submission

Submission to the Victorian Ombudsman

on his Review of the –

Freedom of Information Act 1982 (Vic)

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Office of the
Victorian Privacy
Commissioner

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Submission to the Victorian Ombudsman's Review of the Freedom of Information Act[i]

1 Wider, public, independent review of the three main "information laws" recommended

1. Freedom of information has now been a part of Victorian law and government for 22 years.[ii] It is "part of the furniture" of public administration. Like all furniture, it could do with an inspection and perhaps renovation, but only to make it stronger. This particular item of furniture remains essential, not merely tasteful, for any democratic home.[iii]

2. Freedom of information and information privacy are closely related fields of administrative law. They both deal with information and how it ought flow. Part V of Victoria's *Freedom of Information Act 1982* (FOIA) incubated one of the main data protection rights (access and correction of your own file) until in 2000 the Parliament created a full and separate data protection scheme in the *Information Privacy Act* (IPA).

3. The IPA established the Office of the Victorian Privacy Commissioner and a structure, based on international standards, for the responsible collection and handling of personal information by state and local government and their contracted service providers. The IPA cross-refers to the FOIA in several important respects (discussed later), allows exchanges between the Ombudsman and the Privacy Commissioner and both laws provide for appeals to VCAT.

4. The FOIA is part of the mix of laws that provide Victorians with certain of the internationally recognised human rights[iv], as is the IPA, the main statutory protection in state legislation for the human right to privacy[v]. The two acts, and the rights they enshrine, are compatible, both requiring a balancing process when various public and private interests compete. Parliament began building the administrative structures to do that balancing in the paper-based, pre-desktop computer era (FOIA in 1982), then created the IPA and a way for the two acts to interact with each other in 2000, the era of swiftly converging information and communications technologies, outsourcing, and a focus on "joined-up government" and "e-government".

5. Against this background, it is no surprise that FOI needs modernising and that Victoria would benefit from a more considered analysis of the interaction, in contemporary and reasonably foreseeable circumstances, of all the main "information statutes". These are FOIA, IPA and the *Public Records Act 1973* (PRA).[vi] Each is fundamentally concerned with enforceable rights and obligations governing information and its flows, but each has a different history and specific primary focus.

6. Taken together, the information statutes deal in principles of utmost importance and raise complex public policy issues. If this is the Information Age, then these statutes are of growing importance.

7. Put briefly and in a necessarily simplified way –

   - PRA deals with how we remember information handled for public purposes.
   - FOIA deals with how we disclose information handled for public purposes.
   - IPA deals with how we treat personal information handled for public purposes.

8. Each law was drafted in a separate era. Each deals with overlapping principles affecting who shall have the power knowledge gives.[vii] Each is relevant to our society's adaptation in the current era to extraordinary developments in information and communications technologies.

9. I support the Ombudsman's suggestion in the Discussion Paper – and have previously and separately recommended - that a wider review of the main information statutes be conducted.

10. That review ought be undertaken by an appropriately independent and adequately resourced entity, using public consultation, with terms of reference tailored to bring out the big issues involved. Widest possible consultation should occur, with opportunities for specialists inside and outside government, media, community and public sector to participate. A reference to the Victorian Law Reform Commission is one option.[viii]

11. The review should not be undertaken or controlled by the main departments of the state bureaucracy. They are regulated by the statutes in question and are routinely involved in often sensitive matters arising from applicants attempting to exercise their rights or from regulators undertaking their statutory functions. FOI in particular, but also information privacy, can be a site for matters of political controversy.

12. The information statutes are too important to leave in the hands of interested parties[ix] a review process that may have profound effects on the rights and obligations those statutes contain, and on the future shape of the administrative structures to animate those rights and enforce those obligations.

13. Current relevant regulators/reviewers such as the Keeper of Public Records, Health Services Commissioner, Privacy Commissioner, Ombudsman and VCAT ought be closely consulted in the course of the wider review. Their expertise and perspectives are relevantly different from the departments. Their formal separation and independence from departments and Ministers are likely to act as a useful counterweight to shorter-term considerations.

14. The departments should be encouraged to take an active part in open consultations, partly because of their obvious stake in how they are regulated, and partly because of the considerable expertise built up over 22 years in the Victorian public service about FOI matters in particular.

15. I submit that any broad review be expressly guided by three principles concerning the eventual shape of what may become a single "Information Act" for Victoria –

   - **No dilution** of rights and obligations now existing under the separate statutes. This would include retention of the basic model of case-by-case balancing of the various public and private interests involved in issues of what information ought flow, to whom, from whom, why, how and when.

