

# **VICTORIAN** **ombudsman**

**SafeStreets Documents –  
Investigation into Victoria Police’s handling  
of a Freedom of Information request**

**September 2011**

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## Letter to the Legislative Council and the Legislative Assembly

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report of an investigation into Victoria Police's handling of a Freedom of Information request.



G E Brouwer

**OMBUDSMAN**

31 August 2011

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## Executive summary

1. Victoria introduced freedom of information legislation almost 30 years ago, one of the first jurisdictions in Australia to do so.<sup>1</sup> The purpose was to increase the transparency and openness of government by providing an effective and prompt means by which government documents can be accessed by its citizens. The *Freedom of Information Act 1982* (the FOI Act) was intended to be interpreted in an open manner, reflecting a willingness to disclose information.
2. Often, however, I have seen that the practices in agencies have not been consistent with this intention. This failing was particularly clear in the investigation I have just completed into the processes adopted by Victoria Police in its handling of a Freedom of Information request received from Mr Michael McKinnon, the Seven Network's Freedom of Information Editor.
3. Mr McKinnon had sought particular documents in a Freedom of Information request in May 2010. His complaint to me arose from Victoria Police's reliance on exemptions to refuse access to those documents prior to the 2010 State election, followed by a partial release immediately after the election and a complete release of the documents in January 2011. Mr McKinnon alleged that the various delays in the processing of his request were caused by Victoria Police Freedom of Information decision makers having both a political motivation and a poor understanding of the legal requirements of the FOI Act.
4. My investigation has examined the processing of Mr McKinnon's request which has revealed a number of significant procedural and decision making errors. Those errors led to considerable delays in the provision of the documents until after the 2010 election. I can, therefore, appreciate why he considered that those delays were caused by some form of political motivation. While my investigation has found no evidence of such motivation, it identified poor practices and a less than open Freedom of Information attitude at Victoria Police. This can be seen from a series of errors in the handling of the request which include:
  - a poor decision making process which involved a willingness to apply exemptions:
    - without sufficient material to justify those exemptions and
    - without giving serious consideration as to whether Victoria Police could prove its position if tested and
  - a poor internal review process which did not properly review the initial decision
  - a preparedness to conduct litigation without complying with the Model Litigant Guidelines.
5. Had any one of those errors not occurred, Mr McKinnon would have received the requested documents well before the 2010 election.

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<sup>1</sup> Freedom of Information legislation was introduced in Victoria and the Commonwealth in 1982.

6. This investigation has demonstrated that the willingness to disclose information necessary when applying the FOI Act was not present in the handling of Mr McKinnon's request and has led me to make a number of recommendations. Those recommendations, which are detailed in the report, include not only that an apology be provided to Mr McKinnon, but also that Victoria Police's Freedom of Information policies be reviewed and that additional training be provided regarding Model Litigant Guidelines and the requirements of internal reviews.
7. The Acting Chief Commissioner has accepted my recommendations.

## History

### The application

8. On 19 May 2010, Mr Michael McKinnon, the Seven Network's Freedom of Information Editor, made a Freedom of Information request of Victoria Police seeking:

Access to documents produced in the last two years showing information provided to the agency. Specifically, I am seeking access to the evaluation of the 'Safe Streets Taskforce' completed by PricewaterhouseCoopers.

### The decision

9. Victoria Police's decision on the request was provided on 28 June 2010.
10. That response identified two documents comprising 395 pages which were relevant to the request. Those documents (the 'SafeStreets documents') were:
  - 'Evaluation of Safe Streets' by PricewaterhouseCoopers - June 2009
  - 'Safer Victoria - A whole of government approach to public safety' (Safer Victoria) by PricewaterhouseCoopers - June 2009.
11. In the letter of decision dated 28 June 2010, the primary decision maker advised that he had assessed the material in accordance with the provisions of the FOI Act and decided to deny access to 'all four documents [sic] in full'.<sup>2</sup> He relied on sections 28(1)(b) and section 30(1) of the FOI Act.
12. Section 28(1)(b) exempts 'a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet'. The primary decision maker, in the decision letter, stated that he had made 'enquiries in relation to the purpose for which these documents were prepared' and was 'satisfied that the sole or substantial purpose for which these documents were prepared was for their submission to Cabinet for its consideration'. He did not specify what enquiries he had made or information that he had received which allowed him to reach that decision.

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<sup>2</sup> The primary decision maker in his interview with investigators confirmed that there were only two documents relevant to the request. He also advised that the two syntactic errors in his decision letter referred to in paragraphs 13 and 14 below were drafting errors.

13. Section 30(1) exempts what are referred to as 'internal working documents'. This category covers a number of types of documents. The type that the primary decision maker relied on was documents, the disclosure of which would 'disclose matters in the nature of advice, opinion or recommendation prepared by officers of an agency to assist in the deliberative processes involved in the functions of an agency where such disclosure would be contrary to the public interest'.
14. In the decision letter, the primary decision maker was of the opinion that 'the documents contain information in the nature of opinion, advice or recommendation and were prepared in the course of or for the purpose of the deliberative processes of this response [*sic*]'. He did not address the issue as to whether PricewaterhouseCoopers comprises 'officers of the agency', however, I note that there is a strong line of authority in Victoria which supports the view that contractors can be 'officers' for the purposes of section 30 and it was reasonable for the primary decision maker to accept those decisions as justification for taking PricewaterhouseCoopers as an officer for the purposes of that section.<sup>3</sup>
15. As to the public interest, the primary decision maker was satisfied that the disclosure of 'this document' [*sic*] 'would be contrary to the public interest as to disclose these documents may impede full and frank discussions by staff of Victoria Police in areas of high public concern'. However, he did not explain how he reached that view or what enquiries he made to reach it.

