

TRANSCRIPT

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Monday 25 March 2024

MEMBERS

Dr Tim Read – Chair

Hon Kim Wells – Deputy Chair

Ryan Batchelor

Jade Benham

Eden Foster

Paul Mercurio

Rachel Payne

Belinda Wilson

WITNESS

Wayne Gatt, Secretary, Police Association Victoria.

The CHAIR: I declare open this public hearing for the Integrity and Oversight Committee's inquiry into the operation of the *Freedom of Information Act*. I would like to welcome the public gallery and any members of the public watching the live broadcast.

I also acknowledge my colleagues participating today: on my left, Deputy Chair Kim Wells. Online we have Jade Benham MP from Mildura. I am Tim Read, the Chair. Ryan Batchelor is on my right, and then Belinda Wilson, Eden Foster and Paul Mercurio.

On behalf of the Committee I acknowledge First Nations peoples, the traditional owners of this land which has served as a significant meeting place of the First People of Victoria. I acknowledge and pay respects to the elders of First Nations in Victoria past and present and welcome any elders and members of communities who may visit or participate in the public hearing today.

To our witness, before you give your evidence there are some formal matters to cover, so bear with me. Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things elsewhere, including on social media, those comments will not be protected by this privilege. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament.

All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check once available. Verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

I welcome, from the Police Association Victoria, Wayne Gatt, Secretary, to give evidence at this hearing. Mr Gatt, do you have any brief opening comments, or would you like to go straight to questions?

Wayne GATT: I am happy to go straight to questions, other than to remark that we have intentionally made a very narrow submission pertaining to the matters that we think are relevant to our members. Recognise we walk both sides of the fence with respect to this issue, uniquely. Our members actively manage Freedom-of-Information [FOI] requests, but they also make them occupationally as well, so there are competing interests here. So we have confined our commentary to the areas we think are of best value.

The CHAIR: All right. Thank you. Why don't we go to Paul Mercurio to start us off.

Paul MERCURIO: Thanks, Wayne. Thanks for coming in. I have got one question in two parts: What are the observations of Victoria Police's Freedom-of-Information culture, and what are the major issues affecting Victoria Police's performance of its responsibilities under the Freedom-of-Information scheme?

Wayne GATT: Thank you for the question, Paul. In our submission we clearly call out the time frames and the blow outs. Firstly, can I say that we understand why that is occurring at the moment. It is largely driven by two factors. One is the sheer number or volume of requests that confront Victoria Police. By its very nature Victoria Police as an entity tends to attract FOI requests. It is why it is one of the largest, if not the largest, recipient in the sector for requests for information, and it follows that, given its statutory role, that is a necessary and important part of the system. However, resourcing that is open to it to process what would then follow as a high number of sometimes very complex requests means that the time frame for the satisfaction of those requests within the statutory framework is compromised. Even when the Police Association and their members make applications, we see those time frames roll out into significant periods, at times north of 30 to 35 weeks. That has challenges for the administration and transparency of justice but also to enable proper and fair consideration of matters and the defence of individuals' personal circumstances, from our perspective. But we recognise that that has a broader implication for the community equally when they make those same applications, for the media when they seek transparency in the decision-making of statutory and government bodies, and indeed for members of government who rightly from time to time seek to probe the operations of a significant and fairly large statutory body.

Paul MERCURIO: Do you know what sort of numbers of FOIs you get at the police?

Wayne GATT: I do not want to speak for Victoria Police, but I noted their submission to this inquiry outlined those to be in the thousands, many of them being very complex in their nature, although I think the terminology they use is ‘voluminous’. We would agree many of those matters, particularly as they pertain to serious investigations, would be in the hundreds if not thousands of pages. They will take time to go through, and that is why resourcing is a significant consideration. We think that – and one of the clear recommendations in our submission is that – the government ought consider the complexity and nature of requests that Victoria Police by its very nature as an organisation is likely to receive, and it ought be resourced appropriately to be able to deal with that. That is in the broad public interest and the interest and the objectives of the Act itself.