- **Universal coverage** – that is, in relation to information handled for public purposes (whether by public or private sector entities through outsourcing or corporatisation) every person will be able to assert the rights conferred, and every part of state and local government will be obliged to respond.[x]
- **Maintenance of independent oversight** – with arrangements that have at least the following attributes: separate legal existence from the entities regulated; Governor-in-Council appointment for fixed term; sufficient powers to educate, audit, investigate, conciliate and, as appropriate, make binding determinations (subject to appeal rights); adequate funding direct from Parliament; and capacity to report direct to Parliament, with automatic tabling.

16. Any wider review and reform process may have regard to the results of the work of the Human Rights Consultative Committee (HRCC), chaired by Professor George Williams, and currently expected to report to the Attorney-General in late 2005. Although its brief is much broader than the information statutes, the HRCC's recommendations can be expected to have at least two implications for the information-related human rights of Victorians: the legal shape of those rights; and the administrative arrangements to make the theoretical practical.

17. Since a broader review seems likely to follow the Ombudsman's review, this submission –
    - responds only to certain parts of Ombudsman's Discussion Paper most relevant to privacy and the IPA;
    - sketches the interaction of FOI and information privacy; and
    - proposes ways to make their interaction smoother.

2 Part II statements from a privacy/data protection perspective

18. The Discussion Paper asks (at p. 12) a series of questions about whether Part II of the FOIA should be retained and, if so, whether it should be amended to better reflect the type of information needed by the public. As the Discussion Paper notes (p 11) –
    - Part II is intended to assist FOI users in framing/making their access request; and
    - FOI users report it is often difficult to find out what documents or categories of documents are held.

19. Part II is basic to any FOI scheme, and after 22 years it ought to be working properly as a matter of routine. To the extent it is not, it reflects poorly on the public sector after so long. Part II was intended partly as a spur to better records management. Government needs to know what documents it holds and be able to locate them. If documents cannot be categorised and retrieved in an orderly way, government will not be able to make the time and cost savings that newer information technologies offer (e-government applications). Part II has a role to play. Similarly, the IPA is in part intended to improve the quality and handling of information in the public sector.

20. Part II obligations are consistent with notice obligations in IPA (IPPs 1.3 and 5) and the transparency objective of both Acts (s. 5, IPA; s. 3, FOIA)

21. The obligations created by Part II are also consistent with recent Parliamentary Committee statements relating to e-democracy, which support the availability and accessibility of government information published online to assist the public in making informed choices (see SARC final report into eDemocracy, May 2005, Part II, "Access to Information").

22. Consideration could be given to existing measures in federal government administration, such as the requirements for a Personal Information Digest to be maintained - *Privacy Act 1988*, Information Privacy Principle 5(3):

> A record-keeper shall maintain a record setting out:
>
> a. the nature of the records of personal information kept by or on behalf of the record-keeper;
>
> b. the purpose for which each type of record is kept;
>
> c. the classes of individuals about whom records are kept;
>
> d. the period for which each type of record is kept;
>
> e. the persons who are entitled to have access to personal information contained in the records and the conditions under which they are entitled to have that access; and
>
> f. the steps that should be taken by persons wishing to obtain access to that information.

23. It is not to the point that complying with Part II involves an administrative effort. The question is whether the benefits to be derived from compliance justify the work. The Ombudsman may note that -

    a. other jurisdictions have complied with similar (or greater) legislative obligations without apparent problems – see the practice of Commonwealth public sector agencies to report on a range of matters which the Federal Privacy Commissioner compiles in an annual Personal Information Digest (eg, http://www.privacy.gov.au/publications/pid2004.zip);

    b. any compliance burden should be lessened where the organisation has already complied with Victorian information and health privacy obligations to prepare privacy policies detailing the handling of personal and health information held by the organisation;

    c. once the initial Part II statement (or an enhanced version of it) is compiled, any future compliance burden is likely to be minimal as the statement is unlikely to require substantial revision in subsequent years;

    d. precedents exist in other jurisdictions to guide Victorian agencies in complying with their existing (or enhanced) Part II obligations – see eg, the series of annual Personal Information Digest for Commonwealth and ACT agencies, together with guides on how to prepare a digest entry, at the Office of the Federal Privacy Commissioner's website (http://www.privacy.gov.au/publications/index.html#P); and

    e. technology can assist in cataloguing and managing the records held by Victorian public sector organisations.

3 Processing FOI requests

Misuse of exemptions to deny access, and the problem of "Botpa"

24. The Discussion paper states (at pp 14-15) that one of the most frequent concerns raised by FOI users is the misuse of exemptions to deny access to sensitive documents. Disagreements about the proper application of exemptions to particular documents in specific circumstances are to be expected, and in the FOIA Parliament foresaw the balancing that would be required. Parliament made a presumption of openness, gave general guidance, specifically excluded some types of material (and some entities) from disclosure requests, and then crafted a series of exemption categories. If all or part of a document fits within an exemption, it may be withheld from disclosure.

