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Independent RTI Framework Review

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Background

This submission is made in a personal capacity. I am happy for this to be treated as a public submission.

I have filed perhaps 1-200 Freedom of Information (FOI) /Right to Information (RTI) requests over the last 35 years, including applications in Tasmania, Victoria, New South Wales, Queensland, the Commonwealth of Australia and New Zealand. This includes extensive experience with Tasmania's earlier Freedom of Information Act.

In the last five years, I have filed more than 20 RTI requests in Tasmania, spanning state government agencies, the Premier's office, Government Business Enterprises and several local governments. These were filed as part of my work for *Tasmanian Inquirer*.

The comments below are reflections on my experience with Tasmanian RTI requests that have spanned from applications that were processed smoothly through to internal appeals, appeals to the Ombudsman and routine disclosure.

The importance of a signal from the Premier: The best document disclosure experience I have had with the Tasmanian government was back in about 2009 under the old Freedom of Information Act: within one to two weeks, I had all the documents relevant to my request with reasonable but minimal redactions.

While the old FOI Act was weaker, the difference between then and now was the surrounding political culture. At the time, Premier David Bartlett headed a government that, in the wake of the controversy over the Gunns pulp mill, committed to a suite of measures to "strengthen trust in democracy and political processes in Tasmania". The measure included the establishment of the lobbyist register and a review of the FOI Act.

Since 2014, high-level support for improved transparency has waned. I can't recollect a clear statement by any Premier in the last decade clearly communicating an expectation that ministers and agencies improve their RTI disclosure practices. A signal from the top is crucial in shaping the performance of agencies.

Some other specific points:

Digital vs hard copy provision of released records: In response to a request to TasNetworks, several hundred pages of documents were released but, to my surprise, were couriered to me in hard copy form rather than as a digital file. While some people may prefer printouts, it should be at the discretion of the applicant.

All agencies should be required to have a disclosure log: Most agencies have a disclosure log for RTI documents so that other members of the public can access previously released records. In the case of the TasNetworks documents, I discovered that the agency doesn't appear to have a Disclosure Log. (It is not linked to the RTI section on its Policies page or Publications page or turn up on a search for "Disclosure Log"). Are there other agencies/government business enterprises in a similar position? Shouldn't it be mandatory for agencies to have a disclosure log?

The wording of the RTI request should also be published on the disclosure log: While most agencies publish released documents on their disclosure log, none that I have seen publish the wording of the actual request. Releasing the records but not the terms of the request is like publishing the answer but not the question. On several occasions, I have reviewed documents released to others and wondered whether other records were missed due to the wording of the original request or perhaps the specification of a narrow time window. Sometimes, it is possible to guess who filed the request; other times not.

Disclosing the wording of a request would allow a better understanding of the documents released and potentially minimise the chance of duplicative requests.

Applicants should have the option of acknowledgement on disclosure logs: Disclosure logs currently don't disclose the name of the applicant. As a default setting, it is reasonable that applicants can remain anonymous if they so choose. However, many applicants would be happy to consent to the disclosure of their name if given the option.

From a journalism perspective, an essential part of the story is the to and fro of the arguments over redactions and other information in correspondence with the agency. For example, the applicant's arguments in internal appeals against parts of an initial decision and the agency's responses are important elements in explaining what was and wasn't disclosed. (See for example here). It is also preferable to acknowledge who the applicant was.

It is worth noting that the decisions of the Ombudsman on appeals often name the applicant. The decisions of the Ombudsman also include extracts of the arguments of the respective parties over exemptions.

Set a minimum frequency for the routine disclosure of data: There is currently no minimum Tasmanian government standard on the frequency for data released as routine disclosure under the RTI Act. There should be.

Several years ago, I submitted a successful RTI request to the Department of Natural Resources and Environment requesting data on the use of various devices against seals at fish farms broken down by the name of the company and by month. (See story here.) I also requested the routine disclosure of the data on a monthly basis. NRE Tas initially agreed to disclose the data on a quarterly basis and then unilaterally changed the frequency to six months.

It would be helpful if there is a benchmark for routine disclosure of simple data. For example, the Department of Treasury and Finance routinely discloses data on a monthly basis on gambling-related issues, and the Department of Premier and Cabinet discloses ministerial appointments diaries for each quarter. In my opinion, the disclosure of data monthly is more consistent with the spirit and aim of the RTI Act.

Even where an agency agrees to disclose data on a routine basis, it may not do so in a timely manner. For example, on at least one occasion, I had to prompt NRE Tas about the lack of the latest seal deterrent data. The schedule for the publication of the ministerial diaries is also rather haphazard. These instances suggest that internal systems to ensure the timely disclosure of routine information are not robust.

Is routine disclosure in response to an RTI request a temporary or a permanent commitment? Back in 2009, I applied under the Freedom of Information Act for the ministerial appointments diary of the then Premier, David Bartlett. This disclosure remained the standard practice of Premier Lara Giddings, but Premier Will Hodgman abandoned it after the 2014 election. Is routine disclosure after a FOI/RTI request a binding or non-binding commitment?

Shouldn't routinely disclosed data meet RTI standards as a minimum? Following a 2023 Legislative Council motion, the disclosure of ministerial appointments diaries was recommenced and extended to include all ministers. However, a recent Right to Information request revealed that the Department of Premier and Cabinet (DPAC) released more information than included in the routinely disclosed diaries. Surely, the routinely disclosed information should be consistent with RTI standards.

