



Environmental
Defenders Office



TRANSPARENT FAILURE

Lutruwita/Tasmania's ineffective right to information system and how to fix it

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Acknowledgement of Country

EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

We pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

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Executive Summary

Public access to environmental information is critical to securing and maintaining a healthy environment. Without ready access to government information about the environment and decisions that may affect it, the work of those trying to protect the environment, such as EDO and its clients, is severely undermined.

The importance of access to environmental information has been recognised by the United Nations Special Rapporteur to the Human Rights Council. Principle 7 of the Framework Principles on Human Rights and the Environment calls on States to provide “affordable, effective and timely access to [environmental] information to any person upon request”.¹ This Framework Principal recognises that public access to environmental information is essential for the community to understand how environmental harm may undermine human rights, including the rights to life and health. Access to environmental information also supports the exercise of other human rights, including the rights to expression, association, participation and remedy.²

There is a mounting perception that lutruwita/Tasmanian government departments and authorities are increasingly willing to use exemptions under lutruwita/Tasmania’s *Right to Information Act 2009 (RTI Act)* to obstruct public access to information, particularly where that information might be damaging to either the government or industries that it regulates.

In response to these widespread observations, EDO has undertaken an in-depth analysis of the application of the RTI Act to determine if its stated object of improving democratic government in lutruwita/Tasmania is being achieved.³

Our analysis confirms that lutruwita/Tasmania’s right to information regime is foundering; public authorities are failing to give effect to the objects of the RTI obligations by providing access to information. In fact, lutruwita/Tasmania has Australia’s highest error rate in the interpretation of right to information legislation by public authorities and Australia’s highest rate of refusal to grant access to information. EDO has also found that Tasmanians will also experience delays of nearly three years for external review of RTI decisions.

In this report, EDO draws on its experience helping clients to use the RTI Act to identify the critical problems with the Act and how it is being implemented. We then provide a practical response to these issues currently plaguing the system.



Key Findings

- 1** Despite the Government's commitment to increased transparency, lutruwita/Tasmania continues to have Australia's lowest rate of RTI applications being granted in full.
- 2** In four out of the five most recent reporting years, at least 70% of RTI decisions have been overturned by the Tasmanian Ombudsman, either in full or in part, which demonstrates that public authorities are consistently misapplying the RTI Act to deny public access to information (see table 2).
- 3** In the last year for which records are available (2021/22), public authorities misapplied parts of the RTI Act in nearly every decision reviewed by the Ombudsman (see figures 3, 4 and 5).
- 4** The average time it takes to challenge the decision of a public authority denying access to information by seeking an external review by the Tasmanian Ombudsman has blown out from an average of 230 days in 2016/17 to 987 days in 2021/22 (see figure 6).
- 5** Since 2012, there has been an almost linear increase in the number of RTI external review applications filed each reporting period (see figure 7). However, there has been no marked change in the number of RTI external reviews concluded by the Tasmanian Ombudsman over the same period (see figure 8). This has resulted in a growing backlog of undecided RTI external review applications (see figure 9).
- 6** Despite this growing workload and backlog of RTI external review applications to process, the total revenue of the Ombudsman's Office has, when adjusted for inflation, remained relatively constant between 2012/13 and 2021/22 (see figure 10).
- 7** While more staff within the Tasmanian Ombudsman's office have recently been dedicated to the external review of RTI Act decisions, the efficiency of processing these reviews has not increased by an equivalent rate (see figure 11).
- 8** Close to half of the time it takes for the Tasmanian Ombudsman's Office to complete the external review of an RTI decision is attributable to the review being stalled in "draft" at the "preliminary review stage". This suggests that more senior staff are needed by the Tasmanian Ombudsman to ensure that reviews can be completed in a timely manner.
- 9** There is a need for the RTI Act to be reviewed and amended to better facilitate public access to government information.
- 10** Further funding and resources are required to enable both public authorities and the Tasmanian Ombudsman's Office to fulfil their obligations under the RTI Act.



Summary of Recommendations

Recommendation 1: The RTI Act be amended to include an express statement requiring routine and active release of information to be the preferred method of disclosure of government information.

Recommendation 2: The RTI Act be amended to introduce an explicit presumption that all information sought under the Act is disclosable to a member of the public. The presumption will only be rebutted where the public authority is satisfied that the information falls into a category of exempt information under the Act and, where applicable, that it would be contrary to the public interest to disclose the information.

Recommendation 3: An independent review of existing exemptions from disclosure under the RTI Act be undertaken with a view to recommending amendments to clarify commonly misunderstood or misapplied provisions.

Recommendation 4: The RTI Act be amended to provide a review period of 30 days to replace or qualify the current provision that an external review be resolved “as soon as reasonably practicable”.

Recommendation 5: The RTI Act be amended to remove the requirement that the Ombudsman provide a “preliminary decision” to public authorities and Ministers where a decision is adverse to them and invite their input.

Recommendation 6: The RTI Act be amended to provide the Tasmanian Civil and Administrative Tribunal (TasCAT) with jurisdiction for external review of assessed disclosure decisions, as an alternative and/or consecutive to a review by the Ombudsman.

Recommendation 7: A comprehensive audit of the management and release of government information be conducted, with a focus on incorporating “technology-assisted” compilation and review of information.

Recommendation 8: The Ombudsman’s Office or another suitably qualified independent body be engaged to provide training to public authorities that focuses on the appropriate application of the RTI Act’s exemptions and the public interest test. To the extent the Ombudsman’s Office is engaged for that purpose, the State Government must provide commensurate additional revenue.

Recommendation 9: The Ombudsman be required to publish all decisions on external review applications.

Recommendation 10: Additional resources should be deployed to the RTI jurisdiction of the Tasmanian Ombudsman’s Office as a matter of urgency to arrest and reverse the growing backlog of external review applications.

Recommendation 11: Resourcing and staff distribution in the Ombudsman’s Office (and particularly the RTI section) take into account the demonstrated need for the Office to have sufficient officers at both junior (drafting) and senior (settling/making) levels.

Recommendation 12: The RTI Act be amended to require regular independent reviews of its operation and implementation.

1 Introduction



The RTI Act is to “improve democratic government in Tasmania” by increasing the accountability of, and public participation in, the governance of lutruwita/Tasmania and by acknowledging that information collected by public authorities “is collected for and on behalf of the people of Tasmania...”⁴ However, there is strong evidence that the RTI system is failing at every level to achieve this important goal.

In his 2019/20 annual report, the Tasmanian Ombudsman Richard Connock found that lutruwita/Tasmania had the highest rate of refusal for RTI applications in the country:

“Tasmania’s public authorities refused access to any information in 30% of their 2018-19 RTI decisions. This rate of refusal was nearly twice that of the next highest jurisdiction (Queensland at 16%) and 750% that of Australia’s most open jurisdictions (Victoria and the NT both at 4%). Tasmania’s percentage of refusals in full has been increasing each year since 2016-17 when it was 15%.^{5”}

lutruwita/Tasmania also has a disappointing record when it comes to the provision of information within statutory timeframes. In 2020/21 it was the second-worst jurisdiction in Australia for making decisions on information requests on time, and it has consistently been in the bottom three jurisdictions in this respect since 2014.⁶

There are two key complaints about the operation of the RTI Act.

- (1) When a request for information is made to a public authority or Minister’s office (hereafter, referred to collectively as “public authority”), it is common for the decision-maker to apply the Act in a way that prevents disclosure, often incorrectly. This leads to the perception of a growing “culture of secrecy” where public authorities are actively preventing proper scrutiny of public administrative decision-making.
- (2) It takes on average nearly three years for an application for access to information to be finalised when it proceeds to an external review by the Tasmanian Ombudsman. In the event information is ultimately released, it may no longer be of any use.

Both problems have received widespread media coverage and a commitment to improved transparency and accountability by Government,⁷ yet this attention has not translated to a perceptible change in how RTI applications are processed by public authorities or the Tasmanian Ombudsman’s Office.

The difficulties experienced gaining access to government information have real consequences for Tasmanians seeking to exercise their democratic rights. For example, in the environmental context, getting access to government information can be critical to informing public comment on proposed uses or developments impacting on

the environment, or where a person is seeking civil enforcement orders to address unlawful environmental harm or unlawful developments.

Most environmental and resources legislation in lutruwita/Tasmania provides for the regulator to keep a register of certain documents, such as permits, notices and approvals, that may be searched by the public on payment of a prescribed search fee.⁸ An increasing amount of this registered information can now be found using an online mapping tool called the Land Information System Tasmania (or “the LIST map”) or other online registers.⁹ However, there remains some important information that is not generally publicly available. Such information includes: environmental plans, annual reports and environmental monitoring data for large industries, leases and licences for public lands and waters, and development permits granted by local governments.

Under the RTI Act, there is a presumption that “a person has a legally enforceable right to be provided ... with information in the possession of a public authority or a Minister unless the information is exempt information”.¹⁰ In EDO’s experience, applications under the RTI Act for environmental information not otherwise publicly available are routinely refused in whole or in part.

Most of this information is regulatory in nature, meaning that it is required to be prepared, submitted or held under a legislative requirement. Arguably, there is a strong prima facie argument that the public interest weighs in favour of the information being available to the public to scrutinise to ensure that public authorities are properly enforcing the law, and those they regulate are adhering to it. This presumption is even stronger where those same laws provide for “self help” legal remedies entitling people to complain to or seek orders from administrative decision-makers or tribunals.¹¹

Despite this, public access to such information is often refused on the basis that the documents were provided to the authority “in confidence”, or the release of the information may have an adverse impact on the business affairs of the regulated company.¹²

Much of the environmental information not publicly available is held by the Department of Natural Resources and Environment (NRE) (formerly the Department of Primary Industries, Parks, Water and the Environment or DPIPWE). The Environment Protection Authority was, until recently, a division of DPIPWE. Disappointingly, NRE/DPIPWE consistently ranks in the top 3 of lutruwita/Tasmania’s worst performing agencies for the number of its RTI decisions which are subject to external review requests to the Ombudsman for the years 2017 to 2022. Of all the Ombudsman’s reviews of NRE/DPIPWE decisions in this period, none of the decisions were upheld in full.¹³

These problems are exacerbated by the length of time it takes for the Ombudsman to review a public authority’s decision to refuse or partly refuse an application, or its failure to make a decision.

Case study 1

In one case, an EDO client sought information concerning the scientific monitoring of the release of contaminants from a salmon hatchery into a public waterway and information about any compliance and enforcement action undertaken by the EPA. Only part of the requested information was provided by DPIPWE, with the remainder being redacted on the basis that it was exempt because it had been obtained by the regulator “in confidence” and related to the business affairs of a third party.

It took EDO’s client 842 days to receive the Ombudsman’s decision on their external review request granting them access to additional relevant information. In his decision, the Ombudsman found that the data sought: “is essential to the proper regulation of the health of the Russell River by the EPA”. However, the 842-day wait for the information meant any opportunity to pursue legal avenues which have been open on the facts and circumstances of that case had lapsed.

Case study 2

In another case, a client sought information concerning a marine farm sublease application and a copy of the sublease for a new salmon farm located at Okehampton Bay, on lutruwita/ Tasmania’s east coast. It took our client 1104 days to receive an external review decision from the Ombudsman granting access to the information, by which time all the other statutory approvals for the salmon farm had been granted, and it was too late to be of assistance to our client in taking part in statutory processes or public comment.

Case study 3

On 10 April 2018, an EDO client applied to DPIPWE for information concerning a proposed private development of a 10-hectare island in the Tasmanian Wilderness World Heritage Area for the purposes of helicopter-accessed visitor accommodation. The information requested included copies of two exclusive leases, and details about the cost of rent for the island. The application for the information was made in the context of the development proponent applying for various approvals for the controversial proposal and was aimed at informing our client’s comment in a statutory assessment processes.

Of the 117 pages that were identified by DPIPWE as being relevant to the request, 107 were exempted in full on the basis that they were included in a brief to the Minister, contained personal information of another person or included information that was obtained in confidence. The internal review of that decision (which was made outside the statutory timeframes) resulted in even less information being released to our client, with only 2 pages of the 117 made available. The internal review decision relied upon different bases for exemption, but again found that the leases should be exempted because they were information obtained in confidence.

On 16 November 2018, the applicant requested the Ombudsman conduct an external review of the decision. A year later, the Ombudsman’s office still had not finalised the review and had increased its estimate of the time it would take to complete the review from 568 days to 1034 days. On 16 October 2019, 11 months after the Ombudsman commenced an external review, our client wrote to the Parliamentary Joint

Standing Committee on Integrity to complain about the lengthy delay and lack of any meaningful time frame to conclude the process. On 2 December 2019, the applicant received confirmation that the Committee had received the correspondence and was making inquiries about the matters raised.

On 30 January 2020, 440 days after the external review request was confirmed, the Ombudsman ultimately determined that 106 further pages should be released to the applicant, including information about the rent charged under the leases for the island and copies of the leases, because the information was not obtained in confidence.

The Ombudsman observed that some of the information had already been revealed to the applicant through legal proceedings where the proponent was challenging the local council's decision not to grant a permit for the proposal (the applicant was a party joined to the proceeding).

The Ombudsman also observed that had DPIPWE applied other potential applicable exemptions, those exemptions would have faced a high threshold due to the public interest in the provision of information about third party businesses utilising World Heritage land for profit.

This decision highlights that information which is of great public interest, and that that is relevant to informed participation in statutory decision-making processes is being denied to members of the public under the RTI Act. It also demonstrates that members of the public must wait an extended period of the Ombudsman to overturn decisions made in error, even where that might mean that the information cannot be used for the purpose it was originally sought.

Photo by Nic Fitzgerald.

Tasmanians seeking crucial information under the RTI Act in order to exercise their rights, whether under environmental and planning laws or in relation to any government business, clearly face an uphill battle.

In this report, EDO provides a brief outline of how the RTI Act is currently framed and is intended to operate. We then analyse data from a range of sources to identify the key problems with how the RTI Act system is being implemented by public authorities and the Tasmanian Ombudsman's Office. Finally, we provide a set of practical actions that can be taken to address the shortcomings in Tasmania's RTI system, so that it facilitates the fundamental democratic requirements of transparency and accountability.



