OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference: O1703-077**

Names of Parties: Carlo Di Falco and Tasmania Police

Draft reasons for decision: s48(1)(b)

Provisions considered: s6, s9, s10, s 19, s30(1)

Background

Mr Carlo Di Falco is a target shooter, hunter, collector and member of the Shooters and Fishers Party. The release of a regulatory impact statement and draft regulations regarding changes to the storage of firearms by the Department of Police, Fire and Emergency Management (DPFEM) prompted Mr Di Falco to seek further information.

2 On 4 December 2016, he submitted an application for assessed disclosure under the Act to DPFEM in the following terms:

I. How many gun owners residences have been broken into without the safes being breached or removed? (How can anyone claim that the *current standards* are *insufficient if* more *thieves were deterred than were successful?)*

2. The *numbers of crimes committed with stolen firearms.*

0. How many of the murders on the culpable murder chart were carried out using stolen firearms and the distance at which the murders were carried out *(firearms don't provide any advantage in a murder* over other *methods* if *the murderer was in close proximity to the victim).*

1. The number of convictions of *manslaughter and dangerous driving in the last 10 years.* The *"Counting the Costs" study from the AIC includes manslaughter and death by driving in their murder count.*

2. Number of licensed gun owners on the culpable murder chart in the last 10 years (by the police own definition, gun owners with outstanding AVOs are unlicensed).

3. How many safes *were removed as a result of bolts/screws failing.*

4. A breakdown of the numbers of safes that were breached or taken altogether using demolition tools e.g. chainsaws, angle grinders, mattocks, crowbars, porta pacs etc.

5. *How many stolen firearms were retrieved using fingerprints and* DNA *samples.*

6. *The number of serious crimes e.g. hold ups and assaults* etc *that were solved where the data from the registry was pivotal in getting a conviction.*

7. *How many residences and sheds were damaged in order for firearm thieves to get access to* the *gun safes.*

1I. *The sentence handed down to the person mentioned in the Regulatory* Impact *Statement caught using the* video system.

/2. *What has* been *the cost* to *run* the *registry — a breakdown of costs for the last 10 years (needed for a cost benefit analysis).*

13. *Police man-hours in carrying safe inspections for the last 10 years (needed for a cost benefit analysis).*

3. The *qualification* of *the person who wrote the Regulatory Impact* Statement *(was it* one of *your officers or Roland Brown).*

14. *The number* of *repeat offenders listed by single, double and three or* more *convictions related to the theft of firearms without the imposing* of *a jail* term.

3 On 23 December 2016, Sergeant John Delpero, a delegated officer, released a decision to Mr Di Falco refusing to provide the bulk of the information pursuant to s19 on the basis that the work involved in providing it would substantially and unreasonably divert the Department's resources from its other work, requiring as it would an extensive search of Tasmania Police's databases.

4 Mr Di Falco was provided with information responsive to items 5, II, 12 and 14. Some basic information responsive to items 2 and 3 was also provided, but the bulk of it was refused pursuant to s19. Information responsive to item I 0 was refused pursuant to s9 on the basis that it was otherwise available.

5 Items 4 and 15 were transferred to the Department of Justice pursuant to s14 of the Act and therefore will not be considered further.

6 Following the release of that decision, DPFEM contacted the applicant to advise that the data provided in response to items 2 and 3 was inaccurate and would be revisited. A supplementary decision was provided on 17 January 2017.

7 On 13 January 2017, the applicant requested DPFEM to undertake an internal review. He said that he "agreed" with the responses given in relation to items II, 12 and 14. That being the case, those items will not be considered further either. In relation to the remainder of his application, Mr Di Falco reiterated, that he had asked for information regarding stolen firearms and not firearms confiscated. He said the responses provided to him were confusing or unusable

and he did not accept that the work needed to locate the information was particularly onerous *due to* the *small numbers involved.*

8 On 16 February 2017, Commander P J Edwards, a delegated officer, released a decision on the internal review to the applicant. That decision reached the same conclusion as the decision at first instance, relying on the same provisions. Specifically:

- information responsive to items 5, I I, 12 and 14 was provided;
- information responsive to items 1, 6, 7, 8, 9 and 13 was refused pursuant to s19;
- two reports related to matters the subject of ongoing court proceedings and were therefore claimed to be exempt pursuant s30(1)(a)(iii);
- two further reports were also identified as relating to matters under investigation and therefore claimed to be exempt pursuant to s30( )(a)(i) and s30(I)(f);
- another two were identified as relating to matters the subject of ongoing proceedings in the Coronial Division of the Magistrates' Court, the information was in the possession of the court and it was noted that courts and magistrates are excluded public authorities pursuant to s6;
- only one other had a distance recorded;
- the number of reports responsive to items 2 and 3 was provided; and
- the balance of the request was refused pursuant to s19.

9 On 9 March 2017, the applicant applied for an external review.

10 It was noted by my office that Mr Di Falco had not been given a reasonable opportunity to consult with DPFEM to help him make an application in a form that would remove the ground for refusal before it made its final determination as required by s19(2). In its original decision DPFEM said in relation to a number of items, that *consultation would have* been *impractical given the task* of *collating the material, even for* one *financial year, would be substantial.*

II My office nonetheless wrote to the applicant on 16 November 2017 formally offering him the opportunity to revise the scope of his request. He replied on I December 2017 that he did not want to change the *conditions of the review* and that he did not believe it too *difficult* to retrieve the *information.*

12 DPFEM was advised of this and asked to provide Mr Di Falco with its final decision. On 15 December 2017, Sergeant Jayson Taws, a delegated officer, issued a formal decision to refuse the balance of the request relying on s19.

Relevant legislation

13 As noted, DPFEM primarily refused to provide the information pursuant to s19 because, it said, compliance with the request would require a substantial and unreasonable diversion of its resources. It also refused to provide some information pursuant to s9 on the basis that it was already otherwise available.

14 It claimed an exemption pursuant to s30(I)(a)(iii) in relation to two reports on the basis that disclosure of the information they contained would, or would be reasonably likely to prejudice the fair trial of a person.

15 Exemption was claimed for a further two reports pursuant to ss30(1)(a)(i) and 30(1(f) on the basis that disclosure of the information they contained would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law, and hinder, delay or prejudice an investigation of a breach or possible breach of the law which was not then complete.

16 Copies of sections 19 and 30 are attached to this decision. I consider that s **I** 0 has relevance too and a copy of that section is attached. Also attached is a copy of Schedule 3 to the Act, which contains the matters to be taken into account when assessing whether an application can be refused.

Submissions

17 In an email to Sergeant Delpero dated 28 January 2017, Mr Di Falco said that he did not accept that the effort needed to find answers to the questions posed in his request would create a substantial and unreasonable diversion of DPFEM resources and that **I** *don't* believe *that my requests are particularly onerous due to the small numbers involved.* He also said that

18 In his application for external review, Mr Di Falco stated he was not satisfied with the Department's reliance on s 19 ...on *the basis that a search of the databases would be substantial.*

19 He submitted:

> *The accumulated costs to licenced firearms owners according to the "regulatory impact statement" are up to $9 million, so this information is* of the *utmost importance.*

20 He also asserted that:

> ...most of *this information should be available* [and that it] *should have been included in* the *"regulatory impact statement".*

21 In addition he requested that the application fee be reimbursed as he believed his request to be in the public interest.

22 On 16 February 2017, Commander Edwards reviewed the original decision and replied:

> ...the specific *requests made in your application would demand considerable time consuming* effort on the *part* of *DPFEM employees to extract and collate the relevant data.*

He went on to say that he was:

> *...satisfied that the exemptions applied by Sergeant* De/per° *in his assessment and reported to you on 23* December *2016 were appropriate and in accordance with the legislation.*

Analysis

Items I and 6 to *9*

23 As noted, in a letter from this office dated 16 November 2017, the applicant was advised that the request so far as it related to information responsive to items I to 6, 6 to 9 and 13 had been refused under sl9 and an opportunity to revise the scope of his request had been afforded to him. I note also that no timeframes were stipulated for the information sought by the applicant in his original application, other than for items 4, 5, 12 and 13 in relation to which he sought information over a ten year period.

24 Before upholding a refusal to provide information pursuant to s19(1)(a) I must be 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, having regard to the matters specified in Schedule 3.

25 Of particular relevance in this instance are the following matters referred to in 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;*
>
> the *extent* of the *resources available* to *deal with* the *specified application.*

26 A search by DFEM identified potentially 1,013 offence reports that fell within the scope of the request. A calculation was made by reference to a number of

these offence reports and the average number of pages for each was seven. This equates to an estimated 7,091 pages for all the reports.

27 The Office of the Australian Information Commissioner has suggested that a reasonable time for the assessment of information is seven minutes per page. While this is a fairly arbitrary calculation, in the absence of any other estimate I consider it appropriate to apply it here. At the average of seven minutes per page, it would take an estimated 827 hours to assess the subject information, or approximately 23 full time working weeks for a single officer.

28 The cost of this may be calculated by reference to the average salary of a single officer holding the rank of Sergeant of $75.00 per hour. On this basis the cost of processing the request would be in the vicinity of $62,000.00. DPFEM took the view that it would be difficult to justify this level, of expenditure to process the information requested in its current form.

29 As noted earlier, the applicant was given the opportunity to revise his request with a view to removing the ground for refusal but declined to do so.

30 On the material available to me, I am satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of DPFEM from its other work. That being the case, I am also satisfied that it was entitled to refuse to deal with the request pursuant to s I 9(I)(a).

Item 2

31 The applicant was advised in the Department's decision of 23 December 2016 that *the information* you seek *at point number 2 would require an extensive search* of *Tasmania Police databases and hence, that part* of your *application is refused pursuant to section 19* of the Act. However a *search identified 66 separate reports of serious crime over the last 10 years which involved the use* of *a firearm.* In a supplementary decision dated 17 January 2017, this figure was revised to *42 separate reports of serious crime for* the *calendar year 2016 which involved the use* of *a firearm.*

32 The applicant confirmed that he only required information in relation to offences involving *stolen* firearms. The Department responded by saying that an investigation of each identified case to ascertain whether or not the firearm used had been stolen would be impracticable and again relied on s19 to refuse the request.

33 Following further inquiry by my office, Tasmania Police advised that its Offence Report System database (ORS) does not condescend to that level of detail: the system can be searched for a serious crime and a firearm, but it does not make it apparent whether the firearm used was stolen or not. This would require a manual review of each case and would only show those offences where reported stolen firearms were used, but would not identify firearms either not reported stolen or stolen interstate and imported into Tasmania.

34 I am satisfied, whether for a period of one year or ten years, the task of providing information responsive to Item 2 would again substantially and unreasonably divert the resources of DPFEM from its other work and it was entitled to refuse the request pursuant to s19(1)(a).

Item 3

35 As noted above, the original decision identified *eight reports of murder over the last ten years which involved a firearm or the theft of a firearm/ammunition.* This was later revised in the supplementary decision to twelve *separate reports of murder and manslaughter from I January 2007 to 31 December 2016 which involved the use of a firearm.* Any other information responsive to this part of the request was refused under s19.

36 In DPFEM's decision on internal review dated 16 February 2017, the 12 reports identified were considered further. As to the distance at which the murders were carried out, it was found that two of the matters where this information was disclosed were the subject of ongoing court proceedings and another two were the subject of ongoing Police investigations and were exempted pursuant to ss30(I)(i) and (iii) and 30(I)(f).

37 A further two matters were identified as being the subject of proceedings before the Coronial division of the Magistrates' Court and the information relating to them was in the possession of the Courts: s6( )(b) excludes courts from the operation of the Act unless the information sought relates to their administration.

38 One matter, however, had been finalised and the distance recorded was disclosed. The information provided did not identify whether the firearm used had been stolen. The remaining five cases had no distances recorded.

39 Following further enquiries by this office, Tasmania Police advised that the information disclosed *is as accurate as our systems allow* and cannot be *fulfilled any further* due to *the reporting parameters* of the time. Those parameters do not include whether the firearm used was in fact stolen at the time of the murders and this information, therefore, does not exist. In those circumstances, ss6 and 30 have little or no relevance.

40 Though not referred to by DPFEM, s10(1) permits a public authority to refuse an application if information responsive to it is stored in an electronic form and it cannot be produced using the normal computer hardware and software and technical expertise of the public authority; and producing it would substantially and unreasonably divert the resources of the public authority from its usual operations, having regard to the factors in Schedule 3.

41 DPFEM Reporting Services has confirmed that the information sought cannot be extracted from the data sets kept in the current Tasmania Police electronic information systems. An entirely new *query* methodology would need to be developed to assess whether the information could be extracted. This, says

the Department, would involve a significant amount of time and would unreasonably divert its resources from other more critical work.

42 Section 47(1)(k) allows me to decide any matter in relation to the original application for assessed disclosure that could be decided by the public authority to whom it was made Thus, even though the Department did not refer to s10, I am of the view that it could have, it is relevant to this part of the application and I can have regard to it. I am satisfied that the information requested cannot be produced using DPFEM's normal computer hardware and software, and producing it would substantially and unreasonably divert its resources from its other work, having regard to the matters contained in Schedule 3 referred to in paragraph 25 above. This part of the request can therefore be refused pursuant to s10.

Item 5

43 DPFEM advised that *the number of persons with firearm licences convicted* of *murder, manslaughter and death by dangerous driving (culpable homicide) over the last 10 years is five* (5). As the applicant points out in his letter of 13 January 2017 to the Department, however, he did not ask for information about manslaughter or death by culpable driving, but only about murder by licenced gun owners.

44 As referred to above, however, Tasmania Police cannot respond to this part of the request as the parameters of its computer software are such that this information is unable to be provided.

45 Again, s 10(1) has application; the information sought cannot be extracted from the data sets kept in the current Tasmania Police electronic information systems and producing it, if it exists, would substantially and unreasonably divert its resources from its usual operations.

46 I consider that this part of the request can be refused pursuant to s10.

Item *10*

47 Relying on s9, the Department determined that Mr Di Falco was not entitled to this information because it was already otherwise available and provided a link to the relevant page of its website. The information there was a table outlining the different types of premises unlawfully entered (including dwellings and sheds) from which firearms had been stolen for the financial years 2013/14 and 2014/15.

48 Mr Di Falco responded by reiterating that he had asked for information in relation to how many structures had been damaged by firearms thieves, and that the information provided did not indicate whether structures had been locked or not. There *is* little usable *information,* he said, *I want* to *get a* sense *of how much* force *was used to gain access.*

49 A decision made pursuant to s9 is not one that is reviewable by me under the Act, but it would appear that the information referred to by the Department is not the information sought by Mr Di Falco.

50 Upon further enquiry, the Department conceded that the information provided was not responsive to Mr Di Falco's request, but said that the information he did seek is not captured by Tasmania Police's information systems. In order to locate the information, again each individual report would need to be manually reviewed. It is contended that to do so would substantially and unreasonably divert its resources from its other work and normal operations.

51 I am satisfied that this is the case, and this part of the request could be refused pursuant to either s19 or s10.

Item / /

52 This part of the request sought information about a sentence handed down to a particular person. At the time the request was made, three people had been charged with aggravated burglary and stealing but had not then been sentenced, and Tasmania Police held no information in this regard.

53 A search of DPFEM records disclosed nothing responsive to this part of the request; no named accused or court dates could be found for example. In any event, given the time that has elapsed since the request was made, it seems probable that any offenders would by now have been dealt with by the courts and the information would be a matter of public record. The more appropriate agency for Mr Di Falco to approach in this regard would be the Department of Justice.

Item /3

54 Again, in both its initial decision and on internal review, the Department said that the information responsive to this part of the request was voluminous, and that retrieving it would involve an extensive search of its databases. This would substantially and unreasonably divert its staff away from their other duties, it said, and once again the request was refused under s19.

55 This part of the request sought information in relation to the man hours expended by Police in the preceding ten years in carrying out inspections of gun safes, and in his letter to DPFEM dated 13 January 2017, the applicant wrote: *this one should* be *easy. Tas Pol is a quality assured organisation. The vehicles all have trackers in them. This information should already be logged.*

56 Due to the possibility of criminals listening to their radio transmissions, Tasmania Police do not announce when firearm storage inspections occur. Should a criminal learn the location of residences where firearms were kept or stored, it would be easier to steal and then use these in crimes. As a consequence there is no readily available record of attendances nor how many hours were spent carrying out inspections.

57 I am satisfied that there is no direct means by which the Department can determine the man hours expended and that dealing with this part of the request would necessitate a close examination of its databases which would involve a substantial and unreasonable diversion of its resources from its other work.

Conclusion

58 For the reasons given above, **I** determine that the work involved in providing the information requested in Items I, 2, 6, 7, 8, 9, and 13 would substantially and unreasonably divert the resources of the public authority from its other work, and the Department is entitled to rely on sl9 to refuse to do so.

59 For the reasons given above, I determine that information responsive to Items 3 and 5 cannot be produced using the normal computer hardware and software and technical expertise of the Department and producing it would substantially and unreasonably divert the resources of the public authority from its usual operations, having regard to the factors in Schedule 3, and the Department is entitled to rely on s I 0 to refuse to do so.

60 I determine there was no information held by Tasmania Police responsive to Items I **I** and 13.

61 **I** apologise to the parties for the substantial delay in finalising

this matter. **Dat** August 2020

1 .

R i c h a r d C o n n o c k
O M B S M A N

Section 6

(l) This Act does not apply to information in the possession of the following persons or public authorities, or in the possession of a person whose services are provided or procured for the purposes of assisting the person or public authority, unless the information relates to the administration of the relevant public authority:

(a) the Governor;

(b) a court;

(c) a tribunal;

(d) the Integrity Commission;

(e) a judge;

(f) an associate judge;

(g) a magistrate;

(h) the Solicitor-General;

(i) the Director of Public Prosecutions;

(j) the Ombudsman;

(ja) the Custodial Inspector;

(k) the Auditor-General;

(ka) the Legal Profession Board of Tasmania;

(l) .....

(la) the Parole Board;

(m) the Anti-Discrimination Commissioner;

(n) the Public Guardian;

(o) the Health Complaints Commissioner;

(P) Parliament;

(9) a Member of Parliament.

Section 9

A person is not entitled under this Part to —

(a) information that may be inspected by the public in accordance with another Act; or

(b) information that may be purchased at a reasonable cost in accordance with arrangements made by a public authority.

Section I0

(l) If information is stored in an electronic form, a Minister or public authority may refuse an application under section 13 if -

(a) the information cannot be produced using the normal computer hardware and software and technical expertise of the public authority; and

(b) producing it would substantially and unreasonably divert the resources of the public authority from its usual operations, having regard to the factors in Schedule 3

(2) A person is not entitled to information contained in back-up systems, or information that has been disposed of in compliance with an approved disposal schedule issued under the Archives Act **1983.**

Section 19

(I) 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 information cannot be produced using the normal computer hardware and software and technical expertise of the public authority; andproducing it would substantially and unreasonably divert the resources of the public authority from its usual operations, having regard to the factors in Schedule 3(2) A person is not entitled to information contained in back-up systems, or information that has been disposed of in compliance with an approved disposal schedule issued under the Archives Act **1983. Section 19**(I) If the public authority or Minister dealing with a request is 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; orwould

interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions —having regard to — the matters specified in Schedule 3 — 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.**Section 30**(I) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to —

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.

Section 30

(I) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to —

(a) prejudice —

(i) the investigation of a breach or possible breach of the law; or

(ii) the enforcement or proper administration of the law in a particular instance; or

(iii) the fair trial of a person; or

(iv) the impartial adjudication of a particular case; or

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

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

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

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

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

(2) Subsection (I) includes information that —

(a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or

(b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or

(c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or

(f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation —

if it is contrary to the public interest that the information should be given under this Act.

(3) The matters which must be considered in deciding if the disclosure of information under subsection (2) is contrary to the public interest are specified in Schedule I but are not limited to those matters.

(4) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of information under subsection (2) is contrary to the public interest.

SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application

Sections 10(1)(b) and 19(I)(c)

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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference:** 01709-115

Names of Parties: Ms Debbie Wisby and Ms Jennifer Crawford and Department of Premier and Cabinet

Reasons for decision: s48(1)(a)

Provisions considered: s35, s39

Background

1 In 2016 the General Manager (GM) of the Glamorgan Spring Bay Council conducted an investigation into an alleged breach of confidentiality, relating to the unauthorised disclosure to the *Mercury* newspaper of the GM's newsletter. The newsletter had been distributed to Councillors and council officers via email on 26 April 2016.

2 It appears that some Councillors were concerned about the GM's authority to engage an investigator to undertake the investigation.

3 The GM communicated with the Local Government Division (LGD) within the Department of Premier and Cabinet (DPAC) in relation to certain aspects of the investigation.

4 Ms Debbie Wisby and Ms Jennifer Crawford (the applicants) were both Councillors on the Glamorgan Spring Bay Council. On 6 July 2017, Ms Kathleen Ford of Davis Ford (solicitor for the applicants) submitted a request to DPAC for:

> *All information relating to or touching upon the investigation, including but not limited to all correspondence, notes of telephone/personal contact, submissions, notices and advice.*
>
> *All information relating to or touching upon the contact between the General Manager or any other person or entity on his behalf, including any solicitors or investigators retained by the General Manager or Council and each of Greg Brown and Carmen Kelly, both of the Department's Local Government Division, in relation to the investigation, including but not limited to an offer of assistance by the Department in relation to a potential complaint the General Manager intended to make in respect of an offence under s338A of the Local Government Act 1993, depending on the outcome of the investigation and the statutory foundation of the General Manager's power to undertake the investigation.*

5 A decision was provided on 4 August 2017. Of the 17 documents determined to be within scope of the request, 13 were released in full; 1 in part (with some information claimed to be exempt pursuant to ss 35(1)(a) and 39(1)(b); and 3 were fully exempted from release (pursuant to s35(1)(a)). The documents exempted from release were: an email marked 'confidential' from the Council GM to the LGD and a letter attached to that email (document 9); an email from an officer of the LGD replying to the GM (document 10); and an LGD file note (document 13). Documents 9 and 10 were exempted from release on the basis of s35(1)(a) and (b), and document 13 pursuant to s35(1)(a).

6 On behalf of the applicants, Davis Ford sought an internal review of the decision on 21 August 2017. In particular, Davis Ford sought review of the decision to exempt documents 9, 10 and 13 on the grounds of s35(1)(a) and (b).

7 An internal review decision was provided on 1 September 2017. Documents 9 and 10 were claimed to be exempt pursuant to s39(1)(b). The LGD file note was released.

Issues for Determination

8 I need to determine whether the information claimed to be exempt was communicated in confidence, and satisfies s39(1)(a) or (b). If so, then I need to determine whether its release would be contrary to the public interest.

Relevant legislation

9 Section 33 provides:

> *(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.*
>
> *(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.*
>
> *(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.*

10 Section 39 provides:

> *(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –*
>
> > *(a) the information would be exempt information if it were generated by a public authority or Minister; or*
> >
> > *(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.*

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

(b) relates to trade secrets or other matters of a business, commercial or financial nature; and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

Submissions

11 On behalf of the applicants, Davis Ford sought a review of the decision to rely on s39 to exempt the information set out at paragraph 7 above from release.

12 Davis Ford argued that the information should not have been exempted from release, despite being marked as 'confidential'. Specifically, it argued that:

> *We submit that marking a document confidential does not make it so although we concede that this does indicate that the authors of each document intended that it should be treated as confidential.*

13 In relation to the public interest test, Davis Ford argued that the release of the information is in the public interest:

> *It is submitted that there is significant public interest in matters going to General Managers, without the sanction of Councils, conducting investigations into elected representatives, such as that undertaken by the GM.*

14 Further, Davis Ford argued that the release of the information would not prevent the LGD from obtaining similar information in the future:

> *If it is no part of LGD's role to determine the issue of the legislative authority of the general manager to conduct an investigation into Councillors, then such information cannot impact on the effective role of the Director of Local Government...*

15 The applicants – and by extension Davis Ford – advised that they already knew about the grounds on which the GM relied to initiate the investigation:

> *We confirm that the GM disclosed to us by a letter to our solicitor of 3 October 2016 ..., the grounds upon which he relied to conduct the review. That letter was not marked confidential.*
>
> *As to the reply... as it is no part of the official business of the LGD to determine whether the general manager had legislative authority to conduct the investigation, it is at least possible that the response is an acknowledgement, mere comment, and a request for updates or the like. If that is the case, we submit that the email, or those parts of it, should not be treated as confidential despite being marked as such.*

16 In a letter of 13 September 2018, DPAC submitted that some of the information contained within the email from the GM to the LGD would be subject to client-lawyer legal privilege, which it considered meant that the information should be treated as if it were confidential. DPAC did not submit that the information at issue fell within the legal professional privilege exemption (s31).

> *This independent legal advice would attract client-lawyer legal privilege and it is for the client to determine the extent to which that information is further published. There is no evidence to suggest that privilege has been waived in this instance.*
>
> *The fact that the General Manager revealed the nature of the advice received to the LGD office does not mean that it is published at large and therefore, the confidentiality of this information should still be respected. ...*

17 DPAC also submitted that the initial matter that led to the request for information (ie, the unauthorised disclosure of the material) had triggered a possible complaint process under the *Local Government Act 1993*, and referred to the following extract from its website:

> *The Director does not generally comment on any individual complaints received due to the confidential nature of the issues involved. However, there are instances where the volume or seriousness of complaints are such, that it is in the public interest for the Director to provide a publicly available report at the conclusion of an investigation.*[1]

It argued that this further supported its contention that the information should be considered to be confidential.

18 DPAC also alluded to the reference in the email to the GM's intention to list the retrospective approval of the investigation on the "confidential agenda" of the next Council meeting.

> *The point is raised only for the purposes of identifying that the information was ascribed by the author to have a high level of confidentiality if the subject was to be considered for the closed section of a council meeting.*

19 In relation to the application of the public interest test, DPAC advised that no individual weighting was given to the Schedule 1 matters cited in the original and internal decision; instead, they were considered in their entirety.

20 DPAC further sought to differentiate between what is 'of interest to the public' as compared with the 'public interest' more broadly.

> *While some sectors of the public may have an interest in matters that may be the subject of an investigation, in this instance it was determined that it would not be in the public interest to release either*

[1] http://www.dpac.tas.gov.au/divisions/local_government/investigations

infomation provided to the LGD identifying the content of legal advice provided to the General manager, or information identifying the subject of discussions preliminary to deciding whether to refer a formal complaint to the Director of Local Government.

Analysis

21 The information at issue - comprising (i) an initial email from the GM and (ii) a response from the LGD - is headed 'CONFIDENTIAL'.

22 As the internal review decision-maker abandoned the s35 exemption, I do not need to determine whether it applies.

Legal professional privilege

23 I note that neither the original decision-maker nor the internal review decision maker argued that the information at issue should fall within s 31 – *legal professional privilege*. In its later submission however, DPAC argued that the information would be subject to privilege, and that this reinforced the need to maintain its confidential nature, and hence consider it exempt.

24 Privilege attaches to communication between a lawyer and his or her client, not to communication with a third party in which reference is made to the nature and content of legal advice received.[2]

25 In any case, I consider that the way in which the legal advice is referenced effectively amounts to a waiver of any privilege that might have been said to exist. Accordingly, I do not consider that this strengthens any argument that the release of the information would be contrary to the public interest.

26 For the sake of completeness, I do not consider that the information at issue falls within the s31 exemption.

Communication made in confidence

27 Looking at the s39(1) exemption, I must be satisfied that either its paragraph (a) or (b) apply. Section 39(1) provides that the information must be communicated in confidence, and either: (a) exempt if it were generated by a public authority or Minister; or (b) its disclosure would be reasonably likely to impair the public authority's ability to obtain similar information in the future.

28 I agree that it was likely the author's intention that at least certain parts of his email to the LGD were communicated in confidence.

29 It is not apparent that subsection (a) is relevant in this matter. The information passed between two separate public authorities. It was generated by a public authority but, in and of itself, cannot be considered to be exempt information.

30 Turning to the precise wording of s39(1)(b), on the face of it, I consider that it is not essential to the responsibilities of the LGD for it to obtain or hold

[2] https://www.crownlaw.tas.gov.au/__data/assets/pdf_file/0011/329699/Guidelines_for_the_Disclosure_of_Communications_protected_byClient_Legal_Privilege.pdf

information of the sort under consideration. It may receive such information as a consequence of carrying out its responsibilities, but it does not need to obtain it in order to acquit its responsibilities.

31 The email is, in effect, a request for procedural advice, and in this context it may be argued that its release could deter people in analogous situations from seeking advice from the LGD. This does not, however, equate to an impairment of the LGD's ability to obtain such information.

32 In relation to subsection (b), I am not satisfied that the release of the email would be reasonably likely to impair the ability of the LGD to obtain such information in the future.

33 If there were evidence that this matter led to a formal complaint being investigated by the LGD, I would be more persuaded that its release would be contrary to the public interest. It is not apparent that such an investigation was undertaken. Given that years have elapsed since the emails were sent, I consider that if an investigation had commenced, that would likely be apparent by now.

34 While the identity of the applicant is not normally a determining factor, it is nevertheless the case that the attachment to the GM's email – to which the author ascribes a confidential status – was written by Davis Ford.

The role of the LGD

35 The decision-maker in the internal review referred to the LGD's role in investigating complaints in support of the contention that the information at issue should be treated confidentially. I agree that it is important that the confidentiality of any material considered as part of a complaint process should be maintained; however in this case, there is no evidence that the LGD actually investigated the matter.

Application of the public interest test

36 Exemptions in Division 2 of Part 3 of the RTI Act require application of the public interest test. It provides that information is only exempt if the decision-maker considers, 'after taking into account all relevant matters, that it is contrary to the public interest to disclose the information': s33(1). Exemption therefore requires a higher threshold than simply not being satisfied that release of the information is in the public interest. I make this point because both the applicants and DPAC made submissions in part concerning the notion of what is in the public interest. Importantly though, the test is whether release of the information would be contrary to the public interest. In other words, information does not necessarily need to be in the public interest to be released. Rather, to be exempt, its release must be contrary to the public interest.

37 I accept that there are legitimate arguments as to what is contrary to the public interest, and further, that the public interest is generally served by the disclosure of information.[3]

38 In terms of the public interest factors in Schedule 1 that I am required to take into account in this instance, I consider that the following matters weigh in favour of disclosure:

a) the general public need for government information to be accessible;

b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

…

39 Although not weighing strongly in favour of release, I consider that there is the potential that the release of the information would contribute to debate on a matter of public interest. To the extent that its release would not hinder debate, I do not consider that it weighs against release.

40 For the sake of completeness, I am not satisfied in this case that matter (n) – *whether the disclosure would prejudice the ability to obtain similar information in the future* – weighs against release, for the reasons set out earlier.

41 The remainder of the matters in Schedule 1 are either not negative factors that weigh against disclosure or are not relevant considerations in the current situation.

42 I confirm that I have not considered the matters in Schedule 2 of the Act in deciding if disclosure of the information is contrary to the public interest: s33(3).

Preliminary Conclusion

43 I determine that the information at issue should be released to the applicants.

Submissions to Preliminary Conclusion

44 The above preliminary decision was adverse to DPAC. A copy of it was, therefore, forwarded to the Department, seeking its input before finalising the decision, as required by s48(1)(a).

45 In relation to its internal review decision-maker abandoning the s35 exemption, DPAC submitted that this did not preclude the Ombudsman from considering the exemptions relied upon in the original decision. It further submitted that s35 'enlivens additional public interest considerations relevant to this matter' and that s35(1)(b) applied.

46 There is no obligation on me to consider any potential exemption, unless I consider that it is relevant. It is, however, open to me to consider any

[3] See, eg, matter (a) in Schedule 1 of the Act

exemption. For this reason, and for the sake of clarity given DPAC's submission, I will set out below my reasoning with respect to s35(1)(b).

47 Section 35 relevantly provides:

> *(1) Information is exempt information if it consists of –*
>
> > *(a) an opinion, advice or recommendation prepared by an officer of a public authority; or*
> >
> > *(b) a record of consultations or deliberations between officers of public authorities; or*
> >
> > *(c) a record of consultations or deliberations between officers of public authorities and Ministers –*
>
> *in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.*
>
> *(2) Subsection (1) does not include purely factual information.*
>
> ...

48 The information at issue constitutes – in very broad terms – a request for advice from an officer (the former GM) of a public authority and the provision of advice in return from an officer of a different public authority (DPAC). As DPAC has emphasised, s35(1)(b) provides that information is exempt if it consists of *a record of consultations or deliberations between officers of public authorities*. This subsection differs from s35(1)(a) which provides that information is exempt if it consists of *an opinion, advice or recommendation by an officer of a public authority*. Paragraph 35(1)(a), then, is concerned with deliberative processes within an individual public authority, whereas s35(1)(b) is concerned with deliberative processes between officers of distinct public authorities. The former GM and the DPAC officer who replied to him were both 'officers of public authorities' within the meaning of s35(1)(b).

49 Paragraph 35(1)(b) exempts only 'a record of consultations or deliberations' between such officers [as distinct from 'opinion, advice or recommendation' in s35(1)(a)] and then only if 'in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority...'.

