



***RIGHT TO INFORMATION ACT 2009***

TASMANIA

**OMBUDSMAN'S MANUAL**

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## Introduction

This Manual is issued by the Ombudsman under s 49(3) of the *Right to Information Act 2009* (the Act).

The purpose of the Manual is to assist all users of the Act to better understand and apply it.

It must be understood that the Manual is a guide only. It has no legal force. The Manual should always be read in conjunction with the Act. It is the words of the Act which must be interpreted and applied.

Because of these considerations, the Manual does not contain comment on every provision of the Act, or even refer to every provision.

The Manual will be developed over time, as resources for enhancing it become available, as the legislation is used and becomes better understood, and as the needs of users are better identified. It will also be amended as required.

It is recommended that users of the Manual also seek guidance from the various resources listed in Chapter 11, recognising that the legislation in other jurisdictions will not always be directly comparable. Even when the legislation is comparable, different approaches to interpretation can arise.

The most up-to-date version of the Manual will be found on the Ombudsman's website at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au).

The role of the Manual is different from that of Guidelines issued by the Ombudsman under s 49(1) of the Act. The Guidelines are confined to specific topics, and are intended to be more directive. They only have the legal force attributed to them by the Act. The Manual refers to the Guidelines where relevant.

As with the Manual, the current text of each Guideline can be seen on the Ombudsman website.

I wish to thank Dale Webster of the Department of Justice, and the rest of the review team which developed the Act, for their assistance in helping develop the first version of the Manual.

**Simon Allston**  
**Ombudsman**

1 July 2010

# Chapter 1: General Principles

*In this Chapter:*

## **1.1 Objects of the Act**

### **1.2 Fundamental Considerations in working with the Act**

*1.2.1 Assessed Disclosure is a last resort*

*1.2.2 Section 7 of the Act is central*

*1.2.3 The right is a right to information, not documents*

*1.2.4 The right does not extend to exempt information*

## **1.1 Objects of the Act**

The overarching objects of the *Right to Information Act 2009* are found in s 3 of the Act. The section reads:

### **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.*

This section sets out the underlying aim of the Act - to improve the operation of democracy in the State by increasing the accountability of Government to the people, and by increasing the ability of the people to participate in government decision making. The underlying principle is that the information

held by Tasmanian public authorities belongs to the people of the State, and has been collected for them and on their behalf.

As s 3(4) states, the Act should be interpreted so as to further its objectives. The subsection also states Parliament's intention that decisions under the Act should be made with a view to facilitating the maximum amount of information, quickly and as cheaply as is reasonably possible.

In line with the title to the Act and with s 7 of the Act - a section which is central to the Act's operation - s 3 speaks of "a right to obtain information about the operations of Government". This statutory right has been created to assist in the better working of democracy, and should be seen as part and parcel of our democratic system of government. The administration of the Act, including the making of decisions under the Act as to whether information requested under it is or is not released, should be approached in this spirit, not defensively.

## ***1.2 Fundamental Considerations in working with the Act***

### **1.2.1 Assessed Disclosure is a last resort**

A central principle, expressed in s 12(3) of the Act, is that the "assessed disclosure" of information should only occur as a last resort. An application for assessed disclosure is a formal application (s 13), which leads to a formal decision (s 22) as to whether the application should be granted. Such a decision is open to review under Part 4 of the Act.

The reason why assessed disclosure should only occur as a last resort is that public authorities and Ministers are expected to put processes in place to make information freely available to the public: s 12(3). In principle, if those processes are adequate, the information that a person might otherwise seek to obtain through an application for assessed disclosure may well already be in the public domain. Alternatively, a public authority or Minister may decide to voluntarily release information for which an application for assessed disclosure has been made, without proceeding to a formal assessment of the information concerned.

A proactive approach to the disclosure of information by Government is sometimes referred to as a "push model". It is in some respects a new approach, but of course such pushing out of information takes place when public authorities publish statistics, updates, news, discussion papers and other documents on their websites and in brochures, fact sheets and handouts. Equally so, it is common for authorities to release information in the general course of business - for instance, where a journalist, parliamentarian or member of the public telephones a public authority and asks a question which is immediately answered.

Provision of information in such ways is recognised and encouraged by the Act as part of the principle of proactive disclosure. The aim of the Act is to

avoid the formal, time consuming and expensive process of making and responding to applications by ensuring as much information as possible is made freely available by public authorities and Ministers.

The Act refers to three types of disclosure in this connection (s 12(2)) -

- required disclosure
- routine disclosure
- active disclosure.

These terms are explained in s 5. They are also discussed in detail in Chapter 2 of this Manual.

Required disclosure is disclosure required by law, including under an enforceable agreement. An example is the requirement to publish an annual report, or a decision made under an enactment.

Routine disclosure is the disclosure of information which a public authority decides may be of interest to the public. An example of this might be a discussion paper in relation to a proposal for statutory reform.

Active disclosure is the disclosure of information in response to a request made other than by way of an application for assessed disclosure. An example is the provision of information to a citizen in response to a letter.

### **1.2.2 Section 7 of the Act is central**

As stated, s 7 is central to the operation of the Act.

The section states -

*A person has a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or Minister unless the information is exempt information.*

Every word of this section is significant.

Note that the right is legally enforceable, principally through the processes for which the Act provides, but also potentially through the Courts.

Note also that the right is governed by the words "in accordance with this Act". This expression both enhances the right and detracts from it. As an example of enhancement, the right includes the right to obtain information in accordance with the strict time limits which the Act creates: e.g. s 15(1). As an example of detracting, an application for assessed disclosure must contain the minimum information prescribed by the regulations, or might otherwise be refused on that basis: s 13(3).

The words "in accordance with the Act" also lead into various sections of the Act under which an application for assessed disclosure might be refused, without any consideration of whether or not the information is exempt information. These sections include ss 9, 10, 17, 19 and 20.

Note also that the right does not include a right to "exempt information" - as to which see the initial explanation in section 1.2.4 below, but also Chapter 7.

Note also that the section cannot be properly understood without understanding the terms which it uses.

The word "person" is to be understood by reference to the definition of this word in s 41(1) of the *Acts Interpretation Act 1931*, where it is said to include "any body of persons, corporate or unincorporate, other than the Crown".

The expression "information in the possession of a Minister" is defined in s 5 of the Act to mean -

*... information in the possession of a Minister that relates to the official business of the Minister, but does not include information which is in the possession of the Minister for the sole purpose of collation and forwarding to a body other than a public authority.*

The expression "information in the possession of a public authority" is similarly defined in s 5 of the Act to mean -

*... information in the possession of a public authority that relates to the official business of the public authority, but does not include information which is in the possession of the public authority for the sole purpose of collation and forwarding to a body other than a public authority.*

As to these two expressions, see also ss 5(2) and (3).

Note that these two expressions specifically exclude two types of information from the right created by s 7 -

- information that does not relate to the official business of the authority or Minister, such as informal emails between work colleagues discussing non work matters; and
- information held by the public authority or Minister for no other purpose than collation and forwarding to a body which is not a public authority. This might occur, for instance, where an agency is collating information, not for any purpose of its own, but for forwarding directly to the Commonwealth government under an intergovernmental agreement.

The expression "public authority" is defined in s 3 of the Act to mean -

*(a) an Agency, within the meaning of the State Service Act 2000; or*

*(b) the Police Service; or*

*(c) a council; or*

*(d) a statutory authority; or*

*(e) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose; or*

*(f) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister of the Crown; or*

*(g) a Government Business Enterprise within the meaning of the Government Business Enterprises Act 1995; or*

*(h) a council-owned company; or*

*(1) a State-owned company;*

This definition likewise leads to other definitions in s 5 - those of "council-owned company", "State-owned company" and "statutory authority".

The expression "public authority" is also explained further in s 5(5). Certain persons and bodies are also expressly excluded from it by s 6.

Note that the definition of "public authority" is wider than that of the expression "prescribed authority" in the FOI Act. Of particular note is the express inclusion of State-owned and council-owned companies.

### **1.2.3 The right is a right to information, not documents**

Note that s 7 of the Act gives a right to information, not documents.

In fact, the Act rarely uses the word "document", and more frequently and more appropriately uses the word "record" to refer to something in which information is contained.

The word "information" is defined in s 5 of the Act to mean -

*(a) anything by which words, figures, letters or symbols are recorded, and includes a map, plan, graph, drawing, painting, recording and photograph; and*

*(b) anything in which information is embodied so as to be capable of being reproduced.*

Documents, unless blank, have information in them. Information can also be contained in things that are not documents, such as computers, audio recordings or paintings.

Since the right is a right to information, it will frequently be appropriate to give an applicant for assessed disclosure only part of a document - that part which contains the information that the applicant seeks. The other part may be outside the request, or may contain exempt information (s 18(2)).

#### **1.2.4 The right does not extend to exempt information**

As mentioned, the right provided by s 7 does not extend to "exempt information".

This expression is also defined by s 5, as meaning "information which is exempt information by virtue of a provision of Part 3".

Part 3 contains two Divisions, which deal separately with two different types of exempt information.

Division 1 deals with information which is exempt by its nature. Each section in it declares by its opening words that the type of information with which it deals is exempt. Exemption in each of these cases is not subject to any public interest test. Examples are Cabinet information (s 26) and information covered by legal professional privilege (s 31).

As s 33(1) of the Act explains, Division 2 deals with information which is only exempt if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information. Examples are personal information (s 36) and information relating to the business affairs of a third party (s 37).

The "public interest" here refers to the wider public good, not to what the public might find interesting.

S 33 explains how one determines whether it is contrary to the public interest to disclose the information in question. The decision maker must -

- consider all relevant matters : s 33(1)
- consider all the matters in Schedule 1 : s 33(2)
- disregard as irrelevant all the matters in Schedule 2 : s 33(3).

The approach taken to the public interest in the Act is a major point of difference between this Act and the *Freedom of Information Act 1991*.

Note that s 33 is founded on the principle that the disclosure of the types of information covered by Division 2 of Part 3 must occur unless this would be

contrary to the public interest. This is in line with the objects of the Act expressed in s 3.

The public interest test in the RTI Act is discussed in detail in Chapter 6 of this Manual. Exemptions are discussed in Chapter 7.

## Chapter 2: Types of Disclosure

*In this Chapter:*

*2.1 Introduction*

*2.2 Required Disclosures*

*2.3 Routine Disclosures*

*2.4 Active Disclosures*

*2.5 Assessed Disclosures*

### **2.1 Introduction**

Section 7 of the RTI Act creates a right to information which can be enforced using the provisions of the Act. However, s 12(1) of the Act makes plain that the Act is not intended to discourage the publication or provision of information, including exempt information, otherwise than as required by the Act.

In the review of the *Freedom of Information Act 1991*, the conclusion was drawn that more government information needs to be made available to the community, without the expense, delay, inconvenience and administrative burden associated with the making of a formal FOI application.

The RTI Act expressly states that what it refers to as "assessed disclosure" is the method of disclosure of last resort: s 12(3).

Assessed disclosure is one of four types of disclosure contemplated by the Act. The other three are "required disclosure", "routine disclosure" and "active disclosure". Each of these terms is defined in s 5(1) of the Act.

To elaborate on these terms:

- "Required disclosure" is the disclosure of information by a public authority where (1) the information is required to be published by the RTI Act or another Act; or (2) disclosure is otherwise required by law or is enforceable under an agreement.
- "Routine disclosure" is the disclosure of information by a public authority which the public authority decides may be of interest to the public, where the disclosure is not one of the other three types of disclosure.
- "Active disclosure" is the disclosure of information by a public authority or a Minister in response to a request from a person made otherwise than under the provisions of the Act which outline the process for assessed disclosure - *i.e.* the voluntary release of information on receipt of a request.
- "Assessed disclosure" is the disclosure of information by a public authority or a Minister in response to an application under s 13 of the Act - *i.e.* in response to a formal application for assessed disclosure.

It will be noted that the first two types of disclosure only relate to public authorities. The second two also relate to Ministers.

In elaborating the four types of disclosure, and in providing that assessed disclosure is the method of disclosure of last resort, the RTI Act is seeking to create a change in culture. Public authorities and Ministers should actively examine ways of making information available on a voluntary basis, either by way of general publication or in response to a request.

In this vein, where a public authority finds that it is frequently making active disclosure of the same information, it should consider proactively publishing the relevant information as a routine disclosure. Similarly, analysis of information commonly requested through the process for assessed disclosure could potentially result in routine disclosure of the information or inclusion of the information in required disclosures.

S 17 of the RTI Act reinforces the principle that assessed disclosure is a last resort. It enables a public authority or the Minister to defer providing information in response to an application for assessed disclosure where a decision has already been made, prior to the receipt of the application, to release the information by way of required or routine disclosure within a period of time which is not greater than 12 months from the receipt of the application. S 17(2) requires that, so far as is practicable, the applicant be told when the information is to be published or presented.

The Ombudsman is required by s 49(1) of the Act to issue and maintain a Guideline in relation to the process of disclosing information under the four types of information disclosure created by the Act – see the RTI Guidelines at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au).

## **2.2 Required Disclosures**

As indicated, this expression includes the disclosure of information by a public authority which is required by the RTI Act or another Act. It also includes disclosure by a public authority which is required by law or which is enforceable under an agreement.

The first of these categories includes, for example, the annual report which the Head of Agency of a government Department is required to produce by s 27 of the *Financial Management and Audit Act 1990*, the report on the administration of the RTI Act required under s 53 of the RTI Act, or a management plan for a national park which is published under s 28 of the *National Parks and Reserves Management Act 2002*.

The second of these categories includes for example, the information in the Register of Titles and other public records to which there is a right of access under s 36 of the *Land Titles Act 1980*, or information in a planning application

and related plans and documents, held by a local council, to which there is a right of access under s 57 of the *Land Use Planning and Approvals Act 1993*.

It will be noted that, in so far as the definition of "required disclosure" encompasses disclosure required by an agreement, this must be disclosure which is enforceable at law.

### **2.3 Routine Disclosures**

As earlier explained, this expression includes the disclosure of information by a public authority which the authority considers of interest to the public, where the disclosure does not fall into one of the other three categories.

This category would include information on an authority's website, in fact sheets, in brochures and in formal publications. A good example is the *Tasmanian Road Rules* booklet, published by the Department of Infrastructure, Energy and Resources.

Increasingly government is making information freely available in response to public need or interest, or for informative reasons, and making this available through websites or otherwise - for example, the progress reports published by the Department of Health and Human Services in relation to the publication of Tasmania's Health Plan 2007, or the Schools Improvement Report published by the Department of Education.

