transparency and accountability. The FOI Act has a number of mechanisms which assist in achieving this. The first is that the FOI Act establishes a strong basis for bodies to disclose information. The FOI Act effectively imposes a minimum rather than a maximum right of access by stating that the Act is not intended to discourage or prevent Ministers and agencies from publishing or giving access to documents where they can properly do so or are required to do so by law.<sup>36</sup> People seeking documents through FOI do not have to give a reason for requesting documents nor do they have to demonstrate a connection to the documents. Therefore, government agencies cannot withhold documents on the basis of a person's reasons for seeking them, even if the government is concerned that the documents will be used as a basis for criticism.

The second mechanism is that government agencies must respond to FOI requests within a specified timeframe. The FOI Act requires that agencies respond to initial FOI requests within 30 days. If an agency does not respond within that time, they are deemed to have refused to grant access to the document. In such a case, the FOI applicant may apply without charge for review of the decision by VCAT. In some cases, FOI applicants may complain to OVIC.

Thirdly, the FOI Act sets out a clear framework for the disclosure of documents. This framework effectively provides that documents must be disclosed unless they fall within one of a number of exemptions or exceptions specified in the FOI Act. These exemptions and exceptions seek to balance people's right to seek access to documents with other interests.

The framework for access to documents set out in the FOI Act provides a formal and well understood means by which the public may seek government information and interact with government. If the proposed Regulations were not made, members of the public could not seek information from the prescribed bodies as they would from other government agencies.

## **Option Two – prescribe fewer agencies**

Option Two would be to exclude some bodies prescribed under the proposed Regulations (option one) so that they would not be subject to FOI. There are twelve public TAFE institutes in Victoria. They have been chosen for exclusion under this option as they have the highest processing costs for

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<sup>33</sup> FOI Act, section 50(1)(g).

<sup>34</sup> FOI Act, section 59(1).

<sup>35</sup> Hansard, Parliamentary Debates (Legislative Assembly), Second Reading speech, *Freedom of Information (Amendment) Act 1993*, volume 412, page 1738.

<sup>36</sup> See FOI Act, section 16(2).

FOI requests (an average of \$8,699 per request, see Table 4). They are also part of a sector that has a high number of private sector institutions.

TAFE institutes are established through a Governor in Council Order under the **Education Training and Reform Act 2006**. They form part of Victoria's tertiary education system, delivering vocational education and training (VET). Registered training organisations also provide VET throughout Victoria however they are private organisations and not subject to the FOI Act. Approximately 33% of the market share of enrolments are to TAFE institutions and 41% is to private registered training organisations.<sup>37</sup> The remaining enrolments are in dual sector universities (public universities that offer VET) or adult and community education which are not discussed in this document.

The **Education Training and Reform Act 2006** outlines TAFE institutes governance obligations and defines their powers, functions, and objectives. TAFE institutes are subject to the **Public Administration Act 2004** and the **Financial Management Act 1994**. They are accountable to the Minister for Training and Skills, and managed by DET.

## Costs of prescribing fewer agencies

The costs of option two are the costs of option one less the costs to TAFEs.

As discussed above, TAFE institutes are public entities, meaning they are owned and regulated by the Victorian government. They compete directly with private providers for subsidy funding from the DET. In the 2017-2018 reporting year, TAFE institutes had the highest processing costs from the prescribed bodies. This figure is most likely a result of legal costs. There was one appeal to VCAT in the reporting year against a prescribed body, specifically Melbourne Polytechnic. There were two VCAT hearings relating to the same FOI request requiring legal representation. Accordingly, VCAT appeals drastically increased the average cost of processing FOI requests for TAFE institutes. In comparison, only one other TAFE institute or prescribed body had their decision appealed to VCAT and the matter was withdrawn prior to hearing (see Attachment 4 for number of complaints, review and VCAT appeals for each prescribed body). Therefore, the costs of processing FOI requests are likely to be lower based on the previous appeal rate.

Without the proposed Regulations, the TAFE institutes would not bear these costs and could divert the funds to other services for students. However, even if the TAFE institutes were not prescribed, they would also still need to have mechanisms in place to comply with the access requirements under privacy laws. People would still be able to obtain access to their own personal information using privacy laws, however they would not be able to seek access to other types of information. According to the figures contained in the OVIC Annual Report, during the 2017-2018 and 2016-2017 reporting years, the TAFE institutes received 19 and 7 FOI requests respectively.<sup>38</sup> Of these requests, 13 of 19 were categorised as personal in 2017-2018 and 3 of 7 were categorised as non-personal in 2016-2017. If people were not able to seek access to non-personal information, this might leave a gap in the government's accountability mechanisms and this would not help meet the government's objectives.

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<sup>37</sup> Department of Education and Training, Victorian Training Market Report: 2017, page 3.

<sup>38</sup> OVIC Annual Report 2017-2018, Appendix A.

## Benefits of prescribing fewer agencies

The benefits of this option are the benefits of option one less the public benefits of prescribing TAFEs.

## Option Three – voluntary compliance as a matter of government policy

Option Three would be for bodies not automatically subject to FOI to voluntarily comply with FOI as a matter of government policy, rather than being prescribed under the regulations. This was a practice of bodies such as municipal councils, before the bodies were formally required to comply with the FOI Act.

This option would involve bodies voluntarily complying with an FOI code. Thus, they could choose whether or not to provide documents to people making access requests.

## Costs of voluntary compliance

The costs of this option are likely to be social costs to the public because fewer bodies would be subject to the FOI. These costs are difficult to quantify. Under this option, government bodies not automatically subject to the FOI Act would be able to choose whether or not to comply with FOI and there is a risk some would not comply. This could undermine the principles of government accountability and transparency for prescribed bodies which underpin FOI. For example, there would be a lack of certainty about the types of information to which people could seek access as the body would not be bound to follow the principles on release of documents which are set out in the FOI Act. Nor would they be bound to respond to people's requests for information within the timeframes set out in the FOI Act.

This option could also lead to inconsistency of practice between similar bodies and confusion and uncertainty in the minds of the public about their right to seek access to documents from these bodies, and in the bodies themselves about how they should respond to FOI requests. This was one of the key reasons why the government decided to bring local councils within the ambit of the FOI Act in 1993. Other problems with the voluntary scheme reported at the time were that:

- councils had refused some requests for information out of hand;
- where information was provided, there was no means of checking it was complete;
- there was no mechanism for appeal if people believed the information was not complete; and
- the voluntary code provided insufficient guidance to council officers about how to respond to requests.<sup>39</sup>

It may be possible to resolve this confusion with an FOI code for prescribed bodies. However it would make the FOI regime unnecessarily complicated to have most government agencies required to comply with the FOI Act and prescribed bodies comply with a separate FOI code.

While reputation effects may provide some incentive for entities to comply with a voluntary FOI code, it was reported at the time that many councils simply chose not to comply with the voluntary code.<sup>40</sup> It is likely that this would still be the case if entities were subject to a voluntary code, particularly as

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<sup>39</sup> Legal and Constitutional Committee, Report upon Freedom of Information in Victoria, November 1989, page 29.

<sup>40</sup> Ibid.

there may be a stronger incentive for bodies to withhold negative information which could cause embarrassment to the agency. All of these factors could lead to a lack of confidence in the system.

By contrast, the FOI Act is a well-settled regime for providing access to documents held by government. The FOI Act also provides a formal mechanism for review of decisions about the release of documents through a process of review by OVIC and by appeal to VCAT. These mechanisms available under the FOI Act, would not be available if the bodies were not subject to the FOI regime.

As the bodies proposed to be prescribed are effectively part of the government, it would be inconsistent that they should also not be subject to the scrutiny of FOI and not be required to release non-personal information.

## **Benefits of voluntary compliance**

The main benefit of Option Three would accrue to government bodies as they could choose whether or not to comply with FOI and the manner of compliance. This would provide flexibility to the body concerned and save on processing costs. The body would also have more flexibility about the information that they publish about their functions, activities and policies. They would not have to comply with the strict requirements of Part 2 of the FOI Act and they may not feel compelled to provide even a basic level of information. This could be particularly the case where information reflects badly on the reputation of an agency or directly affect people's lives, either professionally or personally. However, most of the bodies in question would be required to comply with the requirements of the FMA and to provide access to personal information under privacy laws. They would therefore need to have mechanisms in place to process such requests. In any case, as discussed above, the government's policy is to have FOI as the primary mechanism for access to personal information held by government entities.

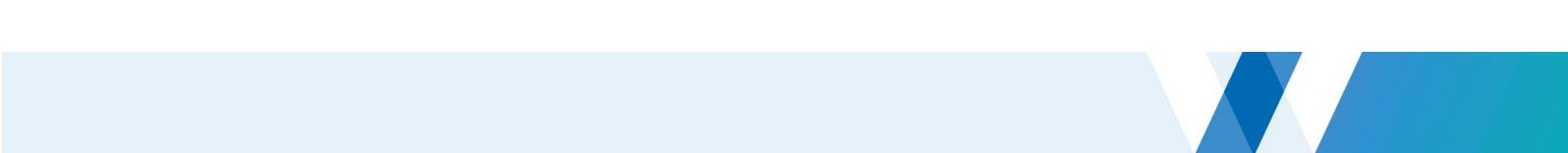
As discussed above, the DPC considers that the social costs of this option would outweigh any potential benefits to the bodies in question.

## **Preferred Option – prescribed bodies**

As discussed above, it is difficult to quantify the costs of FOI to agencies as well as the benefits of FOI to the community. Accordingly, DPC has assessed the options qualitatively against particular criteria to help explain transparently the rationale for the proposed policy approach. Analysis in relation to the bodies to be prescribed in the proposed Regulations is included in Table 6.

The analysis compares each option to the base case. The base case is not to prescribe any bodies in the regulations as being subject to the FOI Act. This means that only bodies which fall automatically within the definition of agency in the FOI Act are subject to FOI.