50 I do not consider that the information at issue represents a record of deliberations. There is nothing to indicate that the communication between the two public authorities was part of a deliberative process that resulted in a decision being made. To that extent, I do not consider the communication to be 'pre-decisional' in nature. It could, however, come within the meaning of 'consultations' between the GM and officer of DPAC.

51 Subsection 35(1) exempts only records prepared 'in the course of, or for the purpose of, the deliberative processes ...' The meaning of that phrase has been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)*, the AAT adopted the view that these are an agency's '... thinking processes – the processes of reflection, for example,

upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[4]

52 The email from DPAC's LGD makes clear that it does not provide legal advice. It does express views, suggests to the GM approaches which it says would be 'a good idea', and recommends a potential future course of conduct.

53 Taking the above into account, the emails are records of consultations within s35(1)(b). It is less clear, but arguable that they fall within the conclusion of s35(1), being 'in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority...' (being the Council and/or DPAC). The applicants contested this, which may be why it was not part of the internal review decision.

54 If the information does fall within the s35 exemption, it is, as noted earlier, only exempt if its release would be contrary to the public interest: s33(1). Therefore, I will set out my reasoning with regard to the public interest arguments put forward by DPAC in its final submission.

55 DPAC argues that matter (m) in Schedule 1 (*whether the disclosure would promote or harm the interests of an individual or group of individuals*) weighs against release of the information at issue:

> *The correspondence in documents 9 and 10 represents a deliberative line of inquiry initiated by [the GM], on the clear assumption that the request for advice and deliberations would remain confidential. Disclosure of such information may have detrimental implications for [the GM]. In this respect, where the information is deliberative and does not represent a final decision, public authorities should be free to interact in the course of their official business, with a degree of certainty that confidential communications will remain confidential.*

56 I have no information or evidence before me that release of the information would harm the interests of the former GM, especially since he no longer holds that position. While he may have wished or expected that the communication would be treated confidentially, that does not amount to evidence that his interests would be harmed by release of the information. Even if the GM had expected that the email would not be released, this does not equate to his interests being harmed. In any case, Davis Ford has previously indicated that it was aware of the grounds on which the GM relied to initiate the investigation (refer paragraph 15 above).

57 I note further that it is not possible to determine definitively which part or parts of the email the GM wished to be treated confidentially. Attached to the email is a copy of the correspondence from Davis Ford, which the GM refers to as a 'confidential copy of the letter received from the Councillors [sic] solicitor'. However, David Ford is obviously already privy to this letter.

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[4] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588

58 Accordingly, I do not consider that matter (m) weighs against release of the information at issue.

59 DPAC expressed the

> *view that the disclosure of such consultations (in the absence of strong public interest reasons to do so) undermines free and frank exchanges between officers of public authorities, and establishes a precedent which erodes the likelihood of similarly consultative inquiries taking place in the future. It is reasonable to conclude that a disclosure of this nature would prejudice the ability to* obtain *similar information in the future (Schedule I (n) of the Act).*

60 I am not persuaded to DPAC's view that disclosure of these emails 'undermines free and frank exchanges between officers of public authorities, and establishes a precedent which erodes the likelihood of similarly consultative inquiries taking place in the future.'

61 As to undermining free and frank exchanges between officers of public authorities, this controversial argument has a long history.[5] As Associate Professor Paterson[6] puts it:

> *This factor is based on the notion that disclosing a document of the type claimed to be exempt would cause persons required to provide such opinion or advice in the future to be less frank and candid in expressing their views. Any such claim must be backed up by evidence[7] and is generally accepted only in relation to high-level communications[8] and even then not in all cases.[9]*

62 The claim is not applicable in relation to these emails, which, with all due respect to those concerned, are not high-level communications of the type contemplated by the Courts. Their disclosure will not, in my view, deter Tasmanian state servants from actively fulfilling their oft-quoted obligation to be frank and fearless in the advice they give. That would be unprofessional and not in keeping with the State Service Principles articulated in the *State Service Act 2000*, s7(1). State Service Principles (a) and (e) are apposite.

63 Given s3, I do not consider it would be appropriate for me to interpret the Act in the manner the Department appears to suggest, particularly not when conducting the public interest test.

64 Furthermore, I am not satisfied that the LGD's functions require it to *obtain* in the future similar information to that under consideration in a manner that could be *prejudiced* by disclosure in this instance. As noted earlier (at paragraphs 30 and 31), the GM's email constitutes, in effect, a request for

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[5] See, eg, Rick Snell, 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues from the Heart of Government' (1995) 57 *Freedom of Information Review* 34

[6] Moira Paterson (2015), *Freedom of Information and Privacy in Australia: Information Access 2.0*, 2nd ed, LexisNexis Butterworths, 413 at [7.18]

[7] For example, in *Bennett v Vice Chancellor, University of New South Wales* [2000] NSWADT 8 at [63] the ADT stressed the need for 'clear, specific and credible evidence'

[8] See, for example, *Re Burns and Australian National University (No 2)* (1985) 7 ALD 425 at 439-40.

[9] See, for example, *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139 at 153

procedural advice more so than the provision of information. Any information provided was for the purposes of making his request.

65 On the face of it, I do not consider it essential to the responsibilities of the LGD for it to obtain information of this sort. In particular, I do not consider the LGD's responsibilities extend to providing advice to a public authority which is unwilling for that advice to ever see the light of day. For such advice, a public authority could obtain its own legal advice, which would be exempt under s31. By contrast, DPAC's reply (Document 10) expressly began:

> *Thank you for your email. As you may be aware, this Division cannot give you legal advice and you should rely on your own independent legal advice. You may wish to discuss the views I have expressed below with your legal adviser.*

66 There is a substantial difference between a public authority:

- obtaining information necessary for its functions; and
- receiving a request for advice related to its functions.

67 The LGD may receive such a request as a consequence of carrying out its responsibilities (such as here, where requested by the GM of a public authority). However, the LGD does not need to *obtain* such information in order to acquit its responsibilities.

68 In any event, the risk that the request and answer may ultimately be released under the Act is less likely to deter similarly consultative inquiries in the future than are other factors. I doubt that risk would make public authorities forgo requests for the LGD's expertise.

69 Accordingly, in relation to I am not satisfied that the release of the information would prejudice the ability of the LGD to obtain similar information in the future. Hence, I do not consider that matter (n) weighs against release.

70 Finally, DPAC argues that matter (o) in Schedule 1 *(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)* weighs against release of the information at issue. It argues that disclosure could have implications on the effective delivery of the LGD's ongoing regulatory functions, and ability to uphold the overarching statutory functions of the Director of Local Government under the *Local Government Act 1993*, s339EA2[10]. It goes on to argue that if the ability of an officer to consult confidentially with the Director was undermined, '...it is reasonable to conclude that it will impede his ability to meet his statutory responsibilities'.

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10 ***339EA. Investigations of complaints and other matters***

(2) The Director, without receiving a complaint under section 339E , may carry out an investigation in respect of –

> *(a) any matter which could be the subject of a complaint under section 339E ; or*
> *(b) any other matter relating to compliance with, or the administration of, this Act.*

71 While I agree it is important that the Director's statutory responsibilities are not undermined, I repeat my earlier observation (at paragraph 33) that, in this case, no formal complaint was either lodged with, or investigated by, the Director. I do not consider that this matter weighs against release.

72 DPAC also refers to the first sentence only of paragraph 39 of the preliminary decision (refer above), arguing that:

> *As your Delegate has acknowledged that the public interest factors ... previously identified do not weigh strongly in favour of release of the information, it is my view that the additional considerations above provide the clear basis on which to determine that the release of the information in question would be contrary to the public interest.*

73 This represents somewhat selective quoting of the reasoning at paragraph 39, and I do not believe it significantly advances DPAC's argument that the release of the information would harm the public interest. The information is only exempt if its release would be contrary to the public interest: s33(1).

74 In deciding that public interest test, I have also considered the matters in Schedule 1 not mentioned above. In this instance, I do not find any of those other matters to be of additional relevance, and certainly not to the extent that they sway me to the view that, on balance, disclosure here is contrary to the public interest.

Conclusion

75 I determine that the information at issue should be released to the applicants in full.

Dated: 11 August 2020

Dr Tom Baxter
Principal Officer (Right to Information)

DELEGATED OFFICER

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** O1802 - 067

Names of Parties: Dr George Lane and Tasmania Police

Draft reasons for decision: s48(I)(b)

Provisions considered: s30, s34, s35, s36, Schedule

Background

I Dr Lane, who has a PhD in chemistry, ordered scientific equipment from China in the name of a business registered at his home address. Tasmania Police was alerted to the parcel as potentially containing glassware consistent with drug manufacture, and subsequently executed a search under warrant at Dr Lane's home in St Helens.

2 On 15 November 2017, Dr Lane submitted an application for assessed disclosure under the Right to *Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (DPFEM). He sought information regarding the police search of his residence, referred to by Dr Lane as a raid. The information sought was extensive and following negotiation between the parties was reduced to information falling into the following categories:

I. Officers' *details*
2. Authorisation, communications and collected *materials*
3. Correspondence with 3' parties
4. Other surveillance
4. Relevant *recent historical data*
5. Data storage

3 On 3 November 2017, the applicant agreed to refine the scope of points I and 2 and confirmed that he no longer sought information responsive to point 6. Some information responsive to point 2 was in the possession of the Department of Justice and insofar as the application related to that information, the request was transferred.

4 On 26 December 2017, Inspector Andrew Keane, a delegated officer, released a decision to the applicant. An amount of information was provided to the applicant including 25 pages of information, 24 photographs and three DVD recordings. Another 16 pages of responsive information was identified in relation to which Tasmania Police claimed partial or complete exemption. In doing so it relied primarily on s30 which exempts information related to the

enforcement of the law. Section 34 was relied on to exempt a report provided to Tasmania Police by a Federal Government Department. Some information was claimed to be exempt under s35 as internal deliberative information, and some as exempt under s36 on the basis that it contained the personal information of a person other than the applicant.

5 On 23 January 2018, the applicant requested that Tasmania Police undertake an internal review.

6 On 13 February 2018, Commander J C Higgins, a delegated officer, released an internal review decision to the applicant. The internal review reached the same conclusions as the original decision in part with the following exceptions:

- an explanation was given for a redaction on page 5;
- information on pages 6 and 8 which had been claimed to be exempt pursuant to 30(I)(e) in the initial decision was said not to be exempt under that provision but under s30(I)(c);
- section 34 was relied on in conjunction with s 30 to exempt information on pages 9 and 10 and 13 to l5; and
- a claim for exemption pursuant to s36 of some information on page 18 was overturned and the information released to the applicant.

7 On 16 February 2018, the applicant requested an external review of all exemptions claimed by Tasmania Police and requested that all the redacted information be released to him.

Issues for Determination

8 I must determine if the information claimed to be exempt by Tasmania Police is eligible for exemption under s30, s34, s35 and/or s36.

9 As s34, s35 and s36 are contained in Division 2 of Part 3 of the Act, they are subject to the public interest test in s 33. That means, should I determine that information is prime facie exempt pursuant to any of those sections, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule I.

Relevant legislation

10 Sections 30, 34, 35 and 36 were relied on in both the original decision and in the internal review decision to support the exemptions claimed. Copies of these sections are attached to this decision.

II Copies of s33 and Schedule I are also attached.

Submissions

12 On 23 January 2018, the applicant asked in his request for an internal review that specific information be released to him. He submitted that he should:

> *... receive a new report that does not have ANY* [sic] *redactions made to the warrant application (in particular), as well as the research notes, intelligence from border/customs, the information reports, the letter from Mark Williams dates (sic] 10 Oct 2017 which has a passage redacted.*

13 He asserted that the disclosure of this information would aid in understanding why the event occurred.

14 In the internal review decision dated 13 February 2018, Tasmania Police made no submissions other than the observations outlined above.

15 On 16 February 2018 the applicant reiterated in his request for an external review the importance of the information to him. He further submitted:

> / *need* to see *ALL information being used against me as this is ruining* my career *and life. Police (in* secret *recording) also cited I-RAD report against me, which RTI denies the* existence of so RTI *is lying on this particular* matter *which* I believe is *illegal. Police must provide the* I-RAD report *on me as requested.'*

16 He also reiterates in his submission his need to see the unredacted application for the search warrant and supporting affidavit, and the entire content of the redacted material.

Analysis

Section *30*

17 Information on page I, being an entry in its Integrated Data Management system (IDM) reproduced on the application for the search warrant, Tasmania Police has claimed to be exempt pursuant to s30(1)(e) as information gathered, collated or created for intelligence. Section 30(I)(e) specifically refers to information contained in databases of criminal intelligence, as well as forensic testing or anonymous information from the public. The question then is what constitutes intelligence.

18 The word is not defined in the Act and that being the case, it is to be given its ordinary meaning. The Macquarie Dictionary[2] defines intelligence as: *knowledge* of *an event, circumstance,* etc., received *or imparted;* news; or *the gathering or* distribution of *information, especially secret or military information which might prove detrimental to an* enemy.

19 The subject information was provided to Tasmania Police by the Department of Immigration and Border Protection (DIBP). Included in this information is when the parcel arrived in Australia, the applicant's address to which the parcel was sent, the applicant's phone number, the address of the sender of the parcel, what the parcel was declared to contain by the sender, and its contents as confirmed by x-ray examination.

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[1] I am unable to determine whether the disputed 1-Rad exists or not, and the applicant should follow up directly with Tasmania Police in this regard.

[2] Online edition

20 Apart from the name, address and phone number of the applicant, I agree that the subject information is exempt pursuant to s30(I)(e). It has clearly been gathered and collated for intelligence and entered in a database of criminal intelligence

21 Tasmania Police relied on s30(1)(e) to again exempt the description of the parcel's contents and procedures adopted during its progress through the mail system contained on page 2. Again, this information has been collated for the purposes of accumulating intelligence and I am satisfied that it is exempt as claimed.

22 Information on page 4 has been redacted. Page 4 contains entries from an officer's note book that refer to the execution of the search warrant at the applicant's premises and the execution of another warrant at different premises. The redacted information relates to the other warrant, and therefore falls outside the scope of Dr Lane's application.

23 Tasmania Police relies on s30(1)(c) to exempt the header of an IDM report on page 5. For information to be exempt under that provision, I must be satisfied that its release would or would be reasonably likely to disclose methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law. I must also be satisfied that disclosure of the information would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

24 The subject information is a heading with the Tasmania Police logo and records by number which officer accessed the IDM and at what time and location. It also identifies which branch of Tasmania Police was dealing with the matter. It does not disclose any methods or procedures for detecting or investigating breaches of the law and I determine that it is not exempt as claimed, and should be released to the applicant.

25 Information appearing below the header includes a validity rating, a grading method used by Tasmania Police to gauge the information's legitimacy. This is claimed to be exempt pursuant to s30(I)(e). I am satisfied that this is information gathered for intelligence purposes, and contained in an intelligence database, and that it is therefore exempt pursuant to s30(I)(e).

26 The remaining information on page 5, which carries over to page 6, consists of a summary of what transpired during the execution of the warrant at the applicant's premises and information under the heading Research *Notes.* The latter information is claimed to be exempt. As noted, in its initial decision on the application, Tasmania Police relied on s30(I)(e) to exempt the notes. On internal review, however, it determined that the information was not exempt under that provision but rather was exempt pursuant to s30(1)(c).

27 The research notes bring together critical information under separate headings. The subject notes identify the offence the applicant was suspected of having committed, his name and his address, and it is recorded that this information was *Filed for intelligence purposes only.* There is no reference to any method or

procedure for preventing, detecting, investigating or dealing with matters arising from breaches of the law; the notes are merely a recitation of basic facts. I am not satisfied that this information is exempt pursuant to s30(1)(c) and I direct that it be released to the applicant.

28 The header on page 7 is claimed to be exempt pursuant to s30(I)(c). For the reasons outlined above in relation to the header on page 5, I determine this information is not exempt and should be released to the applicant. This also applies to the header on page 9, which is claimed to be exempt on the same basis.

29 Below the heading on page 7 the validity rating has been claimed to be exempt under s30(I)(e). For the reasons outlined above, I am satisfied the validity rating is exempt information. This also applies to the validity rating on Page 9.

30 Research notes at the bottom of page 7 and the top of page 8 have again been claimed to be exempt pursuant to s30(I)(c). They contain the same factual information as the research notes on pages 5 to 6, and as there, they do not refer to any methods or procedures. I determine the research notes are not exempt under s30(1)(c) and should be released to the applicant.

31 Research notes on pages II and 12 have been claimed to be exempt under both ss30(I)(c) and (e). The notes on this occasion are far more detailed and, in addition, include significantly more information than the basic factual information contained in the research notes already referred to. I am not satisfied that its release would disclose any methods or procedures which would found exemption under s30(I)(c) but I am satisfied that the information was gathered, collated or created for intelligence and, with the exception of the applicant's name and address, is exempt pursuant to s30(l)(e).

32 In the initial decision, Tasmania Police claimed exemption for information on pages 9 and 10 and 13 to 15 on the basis that it was exempt pursuant to s34 as information communicated in confidence by another jurisdiction. In the decision on internal review, however, while maintaining the claim pursuant to s34, it also claimed exemption pursuant to s30( )(e).

33 The subject information was provided to Tasmania Police by a Commonwealth agency and included information about the parcel, its sender, its contents and its passage through the mail system, and would thus appear to meet the first requirement of s34. lam satisfied, however, that the information was gathered and collated by Tasmania Police for intelligence purposes, is contained in its criminal intelligence database and is exempt pursuant to s30(l)(e)

34 While s30 is not subject to the public interest test contained in s33, s30(2) requires the application of a public interest test to certain categories of information, none of which arise here.

Section 35

35 Some information on pages 5 and 7 has been claimed to be exempt under s35(I). For information to be exempt pursuant to this provision, it must be opinion, advice or recommendation, or a record of consultations or deliberations between public officers or between public officers and Ministers, made in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government. The exemption does not extend to purely factual information.

36 The information claimed to be exempt on pages 5 and 7 is similar and consists of references to the applicant. For the reasons given below, I am satisfied that the information on page 5 is exempt pursuant to s35(I)(a). The information on page 7, however, is a description of the applicant's conduct while Police were at his premises executing the warrant. It is presented as a statement of fact rather than opinion, advice or recommendation. It is the expression of a concluded view, it is not deliberative in nature and it does not attract the exemption contained in s35.

Section *36*

37 For information to be exempt under s36, it must be the personal information of a person other than the person making an application under s13.

38 The Act, at s5, defines personal information as *any information or opinion in any recorded format about an individual* whose *identity is apparent or reasonably ascertainable* from the *information and opinion and the person is alive, or has* been *dead less than 25 years.*

39 The information claimed to be exempt as personal information is the signatures on the Application for Search Warrant of the officer who made the application and of the Justice of the Peace who witnessed it. The Justice's signature also appears on page 3, which is the warrant itself. Tasmania Police relies on the authority of *Neild and* Police Force *Western Australia*[3] which contains the following:

> ... the deleted *matter, the signature, was* exempt *under clause (I) because it was personal information.*

40 As noted above, to be personal information for the purposes of the Act, it must be such that the identity of the person is apparent or reasonably ascertainable. In this instance, I am not persuaded that the identity of the officer and the Justice are apparent from their signatures alone as these are illegible. I also note that the name of the officer and the Justice appear in type beside their signatures on page I and the Justice's name is printed on the top of the warrant on page 3 but no exemption has been claimed for this information.

---

[3] [2001[WA1Cmr 45

4**I** I determine that the signatures are not exempt pursuant to s36.

42 In any event, given that the officer and Justice signed the application in the course of performing their official duties and carrying out the functions they were employed to do, were I required to have recourse to the public interest test, I would be inclined on balance to find the information is not exempt and that it is in the public interest to release it.

Page *16*

43 Page I6 has been redacted in its entirety, but no specific claim for its exemption has been made. It is an email from one police officer to others and refers to a complaint made by the applicant to the then Minister concerning the conduct of police when executing the warrant. The email contains a version of events that apparently differs from that of the applicant and is primarily a recitation of facts. On that basis, my initial view would be that the information is not exempt, but I invite Tasmania Police to comment in this regard before finalising my decision.

Public Interest Test

44 Having determined that the information on pages 9 and 10 and 13 to 15 is exempt pursuant to s30(I)(e) rather than pursuant to s34, the public interest test has no application to it. For the reasons set out below, I find that one item of information claimed to be exempt pursuant to s35 and some limited items claimed to be exempt pursuant to s36 is so exempt, which means that the public interest test applies to those items. Having not upheld the other exemptions claimed pursuant to ss 35, 36 and 37, the public interest test does not arise further.

45 Again for the reasons set out below, disclosure of the limited amount of information found to be exempt pursuant to ss35 and 36 would be contrary to the public interest to disclose it

Preliminary Decision

46 As the decision above was adverse to the Department in that it directed the release of some information which it had claimed to be exempt, as required by s48(I)(a) a draft of the decision was made available to the Department and its input sought before the decision was finalised.

47 By letter dated 13 February 2020, Sergeant Lee Taylor on behalf of the Department made submissions in relation to parts of the preliminary decision, in particular paragraphs 35 and 36 which referred to the information on pages number 5 and 7. In particular, the Sergeant Taylor submitted as follows:

> *I make the submission that the information redacted in* these *points* are *both `opinion' and `advice' prepared by an officer* of a *public authority pursuant to s35(I)(a)* of *the Right to Information Act 2009 (the Act).*

As the reporting officer is *not directly quoting Mr Lane and does not state any direct conversation with him it is difficult to ascertain that this information is* fact *rather than opinion based* on *Mr Lanes demeanour and attitude towards the officers.*

This information serves to *inform and advise* officers *in how* to *deal with and what to* expect *from Mr Lane in the future and will assist with operational decisions concerning* officer *safety. This is further reinforced* by the *next sentence on page 5 of* the redacted *information which* states, *`Lodged for future dealings with LANE'.*

Further to *this, I make* the *submission that it would be contrary* to the *public interest to disclose the aforementioned information as its absolute accuracy cannot be substantiated and may* be *misinterpreted. If this information were disclosed, it may prevent the frank exchange of ideas and opinions between* officers *in the future leading to less robust decision making against the public interest and* to *the detriment* of the *investigation* process.

I further submit that s35(2), (3) and (4) of the Act do not *apply in* these *circumstances and should* not be *taken into consideration.*

48 It was also submitted that the information was not purely factual.

49 In light of those submissions, I revisited the information at issue. Having done so, I am persuaded that the redacted information on page 5 does consist of an opinion prepared by an officer of a public authority in the course of or for the purposes of the authority's deliberative process. It is not a statement of fact but rather the view of one officer expressed for the future information and benefit of others. I also agree with Sergeant Taylor that, for the reasons given it would be contrary to the public interest to disclose it. It is therefore exempt pursuant to s35(I)(a).

48 I refer to paragraph 43 above and my comments in relation to page 16 of the responsive information. At the time of preparing the preliminary decision, the material before me consisted of an unredacted copy of the information and a blank page, but Sergeant Taylor has produced a further version which indicates only a small amount of information is claimed to be exempt as personal information.

49 As noted above, the information is an email from one police officer, Detective Inspector John King, to others and refers to a complaint made by the applicant about the conduct of police when executing the warrant. The only information

that is claimed to be exempt is Detective Inspector King's email address and mobile phone number.

50 Again as noted above, no specific claim for exemption was made for this information, but is clearly the personal information of Detective Inspector King, and in my view is prime facie exempt pursuant to s 36.

51 Section 33 requires me to take into account at least the matters contained in Schedule I when determining where the public interest lies. Having done so, I find that none of the matters favours release of the information. For example, disclosure would not contribute to a matter of public interest, it would not provide any context which would aid in the understanding of a government decision and it would not enhance scrutiny of government decision making. Nor would disclosure promote the administration of justice.

52 In all the circumstances, I am of the view that disclosure of the information would be contrary to the public interest and it is exempt pursuant to s36.

Conclusion

53 I determine the following information is not exempt and should be released to the applicant:

- the name and address of the applicant on page I ;
- the signatures on page 1;
- the signature on page 3;
- the headers on pages 5, 7 and 9;
- the Research Notes on pages 5 and 7; and
- the comments about the applicant on page 7.

54 I determine the remaining information under review is exempt for the reasons given above.

Dated: I pril 2020

ichard Co ock
AN

Attachment I

Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest Sections 30(3) and 33(2)

I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(I) whether the disclosure would promote or harm public health or safety or both public health and safety;

whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(I) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

Attachment 2

Relevant Legislation

Section 30 provides:

(I) *Information is exempt information if its disclosure under this* Act *would, or would be reasonably likely to —*

(a) prejudice —

the investigation of a breach or *possible breach* of the *law; or*

(ii) the enforcement or proper administration of *the law in a particular instance; or*

(iii) the fair trial of a person; or

(iv) the *impartial adjudication* of *a particular case; or*

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

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

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

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

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

(2) Subsection (I) *includes information that —*

(a) reveals that the scope of *a law enforcement investigation has exceeded a limit imposed by law; or*

(b) reveals the *use* of *an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out* of *a breach or evasion* of *the law; or*

(c) *contains a general outline* of *the structure* of *a program adopted by a public authority for investigating breaches of or enforcing or administering* the *law; or*

(d) *is a report on the degree of* success *achieved in a program adopted by a public authority for investigating breaches of or enforcing* or *administering the law; or*

(e) *is a report prepared in the course* of *a routine law enforcement inspection or investigation by a public authority with the function* of *enforcing and regulating compliance with a particular law other than the criminal law* if the *inspection* or *investigation is* complete; *or*

(f) *is a report on a law enforcement investigation, if* the *substance of the report has* been *disclosed* to *the person or* the *body that is the subject of the investigation —*

if it is contrary to the public interest that the information should be given under this Act.

(3) The *matters which must* be *considered in deciding* if *the disclosure of information under subsection (2) is contrary to the public interest are specified in* Schedule / *but are not limited* to those *matters.*

The matters specified *in Schedule 2 are matters that are irrelevant in deciding* if the *disclosure of information under subsection (2) is contrary to the public interest*

Section 33 is contained in Division 2 of Part 3 and provides:

(I) *In this Division, information is exempt information if* the *principal* officer of *the public authority or Minister considers, after taking into account all* relevant *matters, that it is contrary* to the *public interest to disclose the information.*

(2) The matters which must be considered in deciding if the disclosure of *the information is contrary to* the *public interest are specified in Schedule I but are not limited* to *those matters.*

The matters specified in Schedule 2 are matters that are irrelevant in deciding if *the disclosure* of *the information is contrary to the public interest*

Section 34 provides:

(1) Information is exempt *information if —*

(a) its disclosure under this Act would prejudice relations between —

(i) two or more States; or

(ii) a State and the Commonwealth; or

(iii) the Commonwealth or a State *and any other country;* or

(b) the information was communicated in confidence to —

(i) a public authority; or

(iv) a person on behalf of *the public authority —*

by —

(v) the *Government or an authority* of *the Commonwealth,* of *another* State *or* of *another* country; *or*

(vi) a person on behalf of the *Government or an authority* of the *Commonwealth,* of *another* State *or* of *another* country —

and its disclosure would be *reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.*

(2) Information is exempt information if —

(a) the information was communicated to —

(i) a public authority; or

(vii) a person on behalf of *the Government or public*

authority —by —

*(viii)*the *Government or an authority* of *the Commonwealth or of another State; or*

(ix) a person on behalf of the *Government or an authority of the Commonwealth or* of *another State; and*

(b) notice has been *received from* the *Government or an authority* of *the Commonwealth or* of the other State that the *information is not required* to be *disclosed under, as the case may be, a corresponding law of the Commonwealth or* of *the other* State.

(3) *In this section —*

corresponding law *means a law* of the *Commonwealth or* of *another* State *that is declared by the regulations to* be *a law that corresponds to this Act;*

State *includes* the *Northern Territory and the Australian Capital Territory.*

Section 35 provides:

(1) Information is exempt *information if it consists* of—

(a) an opinion, advice or recommendation prepared by an officer *of a public authority; or*

(g) a record of consultations or deliberations between officers of *public authorities; or*

(b) a record of *consultations or deliberations* between officers of *public authorities and Ministers —*

in the course of *or* for the *purpose* of *the deliberative processes related to the official business* of *a public authority, of a Minister or* of the *Government.*

(2) Subsection (I) does not include purely factual information.

(3) Subsection (I) does not include —

(a) a final decision, order or ruling given in the exercise *of an adjudicative function; or*

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to *apply after 10 years* from the date of *the creation* of *the information referred to in that subsection.*

Section 36 provides:

(I) *Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.*

(2) If—

(a) an application is made for *information under this Act; and*

(b) the *information was provided to a public authority or Minister by a third party; and*

(c) the principal officer or Minister decides that disclosure of *the information concerned may* be *reasonably expected* to *be* of concern to *the third party —*

the principal officer *or Minister is to,* if *practicable and* before *deciding whether the disclosure* of *the information under this Act should occur, by notice in writing to* the *third party —*

(d) notify that person that the public authority or Minister has received an application for *the information; and*

(e) state the nature of the information that has been applied for; *and*

(f) request that, within 15 working days from the date of *the notice, the person provide his or her view as to whether the information should be provided.*

(3) If a public authority or Minister, after receipt of *a person's view referred* to *in subsection (2)(f), decides to provide* the *information, the public authority or Minister must, by* notice *in writing given to that person, notify that person* of *the decision.*

(4) A notice under subsection (3) is to —

(a) state the nature of the *information to be provided; and*

(b) if the decision was made on *behalf* of *a public authority or Minister, state the name and designation* of *the person who made the decision; and*

(c) inform the person to whom the notice is addressed of-

that person's right to apply for a review of the *decision; and*

the *authority to which the application for review can* be *made; and*

(iii) *the* time *within which the application must be made.*

A *public authority or Minister must not provide the information referred to in a notice given* to *a person under subsection (3) —*

until 10 working days have elapsed after the date of notification of that person; or

(b) *if during* those *10 working days the person applies under section 43 for a review* of the *decision, until that review determines that the information should be provided; or*

(c) *until 20 working days after notification* of *an adverse decision under section 43; or*

(d) *if during those 20 workings days* the person *applies for a review* of *the decision under* section *44, until that review determines that the information should* be *provided.*

Where:

personal information means any information or *opinion in any recorded format about an individual —*

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

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

TASMANIAN OMBUDSMAN
DECISION

Right to Information Act Review **Case Reference:** 0 1603-079

Names of Parties: Mr Graeme Gilmour and TT-Line

Reasons for decision: s48(I)(b)

Provisions considered: s33, s38, Schedule I

Introduction

On I I January 2016, Mr Gilmour submitted an application for assessed disclosure to TT-Line seeking information relating to the number of caravans and motorhomes arriving in Tasmania via TT-Line's ferry service, *The Spirit of Tasmania.* Specifically, the applicant requested information disclosing:

> [The] *number of caravans carried on a monthly basis between Devonport and Melbourne and vice-versa.*
>
> 2 [The] *number of motorhomes carried on a monthly basis between Devonport and Melbourne and vice-versa.*
>
> *3* [The] *number of Campervan and Motorhome Club* [of Australia] *(CMCA) vehicles carried on a monthly basis between Devonport and Melbourne taking advantage of the* 5% *discount offer and vice-versa.*

2 The applicant proposed a flexible timeframe for the provision of the information. He said:

> *In order to be meaningful, the figures should be over a I 0-year period. If this is not possible, whatever you have I can work with and would be appreciated.*

3 On 5 February 2016, Mr Kevin Maynard, a TT-Line delegated officer, released a decision to the applicant. TT-Line claimed all information responsive to the request to be exempt pursuant to s38 as information relating to the business affairs of a public authority, the release of which would expose TT-Line to competitive disadvantage.

4 TT-Line claimed the release of the information would allow its competitors to estimate with some provision its freight and other cargo carrying capacity and thereby undermine its competitiveness.

5 On 22 February 2016, the applicant requested an internal review of that decision and submitted that reliance on s38 was *spurious and unfounded.*

6 On 8 March 2016, Mr Bernard Dwyer, the CEO of TT-Line and therefore its principal officer, released his internal review decision to the applicant. Mr Dwyer maintained the claim for exemption pursuant to s38.

7 On 23 March 2016, the applicant submitted a request for external review to my office.

Issues for Determination

8 TT-Line advised in relation to Item 3 of the request that it was not possible to isolate the CMCA discount information specific to motorhomes and caravans. The applicant then sought to extend his request to cover all vehicles. This was beyond the scope of the original request for information, however, and not able to be reviewed. It remains open to the applicant to request this information separately of TT-Line should he wish to do so. The applicant accepted that TT-Line was not able to isolate the information relevant to Item 3, and it will not be considered further in this review.

9 TT-Line claimed all other information responsive to the request is exempt under s38(a)(ii) on the grounds that it is a public authority, engaged in trade or commerce, and the information is of a business, commercial or financial nature that would, if disclosed, be likely to expose it to competitive disadvantage. I must be satisfied of all these things before the exemption can apply.

10 Section 38 falls within Division 2 of Part 3 of the Act, which means that if I determine any information responsive to this request is prime facie exempt under that section, I must then consider the public interest test as required by s33.