Government and public authorities also release information routinely through media releases, adverts and indeed special interest media, such as the Glenorchy City Council's "Glenorchy Gazette", which includes a report of decisions of council, upcoming works, upcoming meetings and the like. Often, information at this level will be provided free of charge, but this is not invariably so.

### **2.4 Active Disclosures**

This is the informal release of information on request. This includes answering phone calls, emails and correspondence, and providing information in response to a request for a briefing. It involves a vast number of staff across all public authorities and Ministerial offices, and is a category almost impossible to quantify.

Media, communication or information officers within public authorities have a vital role in identifying the types of information which should be routinely or actively disclosed. They are in daily contact with users of information and are therefore likely to know what information the community wants from their public authority.

## ***2.5 Assessed Disclosures***

Assessed disclosure is disclosure in response to a formal application for the information under the RTI Act, following assessment of the application and of the information requested, in order to determine whether the applicant has a right to the information under the Act.

Chapter 3 of this Manual deals in detail with the process to be followed in responding to an application for assessed disclosure.

## **Chapter 3: Processing an application for assessed disclosure**

*In this Chapter:*

*3.1 Introduction*

*3.2 Obligation on public authorities and Ministers to assist an applicant for assessed disclosure*

*3.3 The Application*

*3.4 Application Fee or Waiver*

*3.5 Voluntary release*

*3.6 Negotiation*

*3.7 Transfer*

*3.8 Timeline*

*3.9 Method of disclosure following assessment*

*3.10 The Decision*

*3.11 Summary table*

### **3.1 Introduction**

It has already been explained in both Chapters 1 and 2 that the assessed disclosure of information under the RTI Act is a last resort. The reasons for this will appear from sections 1.1 and 1.2.1 of this Manual.

As will also appear from section 1.2.1. an application for assessed disclosure is the mechanism by which a person who seeks to exercise the right to information given to them by s 7 of the Act triggers the formal processes which are provided for in the Act. An application for assessed disclosure leads to -

- a formal decision as to whether the applicant is entitled to the information (ss 21 and 22)
- potentially, an internal review of that decision (s 43)
- potentially, external review by the Ombudsman (ss 44 and following).

This Chapter deals with the making of an application for review, and how it is to be processed up to the time of the initial formal decision.

### **3.2 Obligation on public authorities and Ministers to assist an applicant for assessed disclosure**

Note that some of the obligations mentioned in this section are not expressed in the Act to apply to Ministers, but might reasonably be applied in Ministerial offices as a matter of good administrative practice.

There are three obligations for consideration -

1. the obligation on a public authority to provide certain minimum information to applicants about the authority's assessment procedures : s 13(5)
2. the obligation on a public authority or Minister to take reasonable steps to assist a person to make an application which complies with s 13 : s 13(6)
3. the obligation on a public authority to make available to a person general details of the information in the possession of the public authority : s 13(8).

Note that each of these obligations furthers the objects of the RTI Act - as to which again see sections 1.1 and 1.2.1. The observance of the obligations is also likely to assist the public authority or Minister to efficiently process any application which is made.

Each of the obligations is now explained in more detail.

1. Section 13(5) of the RTI Act requires a public authority to provide the minimum information prescribed by Regulations made under the Act about the public authority's assessment procedure for applications for assessed disclosure which are made to it.

In line with this, the *Right to Information Regulations 2010* require public authorities to make the following information available to the public to assist them in making an application and in understanding the process:

- an outline of the objects of the Act
- the address to which an application is to be made
- that an application is to be made in writing
- the application fee payable under s 16 of the Act
- the time within which an application is to be decided
- the opportunities available to the applicant if the time within which the application is to be decided is not met.

It is recommended that this information is made publicly available, on the public authority's website and by other means. The information should also, of course, be made available to potential applicants who contact the public authority.

2. Section 13(6) of the RTI Act specifies two situations in which a public authority or Minister must take reasonable steps to assist a person to make an application which complies with s 13. These are -

- where they are dealing with a person who wishes to make an application for assessed disclosure
- where a person has made an application for assessed disclosure which does not comply with the section.

A public authority cannot therefore refuse an application for assessed disclosure on technical grounds related to s 13 without first trying to help the applicant to rectify the problem.

3. Section 13(8) of the RTI Act requires a public authority to make available to a potential applicant general details of the information in the possession of the public authority. This obligation arises in two situations -

- where a request for such assistance is made
- where it is appropriate for such assistance to be given.

In considering what assistance is appropriate, the public authority should keep in mind the objects of the Act. Defensiveness is not the right approach.

### **3.3 The Application**

An application for assessed disclosure must be in writing : s 13(2).

As required in s 13(3), it must also contain the following minimum information specified in the *Right to Information Regulations 2010, r4*:

- the name of the applicant
- an address of the applicant, for communication on matters relating to the application
- the daytime contact details of the applicant
- the general topic of the information applied for
- details of the information sought
- details of any efforts undertaken by the applicant, before the application was made, to obtain the information sought
- the date of the application

- the signature of the applicant.

Set out in Appendix A of this Manual is a form which public authorities may wish to adopt as part of their assessment procedure, and therefore promote in the information which they make available under s 13(5) about that procedure. Whilst this form will assist applicants to make a complying application for assessed disclosure, applicants are not obliged to use this or any other form; they can make application in any written format, including email, so long as they provide the information listed above.

The application may be made to any public authority or Minister that the applicant believes has the information they seek: s 13(1).

As further explained in the next section, an application must be accompanied by the required application fee, unless waived: s 16(3).

### **3.4 Application Fee or Waiver**

Section 16 of the Act provides for the payment of an application fee, but allows for a public authority to waive that fee in some circumstances. The Act does not allow for any other fees to be charged.

Section 16 states -

#### **16. Charges for information**

- (1) All applications for assessed disclosure of information must be accompanied by an application fee of 25 fee units.*
- (2) The application fee may be waived if –*
  - (a) the applicant is impecunious; or*
  - (b) the applicant is a Member of Parliament acting in connection with his or her official duty; or*
  - (c) the applicant is able to show that he or she intends to use the information for a purpose that is of general public interest or benefit.*
- (3) Before an application is accepted by a public authority or a Minister, the application fee must be paid or a decision to waive the fee under subsection (2) must be made.*

The value of a fee unit is calculated in accordance with the *Fee Units Act 1997*, which provides for annual indexation. The Minister administering the Act (currently the Treasurer) is required to publish that value prior to 1 July each year. From 1 July 2010 the value of a unit will be \$1.36, with the result that the application fee for assessed disclosure for the 2010/11 financial year will be \$34.00.

Each public authority will need to make arrangements for the collection of this fee in accordance with finance instructions which apply to that public authority.

As will appear from ss 16(2)(a) to (c) of the RTI Act, set out above, there are three circumstances in which the payment of an application fee may be waived - where the applicant is impecunious; where the applicant is an MP acting in connection with their official duties; and where the applicant is able to show that he or she intends to use the information for a purpose of general public interest or benefit.

In the case of Stott v Forestry Tasmania (April 2009), which can be viewed on the Ombudsman Tasmania website, the Ombudsman accepted that an applicant was impecunious on the basis of evidence that the applicant was reliant upon a Commonwealth disability support pension. This decision dealt with the equivalent provision in the FOI Act (s17).

Note that an application for assessed disclosure must not be accepted unless the application fee was been paid or waived: s 16(3). An application for waiver of a fee should be considered immediately on receipt of an application and a decision made as soon as practicable.

### ***3.5 Voluntary release***

The public authority or Minister should consider as soon as practicable after the receipt of the application for assessed disclosure whether there is good reason to refuse the release of the information, whether or not it is exempt or other ground for refusal exists.

Going through the statutory process for assessed disclosure is a waste of time and resources if there is no good reason for refusing release of the information, even though technical grounds for refusal may exist. Approaching the matter in this way also promotes the objects of the Act - as to which see section 1.1.

Section 12(1) of the Act expressly states that the Act does not prevent, and is not intended to discourage, a public authority or Minister from publishing or providing information (including exempt information) otherwise than as required by the Act.

### ***3.6 Negotiation***

Subsection 13(7) of the Act allows for a step prior to processing the application where the detail of the application can be the subject of negotiation.

Negotiation for the purposes of s 13(7) is negotiation for the purpose of redefining or redirecting the application. The first step in such a negotiation should normally be to find out exactly what information the applicant is seeking, and why. It will often be the case that an application for assessed disclosure is vaguely expressed, or unduly general in its terms, and refining or redirecting the application at the outset will enable it to be addressed more

efficiently. This is also likely to provide greater satisfaction to the applicant in the long run.

The negotiation should commence as soon as an application is received. Section 15(2) requires that the negotiation be completed expeditiously and in any case not later than 10 working days after receipt of the application.

Normally speaking, an applicant for assessed disclosure must be notified of the outcome of the application no later than 20 working days after the acceptance of the application: s 15(1). Where negotiation takes place under s 13(7), that period is extended to 30 working days: s 15(3).

Note that s 15(4)(a) of the Act enables the time within which an application for assessed disclosure must be decided to be extended by agreement with the applicant. This may be an issue that a public authority or Minister would wish to raise in negotiations with an applicant under s 13(7), where an extension of time is considered to be necessary.

Note that an application may only be refused under s 20 as lacking definition if there has been a negotiation : S 20(b). See section 4.6 of this Manual.

Whilst a negotiation may occur orally, it is sound administrative practice to confirm the outcome in writing (if only by email).

### ***3.7 Transfer***

An application for assessed disclosure may be made to any public authority or Minister who the applicant believes has the information they seek: s 13(1).

When the application is received by the public authority or Minister, consideration should immediately be given to whether the subject matter or part of subject matter of the application is more closely connected with the functions of another public authority or Minister: s 14(1). If this is the case, the public authority or Minister must promptly transfer the application, in full or in part, to the other public authority or Minister: s 14(1)(a). They should at the same time send to the other public authority or Minister any relevant information that they themselves hold: s 14(1)(b).

Where such a transfer occurs, it is to be assumed for the purpose of s 15 (the provision which deals with the time within which a decision on the application must be made) that the receiving authority or Minister received the application at the time of the transfer, or at the expiration of 10 working days after the date of the original application, whichever occurs first. Here is good reason why a transfer under s 14 should occur as soon as practicable after the receipt of the original application.

Note that, following such a transfer, the receiving authority or Minister has the same powers and obligations with respect to the application as if they had received the application in the first place. Thus, for instance, they can seek to

refine it by negotiation, with the result that the time for processing it is extended in the way explained in section 3.6 above.

Where transfer occurs, the transferring agency or Minister must inform the applicant of the transfer: s 14(1)(a).

### **3.8 Timeline**

The general rule, contained in s 15(1) of the RTI Act, is that an applicant for assessed disclosure must be notified of a decision on the application as soon as practicable, but not later than 20 working days from the acceptance of the application.

Section 15(3) states when an application is taken to be accepted. This can only occur if the application fee has been paid, or a decision to waive the fee has been made: s 16(3). Provided that one of those things has happened, the application is taken to have been accepted by the public authority or Minister when it was received. Alternatively, if negotiations under s 13(7) have occurred, it is taken to have been accepted upon completion of the 10 day period allowed for such negotiations under s 15(2).

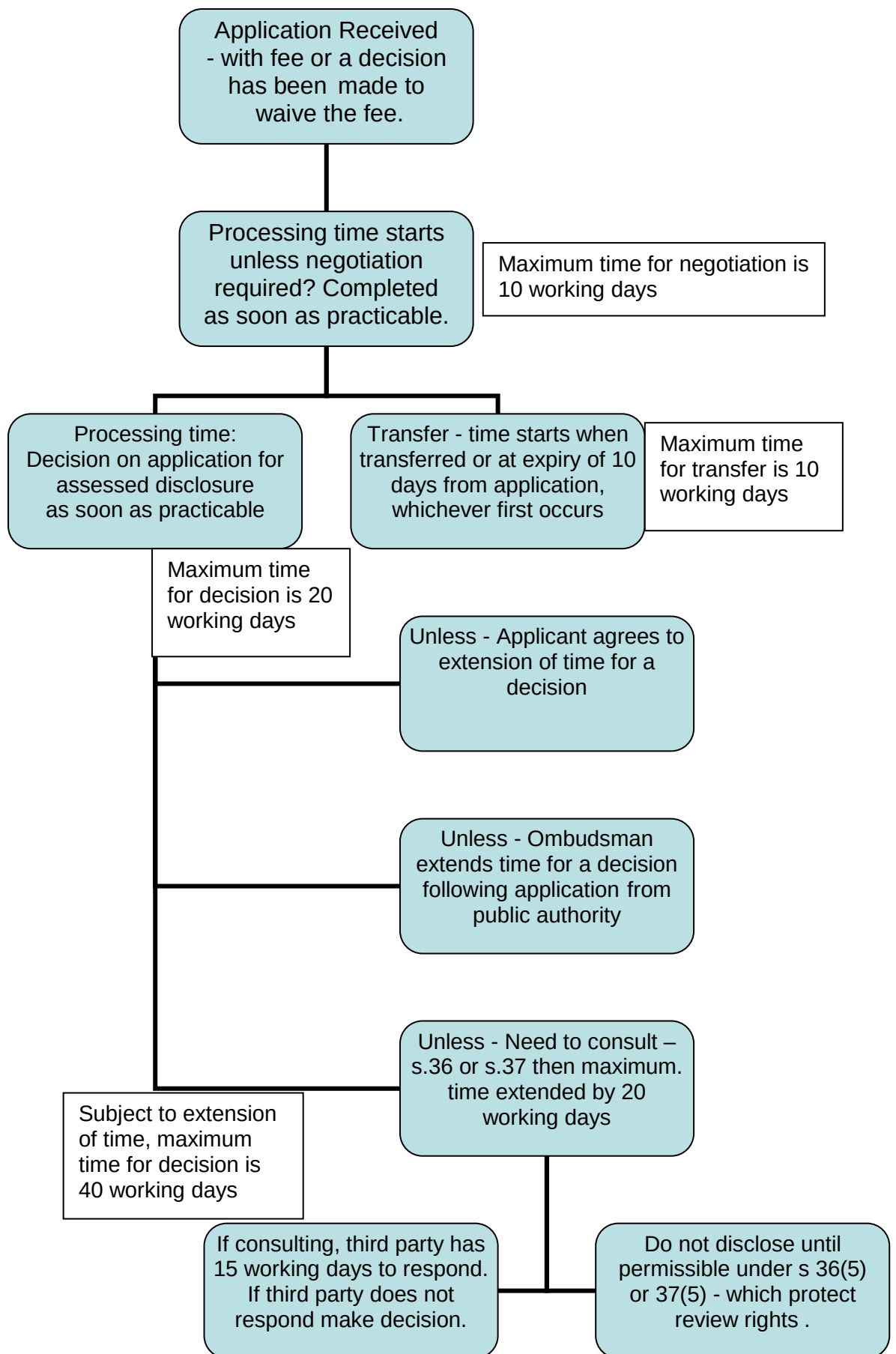
The standard time frame of 20 working days does not apply in certain circumstances-

- where an extension of time has been agreed with the applicant: s15(4)(a)
- where such agreement cannot be reached, the public authority regards this as unreasonable, and an extension of time has been granted by the Ombudsman on application by the public authority - a situation which can only apply where the application is complex or voluminous, or both complex and voluminous: s 15(4)(b)
- where a decision is made to consult a third party under s 36 or 37, in which case the period is extended by a further 20 working days : s 15(5).