The criteria in the analysis were selected because they are consistent with the 'Desired Objectives' outlined above. Improved government openness and accountability is the overriding objective of FOI and therefore has the highest importance. Access to personal information is also considered to be important, but is less persuasive than government openness and accountability as privacy laws provide an alternative means to access personal information. However, as discussed elsewhere in this RIS, because it is government policy that FOI be the key mechanism by which people seek access to their personal information held by government agencies, the personal information criterion is still weighted relatively highly.



As FOI is not of itself a mechanism to increase participation in government policy and decision making, it is given a lower weighting. Compliance costs are also considered to be important, but given the nature, size and functions of the prescribed bodies, the weighting for compliance costs is moderate.

**Table 6: Analysis of options- Prescribed Bodies**

<b>Criteria</b>	<b>Base Case</b>	<b>Option 1 Proposed Regs</b>	<b>Option 2 Exclude TAFE Institutes</b>	<b>Option 3 Voluntary Compliance</b>
<b>Enhance openness &amp; accountability</b>	Public does not have mechanism to access non-personal information held by prescribed agencies.	Public has access to non-personal information held by prescribed agencies that is not exempt under the FOI Act.	Public has no access to non-personal information held by TAFE institutes.	Openness and accountability of prescribed bodies will vary depending on agency's response to requests and compliance with FOI code.
<b>Enhance citizen participation</b>	No mechanism to access to non-personal information held by prescribed agencies. Lack of mechanism to access to documents held by a prescribed body decreases citizen participation. Prescribed agencies not subject to OVIC oversight.	Citizens are able to request all personal and non-personal information held by prescribed agencies. Partial releases or refusals can be reviewed by OVIC.	No access to non-personal information held by TAFE institutes. Lack of access to documents held by TAFE institutes may decrease citizen participation. TAFE institutes not subject to OVIC oversight.	As above, scrutiny of prescribed bodies will vary depending on agency's attitude and compliance with FOI code.
<b>Provide access to personal information</b>	Mechanism to access provided under health and privacy legislation.	Access can be sought from prescribed agencies through the FOI Act.	Access can be sought under privacy legislation.	Access can be sought under health and privacy legislation.
<b>Compliance costs</b>	None.	The incremental cost of the regulations on the agencies is the cost of processing request for non-personal information.	TAFE institutes would not bear the incremental cost of processing request for non-personal information.	The incremental costs of prescribed agencies complying with an FOI code. Costs would be lower than complying with the proposed Regulations as it would be unlikely that there would be any review or appeal mechanism in a voluntary code.



In relation to the objectives of enhancing openness and accountability and citizen participation, Option One meets the objectives best as compared to the base case. This is because more bodies are subject to FOI which means that members of the public have a formal means by which they may seek access to documents containing personal and non-personal information held by those bodies. Option Two does not meet the objectives as well because that option excludes the TAFE institutes. Those organisations are public authorities and government regulated and there would be a gap in accountability if they were not subject to FOI. Option Three meets the least objectives because it would involve voluntary compliance with FOI and there would be no consistent regime for enabling the public to seek access to a range of information held by the prescribed agencies and other public bodies. It is noted that Option Three could still be beneficial relative to the base case because some of the bodies would comply even if compliance were voluntary and compliance would be encouraged.

In the absence of FOI, people may seek access to their personal information through privacy laws. However, FOI is a well settled and understood means by which people may seek access to personal information. As discussed elsewhere in this RIS, it is also government policy that FOI be the primary means of seeking access to personal information for government bodies. Therefore in relation to the objective of providing access to personal information, Option One meets the first objective well. Option Two is less favourable because people would not be able to use FOI to seek personal information from TAFE institutes. Option Three is the least favourable because the bodies may choose not to comply so people may not have the option of seeking personal information using FOI. However, they would still be able to seek personal and health information using privacy laws.

Option One imposes the highest compliance costs as more bodies would be required to process FOI requests and comply with any incremental publication requirements of Part 2 of the FOI Act. Option Two imposes lower compliance costs as the TAFE institutes would not be required to comply. Option Three imposes the lowest compliance costs as bodies could choose whether or not to comply with FOI and any code.

Option One, the proposed Regulations, is the preferred option as it meets the first three objectives. In the absence of the proposed Regulations, members of the public would have no formal means of seeking access to non-personal information held by the bodies to be prescribed under Option Two. Those bodies are effectively part of the structure of government so DPC considers it would be a serious gap in the government's governance structures if they are not subject to FOI. This is particularly the case as a number of the bodies to be prescribed make decisions that directly affect people's lives, either professionally or personally. FOI provides a mechanism to seek information about those decisions.

While there are costs to the prescribed bodies in processing FOI requests, DPC considers that these costs are outweighed by the social benefits in terms of enhanced accountability and transparency of the bodies to be prescribed.

## Part 2 – Exempt Offices

The options set out below particularly relate to the fourth 'Desired Objective' set out above, i.e. that the requirement to provide documents should not risk compromising the integrity, confidentiality and independence of the role of certain statutory offices.

Currently, the FOI Regulations 2009 exempt three bodies:

- the DPP;
- the Solicitor-General; and
- the Public Advocate.

## Base case - prescribe no offices as exempt offices

The base case is to have no exempt offices in the regulations. Without the proposed Regulations, the public would be able to request access to documents held by non-exempt offices.

The requests would result in costs to the offices which were previously exempted from FOI. The costs would be the compliance costs associated with processing FOI requests and publishing information under the FOI Act as discussed elsewhere in this RIS. It is unknown how many FOI requests each of these offices would receive if they were subject to FOI because each of these exempt offices has been exempt from FOI for at least 20 years. However, there are bodies listed below who are subject to the FOI Act that may act as an indication of the number of requests that exempt bodies would receive.

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### Solicitor-General

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The Legal Services Board and Commissioner (LSBC) has been chose for comparison as it deals with complaints about legal practitioners. The LSBC reported eight personal and zero non-personal request in the 2017-2018 reporting year, as well as two complaints resolved informally by OVIC.

If it is assumed that:

- the Solicitor-General would receive the same number of FOI requests as the Legal Services Board and Commissioner (i.e. eight requests);
- average requests cost of \$372 per request; and

then:

- the total annual costs of processing of FOI requests for previously exempt offices would be \$2,976 in addition to the cost of responding to reviews with OVIC or VCAT.

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### Director of Public Prosecutions

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The Office of Public Prosecutions has been chose as its work is related to the work for the DPP. reported receiving 32 personal and two non-personal request in the 2017-2018 reporting year.

If it is assumed that:

- the DPP would receive the same number of FOI requests as the Office of Public Prosecutions;
- average requests cost of \$372 per request; and

then:

the total annual costs of processing of FOI requests for previously exempt offices would be \$12,648 in addition to the cost of responding to reviews with OVIC or VCAT.

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### Office of the Public Advocate

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The Victorian Institute of Forensic Mental Health (the Institute) has been chose for comparison as it

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provides mental health care across Victoria. The Institute reported receiving 62 personal and zero non-personal request in the 2017-2018 reporting year.

If it is assumed that:

- the OPA would receive the same number of FOI requests as the Victorian Institute of Forensic Mental Health;
- average requests cost of \$372 per request; and

then:

the total annual costs of processing of FOI requests for previously exempt offices would be \$23,064 in addition to the cost of responding to reviews with OVIC or VCAT.

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These estimates provide a guide for the potential staffing costs to these agencies if they were not exempted in the proposed Regulations noting that the cost of processing FOI requests vary greatly. These costs do not account for any direct or indirect costs to the agency responding to the reviews by OVIC or any VCAT appeals which would increase costs further.

These figures are estimates only and there are several other factors which should be considered. For example, the Solicitor-General has particularly limited staff resources, therefore the impact on the functions of her office and compliance costs in responding to any FOI requests are potentially significant. The cost impacts of complying with FOI may not be as great for the DPP who could potentially utilise the services of the OPP to process FOI applications.

Costs are likely to be most significant in the case of the Public Advocate. Given the difficult circumstances in which the Public Advocate operates, which are described under Option One below, it is likely that a significant proportion of requests would be more complex requests which would have a significant impact on the Public Advocate's functions. It is therefore likely that the estimate of costs above significantly understates the potential cost impact of FOI on the Public Advocate.

This option is likely to impose a social cost in that requiring the prescribed bodies to comply with FOI would impede those bodies in the performance of their statutory offices. This is further explored in relation to Option One below.

## Option One – proposed regulations - retain the current exemptions

Option One is to retain the exemptions in the existing regulations. The three offices which are exempted under this option each continue to have unique roles within the Victorian government which the DPC considers justify a continued exemption from FOI.

### Nature of office to be exempted

#### ***Director of Public Prosecutions (DPP)***

The DPP is an independent statutory officer appointed by the Governor in Council. The DPP conducts proceedings on behalf of the State of Victoria (also known as the 'Crown') in the High Court, the Supreme Court and the County Court in relation to serious crimes committed in Victoria. The DPP also conducts committal proceedings in the Magistrates' Court, assists the Coroner with inquests and may appeal against sentences in certain circumstances. The DPP's primary role is to decide whether

or not to prosecute an individual who is accused of serious crimes in Victoria. This can also involve other decisions, such as a decision to stop prosecuting or a decision to consider indemnity from prosecution.

The DPP makes decisions about whether or not to prosecute following nationally agreed guidelines. In making those decisions, the DPP considers the prospect of a conviction, interests of victims, the suspected offender and the public interest. He or she must also have regard to considerations of justice and fairness, as well as the need to conduct prosecutions in an effective and efficient manner.<sup>41</sup>

The office of the DPP is currently exempt from FOI under the current Regulations, and has been exempt from FOI since 1987.

However, the OPP, which works for the DPP, is not exempt from FOI. The OPP is an independent statutory authority responsible for preparing and conducting criminal prosecutions. The OPP comprises the Solicitor for Public Prosecutions and a staff of solicitors, legal executives and legal support and administrative staff. The OPP is a separate statutory entity from the DPP.

