

FACT SHEET

Right to Information Amendment Bill 2016

On 27 April 2016 the Ombudsman decided that no avenue exists in the *Right to Information Act 2009* for the review of a decision made by a Minister's delegate.

A copy of the Ombudsman's decision is attached.

This decision creates a loophole whereby a decision made by Ministerial delegate to not release information under the Act is not able to be reviewed.

In practice, Minister's delegate decisions to political staff who work in their Ministerial Office.

By way of contrast, the same decision of a department officer or a Minister to not release information under the Act would be able to be reviewed.

It is not logical to have differing review rights for different decision makers under the Act.

Having some decision makers not subject to review is also inconsistent with the objects of the Act in section 3 which include 'increasing the accountability of the executive to the people of Tasmania'.

The amendment bill will close the loophole and ensure people who have their right to information application decided by a Minister's delegates are able to apply for a review of that decision if not satisfied.

The amendment bill closes the loophole by inserting the words "the Minister" into sections 43(1), (2), (3) and (4) of the Act. This will ensure the decision of a Minister's delegate is treated the same was as a decision made by a delegate in the Government Department.

In effect, this will mean that a person can apply to the Minister for an internal review under section 43. If still dissatisfied with the decision, the applicant can then apply to the Ombudsman for an external review under section 44.

This process mirrors review rights open to people who have applied to Government departments for information.



TASMANIAN OMBUDSMAN

Right to Information Act Review

Names of Parties

The Hon Cassy O'Connor MHA and the Hon Matthew Groom MHA, Minister for Environment, Parks and Heritage

Reasons for decision

Provisions considered: ss43, 44 and 45

Introduction

An application for assessed disclosure under the *Right to Information Act 2009* (the Act) was made by the applicant to the Minister for Environment, Parks and Heritage on 14 December 2015. The scope of the application was negotiated and it was formally accepted on 22 December 2015. It sought:

Correspondence between proponents and the Minister's Office relating to the EOI process for the World Heritage Area, National Parks and Reserves.

A decision was made in accordance with s22 of the Act by the Minister's delegate, [REDACTED] on 23 February 2016. In that decision, 16 pieces of information were claimed to be exempt under s39 of the Act

The decision did not comply with s22(2)(c) of the Act, because it did not:

- inform the applicant of her right to apply for a review;
- identify the authority to which an application for review could be made; or
- advise the applicant of the time limits for seeking review.

In any event, however, this is moot because it is my view that there are no review rights in relation to the decision of a Minister's delegate.

Relevant legislation

In the normal course, where a decision has been made by a delegate, a right to internal review is conferred by s43 of the Act. That section, however, is expressed in the following terms:

- (1) *If a decision in respect of an application made to a public authority for information has been made by a delegated officer, the*

applicant may, within 20 working days after notice of the decision is given to the applicant in accordance with section 22, apply to the principal officer of the public authority for a review of the decision [my emphasis added].

The section only allows a review through s43 when the decision is that of a delegated officer of a public authority, which is defined in the Act as being:

- (a) an Agency, within the meaning of the State Service Act 2000; or*
- (ab) the University of Tasmania; or*
- (b) the Police Service; or*
- (c) a council; or*
- (d) a statutory authority; or*
- (e) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose; or*
- (f) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister of the Crown; or*
- (g) a Government Business Enterprise within the meaning of the Government Business Enterprises Act 1995; or*
- (h) a council-owned company; or*
- (i) a State-owned company;*

That definition very clearly does not include a responsible Minister or his or her delegate. Indeed a responsible minister is separately defined in the Act as being:

- (a) in relation to an Agency, within the meaning of the State Service Act 2000, the Minister responsible for the administration of the Agency; or*
- (b) in relation to another public authority, the Minister administering the Act by which the public authority was established;*

There is clear power for the Minister to delegate his or her decision making at s24 of the Act which provides:

- (1) The principal officer of a public authority or a Minister may by instrument in writing delegate to a person specified in the instrument the performance or exercise of such of his or her functions or powers under this Act (other than this power of delegation) as are specified in the instrument, and may, by instrument in writing, revoke wholly or in part any such delegation.*

Submissions

Ms O'Connor made submissions to this office on 22 March 2016. Her submissions are largely in keeping with my view and can be summarized as follows:

on the face of it and under the provisions of the RTI Act, a decision of a Minister's delegate is not able to be reviewed, either internally or externally reviewed by the Ombudsman.

The Minister's office was afforded the opportunity to make submissions but did not do so.

Analysis

The two sections of the Act that confer on me jurisdiction to conduct an external review are ss44 and 45.

In order to have jurisdiction to conduct an external review pursuant to s44 it is a prerequisite that an application under s43 has first been made.

Section 43 clearly states that where a *delegate of a public authority* has made a decision, an applicant has the right to make an application for internal review. The intention of the section appears to be to provide an opportunity for the principal officer of a public authority to review his or her delegate's decisions prior to the Ombudsman becoming involved.

The question in this case is whether s43 can be interpreted to include Ministers. In my view, it cannot. Throughout the rest of the Act where a section is intended to include both public authorities and Ministers, both are named. See for example s45 where the language used in s45(1)(a)-(f) inclusive refers to *a Minister or Public Authority*. Discrete references to Ministers and Public Authorities throughout the Act indicates that they are to be treated separately. Section 43 provides for the internal review of a decision made by a delegated officer of a public authority only, not that of a Minister.

Section 44 provides for the external review of decisions to which ss43(1), (2) or (3) apply and so is confined to decisions made by delegated officers of public authorities. Section 45 specifically provides for the external review of a Minister's decision, but again not one made by his or her delegate. Section 45(1)(a) provides for external review where a decision has been made:

by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under s43 [for internal review].

I am satisfied that, under the Act, there is no avenue for the review of a decision made by a Minister's delegate.

Since I do not have jurisdiction to accept an application for external review I make no comment as to whether the decision of the delegate was correct or not.

Dated: 27 April 2016

A handwritten signature in black ink, appearing to read 'R. Connock', written over a faint dotted line.

**Richard Connock
OMBUDSMAN**

