

# TRANSCRIPT

## STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

### Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 8 March 2017

#### Members

Ms Margaret Fitzherbert — Chair

Ms Nina Springle — Deputy Chair

Mr Daniel Mulino

Mr Edward O'Donohue

Ms Fiona Patten

Mrs Inga Peulich

Mr Adem Somyurek

Ms Jaclyn Symes

#### Participating Members

Ms Georgie Crozier

Mr Nazih Elasmr

Ms Colleen Hartland

Mr Gordon Rich-Phillips

#### Witnesses

Mr Chris Miller, general counsel,

Mr Sam Porter, executive director, public sector integrity, and

Mr David Butler, director, information management and technology, Department of Premier and Cabinet.

**The CHAIR** — Thank you for coming this evening. The committee is hearing evidence today in relation to the inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016, and the evidence is being recorded. I welcome witnesses to public hearings of this legal and social issues committee. All evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege.

I would invite each of you to address the committee if you wish to do so and suggest that submissions should be around 5 to 10 minutes, and then I will open it up for questions.

**Mr MILLER** — Thank you very much, Chair. I might begin, if I may, with a brief opening statement, and I will introduce my colleagues here as part of that opening statement. Firstly, thank you to the committee for giving us an opportunity to appear and to assist you with your inquiry into the bill.

By way of introduction, I am the general counsel at the Department of Premier and Cabinet. My colleague Mr Sam Porter is an executive director in the office of the general counsel, in my team, and is the lead senior executive responsible for implementing the Special Minister of State's integrity, transparency and accountability reform program. David Butler, to my right, is the department's CIO and the director with line management responsibility for DPC's FOI unit.

During the period of the bill's policy and legislative development process Mr Porter and I were at different points in time responsible for leading the policy development and the consultation process on the bill, so in that context we are able to hopefully assist the committee tonight with information about the consultation process and the policy underpinning the bill. However, as the committee will no doubt appreciate, we are not able to disclose cabinet deliberations or processes.

As between the three of us tonight, Mr Porter is probably going to be best placed to answer questions about policy and the technical details of the bill that is currently under consideration; I will hopefully be able to provide some assistance in explaining elements of the consultation process; and David will be available to assist the committee with any queries it has about the operation of the current FOI framework in so far as it impacts on the department.

Given the evidence that the committee has already heard from the privacy commissioner and the acting FOI commissioner, particularly around the consultation process, we thought it might be helpful if I provide a very brief chronology of the consultation on the bill. If I may, Chair?

**The CHAIR** — Yes.

**Mr MILLER** — The secretary of DPC met with the acting FOI commissioner on 1 March and the privacy commissioner on 3 March to communicate with both of them government's decision to merge their offices. He offered both commissioners the opportunity to receive a more detailed briefing about the proposed policy changes, both on the decision to merge their respective offices and on the other changes proposed to acquit the government's election commitments to reform the FOI system. And in that context Mr Porter briefed the acting FOI commissioner with further details about the proposed policy changes on 4 March 2016.

At that point in time the bill was very much in the development phase; my recollection is that at that point in time we did not have a bill from parliamentary counsel. Following Mr Porter's meeting with the acting FOI commissioner, the acting FOI commissioner provided written comments to DPC on the proposed policy settings, and that was sometime in March. The privacy commissioner met with me, Mr Porter and Mr Bates, deputy secretary for governance policy and coordination at DPC, on 5 May to receive a similar briefing.

During both of those briefings we proposed that the commissioners announce the government's decision on the reforms in parallel to their respective offices in advance of a public announcement from the government on the reforms, and we also offered to provide a communications plan to both commissioners with some suggested speaking points and answers to potential questions to use in briefings with their staff. We also promised to provide the commissioner for privacy and data protection a more detailed written summary of the proposed reforms given that we were not able to secure an opportunity to meet with him earlier and take him through the proposed policy changes in person, as Mr Porter had done with the acting FOI commissioner in March.

In that context, on or around 6 May DPC provided the privacy commissioner with a communications plan and a more detailed written outline of the reforms, and on 10 May DPC provided a communications plan for use with staff to the acting FOI commissioner.