If the third party does not reply within 15 working days from the time of the consultation, the public authority or Minister may proceed to make a decision without considering the third party's input : s 15(6).

An application to the Ombudsman under s 15(4)(b) for an extension of time should be in writing and should specify in detail why the public authority is seeking the extension and how the criteria in the Act are met.

The following chart summarises the time available for the original decision maker to process an application for assessed disclosure.



### ***3.9 Method of disclosure following assessment***

Section 18 of the RTI Act deals with how information which is the subject of an application for assessed disclosure is to be provided.

The basic ways in which information may be provided are set out in s 18(1) -

- by providing a reasonable opportunity to inspect the record containing the information
- where the information is recorded or embodied in a record in a manner in which it can be reproduced, by providing a transcript
- by providing a copy, including an electronic copy
- in the case of information contained in a record from which sounds or visual images can be reproduced, by giving the applicant a reasonable opportunity to hear the sounds or view the images.

Note that under s 18(4) the applicant has a right to be provided with the information in whichever of these particular forms he or she chooses, provided that the public authority has the information in that form, and provided that the release of the information in that form would not breach copyright.

If the information is contained in a record which contains both exempt and non-exempt information, it may be appropriate to give the applicant a copy of all or part of the record in which the exempt information is deleted. Where this is done, the copy should be endorsed with a note which states that the copy is not complete: s 18(2).

If the information requested is part of a larger set of information and the information requested is able to be extracted from that other information by computer or other equipment usually available to the public authority or Minister, then that should be done: s 18(3)

### ***3.10 The Decision***

A decision on an application for assessed disclosure which is made to a Minister must be made by the Minister personally or by an officer to whom a delegation has been given by the Minister under s 24.

A decision on an application for assessed disclosure which is made to a public authority must be made by the "responsible Minister", by the "principal officer" of the authority, or by an officer to whom a delegation has been given by the principal officer under s 24. The phrases "responsible Minister" and "principal officer" are defined in s 5. These definitions should be considered with care.

It is recommended that all decisions on the outcome of an application for assessed disclosure be conveyed to the applicant in writing. However, the Act in its terms (s 22(1)) only requires a written decision when a decision is made -

- that the applicant is not entitled to the information on the grounds that it is exempt information
- that provision of the information should be deferred under s 17
- that provision of the information should be refused by virtue of s 19 (unreasonable diversion of resources) or s 20 (repeat or vexatious applications).

The making of a written decision for the purposes of s 22 is addressed in Chapter 8. The subject of refusing applications is addressed in detail in Chapter 4.

### **3.11 Summary table**

| <b>Processing an Application for Assessed Disclosure</b>                                              |                                                                                                                                                                                                                                                                                                                                                                                                                 |
|-------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Can the information be disclosed without processing the application?</b>                           | The information requested may be information which the public authority decides can be voluntarily released – in which case it should be disclosed immediately without any further assessment of the application.                                                                                                                                                                                               |
| <b>Is the application a complying application?</b>                                                    | An application for assessed disclosure must be in writing and contain the details required by the Regulations. The applicant must be helped to comply.                                                                                                                                                                                                                                                          |
| <b>Is the application accompanied by the required fee or is the payment of the fee waived?</b>        | Before an application is accepted, the required application fee must be paid or waived. If payment is not made, and there is no waiver, contact the applicant and advise them that the application cannot be processed until payment has been received.                                                                                                                                                         |
| <b>Is the application clear about what information is being sought?</b>                               | If not, you should contact the applicant and seek to refine the application. The negotiation should be completed as soon as possible, but in no more than 10 working days.                                                                                                                                                                                                                                      |
| <b>Is all or part of the application more closely related to another public authority or Minister</b> | Transfer the application, or the relevant part, to the other public authority or Minister. Send any relevant information that you hold. Processing time starts for the receiving public authority or Minister at the time of transfer or at the expiry of 10 working days from receipt of the application, whichever is earlier. The receiving authority or Minister may negotiate with the applicant to refine |

| <b>Processing an Application for Assessed Disclosure</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|----------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                          | the application.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>Is the information otherwise available?</b>           | Let the applicant know where they can find the information they require.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Process the application</b>                           | <p>Make a decision as soon as practicable but in no more than 20 working days unless:</p> <ul style="list-style-type: none"> <li>• the applicant agrees to extend the time;</li> <li>• the Ombudsman grants an extension of time, based on an application by the public authority because the application is complex and/or voluminous and the authority believes that the failure to agree to extend time is unreasonable; or</li> <li>• there is a need to consult a third party, which gives a further 15 working days for a decision to be made.</li> </ul> |
| <b>Decision</b>                                          | <p>Provide a written decision, especially where you decide-</p> <ul style="list-style-type: none"> <li>• that the applicant is not entitled to all or part of the information on the ground that it is exempt</li> <li>• to refuse to provide the information by virtue of s 19 or s 20</li> <li>• to defer provision of the information under s 17</li> </ul>                                                                                                                                                                                                  |

## Chapter 4: Refusing applications

*In this Chapter:*

*4.1 Introduction*

*4.2 Refusal due to exemption - s 7*

*4.3 Refusal as information otherwise available - s 12(3)(c)(1), with reference to s 9*

*4.4 Refusal as information otherwise available- s 17, with reference to s 12(3)(c)(ii)*

*4.5 Refusal due to unreasonable diversion of resources - s 19*

*4.6 Refusal of repeat or vexatious application, and application lacking in definition - s 20*

*4.7 Statement of Reasons where refusing an application*

### 4.1 Introduction

As emphasised in Chapter 1 (see section 1.2.2), the right to information given by s 7 of the RTI Act is a right to be provided with information "in accordance with this Act". It is not an absolute right.

That said, a decision maker should not refuse a application for information simply because the right to refuse exists. Recognising the objects of the Act (see section 1.1), the decision maker should consider whether, as a matter of policy, the application should or might appropriately be granted, even though there may be no obligation to do so. Section 12(1) of the Act expressly states that the Act does not prevent and is not intended to discourage a public authority or a Minister from publishing or providing information (including exempt information), otherwise than as required by the Act.

A decision maker should also be mindful of the fact that a ground for refusal may only apply to part of the information under consideration, with the result that the other part may need to be released.

The decision maker may also be under an obligation to seek to remove an obstacle which stands in the way of release. Under s 13(6), a public authority must take reasonable steps to assist the applicant to make an application which complies with s 13, and under s 19(2) a public authority or Minister cannot rely upon s 19(1) to refuse to provide information without first giving the applicant a reasonable opportunity to consult, with a view to assisting the applicant to make the application in a form that would remove the ground for refusal.

There are many grounds upon which an application for assessed disclosure might legitimately be refused. These include the following -

- that the information sought is exempt information : s 7
- that the information may be inspected by the public in accordance with another Act : s 9(a)

- that the information may be purchased at a reasonable cost in accordance with arrangements made by a public authority : s 9(b)
- that the information is stored in electronic form, cannot be produced using the normal computer hardware and software and technical expertise of the public authority, and producing it would substantially and unreasonably divert the resources of the public authority from its usual operations : s 10(1)
- that the information is only held in a back-up system : s 10(2)
- that the information is otherwise available : s 12(3)(c)(1)
- that the information will become available, in accordance with a decision that was taken before receipt of the application, as a required or routine disclosure, within a period of time specified by the public authority or Minister, but not exceeding 12 months from the date of the application : s 12(3)(c)(ii)
- that the application is not in writing : s 13(2) - but note the requirement in s 13(6)
- that the application does not contain the minimum information required by the regulations : s 13(3) - but note the requirement in s 13(6)
- that the information sought is more closely connected with the functions of another public authority or Minister : s 14(1) - in which case there is an obligation to transfer the application
- that the required fee has not been paid : s 16(1), but subject to the possibility of waiver under s 16(2)
- that the public authority or Minister is entitled to defer providing the information because, by reason of a decision taken before the receipt of the application, the information is due to be disclosed as a required or routine disclosure within a period of time specified by the public authority or Minister, but not exceeding 12 months from the date of the application : s 17(1)(a)
- that the public authority or Minister is entitled to defer providing the information because it was prepared for presentation to Parliament, or has been designated by the responsible Minister as appropriate for presentation to Parliament, but is yet to be presented : s 17(1)(b), but note requirement of s 17(2)
- in the case of information sought from a public authority, that the work involved in providing the information requested would substantially and unreasonably divert the resources of the authority from its other work, having regard to the matters specified in Schedule 3 : s 19(1)(a), but subject to the obligation in s 19(2)

- in the case of information sought from a Minister, that the work involved in providing the information requested would interfere substantially and unreasonably with the performance by the Minister of the Minister's other functions, having regard to the matters specified in Schedule 3 : s 19(1)(b), but subject to the obligation in s 19(2)
- that the information is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information: s 20(a)
- that the application is, in the opinion of the public authority or Minister, vexatious : s 20(b)
- that, in the opinion of the public authority or Minister, the application remains lacking in definition after negotiation entered into under s 13(7) : s 20(b).

This Chapter explains a few of these grounds in greater detail - those arising under ss 12(3)(c), 19 and 20.

It also addresses the need for written reasons in the case of refusal on the ground of exemption or deferral under s 17, and in the case of refusal under either s 19 or s 20.

## ***4.2 Refusal due to exemption - s 7***

A brief explanation of this ground for refusal is given in section 1.2.4 of this Manual. A much fuller treatment is given in Chapters 7 and 8.

It is important to recognise that the finding that information is exempt may only affect part of the information requested, and that there may be an obligation to release the balance of the information, with or without deletions. Where information has been deleted from the copy of the information provided, this must be indicated by a note to the effect that the copy is not complete : s 18(2).

## ***4.3 Refusal as information otherwise available - s 12(3)(c)(1), with reference to s 9***

Section 12(3)(c)(1) empowers a public authority or Minister to refuse an application where the information sought is otherwise available. This provision overlaps with s 9 of the Act, which states that a person is not entitled under Part 2 (and hence s 7) to information that may be inspected in accordance with another Act, or which may be purchased at a reasonable cost in accordance with arrangements made by a public authority.

Since there is this overlap, and s 9 is so specific, it must be assumed that s 12(3)(c)(1) is dealing with the availability of the information by some other

means. Examples might be the availability of the information by way of a required or routine disclosure, or by way of having already entered the public domain in some other way. Availability of the information through the Archives Office 'Open Access' scheme would also enliven the operation of the provision.

Availability in this instance is availability to the applicant. Given the objects of the Act, s 12(3)(c)(1) should not be relied upon if the information is not reasonably available to the applicant, without the applicant being exposed to significant difficulty, inconvenience, or cost, or where the information is only available subject to significant conditions or limitations.

#### ***4.4 Refusal as information otherwise available- s 17, with reference to s 12(3)(c)(ii)***

Section 12(3)(c)(ii) empowers the principal officer of an agency or a Minister to refuse an application made in accordance with s 13 on the ground that the information sought will become available as a required or routine disclosure or routine disclosure within a period of not more than 12 months from the date of the application. This can only be done where the decision to make the information available as a required or routine disclosure was made before receipt of the application. When the decision to refuse is made, the applicant must be told when the information is to be released.

Section 17(1)(a) is very similarly worded to s 12(3)(c)(ii), but instead gives a power to defer the provision of the information. A decision to defer providing information is a decision to release it to the applicant, but to postpone that release until a later time, in this case until the disclosure of the information as a required or routine disclosure, or thereafter.

Section 17(1)(b) also provides the power to defer the provision of information on the ground that the relevant information has been prepared for presentation to Parliament, or has been designated by the responsible Minister as appropriate for presentation to Parliament, but has yet to be presented.

Where the decision is taken under s 17 to defer the provision of the information to the applicant, the decision maker must tell the applicant when the information is to be either published or presented to the Parliament: s 17(2). The applicant should also be told when the information is to be provided to them.

Where the decision to defer relies upon s 17(1)(b), the provision of the information cannot be deferred for more than 15 sitting days of either House of Parliament, following presentation of the information to the Minister for presentation to the Parliament : s 17(3).

#### ***4.5 Refusal due to unreasonable diversion of resources - s 19***

Section 19 of the Act provides two grounds upon which an application for assessed disclosure may be refused. One applies to a public authority, and the other applies to a Minister. In each case, the decision must be taken with regard to the matters specified in Schedule 3.

In the case of a public authority, refusal may be on the ground that the work involved in providing the information requested would substantially and unreasonably divert the resources of the authority from its other work. In the case of a Minister, the potential ground is that the work involved in providing the information would interfere substantially and unreasonably with the performance by the Minister of the Minister's other functions.

In each case, refusal can occur without taking the trouble to identify, locate or collate the information.

It is important to note that the potential for the diversion of the resources of the authority, or for the interference with the Minister's functions, must be both substantial and unreasonable when regard has been had to the matters specified in Schedule 3. As this implies, it could be the case that, although the diversion or interference might be substantial, it might nonetheless be reasonable under all the circumstances that this be incurred. Thus, for example, and picking up on item 1(b) of Schedule 3, it could be the case that the importance of the information to the applicant is such that a substantial diversion of resources to locate the information is warranted.

As the introductory words of Schedule 3 indicate, the matters there listed are ones which must be considered when deciding whether or not the release of information can be refused in reliance upon s 19. It is not, however, a complete statement of the matters which may be relevant. The ultimate question remains whether the diversion of resources or interference with Ministerial functions is both substantial and unreasonable, when considering all the circumstances of the case.

As earlier mentioned, and as required by s 19(2), an application for assessed disclosure cannot be refused in reliance on s 19(1) without first giving the applicant an opportunity to consult with the public authority or Minister, with a view to helping the applicant to modify their application to the point that the potential ground for refusal has been removed. The most likely way in which the ground for refusal might be removed would be by limiting the scope of the information requested, but in a suitable case this might also be done by extending the timeline by which the information is to be provided.