2 THE RTI ACT



2.1 Objects and legislative history of the RTI Act

The RTI Act repealed the former *Freedom of Information Act 1991* (Tas) in 2009.¹⁴ The RTI Act was the culmination of a “ten-point plan to strengthen trust in democracy and political processes in Tasmania” announced by then-Premier David Bartlett in August 2008.¹⁵ The RTI Act was intended to facilitate a “major culture change”, support the “push” model of proactive disclosure and:

...change the prevailing view that this sort of legislation is a means to block the disclosure of information, instead of a means to encourage and streamline disclosure with a framework of protection in limited circumstances.¹⁶

The clear legislative intent of RTI Act was to enhance transparency in public authorities’ decision-making by providing that information held by public authorities would be actively disclosed to the public, subject to limited exemptions. It was intended that assessed disclosure (i.e. the making of an application for disclosure of information) would be a last resort that would “rarely be necessary”.¹⁷

The Parliament’s intention to maximize the amount of information to be disclosed was said to be reflected in the Act’s object:¹⁸

- (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);
 - (b) and 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.

To facilitate the achievement of the above object, the RTI Act provides a series of procedures relating to access to government information. These are set out below.

Photo by Dan Broun.

2.2 How is the RTI Act meant to work?

The general framework of the RTI Act has much in common with freedom of information laws in most other Australian jurisdictions.¹⁹

Generally, under the RTI Act:

- (a) A person has a legally enforceable right to be provided, in accordance with the Act, with information in the possession of a public authority or a Minister unless that information is exempt information.
- (b) There are four key types of information disclosure:
 - i. Required disclosure - for information which is required by law to be publicly available;
 - ii. Routine disclosure - for information which the public authority decides to routinely release;
 - iii. Active disclosure - for information which a public authority releases on request, but without a formal application; and
 - iv. Assessed disclosure - for all other information upon the receipt of a formal application under the RTI Act.
- (c) Assessed disclosure should be the option of “last resort”.





- (d) A formal, written RTI application must be lodged for information to be released under assessed disclosure. There is a one-off fee associated with such an application (currently \$42.50). This fee may be waived where the application has been lodged by a member of Parliament, a journalist, where the applicant can demonstrate they are “impecunious”, or where a person can demonstrate they intend “to use the information for a purpose that is of general public interest or benefit”.
- (e) Applications for assessed disclosure must generally be decided “as soon as practicable”, but not later than 20 working days after the application has been accepted. The public authority may have an additional 20 working days to process the application if they have to consult with any third parties. The time to process an application may also be extended with the agreement of the applicant, or by the Ombudsman where it is complex and/or voluminous.
- (f) A formal RTI application may be refused outright because it is too broad, it is a repeat or vexatious application, or because it is a type of “exempt information” prescribed by the Act. We explain the types of exempt information at 2.2 below.
- (g) The public authority must provide reasons for any decision not to release information, including the public interest considerations on which the decision is based (if any).
- (h) If a person is dissatisfied with the outcome of their RTI application, for example, because the information has either been fully or partly redacted, they can seek the review of that decision. If the decision was made by a delegate of the principal officer of the public authority or Minister, a person must first seek review of that decision through an internal review within that public authority or by the Minister (or another delegate). If the person is dissatisfied by the outcome of the internal review decision, only then may he or she apply to the Tasmanian Ombudsman for external review. We consider the external review provisions in detail at 2.3.2.
- (i) Both internal and external review requests must be lodged within 20 working days of the decision the applicant seeks to have reviewed. While an internal review decision must be made within 20 working days (as may be extended in the same way as outlined in (e) above), there is no deadline for the Ombudsman’s external review decision. The RTI Act only requires the Ombudsman to resolve such applications “as soon as practicable”.

Above, right: Photo by Arwen Dyer.

2.3 Exemptions and refusals

Certain provisions of the RTI Act may be invoked by public authorities to deny an applicant access to information. The provisions fall into two broad categories: provisions that confer on a public authority the power to refuse an application for assessed disclosure (**refusal provisions**), and provisions that exempt certain information from disclosure (**exemption provisions**).

2.3.1 Refusal provisions

A public authority can refuse an application for information when:

- (a) The information is held by certain public authorities including, for example, a court or tribunal;
- (b) The information may be inspected by the public in accordance with another Act, including information that may be purchased at a reasonable cost;
- (c) The information sought is in electronic form and cannot be produced using the normal computer hardware and software or technical expertise of the public authority, and producing it would substantially and unreasonably divert the resources of the public authority;
- (d) The information is otherwise available or will become available within 12 months of the date of the application;
- (e) Providing the information would substantially and unreasonably divert the resources of the public authority from its other work or (if the public authority is a Minister) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions;

- (f) The application seeks information that is the same or similar to information previously sought and the application does not disclose a reasonable basis for again seeking that information, or if the application is vexatious.

Most of the refusal provisions are absolute, which means that, where a public authority is satisfied they apply, there is no consideration of the public interest in the information sought or exercise of any discretion.

2.3.2 Exemption provisions

The exemption provisions can be absolute, where there is no discretion to release the information, or conditional, where the public authority must release the information unless it considers that disclosure would be contrary to the public interest.

The most commonly used absolute exemptions apply to:

- (a) Opinions, advices or recommendations prepared by an officer of a public authority or records of consultations or deliberations between officers of public authorities, prepared for the purposes of providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.
- (b) Information that relates to law enforcement and includes information that would: prejudice an ongoing investigation of fair trial; enable a person to ascertain confidential sources of law enforcement information; or disclose investigative methods or procedures.
- (c) Information that is the subject of legal professional privilege.

The most commonly used conditional exemptions apply to:

- (a) Information (other than purely factual information) prepared in the course of, or for the purposes of, the deliberative processes related to the official business of a public authority.
- (b) Personal information of a person other than the person making the application for assessed disclosure.
- (c) Information that relates to the business affairs of a third party, and either relates to trade secrets or is of a nature such that disclosure of the information would be likely to expose the third party to competitive disadvantage.
- (d) Information communicated by or on behalf of a person or government to a public authority and disclosure of the information would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.

Where a public authority finds that information is covered by a conditional exemption, it must consider the 25 “public interest” matters listed in schedule 1 of the RTI Act. For example, these include considerations relating to the need for the information to be publicly accessible, whether the information would contribute or hinder public debate, and whether the disclosure would promote or harm the environment or ecology of the State.

In weighing whether information would be contrary to the public interest to disclose, the public authority is explicitly *prohibited* from considering:

- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
- (b) 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;
- (c) that disclosure would cause a loss of confidence in the government;

(d) 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.

Matters Relevant to Assessment of Public Interest under RTI Act

- 1** the general public need for government information to be accessible;
- 2** whether the disclosure would contribute to or hinder debate on a matter of public interest;
- 3** whether the disclosure would inform a person about the reasons for a decision;
- 4** whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- 5** whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- 6** whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- 7** whether the disclosure would enhance scrutiny of government administrative processes;
- 8** whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- 9** whether the disclosure would promote or harm public health or safety or both public health and safety;
- 10** whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- 11** whether the disclosure would promote or harm the economic development of the State;
- 12** whether the disclosure would promote or harm the environment and or ecology of the State;

Opposite: Photo by Nic Fitzgerald.



- 13 whether the disclosure would promote or harm the interests of an individual or group of individuals;
- 14 whether the disclosure would prejudice the ability to obtain similar information in the future;
- 15 whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- 16 whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- 17 whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- 18 whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- 19 whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- 20 whether the applicant is resident in Australia;
- 21 whether the information is wrong or inaccurate;
- 22 whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- 23 whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- 24 whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- 25 whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

2.4 Review of RTI decisions

As outlined above, the RTI Act provides for two tiers of review.

The first tier is **internal review** where the principal officer must, as soon as practicable, make a fresh decision personally or arrange for a different delegated officer to make a fresh decision. The procedure to be followed for an internal review of an RTI application is generally the same as for the original decision.

The second tier is **external review** by the Tasmanian Ombudsman. In these external review requests, the public authority bears the onus to prove that the information should not be disclosed.

The RTI Act does not prescribe a timeframe or a procedure to be followed in an external review; the Ombudsman is vested with broad powers to “decide on the process for dealing with a review” to resolve an application “as soon as reasonably practicable”. However, where the Ombudsman intends to make a review decision that is adverse to a public authority, the Ombudsman must provide a draft of the decision to the public authority and seek its input before finalising the decision.

As a result, the Ombudsman is regularly required to make a “preliminary decision”, on which input from the public authority is sought, followed by a “final decision” once that input is received and considered.

Given the noble ambition Parliament had for the RTI Act when it was introduced, and the detailed procedures under the Act for the facilitation of access to government information, the resounding criticism of the implementation of the Act raises the question: what went wrong?

3 WHERE, WHEN AND HOW DO THE RIGHT TO INFORMATION PROBLEMS ARISE?



To identify with greater precision what aspects of the RTI system are failing, EDO gathered and analysed data from the following sources:

- (a) Statistics compiled by the Ombudsman's Office in relation to its decisions in the 2017/18, 2018/19, 2019/20, 2020/21 and 2021/22 reporting years on RTI external reviews (**Ombudsman's Statistics**);²⁰
- (b) The published decisions of the Ombudsman in relation to external reviews under the RTI Act from 2016 to July 2022 (**Ombudsman's Decisions**);²¹
- (c) The Ombudsman's annual reports, published pursuant to s 30 of the Ombudsman Act 1978 (Tas) and available on the Ombudsman's website (**Ombudsman's Annual Reports**);²²
- (d) Documents produced by the Ombudsman in response to three RTI applications made by Mr Ben Bartl of Community Legal Centres Tasmania and to questions from EDO (**Ombudsman's RTI Documents**);²³
- (e) The Department of Justice's annual reports in relation to the administration of the RTI Act (**DOJ RTI Annual Reports**).²⁴

Our analysis of this data is not confined to applications of the RTI Act that relate to a single public authority or to environmental and resources decision-making and regulation. This is because the anecdotal observations and media reporting that prompted our examination of the issue suggest a wider problem. However, the general trends explained below are of equal application in the environmental and resources sphere.

Our analysis is divided into two sections: the analysis of public authorities' RTI decisions and the analysis of the Ombudsman's external review process.

3.1 Analysis of public authorities' RTI decisions

3.1.1 Trends in the proportion of granted RTI applications

The DOJ RTI Annual Reports include statistics about the number of RTI applications filed, decided and granted in full. These are shown in Table 1.

Reporting Period	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
RTI applications decided	817	691	952	889	1016	785	797	867	1141	1615
Granted in full	303	261	356	346	309	248	238	281	399	672

Table 1: Number of RTI applications filed, decided and granted in full

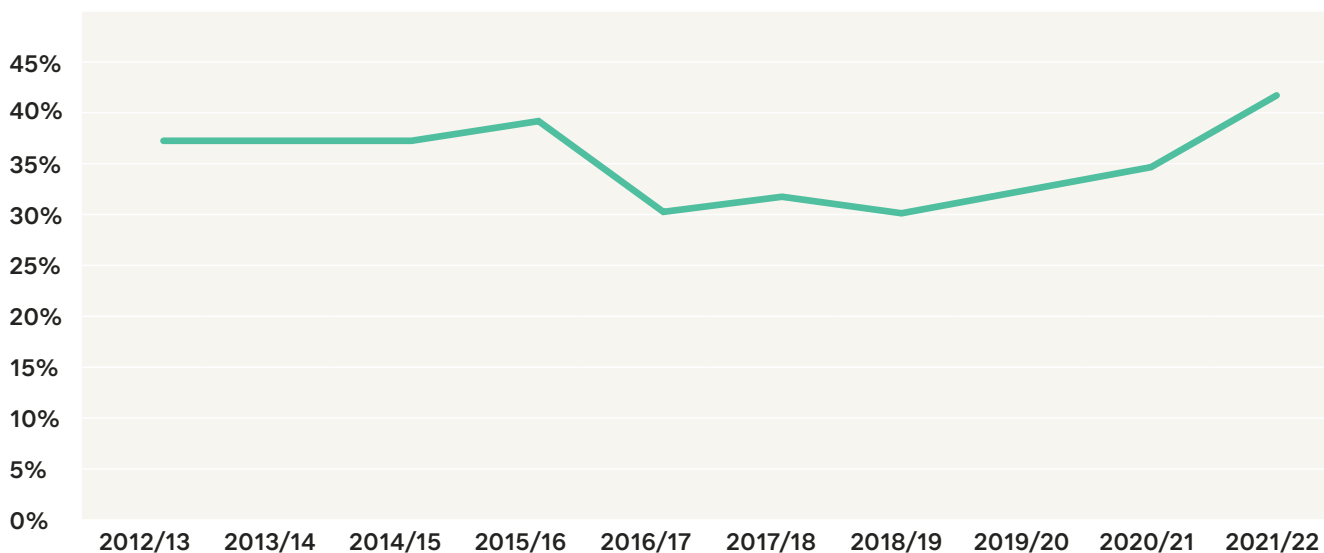


Figure 1: Percentage of RTI applications granted in full by public authorities

— Percentage of RTI applications granted in full

The results suggest that public authorities have remained reluctant to grant RTI applications in full.

The questions then arise as to how public authorities are using the RTI Act to refuse access to information, and whether they are applying the RTI Act correctly?

3.1.2 Do public authorities apply the RTI Act correctly?

In order to determine how accurately public authorities are applying the RTI Act to deny access to government information, we analysed the Ombudsman's published decisions relating to external review applications.

We used the outcome of external reviews conducted by the Ombudsman as an indicator of how well public authorities apply the RTI Act. That is, if the Ombudsman affirmed an authority's decision in relation to a particular exemption, that indicated the agency applied the exemption correctly. If the Ombudsman overturned or varied an authority's decision in relation to a particular exemption, that indicates the authority applied the exemption incorrectly.²⁵

Using the Ombudsman's system of categorising decision outcomes, there are four possible outcomes for an external review:

- (a) **Affirmed** – this means that the public authority's entire decision was agreed with by the Ombudsman's Office. The decision was not changed in any way.
- (b) **Set aside** – this means that the public authority's entire decision was overturned by the Ombudsman's Office.
- (c) **Varied** – this means that at least one aspect of the public authority's decision was changed by the Ombudsman. The "varied" outcome does not differentiate between a decision that is almost completely changed and one that is barely changed at all.
- (d) **Other** – this means that the matter did not proceed to a final decision by the Ombudsman. According to the 2021/22 Annual Report, "other" includes "matters not progressed, withdrawn by applicant, negotiated resolution, information released and/or direction for a new decision to be made, or information released".