On 18 May 2016 DPC provided the commissioners with the government's draft media release announcing the reforms, and I am advised that both the commissioners announced the decision to their staff on the same day, 18 May. On 24 May 2016 the government issued the media release announcing the reforms, and DPC provided both commissioners on that day with a draft of the bill for comment, seeking comments by 27 May, a Friday I believe

I met with the acting FOI commissioner on 27 May and talked with him about his comments on the bill, which were relatively detailed, and on the same day, 27 May, I received those comments in written form — about eight pages worth of comments.

As the committee would be aware, the bill was introduced into the Assembly on 22 June 2016. I thought I might hand over briefly to my colleague Mr Porter just to take you through a high-level overview of the policy and the bill if that is okay, Chair?

**The CHAIR** — Yes.

**Mr PORTER** — Great. As the committee is aware, the bill itself proposes a number of changes to Victoria's FOI and, to a lesser extent, the privacy legislation. The primary purpose of the bill, I think it is fair to say, is to implement the government's election commitments in the FOI space. Just to recap on what they were, the government made a number of election commitments. The first was to create a public access counsellor role in Victoria. The second was to give the FOI commissioner — or the FOI regulator now — a much broader mandate, and that would allow the FOI commissioner with the ability to set professional standards for departmental officers; to educate the public as well as the public sector about FOI; and to review decisions to exempt documents under the cabinet exemption, reflecting the fact that at the moment the FOI commissioner does not have power to review those decisions and that any decision about a cabinet document essentially has to be appealed to VCAT rather than the FOI commissioner.

There were two other commitments: the first was to allow the FOI commissioner to review decisions of ministers and principal officers — that is, secretaries and equivalent heads of other public sector bodies. In addition there were some commitments to reduce the time to respond to FOI requests from 45 to 30 days and to reduce the time that agencies have to seek VCAT appeal rights of the FOI commissioner's decisions from 60 days to 14 days. The bill also then went on to make a number of complementary changes to FOI and privacy legislation.

As you know, the bill includes proposed changes to the governance structure to manage the offices of the FOI commissioner and the commissioner for privacy and data protection. It allows the FOI commissioner to consider a broader range of complaints made against principal officers and ministers, and it gives the FOI regulator the power to undertake own-motion investigations and powers to require agencies to undertake further and better searches, as well as compulsory information gathering powers essentially to boost the FOI regulator's ability to effectively deal with complaints and review requests that he receives.

**The CHAIR** — Thank you. I have a couple of questions just to start off, and the first is that I understood that Tony Bates was going to be coming this evening, but he is not. Is there a reason for that?

**Mr MILLER** — I understand, Chair, that the committee was to be informed of Mr Bates's unavailability. It sounds from your comments as if that might not have happened, but I can tell you that Mr Bates has been approved a period of leave for a period including tonight.

**The CHAIR** — Okay. When is he returning from leave?

**Mr MILLER** — I actually do not have those details at my fingertips, Chair.

**The CHAIR** — Okay, thank you. One other question: you have referred to the consultation process that went on prior to the bill being released. Was there any form of public consultation? Given that we have had evidence earlier in this inquiry that the vast majority of applications under FOI are made by members of the public, what has their involvement been in this bill?

**Mr MILLER** — There was no public consultation as such, but a number of relevant stakeholders were consulted in the process of the bill's development, and those stakeholders included the public service departments, as you would expect, but included within that was the network of FOI managers, colleagues of David's across the public sector, Victoria Police, the Victorian Inspectorate and IBAC, among others. But no, in answer to your question, Chair, there was no broader public consultation before the bill was introduced into the Parliament.

**Mr RICH-PHILLIPS** — Mr Miller, I am just wondering, we were expecting Tony Bates, the deputy secretary — —

**The CHAIR** — I have just covered that. I did just ask some questions regarding that.

**Mr RICH-PHILLIPS** — Obviously there was a lot of evidence relevant to Mr Bates which I would certainly like to test in a hearing. I assume you are not going to be able to answer questions about things Mr Bates did or did not do which have been previously given in evidence?

**Mr MILLER** — Obviously I cannot answer any questions that are not within my direct knowledge. What Mr Porter, Mr Butler and I can do is talk to the policy underpinning the bill and talk to the committee about any further questions it has got about the consultation process or indeed the detail of the bill.

**Mr RICH-PHILLIPS** — Are we likely to have an opportunity to talk to Mr Bates to go through some of the evidence the committee heard last week?