## The internal review

16. On 28 July 2010, Mr McKinnon made an application for an internal review of the primary decision maker's decision. In particular, he argued that there was no evidence to suggest that the documents had been created for the dominant purpose of a cabinet submission. He also argued that 'the section 30 exemption claim fails to identify or balance public interest factors in favour of release'.
17. On 10 August 2010, the internal reviewer provided his internal review response. In that letter the internal reviewer advised that he had 'considered your request and ... conducted a review of the FOI Officer's decision' and 'I concur with' the primary decision maker's decision. He provided no reasons why he reached that decision other than that he relied on sections 28(1) and 30(1) of the FOI Act.

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<sup>3</sup> *Ryder v Booth* (1985) VR 869, *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 and *Kosky v Dept of Human Services* (1998) 13 VAR 420. See also *Kyrou & Pizer, Victorian Administrative Law*, FOI 5.180.

## VCAT

18. Following receipt of the internal review response, Mr McKinnon lodged an appeal with the Victorian Civil and Administrative Tribunal (VCAT) on 19 August 2010. There were a number of directions hearings before VCAT culminating in the directions hearing held on 5 November 2010 before Mr Billings, Senior Member of the Tribunal. This directions hearing was conducted by telephone as Mr McKinnon resides in Queensland.
19. At this directions hearing Victoria Police, which was represented by Mr Ron Gipp of counsel, advised that it would no longer rely on section 28(1) – the Cabinet document exemption. Mr Gipp also indicated that Victoria Police was likely to release the bulk of the documents, but that section 30 may have some application to parts of the documents. This section exempts internal working documents, the disclosure of which would be contrary to the public interest. Mr Gipp sought additional time to allow evaluation as to the application of section 30 by:
  - two inspectors, which Mr Gipp advised would be completed by Tuesday 9 November 2010
  - a subsequent evaluation by Deputy Commissioner Kieran Walshe
  - then by ‘the Attorney-General’s Department’.
20. Mr McKinnon made it clear at the directions hearing that he was seeking to receive the documents by 19 November 2010 so as to allow him to analyse them and make their content available to the public prior to the imminent state election, to be held on 27 November 2010. Mr Gipp sought an adjournment to 26 November 2010 to allow the evaluation process to be completed. However, as a result of Mr McKinnon’s concerns, Mr Gipp suggested the compromise date of 22 November 2010 which VCAT accepted. He also agreed with the proposition put by Mr McKinnon that:
 

at that time then the agency will produce a decision and relevant documents.
21. Despite that agreement, a Legal Officer from Victoria Police (Legal Officer A) wrote to VCAT’s Senior Registrar, General List on 18 November 2010 seeking an adjournment of the directions hearing to 26 November 2010. The reason stated for this request was that ‘[d]espite the respondent’s best endeavours, the respondent is unlikely to be in a position to determine its position on the exemptions to be claimed in respect of the documents in dispute prior to the directions hearing on 22 November 2010’.

22. In that letter Legal Officer A raised for the first time the need for Victoria Police to consult with other agencies due to the 'whole of government recommendations' contained in the documents. She advised the Registrar that, if VCAT adjourned the directions hearing to 26 November 2010:

it is the respondent's intention to release to the applicant those parts of the documents in respect of which no exemption is claimed no later than 25 November 2010.

23. Legal Officer A was not successful in her request and the directions hearing was not adjourned to 26 November 2010. On 22 November 2010, the Senior Member, Mr Davis, adjourned the directions hearing until 6 December 2010.

## Redacted disclosure

24. Victoria Police did not release any documents before 27 November 2010, despite the assurances provided on 5 and 18 November 2010. However, on 3 December 2010, Legal Officer B from Victoria Police, wrote to Mr McKinnon and advised him that Victoria Police had reviewed its reliance on section 30 and had determined to disclose the two SafeStreets documents in part, with certain information being exempted from disclosure. No explanation was provided to Mr McKinnon or VCAT as to why the previous undertakings to provide the requested documents before the election were not kept.
25. Legal Officer B in her response to my draft report argued that the assurances provided at VCAT on 5 November 2010 and by letter of 18 November 2010 were not 'undertakings ... in the legal sense of the word'. She argues that the Victoria Police 'agreed that it would endeavour to have the results of its evaluation by that date [22 November 2010]' .
26. However, this does not accord with what occurred. That can be seen from the assurance provided in Legal Officer A's letter of 18 November 2010, as the words quoted above, demonstrate. Similarly, the transcript of the VCAT directions hearing on 5 November 2010 records the following exchange between Senior Member Billings, Mr McKinnon and Mr Gipp, who appeared for Victoria Police:

MR BILLINGS - Mr McKinnon, Mr Gipp has put forward what he describes as a compromise position. You've asked for the 19th, the respondent wants the 26th but the compromise position would be to make it the Monday the 22nd ...