There is one other comment I would make, and that is timeliness is important. When it comes to Freedom of Information, a request that is satisfied weeks or months after it was requested can sometimes deem [sic] the request to be ineffective or valueless. In our case it has been known to compromise statutory time frames for appeals, indeed time frames that are set for civil actions. And in the context of transparency, it can deem or neuter I suppose the public debate that might need to be provided on a particular issue around Victoria Police’s operations by virtue of the fact that it is delayed somewhat into the never-never.

The CHAIR: Thank you. Let us go to Eden Foster for a question.

Eden FOSTER: Thanks, Chair. Thanks, Wayne, for coming in. The Committee notes the Police Association’s view that section 78 of the *Public Interest Disclosures Act* should be amended so it does not apply to police-related assessable disclosures received by or notified to IBAC that are not determined by IBAC to be public interest complaints. In your view, why is this necessary, and are there potential risks – so for example, adverse impacts on working relationships between police colleagues?

Wayne GATT: Without wanting to repeat the submission, because it is complex legislation, you have a number of Acts here that are intersecting, and I suppose I make the point that it is clear that when a decision – for example, around decisions to provide information – has been challenged, decisions have varied. Indeed even though there are differing decisions, the effect of those to provide any enforceable or reliable precedent is somewhat limited. So we are all sort of left in the dark a little bit as to the relationship between these various pieces of legislation, but we say that surely it must follow that if something – and we understand the importance for a period of time while something is being assessed as a disclosure for it to be considered sensitive in that regard, but surely once that assessment has been made then the rights of a person to know or to access or even to have that access properly considered, as opposed to it being denied on the basis of a broad exemption, is something that needs to be reconsidered. Clearly the information has been considered by that body. It then follows that the accessibility of the information that was considered should also be open for consideration by the applicant.

Eden FOSTER: Okay. Thank you.

The CHAIR: Belinda Wilson.

Belinda WILSON: Thanks for joining us today. What changes are necessary to ensure that the Police Association’s members are able to access their personal and health-related information from Victoria Police in a timely manner?

Wayne GATT: This issue is probably the one that has caused us most concern, and that is the access of our members to their own health records. Most commonly we would see this where a member is deemed unfit for duty, for example, and the Police Association on behalf of that member would make representations on their behalf for a review. The decision-making and the decisions that have been used by police medical officers, for example, would be subject to FOI requests. The delay that is experienced by our members can obviously compromise the effective advocacy that is required for that member of the police force. So we would see a need for our members to be provided with that information more readily and without restraint; it is obviously information in an occupational setting that they should be entitled to. I think Victoria Police in its own submission recognises the importance of people accessing their own personal information. We would respectfully submit that this is a very important cohort of people who should be trusted to the employer. They are only ever seeking information pertaining to their own personal circumstances. They have a right to know the framework and the decisions and the reasons for the decisions that have a potentially very detrimental impact on the status of their ongoing career.

Belinda WILSON: Thank you.

The CHAIR: Just on that, Mr Gatt, if I may: let us focus on, say, someone being assessed as unfit for work. What do you think would be the main hold-up? Is it simply that there are just not enough staff at Victoria Police to process these FOI applications? What is the hold-up in getting that report?

Wayne GATT: Predominantly time, Chair. Again, time is of the essence with these matters. I will say that often our members are quite injured. Sometimes, and I think it is a matter of record in our profession, psychological injury is quite a significant driver of lost time at work. We have members of Victoria Police unable to participate in workforce activities whilst a decision is pending. If that follows into the weeks, there are countless shifts that are lost to the Victorian community and the Victorian taxpayer. But you think about the ongoing impact on the psychological health of that individual and that employee whilst they try to reconcile their future, and we would say that this is very much in the category of information that ought to be automatically provided to a member of Victoria Police.

The CHAIR: I realise I am almost asking you to be in the position of Victoria Police here, which obviously you cannot do.

Wayne GATT: I am not.