25. Review bodies sometimes criticise uses of exemptions by agencies. Requesters naturally do. But in my experience - both as a requester and as a respondent – genuine issues can arise for decision about whether all or part of a given document ought properly be disclosed. Varying views can be validly held, especially where the relevant exemption turns on an assessment of reasonableness, or of the public interest. Section 33, the "personal privacy" exemption in the FOIA is an example, and will be discussed later. Case-by-case balancing, with careful regard to the particular information and the context, is invariably required if good decisions are to be made about information disclosure (see the first guiding principle in para 15 above).

26. Leaving to one side specific FOI exemptions, it is important to stress that privacy is not the same as secrecy, and privacy ought not be misused as an excuse to try to evade transparency or accountability.[xi]

27. As I stated in my first Annual Report for 2001/2002:

> **Privacy is not the same as confidentiality or secrecy.** The flow of information remains an essential element of accountability. Privacy is for the 'natural person', not governments or corporations. The balance between openness and secrecy in relation to government information is stuck primarily in freedom of information (FOI) law, not privacy law. Other legal rules, not privacy, deal with legitimate commercial confidentiality.
>
> The *Information Privacy Act* differs from FOI in three key ways:
>
> 1 Put broadly, FOI compels openness; the IPA compels discretion.
>
> 2 Under FOI, anyone can seek access. Under the IPA, only the subject of the personal information can seek access.
>
> 3 FOI is fundamentally about disclosure and, less often, correction of information. The IPA is more sophisticated and deals also with collection, use, quality, security, transfer and matching of personal information.

28. Among Privacy Commissioners there is a term, "botpa", which stands for "Because of the Privacy Act…". It is used mostly as a noun, but the verb "to botpa" is surely in the offing. We use it as a shorthand term to describe the many examples of organisations or individuals mistakenly or wilfully "blaming" the privacy act when refusing to disclose information that the privacy act allows to be disclosed.[xii] Sometimes, it is the result of lack of training or excessive caution. Sometimes, it is because the holder of information would prefer not to disclose for reasons unrelated to privacy, but finds it convenient to "blame" privacy law.

Releasing documents after deleting exempt material (s. 25)

29. The Discussion Paper notes (at p. 16) that the FOIA requires that access be granted to an exempt document where exempt material can be deleted from it. The Discussion Paper goes on to state that by far the most common type of information deleted is personal information relating to individuals other than the applicant. I support the Ombudsman's suggestion that agencies give close consideration to use of the deletions option to protect personal information where disclosure of that information would be unreasonable but disclosure of the rest of the document's contents would not. This is an important element of the process to balance proper disclosure and proper withholding.

Creating electronic records management systems to better process FOIA requests

30. The Discussion Paper notes (at p. 23) that new electronic data management systems are being introduced across the Victorian government. Technology will enable more powerful searches to be undertaken. The Ombudsman asks whether these systems should be designed and implemented to assist in the FOI search process. They should, not only to assist searches responsive to FOI requests, but also to assist in the records management tasks that Part II implies (see above).

31. The power of search engines raises other issues. It may be that, with the development of artificial intelligence, requesters will be able in future to ask a computer to frame their request and to submit it, and for the respondent agency's computer to process that request in the first instance, searching (like a mini-Google), sifting and collating all the *information* (not "documents", in the 1980s sense) responsive to the request. Software may develop that could provide at least preliminary tagging of those parts of the information that raise particular potential exemptions. It may automatically flag material that could have special implications for personal privacy. But, whatever may be offered by software sellers as aids to information management, decisions to disclose or to withhold under FOI will always require humans. As we all know from the peculiar results often produced by software tools such as spellcheck and online language translations, artificial intelligence is no substitute for the considered workings of the human mind and the subtleties of meanings conveyed by words in context.

32. At the mechanical level of collating and making available information to FOI requesters online, without costs of copying pages, the expansion of e-government and of internet use among the community can be expected to be of benefit. Care needs to be taken to ensure that the use of electronic and online data management tools does not expose delicate personal information to unauthorised access and disclosure, especially because of the speed and breadth of electronic dissemination of data. Once privacy is breached and information is in cyberspace, it cannot be retrieved with certainty.

When documents are in the hands of government's contracted service providers

33. The Discussion Paper refers (at p. 28) to a lack of clear and consistent protocols across government in relation to when responses to FOI requests should extend to documents held by contracted service providers.

34. Where documents containing personal information are held by a contracted service provider who is not subject to the FOIA, access may be sought through the IPA under IPP 6. In some cases, it may be more appropriate for that access to be mediated through the outsourcing organisation – provided they still have constructive possession over the documents. In other cases, it may be more expedient for the contractor to provide individuals with direct access to their own information.

