

OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review **Case Reference: R2207-004**

Names of Parties: Clive Stott and Department of Health

Reasons for decision: s48(3)

Provisions considered: s19

Background

- 1 The applicant, Mr Clive Stott, has an interest in air quality in Tasmania. On 13 June 2022, he lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with the Department of Health (the Department) requesting information about ventilation in hospitals.
- 2 Mr Stott indicated on his application for information to the Department that he had previously emailed the Premier and Minister for Health, the Hon Jeremy Rockliff MP, seeking this information. His application was in the following terms:
 - Which hospital wards in Tasmania do not have conditioned supply air or ventilation installed?*
 - i) Release of schematic diagrams of the heating/cooling/ventilation systems for these wards.*
 - ii) Which wards, if any have portable air purifiers installed.*
- 3 The Department accepted the application on 17 June 2022, after waiving the fee pursuant to s16(2)(a) of the Act.
- 4 On 15 July 2022, Mr Stott applied to this office for external review under s45(1)(f) of the Act, on the basis that the statutory timeframe had expired and he was not in receipt of a decision from the Department. In his covering email he indicated that *I believe the statutory 20 day limit has expired and health [sic] never sought further time.*
- 5 On 25 July 2022, the Department released a s19(2) *Notice of Decision* (the Notice) to Mr Stott. Mr Michael Casey, the Department's delegate under the Act, indicated an intention to refuse the application on the basis that to process the request would *substantially and unreasonably divert the resources of the public authority from its work* (s19(1)). The Notice offered the applicant five days in which to consult with the Department.

- 6 On 26 July 2022, Mr Stott responded to the Notice. In his letter he indicated a willingness to consult with the Department with a view to *remove any grounds of refusal for be in compliance with s19(2)*. His response is more fully set out in Submissions below.
- 7 It appears that the Department never responded to the applicant's letter.
- 8 Correspondence between my office and the Department occurred in July, August and October 2022, with my officers trying to ensure a decision was released as soon as possible. On 8 November 2022, Mr Casey issued a decision refusing the application pursuant to s19.
- 9 On 21 November 2022, Mr Stott applied for internal review. Also on 21 November 2022, the Department accepted the internal review request. The acceptance advised the applicant that:

In accordance with section 43(5) of the Act, the internal review will be completed within 20 working days of today's date (19 December 2022).
- 10 On 21 December 2022, the applicant wrote to the Department because the due date had passed and he had not received the internal review decision.
- 11 On 26 January 2023, Mr Stott had still not received the internal review decision and applied to my office for review on the basis that the internal review decision had not been received in the required timeframe (s44(1)(b)(ii)). In that application he indicated, *I have heard nothing* from the Department.
- 12 Again, my officers made efforts to have the Department release a decision to Mr Stott in January and February 2023 including issuing a direction for a decision to be released pursuant to s47(1)(f) of the Act.
- 13 On 24 February 2023, Ms Sophie Doyle, the Department's delegate under the Act, released the internal review decision. It affirmed the original decision and Mr Stott's application for assessed disclosure was again refused pursuant to s19.
- 14 On 2 March 2023, my office received an application for a full external review from Mr Stott under s44(1)(b)(i). That application for external review was accepted by my office on 8 March 2023.
- 15 Mr Stott applied for priority consideration of his application, citing the compelling need for his application to be dealt with due to it relating to the COVID-19 pandemic and vital health considerations. He also raised concerns regarding the complete refusal of his application and the delays he had experienced from the Department. Having regard to my Priority Policy, the matters raised in his request for priority, the circumstances of the application, the information sought and the public interest in that information, I decided to prioritise his request on 8 April 2023.

Issues for Determination

16 The issues for determination are:

- whether, in refusing the application for assessed disclosure, the Department gave Mr Stott a reasonable opportunity to consult with a view to helping him make an application in a form that would remove the ground for refusal, as required by s19(2); and, if so,
- whether the work involved in dealing with application would substantially and unreasonably divert the resources of the Department from its other work, under ss19(1)(a) and (c), having regard to the factors in Schedule 3 of the Act.