**Mr MILLER** — As I said to the Chair, Mr Bates is on approved leave for this evening. I am not privy to when Mr Bates is returning to the office, so it is not a question I can really help you with, Mr Rich-Phillips.

**Mr RICH-PHILLIPS** — Okay. It would be good to get his position on a number of matters which were canvassed last week. Are you expecting extended leave?

**Mr MILLER** — As I said, I am just not privy to those details.

**Mr RICH-PHILLIPS** — Mr Miller, you went through a series of dates around the process of the preparation of this legislation. Can I ask you: on what date did the bill receive approval in principle in cabinet?

**Mr MILLER** — Mr Rich-Phillips, that is not information that I can provide. I mentioned in my opening that I am not able to stray into areas that would expose the deliberative processes of executive government or of the cabinet.

**Mr RICH-PHILLIPS** — The reason I asked the question is that you would appreciate that with the preparation of legislation, policy work takes place prior to the approval-in-principle stage. Agencies and departments go through a policy development process, following which an approval-in-principle cabinet submission is prepared, which is then signed off by cabinet, and the bill is then drafted after the approval in principle. What I am keen to get a handle on is when the policy development process took place versus the legislative drafting process, so that date, that AIP date, is quite critical to understanding the development process of this legislation.

**Mr MILLER** — Mr Rich-Phillips, I do not disagree with your assumptions about the usual policy development process, and I can confirm that policy development work was undertaken by the department before any cabinet decision was taken, but what I cannot do, Mr Rich-Phillips, is provide you with the details of the dates on which any decision was taken by cabinet. What I can do, as I offered to the Chair in the opening statement, is confirm that as at the time that the secretary met with Mr Watts and Mr Ison, the bill was very much in the development phase and actually not to hand. There was no bill in existence within the department's custody at that point in time.

**Mr RICH-PHILLIPS** — Had it been drafted at that point?

**Mr MILLER** — Again, I think the answer to that question would reveal and go to questions of cabinet deliberation.

**Mr RICH-PHILLIPS** — It is critical to the consideration of the consultation process. If the bill was being drafted, it means the policy decision had already been made.

**Ms SYMES** — I think he has answered the question.

**Mr RICH-PHILLIPS** — The first date you gave, Mr Miller, was around 4 March, maybe 3 March. Was that before or after the AIP decision?

**Mr MILLER** — Mr Rich-Phillips, I cannot provide you with those details. What I can offer is that a government decision had been taken before Mr Watts and Mr Ison were consulted by the secretary.

**Mr RICH-PHILLIPS** — A government decision being a cabinet decision?

**Mr MILLER** — I cannot elaborate any further on that, Mr Rich-Phillips.

**Mr RICH-PHILLIPS** — What do you mean by a government decision?

**Mr MILLER** — I think any answer to that question would take me into the territory of revealing the dates and details of the cabinet processes.

**Mr RICH-PHILLIPS** — Were Mr Watts or Mr Ison involved in the policy decision?

**Mr MILLER** — All I can do, with respect, Mr Rich-Phillips, is take you through the facts, and the facts were that on 1 and 3 March respectively the secretary had that initial discussion with Mr Watts and Mr Ison, and I am happy to take you through some of the detail that followed that, but Mr Watts and Mr Ison were both in various forms and at various stages provided with more detailed outlines of the proposed policy reforms.

**Mr RICH-PHILLIPS** — Did that precede the policy decisions?

**Mr MILLER** — Again, Mr Rich-Phillips, I cannot see a way to answer your question. I am sorry. I am here to be as cooperative as I can be.

**Mr RICH-PHILLIPS** — I appreciate that, Mr Miller, but that is critical to the committee's understanding of whether Mr Ison and Mr Watts were consulted on the policy. As you appreciate from the evidence last week, the consultation process has become significant in the committee's consideration of this legislation. Understanding the policy development, as distinct from the drafting of the legislation — you three gentlemen would have a very clear appreciation of the difference between those two stages — and understanding where the engagement with Mr Ison and Mr Watts came is critical to this committee's understanding of what went on.