Relevant legislation

I I Section 33 provides:

> (I) *In this Division, information is exempt information if the principal* officer of the *public authority* or *Minister considers, after taking into account all relevant matters, that it is* contrary to *the public interest to disclose the information.*
>
> (2) The *matters which must* be considered *in deciding if the disclosure of the information is contrary* to *the public interest are specified in Schedule I but are not limited* to those *matters.*
>
> *(0) The matters specified in Schedule 2 are matters that are irrelevant in deciding if* the *disclosure* of *the information is contrary* to *the public interest.*

12 Section 38 provides:

> *Information is exempt information —*
>
> *(a) if it is —*
>
> *(i) a trade secret* of *a public authority;* or
>
> *(ii) in the case* of *a public authority engaged in trade or commerce, information* of *a business, commercial* or *financial nature that would, if disclosed under this Act, be likely* to expose *the public authority to competitive disadvantage; or*

(b) if it consists of the result of *scientific or technical research undertaken by or on behalf* of *a public authority, and —*

(i) the *research could lead* to *a patentable invention; or*

(iii) the disclosure of the results in an incomplete state would be likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or

(iv) the disclosure of *the results before the* completion of the *research would be likely to* expose the *public authority or the person carrying out the research unreasonably to disadvantage; or*

(c) if it is contained in —

an examination, a submission by a student in respect of *an examination, an examiner's report or any such similar record; and*

(ii) the *use for which the record was prepared has not* been completed.

13 A copy of Schedule I is attached to this decision.

Submissions

14 As noted, the applicant disagrees with TT-Line's position in relation to s38. He argues that the information claimed as exempt by TT-Line could not constitute a trade secret under s38(a)(i). Specifically, he wrote:

> *I disagree with your conclusion. I find your reliance on this section as spurious and unfounded. Firstly, it cannot be argued that the information sought is classified as a* "trade secret".
>
> How *is it suggested that the information sought can be regarded as* `property' *capable* of *constituting a trade* secret?

15 TT-Line did not rely on s38(a)(i), however, rather it relied on s38(a)(ii) and claimed that the release of the information would expose it to competitive disadvantage. The applicant addressed competitive disadvantage only briefly in point five of his internal review submissions. There he submitted:

> There *is* little *value in the information being sought. That is, information regarding* the *number of caravans and motorhomes only [sic]. This information cannot lead to any or any reliable conclusions regarding the numbers of heavy goods* vehicles, *freight, trailers, cars or foot passengers that utilise the TT-Line "Spirit* of *Tasmania". In this sense* alone *it cannot be argued that the information sought puts* the *TT-Line at a `competitive disadvantage'.*
>
> The *information* [sought] *is not secret and can* be *garnered easily and inexpensively if required.*

16 The applicant also refuted TT-Line's claims that the public interest test supported exemption. In this regard he submitted:

> *On an objective view* of the *information sought, it cannot* be *argued that the release* of *such tourism information is contrary to the public interest. The opposite is in fact the case.*

17 In its original and internal review decisions, and in its submissions to this review, TT-Line maintained its claim for exemption under s38(a)(ii). It says it is a business engaged in trade and the information is of a business or commercial nature. It cited Part I of Schedule I of the *TT-Line Arrangements Act 1993* which provides as follows:

> The *principal* objective of *the Company is to manage and facilitate the operation of a shipping service to and from Tasmania in a manner that is consistent with sound commercial practice.*

and went on to submit that:

> *In accordance with its principal objects, TT-Line operates within a defined commercial business model, one component of which is the transportation of caravans and motorhomes* between *Melbourne and Devonport.*
>
> *Once* [the information responsive to the request is] disclosed, TT-Line's position *is that there is a real risk (i.e. it is `likely') that the information* requested *by Mr Gilmour will be used* to expose *TT-Line to competitive disadvantage in relevant markets in which TT-Line* competes.

18 TT-Line claims it has many competitors in the markets for the various goods and services it offers as part of its commercial operation. Specifically:

> *TT-Line submits that the relevant markets* [it operates in and its competitors in those markets] *are as follows:*
>
> a. *The market for transport by sea of motorhomes and caravans between* Me/bourne *and Devonport — i.e.* SeaRoad *and* Toll *Shipping; and*
>
> b. *The markets which provided alternatives to visitors* to *Tasmania bringing their own motorhomes and caravans across Bass Strait — i.e.* motorhome *and caravan hire businesses such as Britz, Hertz, and a plethora* of *others.*
>
> *TT-Line* competes *directly in each of these markets in that these competitors offer the transportation by sea of caravans and motorhomes to and from Victoria or the alternative* of *hiring a* vehicle *which is generally* couples *with travelling* to *and from Tasmania via* one of the *airlines.*

19 TT-Line retracted its claim that release of the information responsive to the request would allow its competitors to determine with some precision the amount of commercial freight it carries. It did maintain, however, that the information is still commercially sensitive and would lead to competitive disadvantage if released.

> *Put simply, the information sought by Mr Gilmour reveals long, medium and short term trends (along with seasonal variations) with respect to volumes* of *caravans and motorhomes transported by* TT-Line *from Melbourne to Devonport broken down by calendar month.*

> Competitors *such as SeaRoads and Toll Shipping can use this information to more* effectively *directly* compete *against TT-Line. For* example, these *competitors could offer tailored deals during TT-Line's peak activity periods with the aim* of *eroding TT-Line's customer base.*
>
> *Similarly, competitors in the vehicle hire market (e.g. Britz, Hertz Maui)* can *use the data to identify times* of *peak demand* for the *transport* of *caravans and motorhomes and tailor vehicle hire offers to TT-Line's target customers encouraging them to `fly and hire' caravans and motorhomes rather than sail with TT-Line.*

Analysis

Section *38*

20 As noted, information can only be exempt under s38(a)(ii) if, in the case of a public authority engaged in trade or commerce, it is of a business, commercial or financial nature that would, if disclosed, be likely to expose the public authority to competitive disadvantage.

21 The definition of *public authority* contained in s5 of the Act includes *a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose.* TT Line is established under the TT-Line Arrangements Act and, as provided in Part I of Schedule I of that Act, it is established to operate a shipping service to and from Tasmania in a manner that is consistent with sound commercial practice.

22 TT-Line's trade is the sale of passenger ferry services, freight, and vehicle transport among other things. I am satisfied TT-Line is a public authority that is engaged in trade or commerce.

23 It now falls to be considered whether the information responsive to the request is of a business, commercial or financial nature that would, if released, be likely to expose the public authority to competitive disadvantage.

24 On the question of likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991,* the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman [2010]* TASSC 39, held that:

> *52. For the information to be exempt its disclosure needs* to be *likely to expose the undertaking or agency not* to *any disadvantage, but a disadvantage which relates to or is characterised by* competition. *The requirements in ss31 and 32* of the *Act that the disadvantage relate* to *competition may have the preservation of* the *competitive process as a broad ultimate goal, but primarily* the *provisions are* concerned *with* the *potential impact on* the *undertaking or agency acting as a competitor in the market ...*

25 The Court further held that:

> *59. ...The application of the correct approach involves an assessment* of *the facts, and findings as* to *likely* exposure to the *relevant disadvantage...*

26 At paragraph 41 the Court interpreted likely to mean that there must *be a real or* not remote *chance or possibility, rather than more probable than not.*

27 The information sought is of a business nature, and the question now is: would the release of monthly figures relating to the number of caravans and motorhomes transported by TT-Line be likely to expose it to competitive disadvantage?

28 I accept there is a real or not remote chance or possibility that, if TT-Line's various competitors wanted to, they could use the seasonal trend data requested by the applicant to target specific services and times of year to the competitive disadvantage of TT-Line.

29 TT-Line is not required to prove that release of the information would actually expose it to competitive disadvantage, nor even that it would probably do so, but that disadvantage would be the likely result. I conclude on the material before me that it is entirely likely that a competitor could use the information to target TT-Line's customers to its own advantage and to the disadvantage of others.

30 As none of TT-Line's competitors are public authorities, the disadvantage is not just one of marketing or management; it goes directly to competition, as neither TT-Line nor any member of the public can compel its competitors to release the same or similar information.

31 It is business intelligence that creates competitive advantage, and losing it that creates competitive disadvantage. I am satisfied that the release of the information responsive to this request would be likely to result in a competitive disadvantage being suffered by TT-Line.

32 I therefore determine that the information responsive to the request is prime facie exempt under s38(a)(ii).

Public Interest Test

33 As noted, the exemption contained in s38(a)(ii) is subject to the public interest test.

34 When determining where the public interest lies, regard must be had to the 25 matters contained in Schedule I of the Act.

35 TT-Line submits that it is a taxpayer owned company, charged with operating in a commercial environment to make a profit. Its profits are returned at an agreed rate to its shareholder ministers and reinvested into the Tasmanian community. It argues that any action that would damage its competitiveness would damage its profit and in turn, harm the return to the community.

36 TT-Line claims matter (b) of Schedule I to be a factor in favour of release on the ground that the information would contribute to a matter of public interest. It conversely claims matters (a), (k), and (s) as factors favouring exemption on the grounds that there is no need for this information to be accessible and it would lead to economic and financial disadvantage to both TT-Line and the State.

37 The applicant refutes that there are any matters that would support exemption.

38 Applying the public interest test involves balancing those things that favour release against those that do not. It is also important to note that whether or not information should be released is to be decided in the context of what is in the public interest as opposed to what might be interesting to the public.

39 Having considered the matters in Schedule I of the Act, **I** am of the view that matters (c) and (f) favour release. I am satisfied that the information, if released, would provide Mr Gilmour with a better understanding of the reasons for decisions made by TT-Line and, ultimately, would increase accountability and improve participation from the community.

40 In favour of exemption, however, I refer to matters (k) and (s). (I do not accept TT-Line's claim that matter (a) supports exemption.) These matters concern both the economic development of the state (k) and the financial interests of a public authority (s). I accept that to expose TT-Line to competitive disadvantage would affect its profits and financial interests. This in turn would harm the economic return to the State and its ability to develop and fund essential services for Tasmanians.

41 I conclude that, on balance, the public interest test factors in favour of exemption outweigh those in favour of release.

Preliminary Conclusion

42 I determine all information in Items I and 2 to be exempt under s38(a)(ii) and should not be released.

43 Item 3 of the original request was not subject to review.

Submissions to Preliminary Conclusion

44 On 4 March 2018, Mr Gilmour submitted a response to the preliminary decision and made some compelling points.

45 Mr Gilmour claimed that the reasons given by TT-Line for maintain that the information should remain exempt under s38 were inadequate and that it had not given proper consideration relevant matters. Specifically, Mr Gilmour submitted:

> *The reasons for concluding the* above are *inadequate and that the basis of forming such opinion is without any or any adequate examination* of *the industry,* the *material already in the public realm or* facts *presented in the material filed in this matter.*

46 Mr Gilmour also referred to the wording of s38(I)(a)(ii), noting that information is only exempt if it is likely to expose a public authority to competitive disadvantage. He claims TT-Line's defence based on seasonal trend data is not sufficient to support the claimed exemption. Specifically, he submitted:

> *Turning* to the *definition* of "likely", *it cannot be suggested that a sound and defensible decision* to *refuse the provision* of *information* be *based on something as generic as a seasonal trend. This requires some further*

consideration of *what information is already in the public domain or easily accessible to businesses regarding such matters.*

47 It has been submitted by Mr Gilmour that there is already a large range of information publicly available in relation to tourism numbers. He suggests the numbers he seeks are not likely to cause any harm to the business interests of TT-Line. He continues:

> *State tourism trends are already captured by Tourism Tasmania in considerable detail. For example, we know:*
>
> > *For the year ending* September *2017 that sea visitors increased by 4,100 over the previous 12 months and over that* same *period air visitors increased by 87,600.*
> >
> > *That 10%* of *all visitors to Tasmania come on* the Spirit of *Tasmania* (see Access 2020 Five year air and se access strategy 2015-2020 *available* on *the Tourism Tasmania website).*
> >
> > *The* most *visited region in Tasmania is the South and the least visited by tourists is the East Coast.*
> >
> > *The break down* of the *origin of interstate and overseas visitors and importantly, that Victorians visit* the *state most frequently and by some margin.*
> >
> > *Long term regional tourism number trends (see* Deloitte Access *Economics* Tasmanian Regional Tourism Satellite Accounts 2016-16 *Final Report prepared for Tourism Tasmania).*
> >
> > *Visitor numbers* to *the* state *each quarter can* be *quickly and easily calculated by examining the quarterly snapshots and* commentary *in relation to same provided by Tourism Tasmania on their website.*

48 Mr Gilmour also said:

> Neither To// *nor SeaRoad offer transport over the bass straight* [sic] for people. They are so/e/y *engaged in the transport* of freight.
>
> *Neither Toll nor SeaRoad in their current* fleet of *ships have any capacity to carry people on board with their motorhome or caravan even* if *they wanted* to, *such that to engage in such* business they *would* need to *commission another* vesse/.
>
> A *quote to freight a caravan or* motorhome *from Melbourne* to *Devonport/Bumie or vice versa can be obtained by calling either* SeaRoad or *Toll. Likewise the cost to put a caravan or motorhome on board the TT-Line accompanied by a passenger can* be *obtained at any time by either an online quote or by calling TT-Line for a* quote *over the phone. Indeed,* they even *breakdown the* cost of *the person and* the cost of *accompanying* vehicle for you on *their online system.*

> *A call to Luke Martin at the Tourism Industry Council of Tasmania will confirm the busiest months* for *tourism in the State are over the summer period and the quietest in* the *state are over* the winter *period as* stated *in countless* reports *over the years or alternatively, a call* to *someone like myself who has been operating in the Tourist* [sic] *industry for 19 years would anecdotally confirm same.*

49 Mr Gilmour confirms he is not seeking data relating to freight, but merely the number of caravans and motorhomes that have been ferried to Tasmania by TT-Line. He continues:

> *am not seeking any information regarding freight and the information sought does not give any insight into freight numbers.* The *information , if provided, only allows me to understand the number of caravans and motorhomes being placed onboard* [sic] the *spirit* [sic] *with passenger(s) (not as freight) on a month by month basis. This information does not enable me to know how many people are travelling with* the *particular caravan or motorhome and neither* does *it enable me* to *know what* they *paid on each occasion,* the *length* of *vehicle or their state* of *origin.*
>
> *How then is the information sought giving any more information to TT-Line's competitors than* they *already know or have access to?* The *harsh reality for TT-Line is that their position as submitted to the Ombudsman is not grounded in fact,* or *logic.* The *information sought cannot rationally be refused on the ground* of *s38(1)(a)(ii)* of the *Act as the provision of such information is not likely to* expose *TT-Line* to *any form of* competitive *disadvantage.*

50 TT-Line were offered an opportunity to respond to Mr Gilmour's comprehensive submission and did so on 20 March 2018. It refuted Mr Gilmour's analysis of its information and reaffirmed its position that the release of the more detailed information requested that is not public available would likely expose it to competitive disadvantage. Specifically, TT-Line submitted:

> *The mere fact that other tourism information is accessible by the public does not prevent the application* of *s38(1)(a)(ii) to the information sought by Mr Gilmour, and in this case it is not relevant to the Ombudsman's review.*
>
> The *information sought by Mr Gilmour is of a farm more details* or *granular' nature than public available generic' tourist information.*
>
> As previously *submitted, the information sought holds direct strategic business value to TT-Line (and in turn, TT-Line's market competitors); it is not reasonable to simply equate it to* the *publicly available* tourism *information* referred to *by Mr Gilmour.*
>
> *With respect, the fact that Mr Gilmour* does *not accept or appreciate the distinction* between *the information sought and `generic' tourism information does not mean that the distinction* does not *exist.*

To conclude, Mr Gilmour's supplementary arguments against the application of *s38(1)(a)(ii) are without merit and they do not form a basis for disturbing* the *findings made in the preliminary decision.*

Analysis

51 Mr Gilmour provides a strong argument as to why the information requested in his application for assessed disclosure should be released. TT-Line, while not making any direct submission other than to disagree, relies on its original submission that the information remains sensitive and if released would expose it to competitive disadvantage.

52 I do not discount TT-Line's concerns in this regard. Mr Gilmour, however, relies on the fact that competitors such as Toll or SeaRoad do not take passengers and that there is therefore no risk to TT-Line's competitive position. While these companies may not take passengers, it does not preclude them from forming partnerships with other passenger carries, such as an airline, to offer bundle deals.

53 I acknowledge the relationship between different types of tourism data is not always clear cut and can come with a range of complexities. I am, however, swayed by Mr Gilmour's argument that the nature of the information he has requested is such that its' release would not be likely to cause competitive disadvantage to TT-Line. While the information requested is not directly available, it is not so distinct from other types of information already in the public domain to lead to the conclusion that its release would be likely to result in a competitive disadvantage, that being a real or not a remote chance or possibility.

54 For there to be a likely chance of competitive disadvantage arising, TT-Line's competitors would have to either invest in a large passenger carrying vehicle as suggested by Mr Gilmour or formalise a business partnership with another organisation that has passenger carrying capacity, and the information requested by Mr Gilmour be used to give them a competitive advantage.

55 Caravans and motorhomes vary in length and width and the carrying capacity of any vessel used to transport these types of vehicles is difficult to determine with any certainty. With or without the information requested by Mr Gilmour, there is nothing stopping a competitor from purchasing a passenger carrying vessel or entering into a partnership with another organisation. **I** do not believe this would lead to a competitive disadvantage but rather, it would just be introducing competition.

56 Based on the information before me, I determine the information should be released to Mr Gilmour.

Passing Comment

57 The value of *Forestry Tasmania v Ombudsman* as a precedent has been called in to question as a result of the decision in *Kaldas v Barbour.* That decision was handed

[1] [2017] NSWCA 275 (24 October 2017)

down by the Supreme Court of New South Wales — Court of Appeal on 24 October 2017.

58 Mr Barbour was the New South Wales Ombudsman at the relevant time and Mr Kaldas an Assistant Commissioner of Police. On 20 December 2016 the Ombudsman provided a report to the New South Wales Houses of Parliament which included three adverse findings in relation to Mr Kaldas. Mr Kaldas sued the New South Wales Ombudsman for declaratory relief on grounds that the findings against him were *ultra vices,* that the Ombudsman was biased and that the Ombudsman had failed to afford Mr Kaldas natural justice.

59 Amongst other things, the Court in that case was required to interpret s35A of the *Ombudsman Act 1974* (NSW), which is in substantially the same terms as s33 of the *Ombudsman Act* (Tasmania) *1978.* Section 33 is in the following terms:

> *The Ombudsman, an officer* of *the Ombudsman or a conciliator is* not *liable, whether on the ground* of *want* of *jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in* respect *of any act purporting to be done or omitted under this* or *any other Act unless the act was done or omitted in bad faith.*

60 In short compass, the Court ruled that the Ombudsman is not subject to the supervisory jurisdiction of the courts. In this regard it was noted that the jurisdiction of the Ombudsman does not involve judicial or quasi-judicial functions of the sort controlled by the Supreme Court in its supervisory jurisdiction. Furthermore, at the completion of an investigation, the Ombudsman has no coercive powers but can only make recommendations; he or she does not affect a person's legal rights and obligations.

61 I have taken advice about a number of issues concerning the application of the reasoning in *Kaldas v Barbour* to the Tasmanian Act. As a result, I have formed the view that the same reasoning applied by the Court in relation to s35A of the New South Wales Act applies to s33 of the Tasmanian Act; this Office is not susceptible to the supervisory jurisdiction of the Court. Further, because s33, like s35A, provides immunity from proceedings *in respect of any act purported to be done or omitted under* ***this or any other Act*** (my emphasis) the protections it provides extend to RTI decisions.

62 I have also taken advice about the provisions of the RTI Act and whether a decision by the Ombudsman under it is amenable to judicial review. Again, there are no coercive powers available at the conclusion of a review, and I take the view that there is no provision in the RTI Act, in particular in ss 47 or 48, to render a decision of the Ombudsman legally binding on a Minister, or public authority. In addition, it seems to me that a review under the *Right to Information Act 2009* is not a decision "made...under an enactment" for the purposes of the *Judicial* Review Act *2000,* because it does not "make a present or contingent difference in the realm of

legal rights or obligations, and it must do this because of the force it derives from the relevant enactment"[2].

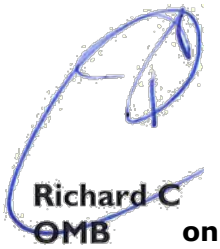
63 I am unable to find anything in the decision of *Forestry Tasmania v* the *Ombudsman* that would lead me to a different view. It does not appear that the Court was taken to s33. In this regard, the value of the case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and to the meaning of the phrases "competitive disadvantage" and `likely to expose", all of which are instructive and with which I agree.

Conclusion

64 I determine the information responsive to Item I and Item 2 of Mr Gilmour's application for assessed disclosure should be released in full.

65 Item 3 of the original request was not subject to review.

Dated: 23 January 2020



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[2] *King v Director* of *Housing* (2013) Tas R 353

Attachment

Right to Information Act 2009, SCHEDULE I

Matters Relevant to Assessment of Public Interest

Sections 30(3) and 33(2)

I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(I) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference:** O1708-113

Names of Parties: Mr Ivan Dean MLC and Department of Health

Reasons for decision: s48(1)(a)

Provisions considered: s39, s43

Background

1 In January 2017, the then Department of Health and Human Services (DHHS) released a regulatory impact statement (RIS) in relation to proposed new laws for personal vaporisers (electronic cigarettes), tobacco licensing, and smoking bans. The Department sought submissions from the public, with a closing date of 30 January 2017. The call for submissions provided that submissions received would be published on the Department's website, including the author's details, unless marked "confidential". The Department received 53 submissions, six of which were marked confidential.

2 On 20 July 2017, Mr Ivan Dean MLC, a member of Tasmania's Legislative Council, submitted an application for assessed disclosure to the Department seeking a copy of the six submissions it claimed were marked confidential. Specifically, Mr Dean's original application for assessed disclosure sought:

> *A copy of the six submissions regarding Ecigs* [sic] *that were labelled confidential, and not made available to the public on the website.*

3 On 7 August 2017, a decision was released to Mr Dean by Ms Siobhan Harpur, the Chief Executive Officer of the Public Health Service, a business unit within the Department. Ms Harpur was a delegated officer of the Department for the purposes of the Act, s21(1)(c).

4 Ms Harpur decided all six submissions, which together consisted of 18 pages, were exempt pursuant to s39(1)(b) on the basis that the information they contain was communicated to the Department in confidence and its disclosure would be reasonably likely to impair the Department's ability to obtain similar information in the future.

5 Mr Dean did not directly dispute that the information might have been communicated in confidence, but did dispute the applicability of the exemption and, on 9 August 2017, requested that an internal review be undertaken. Mr Dean sought to narrow the scope of his application for the purposes of the internal review to only those submissions made by organisations involved in

the production or distribution of tobacco. Specifically, Mr Dean confined the scope of his application to:

> *Submissions provided by British American Tobacco (BAT), Philip Morris, Imperial Tobacco, and/or other organisations and companies involved in tobacco production and distribution.*

6 Section 39 is located in Division 2 of Part 3 of the Act and so any information claimed exempt based on its provisions is subject to the public interest test in s33. Mr Dean asserted that it was in the public interest for the Tasmanian Government to comply with the World Health Organisation (WHO)'s *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*[1] such as its requirements to maintain transparency in setting and implementing public health policies with respect to tobacco control.

7 In its internal review decision of 14 August 2017, the Department expressed some doubt as to whether Mr Dean could narrow the scope of his application. Mr Mick Casey, a delegated officer, proceeded with the internal review by reference to the application as originally expressed, that is, by reference to all six submissions.

8 On 21 August 2017, Mr Dean requested an external review of the Department's decision.

9 To avoid uncertainty as to the scope of his Mr Dean's application for external review, this office wrote to Mr Dean on 14 November 2017. The office sought clarification on whether he wanted submissions only by organisations and companies there were involved in both producing and distributing tobacco, or whether the two were not mutually exclusive and he wanted submissions by those that either produce or distribute, or possibly both produce and distribute. Mr Dean confirmed that his application covered organisations which:

- produce and distribute; and/or
- produce [only]; and/or
- distribute only,

tobacco products.

10 This office wrote again to Mr Dean on 19 February 2020 seeking clarification on whether he still sought submissions by individuals, or now only those by organisations or corporations. Mr Dean advised he wished to confine the scope of his application for external review to exclude submissions by individuals. This can be treated as refining the scope of his application consistent with s13(7), as discussed in more detail later in these reasons.

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[1] Guidelines for implementation of Article 5.3 of the WHO FCTC "Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry", adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7)), at https://www.who.int/fctc/treaty_instruments/adopted/en/ and https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

Issues for Determination

11 Some or all of the following issues may need to be determined:

(a) Was it open to Mr Dean to revise the scope of his request on internal review?

(b) Does s39(2) apply, preventing this information from being exempt under s39(1)? If not, then the following issues remain.

(c) Was the information communicated in confidence to the Department: s39(1)?

(d) If the information was communicated in confidence, would its disclosure be reasonably likely to impair the Department's ability to obtain similar information in the future: s39(1)(b)?

(e) If yes to (c) and (d), then does the public interest test favour release or exemption?

Relevant legislation

12 Any information claimed exempt under s39 is subject to the public interest test contained in s33. Such information is only exempt if 'it is contrary to the public interest to disclose the information': s33(1). When determining the public interest test, '[t]he matters which must be considered [include those] specified in Schedule 1 but are not limited to those matters': s33(2). Copies of s39 and Schedule 1 the Act are at the end of this decision.

13 Australia is a party to the FCTC, having signed it in December 2003 and ratified it in October 2004.[2]

14 Accordingly, the treaty and the WHO guidelines for its implementation, particularly the Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control,[3] to which Mr Dean referred in his request for external review, are likely relevant to my application of the Act in this case. They will be considered later in these reasons.

Submissions

The Department on Internal Review

15 In his internal review decision, the Department's Mr Mick Casey questioned whether, on internal review under s43, the applicant had the right to narrow the scope of his request. Mr Casey said the purpose of s43 is to review the original decision, and so proceeded to undertake internal review for all six submissions to avoid uncertainty.

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2 See the WHO Framework Convention on Tobacco Control at www.who.int/fctc/en/.

3 Guidelines for implementation of Article 5.3 of the WHO FCTC "Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry", adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7)), at https://www.who.int/fctc/treaty_instruments/adopted/en/ and https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

16 The Department assessed the issues under s39, finding that the information was communicated in confidence and its disclosure would be reasonably likely to impair the Department's ability to obtain similar information in the future. In relation to the public interest test, the Department found that matters (a) and (b) contained in Schedule 1, and the FCTC, favoured release of the subject information. However, the Department found those matters to be outweighed by matters (h), (m), (n) and (v), which it contended favoured exemption in this case. It then reached the same conclusion as the original decision maker: that the submissions were exempt in full under s39.

17 I will consider relevant aspects of the Department's internal review decision in appropriate parts of my Analysis below.

The Applicant

18 Mr Dean stated in his application for both internal and external review that Australia is a signatory to the World Health Organisation's (WHO) *Framework Convention on Tobacco Control* (FCTC). He submitted that the FCTC is designed to protect policies from commercial and other vested interests of the tobacco industry, and that the tobacco industry is required to be transparent and accurate.

19 He further quoted the WHO's *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*,[4] eg, Principle 2:

> *GUIDING PRINCIPLES*
>
> *...*
>
> *Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.*
>
> *[paragraph 14.] Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.*[5]

Analysis

20 Mr Dean has confirmed to this office that he does not require the release of any submissions by individuals, which were within the scope of his original application. Given that, he has in effect refined down the scope of his application, as permitted by s13(7). My reasoning for why this is permitted is analogous to that set out below under Issue (a).

21 This leaves only one submission for consideration, that by a corporation.

4 Guidelines for implementation of Article 5.3 of the WHO FCTC "Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry", adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7)), at https://www.who.int/fctc/treaty_instruments/adopted/en/ and https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

5 Ibid at p3.

Issue (a) Was it open to Mr Dean to revise the scope of his request on internal review?

22 Mr Casey noted in the Background to his internal review decision (p1) that:

> *The application for internal review refined the scope to submissions provided by [three tobacco companies] and/or other organisations and companies involved in tobacco production and distribution.*

23 Mr Casey reviewed all of the original decision, after including in his internal review decision a statement (p1) that he was

> *... of the view that the request to limit the scope of the internal review is questionable as the purpose of s43 is to review the original decision.*

24 Mr Casey is correct insofar as s43(1) empowers an applicant to apply to a public authority 'for a[n internal] review of the decision [regarding their original application].' Subsection 43(5) provides:

> *A decision on a review under this section in respect of an application made under section 13 is to be given in the same manner as a decision in respect of the original application.*

25 I read 'in the same manner' as requiring a fresh decision, and incorporating procedural requirements applicable to the original decision such as the provision of reasons. However, s43(1) does not preclude an applicant, in seeking internal review of the original decision, from refining the scope of review sought in the manner that Mr Dean did. By asking that the review relate to only some of the withheld submissions sought in his original application (all of which he had been refused) Mr Dean, in effect, contested only part of the original decision (that relating to corporate submissions, not those by individuals), which a party with an appeal right is entitled to do.

26 Mr Dean's application for internal review showed good reasons (not that he needed to) why he may have limited the scope to submissions by tobacco organisations and companies. For example, his grounds for requesting review included arguments that the FCTC (which applies to governments' dealings with the tobacco industry, not to individuals) required transparency. He also stated that, "This matter has some urgency about it as it will be debated shortly by the Legislative Council."

27 An alternative statutory pathway entitling Mr Dean to refine down the scope of his application on internal review stems from s13(7), which provides that:

> *A public authority or a Minister may negotiate with an applicant to refine or redirect his or her application for assessed disclosure of information.*

28 It follows that an applicant can unilaterally refine down the scope of his or her application to a subset of its original, assuming this does not somehow increase the workload required of the public authority to process or determine the application. Logically, narrowing the application's scope should generally reduce

the workload to some extent, certainly in an application such as this where the effect was to refine down to one the number of submissions requiring a decision.

29 Since s43(5) requires a decision on internal review to be given in the same manner as a decision in respect of the original application, s13(7) can be also applied to an internal review. Hence, the refinement can happen after the original decision, such as when the applicant lodges their s43(1) application for an internal review, as in this instance.

30 I am satisfied Mr Dean was within his rights under the Act to narrow the scope of his internal review request.

31 Since the Department nevertheless decided to review all of the original decision, Mr Dean's initial request for external review related to all of the internal review decision – except that he suggested personal or identifying information of individuals be redacted from their submissions. He did, however, state in his request for external review that it related primarily to submissions involving the tobacco industry, or sellers or importers of e-cigarettes, etc. He subsequently confirmed to this office in February 2020 that he wanted the external review's scope limited to the tobacco industry, or sellers or importers of e-cigarettes, and he did not require any of the submissions by individuals. So this decision relates to the one submission within Mr Dean's refined scope.

Issue (b) Does s39(2) apply to this information?

32 Subsection 39(2) provides that s39(1) excludes from exemption information that:

> *(a) was acquired by a public authority from a business, commercial or financial undertaking; and*
>
> *(b) relates to trade secrets or other matters of a business, commercial or financial nature; and*
>
> *(c) was provided to a public authority or Minister pursuant to a requirement of any law.*

33 The one submission on the RIS was made by the Peregrine Corporation and was provided voluntarily, rather than pursuant to any legal *requirement*. Hence, s39(2)(c) is not met and s39(2) is not applicable.

Issue (c) Was the information communicated in confidence under s39(1)?

34 The Department 'has the onus to show that the information should not be disclosed': s47(4). I will consider, in order, the relevant elements required for information to be exempt under s39(1)(b).

Internal review decision regarding s39

35 The internal review decision set out the provisions of s39, then in its next two paragraphs accurately described the section's first precondition: information

can only be exempt if it is 'communicated in confidence' to a public authority or Minister: s39(1).

36 The internal review decision stated at page 3 that, 'The manner and/or circumstances in which the information has been communicated are evidence of mutual expectations that the information would be treated in confidence.' The decision listed 'factors in support of the fact the information was communicated in confidence', then continued:

> *This is further evident from the fact that the information would not have been voluntarily disclosed to the Department but for the existence of a confidential relationship.*
>
> *For the reasons outlined above, I consider that evidence the information in question was regarded and treated as confidential suffices to prove the information was communicated in confidence within the meaning of s39 of the Act.*

37 I cannot see the basis on which the internal reviewer found as a matter of fact 'that the information would not have been voluntarily disclosed to the Department but for the existence of a confidential relationship.' That is not apparent to me from Peregrine Corporation's submission and I disagree for reasons which I will discuss below, that asserted 'fact' or otherwise being more directly pertinent to s39(1)(b) than to s39(1)(a).

38 I also disagree with the proposition 'that evidence the information in question was regarded and treated as confidential suffices to prove the information was communicated in confidence within the meaning of s39 of the Act.' Merely regarding and treating information as confidential does not suffice to prove the information was communicated in confidence for the purposes of s39. More is needed in this regard, which I will discuss in more detail later in these reasons.

