

Inquiry into the operation of the *Freedom of Information Act 1982 (Vic)*

Submission to Integrity and Oversight Committee,
Victoria Parliament

21 December 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

Endorsements

The following organisations and entities have endorsed the ALA's submission to Victoria Parliament's Integrity and Oversight Committee:



**Victorian Aboriginal
Legal Service**



¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Inquiry into the operation of the *Freedom of Information Act 1982 (Vic)*, which is being conducted by Victoria Parliament's Integrity and Oversight Committee ('Committee').
2. ALA members across Victoria routinely make Freedom of Information (FOI) requests under the *Freedom of Information Act 1982 (Vic)* ('the FOI Act') on behalf of their clients.
3. The ALA submits that people across Victoria are routinely denied information (including their own personal information) because of some of the more restrictive provisions of the FOI Act, as well as because of loopholes in the FOI Act. This has real consequences for those people – many of whom are vulnerable, injured and facing significant hardship – in terms of compensation and access to justice.
4. When documents can be released by virtue of an FOI request or multiple requests, ALA members report delays almost across the board in receiving those documents. These experiences of FOI delays are well-documented by this Committee,² as well as by the Office of the Victorian Information Commissioner (OVIC).³
5. Further, ALA members report that there are often arbitrary restrictions on how many documents can be released per FOI request, which compromises litigation progressing and, ultimately, access to justice.
6. The ALA's submission will address issues with FOI requests in Victoria in relation to:
 - a. Abuse claims;
 - b. Victoria Police;
 - c. Criminal law and justice, including accessing prisoners' health records;
 - d. Local councils;

² Integrity and Oversight Committee, *Performance of the Victorian integrity agencies 2021/22* (Report, November 2023) 71–72.

³ See: Office of the Victorian Information Commissioner, *Impediments to timely FOI and information release: own motion investigation under section 61O of the Freedom of Information Act 1982 (Vic)* (Report, 2021).

- e. The Emergency Services Telecommunications Authority; and
 - f. Medical negligence claims.
7. While the ALA will make recommendations throughout this submission, the ALA's overall recommendations are as follows:

Recommendation: That the Integrity and Oversight Committee should look at Ambulance Victoria's FOI practices and the Victorian WorkCover Authority's FOI practices, which ALA members have generally found to be efficient and clear.

Recommendation: That for all FOI requests made under the *Freedom of Information Act 1982* (Vic), there should be the ability to make FOI requests just for digital material *only*. This would speed up the process and shorten the timeframe before documents are returned to the person who made the FOI request. For those who need access to soft copy material, there would be the option to pursue soft copy material too.

Recommendation: That the necessary amendments be made, including to the *Freedom of Information Act 1982* (Vic), to require all agencies to make a decision regarding an FOI request by a certain date.

Abuse claims

8. ALA members frequently submit FOI requests on behalf of victim survivors of abuse, including victim survivors of child sexual abuse, who are making claims for compensation. An example of a common FOI request is for the records of children who were in state care, including wardship records.
9. ALA members reflect that it can take six months to receive an acknowledgement of an FOI request before the request is even processed. Many more months pass before the materials eventuate. The ALA contends that this is a barrier to litigation progressing and a barrier to victim survivors of abuse accessing justice. It is in best interests of victim survivors of abuse and the whole Victorian community that these matters are progressed towards resolution either via ADR or litigation in a timely manner.

Recommendation: That the Victorian Government should provide investment in advanced technology to assist with the processing of documents and production of summaries.

10. Secondly, documents are released in batches of 500 pages per FOI request. For further records, new FOI requests must be made. For younger clients especially, where those records were created in the age of computers, there can be 10,000+ pages of records. This, again, has the effect of slowing down the progression of litigation and delaying victim survivors of abuse accessing justice.

Recommendation: That the cap on the number of pages of documents released per FOI application should be increased to at least 1,000 pages.

11. The ALA is aware that the Department of Family, Fairness and Housing is piloting a program where a summary setting out the key information contained within a client's file is provided within 21 days of an FOI request being made. This is expected to help legal representatives verify initial details of the case and to progress the matter while waiting for the release of the complete documents.

Recommendation: That consideration be made to expanding the Department of Family, Fairness and Housing's model across other departments and agencies, if the trial is deemed successful – including if this approach has been helpful for victim survivors of abuse and other clients in accessing justice.