35. There has been more outsourcing and privatisation of government services since the FOIA first came into operation in 1983. Care should be taken at the time that services are contracted out to address the key information management issues: who takes care and custodianship over information? how will access requests be handled? Agencies should have enforceable contractual provisions to ensure that they can get what documents they need from their contractors. Where privatisation occurs, the head agreement should deal with the issue and the detailed provisions should deal expressly with the mechanics, including archives issues – the records of large public entities are part of the "shared memory" of Victoria, and the Keeper of Public Records ought be consulted as to the proper handling of such materials well before the moment the entity "goes private".

36. Consideration may need to be given to reviewing whether the FOIA should be revised to apply more clearly in the outsourcing context, with the guiding principle being that information handled for public purposes should be subject to public accountability laws.

37. These are manifestations of larger issues of how to ensure accountability in general in an era in which the previously sharp distinctions between the public and private sectors have blurred.

38. The effect of outsourcing and privatisation in reducing the reach of FOI (and other public accountability laws) was discussed in an independent report to government commissioned by the Victorian Premier, the Hon Steve Bracks MP, in December 1999: *Audit Review of Government Contracts: Contracting, Privatisation Probity & Disclosure in Victoria 1992-1999,* May 2000, Chapter 3 & Appendix 9, http://www.dpc.vic.gov.au/auditreview/. The audit committee adopted the view that:

> Contracting with private sector bodies for the provision of service directly to the public on behalf of government poses a potential threat to the government accountability and openness provided by the FOI Act. It should not be possible to avoid that accountability and openness by contracting with the private sector for the provision of services.

39. This issue and the suggested solutions canvassed by the audit committee should be revisited as part of a wider review of information flow laws, discussed elsewhere in this Submission.

4 The personal privacy exemption in FOI (s. 33)

40. The Discussion Paper explores (at pp 29-32) a number of issues arising out of the operation of the FOI exemption that allows access to be refused where it involves an unreasonable disclosure of the personal affairs of any person (whether living or deceased).

"Personal affairs" v. "personal information"

41. Section 6(2) and section 12 of the IPA provide that the privacy law gives way to the FOIA . Section 33 of FOIA provides an exemption for the "unreasonable" disclosure of information about a person's "personal affairs". Case law suggests that the definition of "personal affairs" is narrower than the definition of "personal information" under the IPA.[xiii]

42. "Personal information" is the better term. The Commonwealth FOIA was amended in 1991 to be consistent with the Commonwealth Privacy Act in the use of the term "personal information". The transition was smooth.

43. A similar amendment to the Victorian FOIA would provide greater clarity and consistency in determining what information held by government ought be protected on privacy grounds, under FOIA or IPA.

44. If the FOIA is to use the broader term of "personal information", consistent with the IPA, then it may be appropriate for the FOIA to be amended to give clear directions on the handling of information relating to public duties and to information about deceased persons. Assistance can also be obtained from non-FOIA case law. For example, while acknowledging the difficulty of making hard and fast rules for information handling where privacy is at stake, courts have crafted useful tests. Building on US tort law, Gleeson CJ, of the High Court of Australia has suggested that:

> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private…. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[xiv]

Information relating to public duties

45. Government agencies already have the experience of deciding when it is appropriate to release information about public servants and other individuals carrying out public roles. For instance, the Discussion Paper notes (at p. 29) that, when deciding whether to release the names of public servants, FOI officers take the view that senior executives have consented to the release of their names. This response is consistent with the approach that might be expected in determining, under the IPA, whether disclosure can occur by consent or where it is reasonably expected.

46. A significant benefit in harmonising the terms used in the FOIA and IPA would be in providing agencies with additional guidance about when disclosure of personal information might be regarded as reasonable. IPP 2 of the IPA sets out a number of grounds authorising non-consensual disclosure of personal information.

47. I am confident that agencies would adapt to using the new term, as Commonwealth agencies have done since 1991.

Deceased persons

48. Currently, the IPA does not protect information relating to deceased persons. The principle is similar to the rule in defamation law, which deals with the closely allied right to reputation. Privacy is a personality right, which ceases to exist when the person ceases to exist. In a practical sense, a right to privacy for the dead will create the issue of who among the living would have sufficient standing to assert the right on behalf of the dead. My own view is that enforceable privacy rights end at death.

49. However, a strong case to the contrary can be made having regard to the following matters:

    a. the FOIA currently protects the personal affairs of persons, whether living or deceased;

    b. the HRA currently protects the health records of deceased persons for a period of 30 years after their death;

    c. disclosure of a deceased person's information (particularly their genetic data) may have an impact on living persons;

    d. special cultural sensitivities may arise when disclosing information about deceased persons to the world at large; and

    e. ready access to the a deceased person's biographical and other data may facilitate the creation of fraudulent or stolen identities.

50. In relation to each of points c., d. and e., any harms can be considered and addressed from the perspective of their effects on the living. They do not necessitate an enforceable right of privacy for the dead. If such a right is to be recognised, it is appropriate that Parliament address this issue directly. I encourage the Ombudsman to promote debate over this fundamental issue, and recommend that it be considered in the broader review recommended elsewhere in this Submission.