We acknowledge that a significant limitation of these data is that it they do not present a complete record of RTI decisions made by public authorities – only those in relation to which external review is sought and actually decided. The analysis does not capture:

- (a) any RTI decisions in relation to which external review is not sought; or
- (b) of those RTI decisions in relation to which external review is sought, any matters where the conclusion of the review process falls into the "other" category, which will include all of the external review applications within the Ombudsman's backlog.
- (c) A new category of decision, "Closed on Preliminary View", has been added by the Ombudsman in the 2021/22 Annual Report. This category relates to the provision of a preliminary decision to the external view applicant and the public authority with the intention of seeking an early resolution to the request without the need for a formal decision. As only two external review requests fell within that category in 2021/22 the following analysis does not address it.

The decisions externally reviewed by the Ombudsman's office represent only a very small subset of the total number of RTI applications made and determined by public authorities each reporting period. Between 2015/16 and 2021/22,

the resolved external review matters comprised on average around 1.6% of RTI applications decided by public authorities.²⁶

This small sample of RTI applications that proceed to external review may not be representative of the broader pool of decided RTI applications; they are likely to be more complex and contentious in nature. They may involve difficult applications of the public interest test in relation to which reasonable minds might differ. However, we do not consider that these limitations undermine the importance of using these data as an evaluation tool. It is vital that public authorities apply the RTI Act correctly where members of the public seek information about contentious matters and where the public interest is a complex and contested consideration.

3.1.3 Decisions set aside or varied by the Ombudsman

The Ombudsman's Annual Reports provide general details about the number of public authorities' decisions affirmed, varied or overturned by the Ombudsman. Subject to the limitations identified above, these statistics give a snapshot of how often public authorities are incorrect in their application of the RTI Act. What this small sample clearly demonstrates is an extraordinarily high level of errors by public authorities in those decisions proceeding to external review, with the majority of decisions varied or set aside.

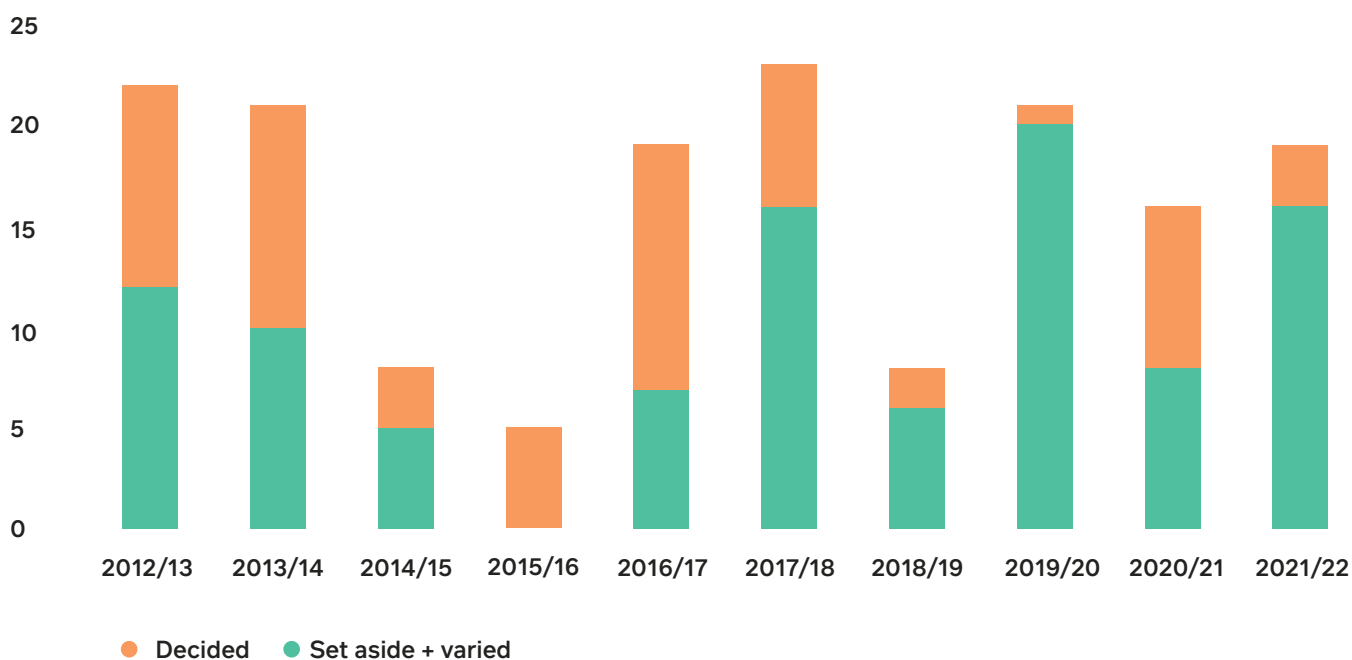


Figure 2: Proportion of externally reviewed RTI decisions that were set aside or varied

Figure 2 demonstrates the proportion of RTI external reviews in which a public authority's decision was set aside or varied. The height of the yellow bar shows the number of external reviews in each reporting period, and the height of the green bar shows the number of external reviews that resulted in the Ombudsman setting aside or varying the public authority's decision. The higher the ratio of green to yellow, the greater the proportion of varied or set aside decisions.

With the notable exception of 2015/16, when there were zero decisions set aside or varied, the data reveals that public authorities' RTI decisions are flawed between 35 and 95% of the time. The average error rate between 2012/13 and 2021/22 was 58% (refer to Table 2).

The external reviews provide evidence of an extraordinarily high error rate by public authorities applying the RTI Act. It is concerning that the rate of incorrect decisions has remained at 70% or more in four out of the five most recent reporting years, culminating in the startling 95% error rate in 2019/2020.

Reporting Period	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	Mean
% set aside or varied	55%	48%	63%	0%	37%	70%	75%	95%	50%	84%	58%

Table 2: Percentage of externally reviewed RTI decisions that were set aside or varied



3.1.4 Public authorities' application of RTI Act exemptions

We used the Ombudsman's Statistics and the Ombudsman's Decisions to identify whether particular provisions are responsible for the generally high (and increasing) error rate. Note the data uses the decision outcome classification system explained in section 3.1.2 above.

The Ombudsman's ruling in relation to each exemption invoked by a public authority is considered a separate "decision", which means a number of decisions are recorded for each matter. We call these **Exemption Decisions**. For the purposes of this report, Exemption Decisions include decisions made under the refusal provisions as well as the exemption provisions we explain at [2.3] above.²⁷

The Ombudsman's Office has provided statistics in relation to external review decisions between 2017-18 and 2021-22. In that period, out of 160 Exemption Decisions, 126 were either varied or set aside. This means that of those RTI applications that proceeded to external review between 1 July 2017 and 30 June 2022, on average, public authorities *incorrectly applied exemptions more than three-quarters (79%) of the time*.

The proportion of incorrect Exemption Decisions has remained reasonably consistent across the five reporting periods for which data is available, as shown in Figure 3.

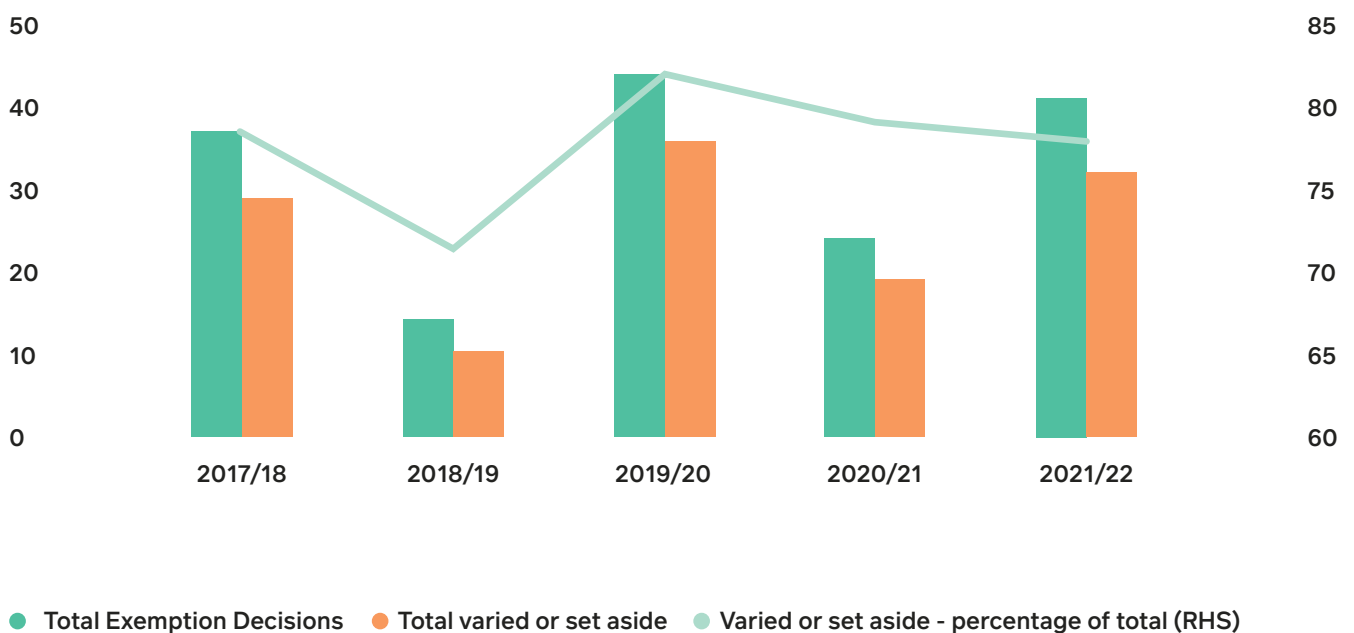


Figure 3: Percentage of Exemption Decisions set aside or varied

Opposite: Photos by Ingrid Christison.



To determine whether there are any exemptions, or classes of exemptions, that public authorities apply particularly poorly, we separated the data on Exemption Decisions into separate groups:

Group 1 - This group contains the Exemption Decisions under Division 1 of Part 2 of the RTI Act, relating to information already in the public domain or that will become available in the next 12 months, or which is in an electronic form that cannot be produced using normal hardware and software. In the period covered by the data, there were two Group 1 Exemption Decisions where an application can be refused in relation to information that is otherwise available or will become available (under s 12 of the RTI Act).

Group 2 - This group contains the Exemption Decisions under Division 2 of Part 2 of the RTI Act. This division of the RTI Act permits a public authority to refuse an application for assessed disclosure if the request would substantially and unreasonably divert the resources of the authority (s19), or is a repeat or vexatious application (s20). Section 17 permits a public authority to defer providing information if the information will be disclosed within 12 months by other means. There were 22 Group 2 Exemption Decisions in the reporting period covered by the data.

Group 3 - This group contains the Exemption Decisions under Division 1 of Part 3 of the RTI Act. This division relates to those exemptions that are not subject to the public interest test, such as for executive council information, Cabinet information, Ministerial briefings, information prejudicial to law enforcement, information subject to legal professional privilege, and information relating to closed Council meetings. There were 43 Group 3 Exemption Decisions in the reporting periods covered by this report.

Group 4 - This group contains the Exemption Decisions under Division 2 of Part 3 of the RTI Act. This division relates to those exemptions that are subject to the public interest test, such as for internal deliberative information, information relating to the business affairs of a public authority or third party, or information obtained in confidence. There were 93 Group 4 Exemption Decisions in the reporting periods covered by this report.

Public authorities applied Group 1 Exemptions Decisions correctly 100% of the time – the Ombudsman affirmed each of the Group 1 Exemption Decisions made in the reporting period. Unfortunately, the same cannot be said of the other classes of Exemption Decisions.

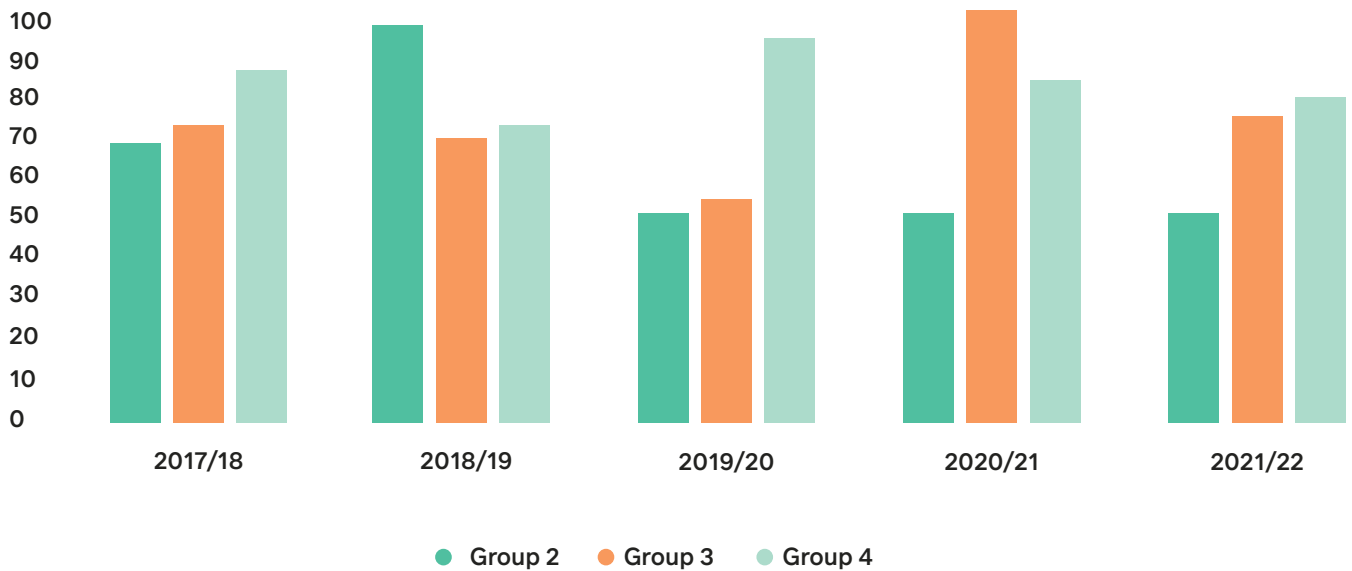


Figure 4: Percentage of Exemption Decisions set aside or varied (by decision class)

Figure 4 graphs the error rate in relation to each exemption class, in each reporting period for which the data exists. It demonstrates that public authorities generally applied Group 4 Exemption Decisions (i.e. exemptions subject to the public interest test) less accurately than the other exemption clauses.²⁸

To investigate how public authorities apply (or misapply) the public interest test further, we analysed all the published decisions of the Ombudsman from 2016 to 30 June 2022, separating each decision into different groups of Exemption Decisions. We then investigated within the Group 4 Exemption Decisions to determine where public authorities go wrong in applying the public interest test.