The DPP and the OPP have different functions. The fundamental difference is that the DPP makes the decision whether or not to prosecute in a particular case, and the OPP conducts the prosecution of the case, acting on the DPP's behalf. The relationship between the DPP and the OPP is effectively a solicitor-client relationship where the DPP is the OPP's only client. This is a unique situation within the Victorian government.

While the DPP may seek the OPP's advice in making a prosecution decision, the prosecution decision remains with the DPP. The nature of the DPP's role is such that he or she should be able to make decisions about whether or not to prosecute a case, freely, independently and without perception of interference.

Under the current circumstances, if people wish to seek documents under FOI about the conduct of a case, they may request that information from the OPP. However, documents relating to the DPP's decision whether or not to prosecute would be exempt.

### ***Solicitor-General***

The Solicitor-General is a barrister, who as a Special Counsel of the Victorian Bar has been appointed under statute to act as an independent counsel to the Victorian government.<sup>42</sup> He or she advises the government on matters of law and appears for the Crown in significant and important court cases. For example, he or she represents the State in important constitutional cases in the High Court of Australia and other superior courts and provides legal advice to the government on matters involving constitutional law, administrative law and on matters of public interest to Victoria. During the period of his or her tenure, the Solicitor-General is retained exclusively by the State and is prohibited from engaging in legal practice except in the exercise of the functions of the office. He or she has a duty to protect confidences of the Crown and cannot act inconsistently with privileges asserted by the Executive Government. The Solicitor-General may be removed from office by the Governor in Council.

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<sup>41</sup> See Annual Report 2017-18, Director of Public Prosecutions, Office of Public Prosecutions, Committee for Public Prosecutions, page 2.

<sup>42</sup> See *Attorney-General and Solicitor-General Act 1972*.

The Solicitor-General plays a unique role as the principal legal adviser to the government. His or her office is independent and he or she is not subject to Ministerial direction.

Virtually all of the Solicitor-General's work (except for minimal administrative duties) is either:

- for the purposes of providing legal advice to the government, or preparing for litigation representing the government, and therefore subject to legal professional privilege; or
- prepared for the consideration of Cabinet, such that disclosure of documents would undermine the confidentiality of Cabinet deliberations, and are therefore subject to Executive privilege.

The Solicitor-General could not ordinarily disclose the documents going in and out of his or her office because of an obligation to maintain the privileges and confidences of the client. The exemption avoids the use of resources responding to requests that would likely be rejected.

The office of Solicitor-General has been exempt from FOI since 1986.

### ***Office of the Public Advocate***

The office of the Public Advocate is established under section 14 of the **Guardianship and Administration Act 1986**. The Public Advocate also has responsibilities under a number of other Victorian Acts, including the **Medical Treatment Act 1988**, **Mental Health Act 1988**, **Health Services Act 1988**, **Supported Residential Services (Private Proprietors) Act 2010** and **Disability Act 2006**.

The Public Advocate has been exempt from FOI since 1987.

The role of the Public Advocate is to support actions and services that promote the rights of people with disabilities and protect them from exploitation and abuse. The duties of the Public Advocate include:

- Community based programs, consisting of:
  - the Community Visitors Program which involves the co-ordination of officially appointed volunteers who visit services established under the **Mental Health Act 1988**, **Health Services Act 1988** and the **Disability Act 2006**
  - the Independent Third Person Program which provides independent persons to assist individuals who have a cognitive or communication disability with being interviewed by the police; and
  - the Community Guardianship Program which provides for volunteers to be delegated the power of guardianship by the Public Advocate, instead an employee
- The Advocate Guardianship Program which provides advocacy and guardianship for people with a disability, as well as being involved in investigations and participating in proceedings at VCAT. The Public Advocate may be appointed by VCAT as a guardian or alternative guardian. The Public Advocate receives various notices, certificates and reports relating to people with disabilities, for example, notices regarding the provision of medical or dental treatment when a person is unable to provide consent and there is no substitute decision maker. Upon receipt of these notices, the Public Advocate monitors compliance with legislative requirements and where appropriate initiates further involvement in the relevant cases. The Public Advocate deals with various applications, including applications for guardianship, administration, enduring powers of attorney and consent to medical treatment and medical research procedures.



The functions and duties of the Public Advocate are carried out by the Public Advocate as well as by staff of the administrative unit, known as the Office of the Public Advocate (OPA), which is run by and set up to support the Public Advocate.

Before taking office, the Public Advocate and any Acting Public Advocate must take an oath or make an affirmation administered by the Speaker of the Legislative Assembly that they will faithfully and impartially perform the duties of the office and will not divulge information obtained under the **Guardianship and Administration Act 1986**, except in accordance with that Act.<sup>38</sup> Thus, the Public Advocate has an obligation of confidentiality imposed on the office.

The Public Advocate is a unique statutory office in that he or she frequently has an on-going relationship with the members of the public and their families when acting in the role of guardian. Unlike other statutory office holders, the Public Advocate's role is a partisan one which involves acting in the best interests of a person with a disability. The Public Advocate is often called upon to act in circumstances involving extremely complex and difficult situations of family conflict. These can involve situations where for example, one family member is in conflict with another about the care of a relative under a guardianship order, or where family members confide information to the Public Advocate about other family members which if disclosed could damage family relationships.

## Costs of Option One

The key costs of prescribing these offices as exempt are the costs of complying with the FOI Act and social costs as the public would not be able to seek documents from these offices through FOI.

### ***Solicitor-General and DPP***

In the case of the Solicitor-General and the DPP, the cost to the public is likely to be minimal as the majority of documents produced by these offices relate to legal advice and would be covered by the legal professional privilege exemption in the FOI Act. Advice provided by the OPP to the DPP would be subject to FOI in the hands of the OPP, but would generally also be covered by the legal professional privilege exemption. Much of the Solicitor-General's work would also be covered by Cabinet confidentiality. It is not possible to place an exact figure on the number of documents that would be subject to existing FOI exemptions, but given the nature of the functions of the DPP and the Solicitor-General, it is likely to be upwards of 90 – 95%.

The kinds of documents held by the DPP or Solicitor-General that may not be accessible in the absence of FOI would be documents of an administrative nature. As the Solicitor-General is a statutory office holder under the Department of Justice and Community Safety's portfolio, it is envisaged that if people wished to obtain information about some administrative functions associated with the Solicitor-General's office could seek information from the Department of Justice and Community Safety.

If people wished to obtain information about the administrative functions associated with the DPP, they may be able to seek some information from the OPP. In addition, the DPP is required to publish an Annual Report, which is tabled in Parliament and which sets out financial information. It is therefore considered that the impact of the exemption would be minimal in relation to such documents.

The DPP also has a policy that it will released reasons for discretionary prosecution decisions to affected parties if it does not interfere with a current investigation, put any party at risk or share

confidential information.<sup>43</sup> Given this policy, the cost to the wider public of exempting the DPP from the FOI Act is minimised as reasons may be provided to those individuals directly affected by a prosecution decision.

### ***Public Advocate***

If FOI applied to the Public Advocate, it is likely that a significant proportion of documents held by the Public Advocate would be exempt from FOI under the personal affairs exemption in the FOI Act (section 33), or due to the Public Advocate's obligations of confidentiality (which may exempt some documents under section 38 of the FOI Act). Therefore, it is likely that the costs to the public of a continued exemption for the Public Advocate would not be significant. However, there would be costs to the Public Advocate processing the request and confirming that documents were exempt. DPC considers these costs outweigh the likely minimal benefit to the public of having the Public Advocate subject to FOI.

In addition, people may be able to seek some information held by the Public Advocate from other bodies. For example, documents relating to VCAT matters are held by VCAT and where appropriate individuals (or their legal representatives) may be permitted to access records on VCAT's files. Certain documents may also be sought from the Department of Justice and Community Safety, such as information about the OPA's corporate services. In terms of accountability, the Public Advocate reports to Parliament each year and sets out the office's financial statements.

## **Benefits of Option One**

As discussed above, the FOI Act recognises that there are certain other public interests, which must be balanced against the disclosure of information under the FOI Act. This is recognised in the kinds of bodies, functions and types of documents which are excluded or exempted from FOI.

### ***Solicitor-General and DPP***

The main benefit of prescribing the DPP and the Solicitor-General as exempt offices is the public interest in the maintenance of absolute integrity, impartiality and independence in the performance of their duties.

The exercise of the DPP's discretion about whether or not to prosecute an individual forms an important part of the criminal justice system. DPC considers it to be in the public interest for the DPP to be able to make decisions about prosecutions without interference or any perception of interference, based on the evidence before him or her. To be able to make these decisions, it is important that the DPP retains a strong level of independence around the exercise of his or her discretion. Historically, the justification for not sharing reasons for prosecution decisions is due to the possibility that there would be a risk of an injustice by infringing the rights to the accused and witnesses. If a decision is legally technical in nature, the information may be misinterpreted by the public. In terms of accountability, the decisions of the DPP are properly tested by the legal system, as cases are run and evidence is tested in court. As mentioned above, the OPP is not exempt from FOI and people may seek information about the running of cases from the OPP. The DPP is required to prepare an Annual Report on his or her operations which is tabled in Parliament. As stated above, the DPP also has a policy of sharing reasons for prosecutorial decision with affected individuals if they

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<sup>43</sup> Director of Public Prosecutions, Policy of the Director of Public Prosecutions for Victoria, available at: <http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>.

are able. The DPP may be removed from office by the Governor in Council upon a resolution of both Houses of Parliament.

The Solicitor-General is the second most senior law officer in Victoria (second only to the Attorney-General). He or she may be removed from office by the Governor in Council. DPC considers that it is in the public interest that the Solicitor-General is free to provide advice to government about often highly sensitive and contentious issues and to preserve the strict level of confidentiality as is required by that office.

Neither the Solicitor-General nor the DPP are subject to the **Public Administration Act 2004** as are most other statutory office holders. That Act sets out a framework for governance in the Victorian public sector and in public administration generally in Victoria. The exemption of the Solicitor-General and DPP from the **Public Administration Act 2004** is a further recognition by government of the unique position of the Solicitor-General and the DPP within the government framework.