The CHAIR: What I am trying to get at is: you are looking at perhaps a psychiatric report or something of that nature, which says, 'This officer's not fit for duty for the following reasons,' and that is the bit of paper you are trying to get your hands on. Is the reason for the delay that there is an unwillingness to share the information – because ultimately it has to be made public in legal proceedings, if there are any – or is it that it is just difficult to redact all the secondary sources or whatever is in there?

Wayne GATT: I do not think in that particular circumstance redaction would be a major feature of the process, but it is probably under the weight of the overall volume of requests made to Victoria Police, where it has to consider both internal matters and external matters equally. There is not to my knowledge any degree of prioritisation, although I do note that in evidence Victoria Police indicated a degree of triage is now occurring, and I support that. But indeed when we consider these matters, there have been delays experienced, and they are not productive or helpful and they can at times injure and have adverse impacts on the individual.

The CHAIR: All right. Thank you very much. Ryan Batchelor.

Ryan BATCHELOR: Thank you, Chair. Mr Gatt, I just want to get into a little bit more of the discussion about section 194(1)(b) of the IBAC Act, your position on that provision, so investigations under that provision and the competing interpretations of its scope that we seem to have had from VCAT [Victorian Civil and Administrative Tribunal]. Effectively we have got this provision of the *IBAC Act* which excludes IBAC investigations from the FOI regime. It seems to me there has been over time, and correct me if I am wrong, questions about how far the scope of that exemption goes – whether it is just about investigations undertaken by IBAC or whether those investigations are undertaken by the Chief Commissioner of Police, having been referred matters by IBAC. Have I got that completely wrong, or is that sort of roughly where it –

Wayne GATT: As I have been briefed on this issue, sometimes it is the scope of what is considered too that becomes a problem. If I might categorise it this way for you: because a matter has been referred to IBAC or referred by IBAC, it then gives rise to the exemption. Not necessarily all of the information would pertain to the investigation that was conducted by IBAC, yet the exemption is almost always relied on to provide blanket exemption for disclosure of all of the materials.

Ryan BATCHELOR: If only a subset of the information was actually used in the IBAC investigation but there is a larger pool of information, the exemption is being expanded to cover the pool rather than that which was undertaken by IBAC?

Wayne GATT: That is correct. We would say that operates against the principles of natural justice and procedural fairness, which ought provide an employee an opportunity to adequately ventilate their defence with all of the information that should ordinarily be available to them.

Ryan BATCHELOR: Just to clarify, what are the sorts of circumstances in a practical sense where a member would be lodging an FOI application to get access to that material? Is that sort of disputes and disciplinary-type proceedings?

Wayne GATT: It could be, and predominantly in disputes. This is where we do a lot of our work of course, given the nature of our organisation – where matters may be considered for a disciplinary hearing. At the lower levels, it could be admonishment or workplace guidance, and a member disagrees with the outcome but is not necessarily furnished with all of the information on which to base their decision-making or indeed mount a defence in those circumstances.

Ryan BATCHELOR: So they are effectively being subject to disciplinary or investigatory procedures and they cannot get their hands on all of the material that is then being used to make a decision.

Wayne GATT: That is correct. We understand that there is a balance in this, particularly in terms of the context of providing protection and particularly around complaint identities where they may relate to serious matters where that is important. But in circumstances where an individual has accusations put to them, for procedural fairness and natural justice it follows that a person should have all of that information available to them so that they can adequately defend themselves.

Ryan BATCHELOR: Do you think that the exemption is appropriate in the IBAC context?

Wayne GATT: In cases where it is limited to the information and the remit of IBAC, yes.

Ryan BATCHELOR: So you are comfortable with IBAC having the exemption as it currently stands; you are just not comfortable with the broader application?

Wayne GATT: Correct. I think our submission, in a very perhaps eloquently blunt manner – if there is such a thing – highlights the overuse of that exemption by Victoria Police, and it is almost templated in its revert to us. It simply gives us a paraphrasing of the exemption from the Act, and you do not receive that information. A more nuanced approach is what is required in the circumstances.