39 The internal review proceeded to consider the elements of s39, concluding that the submissions were fully exempt. I will consider aspects of the internal review decision under relevant parts of my Analysis below.

Regulatory Impact Statement (January 2017) (RIS)

40 The Department's RIS was headed "HAVE YOUR SAY". Amongst other matters, it contained a disclaimer of liability and proposed various changes to the *Public Health Act 1997*. Page 3 included the sentence, "Public comment on the RIS is welcome – see page 27 for details". Page 27 invited comments and included the following:

> *Comments received (including author's details) will be published on the Department website unless they are marked "Confidential".*
>
> *Comments will be reviewed and a report provided for the Minister for Health's consideration.*

41 The offer in the RIS to exclude submissions marked confidential from its default position of publishing submissions online was honoured by the

Department. That does not, in itself, render such submissions exempt information under the Act. Nonetheless, it is a factor I take into account under s39.

Peregrine Corporation's 'PRIVATE AND CONFIDENTIAL' header.

42 The submission by Peregrine Corporation was a four-page letter signed by its Managing Director, then emailed from its Head of Legal (Acting) to the Department on 30 January 2017. The one sentence covering email attached 'our submissions to the discussion paper ...' The email included a footer headed 'LEGAL PROFESSIONAL PRIVILEGE AND CONFIDENTIALITY' stating that "This communication, including all attachments, is intended for the named recipients only...' The footer then claimed privilege, confidentiality, and copyright, using wording one would expect might be a standard footer to each email from an in-house corporate lawyer. The footer seems generic, and its wording focused on 'If you are not the intended recipient ...' of this email, so I place little weight on it in the present context. Peregrine's submission is neither privileged nor copyright. It may have been confidential, but that would require more than the footer to its covering email.

43 The submission referred to the discussion paper, which it noted 'is open for public consultation', and provided 'the submissions by Peregrine Corporation in relation to the Proposal.' The submission did not expressly claim confidentiality except that pages 2-4 each contained a header stating: 'PRIVATE AND CONFIDENTIAL'; 'PEREGRINE CORPORATION'; the page number; and date.

44 The internal review decision found in relation to five submissions, including the one from Peregrine now under consideration, that:

> *... it is apparent from the email or submission being identified as* confidential *that, at the time the information was submitted by the submitter, it was to be held on an understanding of confidence.*

I disagree, for the following reasons.

45 In *Hoskin v Department of Education and Training*[6] Judge Higgins, Vice President of the Victorian Civil and Administrative Tribunal, considered the *Freedom of Information Act 1982* (Vic), s35(1), which had equivalent wording to the RTI Act s39(1). Judge Higgins stated:

> *The first issue for determination is whether the information in these documents was communicated in confidence. The law with regard to this matter is, in my opinion, adequately and correctly set out in* Thwaites v Department of Health and Community Services *(1995) 8 VAR 361. This was a decision of Deputy President Macnamara. The passages with regard to this issue are set out in pps.366-367 of the reasons for decision.*[7]

[6] [2003] VCAT 946 (16 May 2003).
[7] *Hoskin v Department of Education and Training* [2003] VCAT 946 (16 May 2003) at [18].

46 In Thwaites, Deputy President Macnamara reviewed relevant authorities, then stated (***my emphasis***):

> *It would seem therefore that no formal confidentiality agreement is required to establish that information was communicated in confidence nor is it necessary to establish a "meeting of the mind". Conversely* ***the mere fact that a letter is headed "private and confidential" is not sufficient in itself to establish that that communication was made in confidence,*** Re Barnes and Commissioner for Corporate Affairs *(1985) 1 VAR 16 at 18.*[8]

47 Associate Professor Moira Paterson in her book, Freedom of Information in Australia: Government and Information in the Modern State[9] refers to a 'private and confidential' heading being insufficient to establish communication in confidence (citing the above cases).[10] Correspondingly, the fact that pages 2-4 of Peregrine's submission were each headed 'PRIVATE AND CONFIDENTIAL' is not sufficient in itself to establish that the submission was communicated in confidence.

48 There is nothing else in the submission sufficient to establish that it was communicated in confidence. Accordingly, the internal review decision appears, in its passage quoted at para 44 above, to have placed too much weight on the submission's 'PRIVATE AND CONFIDENTIAL' header.

Did Peregrine Corporation's submission have any 'intrinsic quality of confidentiality'?

49 Associate Professor Paterson cites various cases interpreting the *Freedom of Information Act 1982* (Vic), s35(1), which had equivalent wording to the RTI Act s39(1). She notes:

> *That point was also made in* Re Mildenhall and VicRoads *(1996) 9 VAR 362 at 395, where the [Victorian Administrative Appeals Tribunal] stressed that marking a document as 'commercial-in-confidence', cannot prevail in all cases as the material may lack any 'intrinsic quality of confidentiality'. It, however, also observed that the fact that a signed confidentiality agreement was provided as a condition precedent to the provision of signed tender documents to prospective tenderers might entitle it to more weight.*[11]

50 So, following *Re Mildenhall and VicRoads* (and absent anything approaching a signed confidentiality agreement here), is there any 'intrinsic quality of confidentiality' in Peregrine's submission so as to meet the legal test for communication in confidence under s39(1)?

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8 *Re Thwaites and Department of Health and Community Services* (1995) 8 VAR 361 at 366.

9 LexisNexis Butterworths Second Edition 2015,

10 Ibid:266 at [6.70].

11 Ibid. *Re Mildenhall and VicRoads* (1996) 9 VAR 362 at 395 is similarly paraphrased in Moira Paterson (2015), *Freedom of Information and Privacy in Australia: Information Access 2.0*, 2nd ed, LexisNexis Butterworths, 446 at [7.95].

51 In my view, written comments by a major national retailer of tobacco products on a RIS proposing amendments to the *Public Health Act 1997* lack any such 'intrinsic quality of confidentiality'. I say this having regard to the Act, reinforced in the context of this external review by Australia's ratification of the WHO FCTC, for the following reasons.

52 As Mr Dean noted in his requests for internal and external review, Australia is a signatory to the FCTC. Indeed, Australia was among the first signatories to the FCTC in December 2003 and ratified it in October 2004.[12] Consequently, under international law the treaty 'is binding upon [Australia] and must be performed by [it] in good faith.'[13]

53 A statute should be interpreted 'as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.'[14] This approach should inform my interpretation of the Act, including s39(1). In the present context, I should interpret these by reference to the FCTC and the Guidelines[15] for implementation of its articles adopted by the Conference of the Parties.

54 In so doing, I find particularly relevant and useful Article 5.3 of the FCTC Principles 1 and 2 of its Guiding Principles which Mr Dean quoted. I reproduce his quotes to highlight ***his emphasis***:

> *Principle 1*
>
> *... The tobacco industry provides and promotes a product that has been proven scientifically to be addictive, to cause disease and death and to give rise to a variety of social ills, including increased poverty.* ***Therefore, Parties should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible.***
>
> *Principle 2*
>
> *...* ***Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.***[16]

55 Of most direct relevance is the requirement of Principle 2 for Parties to 'ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.' This is best served by disclosure of tobacco industry interactions with Government. All the more so, a submission such as this by a tobacco retailing corporation on a RIS

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12 http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-conv.

13 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, art 26, reflecting the fundamental rule *pacta sunt servanda* (ie, treaties are made to be kept).

14 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

15 http://www.who.int/fctc/guidelines/adopted/guidel_2011/en/, pg 5.

16 See the "Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry" at https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

which set out, amongst other matters, proposed amendments to the *Public Health Act 1997* related to tobacco control.

56 The RIS on its first substantive page contains the following:

> *Public comment on the RIS is welcome – see page 27 for details. Feedback will be considered as a Bill is prepared for Government to consider introducing into Parliament.*

Page 27 stated that 'Comments will be reviewed and a report provided for the Minister for Health's consideration'. Hence, comments on the RIS were invited for the express purpose of consideration by the Department and the Minister to shape the Public Health Bill the Government might take to Parliament.

57 Disclosure of Peregrine Corporation's submission would make transparent that part of its input into the legislative process as described in the RIS, and also increase accountability, as required by Principle 2 of the Guidelines quoted above. Conversely, non-disclosure has the reverse effect, keeping the corporation's legitimate legislative lobbying secret, and thereby keeping opaque enabling and potentially influencing the preparation of a Bill and/or the Minister's consideration of it. Allowing this without the transparency and accountability of publication would be antithetical to Principle 2 set out above.

58 Accordingly, having regard to the case law summarised above, Article 5.3 of the FCTC, and Principle 2 of the Guidelines for the implementation of that Article,[17] I find that Peregrine's submission was not communicated in confidence for the purposes of s39(1).

Issue (d) If the information was communicated in confidence, would its disclosure be reasonably likely to impair the Department's ability to obtain similar information in the future?

59 Even if I am wrong in my finding above, and the entire submission was communicated in confidence for the purposes of s39(1), that would not suffice make it exempt information. For that to result, s39(1)(b) would also need to be satisfied, and then the public interest test applied.

60 Section 39(1)(b) requires that, before information can be exempt it needs to be established that 'the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.' So the question that must be answered here is: if this submission on the RIS is now released, would that be reasonably likely to impair the Department's ability to obtain similar information in the future?

61 In its internal review decision, the Department stated:

> *Taking account of the fact that provision of the information at issue to the Department was voluntary in response to a public consultation process and in confidence, I consider that some diminution in the quality*

17 https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/ p5.

or quantity of information that would be given in the future may be a result that could reasonably be expected to follow from disclosure.

62 The Department was right to take account of the fact that provision of the information at issue to it was voluntary in response to a public consultation process. However, for disclosure to 'be reasonably likely to impair ...' the ability to obtains similar information under s39(1)(b), more is required in terms of likelihood than merely 'some diminution in the quality or quantity of information ... *may* be a result that could reasonably be expected to follow from disclosure' (*my emphasis*).

63 Associate Professor Paterson again in relation to the *Freedom of Information Act 1982* (Vic), s35(1), equivalent of s39(1)(b) says:

> *... What is required is some positive demonstration that the information's disclosure will adversely affect the respondent's future ability to obtain information from persons in general, rather than specifically from the person who confided it. ... It requires 'a degree of impairment going beyond that which is merely trifling' and one which is more probable that not. ...*[18]

64 'More probable than not' requires a probability of at least 51% (ie, the balance of probabilities), more than the 'may' in the Department's internal review decision statement above.'

65 The internal review decision argued that a breach of the confidentiality offer in the RIS would be reasonably likely to impair its ability to obtain similar information in the future. It claimed this on the basis that public submissions are a strong source of community engagement in policy creation and reneging on its undertaking to keep certain submissions confidential would damage its ability to receive submissions, and thus to some extent impair its ability to create good policy.

66 The Department relied on the need for the community, individuals or organisations, to have confidence in the free flow of information and to protect confidentiality when requested to ensure similar information can be obtained in the future.

67 These were relevant considerations in the context of the Department's decisions, which included consideration of submissions by individuals - some relating to their use of electronic cigarettes. However, now that Mr Dean has narrowed the scope of information he seeks to just the tobacco retailer's submission, I place less (albeit some) weight on these considerations. Given Mr Dean's narrowed scope, my decision excludes submissions by individuals, to which different considerations would apply, including potential redaction of personal information under s36.

68 The internal review decision referred to 'the fact that the information would not have been voluntarily provided but for the existence of a confidential

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[18] Supra, 448 at [7.100] citing *Gunawan v Department of Education* [1999] VCAT 665.

relationship' but did not elaborate or provide grounds for finding that alleged fact. I am far from persuaded that is a fact in relation to Peregrine's submission, for the reasons summarised below. Mr Dean referred in his applications for: external review; and (albeit in less detail) the Department's internal review, to the inquiry into and report by the Parliament of Australia's Standing Committee on Health, Aged Care and Sport on the use and marketing of electronic cigarettes (E-cigarettes) and personal vaporisers in Australia. Perusal of submissions to that national inquiry reveals that, while some are listed as 'Name Withheld' or 'Confidential', published submissions were made by corporations including Peregrine Corporation,[19] Philip Morris Limited[20] and British American Tobacco Australia.[21] The fact that their online publication did not deter these submissions undermines the Department's claimed 'fact' quoted above. It makes it unlikely that disclosure of Peregrine's RIS submission now under the RTI Act would impair the Department's ability to obtain similar information in the future – from Peregrine or larger tobacco corporations – since, at least in this respect, past behaviour can be an indicator of future behaviour.

69 I am further reinforced in this conclusion by the content of Peregrine's submissions on the Tasmanian RIS and to the national inquiry. The latter is longer than, and dated nearly 5 months after, Peregrine's submission on the RIS. Some information is common to both submissions. For example, both name the same Managing Director as author, and both include mostly the same background about Peregrine, such as:

- its business name(s) *Smokemart & Giftbox*;
- that it operates 242 tobacco retail sites across mainland Australia'; and
- that 'We are the largest privately owned tobacco retailer in Australia.'

70 The one background sentence in Peregrine's RIS submission not present in its national submission is '5. We have plans to expand our retail network to Tasmania in the next 12 months.' While that information may have been commercially sensitive at the time, it is now public. For example, an online job advertisement by Peregrine closing December 2019 included:

> ***Senior Area Sales Manager (TAS)***
>
> *Apply now Job no: 525648*

19 Peregrine Corporation, Submission to the Standing Committee on Health, Aged Care and Sport, Inquiry into the use and marketing of electronic cigarettes (E-cigarettes) and personal vaporisers in Australia, 21 June 2017, Submission 110 at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/ElectronicCigarettes/Submissions.

20 Submission 321 to the Standing Committee on Health, Aged Care and Sport, Inquiry into the use and marketing of electronic cigarettes (E-cigarettes) and personal vaporisers in Australia, at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/ElectronicCigarettes/Submissions.

21 Submission 326 to the Standing Committee on Health, Aged Care and Sport, Inquiry into the use and marketing of electronic cigarettes (E-cigarettes) and personal vaporisers in Australia, at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/ElectronicCigarettes/Submissions.

Work type: Full time

Location: Melbourne
Categories: Retail Operations

What are we looking for?

We are seeking a hardworking, dedicated and instinctive retailer who has experience with building first class teams within a Speciality based multi-site retail environment. Our Operations are expanding into Tasmania and we want to talk to motivated, experienced Retail Leaders to spearhead our expansion. This newly created role will be responsible for managing the growth of our retail and wholesale operations as well as hiring, training and developing our team in Tasmania. This position will be based in Hobart and the successful applicant will be required to travel interstate for 4 weeks training.

Who are we?

Peregrine Corporation is the largest private company in South Australia and it continues to grow. Our excellence in retail operations is recognised at an international level, with high profile Company brands and Speciality based retail outlets. For more information about Peregrine please visit our website www.peregrine.com.au[22]

71 Subsequent parts of Peregrine's 25 paragraph submission on the RIS were headed:

- Legislative Framework for E-Cigarettes across Australia;
- The Proposed Laws - E-Cigarettes;
- The Proposed Laws - Tobacco;
- Alternative options; and
- Concluding Remarks

72 So it can be seen that there are some similarities (eg, the Legislative Framework section) with Peregrine's submission to the national inquiry.

73 The only things that Peregrine objected to in its RIS submission were the:

- proposed legal requirements for tobacco licence holders to report to the Director of Public Health on their volumes of:
    - e-cigarette sales; and
    - cigarette sales; and
- alternative options for e-cigarettes in the RIS, which it submitted should be dismissed.

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22 https://careers.gift-box.com.au/en/job/525648/senior-area-sales-manager-tas accessed December 2019. See also https://careers.gift-box.com.au/gb/en/job/526078/smokemart-giftbox-tasmania-new-store-opening-expression-of-interest-for-all-roles advertised 23 Dec 2019, accessed March 2020.

74 Peregrine said that sales information is commercially sensitive, and that if the proposed sales data reporting laws proceed, then they should require data reporting by licence holders on a single store basis. It argued that allowing a company that held multiple licences to provide (only) consolidated sales data across multiple stores would provide that company with an unfair competitive advantage over small retailers operating single stores. However, Peregrine's RIS submission itself does not contain (what could now be considered, given the job advertisement quoted earlier) commercially sensitive information. Nor does it relate to trade secrets. So release of Peregrine's RIS submission would not disclose information related to business affairs or:

(a) related to trade secrets; or

(b) likely to expose it to competitive disadvantage,

as would have been required to attract the s37 'business affairs' exemption. Properly, the Department did not claim exemption under s37.

75 Peregrine might prefer its submission not be disclosed (or, judging from its published national submission, might not mind). However, I am far from persuaded that release of its RIS submission under RTI would be reasonably likely to impair the Government's ability similar information in the future. All the more so given it is now over three years since Peregrine made its RIS submission.

76 It seems more likely that that the commercial interests of tobacco corporations and licence holders will continue to drive them to exercise their legal right to make submissions on a future RIS or similar law reform proposal which may affect their operations (eg, impose reporting requirements as the RIS proposed), notwithstanding the prospect of publication of their submission.

77 Indeed, as Peregrine Corporation's letter concludes (its paragraph 24):

> *24. We request that the Tasmanian Government continue to engage with stakeholders regarding any new legislative bill which may be introduced to bring these policies into effect. We would welcome the opportunity to provide comment on any future legislative bill.*

78 I therefore determine the submission on the RIS made by Peregrine Corporation does not satisfy the requirements of s39(1)(b) and should be released in full to Mr Dean.

Issue (e) Passing Comment: Does the public interest test favour release or exemption?

79 I have determined the information is not exempt under s39(1)(b). Accordingly, I need not consider the public interest test. However, had I needed to do so, I would have found that the public interest overwhelmingly favoured disclosure of this submission, contrary to the Department's decision.

80 The Department's application of the public interest test on internal review by Mr Casey found matters (a) and (b) of Schedule 1 and the FCTC favoured

release of the information, while matters (h), (m), (n), and (v) favoured non-disclosure.

81 Of the public interest test matters in Schedule 1 (attached to this decision), I find those in favour of release include matters:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

82 In general terms, release of the submission, read in the context of the Government's subsequent legislative action on the Bill, will create a broader understanding of government legislative decision-making on an important matter of public health.

83 Specific further reasons as to why a tobacco corporation's submission on a public health bill should be published are laid out in the Guidelines for implementation of Article 5.3 of the WHO FCTC 'Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry'.[23] See, for example, my reasoning immediately prior to the heading Issue (d).

84 Similar reasons are relevant in relation to Schedule 1 matter (h) 'whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government', which the Department found favoured exemption.

85 It is true that the RIS contains this on page 27:

> *Comments received (including author's details) will be published on the Department website unless they are marked "Confidential".*

86 Peregrine's submission was not published online. I do not consider that its disclosure now would hinder equity and fair treatment of corporations in their dealings with government given reasons I set out earlier, particularly in regard to the FCTC. Article 5.3 of the FCTC provides the 'ground rules' by which States including Australia have agreed to conduct their dealings with tobacco

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23 Adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7)), at https://www.who.int/fctc/treaty_instruments/adopted/en/ and https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

corporations for the "Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry".[24]

87 Schedule 1 matter (m) 'whether the disclosure would promote or harm the interests of an individual or group of individuals' is no longer relevant now that Mr Dean's scope has been narrowed to the submission by the corporation.

88 Matter (n) 'whether the disclosure would prejudice the ability to obtain similar information in the future' has been considered in some detail above as a requirement of s39(1)(b). I have already determined that the release of the information would not prejudice the ability of the Department to obtain similar information again in the future.

89 Matter (v) 'whether the information is extraneous or additional information provided by an external party that was not required to be provided' is relevant, in that Peregrine provided its submission voluntarily. However, this does not suffice to tip the public interest balance, which overwhelmingly favours disclosure of this submission (for reasons I have described above), against that result.

Preliminary Conclusion

90 I determine the single submission on the RIS subject to external review, that from the Peregrine Corporation, is not exempt information under s39(1)(b) and is to be released in full.

Submissions to the Preliminary Conclusion

91 The above preliminary decision was adverse to the Department. A copy of it was, therefore, forwarded to the Department of Health (the relevant successor Department to the former Department of Health and Human Services) seeking its input before finalising the decision, as required by s48(1)(a).

92 Mr Mick Casey, on behalf of the Department, requested an extension for its input, given that the Department's resources were primarily directed towards managing COVID-19. This office weighed that against s7 and s3(4)(b), then granted the Department an extension to 4 May 2020. On that date, Mr Casey provided the Department's three-page input responding to the preliminary decision, in the following terms. For ease of reference, this decision's numbering of paragraphs and footnotes has been inserted into Mr Casey's input (which had numbered its footnotes but not paragraphs).

93 Thank you for your patience to allow the opportunity to provide comment on the preliminary decision for O1708-113 Ivan Dean MLC.

94 The Department has concerns are [sic] with the:

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[24] Adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7)), at https://www.who.int/fctc/treaty_instruments/adopted/en/ and https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/.

- *broad interpretation given to s43 and*
- *application of s39(1)*

S43. Internal review

95 *Section 43(1) provides*:

> *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.*

96 Where the application for internal review is made by the applicant for assessed disclosure, the application must be made within 20 working days of the date when notice was given to the applicant, in accordance with s22, of the original decision made on their application for assessed disclosure.

97 *Section 22 provides [sic] the public authority to give the applicant written notice of a decision where some or all of the information is not disclosed to the applicant. Any notice must state the reasons for the decision, the name of the person making the decision and inform the applicant of their right to apply for review of the decision, the authority to whom that application for review may be made and the time in which that application for review must be made. It must also state the public interest* consideration, if any, on which the decision was made.

98 Section 43(5) provides

> *A decision on a review under this section in respect of an application made under section 13 is to be given in the same manner as a decision in respect of the original application.*

99 The original application submitted under s13 requested:

> *Could you please provide me with a copy of the six submissions regarding Ecigs that were labelled confidential, and not made available to the public on the website.*

100 The internal review decision of 14 August 2017 was directed at the decision issued 7 August 2017. The operation of subsection (1) and (5) set up a process for an examination of an administrative decision. The nature of an internal review is held within a department by an officer with the power to check the decision of the original decision maker.

101 An internal review allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker. The internal review considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. An internal review may affirm a decision, vary it, set it aside or make a substitute decision.

102 While the preliminary decision submitted for comment infuses the phrase …in the same manner... to alow the scope of an internal review to be narrowed, the Department is not convinced that the phrase can be given this meaning.

103 The phrase in the same manner is viewed by the Department as a direction to s22 whereby the public authority is to give the applicant written notice of a decision. The reference under s45(5) [sic] to s13 is in the past tense necessitating an application once been [sic] assessed as meeting the minimum requirements and accepted, initiated the assessed disclosure process. The word made is past tense and, in the Department's view this constricts the focus of an internal review to the decision made at first instance in its entirety. If the purpose of an internal review is to affirm, vary or substitute it is questionable if this may be undertaken when a significant part of the decision is somehow removed from the consideration.

Section 39

104 The test is whether information is communicated in confidence between the communicator and the receiver to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature.[25] Information is communicated in confidence if it was communicated and received under a mutual understanding that the communication would be kept confidential.[26]

105 In other words, the public authority needs to have understood and accepted an obligation of confidence.[27] The mutual understanding must have existed at the time of the communication not the time of the request for access.[28] For example, when a person gives information to a public authority, they may ask that it be kept confidential and the public authority could accept the information on that basis.

106 A mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the public authority.[29] On the other hand, if a public authority has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the public authority to treat the information confidentially, and therefore any mutual understanding of confidence.[30]

107 It may be clear from a public authority's actions whether the public authority accepted an obligation of confidence and is maintaining that obligation.[31] For example, a public authority may mark a document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.

25 Secretary, Department of the Prime Minister and Cabinet v Haneef (2010) 52 AAR 360.
26 Re Maher and Attorney-General's Department [1985] AATA 180. In Luchanskiy and Secretary, Department of Immigration and Border Protection (Freedom of information) [2016] AATA 184 at [32].
27 Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434.
28 Secretary, Department of Foreign Affairs v Whittaker (2005) 143 FCR 15.
29 National Australia Bank Ltd and Australian Competition and Consumer Commission [2013] AICmr 84 [23].
30 Re Drabsch and Collector of Customs and Anor [1990] AATA 265.
31 Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434.

108 *For the information to have the quality of confidentiality it must be known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.*[32] *For example, information that is provided to a public authority and copied to other organisations on a non-confidential or open basis may not be considered confidential*.

109 The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain. This can occur if the person whose confidential information it is discloses it. The obligation of confidence may also only relate to a limited time period.

110 As noted in the preliminary decision the January 2017 Regulatory Impact Statement advised that comments received may be published unless marked Confidential. In line with this statement the six submissions received marked as confidential were not published on the Department's website and consequently on the Departmental drive filed separately from the other submissions that were received.

111 The January 2017 Peregrine Corporation submission from page two included in the header the statement Private and Confidential. It is noted that the Corporation's June 2017 submission to the Standing Committee on Health, Aged Care and Sport's injury into use and marketing of electronic cigarettes (E-cigarettes) and personal vaporisers in Australia did not carry the same statement.

112 The Department's officers responsible for managing the receipt of the submissions and while authoring the report were clear that the information submitted by Peregrine Corporation was to be treated as confidential. The Peregrine Corporation has been consulted to determine if the mutual understanding of confidentiality had dissolved.

113 *The Corporation maintains that the veil of confidentiality is still applicable. Furthermore, the Corporation has asserted that the June 2017 report provided to the Commonwealth is sufficiently different from that tabled with the Department of Health (Tas). The author of the submission tabled with the Department was aware a submission identified as confidential would be treated as such. To this extent, if the veil of confidentiality was not available the contents of the submission would have been drafted differently*.

114 The Department contends that the mutual understanding of confidentiality is still relevant. Taking the utterings on board from the Peregrine Corporation, even though a notable period has elapsed, the Department considers disclosing the submission would reasonably likely impair the ability to obtain similar information in the future. The likelihood of this impairment is considered to be greater than the 50 per cent mark.

115 [Ends]

32 Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434.

Further Analysis

116 The Department's input will be considered in the same two parts and in the order in which it was provided: s43 and s39.

Interpretation given to s43 - internal review

117 I take no issue with the paragraphs I have numbered 98 and 99 of the Department's input regarding s43.

118 As the Department stated at paragraph 100, 'The internal review decision of 14 August 2017 was directed at the decision issued 7 August 2017.' Therein lies part of the problem.

119 The internal review decision should have been directed not solely at the entirety of the original decision, but also, and arguably more so in order to 'make a fresh decision' as required by s43(4), at the application for information made under s13.

120 Subsection 43(5) provides [my emphasis]:

> A decision on a review under this section **in respect of an application** made under section 13 is to be given in the same manner as a decision in respect of the original application.

121 The Department treated this provision as if it applied not '... in respect of an application made under section 13', but rather, to the original decision in respect of that application. That is, the Department interpreted s43(5) as if, for example, it added the words 'a decision on' where I have emphasised below, so as to read:

> A decision on a review under this section in respect of **a decision on** an application made under section 13 ....

122 This may, in part, explain why the Department was not convinced by the preliminary decision finding that the applicant could limit or narrow the scope of the information sought in his application under s43(1) for internal review, by treating it as:

- A refinement of the scope of information sought, pursuant to the power for that in s13(7), enlivened on review by s43(5); and/or
- a general right, implicit in s43(1)) to confine or limit the scope of one's application for internal review.

123 The Department focused on the need to review the original decision, which is only the first part of the requirement to 'review the decision and make a fresh decision': ss43(4)(a) and (b) [my emphasis]. The Department did not expressly refer, in its input, to the 'fresh decision' component of internal review and, in my view, gave inadequate consideration to it.

124 The Department stated at [103], referring to s43(5), 'The phrase in the same manner is viewed by the Department as a direction to s22 whereby the public

authority is to give the applicant written notice of a decision.' I do not think that phrase *in the same manner* should be read down in the way the Department contends at paragraphs 102-103, as if it were confined to the fact that, like the original decision, it is in writing.

125 Subsection 43(5) has more work to do than that, extending beyond the limited reach argued by the Department. That extension is necessary since the Act says very little about internal review beyond s43, only that it is a precondition for external review, compared to the Act's detailed instructions for the steps to be taken prior to internal review. This favours a broader reading of s43(5) and its phrase *in the same manner*, so as to import, or as the Department said, *infuse*, into internal review much of the detail applicable to the Act's earlier processes.

126 This broader reading is necessary to provide the principles and/or machinery for 'a fresh decision' to be made on internal review, as required by s43(4). As such, it is consistent with the principles of statutory interpretation set out by the High Court in *Victorian Building Authority v Andriotis* [2019] HCA 22.

127 More broadly, following that unanimous judgment, does the Department's interpretation fit well overall with the Act's text, purpose and objects? Or is it more consistent with the Act's purpose and objects that an applicant's ability to refine their application after having made to extend to internal review?

128 Guidance can be gained from the equivalent Act in NSW, since internal review of an application for information is: optional in Queensland, where an applicant can choose it or proceed directly to external review; and is no longer available under Victoria's FOI Act. The NSW Act provides for internal review in ss82-88. Subsection s82(3) expressly provides what I think can be implied in this regard from the minimalist RTI Act, s43:

> **82 Right of internal review**
>
> *(1) A person aggrieved by a reviewable decision of an agency is entitled to a review of the decision by the agency that made the decision (which is referred to in this Part as an* **internal review***).*
>
> *(2) Internal review of a decision is not available if the decision is made by the principal officer of the agency or a Minister (or a member of the Minister's personal staff).*
>
> *(3) An internal review can be limited to a particular aspect of a reviewable decision (such as by being limited to particular information to which the decision relates).*

129 The applicant is 'entitled' to exercise their *right of internal review* across the whole of the agency's original decision: s82(1). It follows that an internal review can only be limited under s82(3) with their consent.

130 I think the Tasmanian Parliament would have intended applicants under the RTI Act to have similar flexibility in applying for internal review under s43.

131 The Department's contrary view, would both:

- deny RTI applicants that flexibility; and
- require each internal review to make a fresh decision across the entire original application, causing public authorities more work and time spent, in circumstances where the applicant only wishes review of one aspect of the original decisions findings.

132 This is pointless in respect of information already released to the applicant with the original decision. I see little value of it in a case such as this, where the applicant (for good reasons he expressed – not that he needed to: see paragraph 26), sought in his application for review to refine, and thereby limit it to, a subset of the information within scope of his original application.

133 In this case, the applicant's refinement reduced the number of submissions within scope from six to one. Reviewing five submissions originally found to be exempt, when the applicant had said he wanted those excluded so as to speed the processing of the review, did not add anything and was of no utility.

134 If anything, the extra time taken to review the additional five submissions by individuals and consider the additional exemption thereby brought into play (personal information under s36, not applicable to Peregrine Corporation) would have delayed the internal review decision. That undermines the intention of Parliament that discretions conferred by the Act be exercised so as to facilitate and promote *promptly* the release of the maximum amount of official information: s3(4)(b).

135 I find that the applicant's attempt to refine and limit the scope of the internal review to a particular aspect of a reviewable decision should have been acted upon.

Application of s39(1)

'Information communicated in confidence': s39(1)

136 I accept the Department's legal propositions and authorities referred to at paragraphs 104 and 109. These relate to the first limb of s39(1), whether the information was 'communicated in confidence'. I also accept the facts regarding that limb as stated by the Department at paragraphs 110-112.

137 At paragraph 109 the Department correctly states:

> *The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain. This can occur if the person whose confidential information it is discloses it. The obligation of confidence may also only relate to a limited time period.*

138 Such a loss of confidentiality has now occurred to the extent that some information in the submission has entered the public domain, insofar as the submission:

(a) contains information repeated in Peregrine's public submission to the national inquiry; or

(b) refers to Peregrine's intention to enter the Tasmanian market, given its job advertisements described earlier in reaching the preliminary decision.

139 In relation to (a) I have had regard to Peregrine's assertion, as paraphrased by the Department, 'that the June 2017 report provided to the Commonwealth is sufficiently different from that tabled with the Department of Health (Tas)': paragraph 113. However, the submissions are not sufficiently different as to justify all the latter having been categorised as exempt given their overlap and similarities described earlier at paragraphs 68 to 72.

140 Furthermore, while it is possible that some of the information in Peregrine's submission was originally 'communicated in confidence', I consider that any quality of confidentiality has declined over time. As the Department noted, an 'obligation of confidence may also only relate to a limited time period'. I do not think that a limited time period must necessarily be expressed between the parties: where it is not, a reasonable period may be implied from the circumstances.

141 Hence, if the submission was originally 'communicated in confidence' for the purposes of the first limb of s39(1), then I am far more doubtful than are Peregrine and the Department of that status continuing now, given the lapse of time since the submission was emailed to the Department on 30 January 2017. This lapse of time is also relevant to subsequent considerations regarding s39(1)(b) and the public interest test, favouring release in both contexts.