Relevant legislation

17 Relevant to this review is s19 of the Act, which incorporates Schedule 3. Copies of both are attached to this decision as Attachment 1.

Submissions

Applicant's Submissions

- 18 The applicant has made submissions, as the application has progressed, outlining his position with respect to the information being sought and the consultation process.
- 19 The applicant's response to the Notice, as emailed by him to the Department on 26 July 2023, provides:

Notice

The Department has taken the view to refuse in relation to Schedule 3 by providing me with scant details as to how:

19(1) (a) it would substantially and unreasonably divert resources from the authority's other work.

(b) it would substantially and unreasonably interfere with the performance by the Minister or the Minister's other functions, and

(c) matters I will come to in Schedule 3 as up until now (and outside RTI Act time limits) I have had no response from the department in relation to my request for information.

19(2) It therefore follows the department has not up until now provided me with a reasonable opportunity to consult with a view to being helped to make this application in a form that would remove the grounds for refusal.

Schedule 3

(a)(b)(c)(d) I believe I have provided sufficiently precise descriptions to be able to locate the documents sought within reasonable time and with reasonable effort. I say this with some authority as I worked in DHHS hospital engineering for many years, was an active member of the state-wide engineering working group, and held full membership of the Institute of Hospital Engineering, Australia (MIHE)

(e) I am familiar with RTI timelines.

Period of Consultation

You rightly point out before a decision can be made to refuse my request, s19(2) requires the department help me make the application in a form that would remove the grounds for refusal.

The department has my application. I look forward to hearing what help it can come up with to remove any grounds for refusal and therefore be in compliance with s19(2).

- 20 The applicant provided further submissions dated 1 March 2023 with his request for external review. I have omitted the reference to his concerns regarding fee waiver, as this is not a matter I can consider in this review. His submissions otherwise set out that:

I am in receipt of DHHS's Internal Review Decision dated 24th February 2023 and it is my wish now please to proceed to a full External Review.

Information has been detailed by me previously in my correspondence dated 26th July 2022.

*Mention is made of this in the latest DHHS **Decision and Statement of Reasons:***

"Whilst the Act does not require an applicant to express reasons for requesting an internal review, when requesting the internal review, the applicant submitted a detailed submission which is summarised under the following headings: 1. Application Fee, 2. Resources Unreasonably Diverted, 3. Reasonable Opportunity to Consult."

...

2. Resources Unreasonably Diverted.

I know what is involved in collating existing information because I worked in hospital engineering. I feel DHHS is making the request appear more onerous than it is.

The information custodian would be able to narrow the search down considerably to buildings, blocks or passageways rather than pad-it-out to individual wards in the first instance; saving valuable time and money.

There have been considerable delays whilst this matter just sat. This important information could have been to hand by now if the matter had been taken seriously rather than trying to use the Act along with case judgements so as not to provide ANYTHING which has been the case.

*Undertaking this request in no way should be seen as, "...an unreasonable diversion of resources away from the provision of health services."
Knowing where our hospital supply air and ventilation fits is vital and complementary for the provision of health services.*

Matter (i) h: No meaningful consultation has taken place because I have just found out after months DHHS considers my request to be "onerous". I refute this of course.

S(19)2 requires DHHS to help me make my request in a form that would remove the grounds for refusal. This has not happened. (i) Where can DHHS show they have helped me remove the grounds for refusal? [sic]

DHHS has not even considered items (i), (ii) or (iii) individually in my application.

Everything has just been lumped together in total and they have said we are busy; this gets a refusal because it is too onerous?

Part of the Internal Review Decision document were missing and DHHS continued to miss-spell my name on the email.

I feel if DHHS is going to claim I was 5 days late at one point in this protracted RTI process then they must look up really where the delays were.

I am sympathetic to the 35,000 pages connected to other RTI requests, however, "When you can't breathe nothing else matters."

Please feel free to contact me if any further information is required.