### **Public Advocate**

It is important that people providing information to the Public Advocate feel that their confidentiality will be protected. Even though existing exemptions in the FOI Act may protect much information from disclosure, people may not understand this and may be unwilling to provide information if they fear that it will be disclosed. The mere fact of making the Public Advocate subject to FOI may impair the Public Advocate's ability to obtain information in relation to persons with disabilities, because people may be too concerned about the possible release of information under FOI. This would seriously inhibit the Public Advocate in the exercise of his or her functions. Maintaining the FOI exemption for the Public Advocate recognises that there is a strong public interest in protecting vulnerable people. It is also consistent with the oath of affirmation of confidentiality which the Public Advocate is required to take upon taking up office.

## Option Two – exempt additional bodies

Option Two is to remake the expiring regulations and add additional exemptions.

The following offices have previously been exempt from FOI:

- the Victorian Ombudsman;
- the Essential Services Commissioner;
- the Legal Services Board and Commissioner; and
- the Electoral Commissioner.

These offices were not included as exempt offices in the *Freedom of Information Regulations 2009* because it was considered they no longer met the threshold for exemption for various reasons.

The reduction in the number of exempt statutory offices accords with the underlying philosophy of FOI that there should generally be a greater level of access to government information unless the statutory office holder has a unique function that justifies a blanket exemption from FOI.

Since the 2009 regulations, a number of new statutory office holders had been created, such as the Independent Broad-based Anti-corruption Commission (IBAC), the Health Complaints Commissioner (formerly the Health Services Commissioner) and Mental Health Complaints Commissioner who, like

the Ombudsman and the other office holders, also have regulatory, investigative and complaint handling functions but would be subject to FOI.

The Public Interest Monitor was also established after the making of the current regulations however it is not discussed in this option as their legislation exempts the body from the FOI Act.<sup>44</sup>

A statutory office should generally not have a blanket exemption from FOI, unless this can be justified by the nature of the statutory office's role.

Under this option, the expiring regulations would be remade so that all or some of these offices would regain their exempt status under FOI. This option includes exempting the three currently exempt office holders as well as:

- the Essential Services Commissioner;
- the Legal Services Board and Commissioner;
- the Electoral Commissioner;
- the IBAC Commissioner;
- the Victorian Ombudsman;
- the Local Government Inspectorate;
- the Health Complaints Commissioner; and
- the Mental Health Complaints Commissioner.

## Nature of the offices

The Solicitor-General, DPP and Public Advocate have been discussed above. The other offices which would become exempted under this option are discussed below.

### ***The Essential Services Commissioner***

The Essential Services Commission was established by the **Essential Services Commission Act 2001** and replaced the Regulator-General, who had previously been exempt from FOI.

The Essential Services Commission is Victoria's independent economic regulator of essential services supplied by a number of industries, including electricity, gas and water. The Essential Services Commission is subject to FOI. The **Essential Services Commission Act 2001** states that the Essential Services Commission must not release documents that is exempt under the FOI Act. This suggests Parliament's intention was that the Essential Services Commissioner would be subject to FOI.

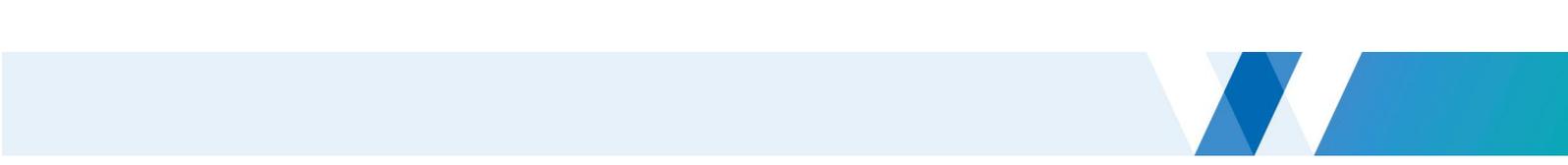
### ***Legal Services Board and Commissioner***

The Legal Services Board and Commissioner was established in 2005 by the **Legal Profession Uniform Law Application Act 2014**.

The Legal Services Board Commissioner is now responsible for the receipt, investigation and resolution of complaints about lawyers. He or she also has an educative role, which includes educating the legal profession and the public.

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<sup>44</sup> *Public Interest Monitor Act 2011*, section 18.



The Legal Services Commissioner is also the Chief Executive officer of the Legal Services Board. The Legal Services Board issues and renews legal practising certificates and maintains registers of legal practitioners and disciplinary action.

The Legal Services Board and Commissioner are subject to FOI under section 5 of the **Legal Profession Uniform Law Application Act 2014**.

### ***Electoral Commissioner***

The Electoral Commissioner manages the conduct of Victorian State elections, local council elections and certain statutory elections. The Electoral Commissioner is the sole member of the Victorian Electoral Commission which was established by the **Electoral Act 2002**. The **Electoral Act 2002** provides clear guidelines for the release of information relating to electors. Therefore, the Victorian Electoral Commission is subject to FOI.

### ***Victorian Ombudsman***

The Ombudsman of Victoria is an independent officer of the Victorian Parliament who investigates complaints from the public about the administrative actions and decisions taken by government departments, statutory bodies or by officers and employees of municipal councils. As discussed elsewhere in this RIS, the Ombudsman has a role in investigating complaints in relation to FOI. The Ombudsman has broad powers to conduct investigations under the **Ombudsman Act 1973**.

The Ombudsman was exempted from FOI in 1998 on the basis that he or she required a high level of confidentiality to properly conduct investigations and carry out his or her role. This remains the case and in 2001, the **Ombudsman Act 1973** was amended to exempt certain documents in the possession of the Ombudsman or his or her staff from FOI. This exemption includes documents that would disclose information that relate to a complaint, an inquiry made under Part 3A of the **Ombudsman Act 1973**, or an investigation, recommendation or report made under Part 4 of that Act. The nature of this section suggests that the Victorian Ombudsman is not to be broadly exempt from the FOI Act and the cost of processing any FOI requests would be low.

### ***The Independent Broad-based Anti-corruption Commission (IBAC)***

IBAC was established under the **Independent Broad-based Anti-corruption Commission Act 2011** (IBAC Act) and began operations in the following year. IBAC is headed by a Commissioner. The Commissioner is an independent officer of the Victorian Parliament that investigates complaints about public sector corruptions and police misconduct.

Similarly to the Victorian Ombudsman, the IBAC Act provides for an exemption of certain documents from FOI. This includes but it is not limited to a complaint, an investigation, a recommendation, and a draft or final report. Therefore, an exemption is not justified.

### ***Local Government Inspectorate***

The Local Government Inspectorate is the dedicated integrity agency for local government in Victoria.

The Inspectorate investigates offences under the **Local Government Act 1989** and monitors governance in Victorian councils.

It is subject to FOI and handled one request in the reporting year 2017-2018. Given the low number of requests and consequently lose cost of FOI to the agency, it does not justify an exemption from the FOI Act.

### ***Health Complaints Commissioner***

The Health Complaints Commissioner was established under the **Health Complaints Act 2016**, replacing the Health Services Commissioner. It is an independent officeholder who works to resolving complaints about health care providers and the handling of health information.

The Health Complaints Commissioner received nine FOI request in the 2017-2018 reporting year.

### ***Mental Health Complaints Commissioner***

The Mental Health complaints Commissioner was established under the **Mental Health Act 2014**. It is an independent body which aims to resolves complaints about public mental health services and recommends improvements. The **Mental Health Act 2014** exempts specific documents from the FOI Act suggesting that it was not the intention that the Mental Health Complaints Commissioner should not be fully exempt from the FOI Act.

## **Costs of Option Two**

The cost of exempting each of the above offices would be social costs in that members of the public would not be able to seek documents from these offices under FOI. While the functions of these offices have not fundamentally changed from the time they were exempt, there is a trend towards greater government openness and accountability. On this basis, it is difficult to justify an expansion of the exemptions from FOI for the bodies listed above.

This contrasts with the Solicitor-General, the DPP and the Public Advocate which continue to have unique roles within the structure of the government (as outlined above).

While IBAC and the Ombudsman also have an investigative and complaint handling role, the breadth of their powers place their offices in a unique position. This was recognised by introducing a specific FOI exemption for certain documents held by the Commissioner in the **Independent Broad-based Anti-corruption Commission Act 2011** and the Ombudsman in the **Ombudsman Act 1973**. That exemption also extends to documents held by the Commissioner's and Ombudsman's staff, so in that sense it is broader than an exemption under the FOI regulations which relates only to an individual office holder.

## **Benefits of Option Two**

The benefits of this option would accrue to the offices as they would not be required to comply with FOI. However, the DPC considers that the social costs of this option would outweigh the benefits.

## **Option Three – partial exemption(s)**

Under this option, offices would be subject to a partial exemption from FOI with respect to the exercise of particular functions. The power to make the proposed Regulations under the FOI Act would support a partial exemption of offices in the FOI regulations.

In New South Wales a legislative approach (and not by way of regulations) has been adopted, where the FOI legislation exempts the information of several agencies, including:

- the office of Director of Public Prosecutions in relation to prosecuting functions;
- the NSW Trustee and Guardian in relation to functions exercised as executor, administrator or trustee;
- the office of Ombudsman in relation to complaint handling, investigative and reporting functions;
- the Legal Services Commissioner in relation to complaint handling, investigative and review functions; and
- the office of Privacy Commissioner in relation to complaint handling, investigative and review functions.<sup>45</sup>

The New South Wales approach is similar to the approach taken to the certain documents held by the Victorian IBAC Commissioner in the **Independent Broad-based Anti-corruption Commission Act 2011**<sup>46</sup> and the Victorian Ombudsman in the **Ombudsman Act 1973**<sup>47</sup>.