Notification of right to object

51. Section 33, FOIA requires agencies, where practicable, to notify individuals of a proposed disclosure of their personal information and provide them with an opportunity to object to it being disclosed ("reverse-FOI"). This right to object for the data subject is important both to FOI and privacy. It better equips agencies to determine whether disclosure is not unreasonable by having a more complete picture of the impact that disclosure may have on the safety, reputation or interests of affected persons. It shows respect for the data subject. Fundamental to privacy is a sense of having a measure of control (or at least being able to influence or to receive notice about) what others know about you, and in the timing of when they come to know it.

Practicability of notification

52. In some cases, it may not be practicable to notify the subject of the information, for instance where they cannot be located. Difficulties may also arise in ascertaining who is the next-of-kin (undefined in the FOIA) to be contacted when proposing to release information about a deceased person.

53. Greater guidance should be given to agencies to assist them in determining when it is not practicable to implement the reverse-FOI mechanism. Where there are difficulties in contacting or notifying individuals, an assessment of "practicable" in each case requires a consideration of relevant material factors including:

    a. the number of persons whose information is involved;

    b. whether the individual has relocated;

    c. the inherent sensitivity of the information in question; and

    d. the reasonable and verifiable costs in time and resources necessary to notify the subject (or the deceased's next of kin) would substantially and unreasonably divert the resources of the agency from its other operations.

54. Where it is impracticable to notify the subject, consideration should then be given to whether partial access should be granted with the identifiable information redacted.

55. Care should be taken not to confuse situations where it is practicable to contact the data subject, but where it may not be proper to do so on other grounds. For example, a family member may seek access to a deceased relative's records, and the next of kin (for the purpose of the reverse-FOI mechanism in s. 33) is the spouse imprisoned for murdering the data subject. Here, notice is practicable (as the next of kin is easily located in prison), but might not be considered proper.

56. Here, agencies need to proceed cautiously if given the authority to dispense with notice because, in effect, they would be denying a person the privacy right to be notified when a disclosure about him or her (or the deceased next of kin) is going to be made. On the other hand, the requester may be placed under undue fear or distress if notice is given of the request, as in the case of the next of kin prisoner. Although the meaning of "practicable" encompasses the notion of prudence, in my opinion a test of "proper in all the circumstances" would be clearer guidance for this type of decision, and would be consistent with the core privacy test in s.33.

57. Relevant considerations in any decision to waive a requirement to notify a data subject include:

    a. whether the subject has given express consent to the disclosure;

    b. the potential psychological, social, or other harm that may arise because of the notification process;

    c. where the data subject had previously expressed a wish not to have identifiable information disclosed, on the basis that such disclosure may cause substantial harm or distress;

    d. where contact with the data subject or next-of-kin is not permitted under a previous agreement, policy, or law.

Review rights, where not notified

58. Where an agency released personal information about a data subject without having notified them of their right to object, there does not appear to be any right of review under the FOIA – irrespective of whether that notification was practicable.

59. Such a disclosure may, in that case, be the subject of a complaint under the IPA, as occurred in *Smith v Victoria Police.*[xv] In that case, although the police relied on the administrative disclosure section (s. 16, FOIA), the Victorian Civil and Administrative Tribunal found that police should have applied section 33, FOIA and given notice of the proposed disclosure to the complainant.[xvi] The failure to invoke section 33 put the disclosure outside of the operation of the FOIA, thereby falling to be determined under the complaints mechanism of the IPA.

60. Greater harmonisation is warranted in the administration and review of decisions involving disclosure of personal information.

Right to proactively object

61. Consideration should be given to providing individuals with a more proactive right to object, enabling them to seek to suppress disclosure of identifiable information where, for example, that disclosure may endanger the life or safety of any person. Apart from the practical point that privacy, once breached, cannot be recovered, such a right is consistent with:

    a. the recent insertion of s. 33(2A) into the FOIA directing agencies to have regard to whether the disclosure of information (including names) may endanger the life or physical safety of any person;

    b. the silent elector provisions in the *Electoral Act 2002 (Vic)*;

    c. other rights to restrict public access to personal information, such as in s. 22A of the *Business Names Act 1962 (Vic)*, which also includes a right of review to the Victorian Civil and Administrative Tribunal (s. 22B); and

    d. international and overseas data protection laws, eg s. 10 of the UK *Data Protection Act 1998* gives individuals a qualified right to prevent the processing (including disclosure) of information where that may cause them or any person unwarranted harm or distress.

Disclosure of personal information where not "unreasonable"

62. FOIA s. 33 allows disclosure of information relating to the personal affairs of a person where this would not be "unreasonable". Deputy President Anne Coghlan has, in *Vaughan v Department of Sustainability and Environment*, suggested a method for carrying out the necessary balancing exercise:

> To satisfy the exemption [in s. 33, FOIA], disclosure of such information must be unreasonable. The test of unreasonableness involves a balancing of competing interests. On the one hand protecting the right to personal privacy of an individual whose affairs may be unreasonably disclosed by granting access to the information against the object of the Act to extend as far as possible the right of the community to access to information in the possession of government or an agency.