Victoria Police

12. ALA members report great difficulty in receiving documents after submitting FOI requests through Victoria Police.
13. The situation worsened during the COVID-19 pandemic, and Victoria Police continue to cite the pandemic as the reason for the substantial delays in releasing documents subject to FOI requests.

14. In the experience of ALA members, it takes 12 to 18 months to receive documents after making an FOI request – not just for documents relating to claims against members of Victoria Police, but also for documents relevant to other cases where police have been involved as part of everyday duties, including claims arising from motor vehicle accidents and historical abuse matters. This prevents access to justice for a range of clients across Victoria.⁴
- a. When ALA members have needed to make complaint to OVIC about these delays, the response consistently is that more staff members have been put on the FOI team or at least that Victoria Police has funding to expand the FOI team. This Committee has also publicly reported that OVIC was informed by Victoria Police as recently as April 2023 about having two years’ worth of funding “for 14 additional FOI staff to assist with clearing the significant backlog of undecided FOI requests”.⁵
 - b. However, in the experience of ALA members, there has been no improvement to Victoria Police’s FOI processing times and delays.

Recommendation: To address the aforementioned delays, the ALA recommends that adequate and sustainable resources are reallocated to prioritise the work of Victoria Police’s FOI team as a matter of urgency.

15. The ALA also notes that police officers are forced to do FOI requests to access their own health records regarding their psychological history.
- a. ALA members report that receiving those records takes 18 months to two years.
 - b. The rationale provided for requiring police officers to go through the FOI process is that psychological records do not fall under the *Health Records Act 2001 (Vic)* and thus can only be shared through FOI requests.
 - c. The ALA submits that this ultimately affects the progression of important claims made by employees of Victoria Police, including claims regarding PTSD.

⁴ See, egs and data, Lachlan Abbott and Cameron Houston, “Unacceptable situation’: Victorians kept in the dark as police breach information laws’, *The Age* (online, 1 November 2022) <<https://www.theage.com.au/national/victoria/unacceptable-situation-victorians-kept-in-the-dark-as-police-breach-information-laws-20221101-p5bum4.html>>.

⁵ Integrity and Oversight Committee, *Performance of the Victorian integrity agencies 2021/22* (Report, November 2023) 73.

Recommendation: That all health records should be available under the *Health Records Act 2001* (Vic), as no type of health record should be confined to only being released through FOI requests.

Criminal law and justice

16. ALA members report that criminal defence lawyers invariably cannot engage – except in limited circumstances – with the FOI process, as the time it would take to receive the requested information, as grounded in experience, is simply too long.
17. Ordinarily, FOI requests would be issued at the commencement of criminal proceedings. However, the delay in receiving materials (measured in many months) means that materials are not received until well after the point at which they are required. This has the effect of making the process almost entirely redundant.
18. The ALA notes that similar issues arise for justice at the civil level, as FOI requests are often not responded to within the limitation period for bringing proceedings. This can have significant flow-on effects for lawyers and other individuals, in terms of providing fulsome advice to clients about their rights and the merits of their case.

Prisoners' health records

19. Most often, the materials sought and required under FOI relate to a prisoner's own health records, which are relevant (if not critical) to plea proceedings.
20. ALA members report that prisoners in Victoria struggle to access to their own health records through Justice Health and must submit FOI requests to do so. In many cases, prisoners do not see their own health information in complete form until the discovery phase during litigation, as the FOI request process is difficult to navigate, riddled with delays and does not yield complete documentation.
21. Delays in releasing prisoners' health records impact most heavily on resolved proceedings in the Magistrates' Court, where an accused is remanded in custody and where the materials are

required for pleas in mitigation, assessments for mental impairment defences, and fitness to be tried. The delay issue impacts in the two following ways:

- a. Where materials are not received in a timely fashion, counsel and solicitor-advocates are placed in the unenviable position of making submissions from the bar table as to a prisoner's psychiatric or physical health – often significant matters upon a plea – in the absence of evidence, and upon instruction alone. This may be accepted in the lower courts; however, in the County and Supreme Courts, it is simply an untenable position.
- b. Prisoner health records are almost always required to properly instruct experts (forensic psychologists, psychiatrists and neuropsychologists) – where materials are not received in time, further delays are incurred.

22. The ALA submits that the slow response time in processing FOI requests by the Department of Justice and Community Safety is obstructive to justice and the progression of litigation.