Under this options, the public would be able to seek access to documents held by these offices, apart from the documents specified in the exemption

## Costs of partial exemptions

The costs of this option, relative to the base case of no regulations, are social costs related to the extent to which bodies are exempt from the FOI. The public would not be able to access non-personal information that is covered by the partial exemption. The types of documents that would be covered by the partial exemption are those which would likely be covered by an exemption under the FOI Act as well. Therefore, the true social cost would be limited by the FOI Act exemptions.

It is considered that adopting an approach such as in New South Wales, where a greater number of bodies have partial exemptions from FOI, would impose a higher social cost than the proposed Regulations, where only three unique offices would be exempt. The exemptions under the New South Wales approach are broadly expressed and may create uncertainty as to the types of documents which are exempt or not exempt. While exemptions could be cast more narrowly, a full exemption provides each office with more certainty and therefore assists in protecting the confidentiality, integrity and independence of each role.

## Benefits of partial exemptions

The benefits of this option, relative to the base case of no regulations, are reductions in costs to agencies with partial exemptions from FOI. A partial exemption may reduce the number of FOI requests that partially exempt bodies would receive under the base case. This would result in lower total costs to agencies in processing FOI requests. If the exemptions were clear, they would also provide more certainty for agencies because they would not need to individually assess every documents under the exemptions under the FOI Act.

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<sup>45</sup> *Government Information (Public Access) Act 2009 (NSW)* section 19 and Schedule 2.

<sup>46</sup> Section 194 *IBAC Act 2011*

<sup>47</sup> Section 29A *Ombudsman Act 1973*



As discussed in relation to Option Two above, the Victorian Ombudsman, together with the staff of the office of the Ombudsman, have a partial exemption from FOI. That exemption is more specific than exemptions in New South Wales discussed above. The Ombudsman has wide-ranging and broad powers to investigate administrative actions taken by government bodies. By comparison, the proposed exempt offices have functions that are by their nature more narrowly focussed and lend themselves more readily to a full exemption. DPC considers that exempting the offices themselves provides more certainty to the office holder.

## Preferred Option - exempt offices

As for the preferred option for the prescribed bodies, DPC has assessed the options qualitatively against the stated criteria to model the rationale for the proposed policy approach. A comparison of the options against the criteria is at Table 7.

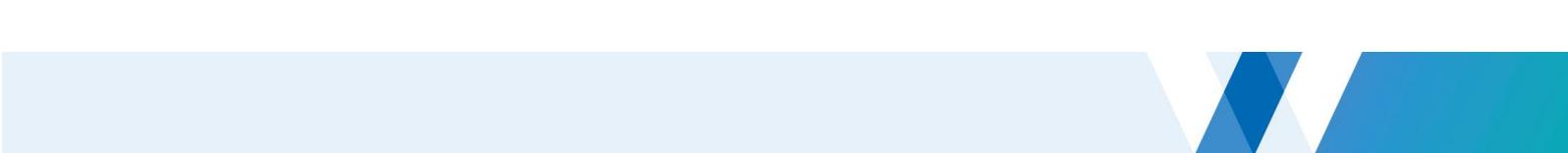
The criteria below were selected because they are consistent with the 'Desired Objectives' outlined above, and in particular seek to balance government openness and accountability with the effective functioning, integrity and independence of particular offices. While still important, DPC considers that compliance costs are less important than the other two objectives in relation to statutory office holders, therefore compliance costs are given a moderate rating.

The base case is the situation of no regulation, which means that no exemptions would apply, with the options compared to the base case. Under the base case, statutory office holders would be subject to FOI.

In relation to the objective of enhancing the independence and integrity of the office holders, Options One and Two are the same because they both exempt a number of offices from FOI. Although there are more exempt offices under Option Two, it is arguable that not all of these exemptions are necessary. Therefore, the relative effectiveness of the two options in achieving this objective is similar. Option Three is less effective because the offices would need to comply with FOI except in relation to specific exemptions.

In relation to the objective of enhancing openness and accountability, the partial exemptions from FOI under Option Three would allow people to seek access to non-exempt documents, but to a lesser extent than under the base case, assuming that the partial exemptions were drafted more broadly than existing exemptions in the FOI Act. Option Two does not meet this because it results in the most number of offices being exempt from FOI. Option One, the proposed Regulations, meets this objective better because fewer statutory offices would have a complete exemption from FOI.

Compliance costs reflect costs to office holders in complying with FOI. Option Two has the lowest compliance costs as there are more exempt offices under that option and hence more offices which would have lower costs as they would not be required to comply with FOI. Therefore the compliance costs of this option would be lower than for the other options. Option One, the proposed Regulations, has the second lowest compliance costs as there are fewer exempt offices than under Option Two. Option Three has higher compliance costs as compared to the other options because the offices would be required to process FOI requests in accordance with partial exemptions. This would still involve some cost as the office would be required to assess the FOI request to see if the exemption applies. However, this cost is likely to be less than the base case assuming that partial exemptions were more broadly drafted than existing exemptions in the FOI Act.



According to this analysis, Option One, the proposed Regulations, is the preferred option with the next best option being Option Three. The functions of the offices to be prescribed as exempt are such that it is important that the holder of that office can exercise his or her functions without interference or perceptions of interference. In the case of the Public Advocate, there is also a strong public interest in ensuring that a vulnerable group in society is adequately protected.

**Table 7: Analysis of options- Exempt Offices**

<b>Criteria</b>	<b>Base Case</b>	<b>Option 1 Proposed Regs</b>	<b>Option 2 Exempt Additional Bodies</b>	<b>Option 3 Partial Exemptions</b>
<b>Enhance the independence and integrity of the office</b>	Office holders must use resources to process FOI requests with most documents likely being exempt under the FOI Act.	Independence of exempt bodies would be enhanced.	Independence of exempt bodies would be enhanced.	Independence of exempt bodies is slightly increased.
<b>Enhance openness and accountability</b>	Office holders would be required to release documents not exempt under the FOI Act.	Only information required to be shared under other accountability mechanisms will be shared.	The threshold for an exempt body under the FOI Act is lower under this option therefore openness and accountability is reduced. With more bodies exempt, there is less openness across more bodies.	Documents not covered by the partial exemption and current exemptions under the FOI Act may be requested and released.
<b>Compliance costs</b>	High compliance costs in processing FOI requests	Lower as exempt bodies do not need to process FOI requests.	Lowest as more exempt bodies do not need to process FOI requests.	Compliance costs are higher as agencies may need to prove a partial exemption is applicable to a request.

## Part 3 – Referral Powers

Regulations 8 and 9 of the proposed Regulations prescribe, in Schedule 2, eight bodies that the Information Commissioner (and Public Access Deputy Commissioner) can refer complaints or reviews under sections 49O(5) and 61L(8) of the FOI Act. Sections 49O(5) and 61L(8) of the FOI Act allow the Information Commissioner to refer a review or a complaint to a relevant authority (person or body) if an issue is identified as being part of that authority’s jurisdiction.

Prescribing the persons and bodies in the proposed Regulations clearly identifies the relevant persons and bodies to whom the Information Commissioner can refer a review or complaint matter should the subject matter relate to the jurisdiction of another relevant person or body without obliging the initial correspondent to rethink his or her request or complaint.

There have not been any issues identified in the operation of the FOI Regulations 2009 in regards to the referral powers nor the prescription of persons or bodies for the purposes of sections 49O(5) and 61L(8). There is little data about the costs expended in the exercise of these powers by OVIC. OVIC made no referrals to any of the prescribed persons or bodies in 2017-2018.

The list of relevant persons or bodies in Schedule 2 is substantially unchanged from the current Regulations except for the removal of two bodies that have been amalgamated or disbanded. The table below compares the relevant schedule in the current FOI Regulations 2009 and the proposed Regulations. The Commissioner for Law Enforcement Data Security has been removed as the body merged with the Privacy Commissioner, who no longer exists. The Privacy Commissioner has also been removed as it was amalgamated with the Information Commissioner, forming OVIC in September 2017. Outdated constituting legislation references of the persons or bodies have also been updated in the proposed Regulations (i.e. Chief Commissioner of Police and the Health Complaints Commissioner).

**Table 8: Comparison of prescribed persons or bodies under the FOI Regulations 2009 and FOI Regulations 2019**

	FOI Regulations 2009	FOI Regulations 2019
Prescribed persons or bodies	Auditor-General appointed under section 94A of the <b>Constitution Act 1975</b>	Auditor-General appointed under section 94A of the <b>Constitution Act 1975</b>
	Chief Commissioner of Police appointed under section 4 of the <b>Police Regulation Act 1958</b>	Chief Commissioner of Police appointed under section 17 of the <b>Victoria Police Act 2013</b>
	Commissioner for Law Enforcement Data Security appointed under Part 2 of the <b>Commissioner for Law Enforcement Data Security Act 2005</b>	Health Complaints Commissioner appointed under section 111 of the <b>Health Complaints Act 2016</b>
	Health Services Commissioner appointed under section 5 of the	The Independent Broad-based Anti-corruption Commission established under section 6 of the <b>Independent Broad-based</b>

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**Health Services (Conciliation and Review) Act 1987**

The Independent Broad-based Anti-corruption Commission established under section 6 of the **Independent Broad-based Anti-corruption Commission Act 2011**

Ombudsman appointed under section 3 of the **Ombudsman Act 1973**

Privacy Commissioner appointed under section 50 of the **Information Privacy Act 2000**

Racing Integrity Commissioner appointed under section 37A of the **Racing Act 1958**

Road Safety Camera Commissioner appointed under section 5 of the **Road Safety Camera Commissioner Act 2011**

Victorian Inspectorate established under section 6 of the **Victorian Inspectorate Act 2011**

**Anti-corruption Commission Act 2011**

Ombudsman appointed under section 3 of the **Ombudsman Act 1973**

Racing Integrity Commissioner appointed under section 37A of the **Racing Act 1958**

Road Safety Camera Commissioner appointed under section 5 of the **Road Safety Camera Commissioner Act 2011**

Victorian Inspectorate established under section 6 of the **Victorian Inspectorate Act 2011**

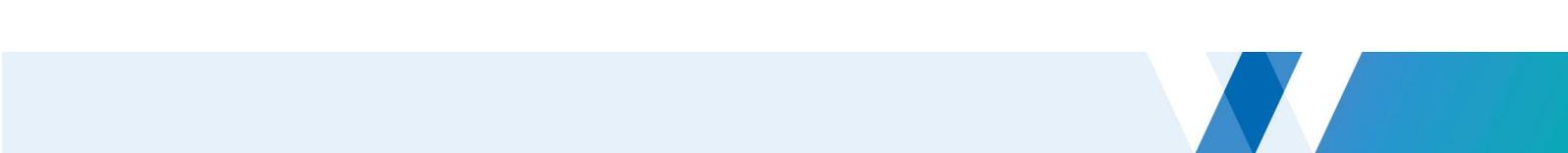
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The Information Commissioner's referral powers are not analysed extensively in this RIS as they do not create a burden on Victorians or the prescribed persons or bodies. Matters or parts of matters are only referred by the Information Commissioner if the matter is outside OVIC's jurisdiction. For example, where the subject matter of the complaint is relevant to the jurisdiction of a prescribed person or body (i.e. the performance of the duties and functions or the exercise of powers). Often, complaints and review requests made to OVIC can raise concerns that go beyond the operation of the FOI Act and the processing of an FOI request.