#### **4.6 Refusal of repeat or vexatious application, and application lacking in definition - s 20**

Section 20 provides three grounds upon which an application can be refused -

- that the information is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information: s 20(a)
- that the application is, in the opinion of the public authority or Minister, vexatious : s 20(b)
- that, in the opinion of the public authority or Minister, the application remains lacking in definition after negotiation entered into under s 13(7) : s 20(b).

Note that the first of these grounds contains two major requirements. The first of these is that the information sought is the same or similar to information which was sought under a previous application to a public authority or Minister; and it is notable in this respect that the previous application does not have to have been made to the same public authority or Minister. The second requirement is that the application does not on its face disclose any reasonable basis for asking again for the same or similar information. As to this, the provision enables the decision maker to rely upon what is on the face of the application - expressed or otherwise apparent - so that no consultation or background enquiry is needed. Additionally, the disclosure by the application of any reasonable basis for making the repeat request is sufficient to displace the potential for reliance on this provision.

For instance, if the application discloses that information earlier given to the applicant has been destroyed in a house fire or otherwise lost, it may be reasonable for that person to ask for the same or similar information again.

The second of the grounds listed above concerns an application which in the opinion of the public authority is vexatious. Note in this respect that it is the application that must be vexatious, not the applicant. This provision is not similar to a "vexatious litigant" provision - it is not the conduct of the applicant which is at issue, or their intentions, but the nature of the application.

Importantly also, the issue of vexatiousness depends on the opinion of the decision maker, but this must be an opinion which is reasonably held, and is based on the character of the application alone.

As required by s 49 (1) (b) of the RTI Act, the Ombudsman has published guidelines on the factors to be considered when determining to refuse an application under s 20. These guidelines can be seen on the Ombudsman Tasmania website. They should be consulted before deciding to refuse an application on any ground provided by the section.

The third of the grounds provided by s 20 is that the application remains lacking in definition after negotiation entered into under s 13(7). It will be recalled that s 13(7) authorises a public authority or Minister to negotiate with an applicant to refine or redirect his or her application. The purpose, of course, is to enable the application to become sufficiently defined for the public authority or Minister to be able to determine with accuracy what information is being sought. S 20(2) authorises refusal of an application where this purpose has not been achieved, after bona fide negotiation with the applicant.

#### ***4.7 Statement of Reasons where refusing an application***

Detailed written reasons which comply with s 22 must be provided where an application for assessed disclosure is refused on one of the grounds specified in s 22(1) -

- where the information is determined to be exempt; or
- where the decision is to defer the provision of the information in accordance with s 17; or
- where the decision is to refuse provision of the information in reliance upon s 19 (the unreasonable diversion of resources) or s 20 (repeat or vexatious applications).

A detailed guide to writing a statement of reasons can be found in Chapter 8.

## **Chapter 5: Dealing with Third Parties**

*In this Chapter:*

*5.1 Introduction*

*5.2 Relevant provisions*

*5.3 Section 36 - personal information*

*5.4 Section 37 - information relating to business affairs of a third party*

*5.5 Sections 15, 36, 37 - timing issues*

*5.6 Internal and external review on the application of a third party*

### **5.1 Introduction**

Public authorities and Ministers often hold information that has come from outside government, from individuals and from organisations. They may also hold third party information in records that have been generated internally, such as information about a person or about a person's business affairs.

There are a number of sections in the Act which apply to such third party information. In some sections of the Act, the term "external party" is used to refer to the third parties concerned.

This chapter provides guidance on how the RTI Act deals with third party information and external parties.

### **5.2 Relevant provisions**

The provisions of the Act which are relevant are -

- s 5(1)                where the expression "external party" is defined to mean a person or organisation who provides their views in response to a request under s 36(2)(f) or 37(2)(f). Such a request takes place in the context of consulting over whether information should be released.
- s 15(5) to (7) -    which deal with the assessment of an application for assessed disclosure where a third party is consulted under s 36 or 37, and in particular with the time within which a decision on the application must be made where that occurs
- s 36(2) to (5)      which deal with personal information, and in that context with the subject of consulting with a third party over whether their personal information should be disclosed
- s 37(2) to (5)      which deal with information relating to the business affairs of a third party, and in that context with the subject of consulting with the third party over whether such information should be disclosed

- s 43(2) and (3) which deal with the right of an external party to seek internal review
- s 45(2) which gives a third party the right to apply to the Ombudsman for review where they –
  - (a) believe that they should have been consulted under s 36 (2) or 37 (2), but were not; and
  - (b) claim to have been adversely affected by an internal review decision under s 43, and were not the applicant for internal review
- s 44 which gives an external party the right of external review, by the Ombudsman
- s 47(5) which states that, where an external party seeks review by the Ombudsman of a decision to disclose their information, the external party has the onus to show that there are grounds why the information should not be disclosed. The Ombudsman is given the power to determine the outcome of the review on the basis that the onus has not been discharged.
- Schedule 1 where item 1(v) of the Schedule refers to an external party in listing matters which are to be considered when assessing if the disclosure of particular information would be contrary to the public interest.

The remainder of this chapter deals with some of these provisions in more detail.

### **5.3 Section 36 - personal information**

Note that it is only necessary to consult with a third party under this section where each of the following requirements is satisfied-

- where the information for which application has been made is information which was provided to the public authority or Minister by the third party : s 36(2)(b)
- where the principal officer or Minister decides that the disclosure of the information concerned "may be reasonably expected to be of concern to the third party" : s 36(2)(c)
- where consultation is "practicable" : see the wording of s 36(2) between paragraphs (c) and (d)

Note that s 36(2)(c) does not require a particular level of concern. In this respect, the paragraph differs from the equivalent provision in s 37, which requires that the concern be substantial - see section 5.4 below.

Where the decision is made to consult, the notice given to the third party must be in writing and fulfil the requirements of ss 36(2)(d), (e) and (f).

If the decision is made to release any of the information, written notice must be given under s 36(3), complying with the content requirements in s 36(4).

Note that s 36(5) imposes controls over the release of the information where such notice is given.

#### ***5.4 Section 37 - information relating to business affairs of a third party***

Note that it is only necessary to consult with a third party under this section where both of the following requirements are satisfied -

- where the information for which application has been made is information which was provided to the public authority or Minister by the third party : s 37(2)(b)
- where the principal officer or Minister decides that the disclosure of the information concerned "may be reasonably expected to be of substantial concern to the third party" : s 36(2)(c) - emphasis added

Note the requirement under s 36(2)(c) that the principal officer or Minister form the view that the disclosure of the information might reasonably be expected to be of substantial concern. The requirement that the concern be of such a nature that it might reasonably be expected to be substantial is not mirrored in s 36(2), the equivalent provision in s 36, dealing with personal information.

Where the decision is made to consult, the notice given to the third party must be in writing and fulfil the requirements of ss 37(2)(d), (e) and (f).

If the decision is made to release any of the information, written notice must be given under s 37(3), complying with the content requirements in s 37(4).

Note that s 37(5) imposes controls over the release of the information where such notice is given.

#### ***5.5 Sections 15, 36, 37 - timing issues***

Where consultation takes place, the period within which the assessment decision must take place is extended by 20 working days : s 15(5). This extra time gives the third party time to respond, and also gives time for any necessary negotiation to take place. As the third party is required to respond

within 15 working days, the decision maker will still have 5 working days after any response is received to finalise their decision.

If the third party does not respond within the 15 day period, the decision maker can proceed to make their decision: s 15(6). Owing to the way in which the term "external party" is defined in s 5(1), as well as the way in which the review provisions in the Act are expressed, the third party will have no right of review under these circumstances.

Note the controls which are placed over the release of information where notice is given under s 36(3) or 37(3) - being notice that the decision maker has decided to release all or any of the information which was the subject of the consultation. These controls lie in ss 15(7), 36(5) and 37(5). The purpose of the controls is evidently to preserve the external party's rights of review etc until the entitlement of the applicant for assessed disclosure to the information sought has been finally determined.

## ***5.6 Internal and external review on the application of a third party***

In the case of an assessment decision made by a public authority, and where the decision has been made by someone other than the principal officer of the authority, the external party may apply for an internal review under s 43: s 43(2). This must be done within 10 working days of receipt of the notice under s 36(3) or 37(3).

See Chapter 9 for the time limits which apply to an application for external review.

No application for internal review is needed if the assessment decision was taken by a Minister or principal officer of a public authority: s 45(1)(a). The external party may go straight to external review.

Note that s 45(2) also gives a right to seek review by the Ombudsman to two types of third party who have not earlier been consulted -

- a person who was not consulted, but believes that this is in breach of s 36(2) or 37(2)
- where an internal review has taken place under s 43, a person other than the applicant for review who claims to have been adversely affected by the decision made.

Note the onus placed by s 47(5) upon an external party who seeks review, which has been mentioned in section 5.2 above. No such onus falls upon the type of review applicant mentioned in s 45(2), for such a person is not an external party, as defined in the Act.

## **Chapter 6: Public Interest Test**

*In this Chapter:*

*6.1 Introduction*

*6.2 The context in which the public interest test arises*

*6.3 Section 33 - the public interest test*

*6.4 Schedule 2 - matters that are not relevant*

*6.5 Schedule 1 - matters that are relevant*

*6.6 Deciding whether disclosure would be contrary to the public interest*

*6.7 Section 30 - information relating to enforcement of the law - public interest issue*

### **6.1 Introduction**

The basic structural principle behind the RTI Act is that, with a view to improving democracy, citizens are to be given access to information held by public authorities and Ministers in this State, except to the extent that this would be harmful to the public interest.

In this context, the expression 'public interest' refers to what is in the interests of the public, not what may be of interest to them. It is a concept which relates to the wellbeing of the community or a significant part of it, from a governmental perspective.

The way in which the RTI Act deals with the public interest is markedly different from the way in which it was dealt with in the FOI Act, and this is perhaps the most fundamental change which the RTI Act brings. Like the FOI Act, the RTI Act does not define the concept. However, unlike the FOI Act, the RTI Act does give substantial guidance on the concept's practical application.

This chapter explains how the Act works in this respect.

### **6.2 The context in which the public interest test arises**

It is important to recognise that the RTI Act as a whole deals with the public interest, as it relates to a particular subject. This is the public interest in the accessibility of information in the possession of public authorities and Ministers. As spelt out in s 3 ('Object of Act'), the background purpose is to improve democracy in the State, by increasing the accountability of the Executive to the people, and by increasing the ability of the people to participate in their governance.

For this purpose, the Act creates a right to certain information: s 7. The right does not extend to exempt information - *i.e.* to information which is exempt by virtue of a provision of Part 3 of the Act.

Part 3 is divided into two divisions. Division 1 deals with exemptions which are not subject to the public interest test. Division 2 deals with exemptions which are subject to the public interest test.

To explain this differently, there is no need to take account of public interest considerations in determining whether information is exempt from release under Division 1 (except in relation to s 30(2)). However, information which falls within Division 2 is not exempt unless the public interest test is satisfied.

The public interest test is spelt out in s 33.

See Chapter 7 for more detailed discussion about exemptions.

### **6.3 Section 33 - the public interest test**

As explained, s 33 only relates to Division 2 of Part 3 of the Act, headed 'Exemptions subject to the public interest test'.

The effect of s 33(1) is that information covered by Division 2 is only exempt if the principal officer of the public authority or Minister (or their delegate under s 24 of the Act) considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

Note how s 33(1) is expressed negatively. The information is only exempt if it is contrary to the public interest for the information to be disclosed.

It might be thought that this wording creates a presumption in favour of disclosure, but that is not an accurate way of describing its effect. The correct position is that -

1. there is a right to information under s 7, but that right does not extend to exempt information, and
2. information covered by Division 2 is only exempt if it is contrary to the public interest for it to be disclosed.

In other words (and assuming that there is no other potential ground for refusal), unless it is contrary to the public interest for the information to be disclosed, disclosure must occur.

Note that s 33(1) states that all relevant matters must be taken into account in deciding whether it is contrary to the public interest to disclose the information. These matters include, but are not limited to, the matters listed in Schedule 2 to the Act: s 33(2). They do not include the matters listed in Schedule 1; those matters are irrelevant (s 33(3)).

## **6.4 Schedule 2 - matters that are not relevant**

Schedule 2 lists four basic matters that must not be taken into account when assessing if the disclosure of particular information would be contrary to the public interest. These are:

- the seniority of the person who is involved in preparing the document or who is the subject of the document
- that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information
- that disclosure would cause a loss of confidence in the government, and
- that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

## **6.5 Schedule 1 - matters that are relevant**

Schedule 1 lists 25 matters that must be considered when assessing if disclosure of particular information would be contrary to the public interest.

Note that these are not the only matters for consideration. All relevant matters must be taken into account: s 33(1). See the words "but are not limited to those matters" in s 33(2).

Some of the matters listed in the Schedule have a positive focus - e.g. paragraph (f), 'whether the disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation'.

Some of them are negatively expressed, e.g. paragraph (r): 'whether the disclosure would be contrary to the security or good order of a prison or detention facility'.

Some matters refer to both positive and negative consequences: e.g. paragraph (m): 'whether the disclosure would *promote or harm* the interests of an individual or group of individuals'.

There are a number of other miscellaneous matters, for instance whether the applicant is an Australian resident and whether the information is wrong or inaccurate: paragraphs (t) and (u).

## ***6.6 Deciding whether disclosure would be contrary to the public interest***

This section gives guidance on how go about deciding whether the disclosure of information covered by one of the sections in Division 2 of Part 3 of the RTI Act would be contrary to the public interest.

As already mentioned, note that all relevant matters must be considered when making this decision, not just those listed in Schedules 1 and 2.

It is recommended that you begin the decision making process in this way -

Identify exactly the information at issue to which the decision applies - *i.e.* the decision to be made as to whether information is exempt under Division 2 of Part 3 of the Act.

Make a list of this information.

Then, with respect to each item on the list, work through the process set out below.

Note in doing so that the Act deals with information, not documents - see section 1.2.3 of this Manual. A document or record containing information may need to be considered in separate parts.

This is the recommended process for each item on the list -

1. Note the provision or provisions in Division 2 which are thought to apply to that item.
2. Ask whether there are any reasons why all or any of the information in the item should not be disclosed, even if it is exempt - see s 12(1).

If there is no good reason for claiming exemption, the information should be disclosed.

4. Go through the matters in Schedule 2 to the Act, noting that they are irrelevant to the decision to be made.

If the only reasons for objecting to the release of the information are ones which fall within Schedule 2, the information should be disclosed.

5. Consider the matters in Schedule 1 to the Act. Which, if any, of these matters is relevant to the decision to be made with respect to the item at hand? Note them down on the list. In doing so, note which ones favour disclosure and which ones weigh against disclosure.