MR McKINNON - ... but the agency is of a view that it can produce a decision and any relevant documents by that date I'm prepared to concede that that's then a solution.

MR BILLINGS - ... But if from your point of view the position is that although you've got the reservations you've just expressed you would be content with the proceeding being adjourned again until Monday, 22 November, well then I propose to make that Order. Were it not dealt with in this kind of way, there could only be further delays and I doubt that would be satisfactory to either party. Now, sorry, you wanted to say something else?

MR McKINNON - My understanding is at that time then the agency will produce a decision and relevant documents; is that correct?

MR GIPP - That's so.

MR BILLINGS - That is - Mr Gipp is nodding and saying that is so.

27. The material deleted from the provided documents was removed for different public interest reasons than those relied on by the primary decision maker and the internal reviewer. In her letter to Mr McKinnon, Legal Officer B did not assert that a disclosure would or may impede frank discussion between officers, but considered release of the documents could 'mislead the public' as the documents contained 'opinions and observations that are not accepted by Victoria Police'. She also considered that the disclosure of the documents would be 'reasonably likely to injure the public interest because it would promote pointless and captious debate as well as create unnecessary confusion as to the accepted position of Victoria Police in its endeavour to deal with alcohol related violence'. Legal Officer B and her instructors placed reliance on the fact that the material in the two reports had 'not been endorsed or implemented by either Victoria Police or by government'. She wrote that she had been instructed that the disclosure would 'promote pointless and unnecessary debate about what might have been accepted and implemented ... by Victoria Police and/or government in responding to public order and safety issues'.

## Complete disclosure

28. Despite that redaction, just over one month later, on 10 January 2011, Legal Officer B wrote to Mr McKinnon and provided the documents in full. No explanation was provided as to why it was no longer in the public interest to redact the documents.

## Complaint

29. Mr McKinnon made his complaint to me on 1 February 2011, expressing concern as to the motivation and expertise of the Victoria Police staff who were involved in dealing with his Freedom of Information request.

## Investigation

30. To examine Mr McKinnon's complaint it has been necessary to review each step in the process adopted by Victoria Police in its handling of Mr McKinnon's Freedom of Information request. This examination has revealed a number of significant defects, cultural and technical, in the handling of Freedom of Information matters by Victoria Police.
31. My investigators reviewed the documents held by Victoria Police regarding this matter and Victoria Police was cooperative in providing the documentation to my investigators. My investigators interviewed the primary decision maker, who was also responsible for the provision of instructions relating to the VCAT litigation and in relation to the release of the documents. They also interviewed:
- the internal reviewer
  - Legal Officer B, one of the internal solicitors to Victoria Police
  - the then Executive Advisor to the Chief Commissioner
  - a senior officer from the Department of Justice.

Each of those persons cooperated with my investigation. Legal Officer A was not interviewed as her role in this matter was comparatively minor.

## The initial decision

32. The initial decision was that the documents fell within both sections 28(1)(b) and 30. There was, however, nothing evident from the documents themselves which indicated that they were prepared for submission to Cabinet. The primary decision maker said in his response to my draft report that he relied on his ‘many years of experience, knowledge and expertise in the practices of FOI and Victoria Police, the investigations of the other officers in the FOI division who assisted me in processing Mr McKinnon’s application and the fact that a previous decision to exempt these documents had been confirmed at internal review’.

***The initial decision was that the documents fell within both sections 28(1)(b) and 30. There was nothing evident from the documents themselves which indicated that they were prepared for submission to Cabinet.***

33. The SafeStreets documents had been the subject of two earlier FOI requests. In relation to the first of those applications, the primary decision maker was not given access to the documents in question. In handling the Victoria Police response to that request, the primary decision maker had sought access to those documents. He discovered that they were held by the then Executive Advisor, Office of the Chief Commissioner, whose approach the primary decision maker paraphrased as being:
- I’ve got them. They’re secret. You can’t see them and I’ll tell you about them so you can apply the exemption.
34. The primary decision maker advised my investigators that he accepted that approach and did not press the Executive Advisor to see the documents. I consider that this was an error. The primary decision maker was performing a statutory function which requires him to assess documents against the assessment criteria in the FOI Act. It is not possible to perform that function without seeing the documents and their content. Accepting another’s word about the content and nature of the documents is not satisfactory.
35. In relation to the second request, the primary decision maker obtained access to the SafeStreets documents. In both cases, access was denied.
36. In handling the Victoria Police response to Mr McKinnon’s request, the primary decision maker again determined that access to the SafeStreets documents would be denied. He was unable to locate any documents providing direct evidence establishing grounds for exemption under sections 28 or 30.
37. The primary decision maker relied on other evidence to form the view that the SafeStreets documents were exempt pursuant to section 28(1)(b), the cabinet document exemption. In forming his conclusion, he relied on three documents.

