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Independent RTI Framework Review
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Via: tasrti.review@gmail.com

Dear Reviewers,

Thank you for the opportunity to make a submission to the Independent Review of Tasmania's Right to Information (RTI) Framework. As the Tasmanian Greens' spokesperson on Justice, Democracy and Integrity, I make this submission on behalf of all our State MPs.

We appreciate the time the Review team has dedicated to the important task of reforming Lutruwita/Tasmania's *Right to Information Act 2009*.

We sincerely hope there is a similar commitment within government to reform, with the aim of ensuring the Act is consistently applied by public authorities in line with the Object of the Act.

3. Object of Act

(1) The object of this Act is to improve democratic government in Tasmania –

(a) by increasing the accountability of the executive to the people of Tasmania; and

(b) by increasing the ability of the people of Tasmania to participate in their governance; and

(c) by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.

(2) This object is to be pursued by giving members of the public the right to obtain information held by public authorities and Ministers.

(3) This object is also to be pursued by giving members of the public the right to obtain information about the operations of Government.

(4) It is the intention of Parliament –

(a) that this Act be interpreted so as to further the object set out in subsection (1) ; and

(b) that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.

While no government has a perfect record of compliance with the spirit and provisions of the Act, the experience of the Greens in Parliament since the election of the Liberal Government in 2010, is that there has been a deliberate and systematic deterioration in application of the Act in a manner that does not serve the above Objects.

We believe many stakeholders who submit to the Review will also note the reflex of agencies and ministerial offices, particularly, to delay assessments, and deny information without lawful basis – actions which have in many cases, if reviewed by the Ombudsman, been found to be in breach of the Act.

While not all experiences with the RTI process are problematic, many are. Our experience has been that the more the subject of the RTI is politically difficult for government, the higher the risk of obfuscation and unlawful denial of public information.

The primary issues with the current application of the *Right to Information Act 2009* (the Act) are cultural. That is, there are elements within the State Service, likely under pressure from Cabinet and political advisers, that serve to obstruct the release of information for the political benefit of the current government.

To quote from the 2021-22 Ombudsman annual report:

"The express object of the RTI Act is clear in relation to its pro-disclosure focus… Too often, sadly, adherence to this object is not evident in practice and a closed, and at times obstructive, approach is taken when responding to requests for assessed disclosure which come before my office."

The Integrity Commission's *Investigation Gatehouse* provides a valuable insight into the RTI process in Tasmania. We won't rehash the details of this case, as it is public and available to read, suffice to say the report was scathing of the pattern of deliberate, unlawful conduct in this case.

This is an instructive case as it is not representative of rare, or the most egregious conduct. It is representative of a common process for an RTI request on a matter that is, or may be of, political sensitivity to government and/or its agencies.

RTI Uplift Project

The Right to Information Uplift Project Discussion Paper was updated in July of 2024, two months after the publication of Investigation Gatehouse.

While the discussion paper briefly noted the investigation and the reports, it did not otherwise discuss the details in the report. Nor did it discuss the matter of Quality Assurance Panels, an issue identified in the Integrity Commission investigation. Nor do any of the meeting minutes of the Steering Committee discuss these matters. It is almost as if the Integrity Commission's damning investigation simply did not happen.

Other elements of this discussion paper are blithely one-sided. Section 9.5 on 'public perception':

"objective measures suggest that RTI delegates across the TSS are working to release as much information as possible to the community, as quickly as possible, despite an ever-increasing workload. However, public discussion around RTI never seems to acknowledge this."

The report makes this claim by assessing the proportion of decisions for which reviews were requested for decisions (2%). The report, however, neglects to mention a few key details. Of the 28 requests for internal review 16 were upheld in full, 10 were upheld in part, and 0 were reversed.

Yet, of appeals that made it to the Ombudsman, 95% had identified errors in the Department's response to applications. The Ombudsman also noted in that year, *"Too often, sadly… a closed, and at times obstructive, approach is taken when responding to requests for assessed disclosure which come before my office."*

In the previous year, the Ombudsman also noted the Tasmanian Government's refusal of access to any information was 7.5 times higher than the leading jurisdictions in Australia.

Given an internal review process in that year had a 0% rate of reversing decisions, and Ombudsman backlogs can mean a review can take years, members of the public blocked in their attempts to obtain public information would likely be dissuaded from embarking on that process.