6. Consider whether there are any other public interest matters, not listed in Schedule 1, that are relevant to the question - public interest matters which favour disclosure, and public interest matters that weigh against disclosure.
7. Consider together all of the matters identified at Steps 5 and 6, in seeking to decide whether it would be contrary to the public interest for the information to be disclosed. Unless you are affirmatively satisfied, taking all these matters into account, that it would be contrary to the public interest for the information to be disclosed, disclosure should occur.

Since the information is only exempt if you are affirmatively satisfied that disclosure would be contrary to the public interest, disclosure should occur if you come to the conclusion that the issue is evenly balanced.

If the eventual decision is that any of the information should not be disclosed, the above process will help the decision maker in complying with the requirement in s 22(2)(d) of the Act. This provision requires that the written notice of the decision which is given to the applicant state the public interest considerations on which the decision is based. See Chapter 8 for guidance on writing reasons for decision.

### ***6.7 Section 30 - information relating to enforcement of the law - public interest issue***

This section is dealt with in more detail in the next chapter - see section 7.2. The reason for mentioning s 30 here is that s 30(2) specifies certain information that is only exempt if (as with the public interest test in s 33) it would be contrary to the public interest for it to be disclosed. This is the only occasion when public interest issues come into play in the operation of Division 1 of Part 3 of the Act.

Ss 30(2)(a) to (f) refer to six categories of information that fall within s 30(1), which are only exempt if the public interest test is met. As with information covered by Division 2 of Part 3 therefore, the implication is that such information is normally not exempt. It will only be exempt if fulfils the further requirement that disclosure of the information would be contrary to the public interest.

Note that the public interest test works the same way in s 30 as it does in s 33. It is necessary in this case also to -

- take all relevant matters into account
- treat all matters in Schedule 2 as irrelevant
- consider all matters in Schedule 1.

## Chapter 7: Exemptions

*In this Chapter:*

*7.1 Introduction*

*7.2 Exemptions that are not subject to the Public Interest Test.*

*7.3 Exemptions that are subject to the Public Interest Test*

### **7.1 Introduction**

The legally enforceable right of a person to be provided with information in the possession of a public authority of Minister provided by s 7 of the RTI Act is subject to the limitation 'unless the information is exempt information'. Exempt information is defined in s 5 as 'information which is exempt information by virtue of a provision of Part 3'.

Part 3 contains two Divisions. Division 1 deals with certain exemptions which are not subject to the public interest test (subject to one limited exception, to be found in s 30(2)). Division 2 deals with certain exemptions which are subject to the public interest test.

The public interest test and the manner of its application are discussed in detail in Chapter 6. The test is found in s 33 of the Act, s 33(1) of which states that information in Division 2 is exempt information (only) if the principal officer of the public authority or the Minister considers, after taking all relevant matters into account, that it is contrary to the public interest to disclose the information. The relevant matters to be taken into account include those listed in Schedule 1. The matters in Schedule 2 are irrelevant.

This chapter discusses and explains the various exemptions in Divisions 1 and 2.

There are essentially four types of exemption.

One type is where the information is exempt because it is of a particular type, without any required consequence flowing from disclosure. Examples are Executive Council information (s 25), Cabinet information (s 26) and information related to closed meetings of council (s 32).

Another type is where the information must have a particular negative effect. Examples are information affecting national or State security, defence or international relations (s 29) and information having certain prejudicial consequences for law enforcement (s 30(1)).

Another type is similar to the first, but the public interest test must here be met. Section 35 provides an example of this type – in order for internal deliberative information to be exempt it must fall within one of the types of information described in the section and it must also be the case that the decision maker is satisfied, after taking into account all relevant matters, that disclosure of the information would be contrary to the public interest.

The final type has all three elements - the information must be of a particular character; it must be the case that disclosure would or might give rise to some particular harm; and it must also be the case that the decision maker is satisfied, after taking into account all relevant matters, that the disclosure of the information would be contrary to the public interest. An example lies in s 37(1)(b), where the information must be information related to business affairs acquired by a public authority or Minister from the third party other than the applicant; and disclosure would be likely to expose the third party to competitive disadvantage.

## ***7.2 Exemptions that are not subject to the Public Interest Test.***

### **Section 25 - Executive Council information**

This exemption covers information that is contained in :

- an official record of a deliberation or decision of the Governor or the Executive Council (or a copy); or
- a record prepared for the purpose of being submitted to the Governor or Executive Council for consideration (or a copy); or
- a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Governor or the Executive Council, other than a record by which such a decision was officially published.

The information must have been brought into existence for the purpose of submission to the Executive Council or Governor for consideration. It must not be purely factual in nature, unless disclosure of the information would disclose a deliberation or decision of the Executive Council or Governor which has not been officially published, in which case the information remains protected.

This exemption protects a particular aspect of the public interest. There is an overriding public interest in deliberations and decisions at the highest level of government - by the Governor and within the Executive Council - remaining confidential.

### **Section 26 - Cabinet information**

This section is similar in design to s 25.

This exemption information that is contained in :

- an official record of a deliberation or decision of the Cabinet (or a copy); or
- a record proposed by a Minister for the purpose of being submitted to Cabinet for consideration (or a copy); or

- a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which such a decision was officially published.

The information must have been brought into existence for the purpose of submission to the Cabinet for consideration. It must not be purely factual in nature, unless the disclosure of the information would disclose a deliberation or decision of the Cabinet which has not been officially published, in which case the information remains protected.

Exemption ceases to apply after the end of 10 years commencing on the day when the information was first considered by the Cabinet at a Cabinet meeting.

This exemption protects a particular aspect of the public interest. Cabinet confidentiality is fundamental to our system of government, and is protected as a matter of convention. The underlying principle is that the quality and nature of decision making at this level of government would or might be adversely affected by being exposed to scrutiny.

Note that this exemption will not protect purely factual information submitted to Cabinet for its consideration in relation to a decision which has been officially published. This means that access can be gained under the Act to the factual basis for any Cabinet decision which has been formally announced.

## **Section 28 - Information not relating to official business**

This exemption covers information in the possession of the Minister which does not relate to the Minister's official business. An example of this would be minutes of a meeting of the local branch of the Minister's political party. The right to information in the Act only extends to information in the possession of a Minister which concerns the Minister's official affairs.

## **Section 29 - Information affecting national or State security, defence or international relations**

This exemption potentially covers any information in the possession of a public authority or Minister, the disclosure of which would or would be reasonably likely to cause harm in one of the following ways:

- endangering the security of the Commonwealth, a State or Territory; or
- endangering the defence of the Commonwealth; or
- adversely affecting the international relations of the Commonwealth; or
- divulging the location of dangerous substances or dangerous goods.

This section obviously protects other, wider aspects of the public interest - matters which go to national or public security, national defence, Australia's relations with other nations, and an aspect of public safety.

## **Section 30 - Information relating to enforcement of the law**

Section 30(1) contains various heads of exemption, and is wider than the equivalent provision in the FOI Act (s 28(1)). Each of these heads of exemption involves some detrimental effect upon law enforcement, although s 30(1)(d) is perhaps more aptly described as addressing detriment to public safety.

Sections 30(2) to (4) deal with certain qualifications to the exemptions provided by s 30(1), where there is the additional requirement that the disclosure of the relevant information must be contrary to the public interest.

These provisions have already been discussed in section 6.7 of the Manual, which addresses the application of the public interest test in s 30(2), and readers are referred that section of the Manual for guidance on how the provisions are to be applied. This is the only part of Division 1 of Part 3 of the Act which raises public interest considerations.

Section 30(1) declares information to be exempt if its disclosure under the Act would, or would be reasonably likely to -

*(a) prejudice –*

- (i) the investigation of a breach or possible breach of the law; or*
- (ii) the enforcement or proper administration of the law in a particular instance; or*
- (iii) the fair trial of a person; or*
- (iv) the impartial adjudication of a particular case; or*

*(b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or*

*(c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*

*(d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or*

*(e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or*

*(f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.*

Section 30(1)(d) goes beyond the cover provided by the equivalent provision in the FOI Act (s 28(1)(d)). It not only concerns information the disclosure of which would, or would be reasonably likely to, endanger life or physical safety, but covers emotional and psychological safety, and the likelihood of harassment or discrimination of a person.

There was no equivalent to ss 30(1)(e) and (f) in the FOI Act. These provisions appear to be designed to extend the cover for police and criminal intelligence files beyond that provided by the FOI Act, because of limitations inherent in the provision in the FOI Act which is equivalent to s 30(1)(c) of the RTI Act (FOI Act, s 28 (1)(c)).

A number of decisions may be found on the Ombudsman Tasmania website which dealt with aspects of s 28 in the FOI Act -

*Clark v Department of Justice* (December 2006)

*ABC v Tasmania Police* (May 2008)

*Wels v Department of Police and Emergency Management* (July 2009)

*Wels v Department of Premier and Cabinet* (September 2009)

*Duncan v Department of Justice* (March 2010)

## **Section 31 - Legal professional privilege**

Under this provision, information is exempt if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Legal professional privilege attaches to confidential communications between a person and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services : *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, at para 9. *Waterford v The Commonwealth of Australia* [1987] HCA 25 confirmed that legal professional privilege extends to confidential professional communications between government agencies and their legal representatives if made with the requisite purpose.

The issue as to whether the privilege has been waived can arise in freedom of information proceedings : *Osland v Secretary to the Department of Justice* [2008] HCA 37

A number of decisions may be found on the Ombudsman Tasmania website which deal with aspects of the equivalent section (s 29) in the FOI Act -

*Cullen v Department of Premier and Cabinet* (December 2008)  
*Jadwan Pty Ltd v Department of Health and Human Services* (March 2009)  
*Hassett v Law Society of Tasmania* (May 2009)  
*Wels v Department of Police and Emergency Management* (July 2009)  
*Wels v Department of Premier and Cabinet* (September 2009)  
*S v Retirement Benefits Fund Board* (March 2010)

These earlier decisions may be of assistance if working with this section.

## **Section 32 - Information related to closed meetings of council**

This section is similar in design to ss 25 and 26, and provides exemption for information that is contained in:

- the official record of a closed meeting of a council; or
- information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
- information that is a copy of, or a copy of part of, information referred to in paragraph (a) or b; or
- information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.

Note that s 32(5) provides that a closed meeting of a council here includes a closed meeting of a council committee.

To be exempt, the information must have been brought into existence for the purpose of submission to the closed meeting of council for consideration. It must not be purely factual in nature, unless the disclosure of the information would disclose a deliberation or decision of the closed meeting of council which has not been officially published, in which case the information remains protected.

Exemption ceases to apply after the end of 10 years commencing on the date of the creation of the information.

The circumstances in which a meeting of a council or council committee can be closed are specified in r 15 of the *Local Government (Meeting Procedures) Regulations 2005*. See also sss 22G, 22K and 22N of the *Local Government (General) Regulations 2005*.

There was no equivalent to s 32 in the FOI Act. This provision has been inserted in the RTI Act to overcome a problem which came to light in a

decision which can be seen on the Ombudsman Tasmania website - *Wakefield v Clarence City Council* (May 2009).

### **7.3 Exemptions that are subject to the Public Interest Test**

See Chapter 6 for discussion about how the public interest test in s 33 of the RTI Act operates.

#### **Section 34 – Information communicated by other jurisdictions**

Subject to application of the public interest test in s 33, s 34(1) declares information to be exempt if -

- its disclosure would prejudice relations between States, between a State and the Commonwealth, or between the Commonwealth or a State and any other country; or
- it was communicated in confidence to a public authority (or to a person on behalf of a public authority) by the Government or an authority of the Commonwealth, of another State or of another country (or by a person acting on behalf of any of those) and the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

Section 34(2) is designed to protect information that would be exempt under the law of another Australian jurisdiction which corresponds to the RTI Act - "a corresponding law". These laws are specified in r 6 of the *Right to Information Regulations 2010*. To be more specific, s 34(2) exempts information which was communicated to a public authority (or to a person on behalf of the Government or a public authority) by the Government or an authority of the Commonwealth or of another State (or by person acting on behalf of any of those) where notice has been received from the Government or from an authority of the Commonwealth or another State that indicates that the information is not required to be disclosed under a corresponding law.

#### **Section 35 – Internal deliberative information**

Based on experience with the FOI Act, this section will be one of the most frequently used exemptions in the RTI Act. The section is the equivalent of s 27 in the FOI Act, with some changes.

The structure of the section needs careful consideration. Broken down, it contains these requirements -

- that the relevant information consists of an opinion, advice or recommendation prepared by an officer of a public authority

- alternatively, that the information consists of a record of consultations or deliberations between officers of public authorities, or officers of public authorities and Ministers
- that the opinion etc. was prepared, or that the consultations or deliberations occurred, in the course of, or for the purpose of, deliberative processes included in the official business of the public authority or Minister, or of the Government
- that the disclosure of the information would be contrary to the public interest
- that the information is not purely factual information
- that the information does not represent a final decision, order or ruling given in the exercise of an adjudicative function, or represent a reason which explains such a decision, order or ruling, and
- that it is not more than 10 years from the date of the creation of the information.

The expression 'deliberative processes' in the section refers to pre-decisional thinking processes within the authority as it moves towards the making of a decision or towards embarking upon a course of action - see *Re Waterford and Department of Treasury (No. 2)* (1985) 5 ALD 588.

A number of decisions may be found on the Ombudsman Tasmania website which deal with the equivalent section (s 27) in the FOI Act -

*Morris v Forestry Tasmania* (September 2007)

*ABC v Tasmania Police* (May 2008)

*Morris v Forestry Tasmania* (July 2008)

*Booth v Department of Primary Industries and Water* (December 2008)

*Cullen v Department of Premier and Cabinet* (December 2008)

*Wakefield v Clarence City Council* (May 2009)

*Wels v Department of Police and Emergency Management* (July 2009)

*S v Retirement Benefits Fund Board* (March 2010)

These earlier decisions may be of some assistance in working with this section.

## **Section 36 - Personal information of a person**

This section is the equivalent of s 30 in the FOI Act, but is different from that section in a number of very significant respects. The most significant changes are -

- the lack of any requirement that disclosure would be unreasonable - made unnecessary by making exemption subject to the public interest test

- the replacement of the phrase "information relating to the personal affairs of a person" with the phrase "personal information of a person", supporting this with a definition of "personal information" (in s 5), and
- the limitation that there is only a need to consult before disclosure where the information was provided to a public authority or Minister by a third party and "the disclosure of the information may reasonably be expected to be of concern to the third party"

The definition of "personal information" in s 5 states that it means -

*"any information or opinion in any recorded format about an individual –*

*(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*

*(b) who is alive, or has not been dead for more than 25 years."*

This definition is not exacting, and covers a greater range of information than the former expression "information relating to the personal affairs of a person". This means that the prime focus in applying the section will be, not on whether the information is personal information, or whether it would be contrary to the public interest to release it. Decisions in relation to s 30 of the FOI Act or comparable provisions in other jurisdictions may give some assistance in this respect.