38. The first document relied on was a memorandum from the Chief Commissioner's Executive Advisor to the Deputy FOI Officer dated 24 September 2009 which was created in relation to the first Freedom of Information request concerning the SafeStreets documents. In that memorandum, the Executive Advisor stated that 'these documents are not to be released as part of any Freedom of Information Request' as they are 'part of a Cabinet in Confidence process'. The primary decision maker treated this document not as an instruction, but as information which assisted him in categorising the documents. The Executive Advisor's memorandum, however, said nothing about the purpose for the creation of the SafeStreets documents, a necessary component of the cabinet document exemption. She has since confirmed to my investigators that she knew nothing as to the purpose for which the SafeStreets documents were created
39. The second document relied on was provided to me with the primary decision maker's response to my draft report. This was an internal Victoria Police memorandum dated 7 January 2010 providing the FOI section of Victoria Police with the SafeStreets documents, in response to the second FOI request. This memorandum advised that the SafeStreets documents 'were to be considered 'Cabinet in Confidence'. Again there is nothing in the memorandum which indicates the purpose for the creation of the SafeStreets documents.
40. The third document relied on was also obtained in response to the second FOI request. It was advice received from the Manager of SafeStreets Projects that was interpreted by the primary decision maker as recording an undertaking by the then Chief Commissioner, Ms Christine Nixon to the State Coordination and Management Committee (SC&MC) to provide a consolidated presentation to the Premier and/or Cabinet. The relevant passages reads:

Chief Commissioner Christine Nixon has presented SafeStreets to the State Co-ordination & Management Council (SC&MC) on two occasions, 18 September & 2 November 2007. SC&MC have agreed to:

- c. request that a consolidated report on the outcomes of this research be provided to SC&MC to serve as an evidence base to direct effective action, with a view to providing in due course a paper and/or presentation to the Premier and/or Cabinet in relation to these issues and possible responses.

To implement SC&MC's resolutions, it is intended that the Chief Commissioner and Secretaries of DOJ and DHS continue to be responsible for sponsorship of coordination of current initiatives, in consultation with DPC.

41. Paragraph (c) makes no reference to any undertaking. It contemplates the creation of two documents being: 'a consolidated report on the outcomes of this research', and; 'a paper and/or presentation to the Premier and/or Cabinet'. At interview, the primary decision maker was unable to explain whether the two SafeStreets documents were the 'outcome of the research' or the 'paper and/or presentation'. As regards the creation of the 'paper and/or presentation', he was unable to explain whether it was to be the responsibility of Victoria Police or SC&MC. This document therefore cannot be said with any certainty to refer to the SafeStreets documents. Even if it does, it is not evidence that they were created for the purpose of submission for consideration by Cabinet.
42. In my view, nothing in those three documents is sufficient to support the primary decision maker's conclusion that the sole or substantial purpose for which these documents were prepared was for their submission to Cabinet, and therefore that they were exempt under section 28(1)(b) of the FOI Act.
43. As to section 30, the primary decision maker considered that the release of the documents was not in the public interest. I was advised by letter from the primary decision maker's deputy dated 18 March 2011, of the justification for the primary decision maker's public interest decision:
- The continuance of an environment that is receptive to questioning and challenging views being put in internal working documents would likely be eroded if agency stakeholders knew their input would be open to public knowledge and scrutiny prior to an approved Victoria Police position being finalised and announced.
44. That letter, however, did not explain how he reached that view and, at interview, the primary decision maker was not able to explain how he reached the view that disclosure of the document 'would be contrary to the public interest as to disclose these documents may impede full and frank discussions by staff of Victoria Police in areas of high public concern'. He conceded that his primary concern was on section 28 and that he should have paid greater attention to section 30, stating:
- I didn't turn my mind fully to the section 30 because I was of the view that they were Cabinet documents.

***The evidence before the primary decision maker and his reasoning as at June 2010 did not justify refusing access to the documents.***

45. I consider that the analysis by the primary decision maker was unsatisfactory. The primary decision maker remains of the view that the SafeStreets documents were Cabinet documents. However, I consider that the results of his investigations and enquiries provided insufficient basis to claim that they were exempt pursuant to either section 28(1)(b) or section 30(1) and, in my view, the evidence before him and his reasoning as at June 2010 did not justify refusing access to the documents.

46. In his response to my draft report, the primary decision maker argues that the word 'unsatisfactory' should not be used as it does not sufficiently acknowledge the more limited basis for decision a first instance administrative decision maker typically acts within. In the primary decision maker's view, a first instance decision maker 'typically acts on the more limited information than is available to parties preparing for trial'. He considers that '[l]itigation in the FOI jurisdiction is inherently impressionistic - being founded on discretionary considerations - which makes the outcome difficult to predict', so 'criticisms founded on such speculation are unfair'.
47. However, the primary decision maker did not refer to the fact that he had considered the same documents in two earlier FOI applications. Moreover, I do not accept his view as to the 'impressionistic' jurisdiction of the Victorian Civil and Administrative Tribunal.

## The internal review

48. The process adopted in relation to the internal review was equally flawed. The internal reviewer relied on legal advice in conducting the review. That advice, dated 9 August 2010 incorporated a draft letter of decision. The internal reviewer adopted that advice and signed the draft letter on 10 August 2010. In my view, that advice was inadequate.