Department's submissions

- 21 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions. The Notice, the original decision and the internal review decision are all relevant to the issues for determination. Extracts from each are set out below, with footnotes and s19 quotations omitted.
- 22 The Notice provides that:

Notice

Section 19 provides that where an application would substantially and unreasonably divert the resources of the public authority from its work, having regard to the list of factors in Schedule 3, the application may be refused without identifying, locating or collating the information. However,

the public authority must allow the applicant to negotiate a more limited or acceptable application.

...

This notice is that while reviewing your request for information, and after consulting with the information custodian, I am satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work.

In forming my view, I have taken into regard the matters listed below of Schedule 3 (Matters relevant to assessment of refusing application).

Schedule 3 (a) *the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;*

(c) *more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications;*

(d) *the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost;*

(e) *the timelines binding the public authority or Minister;*

Period of Consultation

Before a decision refusing the request for information, s19(2) places an obligation that the applicant is granted a reasonable opportunity to consult the public authority with a view to being helped to make the application in a form that would remove the ground for refusal.

If I do not hear from you within five (5) working days from the date of this notice, you will be issued with a decision refusing your application under s19(1) of the Act along with details regarding the right to apply for a review of that decision.

23 From Mr Casey's decision, of 8 November 2022:

Section 19(1) Requests may be refused if resources unreasonably diverted

...

Section 19 provides that where an application would substantially and unreasonably divert the resources of the public authority from its work, having regard to the list of factors in Schedule 3, the application may be

refused without identifying, locating or collating the information. However, the public authority must allow the applicant an opportunity to consult on a limited or acceptable application. The intention of this section is to find a balance between the pro-disclosure objectives of the Act and the unreasonable disruption that could be caused to the performance of a public authority's daily operations if it was required to process voluminous requests for information.

On 25 July 2022 a notice was issued under s19(2) advising that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. The applicant was afforded the opportunity to consult with the public authority within five (5) working days of the date of the notice to remove the ground for refusal.

- 24 The decision goes on, at some length, to provide the delegate's analysis of the meaning of *public interest* which is not relevant to the determination I have to make.

Reasonable opportunity to consult

The applicant proffered that the public authority had failed to provide a reasonable opportunity to consult with a view to being helped to make the application in a form to remove the ground for refusal. The s19(2) notice of the intention to refuse the application provided the applicant the opportunity to consult with the public authority. The applicant expressed the view that the application as drafted was sufficient for the public authority to identify the information.

The wording of s19(2) provides that the applicant be given ... a reasonable opportunity to consult the public authority. The wording of this section contrasts with s13 (7) and (8) that allows for negotiation to refine an application for assessed disclosure or, if appropriate, assist a person to make an application for assessed disclosure. The operation of s13(7) and (8) enables the public authority to be an active participant in an exchange with the applicant. However, s19(2), the emphasis is on the applicant being afforded a reasonable opportunity to consult with the public authority. The ordinary meaning of the word consult is to seek counsel from, ask for advice. Adopting the ordinary meaning, it is not incumbent on the public authority to initiate consultation with the applicant otherwise the requirement would be to enter negotiations as per s13(7).

I am satisfied that the applicant was provided a reasonable opportunity to consult to revise the request. In this case the applicant decided to not consult with the public authority.

- 25 The decision continues by addressing *right to information* and *unreasonable diversion of resources* before reaching the conclusion that:

It is my view that the capacity of the public authority to discharge its normal functions would be undermined by processing the request that is unreasonably burdensome. For the reasons stated above my decision is to refuse to provide the information, in accordance with s19(1) of the Act.

Internal review decision

26 Extracted from the internal review decision, dated 24 February 2023:

Resources Unreasonably Diverted ...

Section 19 provides that where an application would substantially and unreasonably divert the resources of the public authority from its work, having regard to the list of factors in Schedule 3, the application may be refused without identifying, locating or collating the information. However, the public authority must allow the applicant to negotiate a more limited or acceptable application. The intention of this section is to find a balance between the pro-disclosure objectives of the Act and the unreasonable disruption that could be caused to the performance of a public authority's daily operations if it was required to process voluminous requests for information.