Before outlining the results of that analysis, we note we are working with a limited sample of RTI decisions, drawn from those subject to an external review application. Further, not all of the Ombudsman's decisions are published, so the data set may not be representative of the full body of decided RTI external reviews. According to the Ombudsman's reports, 106 external reviews were decided between 2016/17 and 2021/22, but only 67 decisions were published on the Ombudsman's website from that period.²⁹ (We address the issue of not all the Ombudsman's decisions being published in our recommendations in section 4 of the report below.)

3.1.5 Public authorities' application of the public interest test

Our analysis of the published decisions supports the trends identified in our analysis in section 3.1.4. Namely, Exemption Decisions which require the application of public interest criteria are applied especially poorly by public authorities. Figure 5 graphs the error rate ascertained from our analysis of the Ombudsman's Decisions, by exemption group.

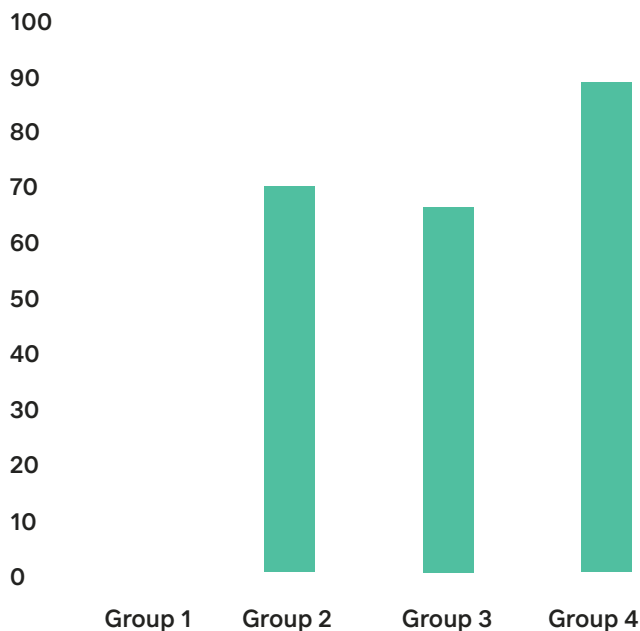


Figure 5: Percentage of Exemption Decisions varied or set aside (by group)

Our analysis shows that of the set aside or varied Group 4 decisions, 54% applied the public interest test incorrectly, and the remaining 46% were set aside or varied because the criteria in the exemption provisions were applied incorrectly.

It is apparent from this analysis that public authorities are failing to properly implement the RTI Act. This may be owing to a poor understanding of how the exemptions operate, or a lack of incentive to give effect to the objects of the Act or, more likely, a combination of both. The extent of the failings revealed by this analysis demonstrates the need for comprehensive review and reform of the system as we set out in section 4.



The lengthy wait for the external review of RTI decisions by the Ombudsman may have also fostered a perception that public authorities will not be held accountable for their decisions. In the next section, we explore the basis for the extraordinary delays in the external review process as part of our examination of the Ombudsman's external review function.

Photo by Nic Fitzgerald.

3.2 Analysis of the Ombudsman's External Review Function

The intersection of poor interpretation of the RTI Act by public authorities and delays of up to three years to review those decisions, means government decision-making and regulation is often kept out of the public gaze. This makes it difficult, if not impossible, for the community to hold those in power to account. In this section, we analyse the Ombudsman's review role in the RTI system with a focus on factors responsible for delays.

We used the following data to assess the exercise of external reviews by the Ombudsman's Office under Pt 4 of the RTI Act:

- (a) The Ombudsman's Statistics;³⁰
- (b) The Ombudsman's Annual Reports;³¹ and
- (c) The Ombudsman's RTI Documents.³²

3.2.1 Time to complete external review

The average time taken for the Ombudsman to conclude an external review has, since 2016/17, increased every year until it peaked in 2020/21. That year, the average time taken for an external review to be concluded by the Ombudsman was 1054 days – almost three years. The data is summarised below in Figure 6.

In the Annual Reports for the reporting periods 2016/17, 2017/18 and 2018/19, the Ombudsman published the average number of days, as at the reporting date, that it took to finalise an application for review. Figures for 2019/20 and 2020/21 are available via the documents produced by the Ombudsman in response to RTIs and questions from EDO. In the 2019/20, 2020/21 and 2021/22 Annual Reports, the Ombudsman provided statistics under the heading "Average Days Open". Figure 8 (p 69 of the Report) indicates that in 2021/22, the "average days open" was between 517 and 622 days. This suggests that the average time taken to complete an external review has remained relatively similar to the average time taken in 2018/19, when the average time was 568 days. However, in response to questions from EDO, the Ombudsman advised us the "average time open" in 2021/22 was 987 days.

It appears the reason for the discrepancy is that the figures for "average time open" have been described differently in the different documents. The figure for "average time open" provided in the 2019/20, 2020/21 and 2021/22 Annual Reports was arrived at by averaging the time that reviews *currently before the Ombudsman* had been open, including those that had not yet been closed. The figures given in the Ombudsman RTI Documents, in response to our questions and in previous Annual Reports was arrived at by averaging the amount of time that reviews finalised in the reporting period had been open. We think this is a better indicator of how long an applicant can expect to wait for an external review to be *finalised*. It is unfortunate that the 2019/20 Annual Report changed the way in which average time open is measured, without explicitly acknowledging that change. This has complicated comparison of the data across reporting periods and is apt to cause confusion.

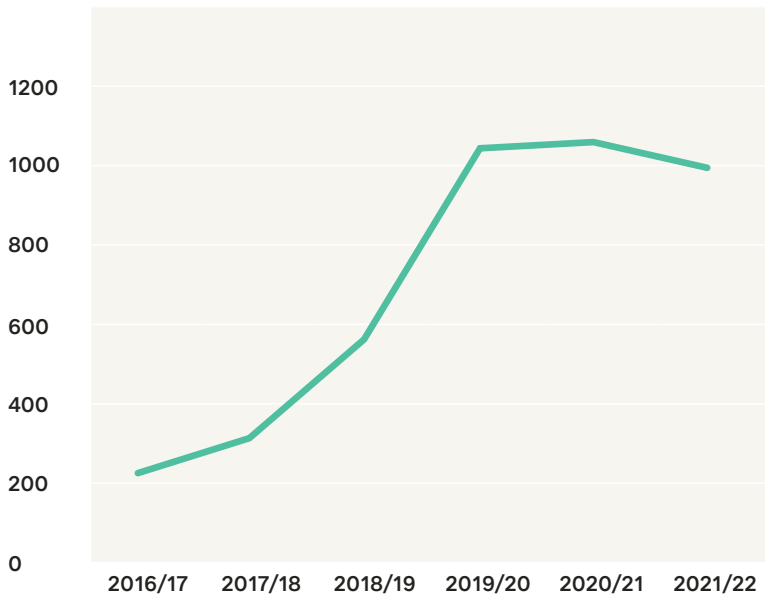


Figure 6: Average number of days that an external review is open

Given the alarming rates of delay for external review, we have sought to identify the cause of these trends in the analysis of the relevant data.

3.2.2 Trends in external reviews filed and completed

There is an approximately linear increasing trend in the number of RTI external review applications filed since 2012/13, as shown in Figure 7.

In Figure 8, the pale green bar represents the total number of reviews concluded in the reporting period. “Concluded” reviews comprise reviews that are decided by the Ombudsman (orange), and those that fall into the “other” category (dark green).³³ There are no clearly identifiable trends in the number of RTI applications concluded by the Ombudsman throughout the period covered by the report. Overall, and despite some significant variation as between reporting periods (most notably in 2016/17), the number of reviews concluded each year has remained relatively stable.

Top: Photo by Ingrid Christison.
Middle and bottom: Photos by Nic Fitzgerald.



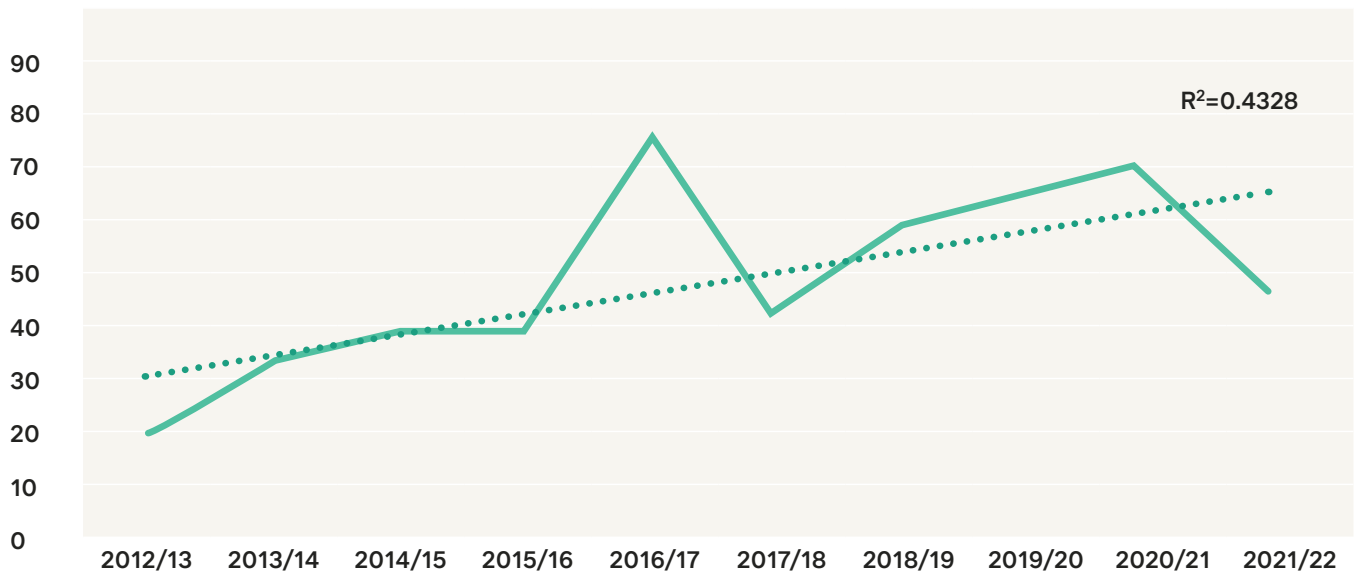


Figure 7: Number of external review applications filed with the Ombudsman

The number of external reviews finalised per reporting period is shown in figure 8.