> In carrying out this balancing exercise, it is well accepted that I must have regard to all the surrounding circumstances including whether disclosure to the world at large would be unreasonable, not whether disclosure to an applicant would be unreasonable….
>
> In deciding under s 33 whether disclosure is unreasonable, I must, among other things, consider the interest of the applicant and purpose for which the applicant requires release…[xvii]

63. The public interest in wide access to information can be promoted without sacrificing the public interest in information privacy by allowing (expressly in law or otherwise in practice) agencies to disclose in limited ways. For instance, it may be considered reasonable to disclose information where:

    a. partial access can be granted (eg, under s. 25, FOIA), with the identifying information redacted;

    b. information is released only where the purpose is a permissible one (such as those set out under IPP 2, IPA), subject to the right to object;

    c. disclosure is made conditional, eg upon an undertaking that the information be used for specified purposes and not be further disclosed (as occurs under other laws – see, eg s. 92, *Road Safety Act 1986 (Vic)*; s. 37, *Electoral Act 2002 (Vic);* s. 94, *Taxation Administration Act 1997 (Vic);* s. 5C, *Land Tax Act 1958 (Vic).*

64. It would be possible to negotiate these sorts of undertakings if access requests involving personal information were dealt with by the Privacy Commissioner, whose role is to conciliate disputes about the handling of personal information. A version of this approach already operates in practice under the IPA. Organisations may seek undertakings from persons seeking access to certain types of information made available for specific purposes that they will use the information only for those purposes.[xviii]

65. Another method for balancing privacy and open access has been recently proposed by the European Data Protection Supervisor, Mr Peter Hustinx, formerly Data Protection Commissioner for the Netherlands and one of the most experienced of the European commissioners in the field. Mr Hustinx suggested that, assuming no legislative provision prohibits access, three conditions should be satisfied before refusing access:

    a. the privacy of the data subject must be at stake;

    b. disclosure would substantially affect the subject; and

    c. disclosure is permitted under data protection legislation.[xix]

5 Review of decisions

Complaint handling and review

66. When Victoria established its FOIA scheme, the office of the Ombudsman was nine years old and if not the only, then the obvious, statutory office to which Parliament could direct requesters who were unsatisfied with the response by any part of government bureaucracy to its FOIA obligations. Specifically, the Ombudsman was empowered to check independently any claims by agencies that the documents responsive to a person's request could not be found. And the Ombudsman could appear before the Tribunal in relation to FOIA matters. However, no role was given to the Ombudsman to try to conciliate FOIA matters between the requester and the agency or Minister, nor could the Ombudsman adjudicate on whether access should be provided. Where the agency denied access, at first instance or at its own internal review by its principal officer or his or her delegate, the requester had to proceed to the Administrative Appeals Tribunal, now VCAT.

67. Nowadays, other independent statutory roles exist and deal with information flow issues closely related to FOIA issues – in particular the Office of the Privacy Commissioner under the *Information Privacy Act 2000*, but also the Health Services Commissioner in relation to the *Health Records Act 2001* – which could fulfil some of the roles previously undertaken by the Ombudsman alone. To a limited extent, the Health Services Commission already exercises such a role in being able to conciliate over refusals of access to health records under s. 51A, FOIA.

68. An Information Commissioner model, which combines FOI and privacy, is in use in the Northern Territory under a combined FOI/privacy/archives statute called the *Information Act 2002 (NT)*. This model is in common use in other countries, notably the UK,[xx] Canada[xxi] and Germany[xxii].

69. In New Zealand, the Privacy Commissioner and Ombudsman share the tasks in what might be called "information cases". The *Official Information Act 1982 (NZ)* originally gave everyone the right of access to their information. In 1993, the individual right of access to personal information was transferred to *Privacy Act 1993 (NZ)*. Now, the Privacy Commissioner handles access requests by persons seeking their own information, and the Ombudsman handles access requests involving information other than the requester's personal information. Where an OIA information request is refused on the grounds that it affects another person's privacy, the Ombudsman is required by the OIA to consult with the Privacy Commissioner before forming any final views about the merits of refusing access.[xxiii] (A similar mechanism exists in Victoria, where the Victorian Electoral Commissioner is required by section 34 of the *Electoral Act 2002 (Vic)* to consult with the Victorian Privacy Commissioner before deciding to release electoral information in the public interest, otherwise than in accordance with other authorised disclosures under that Act.)