On 13 July 2022, a notice was issued under s19(2) advising that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. The applicant was requested to contact the public authority within five (5) working days of the date of the notice to remove the ground for refusal.

The applicant's office emailed the public authority asking the number of pages that require assessment for each point of the request. While, as noted above, s19 provides refusal to disclose the information may be made without identifying, locating or collating the information, a preliminary review was undertaken to gain an indication of the effort to respond to the request.

In order to make a decision under s19(1) of the Act, I must be satisfied that the work involved in providing the information requested would both substantially and unreasonably divert the resources of the public authority from its other work. Having considered the matters specified in Schedule 3 of the Act, and based on my enquiries to date with the information custodian, I am satisfied that the work involved in identifying, collating and providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. Concerning the matters specified in Schedule 3 of the Act my reasons are as follows:

- *Matter 1(a): the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort.*

The term of the request is of a global kind through asking for information pertaining to hospital wards throughout the whole of the state of Tasmania.

How the request is worded encapsulates a large volume of information in the possession of the public authority that is not practical to locate within a reasonable time.

- **Matter 1(b):** whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort.

Even though the applicant is a private citizen, and the information is in connection with ventilation pertaining to hospital wards throughout the whole of the state of Tasmania.

The consideration under Schedule 3 may diminish somewhat due to this fact but I am not convinced that the weight of importance of the application to the applicant outweighs the utilisation of resources in further assessing the application.

- **Matter 1(c):** more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications.

In this context, the resources to be considered are the existing resources required to process the request consistent with attendance to other priorities. It does not refer to the whole of the resources or possible resources it may temporarily be able to obtain to assist in processing the request. Therefore, the resources to be considered are those which would have to be used in:

(1) manually identifying the information in the Department's electronic computer systems;

(2) identifying, locating and collating the information from the computer system;

(3) deciding whether to grant, refuse or defer access to the information or edited information, including resources to be used in examining the information;

(4) extracting the information; and

(5) notifying the applicant of any interim or final decision on the request.

The advice of the information custodian in relation to the application is that it may take the dedication of one officer more than a reasonable amount of time in collecting the information. Such resources cannot be made available for this request without significantly affecting the other work of both the information custodian and the delegated officer under the Act. I further consider that the diversion of resources would be substantial taking account of the number of other Right to Information requests on hand.

- Matter 1(d): the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost.

The advice from the information custodian is that the request will involve an officer being dedicated to manually collate the information by physically every hospital ward in the state. Both the amount of officer-time and salary cost in collating and then assessing the information would therefore be considerable and, in my view, an unreasonable diversion of resources away from the provision of health services.

- Matter 1(e): the timelines binding the public authority or Minister.

Even if the applicant granted additional time for assessing this request, the time dedicated to this application would consequently influence the timelines for other requests and would be unable to be assessed as a standalone matter due to other priorities of the public authority.

- Matter 1(f): the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made.

The information custodian sought advice from the relevant business groups in relation to gathering and collating the information.

- Matter 1(g): the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications.

The applicant has not submitted similar applications to the public authority or Minister.

- Matter 1(h): the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application.

The applicant did not reasonably consult with the public authority in response to its s19(2) notice, therefore, negotiations remain inconclusive.

- Matter (i): the extent of the resources available to deal with the specified application.

The public authority has limited resources available to identify and collate the requested information while there are existing applications still to be assessed. Currently the public authority has 35 000 pages of information to

be assessed. As noted above, the allocation of seven (7) minutes per page equates to over 4 weeks of outstanding work.