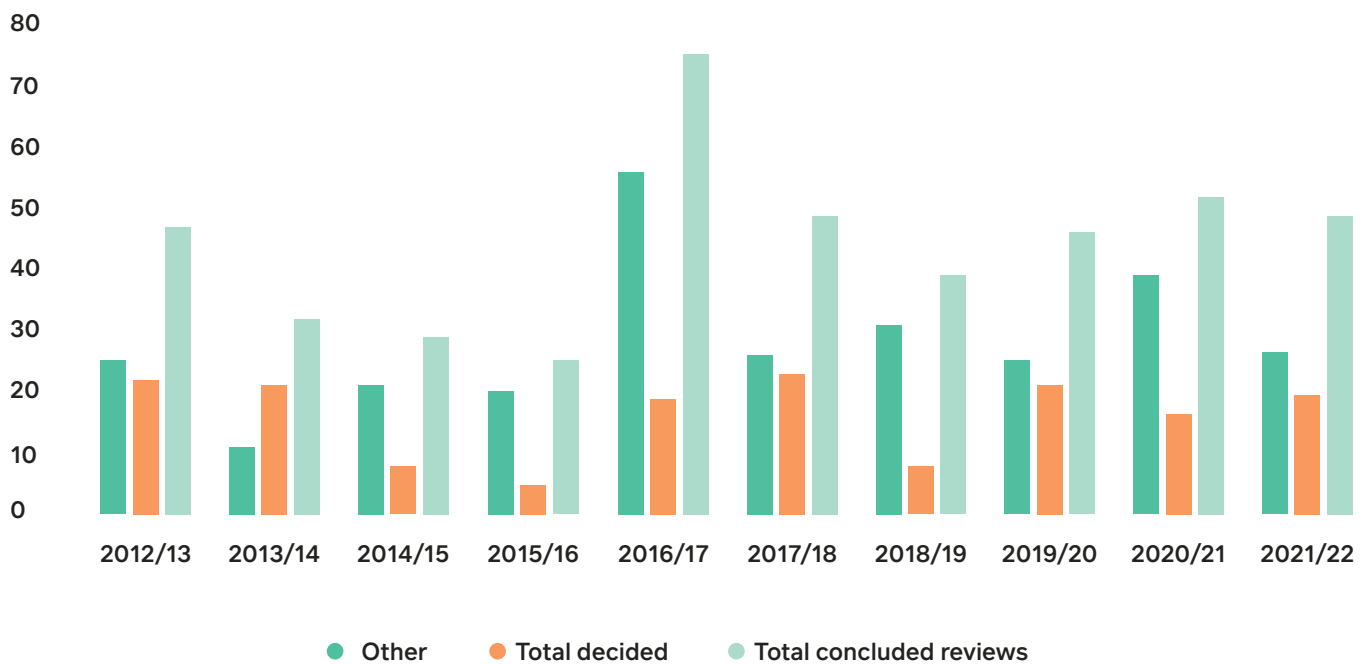


Figure 8: RTI reviews concluded by Ombudsman per reporting period

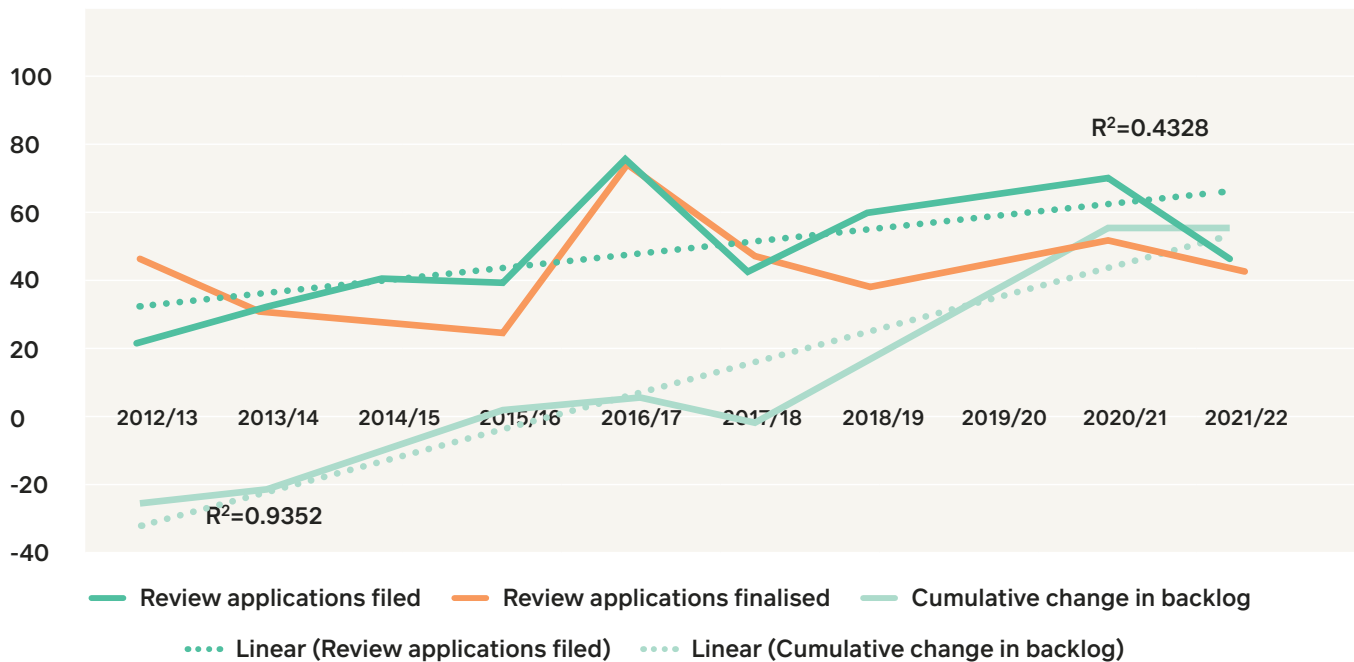


Figure 9: Review applications filed and finalised by Ombudsman, and cumulative change in external review backlog per reporting period

Figure 9 plots on the same axis the number of external review applications filed and the number of external reviews concluded. We also plot the cumulative change in the backlog of external review applications.

In summary, Figure 9 shows that there is an increasing trend in the number of review applications filed, a trend which appears to be approximately linear ($R^2 = 0.43$), while the number of applications finalised in each reporting year by the Ombudsman's Office has remained relatively constant.

Accordingly, each year the Ombudsman is, in general, finalising a lower proportion of the number of applications made. This results in a considerable linear increase ($R^2 = 0.94$) in the backlog of undecided applications. If the current trends continue, the backlog and waiting time for decisions will continue to grow.





3.2.3 Resourcing of the Ombudsman’s Office and RTI productivity

Having established that there is a growing backlog of RTI reviews, we considered whether the Office’s failure to increase the number of external reviews it concludes each year (to keep pace with the yearly increase in applications) is a resourcing problem.

Figure 10 shows the total revenue of the Ombudsman’s Office between 2012/13 and 2021/22.³⁴ We adjusted the total revenue data for inflation to 2021, by applying the Reserve Bank of Australia’s inflation calculator.³⁵ When adjusted for inflation, the total revenue of the Office has remained roughly the same between 2012/13 and 2021/22.

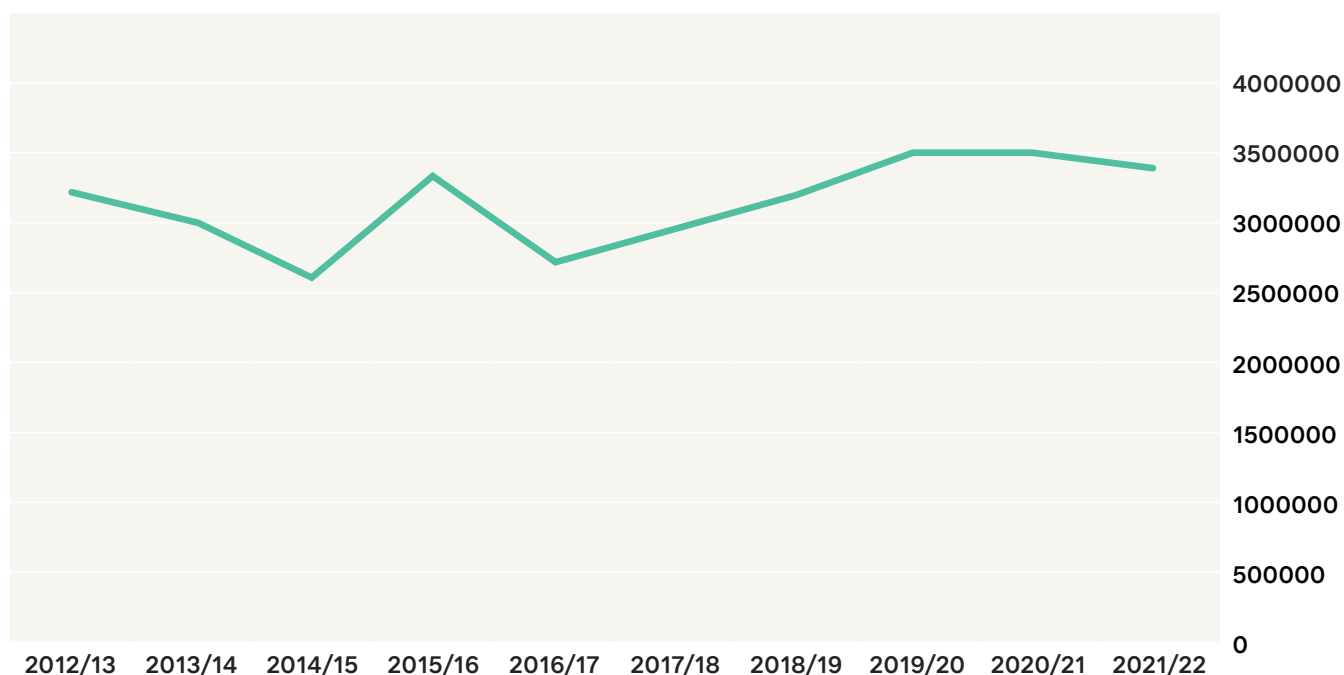


Figure 10: Ombudsman’s Office total revenue (inflation adjusted) between 2012/13 and 2021/22

The growing backlog of RTI applications has been consistently acknowledged by the Ombudsman in his annual reports,³⁶ where it has been tied to chronic underfunding of the Office generally and the RTI jurisdiction more particularly. Indeed, that long term underfunding would lead to significant delay in the RTI jurisdiction was suggested as far back as the 2012/13 Annual Report:

There is a point at which... timeframes to resolve matters will increase dramatically. While this is partly due to the fact that we are dealing with more complex matters, the ability of my Office to maintain the levels of complaint-handling seen in this reporting year with reducing staff numbers cannot be sustained. [Emphasis supplied]

The under-resourcing of the Office has therefore been drawn to the State Government’s attention for at least eight years, and was also recognised in the Parliamentary Standing Committee of Public Accounts’ 2020 report on its Inquiry into the Office of the Ombudsman and Health Complaints Commissioner.³⁷

EDO has been advised by the Ombudsman that the Office has put on four additional (non-permanent staff) and are hoping this will enable them to make progress on conducting and finalising external reviews.

3.2.4 Staffing the RTI jurisdiction

We have attempted to measure the amount of resources devoted to the Ombudsman’s RTI jurisdiction (i.e. as distinct from the Office’s total revenue) in each reporting period. In his annual reports, the Ombudsman publishes an organizational chart indicating how the resources of the Ombudsman are allocated between the various jurisdictions (measured by full time equivalent (FTE)). We used the number of FTE employees from the organizational chart as an indicator of the amount of resources devoted to the RTI jurisdiction, then adjusted that figure depending on comments made by the Ombudsman in the Annual Report referring to staffing increases, by secondment or engagement of additional staff.

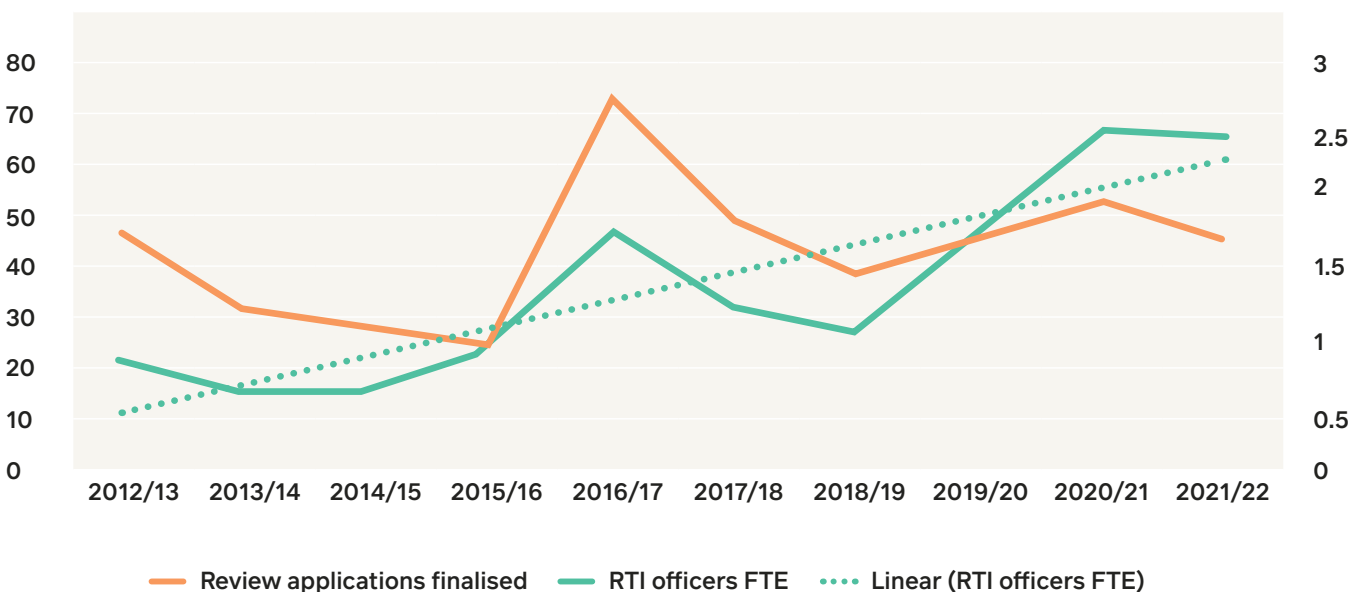


Figure 11: FTE employees in the RTI jurisdiction and the number of finalised RTI reviews

As Figure 11 demonstrates, there is a generally upward trend in the number of FTE employees working in the Ombudsman’s RTI jurisdiction which, unsurprisingly, is reflected in an increasing number of external reviews finalised per reporting period. The relationship is stronger if the results from the years 2019/20 to 2021/22 are not included in the analysis. This is because, despite additional funding and recruitment of new staff,³⁸ the numbers of reviews finalised between 2019/20 and 2021/22 did not increase by as much as would be expected given the correlation established between 2012/13 to 2018/19.

The discrepancy in the relationship between the number of FTE employees and the number of reviews finalised between 2019/20 and 2021/22 may, in part, be explained by a “settling in” period for new staff, a period undoubtedly made more difficult by the disruption of the COVID-19 pandemic, and by staff turnover. So much is acknowledged by the Ombudsman at p 3 of the 2019/20 Annual Report and at p 31 of the 2021/22 Annual Report. However, as we explore further below, there may be other explanations for the fact that the external reviews finalised between 2019/20 and 2021/22 did not increase in line with the number of FTE staff employed in the RTI jurisdiction.

3.2.5 Analysis of the Ombudsman review process

The Ombudsman has provided an outline of how an application for external review is progressed from receipt of the application through to publication of a final decision.³⁹ A full external review process involves at least the following steps:

Ombudsman’s process for external reviews

- 1 receipt of the application for external review and creating its file;
- 2 establishing jurisdiction for an external review;
- 3 obtaining all the relevant information from the public authority or Minister;
- 4 assessing the relevant information, and parties’ arguments, against the Act;
- 5 preparing a case note documenting key points from steps up to and including particularly step 4;
- 6 preparing (a more developed) draft/ preliminary decision;
- 7 settling and making the draft/preliminary decision;
- 8 seeking input on the draft/preliminary decision from the relevant party or parties pursuant to s48(1);
- 9 preparing a final decision (including its statement of reasons);
- 10 settling and making the final decision;
- 11 distributing the final decision to the parties under s48(3); and
- 12 publishing the final decision online under s49(5).



“The average wait time for a decision ... was 987 days.”

We have focused on the Ombudsman’s Office decision-making practice whereby:

- (a) an employee drafts an RTI external review decision (steps 1-6 in relation to a preliminary decision and step 9 in relation to a final decision);
- (b) a more senior officer will then “settle” and “make” the decision (step 7 in relation to a preliminary decision and step 10 in relation to a final decision).

Only the Principal Officer of the RTI jurisdiction or the Ombudsman personally have the authority to “make” and “settle” decisions.⁴⁰

We understand that, prior to the engagement of a dedicated Principal Officer in the 2019/20 reporting period, the Ombudsman *personally* was responsible for making and settling all RTI external reviews.