**Mr MILLER** — Mr Rich-Phillips, all I can do is direct you, I think, to my previous answers that I have offered: that conversation with Mr Watts and Mr Ison followed the taking of a government decision. I cannot elaborate in any more detail on the nature of the decision or the steps in the cabinet process that preceded or followed it.

**The CHAIR** — I think at this stage we might move on to Ms Patten, and ensure that others can ask their questions, and I think we will get an opportunity to come back.

**Ms PATTEN** — Thank you for coming this evening. We have just had some evidence from the law institute. They pointed out just a couple of anomalies, and I just wanted to ask about one, which was the new section 49KA about a review of a decision about an information investigation. But what they seem to find is that if there had been a decision that there could be no investigation, then that section was null and void effectively, because it was a review to say how was that an adequate search, yet the decision could have been that there was no search because the office said it was too onerous or was restricted in one way or another. And they suggested two solutions to that. One was just to get rid of section 49KA or to expand on it and suggest that that review could be not just about the search but about the decision not to search. I wonder if you were aware of this and what your thoughts were.

**Mr MILLER** — I can take the first part if you like. As to whether we were aware, it has been a little while, to be honest with you, Ms Patten, since we last received the comments from LIV. LIV did make submissions to government on the bill and my memory is that they made submissions that identified the issue or area of

concern that you have just raised. I do not have the technical details of the bill in front of me. I am not sure if my colleague Mr Porter can shed any more light on that question.

**Mr PORTER** — Yes. Ms Patten, all I would say is that this power that has been proposed in the bill does add to the suite of tools that the FOI commissioner would have ready to hand to address concerns that come up when he reviews decisions. This is a power that does not currently exist, and there are certainly circumstances in which I think it could properly be deployed in response to what the regulator sees as a failed response.

**Ms PATTEN** — A failed search.

**Mr PORTER** — Yes, that is right. So in that sense I think it does broaden the suite of tools that are available.

**Mr MULINO** — I have two questions. One is on the consultation process. As part of the consultation process there were meetings on 1 and 3 March to run through the overarching government decision, then on 4 and 6 March in relation to a more detailed discussion around some of the elements of the proposed changes, and then on 24 May with both commissioners in relation to the draft bill. So I just wanted to clarify: at each of these meetings was it make clear that any comments or feedback in relation to what was discussed at the meetings were welcome?

**Mr MILLER** — Thanks for your question, Mr Mulino. I just wanted to take you back quickly to the dates. So it is right to say that there were meetings with the secretary on 1 and 3 March, and the briefing between Mr Porter and the acting FOI commissioner on 4 March. I am not sure that there was a further meeting on 6 March.

**Mr MULINO** — Sorry, 6 May.

**Mr MILLER** — 6 May. The meeting with the privacy commissioner was on 5 May, but in each of those meetings I obviously cannot speak to what exactly the secretary offered to each of the commissioners in his initial meetings with them, but certainly in the meetings that Mr Porter and I attended either together or individually the tone of the conversations were to the effect of: we are here to provide some further detail about the reforms further to your initial conversations with Mr Eccles, the secretary, and we offered both commissioners the opportunity to receive some more information from the department if it liked to about the policy reforms and an indication from us to both of them that their comments would be sought on the draft bill.

**Mr MULINO** — And a question on the policy framework. There are a number of changes that are fairly technical and self-explanatory, like reducing time limits for responding and so forth. One of the key changes is of an organisation structure nature, which is to merge the two functions under one information officer. I am just wondering if you could outline what the policy rationale for that is.

**Mr MILLER** — I might invite Mr Porter to respond to that question.

**Mr PORTER** — I just momentarily lost my notes on this point, Mr Mulino; just give me a tick. So in terms of the decision to merge the two offices, there is some policy rationale sitting behind that decision, and that is that allowing FOI and privacy to be regulated by a single body first allows for broad oversight of the Victorian government's information management practices, which will support the identification of policy improvements and emerging issues that come up through the privacy and FOI system. Second, the proposal to merge the offices allows one body to manage the overlap between the FOI and privacy regimes and to align regulatory priorities across both regimes. Third, it creates an opportunity to integrate other information management functions into the office in future if that is a decision that the government of the day decides is an appropriate one to make. Fourth, it also partly addresses the deficiencies that the Victorian Auditor-General's Office identified in the former acting Auditor-General's report on accessing public sector information. I just remind the committee that as part of that report the acting Auditor-General made findings around a number of issues with Victoria's information management structure and legislation.