I further find that the diversion of resources to provide the information would be unreasonable. While the matters listed in Schedule 3 of the Act must be considered when assessing if the processing of an application would result in a substantial and unreasonable diversion of resources, it is not a complete statement of the matters, which may be relevant. In making this decision, I have therefore considered all the facts and circumstances including:

- *the volume of information falling within the scope of the request;*
- *the complexity of the request; and*
- *the work time involved in fully processing the request, taking into account that it is not practicable for those involved in processing the request to concentrate solely on the request, given other work commitments.*

It is my view that the capacity of the public authority to discharge its normal functions would be undermined by processing the request that is unreasonably burdensome. For the reasons stated above my decision is to refuse to provide the information, in accordance with s19(1) of the Act.

It is on this basis that my decision is to refuse your application.

Reasonable Opportunity to Consult

S19(2) of the Act provide “A public authority or Minister must not refuse to provide information by virtue of subsection (1) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal”.

On 14 July 2022, you were provided with a s19(2) notice of decision, providing you with five (5) working days from the date of this notice to reasonably consult with the public authority, with a view to being helped to make the application in a form that would remove the ground for refusal (reducing the scope of your application).

S19(2) of the Act, requires the public authority to allow the applicant to reasonably consult with the public authority prior to a s19(2) refusal notice being provided to the applicant. The s19(1) notice provided you with this notice, the five (5) working days expired on 21 July 2022.

On 26 July 2022, you emailed the public authority, outside the five (5) working days, however, you failed to reasonably consult, advising “[you] look forward to hearing what help [the public authority] can come up with to remove any grounds for refusal and therefore be in compliance with s19(2)”. You did not either reduce the scope of your application, nor provide further details on the information requested.

S19(1) allows a public authority to “refuse to provide the information without identifying, locating or collating the information”, if the public authority is satisfied that the work involved would “substantially and unreasonably divert the resources of the public authority from its other work” (s19(1)(a)). At this point it was determined you failed to reasonably consult with the public authority.

On 8 November 2022, you were provided with a 19(1) decision, advising that your application was refused due to failing to reasonably consult with the public authority as per its notice of 14 July 2022.

It is my decision that you failed to reasonably consult with the public authority and the [sic].

Analysis

- 27 I note that in considering the adequacy of the requirement for the applicant to be first given *a reasonable opportunity to consult the public authority*, I have had regard to the submissions as set out above and also correspondence exchanged between the parties and with my office in relation to this matter.

Statutory obligations

- 28 The Act affords an applicant *a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority ... unless the information is exempt information (s7).*
- 29 Because of these clear intentions in the Act, and that a public authority should take all reasonable steps to release the maximum amount of information possible, refusal of an application should be a last resort. It is only after any avenues for enabling acceptance of a request for information are exhausted that a person’s right to information under the Act is to be displaced, and it should not be done so lightly.
- 30 It is contemplated by the Act that there will be times, despite the best efforts of both parties, when a public authority will be unable to be responsive to a request and that an application will necessarily be refused.
- 31 I cannot agree with the delegate’s assessment in the original decision that *it is not incumbent on the public authority to initiate consultation with the applicant otherwise the requirement would be to enter negotiations as per s13(7)*. I find the characterisation of the requirement for the public authority *to consult* is clear in the wording of s19(2):

...to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.

- 32 The section requires the public authority play a positive role in the consultation process and I am concerned with the Department’s reasoning and attitude to consultation here. A public authority must afford a reasonable opportunity to the applicant to consult, with a view to helping the applicant,

as far as practicable, remove the grounds upon which refusal is based. It is only once this consultation process has occurred that the application is able to be refused, if appropriate.