Ryan BATCHELOR: Do you think that an amendment that makes clear the position in the *Marke* case, I think, which is that it should only apply to IBAC investigations and the material considered within them – do you think a legislative amendment providing that clarity would be sufficient? Or does it need to be more than that?

Wayne GATT: No, it should be legislative. That would be our strong submission, in that decisions in the tribunals do not set precedent and so we will find ourselves in the future going back, ventilating the same arguments time and again and perhaps getting different results in each case. It is just simply clear for legislators to clearly articulate what their intent is and provide a basis or a set of rules which we can all work within. We have outlined our view that the legislation, or proposed changed legislation, should be balanced and should be narrowed to allow reasonable access but also provide a degree of protection that pertains to IBAC's activities, but it needs to be consistent, and in order to get that consistency – and we have seen and cited differing decisions that provide no ongoing or future clarity.

Ryan BATCHELOR: Do you think you could achieve that through guidance material, policy interpretations, or do you think it needs to be legislated?

Wayne GATT: I think, given the importance of the matters we are dealing with, it needs to be legislated.

Ryan BATCHELOR: Thanks, Chair.

The CHAIR: Thanks. Let us go to Jade Benham online.

Jade BENHAM: Thanks, Chair. Thanks for coming today. Are there any other changes you would like to see in Victoria Police's approach to FOI requests?

Wayne GATT: There are – and thank you for the question. One of the suggestions we make is that consideration should be given to publicly releasing information that is deemed to have a broader public interest, as indeed is the case in the UK police force, where for example, if you were to make an FOI request on policing

numbers, where police officers are – I am just giving you a random example – it is an issue of broad community interest. It has obviously been considered as appropriate for release – it does not compromise Victoria Police or its investigations or ongoing activities – but indeed that would be a request that is of interest to other people in the future and may be, and should be, the subject of ongoing updating by Victoria Police, given the expression of interest from a member or a section of the community. So as that operates in the UK, we say those sorts of matters could, and perhaps should, be the subject of ongoing publishing by Victoria Police.

I will say that our submission here I do not believe is inconsistent with Victoria Police's own submission, where they actually hang their hat on providing such information as much as possible. On their website they talk about their strategies and they talk about other information. We commend them on that activity, but to the extent that they may have gaps that are highlighted by requests by the public for this information we say: proactively put that information out there, maintain it in a contemporary manner so that it is updated and open and transparent for the community to see. That also I think reduces some of the load with respect to ongoing requests for the same sorts of information that Victoria Police might be expected to assess on an ongoing basis.

Jade BENHAM: So a push model rather than a pull model?

Wayne GATT: Or a push-and-pull model.

Jade BENHAM: Yes. Thank you.

The CHAIR: Thank you. Let us go to Kim Wells.

Kim WELLS: Thanks, Mr Gatt. One of the issues that we have been discussing in the Committee in our discussions with police and other groups is the issue of body-worn cameras. Obviously the police have concerns about the release of that information when it goes to court. Obviously the part that is shown in the courtroom can be released. Their concerns are about the body-worn camera video being edited or changed in some way. Does the Police Association have a comment about the release of body-worn camera information?

Wayne GATT: Under Freedom of Information?

Kim WELLS: Sorry, under Freedom of Information.

Wayne GATT: Look, we would have. I mean, the Body Worn Camera is a very vexed – it is an emerging issue in policing, I would say, all around the world. It has been in other countries perhaps more than it has in Australia, or for a lot longer, for a greater period of time, but it is a vexed issue. It does capture a range of interactions, some which you might say that a member of the public may have reasonable cause to ask for or to see, much that pertains to investigations and much that contains what would be very protected intelligence and information which would be redacted under current FOI legislation and public interest provisions that presently exist.