In essence I think it is fair to say that he found that Victoria's information environment is fragmented and confused, with a proliferation of numerous unconnected, overlapping and inconsistent plans, strategies, standards and guidance. He also said that there is an absence of a single point of accountability for the intended framework, with information management oversight and leadership dispersed across multiple uncoordinated

bodies, and that the essential elements of an effective framework, such as developing and implementing information management better practices, lack of effective authorisation and oversight. So while it is not true to say that the decision to merge the offices wholly addresses these issues, it is the first step in doing so.

**Mr RICH-PHILLIPS** — Can I just quickly ask: when was that Auditor-General's report, Mr Porter?

**Mr PORTER** — It was December 2015, Mr Rich-Phillips.

**The CHAIR** — You indicated that it is the first step in bringing together a fragmented system. Are you able to explain the remaining process?

**Mr PORTER** — No, I am not. Victoria's information management environment is complex and contains a vast number of bodies and entities who are participants and regulators. This bill really focuses on the two regulators for whom the public is an important stakeholder and who, perhaps it is fair to say, have the most significant regulatory functions over information management practices in that they affect how government releases information that it holds to the public and they affect how people's personal privacy and personal information is held, collected and used by government agencies.

**The CHAIR** — One of the main reasons for merging these two bodies within the framework was their importance to the public in terms of privacy and information release, but evidence was given earlier that the public has not been consulted on this at all. How does that work?

**Mr MILLER** — Look, I think, Chair, all we can say in response to that is that as part of the policy development process, the impacts on the public and the various reports and materials available around the public's access to information and the public's interest in private information being protected were available to the department and considered fully as part of the policy development process.

**Ms SYMES** — Thank you for appearing this evening. Some of the evidence we have received points to New South Wales and Queensland as a reason that we should not follow their model. I am just wondering if you had a comment in response to that view.

**Mr PORTER** — Thanks, Ms Symes. While the bill does propose a merger of the privacy and FOI regulators, as has occurred in the commonwealth, New South Wales and Queensland, the bill does not replicate exactly the same governance structure in Victoria as exists in the commonwealth, New South Wales and Queensland. It actually proposes a bespoke governance framework that is appropriate for the Victorian setting and that in fact addresses some of the governance concerns that have arisen in other jurisdictions. Just to give you a few examples: in the commonwealth office, rather than clearly delineating the powers and functions that can be exercised by each of the office-holders, the commonwealth office also has an information commissioner, an FOI deputy commissioner, in effect, and a privacy deputy commissioner. Under that model, the privacy and FOI commissioners can each exercise the others' powers, and so in that sense there is not the clear delineation of functions in the same way that this bill proposes.

The New South Wales model is an interesting model because in that model there are only two commissioners rather than the three that are proposed in this bill. In that model what happens is that the information commissioner also performs the role of CEO and so, for example, has employment powers and in effect has the strategic control and direction of the office but they are also in their guise as the FOI regulator, with the privacy commissioner sitting separately. In contrast this bill creates a very clear governance structure, with the information commissioner having a broad role and a mandate over both FOI and privacy and then delineated roles for the FOI deputy commissioner and the privacy deputy commissioner so that there is a clear split in the functions.

The commonwealth and New South Wales models also do not contain any express provision against the responsible minister issuing any directions or purporting to control the office. On the Queensland front I just note that the Queensland information commissioner does not have own-motion investigation powers and cannot set professional standards for public officers to follow in dealing with FOI requests.

**Ms SYMES** — That was much more thorough than I expected, so thank you very much for your answer. Just a brief question: we received evidence from Mr Watts, particularly in relation to his view that the purpose

of the bill, as far as it relates to the Privacy and Data Protection Act, was constructed to get rid of him. Can you provide any comment on whether he has any basis for that view?

**Mr PORTER** — It was not constructed to remove Mr Watts from office.

**Mr RICH-PHILLIPS** — But it does in fact do that, doesn't it?

**Mr PORTER** — If passed, it will have the effect of abolishing the Office of the Commissioner for Privacy and Data Protection.