70. I recommend that the Ombudsman consider how this model might operate effectively in Victoria, so that –

- duplication is avoided – this probably means the removal of the "internal review" in the FOIA, where agencies tend to confirm their initial decision – for requesters and government entities;
- the benefits of the specialised expertise of the various statutory offices can be obtained with clear separation and independence for each;
- there is capacity for precise cross-referrals among the relevant statutory offices of cases better suited to the expertise of each;
- a conciliation stage is created for resolving FOIA requests with quicker, better results than a full-scale adversarial review (conciliation stages exist for privacy breach cases under the IPA and HRA);
- an adjudication power could be given to the relevant statutory office (with retention of appeals to VCAT by either requester or respondent agency from the statutory office holder's adjudication).

71. Statistics in the FOI Report 2004 indicate the continuation of the longstanding trend for the largest proportion of FOI requests to be about the requester's own information.[xxiv] Access to one's own information is a quintessential information privacy right, with access and correction provisions typically found in privacy, otherwise known as data protection, laws. See, in Victoria's IPA, Schedule 1, Information Privacy Principle 6.

72. This complex issue of which oversight body should do what, in relation to which information flow law, may be a matter that the Ombudsman could include expressly in proposed terms of reference for the broader review of information flow laws referred to elsewhere in this Submission.

Harmonising privacy and FOI laws – recommendations for reform

73. The IPA and FOIA can be better harmonised in at least the following areas:

    a. make consistent the terminology used in both Acts, as discussed above;

    b. provide FOI requesters with an alternative avenue of review and conciliation by the Privacy Commissioner for refusals of access to their personal information, equivalent to the way denied access to personal health records is dealt with under s. 51A, FOIA;

    c. fold Part V of the FOIA (Amendment of personal records) into the IPA;

    d. remove the inter-relationship provisions (in ss 6(2) and 12) and amend the relevant IPPs to reflect the operation of FOIA in the access and use/disclosure principles, which are the only two aspects of information handling that FOIA is concerned with. This could:

        i. streamline the access regime under IPP 6 so that it had real effect. IPP 6 could then apply to all organisations, irrespective of whether they are covered by the FOIA and, where access is sought from an organisation that was bound by FOIA, IPP 6 could expressly be subject to those provisions; and

ii. make disclosure authorised under IPP 2 where disclosure is made pursuant to an application under the FOIA and the organisation has complied with any obligations for consultation under s. 33;

e. consolidate the information Acts – the IPA, FOIA, and Public Records Act – into a single Information Act;

74. The Northern Territory is the most recent jurisdiction to have enacted privacy legislation. The *Information Act 2003* (NT) incorporates freedom of information, management of public records and privacy, regulated by a single Information Commissioner. This may be the way for the future, to provide clarity for organisations and individuals. However, it is too early to settle any view about the appropriate reform model. Wide consultation would be required, in particular with the Ombudsman, Health Services Commissioner, the Keeper of the Public Records and with VCAT, as well as the public sector and the community.

PAUL CHADWICK
Victorian Privacy Commissioner
9 August 2005

Endnotes

[i] Victoria, Ombudsman, *Review of the Freedom of Information Act*, Discussion paper, May 2005, http://www.ombudsman.vic.gov.au/downloads/FOI%20Discussion%20Paper.pdf.

[ii] *Freedom of Information Act 1982 (Vic)*, commenced July 1983.

[iii] The rationale for FOI laws - chiefly, to improve government accountability and democratic participation - needs no detailed repetition, and remains as valid today and for the "e-future" as it was valid at the paper-document time when FOI schemes were first implemented. From a vast literature, see for instance: Royal Commission on Australian Government Administration, 1976 (Appendix Volume Two); Senate Legal and Constitutional Affairs Committee reports on FOI, 1979, 1987, 2001; Australian Law Reform Commission, Report No. 77, 1995; Bayne, *Freedom of Information*, 1984; Harrison and Cossins, *Documents, Dossiers and the Inside Dope*, 1984, 1993; Chadwick, *FOI – how to use the freedom of information laws*, 1985; Paterson, *Freedom of Information and Privacy in Australia – government and information access in the modern state*, 2005. See also successive US Congressional material since 1966 and, more recently, UK official reports on FOI.

[iv] International Covenant on Civil and Political Rights (ICCPR) Article 25.

[v] ICCPR Article 17. Of course, other laws make important contributions, among them the *Surveillance Devices Act 1999* and the *Health Records Act 2001*.

[vi] The *Health Records Act 2001* (HRA) could be included. The HRA was introduced to complement the IPA by protecting health information held by Victorian public sector organisations, an aspect of personal information excluded from the IPA. the HRA also protects health information held by private sector organisations and grants individuals a right of access to their health information, addressing the legislative gap created by the High Court of Australia's decision in *Breen v Williams* (1996) 186 CLR 71, where it was held that patients of private doctors had no enforceable right in the common law or equity to have a copy of their health record. The HRA is not further mentioned here only because its coverage of the private sector, and so its operation alongside the *Privacy Act 1988 (Cth)*, has the potential to lead to legal complications that would require more detailed analysis than time allows for this particular review of FOI. A wider review should of course consider this issue further.