142 Moreover, the Department's response to the preliminary decision did not address a crucial aspect of it: the FCTC. Without repeating the preliminary decision's reasoning, insofar as it applied to the FCTC, the following from the Department's response, paragraph 106, is analogous:

> *On the other hand, if a public authority has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the public authority to treat the information confidentially, and therefore any mutual understanding of confidence.*[33]

143 In my view, such a statutory obligation to release specified information arises from the Act, properly informed by Australia's international obligations under the FCTC. It would be antithetical to:

- that treaty; and
- Australia's duty to implement it in good faith, pursuant to the *Vienna Convention on the Law of Treaties*,[34]

to refuse to disclose, in response to an RTI application, a submission from within the tobacco industry to government on proposed changes to the *Public Health Act*.[35]

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33 *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265.

34 1155 UNTS 331, art 26, reflecting the fundamental rule *pacta sunt servanda* (ie, treaties are made to be kept).

35 See the preliminary decision's reasons, specifically at paras 52-58.

144 This interpretive approach is consistent with those set out in s3(4) and from paragraph [52] of the preliminary decision.

145 Having considered the Department's submissions, including its relay of its consultation with Peregrine, I do not dispute the parties' contention that they intended that the corporation's submission not be published. Nevertheless, for the reasons above, I remain of the view that, *in law*, Peregrine's submission was not, 'communicated in confidence' for the purposes of the first limb of s39(1), properly construed having regard, in particular, to Australia's obligations under the FCTC. I do not read that treaty as leaving room for a member of the tobacco industry to seek to influence the amendment of public health legislation, without its submission being made public, at least when it falls within the scope of an RTI application.[36]

146 Even if I am wrong regarding the above, that would not change my ultimate conclusion given what follows below regarding s39(1)(b), to which I now turn, and the public interest test.

Impairment of future supply of information: s39(1)(b)

147 As noted in the preliminary decision at paragraph 63, Associate Professor Paterson considers the equivalent NSW provision and notes:

> *... What is required is some positive demonstration that the information's disclosure will adversely affect the respondent's future ability to obtain information from persons in general, rather than specifically from the person who confided it. ... It requires 'a degree of impairment going beyond that which is merely trifling' and one which is more probable that not. ...*[37]

148 Associate Professor Paterson continues:

> *'Similar information' means information of a similar class or character and does not depend on the precise contents of the documents in issue.*[38]

149 In the context of Peregrine's submission, 'similar information' means another submission, rather than the precise contents of Peregrine's submission.

150 As Associate Professor Paterson goes on to say:

> *Review authorities have stressed that something more than a mere diminution in frankness is required. As noted by Young CJ in* Ryder v Booth *[1985] VR 869 at 872, a respondent has the onus of establishing that there will be damage to its ability to obtain similar information in the future. It is therefore insufficient 'to show that a*

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[36] https://www.justice.tas.gov.au/community-consultation/consultations/tasmanian-civil-and-administrative-tribunal-bill-2020#right provides a better example than the RIS of how to explain that 'Information provided to the Government may be provided to an applicant under the provisions of the *Right to Information Act 2009* (RTI). If you have indicated that you wish all or part of your submission to be treated as confidential, your statement detailing the reasons may be taken into account in determining whether or not to release the information ...'

[37] Supra 448 at [7.100] citing *Gunawan v Department of Education* [1999] VCAT 665.

[38] Ibid, 448 at [7.100] citing *Re Landsberger and Victoria Police* [1989] 3 VAR 100 at 102.

> specific individual may be resentful or unwilling to supply information in the future. In his Honour's views, it was not sufficient 'to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed'. In a similar vein, the VCAT has commented that: 'It is necessary to show that information of this type would not in fact be forthcoming'. This narrow approach is justifiable on the basis of the objects inherent in the Act.[39]

151 The object of the Tasmanian RTI Act, as recited in s3 expressly reflects even more strongly the right to obtain information, enabled by the 'legally enforceable right' to access it in s7.

152 Therefore, even accepting, as the Department submitted, that 'To this extent, if the veil of confidentiality was not available the contents of the submission would have been drafted differently' (paragraph 113), this is not enough to attract the exemption under s39(1)(b).

153 As the authorities suggest, 'more than a mere diminution in frankness is required', it being insufficient 'to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed'.[40] Rather, as the Victorian Civil and Administrative Tribunal has commented: 'It is necessary to show that information of this type would not in fact be forthcoming'.[41]

154 The Department has not discharged its onus to establish that this is the case.[42] All the more so given that, 'What is required is some positive demonstration that the information's disclosure will adversely affect the respondent's future ability to obtain information from persons in general, rather than specifically from the person who confided it.'[43]

155 Hence, Peregrine's assertions, and the Department's submissions based upon those, do not suffice to make the submission exempt under s39(1)(b).

The public interest test: s33

156 The Department's response to the preliminary decision did not address the public interest test. The reasons set out above render it unnecessary for me to do so either. Had I been required to, however, I would have found non-disclosure of Peregrine Corporation's submission to be antithetical to the public interest, given:

(a) the Schedule 1 matters discussed in the preliminary decision at paragraphs 79 to 89;

(b) Australia's obligations under the FCTC; and

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39 Ibid, 448-9 at [7.100] [citations omitted].
40 Ibid, 448 at [7.100] quoting Young CJ in Ryder v Booth [1985] VR 869 and noting at n 170 'That view was endorsed by the Appeals Panel of the ADT in Director-General, Department of Education and Training v Mullett [2002] NSWADTAP 13 at [58].
41 Ibid, 449 at [7.100] quoting Debono v Department of Justice – FOI Officer (General) [2008] VCAT 1791 at [22].
42 Ibid, 448 at [7.100] paraphrasing Young CJ in Ryder v Booth [1985] VR 869 at 872; RTI Act, s47(1)(4).
43 Ibid, 448 at [7.100], as quoted above at paras [147] and [63].

(c) Australia's duty to implement the FCTC in good faith, pursuant to the Vienna Convention on the Law of Treaties.[44]

157 Paragraphs 142 to 144 above summarise my reasoning regarding (b) and (c). The Australian Government's ratification of the FCTC implicitly placed international cooperation on tobacco control, and the national interest in tobacco transparency, ahead of any arguments for secrecy.

158 Similarly, disclosure of Peregrine Corporation's submission would promote the public interest matters referenced in paragraphs 79 to 89. While some Schedule 1 public interest matters arguably favour non-disclosure, these were addressed in my preliminary decision. The most relevant, matter (n) of Schedule 1, closely reflects the wording of s39(1)(b). My analysis of the Department's input regarding s39(1)(b) also applies in relation to matter (n).

159 I am therefore not persuaded – and it is the Department which has the onus to do so under s47(4) – 'that it is contrary to the public interest to disclose the information': s33(1). Rather than harming the public interest, releasing Peregrine Corporation's submission on the RIS will promote the public interest. Consequently, were I required to apply the public interest test, that alone would suffice for the submission to be disclosed in full.

Conclusion

160 I determine the single submission on the RIS subject to external review, that from the Peregrine Corporation, is not exempt information under s39(1)(b) and is to be released in full.

Dated: 30 June 2020

Richard Connock
OMBUDSMAN

[44] 1155 UNTS 331, art 26, reflecting the fundamental rule pacta sunt servanda (ie, treaties are made to be kept).

Section 39 – Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(a) the information would be exempt information if it were generated by a public authority or Minister; or
(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
(b) relates to trade secrets or other matters of a business, commercial or financial nature; and
(c) was provided to a public authority or Minister pursuant to a requirement of any law.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

(1) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** 0 1804-1 16

Names of Parties: Jeff Thompson and Tasmania Police

Draft reasons for decision: s48(I)(b)

Provisions Considered: s 19

Background

Mr Thompson has been involved in the high profile case of convicted murderer, Sue Neill-Fraser and as a result, became a person of interest in a Tasmania Police investigation. The matter is proceeding to Court and Mr Thompson requires information held by Tasmania Police to assist in the preparation for his appearance in Court.

2On 8 January 2018, Mr Thompson submitted an application for assessed disclosure to Tasmania Police seeking all information relating to him.

3 On 5 February 2018, Senior Constable Anna Hunter sent a letter to Mr Thompson signalling Tasmania Police's intention to refuse his application under s 19 on the basis that the work involved in processing it would substantially and unreasonably divert its resources from its other work.

4 This letter appropriately set out Tasmania Police's consideration of the matters in Schedule 3 as required by s 19(I)(c). Tasmania Police estimated that it would take I, 167 hours and cost approximately $107,000 to process the I 0,000 plus pages of information responsive to his request. Mr Thompson was given a reasonable opportunity to revise the scope of his application.

5 On 22 February 2018, Mr Thompson replied to Senior Constable Hunter and limited the scope of his application to information that has come into existence pertaining to himself since I April 2016. Mr Thompson offered to reduce his scope further if Tasmania Police could identify the classes of documents it held.

6 On 7 March 2018, Sergeant Lee Taylor, a delegated officer, released a decision to Mr Thompson. The decision confirmed the refusal to provide the information under s 19. The decision claimed that the work required to provide classes of documents would also substantially and unreasonably divert Tasmania Police's resources from its other work.

7 On 26 March 2018, Mr Thompson sought an internal review of his request for information.

8 On 24 April 2018, Mr Thompson sought external review of this matter and I accepted the request under s44(l)(b)(ii) on the basis that he had made a valid request for internal review, 15 working days had elapsed, and he was not in receipt of an internal review decision. The application fee had been paid.

9 On I May 2018, Detective Inspector Matthew Richman, a delegated officer, released an internal review decision to Mr Thompson. The internal review decision reached the same conclusion as the original decision with the exception that it also made findings under s30 to exempt information. The decision claimed that despite the narrowing of the scope, the pages of information responsive to the request are still in the thousands and the substantive figures had not changed.

Issues for Determination

I 0 There is one issue for determination:

- Would processing the request for information substantially and unreasonably divert Tasmania Police's resources from its other work?

Relevant legislation

II Section 19 is the only relevant section for consideration. I attach a copy of sI9 to this decision, and a copy of Schedule 3 which contains the matters required to be considered by s 19(1)(c) when refusing an application.

Submissions

12 Mr Thompson claims the information is important and warrants the time to consider whether or not it should be released as it might be relevant to his defence in Court. Specifically, he submitted:

> I *request that my matter be dealt with as soon as possible.* The *ability* to *access* the *information interferes with my right* to *privacy. The information may or may not also be relevant to my defence in criminal charges against* me. The *criminal proceedings have also impacted on my employment as a solicitor. The delay in this* matter *impacts on my ability* to *address issues which may* arise *in relation* to *Police conduct. If the material requested is not provided within a reasonable time it is likely that* the *matters complained* of *will not be further investigated due* to de/ay.
>
> The *Right to Information Act gives me a legally* enforceable *right* to *information requested subject to exemptions. Further it is apparent to me that* the *Department are not providing a reasonable opportunity to consult with a view of being helped to make* the *application in a form that* would remove *the ground for* removal.

13 Tasmania Police claim the request is substantial and unreasonable and if assessed, would attract significant exemption and divert its resources considerably. Specifically, it submitted:

> *Tasmania Police holds records relevant* to *all three aspects of your application but the combined information sourced is, at this stage, estimated* to be *in excess* of */0,000 pages. A large majority of the documentation would attract exemptions which would therefore require this office to assess it in its entirety; a process that would substantially divert staff from other duties.*
>
> The *time to assess your application has* been *estimated at 1,167 hours. The cost* to *complete this request based on the number of hours and the previously estimated volume* of / *0,000 pages would be $107,916.*

14 Tasmania Police further submitted in response to Mr Thompson's request for internal review:

> *In reviewing this matter, I have considered all documentation that you have provided, and the documentation that has been provided* to *you by Right to Information Services. I have also consulted with investigators and been briefed on the current status of the investigation.*
>
> *I have independently established that Tasmania Police holds a significant number* of *records relevant to your application. Whilst it is difficult to discern* the precise *number, it is in the thousands. A large majority of documentation would attract exemptions which would require page by* page *assessment.*
>
> *Whilst the* scope of *your application has been narrowed somewhat,* nonetheless each *document would need to be considered... I have no reason to believe that the original assessment of time and cost has altered. Clearly this is a substantial and unreasonable diversion* of *resources.*

Analysis

Would processing the request for information substantially and unreasonably divert Tasmania Police's resources from its other work?

15 To determine if the application can be refused under s19, I must be satisfied that the work involved in providing the information sought would substantially and unreasonably divert Tasmania Police's resources from its other work, having regard to the matters in Schedule 3.

16 Tasmania Police claims that there are an estimated 10,000 pages of information responsive to the request, which would take 1,167 hours to process at a cost of approximately $107,000. This is approximately $90 per hour. I note that under s19(1) an estimate of pages is acceptable.

17 In the letter dated 5 February 2018 from Senior Constable Hunter, the matters in Schedule 3 were set out in clear terms and articulated the reasons why Tasmania Police formed the view that processing the application for assessed disclosure would be a substantial and unreasonable diversion of its resources.

18 The matters in Schedule 3 were provided to Mr Thompson with a request under s19(2) to revise the scope of his request in order to make an application in a form that would remove the ground for refusal. This was the correct thing for Tasmania Police to do and demonstrates to me that Mr Thompson has been given a reasonable opportunity to revise.

19 Mr Thompson did revise his scope, however, as noted in the decision by Sergeant Taylor and confirmed on internal review by Inspector Richman, the revision was not substantial enough to remove Tasmania Police's ability to rely on s19.

20 Mr Thompson did request that classes of documents be provided to give him a second opportunity to narrow the scope of his request. Tasmania Police responded that this alone would be a substantial task. As the 10,000 or so pages are related to an investigation, developing, sorting, and then calculating categories would take a considerable amount of resources.

21 I accept that with significant and widespread investigations it is not unusual for a vast amount of information to be created in a relatively short period of time. The objects of the Act are to foster the release of as much information as possible and to hold the executive accountable, which in my view, is what Mr Thompson is attempting to pursue. Section 7 establishes a legally enforceable right to access information, unless it is exempt information.

22 Tasmania Police is not claiming the information is exempt, but refusing to provide it pursuant to s19 is still a legitimate option that is open to it. It is important to balance the rights of the applicant, especially when considering a refusal option under s19, against the operations of the public authority and its limited resources.

23 In my view, Tasmania Police has met the requirements of s19, has had regard to the matters in Schedule 3, has given the applicant a reasonable opportunity to remove its ability to rely on s19, and finally determined that the work involved in providing the information would substantially and unreasonably divert its resources from its other work. I agree that it would.

Preliminary Conclusion

24 I determine that the work involved in providing the information would substantially and unreasonably divert Tasmania Police's resources from its other work and that Mr Thompsons' application can therefore be refused pursuant to sl9.

Submission to the Preliminary Conclusion

25 As the finding in the preliminary decision supported Tasmania Police's decision, there was unsurprisingly no further submission from them.

26 Mr Thompson, however, made a comprehensive submission.

27 Part of this submission included the veracity of the claims by Tasmania Police that it actually held around 10,000 pages of information and that it had not given proper regard to the matters of Schedule 3 as required when applying s19.

Further Analysis

28 There has been some delay in progressing this matter as the Senior Investigation and Review Officer assigned to it was working from home for a significant length of time as a result of the coronavirus.

29 Having returned to the office recently, the Senior Investigator was able to meet with Sergeant Taylor' and the lead Detective. The meeting was frank and directly addressed the issues raised in Mr Thompson's submission.

30 From my Senior Investigator's point of view, the purpose of the meeting was twofold: to test the veracity of the claim that there were 10,000 pages of information responsive to the request; and to then assess that against the matters contained in Schedule 3 of the Act.

3 **I** During the meeting at Tasmania Police's Hobart Criminal Investigation Branch the investigator was shown two rooms of information. In addition, the investigator was shown an audit from Police **IT** Services as to the size and volume of digital files (compared to the hardcopy files located in the two rooms).

32 It is fair to say that the estimate of Tasmania Police that it held approximately 10,000 pages with a time component for assessment of 1,167 hours at a cost of $107,000 was fundamentally incorrect, and grossly underestimated the amount of information held.

33 It is abundantly clear this was not done through any attempt to be misleading. Estimating voluminous information can be a difficult task.

34 Based on the sighted information and the IT audit, my Senior Investigation and Review Officer estimates the total volume of information to be closer to 150,000 pages. Processing this amount of information would increase the estimated time and cost required to deal with the request to 17,500 hours and $1.5 million respectively.

35 Part of the claim made by Mr Thompson was that it was nearly impossible for Tasmania Police to have collated the volume of information related to him in a relatively short period of time. This was put to the Lead Detective and a response was provided. My Senior Investigation and Review Officer was satisfied, as am I, with the explanation provided by Tasmania Police as to how the volume became so significant.

36 Part of the Police response was to provide a list of classes of document and estimations as to the volume of information in each of those classes.

37 It should not go unaddressed that a list of classes of document held by Tasmania Police was something sought by the applicant.

38 After the discussion and having my officer put this to Tasmania Police, I am satisfied with the response and the explanation as to why it cannot be provided.

39 I cannot go into any real detail as to do so would risk jeopardising the investigation and would certainly disclose information which would be exempt under s30 of the Act.

40 In terms of the other matters contained in Schedule 3, I do not want to discount the value of the information to the applicant. It is of no doubt significant importance to him.

41 A balance must be struck, however, between the work required to process the request that might be a significant burden on Tasmania Police, and the purpose of the Act and meeting its objectives.

42 The applicant claims that Tasmania Police cannot rely on s19 to refuse the request when it will need to assess the information anyway as part of his prosecution.

43 While this might at first blush sound reasonable, there is no direct correlation between RTI and the prosecution of a criminal offence. Tasmania Police certainly gathers evidence on crimes it believes have or are being committed and when it considers that it has enough, it refers those matters to the Office of the Director of Public Prosecutions for prosecution through the courts.

44 This is not the same as compliance with a request for information under the Act which requires a high level of analysis of each individual piece of information in order to determine whether it should be released or not.

45 This is not to say Tasmania Police does not or will not put its mind to the veracity of the evidence, but it is more the role of the Director to determine the evidentiary value of the information to the prosecution before the Court.

46 I note the Director is an exempt person under the Act.[2]

47 Despite the underlying positive value that would be created in processing this information I am of the view the work and cost that would be required to do so is so fundamentally burdensome that it would result in a substantial and unreasonable diversion of Tasmania Police's resources away from its other work.

Conclusion

48 I determine that the work involved in providing the information would substantially and unreasonably divert Tasmania Police's resources from its other work and that Mr Thompsons' application can therefore be refused pursuant to s19.

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[2] See s6(1)

Dated: 29 July 2020

Richard Connock
OMBUDSMAN

Section 19

(I) 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 (I) 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

(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.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference: O1607-056**

Names of Parties: Ms Louise Grahame and City of Hobart

Reasons for decision: s48(l)(b)

Provisions considered: s35, s36, s39 and s48(2)

Background

Ms Louise Grahame has been a clothing designer and maker for approximately 40 years. She largely sold her product through a stall at the Salamanca Market run by Council each Saturday in Hobart.

2 For a number of years and for various reasons, there has been conflict between Ms Grahame and a number of other market stallholders. Complaints have been made to Council about Ms Grahame by the other stallholders — two in particular - and Ms Grahame has made complaints to Council about them. Ms Grahame also criticised the way in which Council handled the situation, expressing doubt as to its ability to resolve the issue effectively or fairly.

3 On 9 March 2016, Ms Grahame submitted a request for information to Council under the *Right* to *Information Act 2009* through her solicitor, Roger Baker of Baker Wilson Lawyers. On behalf of Ms Grahame Mr Baker sought information about her and her clothing label Louise *Grahame Design* in the following terms:

> ...copies *of any* letters, *em ails or file notes by any persons in relation to* the *Salamanca Market, which relate to* or *are critical* to [sic] *my client, and her clothing label* "Louise *Grahame* Design" *and "Louise Grahame* Designer/Maker" *since the 1' January 2010* to *date* be provided to *us* pursuant to Section 7 of the *Right to Information* Act *2009.*

4 On 21 April 2016, Ms Libby Wilmshurst, a delegated officer, released a decision to Ms Grahame. The decision released a large amount of information with some information outside the scope of the request and personal information redacted. Council identified ten other documents that it claimed were either fully or partially exempt on the basis that they contained information that was exempt pursuant to s35 of the Act as internal deliberative information or pursuant to s39 as information obtained by Council in confidence.

5 On 8 May 2016, Ms Grahame sought an internal review of the decision.

6 On 7 June 2016, Mr Nick Heath, Council's General Manager and therefore its principal officer, released an internal review decision to Ms Grahame. Mr Heath's decision reached the same conclusions as those in the original decision.

7 Ms Grahame lodged a request for external review with my office on 4 July 2016, and it was accepted on the basis she was in receipt of an internal review decision and it was not more than 20 working days since she received it. The application fee had been paid.

8 Ms Grahame no longer holds a stall at the market, but she has confirmed her desire to continue with this external review.

Relevant legislation

9 As noted Council relies on both s35 and s 39. Section 35 provides as

follows: ***Internal deliberative information***

(0 *Information is* exempt *information if it* consists of—

(a) an opinion, advice or recommendation prepared *by an* officer of *a public authority; or*

(b) a record of consultations or deliberations between officers *of public authorities; or*

(c) a record of *consultations or deliberations between* officers of *public authorities and Ministers —*

in the *course* of or *for the purpose of the deliberative* processes related to the *official business of a public authority, of a Minister* or of the *Government.*

(2) Subsection (I) does not include purely factual information.

(3) Subsection (1) does not include —

(a) a final decision, order or ruling given in the exercise of *an adjudicative function; or*

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to *apply* after *10 years* from the *date of* the *creation of the information referred to in that subsection.*

10 Section 39 provides as follows:

Information obtained in confidence

(I) Information *is* exempt *information if its disclosure under this Act would divulge information communicated in* confidence *by or on behalf of a person or government to a public authority or Minister, and —*

(a) the information would be exempt information if it were generated by a public authority or Minister; or

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

(2) Subsection (I) does not include information that—

(a) was acquired *by a* public *authority or a Minister from a business, commercial or financial undertaking; and*

(b) relates to trade secrets or other *matters of a business, commercial or financial nature; and*

(c) was provided to *a public authority or Minister pursuant to a requirement of any law.*

II Both s35 and s39 are in Division 2 of Part 3 of the Act and are therefore subject to the public interest test contained in s33. That section reads as follows:

(I) *In this Division, information is* exempt *information* if the principal officer of the public *authority* or *Minister considers, after taking into account all relevant matters, that it is contrary to the public interest* to disclose the *information.*

(2) The matters which must be *considered in deciding if the disclosure of the information is contrary to the public interest* are specified *in Schedule I but are* not *limited* to *those matters.*

(3) The *matters specified in Schedule 2 are matters* that are *irrelevant in deciding if the disclosure* of *the information is contrary to the public interest.*

12 Schedules **I** and 2 are attached to this decision.

Submissions

13 Ms Grahame submits the information is important to her as it will go some way to helping her address what she describes as a miscarriage of justice and save her reputation. Specifically, she made the following comments:

> / am *a pioneer Salamanca stallholder, 38 years* [sic]. The *target of hate* crime, *I am being victimised by Hobart City Council due* to *my long history of political assertiveness on behalf* of *all stallholders. HCC scapegoats me* to smokescreen *consequences* of *decades of poor market management and fails* to *investigate bullying and harassment I have* suffered *over two years.*
>
> *Clearly* the *Council has* adopted *a position based on "secret" material* provided to it, *which is critical* of [me]. This is *clearly in breach of the rules* of *natural justice in so* far *as those allegations have never been put* to [me], nor [have **I]** been *given* the opportunity of responding, but nevertheless *Council has acted on* them to *my ...* detriment

14 Council claims that, apart from a file note which it asserts contains internal deliberative information, the information is primarily information that it has

obtained in confidence and releasing it to Ms Grahame would impair its ability to obtain similar information in the future. Council submitted:

> *Releasing this information would disclose information communicated* to *the Council in a confidential manner. Several documents were provided to the Council voluntarily and in confidence and may lead* other members of the *public in* the *future* to *withhold* from *providing* the *Council with relevant information regarding Market arrangements. The reason is* to protect *the personal information* of *those that make submission,* representation to the *Council.*

15 Much of the information provided to my office by Ms Grahame related to the ongoing dispute between her, the other stallholders and Council, not to the original or internal review decisions made on her request for information. That dispute is the subject of a complaint made by Ms Grahame under the *Ombudsman Act 1978,* which is being considered concurrently with this external review. This decision will only address the matters pertaining to the application for assessed disclosure and the decisions made by Council on that request.

Analysis

Internal Deliberative Information

Document 3

16 Council prepared a schedule identifying the ten documents it claims to be exempt and Document 3 is the only one claimed to be exempt as internal deliberative information. It is a file note dated 9 December 2015 prepared by Council's Operations Coordinator, Salamanca Market in relation to some manual handling issues that had been identified in a separate report, and another matter; a letter Council had received concerning the conduct of Ms Grahame.

17 For information to be exempt under s35, it must be information that consists of an opinion, advice or recommendation prepared by an officer of a public authority in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. The exemption does not extend to purely factual information, a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, ruling or order. It also does not apply to information older than 10 years from its date of creation —which is clearly not the case here.

18 Council is a public authority and as noted above, the file note was written by the Operations Coordinator, Salamanca Market, an officer of Council. **I** am therefore satisfied that the first requirement for exemption under s35 is met.

19 The information contained in the file note is in the form of a number of proposals or suggestions to assist Council to come to a decision as to how to resolve the issues of manual handling and the alleged conduct of Ms Grahame. I am satisfied that the information it contains is not purely factual information but rather it consists of a combination of opinion, advice and recommendation designed to inform Council's decision making.

20 I determine that Document 3 is prime facie exempt in full pursuant to s35 pending a consideration of the public interest test.

Information Obtained in Confidence

21 The information contained in the remaining nine documents is claimed by Council to be exempt pursuant to s39(1)(b) on the basis that it is information communicated in confidence by or on behalf of a person to Council and its disclosure would be reasonably likely to impair Council's ability to obtain similar information in the future.

22 The generally accepted test to be applied when considering whether information is confidential or not is that set out in the dissenting judgment of Gummow J in *Corrs Pavey Whiting and* Byrne v *Collector of Customs* (Vic)'. His Honour relevantly said:

> It *is now settled that in order to make out a case* for protection *in equity* of *allegedly confidential information, a plaintiff must satisfy certain criteria.* The
>
> *must* be *able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able* to show that
>
> (ii) the *information has the necessary quality of confidentiality (and is not,* for example, *common or public knowledge);*
>
> (iii) the information *was received by the defendant in such circumstances as* to *import an obligation* of *confidence;*

23 The intentions of the person providing the information, the extent to which it has been circulated and the likely consequences of disclosure have also been held to be relevant considerations when determining the question as to whether information has been communicated in confidence.[2]

Documents 1, 4, 5 and 10

24 These documents consist of or concern complaints received by Council from other stallholders about Ms Grahame.

25 Document I is not so much a complaint, but a recitation by one of the stallholders of the difficulties she and other stallholders have allegedly endured as a result of the behaviour of Ms Grahame and the lack of a constructive response from Council. It is in the form of an email dated 20 April 2016 from the stallholder to the Operations Coordinator, Salamanca Market.

26 The email refers to an incident which had occurred at the market the previous Saturday. It also alludes to other historical matters which had been the subject of previous complaints to Council over a number of years. These had been made known to Ms Grahame and she had responded to them. Indeed in her submissions to this office, Ms Grahame referred to the other stallholders by name and to the various complaints they had made.

I (1987)14 FCR 434

[2] Re Thwaites and Metropolitan Ambulance Service(1996)VAR 64

27 As matters transpired, the complaints from both sides had reached such a level by mid-2014 that Council engaged a mediator to attempt to resolve the differences between Ms Grahame and the other stallholders. These other stallholders were well known to Ms Grahame and she to them, and the complaints by both sides had been made known to the other and all issues were in the open. The mediation was held in August 2014 and was unsuccessful, but it is reasonable to assume that an opportunity to air all grievances was provided.

28 Document 4 is a complaint from another stallholder, made on her own behalf and on behalf of seven other stallholders, dated 25 November 2013 (on reconsideration, this should have read 2015) and signed by all eight. Ms Grahame is aware of this complaint, and who authored it: in her submissions to this office she said she became aware of it three months after it had been circulated.

29 Document 5 is an email dated 9 November 2015 from one of the other stallholders to an officer of Council, after the failed mediation and in response to that officer having apparently asked her to keep Council apprised of any issues arising thereafter. It refers to the alleged conduct of Ms Grahame over the previous month, citing two specific incidents.

30 Document 10 is a letter dated 8 July 2014 from the same stallholder to the Salamanca Market Coordinator, who had apparently suggested that the stallholder record her version of events. The letter goes on to set out the history of the problems between the stallholder and Ms Grahame. It was written at the time the mediation was being arranged.

31 Though it is not definitive of the question to be determined, there is nothing on the face of any of the subject documents to suggest that there was any express or implied promise to treat the information they contain as confidential. In fact, the identities of the other stallholders were known to Ms Grahame and the issues between them had been discussed openly in correspondence for some considerable period. The material provided would suggest that these issues and the stallholders were known to other stallholders as well, and potentially more broadly.

32 1 am not satisfied that the information contained in these four documents *has* the necessary *quality* of *confidentiality* referred to by Gummow J. The information might not have been common knowledge in that it might not have been disseminated outside the Salamanca Market community, but it was by no means secret. The information had and has already been comparatively widely circulated, even though the documents themselves might not have been, and 1 cannot see that their disclosure now would have any significant consequences.

33 It follows that 1 am not satisfied that the information was communicated in confidence, and it is therefore prime facie not exempt information pursuant to s39.

34 Given that finding, I am not required to consider the further requirement contained in s39(1)(b) that disclosure of the information would be reasonably likely to impair the ability of Council to obtain similar information in the future. Had I been required to do so, however, I would have said that it would not.

35 The only body to which stallholders can refer grievances about, and more generally matters concerning other stallholders (apart from the other stallholders themselves), is Council, and I am satisfied that they will continue to do so. I observe also that it is not generally possible to resolve a complaint if the person complained about is not made aware of the particulars of the complaint and the person making it.

Document 7

36 This document is an email from Louise Cooper to Council dated 7 August 2014. Ms Cooper is the principal of Louise Cooper Consulting which, amongst other things, provides mediation and dispute resolution services, and she was engaged by Council to conduct the mediation. The email, in broad terms, conveys what occurred at the mediation and its outcome.

37 Ms Cooper was engaged by Council under the terms of a written Mediation Agreement, a signed copy of which, date stamped 29 July 2014, has been provided by Council. That Agreement contains the following clause:

> The Parties, their support persons, their *representatives and the Mediator will not unless required by law* to *do so, disclose to any* person not present at the *mediation, nor use,* any *confidential information furnished during* the mediation *unless disclosure is* to *obtain professional advice, and the person to* whom the *disclosure is made is advised that the confidential information is confidential.*

38 Such a provision is standard in mediation agreements; mediation and conciliation conferences are conducted in private and information exchanged at these conferences is so exchanged on a without prejudice basis such that it cannot be used in any other forum. This is designed to encourage participants to make concessions and consider alternatives for the purposes of trying to resolve a dispute, safe in the knowledge that, if resolution is not possible, those concessions and alternatives cannot be used against them in another place. It also allows the mediator to conduct the mediation without constraint.

39 Document 7 is an email from Ms Cooper to Council dated 7 August 2014 in relation to the outcome of the mediation. It contains in brief terms a summary of the mechanics of the mediation and its outcome. It does not contain anything that was not already known to all involved. It does not disclose what was actually said by the parties at the mediation or any confidential information and does not therefore, in my view, breach the confidentiality provision contained in the mediation agreement.

40 Further in my view, even if it were said that the email had been delivered in confidence, its disclosure would not impair council's ability to obtain similar information in the future. Such summaries are often made at the conclusion of a mediation, to inform the party who commissioned the mediation of its outcome and what steps might be taken in the future. In all the circumstances, I am not satisfied that the information contained in Document 7 is exempt information pursuant to s39 and it should be released to Ms Grahame.

Document 2

41 This is an email chain, which starts with an email to Council from one of the other stallholders referred to containing a complaint about Ms Grahame. The remaining four short emails in that chain are emails passing between Council officers. All emails were sent on the same day, 22 February 2016.

42 Council has claimed the chain to be exempt in its entirety pursuant to s39(I)(b) as information obtained in confidence, the disclosure of which would be reasonably likely to impair its ability to obtain similar information in the future. No reasons to support this contention in relation to the subject information were provided.

43 The only part of the chain to which that exemption could apply is the email of complaint. For the reasons outlined above in relation to Documents, I, 4, 5, and 10, however, I determine that that email does not contain confidential information and is therefore not exempt from production by virtue of s39(I)(a).

44 The remaining four emails, each containing basically only one sentence, do not contain confidential information either. The first one is from Council's Director, Community Development, to whom the email of complaint was addressed, forwarding it to other officers inviting discussion about what action should be taken. The second is a response from one of those officers giving some context for the complaint. The third is another from the Director requesting that a letter be drafted, and the last is from Council's Senior Operations Coordinator to which a draft letter was attached. None of these qualify as information obtained in confidence and I therefore determine that the remainder of the email chain is not exempt pursuant to s39(l)(b).

