

Changes to the FOI Act

Presentation outline:

- Overview of the amendments
- Key changes for agencies
- Questions and answers

Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017

- Passed with amendments by both houses of Parliament in May 2017
- Received Royal Assent 16 May 2017
- Most measures take effect on **1 September 2017**
- OFOIC free training for agencies coming soon

Key changes to the FOI system

- Integrates FOI, Privacy and Data Protection to create OVIC
- Creates new statutory roles –
 - Victorian Information Commissioner
 - Public Access Deputy Commissioner
 - Privacy and Data Protection Deputy Commissioner
- Other improvements to support and strengthen our FOI system

Key changes for agencies

- OVIC can review principal officers' FOI decisions
- New grounds for complaint against principal officers and Ministers
- Agencies will have 30 days to make FOI decisions (not 45)
- Agencies will have 14 days to appeal OVIC decisions (not 60)
- New mandatory consultation requirements & automatic 15 day extension (**Part III and s 21**)
- New exemption relating to IBAC (**s 31A**)
- Repeal of conclusive certificates for Cabinet Documents (**s 28**)

Key changes to the FOI review regime

A range of new powers and compliance tools for OVIC:

- Power to issue binding professional standards
- Own motion investigative powers
- Coercive powers
- Offences and prosecution powers

Key changes to the FOI review regime

- New function for the Information Commissioner and Public Access Deputy Commissioner – a role in promoting understanding and acceptance of the FOI Act by the public.

Key changes for agencies

REVIEW OF PRINCIPAL OFFICERS' FOI DECISIONS

OVIC (Information Commissioner or Public Access Deputy) will be able to review agency head decisions to:

- refuse or defer access;
- not waive or reduce application fees;
- refuse to amend records.

OVIC will also be able to review decisions by Ministers.

Key changes for agencies

NEW GROUNDS FOR COMPLAINT ABOUT AGENCY HEADS

OVIC will be able to deal with complaints about “an action taken or failed to be taken” by a principal officer in the performance of their obligations under –

- Part IB (Professional Standards); or
- Part II (Publication of certain documents).

Key changes for agencies

NEW GROUNDS FOR COMPLAINT ABOUT MINISTERS

OVIC will also be able to deal with complaints about –

- A Minister's decision that a document does not exist or cannot be located; and
- A failure by a Minister to comply with Ministerial professional standards (made under amended Part 1B).

Key changes for agencies

SHORTER TIME TO APPEAL OVIC DECISIONS TO VCAT

- Reduction from 60 to 14 days for agencies to seek review of OVIC decision to VCAT – changes to s 52(9)



Key changes for agencies

SHORTER TIME TO MAKE DECISIONS ON FOI REQUESTS

- Reduction from 45 to 30 days within which to make a decision on an FOI request – amendment to **s 21**
- Change only applies to access requests (under **Part III**)
 - s 39 amendment requests – 30 days (**s 43**)
 - s 12 requests to specify a doc – 21 days (**s 12(2)**)



Key changes for agencies

EXTENSIONS OF TIME

Key changes to s 21:

- Agencies *may* extend the period for deciding an access request –
 - by up to 15 days, where consultation is required (under **ss 29, 29A, 31, 31A, 33, 34 or 35**); or
 - by up to 30 days, with the applicant's consent.

Key changes for agencies

EXTENSIONS OF TIME

Key changes to s 21 (continued):

- Applicant may consent to any number of further extensions of up to 30 days, provided consent is given before period for decision (including as extended) lapses (**s 21(3) and (5)**).
- Agencies must notify applicant in writing of any extension (including one they have consented to: **s 21(4)**).

Key changes for agencies

NEW MANDATORY CONSULTATION REQUIREMENT

- Current requirements to consult / notify –
 - **Section 33(3):**
 - notify third party individuals of decision to release their personal affairs information and right to seek VCAT review;
 - **Section 34(3):**
 - consult 3rd party undertaking on whether to release their business, commercial or financial information; and
 - notify them of your decision to release.
- In both instances, agencies should await expiry of 60 day appeal period to release the documents.

Key changes for agencies

NEW MANDATORY CONSULTATION REQUIREMENT

- New requirements apply to the exemptions in:

s 29	Documents containing matter communicated by another State
s 29A	Documents affecting national security, defence or international relations
s 31	Law enforcement documents
s 31A	Documents relating to IBAC
s 33	Documents affecting personal privacy
s 34	Documents relating to trade secrets
s 35	Documents containing material obtained in confidence

Key changes for agencies

NEW MANDATORY CONSULTATION REQUIREMENT

Scope of new requirements:

1. notify relevant 3rd party (individual, undertaking, agency, government) of request;
2. seek their view as to whether to disclose;
3. notify them that if they consent, they forfeit VCAT appeal rights;*
4. notify them of decision to release, and their right to appeal to VCAT, unless they consented to the disclosure.*

** Applies to ss 33, 34 and 35 only.*

Key changes for agencies

NEW MANDATORY CONSULTATION REQUIREMENT

For sections 33 and 35:

- Limits on the requirement to notify / consult –
 - likely to **endanger life or physical safety** or cause **undue distress**, or is otherwise **unreasonable in the circumstances**;
 - **not practicable**.