***The process adopted in relation to the internal review was equally flawed. The internal reviewer relied on legal advice in conducting the review.***

49. To be a valid internal review, The internal reviewer was required by section 51(3) of the FOI Act to 'review the decision and to make a fresh decision on the original application'. This, as Judge Dove VP in *Towie v. Medical Practitioners Board (Vic)*<sup>4</sup> put it, requires 'the decision-maker to conduct a review de novo and come to a decision unrestrained by any findings made by the initial decision-maker'.
50. Here, the legal advice did not demonstrate a sufficient review of the bases for which either section 28 or 30 exemptions were claimed. Section 28(1)(b) was considered an appropriate basis for exemption, but to reach that conclusion, reliance was placed on the primary decision maker's decision and a statement to that effect in a letter of instruction to the internal reviewer from the primary decision maker's Division dated 29 July 2010. There is no indication that efforts were made to locate any direct evidence as to whether the two SafeStreets documents were created for the purpose of consideration by Cabinet, or that any attempt was made to review the evidence relied on by the primary decision maker to reach that conclusion. At interview the internal reviewer advised that he understood, at the time, that evidence existed to support the section 28(1)(b) exemption but was not able to identify it. He conceded that, in retrospect, he should have 'asked for a fuller advice in terms of the factual basis supporting the conclusion'.
51. As to section 30(1), the legal advice relied on the same public interest basis as the primary decision maker, but failed to explain how that conclusion was reached. The internal reviewer was also unable to advise how that conclusion could have been reached and conceded, like the primary decision maker, that his attention had been concentrated on section 28:

The second part in terms of section 30 was secondary for me. The main issue was the Cabinet matters .... If we had not got over the threshold of Cabinet, I would have more enquires done on section 30 matters ... to flesh out the issue.

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4 [2004] VCAT 2545.

52. In addition, the form of the letter that was provided with the advice was inadequate in that it failed to provide any reasons. *Freedom of Information Practice Note 8: Decision Letters* issued by the Department of Justice provides as follows:

**7. Is a statement of reasons needed for internal review decisions?**

Although section 27 does not apply to decisions on internal review, it is sound administrative practice for any statement of reasons to contain the types of matters referred to in section 27.

It is unfortunate that the internal reviewer was not advised to follow this sound administrative practice.

53. I consider that the internal reviewer's willingness to accept and act on the flawed advice was an error of judgement. The internal reviewer has accepted that the legal advice was insufficient. By following that flawed advice he undertook an unsatisfactory internal review process. I consider that had an effective process been undertaken, the errors in the primary decision maker's process and decision would have been readily identified with the result that, in the absence of any sounder basis for exemption, the two SafeStreets documents should have been released in August 2010. Given later events, it is most unlikely that a sound exemption basis would have emerged.

***The internal reviewer's willingness to accept and act on the flawed advice was an error of judgement.***

## The VCAT process

54. The problem facing the primary decision maker and the internal reviewer was that the people who worked on SafeStreets had ‘moved on’ from Victoria Police, and there was no clear documentary basis upon which to base a claim of Cabinet exemption. This problem also faced the legal officers<sup>5</sup> who were responsible for the VCAT proceedings brought by Mr McKinnon challenging the internal review decision. Those officers needed to locate witnesses who could give evidence to satisfy VCAT that the documents warranted exemption under section 28(1)(b) and/or section 30 of the FOI Act.
55. On 19 October 2010, Mr Ron Gipp, Victoria Police’s barrister, orally advised Victoria Police’s solicitors, that ‘s.30 [was] difficult’ and that Victoria Police was ‘likely to lose’ on the public interest override provided for by section 50(4) of the FOI Act.<sup>6</sup> Victoria Police paid little or no attention to that advice. It should have raised issues concerning the application of the Model Litigant Guidelines to this matter.

***Mr Ron Gipp, Victoria Police’s barrister, orally advised Victoria Police’s solicitors, that ‘s.30 [was] difficult’ and that Victoria Police was ‘likely to lose’ on the public interest override provided for by section 50(4) of the FOI Act. Victoria Police paid little or no attention to that advice.***

56. The Model Litigant Guidelines, as in force in October/November 2010 create an obligation on:
2. ... the State of Victoria, its Departments and agencies [to]:
    - (a) act fairly in handling claims and litigation brought by or against the State or an agency ...
    - (c) avoid litigation, wherever possible
    - (d) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid
    - (e) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
      - (i) not requiring the other party to prove a matter which the State or the agency knows to be true, and
      - (ii) not contesting liability if the State or the agency knows that the dispute is really about quantum,
    - (f) ... not rely on technical defences unless the State’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement ...
    - (h) ... not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

<sup>5</sup> The legal officers who conducted the VCAT litigation were not the legal advisers of the internal reviewer.

<sup>6</sup> File note of telephone conversation, Mr Ron Gipp and Legal Officer A 19 October 2010.