Several of the prescribed persons or bodies have similar powers to refer relevant matters to OVIC should the matter relate to the jurisdiction of the Information Commissioner.<sup>48</sup> These referral powers support Victorians in ensuring that their matters are directed to and dealt with by the appropriate agency. Without such powers, members of the public would be required to make a second or multiple identical review requests or complaints to the relevant agency which can seem unnecessarily burdensome, time delaying and bureaucratic. These referral powers promote the better access to oversight mechanisms by the public and do not create any additional burden on the prescribed

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<sup>48</sup> For example, the Ombudsman – see section 16I *Ombudsman Act 1973*.



bodies. Given the low but beneficial impact of these referrals powers, DPC did not consider that they needed to be discussed extensively in the RIS.

## Competition Assessment

The *Victorian Guide to Regulation* states that as a matter of good public policy, it is a fundamental principle that new regulations do not restrict competition, unless it can be demonstrated that:

- the benefits of the restriction, as a whole, outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

The *National Competition Principles Agreement* requires an assessment of whether any new primary or subordinate legislation will have an effect on competition. The analysis must demonstrate that the objectives of the legislation can only be achieved by restricting competition and the benefits outweigh the costs of the preferred option.

### Will the preferred option restrict competition?

As a starting point, it is important to note that FOI is a service provided by government. It does not apply to documents held by private sector organisations. Most of the prescribed authorities and each of the exempt offices which are proposed to be prescribed in the proposed Regulations are part of the fabric of government and do not supply goods or services in a commercial context.

Denominational hospitals are religious charitable bodies which provide public hospital services to public patients free of charge in the same way as public hospitals under the **Health Services Act 1988**. Both denominational hospitals and public hospitals are highly regulated and operate in a similar environment. Denominational hospitals do not compete with private hospitals in a commercial environment.

## The Preferred Option and its Effect

As outlined above, the preferred option comprises the proposed Regulations which prescribe a number of bodies as being subject to FOI and exempt three statutory office holders from FOI.

The proposed Regulations affect three groups in society:

- the bodies which are prescribed in the regulations as being subject to FOI;
- the offices which are exempt from FOI; and
- the general public who are the users of FOI.

### Prescribed bodies

The proposed Regulations will require the prescribed bodies to comply with FOI. Most of the bodies which are prescribed in the proposed Regulations are also required to publish information by means other than FOI, such as by the **Financial Management Act 1994** (see Table 1 for list of prescribed bodies under proposed Regulations). Therefore, the costs and benefits of the publication requirements of Part 2 of the FOI Act are likely to be incremental only.

The most significant costs for the prescribed bodies are the costs of processing of FOI requests, estimated to be \$372 per request. Because this figure includes the cost of processing requests for personal information, which can be made under other legislation, they are likely to overestimate the total cost of the FOI regulations. The cost of processing requests for 'non-personal' information represent a 'lower bound' estimate of the costs of the regulations. This cost is estimated to be 6.4% of total FOI processing costs per year.

## Exempt offices

In contrast to the prescribed bodies, there are certain statutory offices which are automatically subject to FOI, but which need to exercise their functions in an independent and confidential manner. In those cases, being subject to FOI could impede the statutory office holder's functions by:

- undermining strong duties of confidentiality;
- discouraging vulnerable people from providing information to the office holder; and
- weakening the perception around the independent exercise of the office holder's discretion

The proposed Regulations exempt three offices from FOI: the Solicitor-General, the Director of Public Prosecutions and the Public Advocate. Each of these offices has unique functions within the Victorian government, with each having strong obligations of confidentiality or requiring strong independence around the exercise of their discretions. The proposed Regulations impose a cost on the public in that they cannot access documents held by those offices under FOI. However, this cost is likely to be minimal as most of the documents held by these offices would be exempt from FOI under existing FOI exemptions.

## Improved access by the public

The FOI Act provides the key means by which members of the public may seek access to documents held by the government. Providing the public with access to government information is an important mechanism for enhancing government accountability in a representative democracy. Enhancing government openness and accountability is a key objective of the proposed measure.

If the prescribed bodies were not subject to FOI, then members of the public could only seek personal information from those bodies under privacy law. There would be no formal or consistent mechanism by which the public could seek access to a broader range of information. This would be a serious gap in government accountability mechanisms.

## Competition assessment

The competition assessment above indicates that the proposed Regulations would have no adverse impact on competition.

## Reasons for rejecting other options

### Prescribed bodies

The other means of meeting the objectives that were considered for prescribed bodies were:

- no regulation – the base case;

- excluding the water companies from the regulations; and
- voluntary compliance with FOI.

These options were not selected as they do not sufficiently meet the desired objectives set out in section four above.

DPC considers the proposed Regulations best meet the objectives of enhancing government openness and accountability and citizen participation, because ensuring that the bodies are subject to FOI means that members of the public have a formal means by which they may seek access to personal and non-personal information. The option which excludes the three water companies, which are government owned and regulated companies, would create a gap in accountability if they were not subject to FOI. The option involving voluntary compliance would not appropriately meet the objectives as there would be no consistent regime for enabling the public to seek access to information held by those bodies.

In the absence of FOI, people may seek access to their personal information through privacy laws. However, FOI is a well settled and understood means by which people may seek access to personal information. It is also government policy that FOI be the primary means of seeking access to personal information for government bodies. Therefore in relation to the objective of providing access to personal information, the proposed Regulations best meet the objective of providing people with access to their personal information.

## Exempt offices

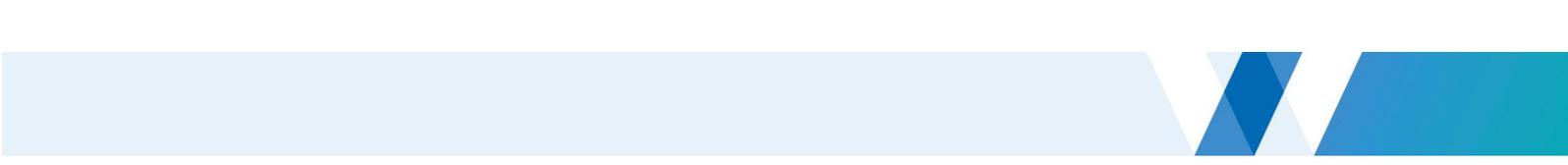
The other options considered in relation to exempt offices were:

- proposed Regulations - retain the current exemptions;
- exempt additional bodies; and
- partial exemptions.

These options were not selected as the proposed Regulations better balance the objective of enhancing the independence and integrity of office holders with the objective of government openness and accountability because they exempt only those offices which have unique functions within the Victorian government. The option of remaking the expiring regulations exempts offices which do not exhibit sufficiently unique characteristics to warrant exemption and therefore does not adequately meet the objective of government openness and accountability. While under the option of a partial exemption certain documents of office holders may be exempt from FOI, DPC considers that this would provide inadequate certainty in relation to some documents and so would not adequately meet the objective of enhancing the independence and integrity of office holders. A similar concern exists in relation to the option of no regulation as this would require offices to process FOI requests in accordance with existing exemptions under the FOI Act.

## Compliance and Enforcement

The FOI regime has a number of elements to facilitate compliance with FOI generally, which are also relevant to facilitating compliance with the FOI regulations.



The Information Commissioner and his Office play a lead role in providing support and guidance on FOI. This consists of:

- providing guidance and practice notes in relation to the operation of the FOI Act;
- providing support to agencies through the FOI managers' network; and
- providing on-going education and training.

Information for government bodies is provided on the OVIC website at <https://ovic.vic.gov.au/>.

If an FOI applicant is dissatisfied with an agency's decision on an FOI matter, there are two types of review that can be sought with the Information Commissioner, depending upon the circumstances.

An FOI applicant may apply to OVIC for a review of an agency or Minister's decision to deny full or partial access to a document, to defer access to a document or to refuse to waive or reduce an application fee.<sup>49</sup> The review request must be made within 28 days of receiving the decision. OVIC primarily attempts to resolve reviews informally but, if unsuccessful, may make a fresh decision in relation to the request. If OVIC also decides to deny access to the documents, the applicant has 60 days to appeal to VCAT.

OVIC also has jurisdiction to investigate complaints about actions by agencies or Ministers in relation to:

- a delay in processing a request;
- a claim by an agency that a document cannot be found or does not exist; and
- an action taken or failed to be taken by a principal officer in the performance or purported performance of their functions and obligations under Part IB (Professional Standards – not yet published or in force) or Part II (Publication of certain documents and information).<sup>50</sup>

OVIC received 636 applications for review of agency decisions in relation to decisions made by 116 different agencies (none related to decisions of Ministers). In 117 of 240 reviews, OVIC made different decisions to the agency. OVIC received 11 review requests for prescribed bodies.