Key changes for agencies

NEW MANDATORY CONSULTATION REQUIREMENT

- New section 33A – where a “child” is required to be notified under ss 33 or 35, agency may notify a parent or guardian of the child.
 - Definition of “child” in s 3 – means a person under 18 years
 - Same considerations re whether reasonable/practicable apply

FREEDOM OF INFORMATION IN VICTORIA

(2B) An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must—

- (a) notify the person who is the subject of that information (or, if that person is deceased, that person's next of kin) that the agency or Minister has received a request for access to the document; and
- (b) seek that person's view as to whether disclosure of the document should occur; and
- (c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the Tribunal for review of a decision to grant access to that document.

(2C) Despite subsection (2B), an agency or Minister is not required to notify a person if—

- (a) the notification would be reasonably likely to endanger the life or physical safety of that person or cause that person undue distress, or

FREEDOM OF INFORMATION IN VICTORIA

is otherwise unreasonable in the circumstances; or

(b) it is not practicable to do so.

(3) If a request by a person other than a person referred to in subsection (2) is made to an agency or Minister for access to a document containing information relating to the personal affairs of any person (including a deceased person) and the agency or Minister decides to grant access to the document, the agency or Minister, if practicable, must notify the person who is the subject of that information (or that person's next of kin) of the—

(a) decision to grant access to the document; and

(b) right to make an application for review of the decision provided by section 50(3).

Key changes for FOI review regime

BINDING PROFESSIONAL STANDARDS

- Information Commissioner will be able to issue binding professional standards to agencies (not Ministers) dealing with –
 - the conduct of agencies in performing functions under the FOI Act; and
 - the administration and operation of the FOI Act by agencies.
- Apply to principal officer and any officer of the agency involved in the operation of the FOI Act.
- Failure to comply provides grounds for complaint.

Key changes for FOI review regime

BINDING PROFESSIONAL STANDARDS

- Information Commissioner must consult on and publish Guidelines before they are binding.
- Principal officers also required to ensure all officers and employees of the agency –
 - are informed of the professional standards; and
 - comply with them when performing functions under the Act.

Key changes for FOI review regime COERCIVE POWERS (Part VIC)

New Part VIC empowers Information Commissioner to compel agencies to appear before Information Commissioner to –

- produce documents; and/or
- give evidence on oath / affirmation (**s 61U**).

Key changes for FOI review regime

COERCIVE POWERS (Part VIC)

- Powers available during conduct of a review (**s 49KB**), or in dealing with a complaint (**s 61I**), or in conducting investigation (**s 61P**).
- Offence to refuse or fail to comply without reasonable excuse (**s 61X**).
 - Statutory secrecy not a reasonable excuse (**s 61ZC**).
 - Certain exemptions (ss 28, 32) do constitute a reasonable excuse (**s 61ZA**).

Key changes for FOI review regime

COERCIVE POWERS (Parts VI and VIA)

A further power for Information Commissioner (or Deputy) to require further searches for documents –

- during a review (**s 49KA**);
- in handling a complaint (**s 61GA**).

Key changes for FOI review regime

OWN MOTION INVESTIGATIONS

- Information Commissioner will be able to conduct own motion investigations into the performance or failure to perform functions under the FOI Act
 - serious or systemic issues
- Investigations conducted in private.
- Reports tabled in Parliament.
 - Strict limits on what may be included (no exempt material, no prejudice to other investigations etc).

Key changes for FOI review regime

CRIMINAL OFFENCES

New Division 2A of Part VII will include new offences for -

- Failing to comply with a notice to attend, produce or provide information (**s 61X**);
- Failure to take an oath or affirmation (**s 61ZE(2)**);
- Wilfully obstruct, hinder or resist the IC without reasonable excuse (**s 63F(1)**);
- Knowingly provide information that is false or misleading in a material particular (**s 63F(2)**); and
- Mislead or attempt to mislead OVIC (**s 63F(3)**).

Key changes for FOI review regime

CRIMINAL OFFENCES

- Reasonable excuse defence available for all offences.
- Offences can be prosecuted by OVIC, Victoria Police or any person authorised by the Information Commissioner.

Questions?