57. Given Mr Gipp's oral advice and consistent with the Guidelines, Victoria Police should have either:
- sought Mr Gipp to clarify his advice by written advice
  - not sought to pursue the section 30 exemption, or
  - formed a view as to why a section 30 argument should be presented despite Mr Gipp's advice that Victoria Police was likely to lose.
58. It did none of those things, although my investigators were informed by Legal Officer B that the primary decision maker was advised of Mr Gipp's advice. However, nothing indicates that this factor was considered in Victoria Police's decisions in November 2010, December 2010 or January 2011.
59. By early November 2010, it was also apparent that it was not possible to locate witnesses to support a claim of exemption under section 28, with the result that Legal Officer B, after conferring with Mr Gipp of counsel and obtaining instructions from the primary decision maker, advised Mr McKinnon on 4 November 2010 that section 28 would not be relied on.
60. Had the Guidelines been seriously considered, Victoria Police would have had to face the question as to whether the documents should have been released in full as at 4 November 2010, once Victoria Police accepted and advised that it no longer would rely on section 28. That it failed to do so indicates a failure on the part of Victoria Police and its internal advisers to appreciate the significance and importance of the Model Litigant Guidelines and their application to Freedom of Information litigation.
61. Legal Officer B in her response argues that this and other paragraphs in this report implicates her unfairly as she was not the decision maker and the role that she played was dependent on instructions. She argues that the importance of the Model Litigant Guidelines was at all times clear to her and she was endeavouring to act consistently with them.
62. The primary decision maker, in his response to my draft report, disagrees with the criticism regarding Victoria Police's failure to comply with the Model Litigant Guidelines, arguing that 'written advice was not necessary [from Mr Gipp], Victoria Police understood the advice provided and did not require clarification'. He also stated that:
- There is nothing in the text or the spirit of the Guidelines that requires Victoria Police, acting as a model litigant, to withdraw from its position merely because there are aspects of it that are in doubt but remain arguable. The requirement is to act on the substantial merits of the case. I repeat, at all times the exemptions were asserted, Victoria Police had a bona fide and reasonable belief that the exemptions were made out.
63. The primary decision maker also argued that 'counsel's concern that the Tribunal's evaluation of s50(4) considerations may result in the documents being released has no bearing on the substantive merit of the s30 claim'.

64. However, Mr Gipp's advice was not that aspects 'are in doubt' or 'remain arguable' or that the Tribunal's evaluation of s50(4) 'may result' in documents being released. It was that Victoria Police was 'likely to lose on s50(4) override'.
65. Legal Officer B also argued that Victoria Police acted consistently with the Model Litigant Guidelines by consulting with senior police as to whether to continue to rely on section 30 and to locate evidence to support its position.
66. Legal Officer B, like the primary decision maker, also minimised the advice received from Mr Gipp, regarding it as advice that 'an exemption may not succeed' and responded that:
- it is important to note that the MLG do not impose an obligation to settle a matter based solely on a party receiving *preliminary legal advice* from its counsel. Acting as a model litigant does not require a party to cease a case the moment it receives advice that the case *may not succeed* [emphasis added].
67. If Legal Officer B considered Mr Gipp's 19 October 2010 advice to be 'preliminary advice', this raises the question as to why no final advice was sought on this issue from Mr Gipp.
68. Legal Officer B in her response argued that there was no need to seek the final advice as the process that she was bound to follow was to 'test' the section 30 exemption after the section 28 claim was abandoned by seeking instructions from senior police. She argues that no final advice was necessary as this 'testing' led to the conclusion that section 30 was no longer sustainable. However, that conclusion was not reached until January 2011 and was based not on the inherent legal unsustainability of Victoria Police's argument regarding the section 50(4) override in relation to section 30, but on the lack of witnesses to support a section 30 exemption.
69. Following the 5 November 2010 directions hearing, efforts were transferred to reviewing the documents against section 30, both within Victoria Police, in other Departments and agencies and at the Department of Justice. Throughout this period Victoria Police obtained advice from other agencies, sometimes phrased in robust terms, concerning what redactions should be applied to the SafeStreets documents on the basis of section 30. This was in spite of Mr Gipp's advice on 19 October 2010 that Victoria Police would 'lose' a claim for exemption on the section 30 ground.
70. In addition to the failure to take Mr Gipp's advice into account, there were two problems with this process that Victoria Police adopted.

71. The first problem was that Victoria Police developed and relied on arguments for exemption without giving adequate consideration to whether it would be possible for Victoria Police to prove its position if tested. This was a failure to adopt the openness that I consider is required in the application of the Freedom of Information legislation and contradicting the standards required by the Model Litigant Guidelines. An agency should not claim an exemption unless it considers that it can clearly support that exemption if required. Victoria Police made such a claim without that support. The result was to unnecessarily delay the release of the documents to Mr McKinnon for six months.

***An agency should not claim an exemption unless it considers that it can clearly support that exemption if required. Victoria Police made such a claim without that support.***

72. Legal Officer B in her response to my draft report asserts that 'VP [Victoria Police] did consider it could support the exemption with evidence'. However she accepts that 'close examination' of that issue was not undertaken until the preparation of the case for hearing was commenced, at which time 'the evidence it had available was shown to be insufficient to prove the exemption before the Tribunal'.
73. Legal Officer B also argues that some of the six months delay was caused by Mr McKinnon, in that he sought adjournments at VCAT from 24 September to 22 October 2010. These adjournments, however, should not have caused any delay to Victoria Police in its assessment of the documents and identification of available evidence.
74. No substantial attention was given to witness identification in relation to the section 30 issue until after the election. At that point it was found that the robust advice provided in November as to the passages that should not be released evaporated once persons were requested to be the validating witnesses. As Legal Officer B accurately observed:

Nothing crystallises someone's mind [more] than when they are getting ready to get into the box.