The Ombudsman’s RTI Documents⁴¹ detail the progress of external reviews in 2019 and 2020 and include the number of external reviews that had decisions drafted by an employee of the Ombudsman’s Office, but not yet settled or made by the responsible officer. They show the stage at which each decision was in the drafting process.

This information reveals that, at 16 October 2019, there were 76 active RTI external review requests before the Ombudsman. Of those:

- (a) 57 had preliminary decisions drafted.
- (b) 6 had final decisions drafted.
- (c) The oldest draft decision was dated 3 May 2017.

The information also reveals that, at 1 July 2020, there were 82 active RTI external review requests before the Ombudsman. Of those:

- (a) 20 had preliminary decisions drafted and provided to the officer responsible for making the decision.
- (b) 20 had case notes prepared.
- (c) 1 had a draft final decision prepared.
- (d) The oldest draft decision was dated to 16 January 2018.
- (e) The average wait time for a decision (the number of days between opening and closing a file, calculated by reference to all files closed in the reporting period 2019-20) was 1035 days.
- (f) The average age of all open files was 418 days.



These figures demonstrate the extent to which the RTI external review process is stalled at the decision “settling” and “making” stages:

(a) At 16 October 2019, 83% of external review applications were stalled in draft and the average time that a decision had been in draft was 280.90 days;

(b) At 1 July 2020, 50% of external review applications were stalled in draft, and the average time that a decision had been in draft was 433.02 days.

These data suggest a significant bottleneck at the stage where a decision is drafted (either preliminary or final) and ready for settling/making by an authorised officer. In the 2019/20 reporting period, the average amount of time a decision spent in draft accounted for 42% of the average wait time for a decision.

A high proportion of the RTI decisions that are stalled in draft are sitting at the preliminary decision stage – 90% in 2018/19 and 98% in 2019/20.

Our analysis suggests that the *distribution* of FTE employees in the Ombudsman’s RTI section is as important as the total number. There is no point in increasing the number of employees responsible for drafting decisions if those decisions will stall in draft due to there not being enough senior employees to settle/make them.

Our analysis did not address the delays that arise within the Ombudsman’s office as a result of the requirement, under s48(1)(a) of the RTI Act, that draft adverse decisions be provided to a public authority for their comment. However, we consider this adds an unnecessary and procedurally unfair hurdle to external review which compounds the lengthy delay period, given an applicant for information is not afforded the same opportunity to respond to a draft decision which is adverse to them. We therefore propose this be repealed or amended.

Left: Photo by Claire Bookless.
Right: Photo by Nic Fitzgerald.

4 RECOMMENDATIONS TO IMPROVE ACCESS TO INFORMATION



In his 2019/20 annual report, the Ombudsman gave a damning assessment of the ability of authorities to interpret and apply the RTI Act, finding that, in applying exemptions to disclosure, “the public interest test is consistently misapplied, if it is referred to at all”.⁴² The failure of public authorities to properly apply the Act, when combined with the delays in the making of decisions under it, renders the RTI Act and its processes ineffective. This is particularly the case for those seeking to exercise their legal rights, such as by participating in statutory approvals processes or undertaking civil enforcement to protect the environment.

Our analysis makes clear that significant reform to both the RTI Act and its implementation is required. We conclude this report with a discussion of our recommendations which aims to revitalise a failing RTI system.

4.1 Recommendations for reform of authorities’ decision making

Currently, the object of the Act is “to be pursued by giving members of the public *the right to obtain information*”.⁴³ The RTI Act’s object is thus immediately constrained by this approach as it suggests a reliance on individuals requesting information rather than exhorting public authorities to pre-emptively publish their information.

While the RTI Act provides for various ways to release information and that assessed disclosure is the method of last resort, this does not reflect EDO's experience. As environmental information will often relate to the activities of third parties, requests for information to be released by active disclosure are frequently met with the response that an application for assessed disclosure is required.

In addition to assessed disclosure being the "method of last resort", we propose the RTI Act be amended to incorporate an express statement that its object be pursued by routine and active release of information as the primary method of disclosure.⁴⁴

Recommendation 1: The RTI Act be amended to include an express statement requiring routine and active release of information to be the preferred methods of disclosure of government information.

Arguably, the statement of a person's right to information,⁴⁵ together with the statement that any discretion exercised under the RTI Act should favour "the provision of the maximum amount of official information",⁴⁶ implies a presumption in favour of the release of information. However, we consider that the RTI Act requires amendment to introduce an express rebuttable presumption that all information sought by an assessed disclosure application is disclosable.⁴⁷ That presumption may only be rebutted if the public authority is satisfied that the information is exempt and where there is an overriding public interest against disclosure. Making the presumption explicit reinforces the need for public authorities to apply the Act accordingly.

Opposite: Photo by Ingrid Christison.
Right: Photo by Nic Fitzgerald.

Such reform would bring Tasmania into line with other jurisdictions with the mandatory access requirement, such as the Commonwealth⁴⁸ and Victoria,⁴⁹ and other jurisdictions which refer to a "pro-disclosure bias",⁵⁰ or emphasise a presumption in favour of access in their objects.⁵¹

Recommendation 2: The RTI Act be amended to introduce an explicit presumption that all information sought under the Act is disclosable to a member of the public. The presumption will only be rebutted where the public authority is satisfied that the information falls into a category of exempt information under the Act *and* that it would be contrary to the public interest to disclose the information.

As our analysis of the Ombudsman's Decisions shows, exemptions to disclosure of information under the RTI Act are generally poorly understood and applied by Tasmanian public authorities and are being applied increasingly to prevent disclosure. We propose a review of the exemptions with a view to clarifying commonly misunderstood or misapplied provisions.

Recommendation 3: An independent review of existing exemptions from disclosure under the RTI Act be undertaken with a view to recommending amendments to clarify commonly misunderstood or misapplied provisions.





“The current near 3 year wait for an external review decision demonstrates the need to impose a timeframe on this process.”

4.2 Recommendations for reform of the external review process

The current near three year wait for an external review decision demonstrates the need to impose a timeframe on this process. The RTI Act should be amended so a prescribed period could replace or qualify the current provision that an external review be resolved “as soon as reasonably practicable”.⁵² We suggest a review period of 30 days which would place lutruwita/Tasmania in line with the ACT legislation.⁵³ We note that, where periods for external review are provided in other jurisdictions, they range from 30 days to 90 days.⁵⁴ Plainly, a radically shortened time frame for external review decisions is likely to require changes to resourcing of the jurisdiction.

Recommendation 4: The RTI Act be amended to provide a review period of 30 days to replace or qualify the current provision that an external review be resolved “as soon as reasonably practicable”.

We also recommend that the RTI Act be amended so as to remove the requirement that the Ombudsman provide a “preliminary decision” to public authorities where a decision is adverse to them and invite their input.⁵⁵ As there is no timeframe for the response, delays arising from this requirement compound the already considerable delays within the Ombudsman’s Office. If, however, this provision is maintained, for reasons of procedural fairness, it should be paired with a provision giving an applicant opportunity to comment on a preliminary decision which is adverse to their position.

Recommendation 5: The RTI Act be amended to remove the requirement that the Ombudsman provide a “preliminary decision” to public authorities and Ministers where a decision is adverse to them and invite their input.

Most Australian jurisdictions offer external review of assessed disclosure decisions by an administrative tribunal as an alternative and/or consecutive to review by the respective Ombudsman or Information Commissioner. We recommend the RTI Act be amended to provide the Tasmanian Civil and Administrative Tribunal with such jurisdiction.

Recommendation 6: The RTI Act be amended to provide the Tasmanian Civil and Administrative Tribunal with jurisdiction for external review of assessed disclosure decisions, as an alternative and/or consecutive to a review by the Ombudsman.

4.3 Recommendations for capacity building

We recommend a comprehensive audit of the management and release of government information, with a focus on incorporating “technology assisted” compilation and review of information.⁵⁶ Using technology to assist in the compilation and review of documents has already been adopted in other sectors, for example, it has been embraced by the courts to facilitate discovery in complex legal proceedings.⁵⁷

Recommendation 7: A comprehensive audit of the management and release of government information be conducted, with a focus on incorporating “technology-assisted” compilation and review of information.

A targeted campaign is required to improve the capacity of public authorities to interpret and apply the RTI Act. Only 5% of externally reviewed decisions were affirmed in 2019/2020, despite the regular provision of comprehensive guidance from the Ombudsman.⁵⁸ The Ombudsman provides some training to public authorities (although

this has been limited in 2020/2021),⁵⁹ but a more focused approach is required which addresses the appropriate application of exemptions and the public interest test. The training should be at least yearly and mandatory for all staff responsible for making decisions under the RTI Act.

Recommendation 8: The Ombudsman’s Office or another suitably qualified independent body be engaged to provide training to public authorities that focuses on the appropriate application of the RTI Act’s exemptions and the public interest test. To the extent the Ombudsman’s Office is engaged for that purpose, the State Government must provide commensurate additional revenue.

Slightly more than half (63%) of the Ombudsman’s decisions were published between 2016 and 2022, missing an opportunity to provide valuable and much needed guidance to public authorities and increase public scrutiny of how public authorities apply the RTI Act. The Ombudsman should be required to publish all decisions on external review applications, including those “preliminary view” decisions which resolve an external review request.

Recommendation 9: The Ombudsman be required to publish all decisions on external review applications.

Our analysis shows that the Ombudsman’s office is clearly stretched in dealing with growing numbers and an increasing backlog of external review applications in a timely manner. The external review process is not only delayed by the wait for responses to adverse preliminary decisions, but also by the lack of sufficient staff with authority to finalise decisions. This has created a significant bottleneck in the Ombudsman’s review process. We propose a substantial funding increase to the Ombudsman’s Office with a focus on recruiting more staff at the senior level to expedite RTI decision making, and work through the growing backlog.

Recommendation 10: Additional resources should be deployed to the RTI jurisdiction of the Tasmanian Ombudsman's Office as a matter of urgency to arrest and reverse the growing backlog of external review applications.

Recommendation 11: Resourcing and staff distribution in the Ombudsman's Office (and particularly the RTI section) take into account the demonstrated need for the Office to have sufficient officers at both junior (drafting) and senior (settling/making) levels.

4.4 Proposal for Independent Reviews of lutruwita/Tasmania's RTI System

As our analysis demonstrates, the two key areas where the RTI system currently fails are the authorities' persistent misapplication of the legislative provisions and inordinate delays in the external review process by the Ombudsman. Our recommendations address both these issues and acknowledge the extent to which each failure amplifies the other.

While we expect the implementation of our recommendations would result in a great improvement to the RTI system, experience both in Tasmania and interstate⁶⁰ demonstrates that amending the RTI Act may not be sufficient to resolve all the barriers in providing an effective system for accessing to information. Legislative

change must be accompanied by strong leadership and rigorous, properly resourced compliance mechanisms to ensure the intent of legislation is fulfilled in its interpretation and implementation.

To this end, we recommend that there be a requirement for regular (e.g. 3 to 5-yearly) independent reviews of both the operation and implementation of the RTI Act with consideration given to:

- (a) the extent to which the objects of the RTI Act are being achieved; and
- (b) the extent to which additional legislative measures, if any, are considered necessary to achieve objects of the RTI Act within the periods required under RTI Act, including by the introduction of performance standards and other mandatory requirements; and
- (c) whether public authorities and the Ombudsman's office have been sufficiently resourced to fulfil their functions and obligations under the RTI Act; and
- (d) any other matter that the Ombudsman considers should be subject to the review.

The reviews and the government's response to them, should be tabled in Parliament.

Recommendation 12: The RTI Act be amended to require regular independent reviews of its operation and implementation.





Opposite: Photo by Ingrid Christison.
Above and right: Photos by Nic Fitzgerald.

End Notes

¹ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Annex: Framework Principles on Human Rights and the Environment, Human Rights Council, 24 January 2018. Available at A/HRC/37/59 - E - A/HRC/37/59 -Desktop (undocs.org) See also EDO (2022) A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia accessed at: <https://www.edo.org.au/2022/08/26/new-report-a-healthy-environment-is-a-human-right/>

² Commentary to Principle 7, *ibid*, at [17].

³ RTI Act, s 3.

⁴ RTI Act, s 3(1).

⁵ Tasmanian Ombudsman's Annual Report 2019/20 at p 29, accessed at: https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0005/592178/ANNUAL-REPORT-2019-2020-Ombudsman-Tasmania.PDF

⁶ NSW Information and Privacy Commission (2022) *National Dashboard - Utilisation of Information Access Rights - 2020-21*, accessed at: https://www.ipc.nsw.gov.au/sites/default/files/2022-06/OGP_Metrics_all_jurisdictions_all_years_June_2022.pdf

⁷ Piia Wirsu, "An abysmal and dismal standard": Concerns raised about the latest report into Tasmania's right to information process', ABC News (online, 17 November 2020) <https://www.abc.net.au/radio/northtas/programs/drive/tasmania-right-to-information-ombudsman-report/12894822> <https://www.abc.net.au/radio/northtas/programs/drive/tasmania-right-to-information-ombudsman-report/12894822>; Jenna Cairney, 'Editorial: Tasmania's shocking record for secrecy is an embarrassment', The Mercury, (online, 18 November

2020) <https://www.themercury.com.au/news/opinion/editorial-tasmanias-shocking-record-for-secrecy-is-an-embarrassment/news-story/1c93d4d4d7a7abee7a0b93b57770a2e9>; David Killick, 'Secret State: Tasmania the nation's least open state, ombudsman declares', The Mercury (online, 18 November 2020) <https://www.themercury.com.au/news/tasmania/in-depth/secret-state-tasmania-the-nations-least-open-state-ombudsman-declares/news-story/004c274ff9b4cd06881f926c76d322de>; Cameron Whiteley, 'Right to Information request returned five years after it was submitted', The Mercury (online 22 November 2019) <https://www.themercury.com.au/news/politics/right-to-information-request-returned-five-years-after-it-was-submitted/news-story/405355a5692e2f93dd1db2b1b8ad9c71>; David Killick, 'Government departments rapped for sneaky RTI practices', The Mercury (online, 19 December 2019) <https://www.themercury.com.au/news/politics/government-departments-rapped-for-sneaky-rti-practices/news-story/065e6cc9a8b0551c3263b09c054f4775>; Christopher Knaus, 'Tasmania's FOI regime crippled by 'outrageous' delays, academics say', The Guardian, (online, 14 January 2019) <https://www.theguardian.com/australia-news/2019/jan/14/tasmanias-foi-regime-crippled-by-outrageous-delays-academics-say>; Richard Baines, 'Tasmanian Ombudsman Right to Information review backlog blows out to 666 years', ABC News, (online, 21 November 2017) <https://www.abc.net.au/news/2017-11-21/tasmanian-backlog-for-rti-review-666-years/9177202> see also Tasmanian Government 'Our record on openness and transparency' (online 18 November 2020) https://www.premier.tas.gov.au/site_resources_2015/additional_releases/a_further_update_on_tasmanias_response_to_adelaide_covid-19_cluster/supporting_our_vibrant_cultural_and_creative_sector/state_budget_delivering_on_keeping_tasmanians_safe/bushfire_-_why_risk_it/our_record_on_openness_and_transparency

⁸ See for example, *Environmental Management and Pollution Control Act 1994* (Tas), s 22; *Mineral Resources Development Act 1995* (Tas), Division 5 Part 10; *Water Management Act 1999* (Tas), s. 12. This information would fall within the category of information for which there is “required disclosure” under the RTIA Act, s 5(1).