While the Greens make regular use of RTI information requests in the course of our work, most applicants are members of the public. Everyday Tasmanians are unlikely to be intimately familiar with the Act, their rights for review, and on what grounds they can appeal a delegate's decision.

The data being proudly touted in the RTI Uplift discussion paper reflects the fact that most applications are not of political concern to government, and do not always attract the same sort of obfuscation, and disregard for the Act, as the applications made by journalists, NGOs, and non-government MPs.

Unlawful Intervention in the Decision-Making of Delegated Officers

Investigation Gatehouse of the Integrity Commission found the Department of Health had established a Right to Information Panel, based on a similar panel in DPAC.

The investigation recommended disbanding the panel *"due to the associated serious misconduct risks and its capacity to subvert compliance with the Right to Information Act 2009 (Tas) in terms of time frames and decision-making."*

We are also aware that, since 2019 at least, NRE (then DPIPWE) had a 'quality assurance panel'. Despite the Ombudsman instructing the Department that this was not permitted

under the Act, we are aware of a 'quality assurance process' delaying decisions continuing as recently as 2023.

These panels operate by reviewing lawful decisions made by a Principal Officer or Delegated Officer. These officers are the decision-makers, and it is not lawful for their decisions to be reviewed prior to being allowed to make them.

Not only does this delay decisions well past legislated timeframes – sometimes for weeks and months – but our view is that, far from being a 'quality assurance' process, it is a political risk assessment process.

We have also experienced delays in decision making from 'ministerial noting', which at times has gone so far as delegated officers telling us their decision is being delayed until they hear back from the Ministers office.

In contrast, during the Labor Green government between 2010-14, both Greens' ministers gave clear, early instruction to our portfolio agencies that we expected full compliance with the RTI Act. Greens ministers rightly adopted a hands-off approach to RTI requests.

Petty Obfuscation

Over the years, we have encountered examples of what can only be described as deliberate, petty obfuscation intended to extend the date for which the clock commences.

There have been attempts to delay email responses accepting an application with the effect of extending assessment times. This is not provided for under the Act, as section 15(3)(a) sets out an application is taken to be accepted on receipt.

There have also been attempts to use a full 10 days to 'consider' whether to enter into negotiations, allegedly under section 15(2). This also isn't allowed by the Act, as the 10 days is a maximum time for negotiations to conclude, not an allotted time for an officer to consider when to enter negotiations. Further to this – if negotiations don't take place, it doesn't extend the total timeframe.

We receive a response to an RTI which in no way satisfied the request. This could be a case of under-resourcing within agencies, but it happens with such consistency, it is reasonable to suggest this is but another delaying tactic.

The most egregious example of pettiness has been delaying accepting an application pending a decision on whether the applicant was a Member of Parliament before accepting the fee waiver. The Ombudsman had to intervene to stop this practice.

Public Interest Test

The 2019-20 Ombudsman annual report noted:

"Agency decisions are still often couched in broad terms. While the exemption sought to be relied on might be cited, the necessary elements of that exemption as it relates to the information at hand are frequently not addressed; there is no analysis made of the considerations relevant to the particular exemption. This typically presents in the form of a comprehensive explanation of what the subject section means, followed by a conclusion that the information sought is exempt, with little or no explanation as to how the exemption applies to the information.

Where relevant, the public interest test is consistently misapplied, if it is referred to at all. It is often the case that only those factors that support a claim for exemption are considered, when a more balanced and considered approach is required."

Our experience is this generally remains true today.

It should be noted this is not the case for all RTI officers. Some provide a comprehensive statement of reasons. Others are operating under significant resourcing restraints. Others, we suspect, are otherwise directed or pressured into issuing refusals that have no basis under the Act and are therefore restricted in their ability to make a compelling statement of reasons.

The most recent Ombudsman annual report (2023-24) noted, *"poor communication by public authorities with applicants and the failure to provide appropriately detailed reasons in decisions remains a common issue"* and *"80% of my decisions varied or set aside the public authority's findings, continuing to reflect a very high percentage of errors in decision-making."*

While we believe the public interest test, when applied accurately, has merit, it is too often misapplied. The test isn't tailored to the individual exemptions to which it applies, is inherently somewhat subjective, and can be complicated for lay persons to accurately apply when appealing a decision.

The Greens suggest the reviewers consider putting forward a narrower, clearer, and more directly relevant set of matters to be considered for individual exemptions.