Consultation

- 33 Before entering the consultation stage, s19 necessarily requires the public authority to first identify that the information requested is of a kind or scope that to assess it will expend more than the usual resourcing. It must be both a substantial and unreasonable diversion of resources, supported by a rational basis for the conclusion.
- 34 The public authority is not required to identify, locate and collate the information but is required to assess the application sufficiently to be able to provide a full explanation to the applicant of the reasons for the proposed refusal. The applicant cannot be helped to make their application in a form which will remove the ground of refusal if such an explanation is not provided.
- 35 It should not be considered a foregone conclusion that simply because the public authority initially found that responding to the request would be a substantial and unreasonable diversion of its resources, that the application cannot be sufficiently refined. Quite the contrary, as there may be any number of outcomes from the consultation enabling the application to be accepted, with varying degrees of refinement required.
- 36 Engagement by both parties in the consultation process may present a number of positive outcomes that lead to an application being accepted, for example:
 - a. the applicant being better able to explain their request, especially if they have subject matter expertise that may be relevant;
 - b. the public authority better understanding the type of information sought or identifying other sources for the information that were not initially contemplated; or
 - c. the applicant understanding the practical challenges for the public authority and reframing or narrowing the request.
- 37 The Act does not prescribe how the consultation is to occur but there must be a reasonable opportunity given, and it obviously should be in good faith and fair.
- 38 The question then is whether the Department provided a reasonable opportunity for the applicant to consult and then engaged in a consultation with the applicant.

Adequacy of consultation

- 39 I find it necessary to first deal with the approach taken at the original decision making stage before turning to the internal review.
- 40 The Department offered the applicant the opportunity to respond to the Notice within five days. In the applicant's letter of reply, emailed the next day, he clearly requests to engage with the Department in order to progress the application.
- 41 The applicant expresses concern at being provided *scant details* with respect to s19(1) and he goes on that *the Department has not up until now provided me with a reasonable opportunity to consult with a view to being helped to make this application in a form that would remove the grounds for refusal. ... I look forward to hearing what help it can come up with to remove any grounds for refusal...*
- 42 On that basis, I reject the delegate's position that the applicant *decided not to consult* with the Department. I find to the contrary, that his response in fact indicated a willingness to accept and consider guidance as to what could be done to refine his request in order to obtain the maximum amount of information responsive to his request.
- 43 I further find that the Department, in offering the arbitrary five day period and then not engaging with the applicant, did not provide a reasonable opportunity to consult.
- 44 It would have been consistent with the statutory requirement to consult for the Department to:
- a. respond to the applicant's letter and provide detail about its position and the basis for the conclusion that dealing with the application would be a substantial and unreasonable diversion of resources; and/or
 - b. schedule an appointment for the parties to discuss the application and the issues arising for the Department that had been identified and that informed the Notice issued.
- 45 The approach taken by the Department hindered the process and prevented Mr Stott from being informed in a manner which may have enabled him to refine the scope of his application and remove the ground of refusal.
- 46 I note that far better practice, such as the exemplary consultation I commented upon in my decision of *Robin Smith and City of Launceston*,¹ is for steps to be taken to identify the relevant information and provide details about the actual number of pages or any other reason that is likely to form the basis of a refusal. Addressing the factors in Schedule 3 during consultation, which are required to be considered and discussed in any

¹ See paragraph 34 in *Robin Smith and City of Launceston (No. 1)* (September 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

decision refusing an application under s19(1), is the most effective way to do this.

- 47 I am disappointed by the approach taken by the Department and I find the applicant was not afforded a *reasonable opportunity to consult*. It is clear in Mr Casey's decision that there is confusion regarding exactly what is sought, as he notes that part of the request *seems to be contradictory*. This highlights that there were matters for discussion between the parties. This lack of engagement with the applicant is not consistent with a reasonable approach in helping an applicant to make a valid application.
- 48 This is further evident from the suggestion by the Department that the only means of obtaining the information is through a labour intensive manual inspection process to create new information. There is no explanation for this proposal and the basis for it. Nor is there any discussion as to other sources considered, for example, maintenance or depreciation schedules, building or engineering records, service contracts, reports such as air quality audits, or other resources such as schematics that the applicant, with his hospital engineering background, may be familiar with. Without proper consultation, it is impossible to determine whether there may be an alternative solution which may remove the ground of refusal.
- 49 With respect to the approach taken by Ms Doyle in the internal review decision, there are separate issues that arise for consideration.
- 50 First, in undertaking the review task the reviewer is to *make a fresh decision* (pursuant to s43(4)(b)) and in so doing approach that task *in the same manner as a decision in respect of the original application* (having regard to s43(5)). It is not at all apparent that the reviewer approached the matter of consultation as required, and instead reliance is made on an assertion that the applicant was out of time in responding to the Notice.
- 51 Second, the reviewer's reliance on the Department's nominated five days is problematic for the following reasons:
 - a. The date relied on for reckoning of the five days offered is wrong (the Notice was dated 25 July 2022, not 14 July 2022 as cited) and Mr Stott did in fact respond to Mr Casey within five days; and
 - b. In any event, there is no statutory requirement that would prevent consultation outside of the Department's nominated five days which appears unreasonably short in the context of lengthy delays in releasing decisions by the Department.
- 52 I find, for the purposes of the internal review, that the Department failed to engage with the applicant with a view to him being helped to make an application in a form that would remove the ground for refusal as required under the Act.
- 53 The Act gives members of the public the right to obtain information from public authorities unless it is exempt information, and it is expressly provided