It is also worth noting that far more detail was disclosed by DPAC in response to my 2008 Freedom of Information request than disclosed following the recent Right to Information request. (I can supply a copy of the original hard copy records if required.)

Extend the period before publication of documents on the disclosure log: The current practice is that agencies publish documents on their disclosure log 48 hours after release to the applicant. In my view, 48 hours is unreasonably short.

The application and appeals process can extend from a month through to several years and involve a significant investment of time by an applicant. Documents released in response to some RTIs can extend to hundreds of pages of complex material that require time to read, sort and analyse. Journalism based on RTI documents requires seeking out people with specific expertise and community members. The current 48-hour exclusivity window also assumes that the applicants have no other commitments at the time documents are released.

I would suggest extending the exclusivity period to 20 working days, matching the time offered to third parties to consider the potential release of documents affecting them. Some applicants might prefer the 48-hour disclosure window. In this case, it should be the right of the applicant to opt-in for a shorter release period. Extending the timeframe offers a level of guarantee to applicants for their effort but only makes a modest change in the total timeframe of an average RTI request.

Isn't it time to make all RTI applications free? Applications are currently free for MPs, journalists and others who can make out a claim of either public interest or hardship. I'm not aware if there is any data on how many applicants a year pay the current $46.75 fee. However, I suspect the amount of revenue is relatively negligible.

Increased training for decision-makers: The Ombudsman's last annual report notes the limited funding and time available for training programs for RTI decision-makers. Better-trained decision-makers offer the potential to reduce the need for internal appeals and reduce costs incurred in external appeals to the Ombudsman's office. On several occasions, I have had to explain basic

procedural steps to decision-makers, such as marking up document redactions with claimed exemptions rather than just claiming a blanket exemption for an entire document. In other instances, decision-making officers were seemingly unaware of well-established precedents by Ombudsman rulings, such as disclosing the names of agency officials in documents.

Should there be training and support available for applicants? There is currently no system for training and support for applicants, especially in navigating the appeals process. Applicants who applied for records either as individuals or for small community organisations find the legal language in initial decisions claiming exemptions rather intimidating. Rather than pursuing an appeal, they often give up and are left feeling the odds are stacked against them. I think they probably would have gained additional information if they had access to advice on how they could craft an appeal. While access to the Ombudsman's decisions is useful, there remains a significant power imbalance between an individual applicant and an agency. First-time applicants, in particular, find the appeals process somewhat overwhelming.

The lack of an evidentiary basis for claims of 'commercial in confidence': There seems to be a trend towards government agencies invoking 'commercial in confidence' as a blanket 'get out of jail free' card without having to disclose information.

For example, when I requested a copy of a tender brief TasNetworks supplied to potential bidders, my request was rejected "due to commercial-in-confidence and privacy considerations". (See here. I obtained the brief via a subsequent RTI request, but that really should not have been necessary.)

In another example, the Tasmanian EPA has published reports submitted by salmon companies monitoring antibiotic residues in public waterways. (See here, here and here.) These reports, which the relevant company commissioned, included the details of the quantity of antibiotics used and the number of cages treated. Several of these reports revealed antibiotic residues in wild fish, some at high levels and others at a significant distance away from the salmon farms. Not surprisingly, the issue gained a substantial amount of public attention. In the recreational fishing community, there was concern about the lack of real-time disclosure of when antibiotics were in use.

Early last year, I inquired with the EPA's media office whether antibiotics had been used since the release of the previous monitoring report and, if so, the type of antibiotic, the name of the lease, the amount of the drug used and how many pens treated. They provided the information without requiring an RTI request.

I subsequently requested the EPA routinely disclose information on when antibiotics were in use and when a residue monitoring report was published. They refused.

This year, when a significant disease outbreak occurred in the D'entrecasteaux Channel, Huon Aquaculture voluntarily disclosed it was using an antibiotic at one of its leases. The EPA refused to state how much antibiotic was used or how many cages would be treated, claiming it was commercial in confidence. How information that was once openly disclosed by all three salmon companies and published by the EPA suddenly became a commercial secret remains unclear.

In the case of TasNetworks, an initial decision to refuse a simple request required an RTI to gain a copy of material that was clearly not commercial in confidence. In the case of the EPA, the refusal of

the agency to disclose the amount of antibiotic used is likely to lead to an RTI to access information that was previously public released.

In the absence of clear guidance on what really is 'commercial in confidence', it seems clear the claim is used to block the disclosure of basic information. The initial failure of media officers to disclose information has flow-on impacts on the RTI workload of an agency. If RTI aims to ensure agencies pro-actively disclose information, any training programs need to extend beyond agency RTI decision-makers to also include media officers.

Appeals bottleneck at the Ombudsman's office: I appreciate that, according to Ombudsman Tasmania's last annual report, the average time to process appeals is declining. While increased resourcing should cut the backlog further, it is important to acknowledge that part of the problem is poor processing of applications at the very start of the process. (See above and here.) In one instance, a relatively simple RTI application of mine ran from December 2020 until a decision by the Ombudsman in May 2024.

In another case, the Ombudsman flagged the possibility I could access a fast-track option to ensure timely processing of an appeal. I didn't take the offer up. While I am sure MPs and journalists can plausibly argue in favour of the quick resolution of appeals, the fast-track option obviously affects other applicants left on the slow track. Who is the fast-track option offered to? How many take it up? What impact does this have on other applicants?

I think others will probably cover this issue, but I also note that the guidance documents on the Ombudsman's website are now getting rather dated.

Thanks for the opportunity to comment.

Yours sincerely,

Bob Burton