OVIC received 475 FOI complaints in 2017-2018, compared to 529 in 2016-2017.<sup>51</sup> In regards to the prescribed bodies, there were 18 complaints to OVIC. St Vincent's Hospital and Yarra Valley Water were subject to the highest number of complaints, namely four complaints each.

OVIC has a number of general powers under the FOI Act in relation to investigating complaints. For example, if reasonable attempts to conciliate a complaint have failed, the Information Commissioner is to take submissions from both parties and is able to compel the production of documents. If the Information Commissioner is of the opinion that action is required to rectify the complaint or that any practice of an agency should be changed, the Commissioner must report that opinion to the agency, together with reasons and such recommendations as he or she sees fit.

As the Information Commissioner may make any recommendation he or she thinks fit, the range of recommendations varies enormously. Recommendations could range from requiring the agency to make further searches for documents to procedural, cultural or system changes. There is no

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<sup>49</sup> See, FOI Act, Div 1.

<sup>50</sup> See, FOI Act, part VIA.

<sup>51</sup> OVIC Annual Report 2017-18, page 37.

information available on the costs to agencies of responding to the Commissioner's recommendations.

## Evaluation Strategy

The FOI Act requires the Information Commissioner to report to Parliament annually on the operation of the FOI Act. This applies to FOI compliance across government and covers the performance of agencies under the FOI regulations.

Each year the Information Commissioner is required to table an FOI Annual Report. In 2017-2018, this report was included in OVIC's Annual Report. Included in each Annual report is information about the number of requests received by agencies, the use of exemptions in relation to initial FOI requests and reviews by OVIC and appeals to VCAT. Copies of recent annual reports can be found at <https://ovic.vic.gov.au/>.

DPC will continue to review the proposed Regulations on a regular basis. As the proposed Regulations are substantially similar to the current Regulations (which presently operate effectively) DPC will maintain regular contact with OVIC (particularly during the annual reporting period) for insights on the management of FOI by prescribed agencies. OVIC is likely to be aware of issues relating to prescribed agencies. The data provided by the prescribed agencies to OVIC as part of the FOI Annual report process will also assist in assessing how the proposed Regulations are working in practice. A full review of the proposed Regulations will also be conducted before the proposed Regulations sunset and DPC will at that time consider whether the list of prescribed bodies and exempt office holders continue to be appropriate.

## Consultation

In preparing the proposed Regulations, DPC consulted with:

- the Office of the Victorian Information Commissioner; and
- all Government Departments.

This RIS will be available for 28 days for public consultation. This timing is so that the proposed Regulations can be made in April 2019.

The availability of the RIS will be advertised in the Government Gazette, on DPC's website ([www.dpc.vic.gov.au](http://www.dpc.vic.gov.au)) and a daily newspaper circulating generally throughout Victoria. Members of the public and bodies and offices affected by the regulations will be able to make submissions to DPC on the proposed Regulations. Departments and relevant statutory office holders will be informed directly about the RIS.

## Attachment 1:

### Comparison between key charges – FOI Act and HR Act

Type of Charge	FOI Act	HR Act
Search time	\$21.70 per hour or part of an hour	No separate cost listed in regulations.
Inspecting documents	\$21.70 per hour or part of an hour	\$17.30 per half hour or part hour
Photocopies (black and white)	20 cents per A4 page	20 cents per A4 page, and reasonable cost in collating the health information, not exceeding \$36.10, and if the health information is not stored at the organisation's usual place of business, \$17.30.
Photocopies (other than black and white)	Reasonable cost in providing the copy	20 cents per A4 page, and reasonable cost in collating the health information, not exceeding \$36.10, and if the health information is not stored at the organisation's usual place of business, \$17.30.
Charge for making arrangements to hear or view sound or a visual image	Reasonable cost in making these arrangements	Reasonable cost of obtaining the equipment, and if the health information is not stored at the organisation's usual place of business, \$17.30.
Charge for making a written transcript of a recording available	Reasonable cost in making these arrangements	Reasonable cost of obtaining the equipment.
Charge for providing a written document if information is not available in a discrete form	Reasonable cost in providing the copy	Reasonable costs otherwise, including for electronic copies, and reasonable cost in collating the health information, not exceeding \$20, and if the health information is not stored at the organisation's usual place of business, \$10.

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Providing a summary of health information if not qualified health service provider

Usual fee of the suitably qualified health service provider for a consultation of a comparable duration.

Reasonable cost, not exceeding \$41.90 per quarter hour (or part thereof) up to \$135.80, whichever is the greater, plus \$17.30 if the health information is in a document not stored at the organisation's usual place of business.

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## Attachment 2:

### Prescribed Bodies- Accountability

Prescribed Bodies	Description	Relevant Act	Department	Responsible Minister	Subject to Financial Management Act 1994	Other accountability mechanisms/ comments
<b>Boards/Committees/Councils/Panels</b>						
Appeal Costs Board	The Board deals with compensation claims to assist parties to legal proceedings to pay legal costs arising from circumstances beyond their control, such as a re-trial following disagreement by a jury.	<b>Appeals Cost Act 1998</b>	Justice and Community Safety	Attorney-General	Consolidated	Subject to <b>Audit Act 1994</b>
Disciplinary Appeals Board	The Boards hear grievances / appeals from teachers and Department of Education and Training personnel about transfer/ promotion, disciplinary matters, sexual harassment and discrimination.	<b>Education and Training Reform Act 2006</b>	Education and Training	Minister for Education		

Electoral Boundaries Commission	The Commission is an independent statutory agency who divides Victoria into electoral regions for the State's Legislative Council and electoral districts for the Legislative Assembly.	<b>Electoral Boundaries Commission Act 1982</b>				
Firearms Appeals Committee	The Committee reviews certain decisions of the Chief Commissioner of Police made under the <i>Firearms Act 1996</i> and certain other Acts.	<b>Firearms Act 1996</b>	Justice and Community Safety	Minister for Police	Consolidated	Subject to <b>Audit Act 1994</b>
Food Safety Council	The Council advises the responsible Minister on food safety, food standards and public health matters in relation to food.	<b>Food Act 1984</b>	Health and Human Services	Minister for Health	Consolidated	Subject to <b>Audit Act 1994</b>
Land Tax Hardship Relief Board	The Board reviews applications for relief or postponement of land tax on the grounds of hardship.	<b>Land Tax Act 1958</b>	Treasury and Finance	Treasurer	Yes (Part 7)	State Revenue Office administers the Board
Medical Panels established under the <b>Accident</b>	The Panels provide medical opinions in relation to claims under the <b>Accident Compensation</b>	<b>Accident Compensation Act 1985</b>	Treasury and Finance	Minister for Workplace Safety	Consolidated	Subject to <b>Public Administration Act 2004</b> (apart from Part 3)

<b>Compensation Act 1985</b>	<b>Act 1985.</b>					
Mental Health Tribunal	The Tribunal is an independent body which hears appeals and conducts reviews of persons being treated as involuntary patients within the mental health system.	<b>Mental Health Act 2014</b>	Health and Human Services	Minister for Health	Yes (Part 7)	Subject to <b>Audit Act 1994</b>
Merit Protection Boards	The Boards advise the Minister and Secretary about matters concerning the principles of merit and equity in the teaching service and hear appeals in relation to certain decisions.	<b>Education and Training Reform Act 2006</b>	Education and Training	Minister for Education	Consolidated	Subject to <b>Audit Act 1994</b>
Professional Boxing and Combat Sports Board	The Board provides advice to the Minister on matters relating to professional boxing and martial arts in Victoria.	<b>Professional Boxing and Combat Sports Act 1985</b>	Sport and Recreation, Department of Health and Human Services	Minister for Sport	Consolidated	
Public Records Advisory Council	The Council reports and makes recommendations to the Minister on any matter relating to the <b>Public Records Act 1973</b> .	<b>Public Records Act 1973</b>	Premier and Cabinet	Special Minister of State	Consolidated	Subject to <b>Audit Act 1994</b>
Racing Victoria	Racing Victoria develops and manages the	<b>Racing Act 1958</b>	Justice and Community Safety	Minister for Racing	No	Subject to <b>Audit Act 1994</b>

	conduct of the racing of thoroughbred horses in Victoria.					
Victoria Grants Commission	The Commission is responsible for the annual determination of grants to local government bodies.	<b>Victoria Grants Commission Act 1976</b>	Environment, Land, Water and Planning	Minister for Local Government		
Victorian Legal Admissions Board	The Board assesses eligibility of individual applicants to be admitted to legal practice.	<b>Legal Profession Uniform Law Application Act 2014</b>	Justice and Community Safety	Attorney-General	Yes	Subject to <b>Audit Act 1994</b>
Victorian Multicultural Commission	The Commission provides independent advice to the Victorian Government to inform the development of legislative and policy frameworks, as well as the delivery of services.	<b>Multicultural Victoria Act 2011</b>		Minister for Multicultural Affairs	Yes	Subject to <b>Audit Act 1994</b>
Victorian Veterans Council	The Council advises the Premier on issues affecting the Victorian veteran community.	<b>Veterans Act 2005</b>	Premier and Cabinet	Minister for Veterans	Yes (Part 7)	Subject to <b>Audit Act 1994</b>
WorkCover Advisory Committee	The Committee provides feedback to the Board on the most effective means of promoting a healthy and safe working	<b>Occupational Health and Safety Act 2004</b>	Treasury and Finance	Minister for Workplace Safety	Consolidated	Division 6 of the <b>Occupational Health and Safety Act 2004</b>

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environment.