45 I did consider whether the exemption contained in s35 for internal deliberative information might apply, but none of the information in the four internal emails is deliberative in nature: it is basically notification of the complaint and a direction as to the preparation of a response. Section 35, therefore, does not apply either.

46 I determine that none of the information in the email chain is exempt information and it should be released to Ms Grahame in full.

Documents 6 and 8

47 Document 6 is headed *Market* report and dated 7 November 2015. It was authored by Council's Market Coordinator. Document 8 is a two page email from the Senior Operations Coordinator to the Director, Community Development dated 5 August 2014.

48 Both of these documents have been claimed to be exempt by Council again on the basis that they contain information obtained in confidence the release of which would be reasonably likely to impair Council's ability to obtain similar information in the future. In the case of the email, exemption in full is claimed while the report is claimed to be only partially exempt.

49 Both documents were prepared by officers of Council, in the course of their employment and apparently in the performance of their duties and functions.

50 Turning first to the Market Report, it contains 17 paragraphs in its two pages but only four paragraphs, the third to sixth paragraphs on the first page, relate to Ms Grahame and it is these that are claimed to be exempt. The remaining paragraphs are beyond the scope of Ms Grahame's request and will not be considered in this review.

51 A report to Council is prepared routinely by the Market Coordinator following each Saturday market, and contains a summary of any incidents or events, and things of interest or note. Even if it could be said that the subject report's contents included confidential information, which I am not satisfied that they do, the release of any such information would not impair the Council's ability to obtain similar information in the future: its preparation is part of the Coordinator's role.

52 Document 8, the email from the Senior Operations Coordinator to the Director, Community Development of 5 August 2014, appears to have been written as part of the mediation process. Amongst other things, its first page contains background information, outlines the unsuccessful attempts made by the Operations Coordinator to resolve the differences between the parties herself, and sets out a time line for the proposed mediation process.

53 Again, I am not satisfied that the first page of the email contains information obtained in confidence, but even if it did, its release would not be likely to impair Council's ability to obtain similar information in the future. As with the Market Coordinator, providing the sort of information contained in the email is part of the Operations Coordinator's role.

54 It follows that the requirements for exemption contained in s39(l)(b) have not been met and the information contained in Document 6 in its entirety and the first page of Document 8 is not exempt information by virtue of s39(I).

55 The second page of Document 8, however, is a cut and paste from an email received by the Operating Coordinator from Ms Cooper on 30 July 2014. It contains information in relation to the pre-mediation actions Ms Cooper had undertaken and discussions she had had with the parties. It also contains her advice as to what Council might do leading up to the proposed mediation. It is preceded at the bottom of the first page by the words *Confidential* notes from Louise Cooper *—Mediator,* making it tolerably clear that the information, though contained in an internal email, was actually obtained from Ms Cooper. (Ms Cooper's email is Document 9.)

56 I reiterate here the contents of paragraphs 38 and 39: the mediation process is a private one and participants have a reasonable expectation that confidentiality will be maintained. The release of confidential information obtained as part of the mediation process would make complainants and other parties disinclined to engage, and the Mediator unlikely to produce information about the process and provide advice.

57 Confidentiality allows participants and the mediator to freely explore all possible avenues of resolution without exposing themselves to disadvantage should resolution not be achieved. If information obtained as part of the mediation

process were to be released, effectively to the world at large, then people would be disinclined to engage, and this would affect the ability of Council to utilise it.

58 I am satisfied that the information contained on the second page of the email was provided to Council in confidence and its release would impair Council's ability to obtain similar information in the future and it is therefore prime facie exempt under s39(l)(b).

59 I once again considered whether s35, the exemption for internal deliberative information, might apply to the balance of the information but I am satisfied that it does not.

60 While the four relevant paragraphs in the Market Report were prepared by an officer of a public authority as required by s35, they do not contain opinion, advice or recommendations given in the course of Council's deliberative process as required by s35( )(a): they are a recitation of the facts and circumstances relating to an incident involving Ms Grahame that had occurred at the previous Saturday's market.

61 Likewise, the Operating Coordinator's email of 5 August 2014 does not primarily consist of opinion, advice or recommendation provided by her as a public officer. The first page contains primarily factual material; it is a report of past events, and the time line for the proposed mediation.' The information on the second page was not provided by a public officer, but by Ms Cooper.

62 I therefore determine that the information contained in Document 6 and the first page of Document 8 is not exempt information pursuant to s35(**l).**

Document *9*

63 This is the email from Ms Cooper of 30 July 2014 referred to above.

64 For the reasons already enunciated, I am of the view that the email is exempt pursuant to s39(I)(b) as information communicated in confidence to Council by Ms Cooper, the disclosure of which would be reasonably likely to impair the ability of Council to obtain similar information in the future and, subject to consideration of the public interest test, is exempt information.

65 Also as noted at paragraph 61, and for the sake of completeness, the email cannot attract the exemption for internal deliberative information contained in s35 because it was not prepared by a public officer as required by s35( ).

The Public Interest Test

66 As referred to earlier in this decision, both s35 and s39 are contained in Division 2 of Part 3 of the Act and are therefore subject to the public interest test contained in s33. In summary, I have found the following information to be prima facie exempt information:

- Pursuant to s35, Document 3 — the File Note of 9 December 2015;

[3] I note that the email is headed Confidential *Mediation Timeline,* but this is not definitive - see Re *B and Brisbane North Regional Health Authority [1994]* I QAR 271

- Pursuant to s39( )(b), the second page of Document 8 - the reproduction of Ms Cooper's email of 30 July 2014; and
- Pursuant to s39(I)(b), Document 9 — the email itself.

67 The matters which must be considered when determining whether it would be contrary to the public interest to disclose prime facie exempt information are specified in Schedule **I,** but consideration is not limited to those matters.

68 Having considered all 25 matters in Schedule I, I have come to the conclusion that the matters which favour exemption outweigh those that favour release. I find the following considerations most relevant:

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

69 **I** determine that the public interest test favours the exemption of the information identified in paragraph 66 above.

Preliminary Conclusion

70 Accordingly, **I** determine that the following is exempt information:

- Pursuant to s35, Document 3 — the File Note of 9 December 2015;
- Pursuant to s39(I)(b), the second page of Document 8 - the reproduction of Ms Cooper's email of 30 July 2014; and
- Pursuant to s39(I)(b), Document 9 — the email itself.

71 The balance of the information is to be released to Ms Grahame in

full. Response to the Preliminary Conclusion

72 By letter dated 14 June 2019, Council responded to my Preliminary Conclusion and advised that, broadly speaking, it did not object to the conclusions reached. In relation to the information concerning the complaints about Mrs Grahame it received from other stallholders, Council accepted my reasoning for not finding this information exempt pursuant to s39(I)(b), but went on to say that the exception for personal information contained in s36 ought to be considered.

73 Council referred to the context of the making of the subject complaints and submitted that the disclosure of the information may be of concern to the third parties involved, particularly given the history between the other stallholders and Ms Grahame, and the fact that some continued to be stallholders. As noted earlier in this decision, however, Ms Grahame is no longer a stallholder.

74 Council did not rely on s 36 in either its initial decision or the decision on internal review, and does not identify any personal information specifically in its letter. It seems implicit, however, that Council refers to the names of the complaining stallholders.

75 Section 36 provides that information is exempt if its disclosure would involve the disclosure of the personal information of a person other than the person making an application under s13. Personal information is defined in s5 as:

> *any information or opinion in any recorded format about an individual —*
> *(a) whose identity is apparent or is reasonably ascertainable* from the *information or opinion; and*
> *(b) who is alive, or has* not *been* dead for *more than 25 years;*

76 Like s39, s36 is to be found in Division 2 of Part 3 of the Act and is therefore subject to the public interest test contained in s33.

77 The names and details of the complainant stallholders is clearly their personal information, and was provided to Council by them and not Ms Grahame.

78 Section 36(2) provides that if a public authority holds information given to it by a third party, and is of the view that the release of that information would be of concern to the third party, if practicable and before deciding whether disclosure of the information should occur, the public authority should consult with the third party. Because Council did not rely on s36, it did not consult with the other stallholders before making its decisions on Ms Grahame's application. It suggests, however, that I should do so now.

79 It is my view, however, that consultation is no longer practicable. As noted earlier in this decision, particularly at paragraphs 26 to 28 and 31, Ms Grahame is well aware of the complaints and who made them - the parties even attended a mediation together - and within the market community at least, the complaints and the identity of the complainants are common knowledge.

80 In addition, having had regard to the matters contained in Schedule I, I am not satisfied that it would be contrary to the public interest to release the subject information, and on balance the factors favouring release outweigh those favouring exemption. I find the following to be of most relevance:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation; and

(g) whether the disclosure would enhance scrutiny of government administrative processes.

Final Decision

81 In light of the above, I confirm my preliminary decision that the following is exempt information:

- Pursuant to s35, Document 3 — the File Note of 9 December 2015;
- Pursuant to s39(I)(b), the second page of Document 8 - the reproduction of Ms Cooper's email of 30 July 2014; and
- Pursuant to s39(I)(b), Document 9 — the email itself.

82 I further determine that the identities of the stallholders who made complaints or raised concerns about Mrs Grahame is not exempt information pursuant to s 36.

83 Accordingly, all information other than that referred to in paragraph 71 is to be released to Ms Grahame.

Reconsidered Final Decision

84 My final decision set out above was sent to the applicant and Council. Council subsequently contacted my office. It was drawn to my attention that the personal information of certain stallholders required to be released under my final decision extends beyond their names.

85 In particular, that personal information includes the mobile telephone number and personal email address of one individual stallholder who had been most in dispute with the applicant. I had accidentally omitted to consider exempting this person's:

- mobile telephone number from Document I; and
- their email address from that document and their other email correspondence to Council.

86 A number of stallholders also contacted my office. They objected to and expressed grave concerns about the prospect of correspondence containing their personal information, including names and particularly contact details, being released to Ms Grahame. These concerns are understandable given that the stallholders had not previously been consulted.

87 My office spoke with the applicant regarding my final decision. The applicant agreed that she was agreeable to stallholders' contact details such as a mobile phone number and email address to be voluntarily redacted before Council released the information to her. She also said she did not use email herself. The applicant said, however, that she did want to see the names of stallholders who had complained about her to Council as required by my decision.

88 The applicant also asked my office to pass on to the Council her new address in northern Tasmania for it to send the information in due course.

89 The Act constrains my capacity to reconsider final decisions. Section 48(2) provides:

> *Where a decision has been finalised, the Ombudsman may only* reconsider *it* to *correct an accidental mistake or omission.*

90 Neglecting to consider exempting the mobile phone number and personal email address of the stallholder who had been most in dispute with the applicant was an accidental omission on my part, capable of reconsideration under s48(2).

91 I determined at para 82, however, "that the identities of the stallholders who made complaints or raised concerns about Mrs Grahame is not exempt information pursuant to s 36." This was not an accidental mistake or omission; it was a determination, my reasons for which are set out clearly. See for example paragraphs 72 to 80 above and, as noted in paragraph 79, paragraphs 26 to 28 and 31

92 Council wrote to my office on 17 January 2020. In summary, Council provided:

i. a brief background to Ms Grahame's application;

ii. its proposal that, and how, I should reconsider my final decision; and

Hi. suggested steps for it to communicate with all affected stallholders, rather than my office doing so, while my office communicated with the applicant.

93 Council's background focused on the disputes between the parties and its concerns as to what might happen should the stallholders' personal information be released. It is not necessary for me to repeat that history and those concerns here. They are referred to earlier in these reasons, and the risks if disputes reignite are apparent to all.

94 Council's proposals were specific, itemised in a list from (a) to (d), and included redaction of the stallholder's mobile phone number and email address as referred to in paragraph 85 above.

95 Given that the applicant has agreed that this personal information can be redacted, I formally direct Council to do so before releasing the information.

96 Council's proposal in its letter of I7 January went further, requesting I exempt information itemised by Council as:

(c) other stallholders' personal information, being their signatures and stall site numbers, on page 2 of Document 4; and

(d) the names of two stallholders.

97 Council suggested I could do so to:

> ... correct an *accidental mistake under section 48(2) of* the Right to Information Act 2009 *(Tas). In these circumstances, one such mistake,* for *example, could be that the Ombudsman has accidently assumed in paragraph 28 of the Decision* that *the identity of all* of the *Stallholders* recorded *in* Document *4* were/are *known to* the Applicant It *is our understanding that this may not be* the case.

98 If that were so, that I had made an accidental and mistaken assumption, it might constitute a mistake that I would be entitled to reconsider and correct under s48(2). When so doing, I could also reconsider and correct my determination at paragraph 82 that the identities of the stallholders who made complaints or raised concerns about Mrs Grahame is not exempt information pursuant to s 36, if that were founded on an accidental mistake. Accordingly, I will entertain and consider Council's suggestion.

99 I described Document 4 at paragraph 28. In my final decision of 6 November 2019, I mistakenly referred to the letter as dated 25 November 2013, and that should have read 2015. That typographical error was an accidental mistake, which I have corrected in this reconsidered decision.

100 I then said of Document 4 at paragraph 28:

> *Ms Grahame is aware* of *this complaint, and who authored it: in her submissions* to *this office she said she became aware* of it three months *after it had been circulated.*

101 Her submission had named two stallholders whom she said composed the letter, which she said "was circulated for stallholder signature and forwarded to HCC."

102 It is not practicable for me to determine conclusively that the identity of *all* the stallholders who signed the Document 4 letter of complaint were or are now known to the applicant. Document 4, however, concludes with one line immediately above the signatures: "Copies of this letter will be sent to H.C.C. Management and alderman."

103 That line is consistent with Ms Grahame's reference to Document 4. Moreover, it also shows that the signatories understood the letter would be shared with H.C.C. management and aldermen. It would be reasonable to assume the letter would then find its way to the person it complained about, Ms Grahame, in order to afford her natural justice by giving her details of the allegations made against her and the opportunity to reply. This is consistent with Ms Grahame's comments that she was aware of the complaint.

104 In any event, Council does not positively assert that the identity of all the stallholders who signed the document was not known to Ms Grahame, nor does it disclose its reasons or evidence for its understanding that this might be the case.

105 Accordingly, I do not think that my reasoning in paragraph 28 was flawed and no accidental mistake or omission is demonstrated. That being the case, I am unable to revisit that part of my decision.

106 The above, including Document 4's concluding line, also tends to support the other reasons for my determination at paragraph 82, that the identities of the stallholders who made complaints or raised concerns about Mrs Grahame is not exempt information pursuant to s 36.

107 Stallholder names, signatures and site numbers, while personal information, are not, on balance, exempt information because it is not contrary to the public interest to release them by virtue of the matters listed at paragraph 80. There are also

associated issues of natural justice in relation to the applicant knowing the details of the written case that was put against her, and by whom.

108 I say this notwithstanding the risk relevant to the public interest that Council suggested in its letter of 17 January 2020 may flow from release of the information, attaching to how the applicant might react to it. How an applicant might react to information disclosed does not tilt the balance to make such disclosure contrary to the public interest. For example, even the risk that an applicant might misinterpret or misunderstand information released is expressly irrelevant (see Schedule 2(I)(d)).

109 The concerns expressed by Council and the stallholders are no doubt genuinely held. Factors reducing the risk that their concerns will crystallise due to the disclosure, however, include:

- the extended passage of time since relevant events occurred;
- the applicant's departure from the Salamanca market and her subsequent relocation away from Hobart;
- her agreement to some voluntary redactions; and
- her expressed desire for closure.

110 The mediator said in Document 7, to be disclosed to Ms Grahame as referred to in paragraphs 36 to 40 above:

> It *seems they are agreed* to *disagree and* move on *with* the intent *of minimal, if any, future communication / interaction.*

Honouring and abiding by that agreement would seem the best outcome for all.

II I If the applicant, contrary to the above agreement, responded abusively on receipt of the information, then there would be legal mechanisms open to the Council and/or affected stallholders. I hope that does not prove necessary.

112 Council has the onus pursuant to s47(4) to show that information should not be disclosed. For the above reasons, in my view, that onus has not been discharged in this case. Accordingly, notwithstanding the depth of concerns expressed by the stallholders and Council in its letter of 17 January 2020, my determination at paragraph 82 stands.

113 Having reconsidered my Final Decision, other than to revisit paragraph 83 so as to correct my accidental omission in relation to some exempt information, redaction of which has now been agreed to by the applicant, 1 confirm it. The email address and mobile phone number of the stallholder author of Document I is exempt information and should be redacted from Documents I, 2 and 5, but her name is not exempt information, consistent with paragraph 82, and should remain beside the email address.

114 Accordingly, **I** correct my Final Decision under s48(2) so as to add to the dot points of exempt information at para 81:

> Pursuant to s36(1), the following personal information of the author of Document **I:** that person's telephone number in Document I; and that person's email address in Documents **I,** 2 and 5.

115 Beyond that, the balance of my Final Decision remains unchanged and **I** formally direct Council to implement it.

Dated: 5 March 2020

DSMAN

SCHEDULE I - Matters Relevant to Assessment of Public Interest

(I) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(0 whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(I) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

RIGHT TO INFORMATION ACT 2009 - SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest

I. The following matters are irrelevant when assessing if disclosure of particular information would be contrary to the public interest:

(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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O 1811-065**

Names of Parties: Mr Richard Webb and Department of Primary Industries, Parks, Water, and the Environment (DPIPWE)

Reasons for decision: s48(I)(a)

Provisions considered: s27, s35, s36, s39

Background

I A proposed development on Halls Island, located at Lake Malbena, was announced to the public and it quickly became a matter of significant concern and interest to members of the public, Members of Parliament and the media.

2 On 10 April 2018, Mr Richard Webb submitted an application for assessed disclosure to the Department seeking a range of information in relation to the development proposal for Halls Island.

3 On 25 September 2018, Ms Katrina Oakley, a delegated officer, released a decision to Mr Webb. The decision identified II7 pages of information responsive to the request and exempted 107 pages in full on the basis that it was information that was either prepared to brief a Minister, personal information of another person other than the applicant, or it was information obtained in confidence.

4 On 16 October 2018, Mr Webb requested an internal review of that decision.

5 On 13 November 2018, Mr Webb submitted a request for external review on the basis of a deemed refusal. It was accepted under s45(I)(f) because the statutory timeframe to release an internal review decision had expired and Mr Webb was not then in receipt of a decision from the Department. The fee was paid.

6 On 16 November 2018, Ms Roxana Jones, a delegated officer, released an internal review decision to Mr Webb. The internal review decision reached a similar conclusion to the initial decision and exempted more information, releasing only two pages. It claimed Mr Webb was not entitled to some of the information requested pursuant to s9 as it was otherwise available to be inspected by the public in accordance with another Act or could be purchased at a reasonable cost in accordance with arrangements made by a public authority. Other information was claimed to be exempt as either internal

deliberative information, personal information of another person, or that it was information obtained in confidence.

7 Mr Webb confirmed, having received the internal review decision, that he intended to continue with the external review process.

Issues for Determination

8 There are four issues for determination:

- Is the information on page 106 otherwise available and therefore Mr Webb is not entitled to it?
- Is a Minute to the Minister exempt as internal deliberative information?
- Is information in a Minute to the Director exempt because it contains the personal information of another person?
- Are two leases exempt on the basis that they consist of information that was obtained in confidence?

Relevant legislation

9 The relevant sections of the Act are s9, s35, s36, and s39. I attach copies of these sections to this decision, and, because the exemptions contained in the latter three sections are subject to the public interest test, a copy of Schedule which contains matters relevant to the test. I also include a copy of s27 as I consider it relevant to the information at issue, though not referred to by the Department.

Submissions

10 Mr Webb claimed that there is a dispute on the facts and that the nature of the information requested by him is squarely in the public interest. Specifically, he submitted:

> *... it has* been *variously implied by the developer that the entirety of Halls Island was under lease to previous* lease *holder* [sic]. *This has allowed* the *granting* of the *new commercial* lease to be presented *as a transfer.* However, the RTI *documents released to date strongly imply that only* the *36 square* meter *hut site on Halls Island was under lease, and* the *remainder of the 10 ha island was part* of *the Walls of Jerusalem National Park.*
>
> *It would be interesting to know, therefore, whether the Department of* State *Growth minute described* the *previous status* of *Halls Island as 'factual in formation'* to *provide context.*
>
> *I* also believe *that public* interest [sic] test *overwhelmingly supports the release* of *the non-commercially sensitive* components *of the lease, as this information would significantly contribute* to *the ongoing public debate. The* level of *public interest is established by:*

- The *significant state and national media attention that the Halls Island project has received in the past few months*
- *The 900 submissions that the Federal Environment department* received *under the EPBC process*
- *The legal action that has been launched against the EPBC* process *in* the *Federal court.*

Factors that have contributed to the *strong public interest in this issue include:*

The unprecedented nature of granting a significant exclusive commercial lease to a developer over *an area that was previously part* of *a national park*

- The *unprecedented nature* of the *proposal to use helicopters for transporting clients within the* TWWHA

The lack of public consultation on *the development*

- The *re-zoning of* Lake *Malbena from 'wilderness' to 'self-reliant recreation' after* the developer *expressed* interest *in the proposal*

The expansion of a historic 36 m2 /ease to *a commercial 10 ha lease.*

The *ongoing exclusion* of *members of* the *public by the* developer.

I *agree* that *there should generally* be *a high threshold* of *public interest before such information should be released. This would* protect the *rights of leaseholders and DPIPWE in general.*

However, I would maintain that this threshold has been met and exceeded *in this specific case. Making information available that encourages transparent decision making and allows the government to be held to account is obviously one of the primary purposes of* the Act.

I I The Department maintains that the bulk of the information is information that it has traditionally treated as confidential and that it has no intention of straying from its long standing practice. Specifically, it submitted:

The *information in question comprises two* /eases *for Crown land for Halls Island, Lake Malbena.* The Right to Information Act 2009 *Tasmania Ombudsman's Manual (July 2010) at page 51 states:*

"There are two limbs to the *section, but each is subject to the same precondition — that disclosure* of *the information would divulge information communicated in* confidence *by or on behalf of a person ... to a public authority* or *Minister. Satisfaction* of *this precondition requires evidence. There must* be *evidence which goes to show that the relevant information was communicated in confidence in this way."*

My decision is to find the information exempt based on the standard practice of *the relevant part of DPIPWE, which has the ongoing support of* the Department at *the highest level. This practice is to treat the contractual arrangements* between *third parties and* the *Crown, including in the form of lease documentation, as strictly confidential. This is a matter ofpolicy, rather than a statutory obligation.*

Section 39(I)(b) of *the Act requires that disclosure of the information would* be *reasonably likely* to *impair* the *ability* of *DPIPWE* to *obtain similar information in the future.* The *third party is able* to *publish any and all of its own information. However, information submitted in good faith to DPIPWE should not be released in full without considering exemptions under the Act and public interest considerations. For these reasons, I have determined that* disclosure of *the information in question would be reasonably likely to impair the ability of DPIPWE* to *obtain similar information in the future.*

I agree with the *original decision that consideration of* whether *disclosure is in the public interest is a balancing exercise. This means it is a matter of judgment. Essentially, the consideration* of *this depends on the particular facts of the matter and the context in which it is being considered.1 In this particular case,* due to *the subject matter, reasons in favour* of *disclosure are strong. However, against this I must weigh* the *principle* of *maintaining the practice in DPIPWE of retaining confidentiality and not being the party that first discloses leases.*

Given this very clear and shared understanding, I consider that releasing such *information could only have* the effect *of undermining confidence in the confidentiality of the process. In my view this would* be *reasonably likely to impair the ability of DPIPWE to obtain similar information in the future, which would* be *a significant detriment to* the Department's *ability to carry out its functions under the Crown Lands Act.*

I take the view that it would be contrary to the *public interest to overturn that longstanding principle and practice. For these reasons, I have concluded that, on balance, disclosure* of the *information would* be *contrary to the public interest and that the public interest lies in maintaining the confidentiality* of the *internal deliberative process.*

Analysis

Is the information on page 106 otherwise available and therefore Mr Webb is not entitled to it?

12 A decision that an applicant is not entitled to information under s9 is not a reviewable decision by this office.

13 Jurisdiction to conduct this external review is conferred by s44, which provides that an external review can be sought if an internal review pursuant to s43 has been completed.

14 Section 43 relevantly provides that an internal review is only available where the public authority has made a decision and notice of that decision has been given to the applicant in accordance with s22. Section 22 applies to four classes of decision:

- where it has been determined that the applicant is not entitled to the information because it is exempt information by virtue of one or more of the exemption provisions (ss25-42);
- where provision of the information has been deferred under s17;
- where the application has been refused pursuant to s19; and
- where the application has been refused on the basis that it was a repeat or vexatious application (s20).

15 A decision not to provide information under s9 is not a decision to which s22 applies. As a consequence, no internal review of such a decision is available under s43 and nor therefore can it be externally reviewed under s44.

Is *a Minute* to the *Minister* exempt *as internal deliberative in formation?*

16 For information to be exempt pursuant to s35(I)(a), I must be satisfied that it consists of an opinion, advice, or recommendation prepared by an officer of a public authority in the course of, or for the purpose of, the deliberative process related to the official business of a public authority, a Minister or of the Government.

17 I am not satisfied that s35 is the appropriate exemption to be applied to this information. The Minute to the Minister contains the Department's position on a particular subject. It is not deliberative, it is its concluded position. The deliberative material that might relate to this Minute could be such things as email communications passing between officers disputing, contributing, or questioning pieces of information in a previous draft of the Minute. This is the nature of internal deliberative information, it is pre-decisional.

18 As this Minute has left the Department, was submitted to and then signed by the Minister, it is clearly no longer internal nor deliberative.

19 I determine the Minute to the Minister is not exempt under s35.

20 The more appropriate exemption to consider when assessing ministerial documents such as this is s27, the exemption for internal briefing information of a Minister.

21 For information to be exempt under s27, it must consist of an opinion, advice, or a recommendation prepared by an officer of a public authority or a Minister, or a record of consultations or deliberations between officers of public authorities and Ministers in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in the connection with the Minister's parliamentary duty.

22 There are some exceptions to this, namely where the information:

- is 10 or more years old;
- was solely submitted to or proposed to be submitted to a Minister, unless it was brought into existence for the purpose of briefing the Minister; and/or
- contains purely factual information.

23 It is clear that the Minute meets the requirements of s27(I). It has been prepared by an officer of a public authority for the purposes of seeking a decision from the Minister on an issue that was directly relevant to his portfolio. The body of the Minute does, however, contain factual information, and I need to determine whether or not it contains purely factual information that would preclude it from exemption by virtue of s27(4).

24 As to the meaning of `purely factual information', in Re *Waterford and the Treasurer* of the *Commonwealth* of *Australia (No 1),*[1] the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms and stand alone as such.

25 It is difficult, if not impossible, to prepare a Minute to a Minister seeking, typically, some form of decision without putting factual information in it at some point. This Minute is no exception.

26 What is more difficult to ascertain is whether the factual information is purely factual. I have considered the information carefully and I am of the view that it is not purely factual. If released, the factual information would reveal the nature of the information that is exempt as opinion, advice, or recommendation. I determine the Minute to the Minister is exempt in full under s27.

27 As s27 is found in Division I of Part 3, the exemption it creates is not subject to the public interest test.

Is *the information in a Minute to the Director exempt because it contains the personal information* of *another person?*

28 The Minute to the Director is identified as pages 107 and 108 in the original decision and is a Minute to the Director from the Acting General Manager, Parks and Wildlife dated 23 August 2016 concerning the proposed transfer of a shack site licence at Lake Malbena. The internal review decision refers to it as information on pages 104 to 106. It appears that the internal review schedule of documents has been collated excluding the information that was released with the original decision. It has also added a page making it a three page Minute.

29 For clarity, I will use the original decision schedule. I have reviewed the subject information and can confirm that it consists only of two pages.

I (1984) AATA 518 at 14

30 There are three pieces of information claimed to be exempt pursuant to s36 in the Minute: the signature of the Director who approved it; the signature of the Acting General Manager who submitted it; and a figure for annual rent contained in the body of the document.

31 For information to be exempt under s36, I must be satisfied that it is information that, if disclosed, would involve the disclosure of personal information of a person other than the person making the application under s13.

32 Personal information is defined in s5 of the Act as any information about a person whose identity is apparent or reasonably ascertainable, and who is alive or has not been dead for more than 25 years.

33 Starting with the figure for annual rent outlined in the Minute, this is not personal information. There is nothing about this figure that could possibly meet the definition of personal information contained in the Act, and it is odd that is being claimed to be exempt when the names of the transferor and transferee have been released in full.

34 I determine the figure for annual rental is not exempt and is to be released in full.

35 Turning to the two signatures, the signature of the Acting General Manager, Andrew Roberts,[2] has been claimed to be exempt on the basis that his identity would be apparent or reasonably ascertainable if it were released. I am not satisfied this is the case given the full name of the Acting General Manager has been released in full to Mr Webb. Even if the Acting GM's name was not included in the minute, which it is immediately under the signature, the signature itself is illegible and on its own would not identify Mr Rhodes.

36 The Director's signature is also illegible. The Director's name is not mentioned in the Minute, and the identity of the Director is not apparent, and there is no way to reasonably ascertain the identity of the Director from the signature alone.

37 I determine the two signatures are not exempt pursuant to s36 and are to be released in full.

Are two *leases* exempt on the *basis they consist* of *information that was obtained in confidence?*

38 The first lease is a Lease and Business Licence between the Minister, The Hon Elise Archer MP, and the Operator, Wild Drake, and the second is a lease between the Minister and Daniel Hackett as Lessee. Both leases have been claimed to be exempt under s39 on the basis that they contain information obtained in confidence.

39 For information to be exempt under s39(I), I must be satisfied that its disclosure under this Act would divulge information communicated in

[2] Corrected from *Rhodes* as per the Department's submission

confidence by or on behalf of a person or government to a public authority or Minister and the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

40 Section 39(2) provides that the exemption does not extend to information that:

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking, and

(b) relates to a trade secret or other matters of a business, commercial, or financial nature, and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

41 As the lease agreements were voluntarily entered into by both parties, I am confident that s39(2)(c) does not apply. As all three of the requirements of S39(2) must be met before the exemption can be excluded, consideration now needs to be given as to whether the information is exempt under s39(I).

42 I note the Department relies on its longstanding policy to keep this category of information confidential, however, as admirable as that might be, a decision to exempt information under s39 requires that consideration be given to each of the elements of that section as they relate to the information at issue rather than usual practice.

43 It needs to be established that the leases were communicated in confidence to the Department and that, if released, it would impair the Department's ability to obtain similar information in the future.

44 There is nothing in either lease that would suggest to me that they had been prepared and executed on the understanding of both parties that the information they contain was given and received in confidence.

45 The word "confidential" is used in the first lease but specifically in relation to negotiations exchanged in relation to the resolution of dispute or difference pursuant to clause 22.3 or, as referenced in the Department's submission, in relation to disclosure and that any party may, without the permission of the other party, release any part or all of the lease agreement.

46 The leases are not generally marked as confidential, nor do they contain explicit confidentiality clauses. The second lease, while shorter than the first, contains similar provisions, and neither lease attempts to enforce any form or confidentiality.

47 I am also not satisfied that, if the leases were released, it would impair the Department's ability to obtain similar information in the future. The other parties to the leases, Wild Drake and Mr Hackett, are gaining a financial and commercial advantage by signing the documents. For this requirement of s39 to be met, it would need to be shown that future proponents would not enter

into a financially beneficial arrangement unless the terms of that arrangement were to be kept confidential. This contention is not supported by the lack of any claim of confidentiality in the lease agreement.

48 It appears to me that the Department has relied on what is no doubt a tried and established method of internal practice, but in the specific circumstances of this application for assessed disclosure, it has failed to satisfy the requirements of s39.

49 I also note, if the leases were not in a world heritage area they would be available to the public at a cost through the Land Information System Tasmania (LIST) maintained and operated by the Department.

50 I determine the leases are not exempt under s39 as they do not contain information communicated in confidence and their release would not impair the Department's alibility to obtain similar information in the future.

Preliminary Conclusion

5 I I determine that I have no jurisdiction under the Act to determine whether the application of s9 was appropriate or otherwise.

52 I determine that the Minute to the Minister is exempt in full pursuant to s27.

53 I determine that the Minute to the Director contains no exempt information and is to be released in full.

54 I determine that the two leases are not exempt and are to be released in full. **Submissions to Preliminary Conclusion**

55 As the preliminary decision was adverse to the Department, only the Department received a copy of it in accordance with s48(I)(a) and given the opportunity to provide input before the decision was finalised.

56 On 20 January 2020, the Department made a submission to this office.

57 It noted that some of the information had been revealed during proceedings before the Resource Management and Planning Appeal Tribunal. It was agreed by the developer, Mr Hackett, that the information would be released with the exception of some business information which he proposed to redact.

58 Subsequently, the Department received the preliminary decision and had a further conversation with Mr Hackett. It was resolved that Mr Hackett would release the information in full.

59 The Department also notes that s37 (information relating to third party business affairs) was considered in the internal review decision, but not in great detail, as s39 was the more appropriate section.

60 It does not seem to suggest that we should have considered s37, only that it might have been appropriate to have done so.