Matters under the Act, relevant to determining whether internal deliberative information should be released, may differ from those relevant to information likely to affect cultural, heritage and natural resources of the State.

Likewise, some categories of potentially exempt information may be more appropriate to have a stronger presumption in favour of release (internal deliberative, for example), and some may be more appropriate to have more of a presumption against release (like personal information of a person).

We suggest the inclusion of individualised criteria would provide the benefit of being able to address the specifics of a potentially exempt criteria.

For example, it may be beneficial to distinguish how information relating to business affairs of a third party is treated based on how that information was obtained.

Financial information obtained under regulatory compliance obligations, for example, may be appropriate to treat differently than information provided for the purposes of being granted a lease over public land, or a tender for high-risk services like child safety.

While this kind of distinction can and should be appropriately assessed under the public interest test, the more things are clearly spelled out, the less likely it will be for the Act to be misapplied.

Resourcing

Resourcing constraints are often reported to us as reasons for delays in RTI decisions being issued within legislated timeframes.

This resourcing problem is also evident in the Ombudsman's office, which has been beset by backlogs through no fault of the office itself.

Active Disclosure

The Act emphasises that assessed disclosure is to be the method of last resort. Despite this, assessed disclosure is the default approach to the provision of information. Active disclosure is rarely utilised.

To give an example, the information disclosure policy of NRET says in respect of active disclosures:

"Active Disclosure

3.7 Active Disclosure is a disclosure of information by the Department in response to a request from a person. For example, if information is more than 10 years' old and is not sensitive or confidential, an active disclosure may occur.

3.8 It is the responsibility of Divisions, as information custodians, to make decisions on active disclosure.

3.9 Complex requests for information may need to be dealt with in writing with management clearance for disclosure. It depends on the nature of the information requested. For example, information about third parties; confidential information and internal communications may need clearance. If in doubt, the person should be directed to submit an assessed disclosure (RTI) request."

This provides extremely limited guidance and is not consistent with an RTI being a method of last resort.

The Act should be amended, or the Ombudsman should issue guidelines, that are far more detailed in respect of when active disclosure should take place.

RTI request contact information

Finding the contact details to make RTI requests can be difficult. In fact, the Government Business Enterprise (GBE), TT Line doesn't provide a public email address for RTI requests.

The contact information should be readily accessible and available at the departmental level as well as having a centralised list for all government departments and GBEs.

Independent Assessment

The Greens are of the view that the most significant problems with the right to information framework in Tasmania are cultural. Specifically, there are those actively promoting a culture of obfuscating the process to prevent the release of information that is politically sensitive to the Tasmanian Government.

The Act, as written, is not being applied. Any amendment to the Act should, therefore, be approached in the understanding that there will be active attempts to not comply with them when convenient.

With this in mind, the only options we see for improved compliance involve either a form of sanctions for non-compliance, or independent assessment.

The Greens do not see a realistic path for sanctions. We believe sanctioning individual RTI officers would not be just – many are facing explicit or implicit pressure from senior management or ministers' offices.

Any process that would require proving a person ultimately responsible for obfuscation would also be problematic, as this may be difficult to prove.

On this basis our preferred option would be for independent assessment. In our mind the only appropriate body for this would be a properly funded Ombudsman, working to a reformed Right to Information Act.

In closing, we point to other specific examples of a culture of secrecy and non-compliance with the Act leading to significant Ombudsman's decisions.

The most recent, egregious example was the result of journalist Camille Bianchi's determination to find the truth, and the Ombudsman's decision foundational to the establishment of the Commission of Inquiry into Child Sexual Abuse in Institutional Settings.

https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0006/638412/O2006-133-Bianchi-and-DoH-Final-Decision.pdf

https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0009/557865/O1901-126-Decision-Final-Signed.PDF

https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0007/658402/R2202-021-Final-Decision-OConnor-and-NRET.pdf

While we have made few specific recommendations to the Review, we again point Reviewers to the substantial body of work and evidence-based recommendations made by the Environmental Defenders' Office (Tas), in its report, '*Transparent Failure – Lutruwita/Tasmania's ineffective right to information system and how to fix it.*'

We trust our observations – made over many frustrating years working to obtain information in the public interest – will be helpful to your work. We very much look forward to your final report and commit to being an ongoing, constructive participant in progressing RTI reform.

Yours sincerely,

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Spokesperson for Justice, Democracy and Integrity

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