Previous decisions of the Ombudsman in relation to s 30 of the FOI Act which can be seen on the Ombudsman Tasmania website are -

*Ogilvie v Southern Midlands Council* (September 2007)

*ABC v Tasmania Police* (May 2008)

*Di Falco v Kingborough Council* (August 2008)

*Booth v Department of Primary Industries and Water* (December 2008)

*Wels v Department of Police and Emergency Management* (July 2009)

*Wels v Department of Premier and Cabinet* (September 2009)

*S v Retirement Benefits Fund Board* (March 2010)

See section 5.3 of this Manual for discussion about consultation with a third party under this section.

Note that requests for the personal information of an applicant are covered by Clause 6(1) of Schedule 1 to the *Personal Information Protection Act 2004*.

## **Section 37 - Information relating to business affairs of third party**

This section is the equivalent of s 31 of the FOI Act, but there are a number of significant differences that should be noted. Chief amongst these are -

- the fact that exemption applies only to information related to "business affairs" which satisfies the other requirements of the section
- the fact that, whereas under the previous section the information needed to have been acquired from a business, commercial or financial undertaking, it now needs only to have been acquired from a person or organisation other than the person making the application for assessed disclosure
- the fact that the section does not include any content equivalent to s 31(2) of the FOI Act, which has been made unnecessary in s 37 by making the section subject to the public interest test, and
- the limitation in relation to consultation with the third party, that consultation is only required where the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party

See section 5.4 of this Manual for discussion about consultation with a third party under this section.

Assistance in understanding the expression "trade secrets" can be gained from *Prismall v Department of Economic Development and Tourism*, a decision made by the Ombudsman in August 2009 and published on the Ombudsman Tasmania website.

The concept of exposure to "competitive disadvantage" was the subject of detailed consideration by Porter J of the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman* [2010] TASSC 39 (27 August 2010), a case which dealt with the proper interpretation of ss 31 and 32 of the FOI Act.

In that decision, Porter J held that –

- the term "competitive disadvantage" was used in those two provisions "in a commercial or economic sense" (para 50)
- the term denotes disadvantage which "relates to or is characterised by competition" (para 52)
- although "competition" has the "commonly understood meaning of market rivalry where there is a "striving for custom between rival traders in the same commodity" ... in economic terms the concepts of competition and competitive disadvantage go beyond what might be regarded as the ordinary notions of rivalry in a market, to include rivalry between supplier and acquirer" (para 53)
- "something which lessens an entity's ability to maintain competition between suppliers, and which affects its capacity to secure a lower or "competitive" cost for goods or services acquired (is) a disadvantage relating to competition" (para 54)

- competitive disadvantage “is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason or circumstance” (para 55). Porter J added, in the same paragraph: “Further, I think that practical business sense compels the view that the term would include a disadvantage to an undertaking or agency in negotiating with a supplier of goods or services. That is, a competitive disadvantage arises when a supplier acquires information which gives it a negotiating advantage leading to financial detriment.”
- it is important to note the whole of the phrase within which the term “competitive disadvantage” appears, which requires that the disclosure of the information be likely to expose the entity to such disadvantage. The word “likely”, in this context, denotes “a real or not remote chance or possibility, rather than more probable than not” (para 41). It is the likelihood of exposure to competitive disadvantage that must be assessed. As Porter J stated: “Those are the words used by Parliament and there is no warrant to frame the test in terms of eventuation of the risk or actual lessening of competitive ability.” ( para 56)

By the language of s 37(2) the implication is that any such disadvantage must be "substantial". Presumably, if the likely disadvantage was only insubstantial, this would weigh in favour of disclosure when the public interest test is applied. In this respect that there are number of items in Schedule 1 to the Act ("Matters relevant to Assessment of Public Interest") that are particularly relevant to s37 - items (s), and (w) to (y).

### **Section 38 - Information relating to business affairs of public authority**

This section is equivalent to s 32 of the FOI Act, and is virtually in the same form as that section.

Like s 37, it uses the concepts of "trade secrets" and exposure to "competitive disadvantage". See the notes above in relation to s 37 for information and discussion about these concepts.

### **Section 39 - Information obtained in confidence**

Judging from experience with the equivalent section of the FOI Act (s 33), this will be one of the more frequently used exemptions in the RTI Act.

Allowing for the removal of elements which related to the public interest, now adequately covered by the public interest test in s 33, s 39 is in virtually identical terms to its predecessor.

There are two limbs to the section, but each is subject to the same precondition - that disclosure of the information would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister. Satisfaction of this precondition requires evidence. There must be evidence which goes to show that the relevant information was communicated in confidence in this way. Often an intention that the communication be confidential will be readily apparent from the terms of the document or from the surrounding circumstances, but this is not always the case.

Having established this precondition, exemption will then depend on satisfying the requirements of either s 39(1)(a) or (b).

Section 39(1)(a) requires that the information would have been exempt if it were generated by a public authority or Minister. The focus of this provision on what would have been the case if the information had been generated by a public authority or Minister naturally leads to consideration of those exemption provisions which depend upon creation of the information by a public authority or Minister. These are ss 27 and 35. An example of a document that might be covered by s 33(1)(a) is confidential advice from an external consultant, which, if it had been prepared within government, might have attracted exemption under s 35.

Section 39(1)(b) requires that disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

Assistance in applying this section may be obtained from the following decisions made by the Ombudsman in relation to s 33 of the FOI Act -

*X v Legal Aid Commission of Tasmania* (December 2006)

*Morris v Forestry Tasmania* (April 2007)

*ABC v Tasmania Police* (May 2008)

*Morris v Forestry Tasmania* (July 2008)

*Di Falco v Kingborough Council* (August 2008)

*Pacific National v Department of Industry, Energy and Resources* (September 2008)

*Booth v Department of Primary Industry and Water* (December 2008)

*Wels v Department of Police and Emergency Management* (July 2009)

*Prismall v Department of Economic Development and Tourism* (August 2009)

## **Section 40 - Information on procedures and criteria used in certain negotiations of public authority**

Subject to the application of the public interest test, this section provides exemption for instructions for the guidance of officers of a public authority on the processes to be followed or the criteria to be applied—

- in negotiations, including financial, commercial and labour negotiations;  
or

- in the execution of contracts; or
- in the defence, prosecution and settlement of cases; or
- in similar activities –

relating to the financial, property or personnel management and assessment interests of the Crown or of a public authority.

### **Section 41 - Information likely to affect State economy**

Subject to the application of the public interest test, this section provides exemption for information about proposed action or inaction by the Parliament, the Government, a Minister or a public authority in the course of, or for the purpose of, managing all or part of the State economy. The information must also be such that its disclosure is likely to have one of two effects -

- give someone an unfair advantage, or
- expose someone to unfair disadvantage.

Again subject to the public interest test, the section also provides exemption to information where the disclosure of the information would reasonably be expected to have a substantial adverse effect upon the ability of the Government or of any public authority to manage all or part of the economy of the State.

### **Section 42 - Information likely to affect cultural, heritage and natural resources of the State**

Subject to the application of the public interest test, this section provides exemption for any information in the possession of a public authority or Minister the disclosure of which would be likely to cause harm in one of the following ways:

- threaten the survival of a rare or endangered species of flora or fauna; or
- prejudice any measures being taken, or proposed to be taken, for the management or protection of a rare or endangered species of flora or fauna; or
- have an adverse effect on a site or area of scientific, cultural or historical significance; or
- prejudice any measures being taken, or proposed to be taken, for the management or protection of a site or area of scientific, cultural or

historical significance provided such measures would not themselves have any of the effects referred to in paragraph (a), (b) or (c).

## **Chapter 8: Statements of Reasons<sup>1</sup>**

*In this Chapter:*

*8.1 Introduction*

*8.2 When a Statement of Reasons is required*

*8.3 Content of a Statement of Reasons*

*8.4 Matters which should or may be omitted from a Statement of Reasons*

*8.5 Preparation and use of schedules*

*8.6 Checklist for a Statement of Reasons*

### **8.1 Introduction**

Section 22 of the RTI Act requires that, in the case of certain types of decision not to provide information, a public authority or Minister provide an applicant with written notice of the decision. Section 22(2) specifies a number of things that such a notice must contain. These include reasons for the decision.

For simplicity, this chapter refers to written notice of a decision as a Statement of Reasons.

Although the requirements imposed by s 22 do not apply to every decision which may be made under the Act, it is best to provide detailed reasons as a matter of course with all such decisions, since this will help the applicant to understand the process and will help ensure that the official record is complete.

A Statement of Reasons is needed at the time of the initial decision and at the time of any internal review.

### **8.2 When a Statement of Reasons is required**

A Statement of Reasons is required where a decision maker decides -

- that the applicant is not entitled to information because it is exempt information
- that provision of the information should be deferred in accordance with s 17
- that provision of the information should be refused in reliance upon s 19 (unreasonable diversion of resources) or s 20 (repeat or vexatious applications).

The Act does not require a Statement of Reasons where a public authority or Minister refuses disclosure for other reasons or decides to make disclosure.

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<sup>1</sup> This Chapter has been developed with extensive reliance upon Freedom of Information Guidelines available on the website of the Commonwealth of Australia Department of the Prime Minister and Cabinet. See [http://www.dpmc.gov.au/foi/docs/FOI\\_section26\\_notices.doc](http://www.dpmc.gov.au/foi/docs/FOI_section26_notices.doc).

However, good administrative practice requires that the applicant still receive written notice of the decision, including appropriate information about review rights. Even where disclosure is made, the applicant may wish to contend that the searches made in response to the request were inadequate and that a decision purporting to give access to all documents in fact did not do so.

It is open to the Ombudsman to require the public authority or Minister to provide better reasons for decision as part of the external review process: s 47(1)(n).

### **Third Parties**

If an agency decides to release a document despite the objections of a third party, that party should be notified in writing at the same time the applicant is notified of the decision - see ss 36(4), 37(4), 43(2) and (3). An affected third party has a right of review under the RTI Act and the public authority or Minister is unable to release the documents in question until certain time limits have expired : ss 36(5) and 37(5).

Again, it is good administrative practice to provide the third party with a Statement of Reasons to aid their understanding of the decision.

### **Deemed Refusal**

If there is a 'deemed refusal' under section 46 (1) to disclose information which is the subject of an application for assessed disclosure - ie the time for assessing the application has expired and the applicant has not received notice of the decision, giving the applicant the right to make an application for review to the Ombudsman - the Ombudsman may on external review direct the public authority or Minister to make a decision on the original application. This may be valuable in avoiding the need for a review, or in refining the issues which the Ombudsman must consider. In these cases the applicant should be advised of the decision in the form of a Statement of Reasons as soon as possible after the actual decision.

## ***8.3 Content of a Statement of Reasons***

A well-written Statement of Reasons should do the following:

- It should explain the scope of the information applied for, as understood by the decision maker, and hence the scope of the decision.
- It should show how the decision was arrived at, based on specific findings of fact.
- It should show a rational connection between the findings of fact and the decision.

- It should relate exemption claims to each specific document, or part of a document, and must not simply repeat the wording of the exemption section or the terms of the decision itself.
- It should quote the precise words of any claimed exemption, or alternatively a copy of the exemption should be attached.
- It should address all relevant elements of the relevant statutory provisions.
- Where there is a need to decide whether it is contrary to the public interest to disclose the information, it should specify all of the matters, whether specified in Schedule 1 of the Act or not, which have been taken into account in the consideration of that issue, and should explain the process of reasoning which has led the decision maker to the final outcome on that issue.
- It should refer to any Guidelines issued by the Ombudsman under s 49 of the Act upon which reliance has been made.
- It should explain any legal principles or authority relied on in making the decision.
- It should incorporate adopted material into the decision, not merely refer to it.
- It should deal with any submissions by the applicant.
- Where there are numerous documents, it should use a Schedule of Documents to better explain the decision with respect to each document.

## **The preparation and making of the decision**

Anyone can prepare a Statement of Reasons on behalf of the decision maker.

Where a person other than the decision maker is preparing the Statement, the decision maker must exercise his or her own power of decision making on the basis of an examination of the documents in question and other relevant material, and not simply adopt the draft at face value. In other words, the decision maker must actually make a decision.

It is necessary to emphasise this point. The person who makes the decision, whether at first instance or on internal review, is personally responsible at law for the decision made. It is their decision, whoever may have contributed to the text or to the reasoning behind it. The final content and outcome of the decision should not be determined by anyone else.

In the case of a decision on internal review, the decision maker must be someone other than the person who made the initial decision on the application, and the earlier decision maker should play no part in the review.

## **Formal requirement of a Statement of Reasons**

The following elements constitute the formal statutory requirements of a Statement of Reasons (s 22 of the RTI Act):

1. formal notice of the decision
2. the name and designation of the decision maker
3. the reasons for the decision;
4. if the decision involves or relies upon consideration of the public interest, a statement of the public interest considerations on which the decision was based, and
5. the required information about rights of review and lodging a complaint with the Ombudsman.

## **Notice in writing of the decision**

The Statement of Reasons must include formal written notice of the decision being made. This notice must:

- clearly identify the documents containing the information at issue (without disclosing any exempt material where exemptions are claimed)
- state the decisions made in relation to each document or part of a document
- clearly state which exemptions are being claimed for each document or part of a document.

As explained below, a Schedule of Documents is invaluable in helping satisfy these requirements with clarity.

## **Name and designation of the decision maker**

RTI decisions should only be made by the responsible Minister, by the principal officer of the public authority or by a person who holds a current delegation under s 24 of the Act. The Statement of Reasons for a decision must state the name and designation of the person who made the decision. It should also state that the decision maker is a delegated officer if this is the case.

In doing the latter, the Statement of Reasons might for instance say:

*“In making this decision, I am exercising powers delegated to me by the principal officer of the Department under s 24 of the Right to Information Act.”*

## **Reasons for the decision**

Applicants must be provided with the reasons for the decision. These reasons must demonstrate how each decision has been arrived at on the basis of findings of fact made. This will normally involve a discussion as to which elements have to be met to establish, say, an exemption, or some other statutory criterion on which access was refused or deferred.

A good decision is evidenced by rational explanation. The Statement of Reasons should contain such an explanation.

Early in the Statement of Reasons, the decision maker should sensibly quote the words used by the applicant in describing the information for which application was made. The Statement should then record the outcome of any negotiation which occurred with the applicant pursuant to s 13(7), to refine or redirect the application. If necessary, it should record the decision maker's understanding as to the scope of the information being sought through the application.