**Ms PATTEN** — Can I just follow quickly on that? Was there any reason why you decided that for the current protection for the privacy commissioner and the Freedom of Information Commissioner, which is that they can only be removed by Parliament, that that position be diluted substantially in this bill? Certainly the LIV would recommend that those two important commissioners maintain that protection of the Parliament from the removal. What was the policy position for diluting that protection?

**Mr MILLER** — Let me start, Ms Patten, with my thoughts on that question, and I presume in particular you are referring to the mechanisms for removing or suspending commissioners?

**Ms PATTEN** — Yes, correct.

**Mr MILLER** — In the case of the Victorian information commissioner — the role to be set up by this bill — the determination, if you call it that, and the removal arrangements are as per the determination and removal arrangements that apply to the privacy and data protection commissioner. As Mr Porter has mentioned, there are steps in the bill to further clarify the independence of that office from the executive government, including the provision that the minister responsible cannot issue directions to control the information commissioner. I think it is an important point here that the bill equips the information commissioner, which sits at the head of the consolidated office, with all of the regulatory and decision-making powers that are currently available to both the privacy and data protection commissioner and the acting FOI commissioner.

**Mr PORTER** — It is also just worth noting, Ms Patten, that the suspension and removal arrangements for the deputy commissioners are the same as the current arrangements for removing or suspending assistant FOI commissioners under the FOI act.

**Ms HARTLAND** — I have had a lot of experience with FOI over 30 years as a community activist and as an MP, and in my mind it has failed nearly the entire time under a range of governments, so how will these changes to the bill, especially for community, make it easier for community to actually use FOI and be able to access the documents that they are seeking?

**Mr MILLER** — Thanks, Ms Hartland, I might start just with a couple of observations in response to that. You would be aware that the bill seeks to reduce the time available to agencies to respond to an FOI request, the intent of which is to expedite the process between application and receipt of FOI documents. Added to that, the proposed changes to the appeal periods give agencies less time within which to appeal a decision made by the FOI commissioner or the new Victorian information commissioner. Again, that is designed to expedite the time between application and receipt and final determination of an FOI request. I think the proposed changes to OVIC's role with respect to the cabinet exemption will also assist in addressing some of the frustrations and issues that you are talking about, in that by providing the community with access to the Office of the Victorian Information Commissioner — which I should note is a no-cost review function in terms of the commissioner's hearing — it will again provide some more alternative and more user-friendly and more accessible pathways for applicants to have their FOI requests resolved finally. Did you want to add anything to that, Mr Porter?

**Mr PORTER** — Yes, look, I will just add to that to say, Ms Hartland, that this bill also makes clear that the FOI regulator's mandate — and it will be the information commissioner — is to educate the public as well as the public sector about how to get access to their information under FOI, and so in that sense hopefully the commissioner will go out and educate the community to help them get better access to any of their information held by government. I would also just add that the suite of extra tools that will be provided to the information commissioner that do not currently exist will help the commissioner to deal with circumstances where government has not properly withheld documents in response to FOI requests.

**Ms HARTLAND** — If I could have a follow-up, in terms of the education, what I have found — and I do assist a lot of community groups currently with doing their FOI requests — is that you have to be incredibly specific about what it is you are asking for or you will get a truckload of documents and not get the one piece of paper that you are actually looking for. In that education, how will people know that that is available? How will community groups know that that education is available?

**Mr PORTER** — Yes, look, that ultimately is probably a question that the information commissioner is perhaps better equipped to handle as part of the implantation of the new arrangements for the office, but I would expect that the information commissioner would make information available through a wide range of media including through their website. They, I think, at the moment have a helpline as well that anyone can call to ask questions about their FOI issues and about their FOI reviews that are underway, and so it really is probably an implementation issue.

**Mr RICH-PHILLIPS** — Mr Porter, can I take you back to your answers to Ms Symes or Mr Mulino about the rationale for the amalgamation of the two offices that will bring them under the one commissioner. You referred to managing the overlap between the two offices. Can you outline the extent of that overlap and the nature of that overlap, please?

**Mr PORTER** — Sure, look, while it is true to say there is some overlap, that arises because the FOI and privacy regimes both support the release of government information but in different ways. The FOI regime is primarily concerned with the release of government information, but in contrast the privacy regime allows access but with the focus on protecting the use and disclosure of personal information. I would also just note that the FOI and privacy and data protection acts contain regimes for accessing personal information held by government, but those regimes operate somewhat differently.