***The robust advice provided in November as to the passages that should not be released evaporated once persons were requested to be the validating witnesses.***

75. Legal Officer B however, in her response argues that the first sentence in the previous paragraph is incorrect and misunderstands the way FOI cases are prepared. She states that the 'process began in early November and there were sound reasons for it not beginning sooner'. She claimed that those 'sound reasons' were that 's28 would be a complete answer to the request and it was appropriate to defer close consideration of s30 until the s28 issue was resolved'. She therefore considers, first, that it was appropriate for Victoria Police to continue to assert that section 30 was valid defence even though it had been advised that it was 'likely to lose' on that ground and, secondly, that it was not necessary for the merits of the section 30 defence to be closely examined until it became the sole basis on which the application could be defended. I do not share this view and consider that this understanding does not accord with the Model Litigant Guideline that requires agencies to 'act fairly in handling claims and litigation brought by or against the State or an agency'. This obligation means that agencies do not assert a defence that it has reason to believe is flawed unless there are public interest reasons for doing so.
76. She also does not explain why it took until January 2011 before it was determined that Victoria Police did not have sufficient evidence to support the exemption that it had claimed since June 2010.
77. The efforts spent in November 2010 to redact documents and prepare the matter for trial were largely wasted as they were not associated with efforts to locate validating witnesses. Had they been, it is likely that no witnesses would have been located and that the documents could have been released in full before the election on 27 November 2010.
78. The primary decision maker, in his response disagrees with this and advises that:
- 'From November 2010, in response to our inquiries, we were being given information from individuals within government that was consistent with maintaining the s30 exemption claimed. On the basis of our work there existed a reasonable basis for believing witnesses to substantiate the exemption claimed existed. I held a bona fide belief that this was the case at all relevant times. I was never on notice that this was in doubt ...'
79. Legal Officer B also disagrees with my criticism on this point, stating that the arguments relied on to support the 3 December 2010 decision not to release parts of documents 'were based on the feedback received from Inspector C and from the office of Deputy Commissioner Walshe'. However, that feedback, as described by Legal Officer B, said nothing as to the presence of witnesses to establish the claimed exemption, although, in her response, Legal Officer B felt it was 'implicit' in the feedback that these persons (two Inspectors) would be suitable persons to give evidence'. It is, however, apparent that Victoria Police did little to give certainty to this implication until after the election.

80. Legal Officer B also states that she was 'making efforts to locate appropriate witnesses' but does not explain why those efforts could not have been completed before the state election other than that she was relying on instructions to deal solely with section 28 until 4 November 2011. She also states that her:

efforts as legal adviser to prepare the documents under instructions for partial release and to identify suitable witnesses for the hearing were undertaken legitimately and in the honest and genuine belief that the application would proceed to hearing. Those were my instructions from VP [Victoria Police] and my understanding is that those instructions were based on the evidence then understood to be available to VP.

81. The second problem was that Victoria Police and the Department of Justice (the Department) agreed that the Department would conduct the central role of liaising with other agencies. My examination of the process undertaken in the Department indicates that that task was exercised appropriately and adequately in view of the other demands placed on the Department at the time.

82. However, Victoria Police did not consult with the Department regarding the assurances that were provided to VCAT and Mr McKinnon on 5 and 18 November 2010 as to the days upon which it was undertaking to release the documents. Had there been such consultation, the undertakings may not have been made. Furthermore, Victoria Police did little to press the Department to provide the information that it was seeking so as to allow the undertakings to be met. This was unsatisfactory. If an undertaking is given to an applicant and to the Tribunal, the agency should take every step that is necessary to ensure that that undertaking is both properly formulated and met. I am not satisfied that the officers in Victoria Police adopted that standard.

83. From witness interviews, it is apparent that the failure to keep the undertakings of 5 and 18 November 2010 was not caused by an unwillingness of Victoria Police officers to keep them.

84. Had Victoria Police been seeking purposely to delay the response to the request, it could easily have done so by seeking to have the matter fixed for hearing at the directions hearing on 5 November 2010, which would have put the matter off until February or March 2011. It did not take that step, but took steps it considered necessary to release what documents it could before the election. However, it underestimated its ability to achieve that end before 27 November 2010, and by relying on the Department to do much of the 'leg work' and failing to press the Department to require it to provide its response in time, it was unable to meet the obligations that it had voluntarily entered into.

85. The primary decision maker argues that as Victoria Police 'made the Department of Justice aware of the timeframe for responding, understood that the Department was seeking urgent responses and was checking with the Department on a number of occasions to ensure the process was being undertaken appropriately'. He also said:

At all material times, Victoria Police understood that the obligation to meet the Tribunal ordered timetable was its own and made a bona fide endeavour to meet that timetable.

86. Legal Officer B also rejects the conclusion that Victoria Police failed to press the Department of Justice, stating:

It must be borne in mind that VP [Victoria Police] has a limited capacity to force another government agency to act and no ability to dispute the time lines another agency says are necessary for it to perform its own functions. In that context I and VP did all we could.