⁹ The LIST map is a free online tool that can provide a wealth of information about regulatory information in a spatial format. It is accessible at: <https://maps.thelist.tas.gov.au/listmap/app/list/map>

¹⁰ RTI Act, s 7.

¹¹ For example, under section 48 of the *Environmental Management and Pollution Control Act 1994* or section 64 of the *Land Use Planning and Approvals Act 1993*.

¹² In *Elaine Anderson and Director of Inland Fisheries Decision Number O1805-129*, the Ombudsman held that the Director’s refusal to release information in a lease because of an internal policy “to treat lease and licence documents as private and confidential contracts” had not addressed whether, in fact, the lease information had been provided in confidence. The Ombudsman ultimately found that the general statutory obligation under s7 of the RTI Act to release non-exempt information outweighed the Director’s internal policy to keep lease information confidential. Accessible at: O1805-129-Anderson-Final-Decision-Signed_3F3D2.pdf

¹³ See Tasmanian Ombudsman’s Annual Report 2019/20 at Table 24, p 72, accessed at: https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0005/592178/ANNUAL-REPORT-2019-2020-Ombudsman-Tasmania.PDF . EDO also analysed the Tasmanian Ombudsman’s published decisions from 2016 to 30 June 2022 and no NRE or DPIPWE decision was upheld in full in that time. We excluded any decisions from our analysis where the Ombudsman found he did not have jurisdiction to undertake the external review.

¹⁴ RTI Act, s 56 and Sch 4. Subject to transitional provisions – see *Right to Information (Consequential and Transitional) Act 2009* (Tas), s 5.

¹⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 15 October 2009, pt 2 p 70 (Ms Giddings, Minister for Justice).

¹⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 15 October 2009, pt 2 p 70, 72 (Ms Giddings, Minister for Justice).

¹⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 15 October 2009, pt 2 p 71 (Ms Giddings, Minister for Justice).

¹⁸ RTI Act, s 3.

¹⁹ *Freedom of Information Act 1982* (Cth); *Government Information (Public Access) Act 2009* (NSW); *Freedom of Information Act 1982* (Vic); *Right to Information Act 2009* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (WA); *Information Act 2002* (NT); *Freedom of Information Act 2016* (ACT).

²⁰ EDO is grateful to the Ombudsman for providing those statistics and agreeing to their use in this report.

²¹ Published decisions are all post-2016. Decisions are published on the Ombudsman’s website at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>.

²² See <https://www.ombudsman.tas.gov.au/publications/annual-reports>. We considered the Ombudsman’s Annual Reports from 2012/13 – 2021/22.

²³ These requests sought information about the number of active reviews currently before the Ombudsman and are provided in Appendix B. EDO is grateful to Mr Bartl for providing the documents produced by the Ombudsman in response.

²⁴ We considered the DOJ RTI Annual Reports from 2012/13 to 2021/22.

²⁵ It is important to note that, in analysing this data, we make the assumption that the Ombudsman's interpretation of the RTI Act and its application is correct.

²⁶ The figures for RTI applications decided are provided in the Department of Justice Annual Report on the administration of the RTI Act. The external review numbers are provided in the Tasmanian Ombudsman annual report.

²⁷ See at 2.2 above for an outline of the Refusal Provisions and the Exemption Decisions and the distinction between the two.

²⁸ The exceptions to this general trend were in 2018/19, when 100% of Group 2 Exemption Decisions were set aside or varied by the Ombudsman (compared with 71% of Group 3 Exemption Decisions and 75% of Group 4 Exemption Decisions) and in 2020/21, when 100% of Group 3 Exemption Decisions were set aside or varied by the Ombudsman (compared with 50% of Group 2 Exemption Decisions and 85% of Group 4 Exemption Decisions). However, this refers to only one Group 2 Exemption Decision and one Group 3 Exemption Decision in singular years so, for this reason, we do not consider them as disruptive of the general trend.

²⁹ Of those 67 decisions, 5 were determined to be not relevant, leaving us with a relatively small sample of 62 decided reviews.

³⁰ Above n 20.

³¹ Above n 22.

³² Above n 23.

³³ See at 3.2 above for a description of the types of reviews that fall into the "other".

³⁴ Revenue is reported in the Ombudsman's Annual Reports per calendar year, not per financial year.

³⁵ <https://www.rba.gov.au/calculator/annualDecimal.html>

³⁶ See, for e.g. 2013/14 Annual Report, p 22; 2014/15 Annual Report, p 9; 2015/16 Annual Report, pp 6, 15; 2016/17 Annual Report, p 4; 2017/18 Annual Report, pp 3, 19.

³⁷ Parliamentary Standing Committee of Public Accounts, Parliament of Tasmania, *Inquiry into the Office of the Ombudsman and Health Services Commissioner* (2020), Finding 27 p 9.

³⁸ In 2019/20, the allocation of an additional \$245,000 in recurrent funding for the Ombudsman's RTI jurisdiction resulted in the recruitment of a Principal Officer (RTI) and an Investigation and Review Officer.

³⁹ The information forms part of RTI Documents, see above n 23.

⁴⁰ See the Ombudsman's submission to the Parliamentary Standing Committee of Public Accounts' Inquiry to Examine the Office of the Ombudsman and Health Complaints Commissioner, dated 7 March 2019.

⁴¹ See above at n23.

⁴² Ombudsman's Annual Report 2019/2020, p33.

⁴³ RTI Act, s 3(2).

⁴⁴ See, for example, the object of the NSW *Government Information (Public Access) Act 2009* which highlights the proactive public release of information (s3(1)(a)). Section 6(1) of of this Act requires mandatory proactive release.

⁴⁵ RTI Act, s 7.

⁴⁶ RTI Act, s 3(4).

⁴⁷ This amendment would likely be to RTI Act, s 7.

⁴⁸ *Freedom of Information Act 1982* (Cth), s18(1).

⁴⁹ *Freedom of Information Act 1982* (Vic), s20(1).

⁵⁰ *Right to Information Act 2009* (Qld), s39(3);
Freedom of Information Act 2019 (ACT), s9.

⁵¹ *Government Information (Public Access) Act 2009* (NSW), s5.

⁵² This amendment would likely be to RTI Act, s 47(6).

⁵³ *Freedom of Information Act 2019* (ACT), s82(3). The 30-day period for review can be paused while the Ombudsman attempts to resolve the matter through an informal process or mediation.

⁵⁴ *Freedom of Information Act 1992* (WA), s76(3) provides a 30-day review. The 30-day period applies unless the Commissioner considers it “impracticable” to decide the complaint within that time. *Government Information (Public Access) Act 2009* (NSW) s92A(1) provide a 40-day review period. The review period may be extended by the Information Commissioner with agreement from the applicant. *Information Act 2002* (NT) s106(1) provides a 90-day review period.

⁵⁵ RTI Act, 48(1)(a).

⁵⁶ We acknowledge the legitimate concerns regarding technology-assisted decisions which affect human rights. The use of Artificial Intelligence (AI) may not present significant human rights issues in the information management context but there is still a need for appropriate safeguards. In a recent report, the Australian Human Rights Commission proposed important protections for all jurisdictions to incorporate into their use of technology, as well as the introduction of a federal AI Safety Commissioner. *Human Rights and Technology*, released in May 2021. Available at AHRC_RightsTech_2021_Final_Report.pdf

⁵⁷ In 2016, the Victorian Supreme Court first approved the use of predictive coding in Australia in *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors [No 1] [2016] VSC 734*. The Court has since issued a practice note ‘Technology in Civil Litigation’ which states: “The use of technology in civil litigation facilitates the just, efficient, timely and cost-effective resolution of the real issues in dispute. The Court expects parties to acquit their obligation to ensure costs are reasonable and proportionate by employing technology to save time and costs wherever possible”. The NSW Government has introduced a strategy which aims to use artificial intelligence to improve service delivery and government decision-making. The NSW AI Strategy is available at <https://www.digital.nsw.gov.au/policy/artificial-intelligence-ai/ai-strategy/strategy-overview>. Finally, lutruwita/Tasmania’s Department of Justice has introduced a digital information sharing program which could form the basis for a broader review of the management and sharing of information across the Tasmanian Government. See the media release of Attorney General Elise Archer, 24 November 2020 ‘Digitally transforming Tasmania’s justice system’, available at Digitally transforming Tasmania’s justice system (mailchi.mp)

⁵⁸ The Ombudsman’s Manual, published decisions and annual report commentary provide comprehensive guidance on the proper application of the Act.

⁵⁹ As noted in the Ombudsman’s annual reports.

⁶⁰ See for example, the State of Queensland (Department of Justice and Attorney-General), Report on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009*, p 10. The report is available at 5517T2014.pdf (parliament.qld.gov.au)

APPENDIX A – List of Figures and Tables

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APPENDIX B – Ombudsman’s RTI Documents

Ombudsman Tasmania

Level 6, 86 Collins Street, Hobart
GPO Box 960, Hobart Tas 7001
Phone: 1800 001 170
Email: ombudsman@ombudsman.tas.gov.au
Web: www.ombudsman.tas.gov.au



File: RTI 001/2019-20

16 October 2019

Mr Benedict Bartl
Policy Officer
Community Legal Centres Tasmania
Via Email Only

Dear Mr Bartl

Right to Information Act 2009 – Application for assessed disclosure

Thank you for your application for assessed disclosure submitted on 16 October 2019 under s13 the *Right to Information Act 2009*. Your application was accepted on 16 October 2019 via email. You were also notified of this office’s decision to waive the fee in accordance with s16(2)(c) as per your request.

Please below the substantive response to your request.

1. How many active reviews does the Ombudsman Office currently have?
 - At the date of your application there were 76 active right to information external reviews.
2. Of those active reviews, how many have had decisions drafted?
 - Of the active 76 external reviews, 63 (83%) have been drafted.
3. Of the active reviews that have been drafted, what date were they drafted?
 - Please see attached table.
4. What is the status of each of those drafted?
 - This has been combined with the table referenced in question 3.

Despite all information being released in full, you have to right to seek an internal review of this decision within 20 working days from your receipt of it. You may seek review under s43(1) in writing to the Ombudsman as principal officer via GPO Box 960, Hobart, TAS, 7001.

Yours sincerely

Mike Cain
DELEGATED OFFICER

Response to Questions 3 and 4

Number	Date Drafted	Status
O1504-155	3 May 2017	Pending approval of preliminary decision
O1601-005	5 July 2017	Pending approval of preliminary decision
O1603-079	8 June 2018	Pending approval of final decision
O1607-056	17 June 2019	Pending approval of final decision
O1608-191	17 January 2018	Pending approval of final decision
O1609-043	14 June 2018	Pending approval of preliminary decision
O1610-065	15 June 2018	Pending approval of final decision
O1611-019	September 2019	Pending approval of final decision
O1611-194	22 June 2018	Pending approval of preliminary decision
O1702-121	11 January 2018	Pending approval of preliminary decision
O1702-209	15 August 2018	Pending approval of preliminary decision
O1703-077	7 May 2018	Pending approval of preliminary decision
O1703-189	26 October 2018	Pending approval of preliminary decision
O1705-049	7 December 2017	Pending approval of preliminary decision
O1706-057	16 January 2018	Pending approval of preliminary decision
O1706-106	23 June 2017	Pending approval of preliminary decision
O1708-051	24 May 2018	Pending approval of preliminary decision
O1708-113	15 November 2017	Pending approval of preliminary decision
O1709-115	August 2019	Pending approval of final decision
O1710-026	21 February 2019	Pending approval of preliminary decision
O1710-077	20 August 2018	Pending approval of preliminary decision
O1712-001	25 May 2018	Pending approval of preliminary decision
O1712-082	13 November 2018	Pending approval of preliminary decision
O1801-153	6 February 2018	Pending approval of preliminary decision
O1802-067	30 April 2018	Pending approval of preliminary decision
O1804-099	17 January 2019	Pending approval of preliminary decision
O1804-116	14 November 2018	Pending approval of preliminary decision
O1805-129	26 February 2019	Pending approval of preliminary decision
O1807-024	26 February 2019	Pending approval of preliminary decision
O1808-084	28 March 2019	Pending approval of preliminary decision
O1808-132	19 March 2019	Pending approval of preliminary decision

O1808-137	15 May 2019	Pending approval of preliminary decision
O1809-152	26 June 2019	Pending approval of preliminary decision
O1810-040	29 October 2018	Pending approval of preliminary decision
O1811-065	22 March 2019	Pending approval of preliminary decision
O1901-032	1 July 2019	Pending approval of preliminary decision
O1901-082	15 March 2019	Pending approval of preliminary decision
O1901-107	27 May 2019	Pending approval of preliminary decision
O1901-126 (O1502-081)	21 March 2019	Pending approval of preliminary decision
O1901-130	25 February 2019	Pending approval of preliminary decision
O1901-166	22 February 2019	Pending approval of preliminary decision
O1903-002	15 March 2019	Pending approval of preliminary decision
O1903-003	27 September 2019	Pending approval of preliminary decision
O1903-130	22 July 2019	Pending approval of preliminary decision
O1903-173	26 June 2019	Pending approval of preliminary decision
O1904-087	28 June 2019	Pending approval of preliminary decision
O1904-098	2 July 2019	Pending approval of preliminary decision
O1904-105	2 July 2019	Pending approval of preliminary decision
O1904-118	15 October 2019	Pending approval of preliminary decision
O1904-160	18 July 2019	Pending approval of preliminary decision
O1905-104	23 July 2019	Pending approval of preliminary decision
O1905-143	4 July 2019	Pending approval of preliminary decision
O1905-168	22 July 2019	Pending approval of preliminary decision
O1906-102	23 July 2019	Pending approval of preliminary decision
O1907-050	12 August 2019	Pending approval of preliminary decision
O1907-118	18 September 2019	Pending approval of preliminary decision
O1907-129	4 October 2019	Pending approval of preliminary decision
O1907-143	9 August 2019	Pending approval of preliminary decision
O1907-145	12 August 2019	Pending approval of preliminary decision
O1907-157	11 September 2019	Pending approval of preliminary decision
O1909-084	19 September 2019	Pending approval of preliminary decision
O1909-092	14 October 2019	Pending approval of preliminary decision
O1909-093	8 October 2019	Pending approval of preliminary decision

Ombudsman Tasmania

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File: RTI 001/2020-21

27 July 2020

Mr Benedict Bartl
Policy Officer
Community Legal Centres Tasmania

via email only ben@tenantstas.org.au

Dear Mr Bartl

Right to Information Act 2009 – Application for assessed disclosure

Thank you for your application for assessed disclosure submitted on 1 July 2020 under s13 the *Right to Information Act 2009*. Your application was accepted on 1 July 2020. You were also notified of this office's decision to waive the fee in accordance with s16(2)(c).