61 I note the internal review decision under the subheading Decision and the statement I *have decided that:* refers to the two exemptions applied: s35 and s39. Section 37 was not mentioned, nor was it considered in that part of the decision which addressed the application of the public interest test.

62 Under the subheading *Other* exemptions there is one paragraph about s37. It is there suggested that other exemptions *might* apply and *could* be applicable (my emphasis), in particular s 37. It goes on, however, to rightly confirm that before exemption could be claimed pursuant to that section, there would need to be consultation with Mr Hackett, which it had not undertaken, and refers to the *extensive* appeal rights accruing to Mr Hackett in this regard and concluded that it is *sufficient* to *rest my decision on section 39.*

63 I am satisfied the Department did not consider s37 in its decision and therefore it was not immediately applicable to this external review. If it had relied on the provision, provided reasons for its decision to do so, produced evidence relevant to the public interest considerations, and undertaken the requisite consultation, then it would have been considered along with the other exemptions in its decision.

64 A decision by this office, however, is a fresh decision and I stand in the shoes, as it were of the original decision maker. It is open to me to consider any section of the Act that might apply, whether the Department has relied on it or not.

65 In the the circumstances of this matter, however, where the information subject to the Department's submission has already been made public, whether s 37 applies or not is a moot point. In a passing comment, though, I consider that an exemption relying on that provision for information relating to third party businesses utilising public world heritage land for profit might face a high threshold in terms of the application of the public interest test.

66 The Department also alleges a mistake in paragraph 49 above where I made the distinction between developments in world heritage areas and those that are not in the context of the amount of information that might be publicly available through the Land Information System Tasmania (LIST). It says that there is no such distinction, and that the boundaries of all leases and licences and Agreement IDs are accessible on LISTmap.

67 My comments in paragraph 49 were based on information provided to my office by the section of the Department that manages LIST, which would seem to indicate some internal breakdown in communication. In any event, I acknowledge that a LIST search of Halls Island does produce a map (although this could not be generated when searched by me) and identifies its owner as the Crown and Mr Hackett as an interested party and a rate paying lessee.

Conclusion

68 Despite some of the information already having been released to the applicant, my decision remains unchanged.

69 **I** determine that I have no jurisdiction under the Act to determine whether the application of s9 was appropriate or otherwise.

70 I determine that the Minute to the Minister is exempt in full pursuant to s27.

71 I determine that the Minute to the Director contains no exempt information and is to be released in full.

72 I determine that the two leases are not exempt and are to be released in full.

DSMAN **Dated:** 3QJanuary 2020

Section 9

A person is not entitled under this Part to —

(a) information that may be inspected by the public in accordance with another Act; or

(b) information that may be purchased at a reasonable cost in accordance with arrangements made by a public authority.

Section 27 — Internal briefing information of a Minister

(I) Information is exempt information if it consists of —

(a) an opinion, advice or a recommendation prepared by an officer of a public authority or Minister; or

(b) a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose 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.

(l) Subsection (I) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(2) Subsection (I) does not include information solely because it —

(a) was submitted to a Minister for the purposes of a briefing; or

(b) is proposed to be submitted to a Minister for the purposes of a briefing

if the information was not brought into existence for submission to a Minister for the purposes of a briefing.

(l) Subsection (I) does not include any purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

(2) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 — Internal Deliberative Information

(I) Information is exempt information if it consists of —

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (I) does not include purely factual information.

(3) Subsection (I) does not include —

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 — Personal information of a person

(I) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

(2) If —

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party —

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party —

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to —

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of —

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

([5]) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) —

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Where :

personal information means any information or opinion in any recorded format about an individual —

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

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

Section 39 — Information obtained in confidence

(l) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and —

(a) the information would be exempt information if it were generated by a public authority or Minister; or

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

(2) Subsection (I) does not include information that —

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

(b) relates to trade secrets or other matters of a business, commercial or financial nature; and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

SCHEDULE I - Matters Relevant to Assessment of Public Interest

(I) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

whether the disclosure would enhance scrutiny of government administrative processes;

whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

whether the disclosure would promote or harm public health or safety or both public health and safety;

whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

whether the disclosure would promote or harm the economic development of the State;

whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

OMBUDSMAN TASMANIA

RECONSIDERED DECISION

Right to Information Act Review

Case Reference: O1712-082

Names of Parties: Rudra Sharma and Department of Primary Industries, Parks, Water, and the Environment (DPIPWE)

Reasons for decision: s48(I)(a)

Provisions considered: s27, s35

Background

1 Mr Sharma owns a property in Sandy Bay. He has lodged two dealings with the Land Titles Office (LTO):

- the first seeking a vesting order on land behind his property based on a claim of adverse possession of that land by him; and
- the second relating to the production by Hobart City Council of a certificate to the effect that granting an application for possession will not result in the continuation or creation of a sub-minimum lot, or if it will, that Council nonetheless consents to the granting of the application.'

2 The need for the certificate arises when the granting of an application would result in the continuation or creation of a lot smaller than the minimum required by s109 of the *Local Government (Building and Miscellaneous Provisions) Act 1993.* In the case of land in an urban building area, this is 550 square meters (see s109(1)(c)(i).)

3 On 10 October 2017, Mr Sharma submitted an application for assessed disclosure under the Act for information held by the Department in relation to the LTO. The Department is the agency responsible for the LTO.

4 Mr Sharma's application was in the following terms:

> *Information sought relates to issues arising after the finalisation* of *the applications for vesting order based on long possession (Dealing 049972),* certificate *pursuant* to sec 138Y *(Dealing 889273) and* sec *142 (Dealing C686857, withdrawn) which was finalised in 2009. The information sought includes any matter directly or indirectly associated with* these *applications and* the *post finalisation issues.* The *period for which the information is sought is 21 December 2015 to date.*

---

[1] *Land Titles Act 1980* (Tas), s 138Y

> The type *of information sought is any communication (electronic or otherwise) with any surveyor or other people either within or outside the LTO and personal notes including handwritten notes, diary notes and notes in any form whatsoever regarding any form of discussions or meetings with surveyors and others, including but* not *limited* to:
>
> - *Discussions or meetings* between *Ms Rutledge and Surveyor N Griggs;*
> - *Discussions or meetings between Ms Rutledge and any other surveyor;*
> - *Discussions or meetings* between *Mr Young and any surveyor;*
> - *Discussions or meetings between Ms Rutledge and any* employee of *Hobart City Council;*
> - *Discussions or meetings between LTO staff;*
> - *Discussions or meetings between LTO staff and any staff of Geospatial Infrastructure and Surveying.*

5 On 8 November 2017, Ms Alison Scandrett, a then delegated officer, released a decision to Mr Sharma. The decision found 69 pages of information responsive to the request and concluded that production of 26 pages could be refused under s I 2(3)(c)(i) on the basis that the information they contained was otherwise available. The Department claimed another 38 pages to be exempt pursuant s35 on the basis that they contained internal deliberative information. Five pages were released in full.

6 On 15 November 2017, Mr Sharma requested an internal review of the decision on his application for information, arguing that none of the information he sought was exempt.

7 On 12 December 2017, an internal review decision had not been released to Mr Sharma and he sought an external review by this office on the basis of a deemed refusal. His request was accepted under s44( )(b)(ii) as he had made a valid request for internal review, 15 working days had elapsed since that request had been made, and he had not received an internal review decision. The fee had been paid.

8 On 25 January 2018, before this office had conducted its review, Ms Roxana Jones, another delegated officer, released an internal review decision to Mr Sharma. It reached a different conclusion to the original decision. The decision to refuse information under s 12 was overturned and instead that information was released to Mr Sharma, and some of the claimed s35 exemptions were also overturned. It noted too, that the number of pages of information responsive to the request was actually 67 not 69, two pages being duplicates.

9 The Department prepared what it called a Decision Table that identified all the information responsive to the request in the form of a numbered list. The information that remains at issue is that contained on pages 25 to 26, 32, 34 to 41, 47 to 48 and 53 to 60 — a total of 21 pages - and consists of internal email

communications, draft correspondence, file notes and a background note concerning the dealings lodged and Mr Sharma's communications with Departmental officers.

Issues for Determination

I 0 There are two issues for determination arising from the Department's decision and a third one that I will consider in addition:

- Is the information claimed to be exempt internal deliberative information as set out in s35?
- If it is, does the public interest test favour release or exemption?
- Is some of the information exempt under s27 on the basis that it consists of internal briefing information of a Minister?

Relevant legislation

II With the right of refusal contained in s12(3)(c)(i) no longer relied on, the primary provision of the Act which falls for consideration in this review is s35. A copy of that section is attached. As s35 is included among the exemptions contained in Division 2 of Part 3 of the Act, it is subject to the public interest test contained in s33. A copy of that provision is also attached, as is a copy of Schedule I which contains the matters to be taken into consideration when assessing where the public interest lies.

12 In addition, I considered whether s27 might apply to some information responsive to Mr Sharma's request, it being the section which creates an exemption for the internal briefing information of a Minister. I also attach a copy of s27.

Submissions

13 Mr Sharma is of the view that as the information relates to his property, there is no reason why any of it should be exempt. Specifically, he submitted:

> *I cannot* see *any reason why any information should* be *withheld from me.* The *entire process has to do with my title and I have provided specific details as to why SP 1820 is correct.* Those *details were not considered in P145265 by surveyor N Griggs.*
>
> *Those details were not considered by* the *Recorder* of Titles *when she made the decision* to *change my title with respect to the NE and SE boundary with Lot I ISPI820.* There *is clear evidence that there is something very wrong with P145265. In all the circumstances* the Recorder of *Titles should embrace* the *issue I have raised rather than put barriers in my way.*
>
> *I do not consider any* of *the documents should be* exempt *under the law. /* note *that Ms Scandrett has provided broad statements* to *claim*

exemption. If *upon review you can consider any of the documents* to *be exempt, please advise detailed reasons in respect of each document.*

14 The Department maintained in its decisions that the information for which exemption has been claimed is internal deliberative information and it would be contrary to the public interest to release it. In the initial decision it was observed that:

> Some of the *information you have requested comprises consultations between officers of DPIPWE in the course* of *the official business, being communicating with members of* the *public in relation* to the *business* of *the Land Titles Office. Some* of *the documents contain opinions and advice prepared by DPIPWE and/or Minister's Office staff in relation to communications made as part of official business.*

IS This was repeated in the decision on internal review which went on to say:

> The *internal email communications, draft correspondence, file note and briefing were generated in order* to *explore and explain the issues and options available to the* Department *in relation to the boundary issue at* [the Sandy Bay property]. *The decisions arrived at are generally then expressed in formal correspondence or* other written *form. Given the nature of* the *information, being drafts, proposals and* incomplete *representation* of *internal opinion, not the settled policy position of* the Department *or the Minister, I am satisfied that the information was generated for* the purpose of the deliberative *processes related to the official business of a public authority and/or Minister, and that it is not informative as to the reasons for any decision.*

16 In relation to the public interest test the decision on internal review included the following:

> It *is* the *expectation of the public that government decision-making* processes *are open, transparent and* accessible, *particularly when there is a* need for *decisions that may adversely* affect *them to be understood. In this instance the internal deliberations and the General Manager's recommendation and advice to the Minister have* been *informed by factual details and* advice *obtained from several sources including yourselves.*
>
> There is *a* need for *DPIPWE* officers *and Ministers* to receive *advice that is* protected *from public scrutiny when that was not its intended purpose.* There *is a risk that disclosure* of *such information in this context could inhibit DPIPWE* officers *from providing free and frank advice and recommendations to Ministers and* other officers *in future deliberations. This would be detrimental to the decision-making process and contrary to the public interest.*

Analysis

Is the information claimed to *be exempt prime* fade *exempt as internal deliberative information pursuant to s35?*

17 For information to be exempt under s35 it must consist of:

- an opinion, advice, or recommendation prepared by an officer of a public authority; or
- a record of consultations or deliberations between officers of public authorities; or
- a record of consultations or deliberations between officers of public authorities and Ministers,

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or the Government.

The information at issue

18 As noted above, the information in relation to which a claim for exemption is maintained can be identified by reference to page numbers in the Department's Decision Table. The numbered documents in that Table are, however, in reverse chronological order. The information makes more sense, and gains some context, if it is presented in chronological order, and that is what **I** propose to do.

19 The first item of information to be considered is on page 61. It is a file note, made by a member of the responsible Minister's staff and dated 15 August 2017. It records a telephone conversation between that member of staff and Mr Sharma in which Mr Sharma apparently requested a meeting with the Minister in relation to his various dealings, because, amongst other things, he had exhausted all avenues with the Land Titles Office.

20 I am satisfied that the file note was prepared by a public officer, but it does not contain any opinion, advice or recommendation, it does not refer to any consultations or deliberations between officers of public authorities, and nor does it contain any consultations or deliberations between public officers and Ministers. It is merely a record of what Mr Sharma said to the Ministerial Officer during their telephone conversation.

21 It even includes the following:

> ***Please note:*** *File Notes as described by constituent.* The *notes* provided *do not indicate any judgement* on the *part of the Minister's* Office *and are provided as a guide* only.

22 I am satisfied that the File Note does not meet the criteria for exemption in s35.

23 Page 59 is an exchange of emails between the General Manager, Land Tasmania and the Section Manager, Plan Examination at the Land Titles Office. It starts

with an email from the General Manager dated 29 August 2017 asking for background information in relation to the situation with Mr Sharma, and concludes with an email from the Section Manager dated 30 August 2017 providing that information by way of an attachment.

24 Again, the email exchange does not contain any opinion, advice or recommendation, it does not refer to any consultations or deliberations between officers of public authorities, and nor does it contain any consultations or deliberations between public officers and Ministers. It is a simple request for information and a response. It is not internal deliberative information and is therefore not exempt pursuant to s35.

25 Pages 55 to 58 is the attachment to the Section Manager's email of 30 August 2017. It consists of a document, the heading of which includes the address and title details of Mr Sharma's property, identifies Mr Sharma and his wife as the owners of the property and includes the words: "Boundary Issue" and "Background". It is a dot point summary of the history of the dealings and communications between the Land Titles Office and Mr Sharma. It is divided into two parts under the sub-headings "Brief Summary" and "A Little More Detail".

26 Attached to the document is a Plan of Survey showing the boundaries of Mr Sharma's property.

27 There is nothing that indicates who the author of the document was, though it came from the Section Manager. It might be inferred from that, that the Manager or another officer authored the document, but this cannot be said with certainty.

28 In any event, with the possible exception of the information following the penultimate dot point under the heading "Brief Summary" and the last dot point under "A Little More Detail", the document does not contain any opinion. Nor does it contain advice or recommendations, and it does not refer to any consultations or deliberations. It is a statement of facts, and even the information after the two dot points referred to is more in the nature of observation or comment rather than opinion.

29 I am satisfied that the document stands alone and that all the information it contains, other than possibly the information following the two dot points referred to above, is purely factual information. Section 35(2) provides that the exemption created by s35(I) does not include purely factual information. The bulk of the document is therefore not exempt and should be released.

30 As to the information following the two remaining dot points, even if it could be said to contain opinion, and I am not completely persuaded that it could, am not satisfied that it was provided in the course of, or for the purposes of the Department's deliberative processes related to its official business. They are brief summations of the information that precedes them and I am satisfied that the information is not exempt under s35(I).

31 The summary was, however, prepared for the information of the Minister and delivered to his office and is therefore potentially exempt pursuant to s27. To meet the requirements of that provision, however, again the information must, in the context of this review, consist of an opinion, advice or recommendation prepared by an officer of the Department or a record of consultation between officers in the course of or for the purposes of briefing the Minister. Like s35, the exemption created by s27 does not extend to purely factual information.

32 For the same reasons outlined in paragraphs 26 to 31 above, the information is not exempt pursuant to s27 - it is not known who authored it, it contains no opinion, advice or recommendation but rather is purely factual information and stands alone as such.

33 As for the Plan of Survey, that is information which is publicly available and can be obtained by making the appropriate searches. I confirm that the Department no longer relies on s 12, and the plan could not be exempt under s35 and it therefore should be released.

34 Pages 53 and 54 is an email exchange between the Departmental Liaison Officer and the General Manager, Land Tasmania commencing on 29 August 2017 and concluding on 3 I August 2017.

35 Page 54 is an email from the Liaison Officer to the General Manager seeking advice in relation to the situation with Mr Sharma before making an appointment for him to meet the Minister. It does not contain any opinion, advice or recommendation, nor does it refer to any consultations or deliberations. It is not, therefore, exempt pursuant to s35.

36 Page 53 on the other hand, being the response from the General Manager, meets the criteria of s35: it consists of advice prepared by an officer of a public authority, given in the course of, or for the purpose of the deliberative process related to the Department's official business and is therefore prime facie exempt.

37 Page 48 is an email from the General Manager, Land Tasmania to a Ministerial Advisor dated 4 September 2017. The email was also copied to the Surveyor General and the Recorder of Titles. It records what was said by the General Manager and Mr Sharma in a telephone conversation the previous Friday, 1 September 2017. Page 48 also has a brief email of acknowledgement and thanks from the Ministerial Adviser sent later the same day.

38 Page 47 reproduces the General Manager's email but includes a brief email of thanks from the Surveyor General.

39 As noted the principal email is a record of a telephone conversation, during which, amongst other things, Mr Sharma expressed his unhappiness at not meeting the Minister and declined a meeting with Departmental staff. Again, it does not contain any opinion, advice or recommendation, it does not refer to any consultations or deliberations between officers of public authorities, and nor does it contain any consultations or deliberations between public officers and the Minister. It is merely a record of what Mr Sharma and the General

Manager discussed during their conversation. It is therefore not exempt pursuant to s 35, and nor are the two short emails of thanks.

40 Pages 34 to 41 is another email chain consisting of emails passing between the Section Manager (Plan Services Section), the General Manager, Land Tasmania and the Deputy Recorder of Titles, and an attachment to one of the emails of the Deputy Recorder to the General Manager. All the emails are dated 14 September 2017.

41 The first email at page 41 is from the Section Manager to the Deputy Recorder providing by way of attachment a sample of the LTO's correspondence with Mr and Mrs Sharma and their solicitors which reflected a position it had adopted of not replying to their inquiries unless they lodged a dealing. Page 40 is part of a letter setting out this position.

42 Pages 41 and 40 do not contain any opinion, advice or recommendation, nor record of consultations and deliberations between officers of public authorities. Rather it provides the General Manager with information as to the manner in which the LTO had determined to deal with the Sharmas. It does not meet the requirements of s35 and is therefore not exempt.

43 The balance of the email chain being pages 34 to 39, however, is in my view prime facie exempt pursuant to s35. It is a record of consultations and deliberations between the participants, all of whom are public officers, in the course of a deliberative process related to the LTO's official business, that is the content and form of a proposed communication with Mr Sharma.

44 Page 3I is another exchange of emails, this time between an Executive Officer and the General Manager dated 22 September 2017. It does not contain any deliberative material. The Executive Officer reports a telephone conversation she had had with Mr Sharma in which he had asked when he might expect a response to correspondence and what she had told him in this regard. The General Manager's email advises that a response has been prepared. The emails do not meet the requirements of s35 and are not exempt.

45 The remaining information which falls for consideration is the information on pages 25 and 26. Again this is an email exchange consisting of an email sent by the General Manager, Land Tasmania to the General Manager, Strategic Services and to the Deputy Secretary of the Department, and the responses of those two officers. All emails are dated 4 October 2017. The General Manager, Land Tasmania's email sets out how is he is thinking of dealing with Mr Sharma and saying he will call the other officers to discuss.

46 The General Manager, Strategic Services responded by saying she was on leave, would be back the following day and was happy to see if she can help. The Deputy Secretary's response is one line agreeing with the General Manager,

Land Tasmania's approach. As with most of the other emails, there is no deliberative information, no opinion, advice or recommendation and is not exempt pursuant to s27.

47 In summary, the only information I have found to be prime facie exempt pursuant to s35 is the information on pages 53 and 34 to 39.

Public Interest Test

48 As noted earlier in this decision, because s35 is included among the exemptions contained in Division 2 of Part 3 of the Act, it is subject to the public interest test contained in s33. When determining whether it is in the public interest to maintain the exemption or to release the information, s33 requires me to have regard to the matters contained in Schedule I.

49 Having considered the matters in Schedule I as they relate to the information at issue, I consider that the matters in favour of release are those contained in paragraphs (a), (c), (d), (f), (g), and (h). Releasing the information would fully inform Mr Sharma as to the reasons for decisions made and provide him with context in relation to those decisions. Release would enhance scrutiny of the Department's decision-making and administrative processes, and in this instance, dispel any suggestion that the Department behaved other than in an open, reasonable and fair manner.

50 I can find no matters in the Schedule which favour the maintenance of the exemption. For example, the release of the information would not cause harm to the interests of any person, in particular those of the Department, or its ability to obtain similar information in the future, and would not generally be contrary to the public interest.

51 I note the Department in its decision asserted:

> There *is a need* for *DPIPWE officers and Ministers to* receive *advice that is protected from public scrutiny when that was not its intended* purpose.

52 In general terms, I agree with this, but the Act does not allow a blanket approach to be adopted. The specific information responsive to a request must be considered and assessed against the requirements of the exemption provisions of the Act, and only if it meets those requirements can exemption by sustained.

53 As previously noted the Department also asserted:

> There *is* a *risk that disclosure* of *such information in this context could inhibit DPIPWE officers from providing free and frank advice and recommendations* to *Ministers and other officers in future deliberations. This would* be *detrimental to the decision-making process and contrary to the public* interest.

54 I do not agree with this assertion; its corollary is an insinuation that public servants only provide frank and fearless advice if they believe it will be kept secret. It is a fundamental part of the work of many senior public servants, such as those involved here, to provide frank and fearless advice. To suggest that those officers would do otherwise, is to suggest that they would not do their jobs to the best of their ability if they thought information might be released in compliance with the law. I cannot accept that this is the case.

55 For the reasons given above, while I am satisfied that the information on pages 53 and 34 to 39 is provisionally exempt pursuant to s35, I am not satisfied that it would be contrary to the public interest to disclose it.

Preliminary Decision

56 I direct that all the information claimed to be exempt pursuant to s35 be released to Mr Sharma.

Submission to Preliminary Decision

57 The preliminary decision was released on 23 December 2019.

58 As the preliminary decision was considered adverse to the public authority, only it received a copy in accordance with s48(I)(a).

59 On 13 January 2020, the Department indicated it did not wish to make a submission and that it had already actioned the direction set out in the preliminary decision.

60 The applicant confirmed this had occurred.

Decision

61 As no submission was made, my decision remains unchanged. I direct that all the information claimed to be exempt pursuant to s35 be released to Mr Sharma.

62 I note the Department has already complied with this decision.

Reconsideration

63 Following receipt of the final decision, Mr Sharma contacted my office. He drew attention to then paragraph 3 of the decision, and its reference to a third dealing lodged with the LTO by a surveyor having been finalised in 2009. Mr Sharma advised that there had only ever been two dealings lodged and he had confirmed this with the LTO after receiving the decision.

64 In light of Mr Sharma's advice, I revisited the information responsive to his request provided by the Department, and it would appear that I misread it in part and that there were indeed, only two dealings lodged.

65 Section 48(2) provides that where a decision has been finalised, I may only reconsider it to correct an accidental mistake or omission. My misreading of the information was an accidental mistake, which I have now corrected by

omitting the original paragraph 3. The following paragraphs have been renumbered accordingly.

Dated: 19 March 2020

Richard Conn
OMBUD N

Section 27 — Internal briefing information of a Minister

(I) Information is exempt information if it consists of —

(a) an opinion, advice or a recommendation prepared by an officer of a public authority or Minister; or

(b)a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose 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.

(I) Subsection (I) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(2) Subsection (I) does not include information solely because it —

(a) was submitted to a Minister for the purposes of a briefing; or

(b) is proposed to be submitted to a Minister for the purposes of a briefing—

if the information was not brought into existence for submission to a Minister for the purposes of a briefing.

(I) Subsection (I) does not include any purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

(2) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 — Internal Deliberative Information

(I) Information is exempt information if it consists of —

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (I) does not include purely factual information.

(3) Subsection (I) does not include —

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

SCHEDULE I - Matters Relevant to Assessment of Public Interest

(I) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(l) whether the disclosure would promote or harm public health or safety or both public health and safety;

whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1703-189**

Names of parties: T and Tasmania Police

Reasons for decision: s48(I)(a)

Provisions considered: s30, s3l, s35, s36

Background

The applicant, T, alleges that in the late 1970s a named assailant deliberately held her against her will and raped her. An initial police investigation did not find the necessary evidence to lead to an arrest.

2 On 30 August 2016, T submitted an application for assessed disclosure to Tasmania Police seeking all information in her police file related to the incident. T's application was in the following terms:

> / am *writing as below* to get *a* copy of *everything in my file Re my complaints re* [the alleged perpetrator] to police *since he took me against my will and held me against my will, then raped me in about June 1978.*

3 Tasmania Police accepted the application on 5 September 2016, after the minimum requirements had been met. On 30 September 2016, Sergeant John Delpero, a delegated officer, released a decision to T. The decision identified 155 pages of relevant information and a recorded interview. It exempted much of the information on the bases that it was related to the enforcement of the law, it would attract legal professional privilege in legal proceedings, it was internal deliberative information, and personal information.

4 T requested an internal review of this decision on 19 October 2016 on the basis she believed the information was not exempt and should have been provided to her.

5 On 22 February 2017, Inspector Glen Ball, a delegated officer, released an internal review decision to T. The internal review decision reached the same conclusion as the original decision.

6 On 26 March 2017, T requested an external review of this decision. The request was accepted on 27 March 2017. The internal review decision letter of 22 February was posted. Allowing three working days for postage, including a public holiday on 13 March for Eight Hours Day, T's request for external

review was received just on 20 working days after notification of the decision. It was therefore accepted under s44 — the fee having been waived under s16(2)(a).

Issues for determination

7 The five issues for determination are:

(I) Would the release of information expose a method or procedure relied on by Tasmania Police as set out in s30(I)(c)?

Would correspondence between Tasmania Police and the Office of the Director of Public Prosecutions be subject to legal professional privilege, making it exempt under s31?

Are various reports exempt under s35 as claimed by Tasmania Police because they consist of internal deliberative information?

Is the remaining bulk of the information exempt under s36 on the basis it forms the personal information of another person?

If exemptions are found to apply for s35 or s36, does the public interest test, on balance, support exemption or release?

Relevant legislation

8 Tasmania Police relied on s30, s31, s35, and s36. Copies of these sections are attached to this decision. A copy of Schedule I is also attached in relation to the public interest test.

Internal review decision

9 Tasmania Police's internal review decision set out its reasons, maintaining as listed in a table at the end of the reasons that all exemptions applied in the original decision remained valid to exempt the corresponding information. In relation to s30, Tasmania Police's internal review decision stated:

> *... I have taken into account the contents* of the *Tasmanian Ombudsman's decision in* C and Department of Police and Emergency Management (2012) Case Reference 1106-219, *which provides guidance on exemptions applying to the disclosure* of *`methods for preventing, detecting or investigating breaches of* the *law'. 1 have determined that portions* of the file *do contain information linked* to *methods [sic] preventing,* detecting *or investing breaches* of the *law and the disclosure of the information would be reasonably likely to prejudice* the *effectiveness of those methods or procedures and as such, is exempt information.*

10 In relation to s3 I, the internal review decision quoted a past Tasmanian Ombudsman decision, then stated:

Communication to *Tasmania Police from the Office of the Director* of *Public Prosecutions relates dominantly to legal advice and as such, I have determined such information* to be *exempt.*

II The internal review decision's application of the public interest test commenced:

> *... `Relevant matters'* [of the public interest test] are *particularised in Schedule I* of the *Act and are applicable in this review (relating to s30(3) of the Act). The public interest* test *is also applicable when considering information to be exempted in accordance with s35 and s36* of the Act. The *following matters from* Schedule I *of the* Act have been *applied during this reveiw:*
>
> *[Matters (a), (f), (h), (m), (n), and* (p) *from Schedule I were then listed].*

Applicant's submissions

12 T submits that she should have been given more information than she received on the basis it was already promised to her and there are no court proceedings that should be holding it up. Specifically, she submitted:

> *Mr Wilby told me that all would be released to me when I said I wanted a copy* of *all information from my* file. There *are no court proceedings on* foot *so that is not a reason to not* re/ease *and I request all* re/eased [sic].
>
> *Abductions and rape is a serious* offence *and the public at large expect Police and DPP should* be *transparent and accountable for any outcomes/non-outcomes and the reasons why.*
>
> *I want all information released as disclosure will improve accountability. I want all internal deliberative information released as I was told it would be and it is in public interest to do so. Thus improving confidence in police and DPP may lead to women's increased trust in* the system.
>
> *Any legal privilege has been waived by police giving [the alleged perpetrator] my name now and breaching my privacy. They gave my current name to a known murderer. I was told by Wilby that I could have copies* of *everything.*

Analysis

13 There were many seemingly blank pages in the information released to T, including a series of pages that appear as if they have been redacted with grey colour. This is due to the file being scanned/copied in its entirety, presumably using double-sided scanning/copying. This has resulted in alternating blank pages being included. The grey coloured pages were copies of folder dividers separating different sets of information. I am satisfied these pages, included in

the pagination of the final determination from Tasmania Police, do not contain assessable information.

Issue I: Would the release of information expose a method or procedure relied on *by Tasmania Police as set out in s30(1)(c)?*

14 Tasmania Police has exempted under s30(1)(c) material on pages 50-53, 56-57, 59, and 70.

15 For information to be exempt under s30(1)(c), its disclosure must be reasonably likely to disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

16 The first reliance on this exemption by Tasmania Police relates to pages 50-53. I will also consider page 70 here as it is relevantly similar. I accept the decision of Tasmania Police and determine the information on these pages is exempt under s30(I)(c). It is not practical to provide in-depth reasons as to how or why I reach this conclusion as to do so would reveal the nature of the exempt information.

17 Suffice to say, although this information is relevant to T, its release would reveal certain methods used to prevent, detect, or investigate breaches or evasions of the law. I am satisfied that to release this information would prejudice the effectiveness of these methods, not just in this particular instance, but for future instances across cases not directly related to this one.

18 The next instance of this exemption relied on by Tasmania Police is at pages 56 and 57. These two pages consist of an extract from a Police database system and could reasonably be described as a top-level information about the alleged perpetrator, the subject of T's application for assessed disclosure.

19 Unlike pages 50-53, I am not satisfied these two pages are exempt under s30(I)(c). The information is inherently different and, in many regards, administrative in nature. The information does not reveal a method or procedure and therefore is outside the scope of this exemption section. This, however, has also been claimed by Tasmanian Police to be exempt under s36 and so will be dealt with under that part of this analysis. I determine for the purposes of this part, however, that the information on pages 56 and 57 is not exempt under s30(I)(c).

20 The final use of this section to be considered is on page 59. For the reasons set out above for pages 56 and 57, I find that page 59 is not exempt under s30(I)(c). There is almost no information on this page, and certainly nothing that would, if released, prejudice the effectiveness of a method or procedure. It contains similar information to that which has already been released by Tasmania Police on page 69. This information is, however, also covered by s36 and I have considered it further below under that section.

Issue 2: Would the *information from* the Office of the *Director* of *Public Prosecutions be subject to legal professional privilege making it exempt under s3 I?*

21 The only reliance by Tasmanian Police on s3I to exempt information on the basis of legal professional privilege is on pages 8-14.

22 For information to be exempt under s3l, the Act provides it must be of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

23 Legal professional privilege is a rule of substantive law' that allows a person to resist giving information that would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice, including for representation in legal proceedings.[2]

24 The High Court of Australia adopted the dominant purpose test for privileged information as a replacement for the former sole purpose test in *Esso Australia Resources Ltd v Federation Commissioner* of *Taxation,*[3] distinguished from *Grant* v Downs.[4]

25 The seven pages 8-14 claimed to be exempt under s3 I are from Principal Crown Counsel at the Office of the Director of Public Prosecutions to Tasmania Police, in response to a request from Tasmania Police (pages 17-18) referred to below. The pages provide legal information for the dominant purpose of giving legal advice and/or advice in respect of litigation. I will not discuss the substantive material. I determine pages 8-14 are exempt under s3 I.

Issue 3: Are the various reports exempt under s35 as claimed by Tasmania Police because they consist of *internal deliberative information?*

26 Tasmania Police relied on s35 to exempt information on the basis it forms internal deliberative information on pages 17-18, 20-21, 26-29, 73, 82, and 96-108.

27 For information to be exempt under s35( ), it must consist of: an opinion, advice, or recommendation prepared by an officer of a public authority; or a record of consultations or deliberations between officers of public authorities in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. This exemption does not include: purely factual information (s35(2)); a final decision, order, or ruling, or reasons which explain such (s35(3)); and information more than I 0 years old (s35(4)).

28 As to the meaning of `purely factual information' in s35(2), I refer to Re *Waterford and the Treasurer* of *the Commonwealth of Australia (No I)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the

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[1] *Attorney-General (NT) v Maurice (1968)* 161 CLR 475 at 490 per Deane J

[2] *Daniels Corporation International v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49 at [9]

[3] (1 999) 201 CLR 49 at 73 [61] per Gleeson CJ, Gaudron and Gummow jj.