**Mr RICH-PHILLIPS** — So where is the overlap? To what extent do these agencies work together? Because the evidence last week from both Mr Watts and Mr Ison suggests they operate quite independently and there is very little — certainly operational — overlap and certainly very little operational contact. So I am trying to get a sense of what is the overlap that justifies the rationale for bringing the two offices together.

**Mr PORTER** — I am not sure it is fair to say that operationally there is no room for the two regimes to intersect, because at their heart what both the FOI and privacy regulatory regimes deal with is the use, collection and disclosure of information that is held by government. So operationally someone accessing their information under the FOI regime will be accessing the same information that they might seek access to under the Privacy and Data Protection Act.

**Mr RICH-PHILLIPS** — Under what circumstances is an applicant likely to seek information under the FOI regime and separately under the privacy and data protection regime?

**Mr PORTER** — The practice that I am aware of is that about two-thirds of FOI applications made to government are by people seeking to access their personal information, but I cannot comment on the circumstances in which particular individuals make a choice to access their information through the Privacy and Data Protection Act versus the FOI regime.

**Mr RICH-PHILLIPS** — But that two-thirds — Mr Ison has given me similar numbers in private briefings — are handled through the FOI regime, and if there are disputes, they are handled through the FOI office. I assume they do not engage with the commissioner for privacy and data protection's office. There is not an overlap between the two offices in that sense.

**Mr PORTER** — Well, no, except that the privacy commissioner could receive complaints and consider complaints, I think, under his legislation around access requests submitted under the Privacy and Data Protection Act.

**Mr RICH-PHILLIPS** — I think typically doesn't, if I am correct — if I understand correctly Mr Ison's advice.

**Mr PORTER** — Look, I cannot comment on the practice of individuals seeking access to their information or how they handle complaints.

**Mr MILLER** — But I think, Mr Rich-Phillips, just to add to Mr Porter's answer, in an operational sense, if you think about the various geneses for complaints about privacy, for example, or complaints about the way agencies respond to FOI applications — the timeliness, the manner of those sorts of issues — by consolidating those two functions within the same office you are effectively bringing together two agencies that, both from different lenses sure, are exposed to agencies and the way that those agencies handle, store, provide access to and make secure information. So one of the key benefits we see from a policy perspective here is that you are bringing that know-how together into the same office such that the information commissioner can better engage with government about the way that government holistically deals with information.

**Mr RICH-PHILLIPS** — Does the ordinary departmental consultation policy development process not allow for that interaction between agencies without having to pass new statute to combine them?

**Mr MILLER** — I think the beauty of consolidating at that, if I might call it, oversight level is that both the privacy commissioner and the FOI commissioner in their current roles have a perspective across all agencies. I think it is very difficult for departments even with an active culture of collaboration to, if you like, sit above the operational practices and identify high-level trends. So our view is the governance structure enables and puts into place positions — vantage points — which actually offer that view on the government.

**Mr RICH-PHILLIPS** — Thank you. We are limited on time, are we?

**The CHAIR** — We are scheduled to finish at 8.

**Mr RICH-PHILLIPS** — I would just ask for one. The root and branch review of the FOI act, are you able to provide the committee with a copy of the terms of reference for that, please?

**Mr MILLER** — I am not able to provide a copy, Mr Rich-Phillips, of the terms of reference.

**Mr RICH-PHILLIPS** — Are you able to take that on notice? By your answer, do you mean that you do not have it with you now, or — —

**Mr MILLER** — What I can offer to do is take your question on notice and consider an appropriate response to that question.

**Mr RICH-PHILLIPS** — It was committed by the minister to be completed now. I take it that is not going to be the case — in March 2017?

**Mr MULINO** — In March.

**Mr MILLER** — Look, I will take your question on notice and come back to you with an appropriate response — on both of your two questions, if that is okay, Mr Rich-Phillips.

**Mr RICH-PHILLIPS** — Thank you, Mr Miller.

**The CHAIR** — Are there any further brief questions? No? In that case, gentlemen, I thank you for coming this evening and for your evidence. You will be provided with a transcript that you can check for accuracy within a few weeks time.

**Mr RICH-PHILLIPS** — Thank you, gentlemen.

**Committee adjourned.**