I note that you

acknowledge section 6 of the RTI Act excludes the Ombudsman “unless the information relates to the administration of the relevant public authority”. In our opinion, the information sought is not exempt information as we are only after statistical/administrative information and not information about any particular file or operational data.

The RTI Act ‘does not apply to information in the possession of’ the Ombudsman unless (as you say) ‘the information relates to the administration of the relevant public authority’: s6(1)(j). The s6 ‘does not apply’ exclusion is wider than the concept of exempt information. The Act does apply to exempt information but, for example, the right in s7 does not extend to it.

Given that you ‘are only after statistical/administrative information and not information about any particular file or operational data’, I have not, for example, added the file number of each particular file to the table at the end of answers to your questions. This also relieves me of the need to consider if that file numbering is ‘personal information’ as defined in the Act, s5(1). If it were, that could trigger consultation requirements for potentially exempt information pursuant to s36.

Please find below the information you requested, as at 1 July 2020 unless otherwise specified.

1. How many active reviews does the Ombudsman Office currently have?

On 1 July 2020 the office of the Ombudsman was managing 82 active applications for external review under the *Right to Information Act 2009* (Tas) [the RTI Act].

2. Of those active reviews, how many have had decisions drafted?

A full external review process generally requires, due to s48(1) of the RTI Act, at least two types of decision:

- (a) A 'draft' decision on which we must seek input from the public authority or Minister if adverse to them: s48(1)(a). Our office titles such a decision 'preliminary'.
- (b) A finalised decision, after we consider any input provided under s48(1).

A full external review process involves at least the following steps:

- 1. receipt of the application for external review and creating its file;
- 2. establishing jurisdiction for an external review;
- 3. obtaining all the relevant information from the public authority or Minister;
- 4. assessing the relevant information, and parties' arguments, against the Act;
- 5. preparing a case note documenting key points from steps up to and including particularly step 4;
- 6. preparing (a more developed) draft/preliminary decision;
- 7. settling and making the draft/preliminary decision;
- 8. seeking input on the draft/preliminary decision from the relevant party or parties pursuant to s48(1);
- 9. preparing a final decision (including its statement of reasons);
- 10. settling and making the final decision;
- 11. distributing the final decision to the parties under s48(3); and
- 12. publishing the final decision online under s49(5).

The steps involving preparation of decisions are often iterative processes undertaken over a period of time. Step 5, preparing a case note, is an optional additional step only prepared for some files.

Pursuant to s47, the office is able to resolve some applications for external review without proceeding through the full process outlined above.

Of the 82 active reviews as at 1 July 2020, 22 had draft/preliminary decisions drafted, and case notes (step 5), which form the basis for a preliminary decision, had been drafted on 18. One had a draft of a final decision largely prepared (step 9), but not as at 1 July 2020 provided to the officer responsible for settling and making the decision (step 10).

3. Of the active reviews that have been drafted, what date were they drafted?

Please see the table below, showing the date at which the officer preparing the case note or draft/preliminary decision sent it to the officer (who at that time was) responsible for settling and making the decision. There was an internal reallocation of responsibilities after I commenced with the office in September 2019.

4. What is the status of each of those drafted?

This has been addressed overall in the answer to Question 2. More individual detail as to the status of each of those drafted is included in the table below.

5. What is the average wait time for the release of a finalised external review decision?

Calculating an ‘average wait time’ for the release of a finalised external review decision’ is not straightforward. Our past proxy for such a figure is dependent on the age of files for which decisions were required and finalised in the period across which the average is calculated.

Given your application was at 1 July 2020, we can say that across the year 1 July 2019 – 30 June 2020, of the external review files closed after requiring a finalised decision, the average age of those files (an older subset of our total files) was 1035 days. Closing a file older than the then average age increases the average figure. For example, all our remaining files from 2015 or 2016 were finalised and closed during the year 1 July 2019 – 30 June 2020, thereby increasing the average age of files closed during the 2019-20 year.

The above figure is retrospective and not a ‘wait time’ for currently active reviews going forward. The average days open across all 82 active external reviews as at 1 July 2020 was 418 days.

Further to Answers to Your Questions 3 and 4

End Date Step 5, 6 or 9 Completed and Provided to (the then) Approving Officer	Status
16 January 2018	Draft/preliminary decision (step 6) prepared
6 February 2018	Draft/preliminary decision (step 6) prepared
7 May 2018	Draft/preliminary decision (step 6) prepared
24 May 2018	Draft/preliminary decision (step 6) prepared
25 May 2018	Draft/preliminary decision (step 6) prepared
20 August 2018	Draft/preliminary decision (step 6) prepared
29 October 2018	Draft/preliminary decision (step 6) prepared
17 January 2019	Draft/preliminary decision (step 6) prepared

21 February 2019	Draft/preliminary decision (step 6) prepared
22 February 2019	Draft/preliminary decision (step 6) prepared
25 February 2019	Draft/preliminary decision (step 6) prepared
26 February 2019	Draft/preliminary decision (step 6) prepared
15 March 2019	Draft/preliminary decision (step 6) prepared
15 March 2019	Draft/preliminary decision (step 6) prepared
19 March 2019	Draft/preliminary decision (step 6) prepared
15 May 2019	Draft/preliminary decision (step 6) prepared
27 May 2019	Draft/preliminary decision (step 6) prepared
26 June 2019	Draft/preliminary decision (step 6) prepared
26 June 2019	Case note (step 5) prepared
28 June 2019	Case note (step 5) prepared
1 July 2019	Draft/preliminary decision (step 6) prepared
2 July 2019	Case note (step 5) prepared
4 July 2019	Case note (step 5) prepared
22 July 2019	Case note (step 5) prepared
22 July 2019	Case note (step 5) prepared
23 July 2019	Case note (step 5) prepared
23 July 2019	Case note (step 5) prepared
9 August 2019	Case note (step 5) prepared
9 August 2019	Case note (step 5) prepared
12 August 2019	Case note (step 5) prepared
12 August 2019	Case note (step 5) prepared
Draft final decision of 28 August 2019 sent to decision maker 2 July 2020	Draft final decision (step 9) of 28 August 2019 sent to decision maker 2 July 2020.
11 September 2019	Case note (step 5) prepared
18 September 2019	Case note (step 5) prepared
19 September 2019	Case note (step 5) prepared
27 September 2019	Case note (step 5) prepared
4 October 2019	Case note (step 5) prepared
8 October 2019	Case note (step 5) prepared
14 October 2019	Case note (step 5) prepared

15 October 2019	Case note (step 5) prepared
12 November 2019	Draft/preliminary decision (step 6) prepared

Despite all information requested being released in full, you have the right to seek internal review of this decision within 20 working days after today. You may seek review under s43(1) in writing to the Ombudsman as principal officer by return email or via ombudsman@ombudsman.tas.gov.au or by letter to GPO Box 960, Hobart, TAS, 7001.

Yours sincerely



Dr Tom Baxter
Principal Officer (Right to Information)

DELEGATED OFFICER

Ombudsman Tasmania

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In reply please quote: **O2112-120**
Contact Officer: Leah Dorgelo

13 January 2022

Mr Ben Bartl
Community Legal Centres Tasmania

Via email: ben@tenantstas.org.au

Dear Mr Bartl

Right to Information Act 2009 – Request for information

Thank you for your email dated 20 December 2022, requesting information regarding delays in finalising external review applications to the Ombudsman under the *Right to Information Act 2009* (the Act).

In accordance with s12(3) of the Act, assessed disclosure is the method of last resort and I provide the following information as an active disclosure. The information provided in response to your questions is current as a 'snapshot' as at the date of this letter, as case numbers and the status of work on files are subject to constant change.

1) How many active reviews does the Ombudsman Office currently have?

Year of application	Number of open external reviews
2018	3
2019	30
2020	43
2021	22
2022	1
Total	99

2) Of those active reviews, how many have had decisions drafted?

3) Of the active reviews that have been drafted what date were they drafted?

4) What is the status of each of those drafted?

To answer these questions jointly, drafts of decisions at various stages of completion are present on the majority of open external review files. This is not necessarily indicative of whether the review is close to finalisation, as many were prepared by previous staff members of our office and require further work before they will be approved by the Ombudsman. One draft external review decision is currently with the Ombudsman for his approval, this was submitted for approval on 12 January 2022. One external review preliminary decision is currently with a public authority to seek its input prior to the

finalisation of the decision, in accordance with s48(1)(a) of the Act, with a response due by 21 January 2022.

5) What is the average wait time for the release of a finalised external review decision?

Calculating an 'average wait time for the release of a finalised external review decision' is not straightforward. Our past proxy for such a figure is dependent on the age of files for which decisions were required and finalised in the period across which the average is calculated.

For 2021, of the external review files closed after requiring a finalised decision, the average age of those files (an older subset of our total files) was 1054 days. Closing a file older than the then average age increases the average figure. For example, all our remaining files from 2017 and most from 2018 were finalised and closed during 2021, thereby increasing the average age of files closed during that year.

Please note that significant staffing changes and process improvements have recently occurred and this figure is not indicative of the future wait time for external review decisions. A focus on earlier resolution has also meant that many files are finalised without the need for a formal external review decision.

I hope the above information assists with your enquiries. I have recently commenced as Principal Officer – Right to Information and can assure you that our office is actively working to reduce the historical backlog of external reviews. It is our key priority and steady progress is being made. Our Priority Policy has also recently been updated and its coverage extended, to try to reduce the impact of delays on newer applications which may have compelling reasons to be expedited.

You are welcome to seek further information from our office at any stage regarding the historical backlog and information will be provided whenever this is reasonable and appropriate.

Yours sincerely



Leah Dorgelo
PRINCIPAL OFFICER

From: Ombudsman RTI <RTI@ombudsman.tas.gov.au>
Sent: Thursday, December 1, 2022 12:50 PM
Subject: RE: Right to Information Request regarding Ombudsman's data for 2021-22

Dear Kate and Claire,

Thank you for your emails and request for information. As with previous requests, we are happy to provide a response as an active disclosure of information. As expressed in the Challenges Faced part in the Right to Information section of the 2021-22 Annual Report the Ombudsman has just released, the Ombudsman shares your concern regarding the long wait times for external review decisions and the slower than hoped progress towards elimination of the historical backlog of review requests. I can assure you that work is continuing towards this goal and recruitment and retention of skilled staff has been the primary obstacle to further progress.

We are currently recruiting for an [Intake and Assessment Officer](#) and [Investigation and Review Officer](#), which would be ideal roles for graduate or junior lawyers seeking practical administrative law and public service experience (full details in links). Please circulate through your networks if you are aware of suitable applicants who may wish to work on reducing the backlog of RTI external reviews.

To answer your specific questions:

1) **How many active reviews does the Ombudsman's office have as of 1 July 2022?**

As set out in the Annual Report for the 2021-22 financial year, there were 101 active external reviews as of 1 July 2022.

- 2) **Of those active reviews, how many have had decisions drafted?**
3) **Of the active reviews that have been drafted what date were they drafted?**
4) **What is the status of each of those drafted?**

To answer these questions jointly, drafts of decisions at various stages of completion are present on a significant number of open external review files. This is not necessarily indicative of whether the review is close to finalisation, as many were prepared by previous staff members of our office and require further work before they will be approved by the Ombudsman.

5) **What is the average wait time for the release of a finalised external review decision?**

For the 2021-22 financial year, of the external review files closed after requiring a finalised decision, the average days between receipt of the review request and a decision was 987 days. Due to efforts to reduce our historical backlog of external reviews, this figure is not indicative of the future wait time for external review decisions. A focus on earlier resolution has also meant that many files are finalised without the need for a formal external review decision.

In relation to your subsequent questions of 23 November 2022, Table 4 in the 2021-22 Ombudsman Tasmania Annual Report is correct, Table 30 was included in error and contains incorrect information. I apologise for the confusion and this error in the annual report.

In relation to decisions of 2021-22, your list is not missing one decision but actually has an additional one to the number we've used for our statistics. Patrick Billings and the Department of Justice was a

reconsidered decision from the previous financial year, so was not included in 2021-22 numbers as it had been counted in the 2020-21 financial year.

I reviewed the spreadsheet you attached and have edited a version of the first table (2021-22) to be correct as per our records. This is saved in Sheet2. I have not updated any of the other information to reflect these changes or reviewed the accuracy of the rest of the document.

I hope this information is of assistance.

Kind regards,



Leah Dorgelo (pronouns – she/her)
Principal Officer – Right to Information
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Ombudsman Tasmania acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.



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