The Statement of Reasons should include the relevant sections of the RTI Act being relied on, either in the body of the decision or as an attachment. The decision maker's understanding of the relevant law should be set out and, where necessary, the decision should refer to decisions of the Courts or other authorities, including the Ombudsman, as to the correct interpretation of the relevant statutory provisions.

The Statement should be specific as to why the information concerned is believed to come within an exemption, without revealing details of any material claimed to be exempt.

The decision maker should look at each relevant document, or separate part of a document, and state specifically why access to the document or to information in it is being refused. As stated elsewhere in this chapter, this is best done through the use of a Schedule of Documents. The Schedule should be supported by reasons which elaborate upon the brief information given in the Schedule.

In framing the Statement of Reasons, the decision maker should refer to any arguments, submissions or evidence presented by the applicant in support of disclosure, and indicate how these have been dealt with.

## **Addressing exemptions when giving reasons for the decision**

There are two types of exemption provision in the RTI Act - ones which are not subject to the public interest test in s 33, and ones which are. The first class of provision falls within Division 1 of Part 3 of the Act (ss 25 to 32). The second class falls within Division 2 of that Part (ss 33 to 42).

Information which is covered by an exemption in the first class is exempt simply by reason of satisfying the requirements of the relevant section.

Information which is covered by an exemption in the second class is exempt if it satisfies the requirements of one of ss 34 to 42, and if, after taking all relevant matters into account, the principal officer or Minister considers that it would be contrary to the public interest to disclose the information (s 33). The matters to be taken into account in this respect are listed in Schedule 1 to the Act, but are not limited to those matters. Schedule 2 lists matters which are irrelevant to the decision.

See Chapter 6 and 7 for a fuller discussion of public interest and exemptions.

It is essential that a Statement of Reasons addresses every element of an exemption as set out in the RTI Act.

For example, a claim that certain information being sought is internal deliberative process information and exempt under s 35 of the RTI Act would need to address each of the following elements :

- that the information is in the nature of an opinion, advice or recommendation prepared by an officer of a public authority or a record of consultations or deliberations between officers of public authorities or a record of consultations or deliberations between officers of public authorities or Ministers : ss 35(1)(a) - (c)
- that the information arose in the course of, or for the purpose of, deliberative processes related to the official business of a public authority, of a Minister or of the Government : s 35(1)
- that the information is not purely factual in nature : s 35(2)
- that the information is not a final decision, order or ruling given in the exercise of an adjudicative function or a reason which explains such a decision, order or ruling : s 35(3)
- that it is less than 10 years since the date of the creation of the information : s 35(4)
- and that after taking into account all relevant matters, the decision maker considers that it is contrary to the public interest to disclose the information : s 33.

The Statement of Reasons would require findings of fact in this regard. It would also require a discussion of how the decision maker reached his or her conclusions. That discussion would need to identify the various matters, whether listed in Schedule 1 or not, which the decision maker had taken into account in reaching his or her conclusion that it would be contrary to the public interest to disclose the information. The decision might also refer to matters in Schedule 2 which have specifically been disregarded. The discussion would, as needed, involve the discussion of any issues of law arising, citing relevant authority.

### **Information about rights of review**

The applicant must be given the information required by s 22(1)(c) of the Act concerning the applicant's right to apply for a review of the decision. In the case of an initial decision under the Act, the relevant right to review is a right to internal review under s 43. In the case of a decision on internal review, the relevant right to review is review by the Ombudsman.

The information which must be given to comply with s 22(1)(c) is -

- information that the applicant has a right to apply for the review of the decision
- the name of the authority to which the application for review can be made
- the time within which the application for review must be made.

It is recommended that the notice include contact details for the review authority.

The contact details for the Ombudsman are -

Office of the Ombudsman  
GPO Box 960  
HOBART  
TAS 7001

Freecall - 1800 001 170  
Fax - 03 62338966  
Email - [ombudsman@ombudsman.tas.gov.au](mailto:ombudsman@ombudsman.tas.gov.au)

## ***8.4 Matters which should or may be omitted from a Statement of Reasons***

### **Omission of exempt material**

A Statement of Reasons should not contain any material which is itself exempt, or which does not relate to the official business of the Minister or public authority.

A Statement of Reasons should not disclose the very information to which the decision to refuse access relates.

### **Non-disclosure of the existence or non-existence of information**

The Statement of Reasons may state the decision in terms which neither confirm nor deny the existence of information which would be exempt information on a ground specified in Division 1 of Part 3 of the Act : s 22(4). Such an approach should be avoided wherever possible in order not to deprive an applicant of knowledge of the existence of the information, and the opportunity to test whether access to it has been properly refused. Where this course is adopted, the existence of the information must be disclosed to the Ombudsman in any later review by the Ombudsman of the decision.

## ***8.5 Preparation and use of schedules***

In all but the simplest cases, decision makers will usually find that it is helpful to prepare a Schedule of Documents at the earliest possible opportunity and to use this in conjunction with the decision making process. When the decision is made, the final Schedule can be attached as part of the decision notice.

It is crucial that a Schedule not be used as an inadequate substitute for a full, detailed Statement of Reasons which properly explains the basis for all decisions to refuse or to defer access to information. Do not adopt the approach that if full reasons will not fit neatly into your Schedule, they need not be stated at length. Where a Schedule of Documents is prepared, it should always be used as an adjunct to properly stated reasons.

It is suggested that the Schedule of Documents contain separate columns for the following details with respect to each document containing information covered by the application for assessed disclosure –

|             |                                                                                                                |
|-------------|----------------------------------------------------------------------------------------------------------------|
| No.         | Number allocated to the document for the purposes of listing it in the Schedule                                |
| Date        | The date when the document was created (or received, if the date of creation is not known or is not relevant). |
| Description | Brief description of the document, including the name of the author and of the addressee                       |
| Release?    | Yes or No. Full or partial.                                                                                    |

## Basis for the Decision Taken

Within the scope of the applicant for assessed disclosure? Relevant section of the Act. Sufficient information to briefly explain decision, when considered in conjunction with the detailed reasons provided in the text of the Statement of Reasons

Note that the Schedule should refer in some way to the *specific reasons* for the refusal of access to each *specific piece of information or part thereof* for which exemption is claimed. Where the same reason applies to a number of pieces of information it may be convenient to give numbers or letters to those reasons so that it is not necessary to set out the reasons in full each time they are referred to. Care must be taken, however, to see that the correct reasons are stated in each case. The reasons for claiming one exemption for one particular piece of information or part thereof will frequently be different from those for claiming the same exemption in relation to another piece of information.

The precise form of a schedule is not important so long as it contains all the information necessary for the applicant to identify and understand the nature of the relevant information and to be aware of all relevant exceptions or exemptions claimed as a basis for refusal, and to locate full, detailed reasons for each refusal decision.

## 8.6 Checklist for a Statement of Reasons

### STEP 1 Background/Scope

- The decision should explain the scope of the application, as understood by the decision maker. In so doing, the decision should quote the exact words used in the application to describe its scope.
- If necessary, include details of negotiations with applicant to refine or redirect scope (dates and what was agreed).
- If part of the application was transferred, state when and to whom and which part of the request not transferred is being dealt with

### STEP 2 Authorisation

- Ensure that the decision indicates the source of the contains decision maker's authority to make the decision.

### **STEP 3 Legislative basis for decision**

- Ensure that, either in the body of the decision or as an attachment, each section of the Act relied upon is set out so the applicant knows the actual text of the sections relied on.

### **STEP 4 Informant at issue**

- Identify information at issue - what it is and where located

### **STEP 5 Evidence/Material upon which findings are based**

- What material was used in the decision eg submissions by the applicant or third parties?
- Did the decision maker rely on policy or procedural material, guidelines, handbooks or memos — if so what was it?
- What other factors/evidence/documents were taken into account? State them.

### **STEP 6 Decision**

- Set out the decision you have reached.

### **STEP 7 Reasons for decision**

- Set out the reasons why you believe each piece of information not being released meets the criteria for exemption.
- In so doing, set out your understanding of the legislative basis, referring to authority to the extent needed.
- In so doing, set out any evidence/findings you have relied on in coming to the conclusion that the information is exempt.
- Where relevant, address the requirements of s 33 - the public interest test. Set out the matters, whether listed in Schedule 1 or not, which you have taken into account in deciding that it is or is not contrary to the public interest for the information to be disclosed. State the conclusion which you came to after weighing these matters, and explain the reasoning which led you to that conclusion.
- Sum up your findings in the language of the Act.

### **STEP 8 Review and complaint rights**

- Set out or attach information re right of review - nature of the right; to whom application may be made, with contact details; and time within which application must be made

### **STEP 9 Signing off**

- Sign and date the Statement of Reasons. State authority to make decision, where acting as delegate.
- Make sure all attachments are attached and that information to be released is attached

## Chapter 9: Reviews

*In this Chapter:*

### *9.1 Overview*

### *9.2 Internal review*

#### *9.2.1 General*

#### *9.2.1 Who may apply for internal review?*

#### *9.2.3 Time frame within which application for internal review must be made*

### *9.3 External review – Review by the Ombudsman*

#### *9.3.1 Must internal review take place first?*

#### *9.3.2 Who may apply for external review?*

#### *9.3.3 Time frame within which application for review by the Ombudsman must be made*

#### *9.3.4 Grounds upon which an application for review by the Ombudsman may be made*

#### *9.3.5 The conduct of a review*

#### *9.3.6 Onus*

## **9.1 Overview**

The RTI Act provides for two types of review – internal review and external review. This chapter contains detail about both types of review.

Internal review occurs within a public authority. It involves the reconsideration within the public authority of a decision by a delegated officer (see s 24) on an application for assessed disclosure. The review decision is made by the principal officer of the authority or by another delegated officer.

External review is review by the Ombudsman. In some circumstances, the applicant for review cannot go to the Ombudsman until the matter has first been subjected to internal review. There are a number of other circumstances in which the applicant may go straight to the Ombudsman. Importantly, this can occur if the time within which the applicant for assessed disclosure should have been notified of a decision on their application has passed (s 15), and they have not received notice of such a decision: s 46(1).

Third parties can also have rights to both internal and external review.

The Ombudsman has issued a Guideline on the Review of Decisions by the Ombudsman, which can be seen at –

[http://www.ombudsman.tas.gov.au/right\\_to\\_information2/rti\\_process/right\\_to\\_information\\_guidelines\\_and\\_manual](http://www.ombudsman.tas.gov.au/right_to_information2/rti_process/right_to_information_guidelines_and_manual) .

The Ombudsman's website also carries a brief summary in relation to reviews, at –

[http://www.ombudsman.tas.gov.au/right\\_to\\_information2/rti\\_process/right\\_to\\_information\\_application\\_for\\_assessed\\_disclosure\\_application\\_form](http://www.ombudsman.tas.gov.au/right_to_information2/rti_process/right_to_information_application_for_assessed_disclosure_application_form) .

## **9.2 Internal review**

### **9.2.1 General**

Internal review relates only to an application for assessed disclosure which has been made to a public authority. It does not apply where the application was made to a Minister.

This type of review involves reconsideration within the public authority of the initial decision made on such an application by a delegated officer (see s 24). Application for such a review must be made to the principal officer of the authority: s 43(1). The internal review decision is made by the principal officer or a delegated officer other than the one who made the original decision : s 43(4).

Note that the requirement that a reviewing officer other than the principal officer must be a delegated officer represents a change from the situation which existed under the FOI Act.

A decision on the review must be given in the same way as a decision in respect of the original application (s 43(5)). Importantly, this means that reasons must be given in accordance with s 22 of the Act – see Chapter 8 of this Manual.

### **9.2.2 Who may apply for internal review?**

Application for internal review can be made by three types of person –

- the applicant for assessed disclosure, seeking review of the original decision made on their application : s 43(1)
- a third party who seeks review of a decision to provide information relating to their personal affairs, who has been given notice of that decision under s 36(3) : s 43(2)
- a third party who seeks review of a decision to provide information which is likely to expose them to competitive disadvantage, who has been given notice of that decision under s 43(3).

The Act refers to such third parties as “external parties”.

### **9.2.3 Time frame within which application for internal review must be made**

Where the application for internal review is made by the applicant for assessed disclosure, the application must be made within 20 working days of the date when notice was given to the applicant, in accordance with s 22, of the original decision made on their application for assessed disclosure : s 43(1).

Where the application for internal review is made by an external party (see section 9.2.1 above), it must be made within 10 working days of the date upon which notice of the original decision was given to the external party under s 36(3) or 37(3) : ss 43(2) and (3)

It is at least arguable from the wording of s 43(1) that time does not start to run under that provision until a notice of decision which fully complies with the requirements of s 22 has been given. Decision-makers would be wise to assume that this is so.

It is also suggested that the words “notice is given to” in s 43(1) should be read as “notice is received by”. This interpretation is semantically open, and would bring the provision into harmony with ss 43(2), 43(3), 44(1)(b)(i) and 45(3).

## **9.3 External review – Review by the Ombudsman**

### **9.3.1 Must internal review take place first?**

There are a number of situations in which an applicant for review may apply to the Ombudsman without first obtaining a decision on internal review.

This is so where the original decision on the application for assessed disclosure was made by the principal authority or Minister, so that an application for internal review is not practicable: s 45(1)(a).

It is also so where the time within which the applicant for assessed disclosure should have been notified of a decision on their application has passed (s 15), and they have not received notice of such a decision: s 45(1)(f). Under these circumstances, the principal officer or Minister is taken to have made, on the last day of the relevant period, a decision refusing to grant the application : s 46(1). Because this is taken to have occurred, again s 43 cannot apply.

It is also possible to go direct to the Ombudsman where an application for internal review has been made and 15 working days have passed without the applicant for review being notified of the result : s 44(1)(b).

Section 45(1) of the Act specifies a number of other circumstances where it is possible for the applicant for assessed disclosure or a third party to go direct to the Ombudsman.

### **9.3.2 Who may apply for external review?**

The applicant for assessed disclosure may of course do so.

There are also certain circumstances where “external parties” (see section 9.2.2 above) or other third parties can seek external review.

This can be done by –

- an external party who seeks external review after seeking internal review under either s 43(2) or s 43(3) – see s 44(1)
- a third party who was not consulted under s 36(2) or s 37(2), and believes that they should have been – see s 45(2)(a)
- a third party who claims to have been adversely affected by an internal review decision under s 43, where the internal review resulted for an application for review by someone else – see s 45(2)(b).