Recommendation: That the Victorian Government provides adequate funding and resources to ensure the Department of Justice and Community Safety can process FOI requests in a timely and efficient manner.

23. Prisoner records are also only provided in batches of 150 pages per FOI request. A subsequent request for more pages can only be made after receipt of the first or prior batch of 150 pages. This is also obstructive to justice and the progression of litigation.

Recommendation: That, as above with health records for employees of Victoria Police, prisoners in Victoria should have unfettered access to their own health records.

24. In the above setting and in practice, criminal defence lawyers are often left with no option but to issue subpoenas for prisoner health records, which involves the inefficient use of Court resources. There is also risk of forensic disadvantage in this situation, which must be balanced against the need for defence to receive materials in a timely fashion. An accused ought to have the benefit of receiving their own health records under the FOI process, without incurring the forensic disadvantage of simultaneously having the materials disclosed to the prosecution – which is what occurs under the subpoena process.

25. The consequences within the criminal justice jurisdiction are manifold – it results in manifest unfairness to an accused in having a plea in mitigation properly put; it can result in accused persons spending longer in custody than the Court might otherwise require upon sentence; it results in forensic disadvantage to the accused; it results in delays in Court proceedings and inefficient use of Court time and resources; and it can result in experts being instructed in such a manner that is incomplete.

Local councils

26. ALA members routinely submit FOI requests to garner information from local councils (for example, records regarding defective roads and hazardous footpaths) in relation to a variety of claims (examples include road injury matters and work-related construction injury injuries).
27. ALA members report that there are significant delays in local councils processing FOI requests.
28. In addition, ALA members discover via issuing a subpoena during discovery that too often what the local councils do release is incomplete information. This reflects a lack of transparency and a barrier to injured Victorians accessing justice and compensation.

Recommendation: That funding and resources are allocated to ensure that local councils can process FOI requests in a timely and efficient manner. Local councils' obligations under all relevant legislation to release information should be clarified to ensure access to justice is not compromised.

The Emergency Services Telecommunications Authority

29. ALA members report significant issues in the approach of the Emergency Services Telecommunications Authority (ESTA) to releasing documents or files, for example of the audio of a 000 call. In that example, that includes ESTA requiring the consent of the person who made the emergency call before ESTA will consider releasing that audio.
30. ALA members report that ESTA's processes regarding the release of information are opaque, inconsistent and every-changing – sometimes ALA members are told an FOI request under the

FOI Act is required, sometimes (and more recently) ALA members have been told to make applications under the *Emergency Services Telecommunications Authority Act 2004* (Vic).

31. Previously, ESTA would release the audio of a 000 call and redact the caller's name and any identifying details. However, recently ALA members report that ESTA is refusing to release the audio at all. The ALA contends that the caller's voice alone and/or the details of what the caller has observed should not be considered identifiable forms of personal information, and should thus not be blocked from release. This obstructs access to and the progression of justice.
32. Engaging with the FOI process in this instance is, in the experience of ALA members, not accessible or efficient. In order to receive the desired document or file, ALA members must instead rely on the relevant records being subpoenaed during the discovery phase.

Recommendation: That ESTA's obligations under all relevant legislation to release information should be refined and their processes should also be clarified to ensure access to justice is not compromised.

Medical negligence claims

33. In the medical negligence space, ALA members have found that it is impossible through the FOI process to receive copies of crucial documents, including the results of internal investigations, root causes analysis reports, and materials relating to Safer Care Victoria investigations. The reason given is that those documents are protected by privilege.
34. This is obscuring the public's right to know about incidents in or findings about Victoria's health system,⁶ and prevents access to justice for those making medical negligence claims.

Recommendation: That there be a focused review of when protection by privilege should and should not be invoked during FOI requests processes, given that this invocation obscures transparency and undermines accountability.

⁶ See, eg, Aisha Dow, 'Eleven young Victorians die in preventable emergency department failures', *The Age* (online, 15 November 2023) <<https://www.theage.com.au/national/victoria/eleven-young-victorians-die-in-preventable-emergency-department-failures-20231113-p5ejnp.html>>.

Conclusion

35. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Inquiry into the operation of the *Freedom of Information Act 1982 (Vic)*.
36. The ALA is available to provide further assistance to the Integrity and Oversight Committee on the issues raised in this submission.

A handwritten signature in black ink, appearing to be 'LF', with a dotted grid background.

Lachlan Fitch

President, Victoria Branch Committee

Australian Lawyers Alliance