87. There is nothing to indicate that there was any improper or political purpose in the Department of Justice or Victoria Police not providing the documents before 27 November 2010, the election day.

88. In his response to my draft report, the primary decision maker added:

Finally, I note that Mr McKinnon's complaint and your subsequent investigation have resulted in my instituting improvements to the FOI Division of Victoria Police. I have arranged for staff of the FOI division to receive further training on the appropriate use of the s28 exemption and had created a template of appropriate questions to ask business units who state documents are cabinet in confidence which focus on the purpose for the document's creation.

## Conclusions

89. I consider that there have been a number of procedural and decision-making errors in the conduct of Mr McKinnon's Freedom of Information request which prevented him receiving the documents to which he had a statutory entitlement for over six months and until after the 2010 election. I can, therefore, appreciate why he considered that those delays were caused by some form of political intent. While I have found no such intent, I was very concerned as to the technical errors displayed in relation to this request.
90. The errors primarily related to the readiness to accept the existence of exemptions with insufficient material to support the exemption. This willingness was demonstrated at both the initial decision and internal review stages and indicates a less than open freedom of information attitude at Victoria Police. This investigation has demonstrated that the willingness to disclose information necessary when applying the FOI Act was not present in the handling of Mr McKinnon's request. This is contrary to the intent of the FOI Act, which is aimed at creating an open and transparent process by which government documents may be accessed by citizens.
91. The Acting Chief Commissioner does not accept this conclusion, advising that as 'Victoria Police strives to meet all of its statutory obligations and on the basis of one FOI request, it seems a harsh conclusion in the circumstances'. The primary decision maker and the internal reviewer also disagreed with this conclusion arguing that it was 'inappropriate to generalise from such a specific inquiry to something as broad as' an organisational attitude. The Acting Chief Commissioner advises that he will continue to explore improvements to access documents more quickly over the coming year'.
92. The errors also demonstrated an inadequate and unacceptable internal review process, in both form and substance, which did not in any way review the initial decision. This particular error occurred as a result of the acceptance of poor legal advice.
93. The Acting Chief Commissioner considered that the internal reviewer conducted an appropriate internal review as he 'specifically sought legal advice in the expectation that the appropriate inquiries would be made and for the purpose of reviewing the initial decision'.
94. These errors were magnified by a willingness to claim exemptions without taking any serious steps to determine the capacity of the agency to support those exemptions if tested. An agency should not claim an exemption unless it has the capacity and willingness to support that exemption.

95. The internal reviewer, in his response confirmed that the two Safe Streets documents did not contain any reference to indicate whether or not they were prepared for cabinet and stated that:
- I had been aware of the preparation of the reports and understood that they would form part of an ERC [Expenditure Review Committee] process and I accepted the legal advice as confirmation that the documents were prepared for the purpose of submission for consideration by Cabinet as stated in the advice. I was surprised when I was later informed that the Steering Committee members were not in a position to provide this evidence.
96. Of most concern was a failure to appreciate and act according to the Model Litigant Guidelines. The Acting Chief Commissioner has requested that this conclusion be removed from the report as he considers that 'there is no evidence in the draft report to suggest that my staff did not appreciate them'. I disagree with that observation. It is apparent that Victoria Police still does not appreciate the nature of Mr Gipp's advice.
97. I note that the responses from two of the persons involved in this matter have attempted to minimise Mr Gipp's legal advice when presenting arguments as to why they consider that the Model Litigant Guidelines have been complied with. The Acting Chief Commissioner's response to my draft report also regarded Mr Gipp's advice as being confined to 'section 30 [was] difficult', whereas Mr Gipp also included the much more significant advice that Victoria Police was 'likely to lose on s50(4) override'. This reinforces my conclusion that Victoria Police have failed to properly consider and apply the Model Litigant Guidelines in this matter.
98. Had any one of those errors been corrected, Mr McKinnon would have received the requested documents before the 27 November 2010 election, as he had sought.

## Recommendations

### Recommendation 1

I recommend that Victoria Police provide an apology to Mr McKinnon.

### Recommendation 2

I recommend that Victoria Police provide additional training to Victoria Police legal and FOI staff on the Model Litigant Guidelines and their application.

### Recommendation 3

I recommend that Victoria Police review its policies on Freedom of Information requests to emphasise that:

- FOI officers need access to each and every document that is subject to a Freedom of Information request
- FOI officers should not claim an exemption without giving serious consideration to the question of how an exemption is to be established if challenged.

### Recommendation 4

I recommend that Victoria Police provide additional training to Victoria Police staff engaged in internal review and in providing legal advice regarding the requirements of internal review.

The Acting Chief Commissioner has accepted the recommendations.

G E Brouwer  
**OMBUDSMAN**

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A report of investigations into the City of Port Phillip  
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An investigation into the Transport Accident  
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July 2009

*Whistleblowers Protection Act 2001* Conflict of  
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*Whistleblowers Protection Act 2001* Investigation  
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Complaint handling guide for the Victorian Public Sector 2005  
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Review of complaint handling in Victorian universities  
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Investigation into the conduct of council officers in the administration of the Shire of Melton  
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