[vii] Madison's great phrase, not mine. James Madison, Letter to WT Barry, 4 August 1822.

[viii] The Victorian Law Reform Commission had previously been asked to inquire into options for protecting privacy, having regard to existing FOI legislation: Victorian Law Reform Commission, *Privacy*, Discussion paper no. 29, October 1992. Its inquiry was aborted when it was abolished in November 1992.

[ix] Contrast, for instance, the FOI proposals of the two Commonwealth Inter-Departmental Committees of 1974 and 1976 with the more open-government oriented work of non-departmental entities such as the Munro Royal Commission (1976), Senate Committee on Legal and Constitutional Affairs (1978, 1987) and the ALRC (1995).

[x] Exclusions for whole entities or classes of entity tend to undermine the integrity of information law schemes and weaken the accountability and improved records management that such laws promote. Of course, as now, exemptions are appropriate in relation to particular information in particular circumstances, and those exemptions should be set out in the statute. State and local government entities should be responsible for the acts and omissions of their contracted service providers in relation to information handled for a public purpose.

[xi] The Senate Committee reviewing the *Privacy Act 1988 (Cth)* in June 2005 made a similar point at para 7.51 of its report, and appeared to endorse a suggestion that the Federal Privacy Commissioner be empowered to issue a corrective statement, at the expense of the organisation responsible for the misrepresentation, where the Privacy Act is represented.

[xii] See newsletter of the Office of the Victorian Privacy Commissioner, *Privacy Aware,* Vol. 2, no. 4, Summer 2003-04, p 4.

[xiii] See, eg, *The University of Melbourne v Robinson* [1993] 2 VR 177, where Eames J states at 187: "The reference to the "personal affairs of any person" suggest to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or other public activity with which the person occupies his or her time."

[xiv] *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* [2001] HCA 63, para 42

[xv] *Smith v Victoria Police* [2005] VCAT 654.

[xvi] Ibid paras 64-70.

[xvii] *Vaughan v. Department of Sustainability and Environment* [2004] VCAT 1562, at paras 23-25.

[xviii] See Office of the Victorian Privacy Commissioner Information Sheet 10.02, *Fences and Privacy*, 8 Oct 2002

[xix] European Data Protection Supervisor, *Public Access to Documents and Data Protection*, Background paper no. 1, July 2005, http://www.edps.eu.int/publications/policy_papers/Public_access_data_protection_EN.pdf.

[xx] The UK Information Commissioner (http://www.informationcommissioner.gov.uk) administers both the *Data Protection Act 1998* and the *Freedom of Information Act 2000.*

[xxi] For example, the Ontario Information and Privacy Commissioner (http://www.ipc.on.ca) administers the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act;* the British Columbia Information and Privacy Commissioner (http://www.oipcbc.org) administers the *Freedom of Information & Protection of Privacy Act* and private sector privacy legislation; and the Quebec Commissioner for Access to Information (http://www.cai.gouv.qc.ca/index-en.html) administers private sector privacy legislation together with *An Act respecting access to documents held by public bodies and the protection of personal information*.

[xxii] See, for example, the Federal Data Protection Commissioner who administers the Federal Data Protection Act and who will, from 1 January 2006, also administer the recently enacted FOI legislation (http://www.bfd.bund.de/information/pmen17.pdf). FOI and data protection laws are also jointly administered by the provincial Data Protection Commissioners (Datenschutzbeauftragten der Länder) – see, eg, the Brandenburg State Commissioner for Data Protection and Access to Information (http://www.lda.brandenburg.de), and the Berlin State Commissioner for Data Protection and Freedom of Information (http://www.datenschutz-berlin.de and http://www.freedom-of-information.de).

[xxiii] See New Zealand, Office of the Ombudsmen, *Privacy,* Practice guideline 4.1, http://www.ombudsmen.govt.nz/downloads%20Guidelines/guideB41_02.pdf; New Zealand, Office of the Privacy Commissioner, *The Roles of the Ombudsman and the Privacy Commissioner,* Fact sheet 11, http://www.privacy.org.nz/people/fact11.html.

[xxiv] According to the FOI Annual Report for 2003-04 (available at http://www.justice.vic.gov.au > Resources > Annual Reports), personal access requests formed 45% of the FOI requests for the "Top 30 agencies" (including Victoria Police, Department of Human Services and various health providers; WorkCover, Transport Accident Commission, Department of Justice, Department of Infrastructure, Department of Education and Training, VicRoads, and the Environment Protection Authority). Personal privacy (s. 33) was also by far the most frequently cited exemption, relied on in 3610 cases, with the next most cited exemption (s. 30 – internal working documents) accounting for 1133 cases.