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## Water Companies

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City West Water Limited	City West Water is a government owned retail water business in metropolitan Melbourne, servicing customers in Melbourne's Central Business District and inner and western suburbs.	<b>State Owned Enterprises Act 1992</b> <b>Water Industry Act 1994</b>	Environment, Land, Water and Planning	Minister for Water	Yes	Subject to regulation by Essential Services Commission. Water and sewerage licences issued under the <b>Water Industry Act 1994</b> . Subject to <b>State Owned Enterprises Act 1992</b> and <b>Audit Act 1994</b>
South East Water Limited	South East Water is a government owned retail water business in metropolitan Melbourne, servicing customers in Melbourne's south eastern suburbs.	<b>State Owned Enterprises Act 1992</b> <b>Water Industry Act 1994</b>	Environment, Land, Water and Planning	Minister for Water	Yes	Subject to regulation by Essential Services Commission. Water and sewerage licences issued under the <b>Water Industry Act 1994</b> . Subject to <b>State Owned Enterprises Act 1992</b> and <b>Audit Act 1994</b>
Yarra Valley Water Limited		<b>State Owned Enterprises Act 1992</b> <b>Water Industry Act 1994</b>	Environment, Land, Water and Planning	Minister for Water	Yes	Subject to regulation by Essential Services Commission. Water and sewerage licences issued under the <b>Water Industry Act 1994</b> . Subject to <b>State</b>

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**Other Organisations**

Royal Society for the Prevention of Cruelty to Animals	The RSPCA is an independent animal welfare charity.	RSPCA inspectors are approved as inspectors pursuant to section 18 of the <b>Prevention of Cruelty to Animals Act 1986</b>	Environment, Land, Water and Planning	Minister for Agriculture		
Yooralla	Yooralla is a not-for-profit community service provider.	<b>Yooralla Society of Victoria Act 1977</b>	Health and Human Services	Minister for Disability, Aging and Carers	Yes	Yooralla is a funded agency so it is subject to the Department of Health and Human Services Standards and the National Standards for Disability Services.

**Health**

Denominational hospitals listed in Schedule 2 to the <b>Health Services Act 1988</b>	The hospitals are charitable religious bodies that provide public hospital services free of charge to public patients in the same way as public hospitals.	<b>Health Services Act 1988</b>	Health and Human Services	Minister for Health	s53A only (this requires the hospital to table its annual report in Parliament).	Expenditure and operations subject to Significant statutory controls under the <b>Health Services Act 1988</b> . Subject to <b>Audit Act 1994</b>
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## TAFE Institutions

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TAFE Institutes created under section 3.1.11 of the <b>Education and Training Reform Act 2006</b>	TAFE Institute provide technical and further education services.	<b>Education and Training Reform Act 2006</b>	Education and Training	Minister for Education and Minister for Higher Education	Yes	Subject to <b>Audit Act 1994</b>
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## Attachment 3:

### Comparison of the disclosure requirements between Part 2 of the FOI Act and the Financial Reporting Direction issued under the Financial Management Act 1994 (FMA)

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#### FRD 22H Standard Disclosures in the Report of Operations

Section 45 of the FMA requires an entity to prepare a report of its operations. FRD 22H requires disclosure of information about the entity and its activities, operational highlights and other relevant information, additional to financial statements. This includes:

General information:

- Statement about occupational health and safety matters, including performance indicators
- Manner of establishment of the entity and relevant Minister
- Objectives, functions, powers and duties of the entity and summary of activities, programs and achievements for the reporting year
- Nature and range of service provision
- Organisational chart
- Workforce data
- Financial information
- Information about consultancies valued in excess of \$10,000, including the consultants engaged, summary of project and project fees
- The number of consultancies individually valued at less than \$10,000

Subject to the provisions of the FOI Act, other information that must be retained includes:

- Details of publications produced by the entity about itself and how these can be obtained
- Details of changes in prices, fees, charges, rates and levies charged by the

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#### Publication requirements under Part 2 of the FOI Act

Section 7 requires an agency subject to the FOI Act to cause the following details to be published (usually in an annual report, and available on a website) :

- the agency's organisation, functions and powers
- the categories of documents that are in the possession of the agency,
- the procedures for obtaining access to the documents and the identity of the officer who handles requests for access
- literature available by way of subscription service or mailing list
- lists of the boards, councils, committees and other bodies established for the purposes of advising the agency, whose meetings are open to the public or minutes available for inspection.

Section 8 requires each agency to make available, for inspection and purchase by the public, copies of:

- manuals, policy documents, procedures and guidelines used by the agency to make decisions and recommendations with respect to people's rights and obligations
- documents used by the agency in enforcing Acts or schemes administered by the agency, where members of the public may be directly affected by that enforcement. The agency must publish an index of these documents.

Section 11 requires agencies to publish an index of documents and reports in their possession.

Agencies are not obliged to make documents available which would be exempt under the FOI Act or any other legislation.

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entity

- Details of any major external reviews carried out on the entity
  - Details of major research and development activities undertaken by the entity
  - Details of overseas visits undertaken, including a summary of the objectives and the outcomes of each visit
  - Details of major promotional, public relations and marketing activities undertaken by the entity
  - A list of committees sponsored by the entity, including their purposes and extent to which these have been achieved.
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## Attachment 4:

### Prescribed Bodies: Number of reviews and complaints made to OVIC and VCAT appeals in 2013-14 to 2017-2018

Prescribed Body	2017-2018			2016-2017			2015-2016			2014-2015			2013-2014		
	Review	Complaint	VCAT												
<b>TAFES</b>															
Bendigo Kangan Institute	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Chisholm Institute	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Federation Training	1	0	0	0	0	0	0	0	0	0	0	0	-	-	-
Melbourne Polytechnic	1	1	1	0	1	0	0	1	0	0	0	0	-	-	-
Willian Angliss Institute	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0
<b>Total</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Denominational Hospitals</b>															
Calvary Hospital	0	0	0	0	0	0	1	0	0	0	1	1	0	0	0
Mercy Hospitals	0	1	0	1	0	0	0	0	0	5	0	0	1	0	0
St Vincent's Hospital	3	4	0	0	4	0	2	0	0	2	6	0	1	2	0
<b>Total</b>	<b>3</b>	<b>5</b>	<b>0</b>	<b>1</b>	<b>4</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>7</b>	<b>1</b>	<b>2</b>	<b>2</b>	<b>0</b>
<b>Boards, Committees, Panels</b>															

Mental Health Tribunal	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Merit Protection Board	0	0	0	0	0	0	0	0	0	2	1	0	0	0	0
Racing Victoria	3	2	0	1	2	0	1	0	0	1	3	0	0	0	0
Multicultural Commission	0	0	0	0	0	0	0	0	0	2	1	0	0	4	0
Victorian Legal Admission Board	0	0	0	0	0	0	1	0	0	-	-	-	-	-	-
Victorian Legal Services Board	0	2	0	1	0	0	1	0	0	1	0	0	1	1	1
<b>Total</b>	<b>3</b>	<b>5</b>	<b>0</b>	<b>2</b>	<b>2</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>5</b>	<b>4</b>	<b>0</b>	<b>1</b>	<b>5</b>	<b>1</b>
<b>Other</b>															
RSPCA	2	2	0	0	1	0	0	0	0	0	0	0	0	0	0
Yooralla	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Total</b>	<b>2</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>									

	Reviews	Complaints	VCAT Appeals
<b>Average (2013-2018)</b>	<b>7.2</b>	<b>8.4</b>	<b>0.6</b>

## Attachment 5:

### Prescribed Bodies: Number of FOI requests 2013-14 to 2017-2018

Prescribed Bodies	2017-18		2016-17		2015-16		2014-15		2013-14	
	Personal requests	Non-Personal requests								
<b>TAFE Institutions</b>										
Bendigo Kangan Institute	0	2	0	0	0	0	1	1	0	2
Box Hill Institute	0	0	0	0	0	0	0	0	0	0
Chisholm Institute	1	1	0	0	2	0	2	0	0	2
Federation Training	1	0	0	0	0	0	0	0	-	-
Gordon Institute	0	1	1	0	0	0	0	0	0	0

Goulburn Ovens Institute	0	1	0	0	0	0	0	0	0	0
Holmesglen Institute	0	0	0	1	2	0	0	0	0	0
Melbourne Polytechnic	2	5	0	2	5	0	1	0	-	-
South West institute	1	1	1	0	0	2	0	1	1	0
Sunraysia Institute	0	1	0	0	1	0	0	0	0	0
William Angliss Institute	0	1	2	0	0	1	1	0	0	0
Wodonga Institute	1	0	0	0	0	1	2	0	0	0

**Health**

Calvary	11	20	16	18	13	5	5	5	27	0
Mercy Hospitals	534	1	472	1	427	7	357	50	288	29
St Vincent's Hospital	940	34	966	22	750	115	765	99	780	106

**Boards/Committees/Commissions/Panels**

Appeal Costs Board	0	0	0	0	0	0	0	0	0
Disciplinary Appeals Board	0	0	0	0	0	0	0	0	0
Electoral Boundaries Commission	0	1	0	0	0	0	0	0	0
Firearms Appeals Committee	1	1	0	0	0	0	0	0	0
Food Safety Council	-	-	-	-	-	-	-	-	-
Land Tax Hardship Relief Board	0	0	0	0	0	0	0	0	0
Medical Panels	1	1	0	1	0	0	0	0	0
Mental Health Tribunal	10	0	9	1	0	1	0	1	0
Merit Protection Boards	0	0	0	0	0	0	0	0	4
Professional Boxing and Combat Sports Board	0	0	0	0	0	0	0	0	0

Public Records Advisory Council	0	0	0	0	0	0	0	0	0	
Racing Victoria	5	4	25	10	3	10	1	4	0	4
Victoria Grants Commission	0	0	0	0	0	0	0	0	0	0
Victorian Legal Admissions Board	0	1	0	0	0	1	-	-	-	-
Victorian Legal Services Board	8	0	9	0	12	2	18	0	3	1
Victorian Multicultural Commission	0	0	0	0	0	0	0	0	5	0
Victorian Veterans Council	0	0	0	0	0	0	0	0	0	0
WorkCover Advisory Committee	0	0	0	0	0	0	0	0	0	0
<b>Other Organisations</b>										
Royal Society for the Prevention of Cruelty to Animals	13	7	11	6	17	4	13	4	6	5
Yooralla	5	0	2	0	1	0	0	0	3	0