Can I say that, in assessing that under FOI, I have talked to the volume of work that exists for voluminous paper-based or electronic explorations that exist now. The mind boggles at how much work would be involved in doing this in an AV [audiovisual] capacity and then to redact that for the necessary protections that would be required. So I would say as a starting position we would say the feasibility of actually doing that and satisfying the demand safely and consistent with the public interest considerations that exist presently would be somewhat challenging. That would be our primary concern, and I would be surprised if Victoria Police had a differing view.

Disclosure provisions under the relevant legislation under the *Crimes Act* and related Acts of Parliament provide an accused person in appropriate circumstances the ability to have information pertaining to their prosecution disclosed. I think that is right and appropriate. Of course a person needs to be furnished with all the available information so that they can mount their defence. That is not inconsistent with the position that I have also put on behalf of our own members in different circumstances, but it is limited to accused persons as opposed to John Citizen off the street making a broad fishing-type, I suppose, enquiry that would simply consume thousands and thousands of police hours and, I will say, not only at the administrative level of Victoria Police but very much at the operational level of Victoria Police. My fear here is that the net loser would be the Victorian community, who would be starved of policing resources that would then be redirected

into the monitoring, redaction and assessment of online AV material. This is not inconsistent with the – I suppose the word I have to use is – overwhelming weight that current disclosure provisions have placed on operational police officers across the state in the last 18 months.

Kim WELLS: Yes. Fair. Thanks.

The CHAIR: Good. Are there any other questions from anyone on the Committee? I am just interested in going back to consultation with people who may be named in documents that are the subject of FOI requests – I think you mentioned this in your submission – and the need under the current legislation for very extensive consultation. Can you see any way to streamline that process or reduce that need for consultation without unintended consequences?

Wayne GATT: Well, if I am understanding your question, Chair, correctly, I think you are referring to the process of clarification around a request to try and narrow or expediate the process of providing that information. Is that correct?

The CHAIR: That is certainly part of it, but even just, you know, once you are satisfied that this is what you want, police or whichever agency still has to either consult with or redact third parties that are named in material, which is in a lot of policing documents.

Wayne GATT: Yes. I suppose that is necessary to protect the individual interest from time to time, particularly in a policing context. In any single interaction, you, your colleagues and innocent and unrelated members of the public may be named, and they need to have their interests, I suppose, protected in that process.

The other part to that, Chair, is narrowing the scope of particularly large requests so that we can cut to the chase and provide the information that is actually required. Some of that can be by people providing more nuanced requests in the first instance, but some of it actually requires Victoria Police, quite properly, to engage with the applicant to say, ‘Well, what is it you are actually seeking? Is it the entire Victoria Police database, or is it this bit that pertains to this section of what you have enquired about?’ I think that they are reasonable exchanges that need to happen to grease the wheels of the system, if you like. Otherwise the system would simply collapse under its own weight.

The CHAIR: Do you think that the legislation, as it is currently, allows sufficiently for those kinds of exchanges and narrowing of scope of requests, or do you think –

Wayne GATT: It puts a very, very tight time frame on Victoria Police to provide that, to be fair – not that it is meeting its time frames at the present time. That would not be something I am sure it seeks to intentionally do; that is a product of the sheer volume and the resourcing issues. But it probably does not help in the big cases, where voluminous or complex material requires even internal consideration and consultation to determine what might be risky information or what might be against public interest considerations. I think in those cases there should be a reasonable capacity to seek extension or indeed have that form of application considered differently to perhaps more simplistic or routine inquiries. I think if you can separate the two, there is perhaps an argument to say the routine should be dealt with in a more timely way to get that information to the applicant quickly and more consistently within stated legislative time frames, with a little bit of that slack picked up from some reasonable amendments to provide the more complex matters to be properly considered.

The CHAIR: Thank you. All right. If there are no further questions, then it falls to me to thank you very much both for your submission and also for coming along and answering our questions today.

Wayne GATT: It is my pleasure. Ta.

The CHAIR: Thank you. We will suspend the hearing now, and we will resume in 10 or 15 minutes with our next witnesses.

Witness withdrew.