by s3(4)(b) that discretions conferred by the Act are to be exercised to facilitate the provision of the maximum amount of official information. Accordingly, it follows that refusal of an application at the outset should only occur when truly necessary. The lack of engagement by the Department in this instance does not meet this standard and I urge the Department to properly apply the object and spirit of the right to information scheme in future.

Preliminary conclusion

54 In accordance with the reasons set out above, I determine that the Department did not comply with s19(2) and is not entitled to rely on s19 to refuse Mr Stott's application.

Conclusion

55 As the above preliminary decision was adverse to the Department, it was made available to it on 26 May 2023, under s48(1)(a) of the Act, for its input before the decision was finalised.

56 The Department was invited to provide submissions in reply to the preliminary decision, by 7 June 2023. On that date an extension of time was requested and granted until 13 June 2023. A further extension of time to 7 July 2023 was sought and refused, as this appeared to have been sought in order for consultation to occur with Mr Stott which is what was being required in accordance with my preliminary decision. A new amended due date for submissions of 23 June 2023 was granted, but none were received.

57 Although no submissions were received, on 13 June 2023 Ms Leah Dorgelo, my Principal Officer – Right to Information, spoke with Ms Megan Hutton, General Manager Legal Services of the Department, about Mr Stott's application and the preliminary decision. During that conversation Ms Hutton indicated a willingness to take the necessary steps to identify any information that might be responsive to the request and to look at consulting with Mr Stott in order to better understand his request.

58 I understand that, helpfully, the Department has begun to look at options for locating and providing some information to Mr Stott that is responsive to his request. I acknowledge that approach is both consistent with the objectives and provisions of the Act.

59 The expected result is that the Department will either assess information located that is responsive to Mr Stott's request (and release this subject to any applicable exemptions) or, if there is little or no information available, it will provide fulsome reasons as to why there is no information available. Consultation under s19(2) will be properly conducted, if relevant.

60 Accordingly, I have not altered my conclusions reached in my preliminary decision.

- 61 For the reasons set out above, I determine that the Department did not comply with s19(2) and is not entitled to rely on s19 to refuse Mr Stott's application.
- 62 I direct the Department to re-assess the application in accordance with the provisions of the Act.

Dated: 26 June 2023

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a vertical line and a horizontal stroke, all enclosed within a large, sweeping loop.

Richard Connock
OMBUDSMAN

ATTACHMENT I

Relevant legislation

Section 19

(1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –

(a) would substantially and unreasonably divert the resources of the public authority from its other work; or

(b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions –

having regard to –

(c) the matters specified in Schedule 3 –

the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.

(2) A public authority or Minister must not refuse to provide information by virtue of subsection (1) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.

SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application

I. The following matters are matters that must be considered when assessing if the processing of an application for assessed disclosure of information would result in a substantial and unreasonable diversion of resources:

(a) the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;

(b) whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort;

(c) more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications;

(d) the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost;

(e) the timelines binding the public authority or Minister;

(f) the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made;

- (g) the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications;
- (h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;
- (i) the extent of the resources available to deal with the specified application.