### **9.3.3 Time within which an application for review to the Ombudsman must be made**

Where an internal review decision has occurred, the application to the Ombudsman for external review must be made within 20 working days of the date when the applicant for external review was informed of the result of the internal review : ss 44(1)(b)(i) and (2).

Where the applicant for external review applied for internal review but did not receive a decision on that application within 15 days of the making of the application, the application for external review must be made within 20 working days of the expiry of that 15-day period : ss 44(1)(b)(ii) and 44(2)

Where the application for external review is made on one of the grounds in s 45(1) which is predicated upon the making of a decision, the application must be made within 20 working days of the date upon which the applicant for external review received notice of the decision : s 45(3).

Since s 45(1)(f) of the Act is not predicated upon a decision having been made, it would appear that there is no time limit for an application for external review which is based upon a deemed refusal under s 46(1).

Likewise, the Act does not presently prescribe a time limit for the making of an application for review which is based on s 45(2).

It is possible that undue delay in making an application for external review where no time limit is prescribed may be refused by the Ombudsman under s 47(1)(l).

#### **9.3.4 Circumstances under which an application for review by the Ombudsman may be made**

Application for external review may be made to the Ombudsman –

- by an applicant for internal review (who may be the applicant for assessed disclosure or an external party) who is not satisfied with the result of that review : s 44(1)(b)(i)
- by an applicant for internal review (who may be the applicant for assessed disclosure or an external party) who has not been informed of the result of that review within 15 working days of making application for the review: s 44(1)(b)(ii)
- where the applicant for external review would have been able to make an application for internal review if the original decision had not been made by a Minister or the principal officer of a public authority : s 45(1)(a). This could be either the applicant for assessed disclosure or an external party.
- by an applicant for assessed disclosure, where a Minister or public authority has made a decision that the information requested by the applicant was not in existence on the day the application was made : s 45(1)(b)
- by an applicant for assessed disclosure, where a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright : s 45(1)(c)
- by an applicant for assessed disclosure, where a Minister or public authority has made a decision that the information requested is not in the possession of the Minister or public authority : s 45(1)(d)
- by an applicant for assessed disclosure, where a decision has been made by a Minister or public authority, and the applicant believes, on reasonable grounds, that there has been an insufficiency in the

searching for the information by the Minister or public authority : s 45(1)(e)

- by an applicant for assessed disclosure, where they have not received a decision on their application for assessed disclosure and the period specified in, or calculated under, s 15 has elapsed : s 45(1)(f). This is a case of “deemed refusal” – see s 46(1).
- by a third party, who believes that they should have been consulted under s 36(2) or 37(2) – see s 45(2)(a)
- by a third party who claims to have been adversely affected by a decision made on internal review under s 43 – see s 45(2)(b).

### **9.3.5 The conduct of a review**

The Ombudsman has issued a Guideline under s 49 of the RTI Act on the conduct of reviews, which indicates the procedure which the Ombudsman is likely to apply to an application for review–

[http://www.ombudsman.tas.gov.au/right\\_to\\_information2/rti\\_process/right\\_to\\_information\\_guidelines\\_and\\_manual](http://www.ombudsman.tas.gov.au/right_to_information2/rti_process/right_to_information_guidelines_and_manual) .

The Ombudsman has multiple powers in relation to the conduct of reviews, and is required by s 47(6) to use these to resolve an application for review as soon as possible after receipt. Where the application cannot be resolved, the Ombudsman must deliver his or her decision on the review as soon as practicable : s 47(6)(b).

The powers given to the Ombudsman which may be used to attempt to resolve an application for review include the following –

- in the case of failure of a public authority or Minister to comply with a time limit under s 15 (*i.e.* a case of deemed refusal), the power to direct that a decision be made by the public authority or Minister : s 47(1)(e)
- the power to direct an internal review, if one has not already been completed : s 47(1)(f)
- the power to direct a public authority to provide better reasons for decision : s 47(1)(n)
- the power to give a public authority or Minister, upon application, and subject to such conditions as the Ombudsman thinks fit, further time to deal with the request : ss 46(3) and (4)
- the power to conciliate the application : s 47(1)(g)
- the power to give directions to a party, related to the conduct of the review : s 47(1)(q)

If a formal decision is required, the Ombudsman may make any decision on the application for review that could have been made by the public authority or Minister to whom the application for assessed disclosure was made: s 47(1)(k).

The Ombudsman may also direct that his or her decision be implemented by the public authority within a period of 20 working days or such lesser period as the Ombudsman may determine : s 47(1)(p).

If the public authority fails to comply with such a direction, the Ombudsman may report that failure to the Parliament through the Joint Committee on Integrity established by s 23 of the *Integrity Commission Act 2009* : s 47(7).

### **9.3.6 Onus**

It is important to note that the RTI Act contains two onus provisions, ss 47(4) and (5), which are likely to have a considerable influence on the outcome of reviews.

The onus here is not an onus of proof, so much as an onus of persuasion, which may include an onus to provide evidence which will satisfy the Ombudsman of a matter at issue.

An onus is an obligation or burden or responsibility, in this case responsibility for satisfying the Ombudsman of certain matters.

S 47(4) applies where the Ombudsman is determining a matter brought by an applicant. This section imposes an onus upon the public authority or Minister to satisfy the Ombudsman that the information should not be disclosed.

S 47(5) applies where an external party seeks review of a decision by a public authority or Minister to disclose their personal or business information – as to which see ss 36 and 37. In this situation, the external party has the onus of satisfying the Ombudsman that there are grounds for deciding that the information should not be disclosed: s 47(5)

In each case, the Ombudsman may determine the matter on the basis that the onus has not been discharged.

## **Chapter 10: Reporting**

*In this Chapter:*

*10.1 Reporting requirements of public authorities*

*10.2 Reporting requirements of Department of Justice*

*10.3 Reporting requirement of Ombudsman*

### **10.1 Reporting requirements of public authorities**

Section 23 of the RTI Act requires the principal of a public authority to provide certain information on the public authority's engagement with the Act, as soon as practicable after the end of each financial year. By implication, the information required is information which relates to that past financial year.

It is to be expected that these reporting requirements will be met in the public authority's annual report.

The information which the principal officer is required to provide is as follows -

- details on information published by the public authority as required or routine disclosures: s 23(1)(c)
- the number of applications for assessed disclosure made to the public authority: s 23(1)(d)(i)
- the number of applications for assessed disclosure refused by the public authority and the sections of the Act under which they were refused: s 23(1)(d)(ii)
- the number of applications for assessed disclosure relating to information which was held to be exempt, or part of which was held to be exempt, and the sections of the Act under which the information was exempt: s 23(1)(d)(iii)
- the number of applications for internal review and the outcome of those reviews: s 23(1)(d)(iv).

### **10.2 Reporting requirements of Department of Justice**

As in the FOI Act, the RTI Act requires the Secretary of the Department of Justice to produce a report on the administration of the Act.

This report is expected to be very similar to the Freedom of Information Annual Report produced in recent years. The practice in relation to that report

has been for the Department to send a request for statistics to all public authorities in June of each year.

Section 53(1) requires the Secretary of the Department to prepare a report as soon as practicable after the end of each financial year, including the following data -

- the number of applications for assessed disclosure made, and the public authorities or Ministers that received those applications: s 53(1)(a)
- the number of applications for assessed disclosure that were refused and the sections of the Act under which they were refused: s 53(1)(b)
- the number of applications for assessed disclosure where information which was held to be exempt, or part of which was held to be exempt, and the sections of the Act under which the information was exempt: s 23(1)(d)(iii)
- the number of applications for internal review and the results of those applications: s 53(1)(d)
- a list of Acts, and sections from those Acts, which exempt information or public authorities from the provisions of the RTI Act: s 53(1)(e)
- the number of applications for external review made to the Ombudsman and the results of those applications: s 53(1)(f).

The report must then be tabled in Parliament.

### ***10.3 Reporting requirements of Ombudsman***

Section 53(3) requires the Ombudsman to provide a report to Parliament about the operation of the Act and any relevant matters. This report is to be contained in the annual report of the Ombudsman.

## Chapter 11: Useful resources and links

*In this Chapter:*

*1.1 Introduction*

*11.2 Recommended RTI resources*

*11.3 Recommended FOI resources*

*11.4 Other Links*

### **1.1 Introduction**

When working with legislation, it is frequently unwise to go too quickly to secondary materials such as Parliamentary debates, case law and academic writings. The fundamental aim is to understand and apply the Act, and therefore the first aid to interpretation is the Act itself - the stated objects; how the provision you are trying to interpret fits into the scheme of the Act as a whole; how the same expression is used elsewhere in the Act, etc.. Stay with the Act as long as possible, reading it in conjunction with the *Acts Interpretation Act 1931*. Also consider as carefully as possible how the Act applies to the particular circumstance at hand. Try not to overcomplicate things.

If you do need to go to secondary materials, be discerning. The RTI Act contains a lot of material which will look familiar to users who have had experience with the FOI Act. However, the RTI Act does work differently in many respects, often very differently - for instance in how it deals with the public interest. Previous decisions of the Ombudsman under the FOI Act will be of some assistance in many situations, but their relevance will have to be considered with care. The same is true of other secondary materials that may have been useful in dealing with the FOI Act.

The design of the RTI Act has been greatly influenced by the *Right to Information Act 2009* in Queensland, and the law reform work that led to it, so some guidance might be obtained from a couple of Queensland websites, particularly that of the Office of the Information Commissioner, Queensland.

Because of the caution that needs to be exercised in using secondary materials with this new legislation, and because of the caution that needs to be exercised in using secondary materials generally, there are three parts to the remaining part of this Chapter - one dealing with links which are closely related to the RTI Act; one dealing with links which are more closely related to the FOI Act; and one dealing with additional links which may be found helpful.

## **11.2 Recommended RTI resources**

The following links are provided:

The RTI Act :

[http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc\\_id=70%2B%2B2009%2BAT%40EN%2B20100701000000;histon=;prompt=;rec=;term=right](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=70%2B%2B2009%2BAT%40EN%2B20100701000000;histon=;prompt=;rec=;term=right)

The *Right to Information Regulations 2010*:

[http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc\\_id=%2B51%2B2010%2BAT%40EN%2B20100701000000;histon=;prompt=;rec=;term=right](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=%2B51%2B2010%2BAT%40EN%2B20100701000000;histon=;prompt=;rec=;term=right)

The *Acts Interpretation Act 1931* :

[http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc\\_id=59%2B%2B1931%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=interpretation](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=59%2B%2B1931%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=interpretation)

The second reading speech made when the *Right to Information Bill 2009* was presented to Parliament (see Annexe B from the Bill and clause notes).

The Parliamentary debates in the House of Assembly :

<http://www.parliament.tas.gov.au/HansardHouse/>

The Parliamentary debates in the Legislative Council :

<http://www.parliament.tas.gov.au/HansardCouncil/>

The RTI page on the Ombudsman Tasmania website :

[http://www.ombudsman.tas.gov.au/right\\_to\\_information2/rti\\_process](http://www.ombudsman.tas.gov.au/right_to_information2/rti_process)

The Office of the Information Commissioner, Queensland :

<http://www.oic.qld.gov.au/>

The Right to Information page on the website of the Department of Premier and Cabinet, Queensland :

<http://www.premiers.qld.gov.au/right-to-info.aspx>

## **11.3 Recommended FOI resources**

The FOI Act :

[http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc\\_id=22%2B%2B1991%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=freedom%20of%20information](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=22%2B%2B1991%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=freedom%20of%20information)

The *Freedom of Information Regulations 2001* :

[http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc\\_id=%2B39%2B2001%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=freedom%20of%20information](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=%2B39%2B2001%2BAT%40EN%2B20100630000000;histon=;prompt=;rec=;term=freedom%20of%20information)

Decisions of the Tasmanian Ombudsman under the FOI Act :

<http://www.ombudsman.tas.gov.au/home>

Australasian Legal Information Institute - extensive legal resources from all jurisdictions in Australasia :

<http://www.austlii.edu.au/>

Office of the Information Commissioner, Queensland

FOI Concepts - <http://www.oic.qld.gov.au/foi-concepts>

Decisions under the former *Freedom of Information Act 1992* (Qld) :

<http://www.oic.qld.gov.au/decisions>

WA – Office of the Information Commissioner

<http://www.foi.wa.gov.au/dnn/home.aspx>

Commonwealth Freedom of Information Guidelines

<http://www.dpmc.gov.au/foi/guidelines.cfm>

Moir Paterson, *Freedom of Information and Privacy in Australia*,  
Butterworths, 2005

## **11.4 Other Links**

NSW - Office of the Information Commissioner

<http://www.oic.nsw.gov.au/>

NT – Office of the Information Commissioner

<http://www.nt.gov.au/justice/infocomm/>

UK Information Commissioner's Office

<http://www.ico.gov.uk/>



## **Appendix A**

### ***Sample Application form***

## Right to Information Act 2009

### Application for Assessed Disclosure

#### Applicant's Details:

Name:

Title:

Postal Address:

#### Daytime contact information:

Telephone:

Business

Home

Mobile

Email:

#### Public authority or Minister applied to:

#### General topic of information applied for:

(one sentence summary of information requested)

#### Description of efforts made prior to this application to obtain this information:

**Application fee included (please tick)**

**OR**

**Application  
for waiver:**

Member of  
Parliament

Impecunious  
applicant

General public  
interest or benefit

**If application for personal information, proof of identity provided (please tick)**

**Details of the Information sought:**

(If there is insufficient room in the space provided please attach further details.)

**Applicants Signature:**

**Date:**

## Information about assessed disclosure under the Right to Information Act 2009

### Object of the Act

Section 3 of the Act includes this statement of the objects of the 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.*

### Applications for assessed disclosure

- Applications are to be addressed to:  
[insert address here]
- Applications are to be made in writing and include the information required by Regulation 4 of the *Right to Information Regulations 2010*.
- Applications are to be accompanied by the application fee. This fee is 25 fee units, which is \$34.00 as at 1 June 2010 and is indexed annually.
- An applicant can apply for the application fee to be waived where the applicant is a Member of Parliament in the pursuit of their official duty; where the applicant is impecunious; and where the information sought is intended to be used for a purpose that is of general public interest or benefit

### Responsibilities of the public authority

- Applicants are to be notified of the decision on an application for assessed disclosure within 20 working days of the application being accepted by the public authority.
- Before the application is accepted, the public authority has a maximum of 10 working days to negotiate with the applicant to further define the application.
- If a need to consult with a third party arises, a further 20 working days will be allowed in addition to the original 20 days.
- If these time limits are not conformed with, the application will be deemed to be refused and the applicant may apply to the Ombudsman for a review of that decision.



## **Appendix B**

### ***Right to Information Bill 2009***

### ***Second Reading Speech and Clause Notes***

Available online