[4] (1 976) 135 CLR 674

word 'purely' has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms.'

29 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In Re *Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[6]

30 Applying s35 first to pages 17 and IS, these consist of a letter from Tasmania Police to the Office of the Director of Public Prosecutions headed "Request for File Determination: ...". There are only two paragraphs of these two pages in relation to which exemption pursuant to s35 is claimed. The remaining exemptions claimed rely on s36, which will be considered below.

31 Exemption pursuant to s35 is claimed for the fourth paragraph (that after the acronyms "CIB VCU") on page 17 and for the first paragraph on page 18. While there might be some scope for argument as to whether s35 applies here, the s3 I exemption on the ground of legal professional privilege is more clearly applicable. This letter to the Office of the Director of Public Prosecutions is a request for recommendations as to an investigation. As such, the letter requests legal advice (which was subsequently provided to Police, being pages 8-14 considered above) and these two paragraphs would be privileged from production in legal proceedings. This is so despite the fact Tasmania Police has chosen to release some of the information already which, as the client in the client-lawyer relationship, is its prerogative.

32 Accordingly, I determine that these two paragraphs are exempt under s3l. It is therefore not necessary to determine if they would also be exempt under s35. The remaining exemptions on these two pages relate to s36 and have been considered generally in that context below. However, for the reasons set out above, it suffices to exempt the remaining redactions by Tasmania Police to this two page letter on the grounds of s3l.

33 The next item of information claimed to be exempt under s35 is the first paragraph on page 20 and some information towards the end of page 21. These are part of a document comprising pages 19-29. It is not clear to me on the face of it exactly what this document is. However, on reading it in its entirety, it appears to be an internal briefing or report that consists of some facts, some opinion, and ultimately concludes with recommendations. The recommendations include that the matter be reviewed and forwarded to the Office of the Director of Public Prosecutions for legal opinion if deemed appropriate.

34 The information that has been exempted under s35 on page 20 and towards the end of page 21 is not "purely factual information" within the meaning of

Re *Waterford and the Treasurer* of *the Commonwealth* of *Australia (No I) (1984)* AATA 518 at 14 [6] Re *Waterford and Department* of *Treasury (No 2) (1985)* 5 ALD 588

s35(2) as explained above. Rather, it is more an opinion. I am satisfied this information is, on the face of it, exempt under s35. However, as s35 falls under Division 2 of Part 3 of the Act, any exemption must be subject to the public interest test, which will be considered later below.

35 The next consideration under s35 relates to pages 26 to 29. I will consider this in two parts. The first part will be the information claimed exempt on pages 26 and 28-29. I will then consider the information claimed exempt on page 27 separately.

36 The relevant information on pages 26 to 29 is: the first two paragraphs on page 26; the information above the heading `Medical' on page 28; and all but the last paragraph on page 29.

37 This information consists of an opinion, advice, or recommendation prepared by an officer of a public authority. It is deliberative, or pre-decisional, in that it is being used to seek advice (internally, and ultimately from the Office of the Director of Public Prosecutions) on whether or not a definitive action (steps towards commencing proceedings) should be taken. I am satisfied this information is exempt under s35. As s35 falls under Division 2 of Part 3 of the Act, any exemption must be subject to the public interest test, which will be considered below.

38 On page 27, s35 has been relied on by Tasmania Police to exempt half of the information in the eighth dot point. This is a factual account of the information that an interviewee gave at the Glenorchy Police Station. It is not deliberative in nature, but is a factual representation of what was provided to police in that interview. I am not satisfied this information meets the requirements of s35 and I determine it is not exempt under s35. However, part of this information includes a name of another third party, so I have considered this further below under s36.

39 Page 73 consists of a police report of an "Historical Rape Complaint" made by T at the Hobart Police Station. The relevant information that has been claimed exempt is all of paragraph five and the first two sentences of paragraph seven.

40 The first sentence of paragraph 5 is "purely factual information" regarding T having attended Glenorchy and Hobart CIB. As such, it is not exempt: s35(2).

41 The balance of the information claimed exempt on page 73 is in the nature of opinion regarding the credibility or reliability of T's evidence. For equivalent reasons to those set out earlier regarding similar information, this is exempt under s35(1), subject to the public interest test which I will consider later below.

42 Page 82 is a page of handwritten notes dated 17 April 2003 pertaining to a returned phone call from then Commonwealth (and former Tasmanian) Director of Public Prosecutions (DPP). Tasmania Police has relied on s35 to exempt this information. This page is not exempt under s35 since s35(I)

ceases to apply after I O years from the date of the creation of the information: s35(4).

43 The final reliance on s35 has been applied by Tasmania Police across all of pages 96 to 108. These pages consist of the "Reasons for Decision" by the Parole Board for it making an order that a named prisoner be released on parole. The reasons are dated 2002 so, being older than 10 years, are not exempt under s35 due to s35(4).

44 I note in passing that, leaving aside the 10 year rule, there are various other reasons why the Parole Board's reasons for a parole order such as this should not be claimed exempt under s35 without further consideration. For example, the parole order is not a pre-decisional part of the Board's "deliberative processes" as required for exemption under s35(I). Rather, it is a final order given "in the exercise of an adjudicative function" so the order and the reasons explaining it are not exempt under s35(I) due to s35(3)(a).

45 Furthermore, the Parole Board's power to order that a prisoner be released on parole is in the *Corrections* Act *1997,* s72(3)(a). If the Parole Board makes such an order, it is to publish its reasons for the order (and give a copy to certain victims of the prisoner): *Corrections Act 1997,* s72(7)(b).

46 A number of the Parole Board's decisions can be found on its website dating from 2003.[7] However, I cannot see any 2002 decisions still published there. Accordingly, Tasmania Police is to provide to T a copy of pages 96 to 108 containing the Parole Board's decision.

Issue 4: Is the remaining bulk of the information exempt under s36 on the basis it forms personal information of *another person?*

47 The only remaining exemptions relied on are under s36. For information to be exempt under s36 it must be information that, if disclosed, would reveal the "personal information" of a person other than the person making the application under sl3.

48 The Act, s5(I) defines "personal information" to mean any information or opinion about an individual from which their identity is either apparent or reasonably ascertainable. The definition excludes a person who has been dead for more than 25 years.

49 Tasmania Police has relied on this exemption across a large range of pages: I, 3-7, 17-22, 24-29, 32, 34, 36, 42, 45, 50-53, 56-57, 59, 62-53, 73, 81, 93, 113, 125, 132, 139, 141-150, and 153. The recorded police interview is also considered under s36.

50 I will not consider each of these pages individually as they all largely relate to only a few categories of personal information. These categories are personal information relating to: the alleged perpetrator; third parties; signatures; and other contact details such as email addresses and phone and fax numbers.

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[7] www.justice.tas.gov.au/paroleboard/decisions/decisions_2002

Alleged Perpetrator

51 The former name of the perpetrator alleged by T is well known to her, and she named him in her application. Accordingly, it may seem odd to exempt his personal information, especially his name. However, if this information is released to the applicant, legally it is not limited solely to her, but could potentially become viewable by the world at large. So the alleged perpetrator's personal information requires further consideration under s36.

52 Based on the wording of s36(I), I am satisfied that the name, address, date of birth, physical description, or any other reasonably identifiable information about the alleged perpetrator is exempt under s36. This is not, however, to extend to the headings or titles of the information on these pages from which he is not reasonably identifiable.

53 As s36 falls under Division 2 of Part 3, any exemption must be subject to consideration of the public interest test, which will be considered below.

Third Parties

54 The third parties in this instance are few and largely relate to witnesses, other victims, or people working on behalf of the alleged perpetrator (eg, as a lawyer). With the exception of the references to Lucille Butterworth (such as on pages 26 and 73) and Amanda Carter, I am satisfied the names of third parties meet the requirements of s36(l). The names of Lucille Butterworth and Amanda Carter are outside the s5(I) definition of personal information since they have been dead for over 25 years, so they are not exempt under s36.

55 I determined earlier that on page 27 the eighth dot point was not exempt under s35. Part of this information includes the surname of a third party that is exempt under s36.(I)

56 As s36 falls under Division 2 of Part 3, any s36 exemption must be subject to the public interest test, which will be considered below.

Signatures

57 Tasmania Police relied on exemptions under s36 for the signatures of multiple persons, which can be a form of personal information. Every signature that has been exempted, however, is accompanied with the person's printed name which has been released. Given that, I am not sure of the purpose under s36 in then claiming exemption of their signature.

58 Perhaps refusal to release signatures was an attempt to avoid their subsequent misuse. If so, I do not consider it justified since that would presuppose, in the absence of specific evidence, that a person will then misuse the signature. Given that would likely constitute a crime (within the realm of forgery, fraud and/or impersonating a police officer) the risk of possible misuse does not outweigh the public interest in more fulsome release, including signatures (particularly of persons where their name has already been released).

59 I am satisfied there is no need to consider the signatures further at this point and they should be released in full. This is consistent with my decision in *Webb and DPIPWE (3o January 2020) 01811-065* at paragraphs 35-37.

Phone numbers and email addresses

60 Tasmania Police has applied s36 to various different phone numbers, fax numbers, and email addresses. The phone numbers are for government or business offices. These are not exempt under s36 are to be released in full.

61 The email addresses may be considered personal information under s36, however, based on similar reasoning set out above under `Signatures', I do not think their redaction justified. Except in extraordinary circumstances, the public interest (eg, access and accountability) in release of a public servant's work email address outweighs any argument for it to be withheld. These email addresses are not exempt under s36 are to be released in full.

Police interview with the alleged perpetrator

62 I note from the original decision of Tasmania Police that it consulted with the alleged perpetrator concerning the interview with him recorded 7 March 2016 and he consented to it being released. Tasmania Police exempted it anyway and T's internal review application argued that due to the perpetrator's consent, the entire interview should be released. The internal review decision refused this as, in its words, "The interview contains other non-public authority third parties which is exempt as personal information".

63 The alleged perpetrator's consent to release of the interview, while not binding on Tasmania Police, is a significant consideration in determining if an exemption should apply.

64 The only reason for exemption of the interview claimed by Tasmania Police in its review decision is the personal information of other third parties mentioned. It is inappropriate to exempt the entire 20-minute interview based on its limited reference to personal information of other non-public authority third parties. All the more so here given that the quality of this recording is so poor that it is very difficult to make out responses by the alleged perpetrator. This is confirmed from outside Tasmania Police at page 8 (an exempt document).

65 In this instance, the appropriate approach is for Tasmania Police to extract/redact from the recording prior to its release personal information of other non-public authority third parties, leaving in that of the alleged perpetrator who consented and T. This should not be an unduly onerous task given that the poor quality audio in the recording limits the extent to which it discloses `personal information' as defined in s5(1). For example, paragraph (a) of that definition applies only where an individual's "identity is apparent or reasonably ascertainable from the information".

66 I therefore direct Tasmania Police under s47(l)(q) to:

- reassess the interview recording;
- copy then redact from it exempt information under s36; then
- release the redacted balance to T.

T should be advised of where in the recording extracts have been redacted under s36 and why.

Issue 5: If exemptions are found to apply for s35 or s36, does *the public interest test, on balance, support exemption or* release?

67 I will consider the public interest test in two parts — in relation to s35 and then s36.

Section 35

68 I have made determinations above that s35 does apply to some of the information on pages 26, 28, 29 and 73. This information is contained in a Tasmania Police internal briefing/report which concludes by recommending it be sent to the DPP for legal advice if deemed appropriate.

69 I have considered the matters of the public interest test in Schedule I of the Act (see attached). I find that three Schedule I matters favour release, namely matters (a), (g), and (m). I find these matters favour release for the following reasons:

(a) Matter (a) is broadly worded and release of this information would promote the general need for information to be accessible.

(g) Release of this information would enable enhanced scrutiny of Tasmania Police administrative processes.

(m) Release would promote the interests of T, mostly in enabling her to better understand what occurred based on the information she provided. In particular, release would enable T to read what Tasmania Police officers saw as limitations in a prosecution to the value of the evidence she provided. That should help her to better understand why, after advice from the Office of the DPP, her report of a rape was not pursued to prosecution .

70 In favour of exemption, I also find three matters, namely (h), (j), and (m). I find these matters favour exemption as the primary material is based on an allegation which, following advice from the Office of the DPP, was not prosecuted. Hence, the alleged perpetrator has not had the opportunity to defend the allegation in court. Therefore, release and potential public dissemination of this information would hinder:

- equity and fair treatment of the alleged perpetrator (matter (h));
- their right to procedural fairness (matter (j)); and
- their interests (matter (m)).

71 Furthermore, there is a risk that the release of deliberative or pre-decisional information of the above nature could, in terms of matter (j), harm the administration of justice, including undermining the need to afford procedural fairness to the alleged perpetrator who was not charged with regard to T's complaint. Given that charges were not pursued, I regard matter (j)'s reference to "enforcement of the law" as less likely to be undermined by disclosure in this case (as distinct from one where law enforcement proceedings are ongoing).

72 I have also considered the need to interpret the Act so as to further its object, and exercise discretions pursuant to s3(4)(b). The appropriate balance can be struck by releasing to T most of the information redacted due to s35 on pages 26, 28, 29 and 73, but only where that can be done without prejudicing the rights of the alleged perpetrator (to procedural fairness and the presumption of innocence in relation to T's allegations) or third parties.

73 Therefore, I find that it would be contrary to the public interest to disclose at this time any of the information redacted by Tasmanian Police at page 28. Exemption under s35(I) ceases to apply after 10 years from the date of the creation of the information (which was dated 23 June 2016): s35(4).

74 I find it would not harm the public interest to disclose to T the balance of the information which I have found would otherwise be exempt under s35(I). That balance is the information which Tasmania Police found to be exempt under s35 on pages 26, 29 and 73, subject to the following proviso.

75 Parts of the information on pages 26, 29 and 73 (ie, names other than that of the applicant) may still be exempt under s36 and, pursuant to s36-related reasons, it may harm the public interest to disclose those parts. I therefore direct Tasmania Police release to T the information it redacted due to s35 on pages 26, 29 and 73, but only after redacting all occurrences of the names of:

- the alleged perpetrator; or
- third parties (unless they have been dead longer than 25 years),

if I find that those names are exempt under s36 *and* their disclosure would be contrary to the public interest. I turn now to that latter section 36 issue.

Section 36

76 I have made determinations above that s36 does apply to personal information relating to the categories of `third parties' and the `alleged perpetrator'. I will consider this information together.

77 I have considered the matters in Schedule I and I find that matter (m) favours release of this information. For similar reasons to those described above under the heading "Section 35", I am of the view that the release would promote the interests of T.

78 However, the value to T of this personal information of other individuals is significantly outweighed by those matters favouring exemption, namely matters

(h), (j), (m), and in the case of the third parties, matter (n). The reasons for matters (h), (j), and (m) apply in the same way here as reasoned above for s35.

79 In addition, matter (n) applies. Disclosure (potentially public) of personal information of third parties, or alleged perpetrators, in a matter such as this which does not proceed to prosecution, would prejudice Tasmania Police's ability to obtain similar information in the future from those who would be likely become less likely to cooperate in future investigations.

80 I determine that the personal information of the third parties and the alleged perpetrator is exempt under s36.

Preliminary Conclusion

81 For the reasons set out above, I determine that the use by Tasmania Police of exemptions in:

a. Section 30 is varied in accordance with the above decision.

b. Section 31 is affirmed.

c. Section 35 is varied in accordance with the above decision.

d. Section 36 is varied in accordance with the above decision.

82 I direct Tasmania Police to release to T that information which it had determined was exempt information where I have determined above that it is not.

Submissions to the Preliminary Conclusion

83 The above preliminary decision was adverse to Tasmania Police in that it directed the release of information which it claimed to be exempt. A copy was therefore forwarded to Tasmania Police seeking input before finalising it as required by s48(I)(a). Sergeant Lee Taylor replied very promptly on behalf of Tasmania Police, making submissions into those of the above findings it believed would cause concern. Sergeant Taylor's submissions read as follows.

> ***Points 60 and 61 — Phone numbers and email addresses***
>
> *In relation to points 60 and 61* of *the review, the preliminary decision has been made that the redacted information containing Tasmania Police email addresses and Tasmania Police* phone *numbers are* not *exempt pursuant* to *s36 (Personal Information) of the Act.*
>
> *The decision states at Point 60,* The *phone numbers are* for *government or business offices.* These *are not* exempt *under s36 are to* be *released in full.' Further to this, Point 61 states, The email addresses may* be *considered personal information under s36, however, based on similar reasoning set out* above *under `Signatures, I* do not *think their redaction justified.* Except *in extraordinary circumstances,* the *public interest (eg, access and accountability) in release of a public servant's work* email *address outweighs any argument for it to be withheld. These email addresses are not exempt under s36 are* to *be released in full.'*

I make the submission that the *information redacted in these points should* be *considered as* the *personal information of the officers utilising these facilities.*

The Department of Police, Fire and Emergency Management (DPFEM) and more *specifically Tasmania Police has taken a number* of *precautions* to *maintain the privacy and security of its members.*

Members *of Tasmania Police deal with dangerous situations and dangerous people on a daily basis.* These people *often have varied mental capacities and illnesses and can become a serious safety concern* to the officers who *deal with them, through physical, mental and or emotional harm.*

Further to *this, other members of the community can become fixated on a particular* officer *or unit and harass them through a number of communication platforms including work emails and police `desk' phone numbers which can and does divert* officers away from *their primary functions.*

In an attempt to reduce security breaches including the *harassment* of officers, the DPFEM *provides generic phone numbers (switchboard) and generic email addresses for the public's use. To release this information* to *the general public would give rise to breaches of personal security/safety when other sufficient means have been provided to contact members.*

Tasmania Police make no further submission in relation to the other *points of your Preliminary Decision.*

Further Analysis

84 In summary, **I** accept the matters referred to in Sergeant Taylor's submissions and am persuaded that direct work telephone numbers and the individual email addresses of Tasmania Police officers (collectively, the `contact details') are exempt information under s36. I am so persuaded for the reasons which follow.

85 Personal information is relevantly defined in s5(I) as:

> *... any information* or *opinion in any recorded format about an individual —*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(c)*

86 In the case of the subject emails, the officers' identities are apparent. An individual's identity is reasonably ascertainable from their direct phone number by phoning that number. Hence, both these types of contact details are *personal information* as defined in s5(I).

87 On the other hand, the general 24 hour switchboard number and generic email addresses which DPFEM provides for the public's use are not personal information because they do not constitute information about an individual.

88 Having reached the conclusion that the contact details are personal information, the question then is, whether or not it would be contrary to the public interest to disclose the information.

89 It has been the position of this office that it is not contrary to the public interest to disclose the names of state servants/employees if:

- the servant/employee is acting in the course of their duties;
- the servant/employee is publicly identifiable as being employed in that area; and
- on the face of it, there does not appear to be any personal risk in identifying the servant/employee.'

90 The names of Tasmania Police members are not in issue here, there being no objection to their release, but solely the disclosure of those members' direct contact details. The third dot point in paragraph 89 above, however, has relevance in this regard, given the issues raised by Sergeant Taylor in his submissions. So too does matter (m) of Schedule I: disclosure could well promote or harm the interests of an individual or group of individuals.

91 Sergeant Taylor's submissions persuade me that disclosing the individual contact details of Tasmania Police officers to the applicant, and thus potentially to the world at large, would unduly harm their interests by exposing them to the harassment and the situations to which he refers. That would not only be contrary to public interest matter (m) but also matter (j) in that it would have the potential to harm the administration of justice, including affording procedural fairness and the enforcement of the law.

92 The fact that Tasmania Police provides generic phone numbers and email addresses for the public's use means there is little to be gained, in terms of Schedule I public interest matters, by disclosing the individual contact details. Indeed having considered all of the matters contained in Schedule I, I can find none that favour release of the information. For example, disclosure would not contribute to a matter of public interest, it would not provide any contextual information which would aid in the understanding of a government decision and nor would disclosure promote the administration of justice.

93 Release of the contact details could lead to breaches of personal security/safety, unnecessarily given that Tasmania Police provides sufficient generic phone and email methods for the public to contact its members.

94 Hence, I find that it would be contrary to the public interest to disclose the contact details and they are exempt information pursuant to s36.

95 As noted above at paragraph 90, it is only the contact details of Tasmania Police members — their individual email addresses and direct telephone lines -

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See S *and the Department* of Police, *Fire and Emergency Management (DPFEM)* O1905-210 at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions under "Section 30..." and www.ombudsman.tas.gov.au/ data/assets/pdf file/0010/536995/O1905-210-Decision-online.pdf at [26].

that **I** have determined to be exempt, not their identities. **If** names appear on the header of an email, in its body or in a signature block, these are not exempt; only the address is.

Conclusion

96 For the reasons set out above, **I** determine that the claims for exemption by Tasmania Police on the basis of:

a. Section 30, are varied in accordance with the above decision.

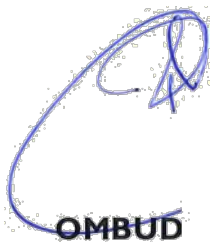
b. Section 3 I, are affirmed.

c. Section 35, are varied in accordance with the above decision.

d. Section 36, are varied in accordance with the above decision.

97 **I** direct Tasmania Police to release to T that which it had determined was exempt information where **I** have determined in this decision that it is not exempt.

Dated: 22 June 2020



Richard C

SMAN

Section 30 — Information relating to enforcement of the law

(I) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to —

(a) prejudice —

(i) the investigation of a breach or possible breach of the law; or

(ii) the enforcement or proper administration of the law in a particular instance; or

(iii) the fair trial of a person; or

(iv) the impartial adjudication of a particular case; or

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

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

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

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

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

(2) Subsection (I) includes information that —

(a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or

(b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or

(c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of

enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or

(f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation —

if it is contrary to the public interest that the information should be given under this Act.

(3) The matters which must be considered in deciding if the disclosure of information under subsection (2) is contrary to the public interest are specified in Schedule I but are not limited to those matters.

(4) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of information under subsection (2) is contrary to the public interest

Section 31 — Legal professional privilege

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

Section 35 — Internal deliberative information

(I) Information is exempt information if it consists of —

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (I) does not include purely factual information.

(3) Subsection (I) does not include —

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 — Personal information of a person

(l) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

(2) If —

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party —

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party —

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to —

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of —

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) —

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those I 0 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Under s5(I):

personal information means any information or opinion in any recorded format about an individual —

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

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

SCHEDULE I - Matters Relevant to Assessment of Public Interest

I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(l) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(I) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident, in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1703-189**

Names of parties: T and Tasmania Police

Reasons for decision: s48(I)(a)

Provisions considered: s30, s3l, s35, s36

Background

The applicant, T, alleges that in the late 1970s a named assailant deliberately held her against her will and raped her. An initial police investigation did not find the necessary evidence to lead to an arrest.

2 On 30 August 2016, T submitted an application for assessed disclosure to Tasmania Police seeking all information in her police file related to the incident. T's application was in the following terms:

> / am *writing as below* to get *a* copy of *everything in my file Re my complaints re* [the alleged perpetrator] to police *since he took me against my will and held me against my will, then raped me in about June 1978.*

3 Tasmania Police accepted the application on 5 September 2016, after the minimum requirements had been met. On 30 September 2016, Sergeant John Delpero, a delegated officer, released a decision to T. The decision identified 155 pages of relevant information and a recorded interview. It exempted much of the information on the bases that it was related to the enforcement of the law, it would attract legal professional privilege in legal proceedings, it was internal deliberative information, and personal information.

4 T requested an internal review of this decision on 19 October 2016 on the basis she believed the information was not exempt and should have been provided to her.

5 On 22 February 2017, Inspector Glen Ball, a delegated officer, released an internal review decision to T. The internal review decision reached the same conclusion as the original decision.

6 On 26 March 2017, T requested an external review of this decision. The request was accepted on 27 March 2017. The internal review decision letter of 22 February was posted. Allowing three working days for postage, including a public holiday on 13 March for Eight Hours Day, T's request for external

review was received just on 20 working days after notification of the decision. It was therefore accepted under s44 — the fee having been waived under s16(2)(a).

Issues for determination

7 The five issues for determination are:

(I) Would the release of information expose a method or procedure relied on by Tasmania Police as set out in s30(I)(c)?

Would correspondence between Tasmania Police and the Office of the Director of Public Prosecutions be subject to legal professional privilege, making it exempt under s31?

Are various reports exempt under s35 as claimed by Tasmania Police because they consist of internal deliberative information?

Is the remaining bulk of the information exempt under s36 on the basis it forms the personal information of another person?

If exemptions are found to apply for s35 or s36, does the public interest test, on balance, support exemption or release?

Relevant legislation

8 Tasmania Police relied on s30, s31, s35, and s36. Copies of these sections are attached to this decision. A copy of Schedule I is also attached in relation to the public interest test.

Internal review decision

9 Tasmania Police's internal review decision set out its reasons, maintaining as listed in a table at the end of the reasons that all exemptions applied in the original decision remained valid to exempt the corresponding information. In relation to s30, Tasmania Police's internal review decision stated:

> *... I have taken into account the contents* of the *Tasmanian Ombudsman's decision in* C and Department of Police and Emergency Management (2012) Case Reference 1106-219, *which provides guidance on exemptions applying to the disclosure* of *`methods for preventing, detecting or investigating breaches of* the *law'. 1 have determined that portions* of the file *do contain information linked* to *methods [sic] preventing,* detecting *or investing breaches* of the *law and the disclosure of the information would be reasonably likely to prejudice* the *effectiveness of those methods or procedures and as such, is exempt information.*

10 In relation to s3 I, the internal review decision quoted a past Tasmanian Ombudsman decision, then stated:

Communication to *Tasmania Police from the Office of the Director* of *Public Prosecutions relates dominantly to legal advice and as such, I have determined such information* to be *exempt.*

II The internal review decision's application of the public interest test commenced:

> *... `Relevant matters'* [of the public interest test] are *particularised in Schedule I* of the *Act and are applicable in this review (relating to s30(3) of the Act). The public interest* test *is also applicable when considering information to be exempted in accordance with s35 and s36* of the Act. The *following matters from* Schedule I *of the* Act have been *applied during this reveiw:*
>
> *[Matters (a), (f), (h), (m), (n), and* (p) *from Schedule I were then listed].*

Applicant's submissions

12 T submits that she should have been given more information than she received on the basis it was already promised to her and there are no court proceedings that should be holding it up. Specifically, she submitted:

> *Mr Wilby told me that all would be released to me when I said I wanted a copy* of *all information from my* file. There *are no court proceedings on* foot *so that is not a reason to not* re/ease *and I request all* re/eased [sic].
>
> *Abductions and rape is a serious* offence *and the public at large expect Police and DPP should* be *transparent and accountable for any outcomes/non-outcomes and the reasons why.*
>
> *I want all information released as disclosure will improve accountability. I want all internal deliberative information released as I was told it would be and it is in public interest to do so. Thus improving confidence in police and DPP may lead to women's increased trust in* the system.
>
> *Any legal privilege has been waived by police giving [the alleged perpetrator] my name now and breaching my privacy. They gave my current name to a known murderer. I was told by Wilby that I could have copies* of *everything.*

Analysis

13 There were many seemingly blank pages in the information released to T, including a series of pages that appear as if they have been redacted with grey colour. This is due to the file being scanned/copied in its entirety, presumably using double-sided scanning/copying. This has resulted in alternating blank pages being included. The grey coloured pages were copies of folder dividers separating different sets of information. I am satisfied these pages, included in

the pagination of the final determination from Tasmania Police, do not contain assessable information.

Issue I: Would the release of information expose a method or procedure relied on *by Tasmania Police as set out in s30(1)(c)?*

14 Tasmania Police has exempted under s30(1)(c) material on pages 50-53, 56-57, 59, and 70.

15 For information to be exempt under s30(1)(c), its disclosure must be reasonably likely to disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

16 The first reliance on this exemption by Tasmania Police relates to pages 50-53. I will also consider page 70 here as it is relevantly similar. I accept the decision of Tasmania Police and determine the information on these pages is exempt under s30(I)(c). It is not practical to provide in-depth reasons as to how or why I reach this conclusion as to do so would reveal the nature of the exempt information.

17 Suffice to say, although this information is relevant to T, its release would reveal certain methods used to prevent, detect, or investigate breaches or evasions of the law. I am satisfied that to release this information would prejudice the effectiveness of these methods, not just in this particular instance, but for future instances across cases not directly related to this one.

18 The next instance of this exemption relied on by Tasmania Police is at pages 56 and 57. These two pages consist of an extract from a Police database system and could reasonably be described as a top-level information about the alleged perpetrator, the subject of T's application for assessed disclosure.

19 Unlike pages 50-53, I am not satisfied these two pages are exempt under s30(I)(c). The information is inherently different and, in many regards, administrative in nature. The information does not reveal a method or procedure and therefore is outside the scope of this exemption section. This, however, has also been claimed by Tasmanian Police to be exempt under s36 and so will be dealt with under that part of this analysis. I determine for the purposes of this part, however, that the information on pages 56 and 57 is not exempt under s30(I)(c).

20 The final use of this section to be considered is on page 59. For the reasons set out above for pages 56 and 57, I find that page 59 is not exempt under s30(I)(c). There is almost no information on this page, and certainly nothing that would, if released, prejudice the effectiveness of a method or procedure. It contains similar information to that which has already been released by Tasmania Police on page 69. This information is, however, also covered by s36 and I have considered it further below under that section.

Issue 2: Would the *information from* the Office of the *Director* of *Public Prosecutions be subject to legal professional privilege making it exempt under s3 I?*

21 The only reliance by Tasmanian Police on s3I to exempt information on the basis of legal professional privilege is on pages 8-14.

22 For information to be exempt under s3l, the Act provides it must be of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

23 Legal professional privilege is a rule of substantive law' that allows a person to resist giving information that would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice, including for representation in legal proceedings.[2]

24 The High Court of Australia adopted the dominant purpose test for privileged information as a replacement for the former sole purpose test in *Esso Australia Resources Ltd v Federation Commissioner* of *Taxation,*[3] distinguished from *Grant* v Downs.[4]

25 The seven pages 8-14 claimed to be exempt under s3 I are from Principal Crown Counsel at the Office of the Director of Public Prosecutions to Tasmania Police, in response to a request from Tasmania Police (pages 17-18) referred to below. The pages provide legal information for the dominant purpose of giving legal advice and/or advice in respect of litigation. I will not discuss the substantive material. I determine pages 8-14 are exempt under s3 I.

Issue 3: Are the various reports exempt under s35 as claimed by Tasmania Police because they consist of *internal deliberative information?*

26 Tasmania Police relied on s35 to exempt information on the basis it forms internal deliberative information on pages 17-18, 20-21, 26-29, 73, 82, and 96-108.

27 For information to be exempt under s35( ), it must consist of: an opinion, advice, or recommendation prepared by an officer of a public authority; or a record of consultations or deliberations between officers of public authorities in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. This exemption does not include: purely factual information (s35(2)); a final decision, order, or ruling, or reasons which explain such (s35(3)); and information more than I 0 years old (s35(4)).

28 As to the meaning of `purely factual information' in s35(2), I refer to Re *Waterford and the Treasurer* of *the Commonwealth of Australia (No I)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the

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[1] *Attorney-General (NT) v Maurice (1968)* 161 CLR 475 at 490 per Deane J

[2] *Daniels Corporation International v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49 at [9]

[3] (1 999) 201 CLR 49 at 73 [61] per Gleeson CJ, Gaudron and Gummow jj.

[4] (1 976) 135 CLR 674

word 'purely' has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms.'

29 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In Re *Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[6]

30 Applying s35 first to pages 17 and IS, these consist of a letter from Tasmania Police to the Office of the Director of Public Prosecutions headed "Request for File Determination: ...". There are only two paragraphs of these two pages in relation to which exemption pursuant to s35 is claimed. The remaining exemptions claimed rely on s36, which will be considered below.

31 Exemption pursuant to s35 is claimed for the fourth paragraph (that after the acronyms "CIB VCU") on page 17 and for the first paragraph on page 18. While there might be some scope for argument as to whether s35 applies here, the s3 I exemption on the ground of legal professional privilege is more clearly applicable. This letter to the Office of the Director of Public Prosecutions is a request for recommendations as to an investigation. As such, the letter requests legal advice (which was subsequently provided to Police, being pages 8-14 considered above) and these two paragraphs would be privileged from production in legal proceedings. This is so despite the fact Tasmania Police has chosen to release some of the information already which, as the client in the client-lawyer relationship, is its prerogative.

32 Accordingly, I determine that these two paragraphs are exempt under s3l. It is therefore not necessary to determine if they would also be exempt under s35. The remaining exemptions on these two pages relate to s36 and have been considered generally in that context below. However, for the reasons set out above, it suffices to exempt the remaining redactions by Tasmania Police to this two page letter on the grounds of s3l.

33 The next item of information claimed to be exempt under s35 is the first paragraph on page 20 and some information towards the end of page 21. These are part of a document comprising pages 19-29. It is not clear to me on the face of it exactly what this document is. However, on reading it in its entirety, it appears to be an internal briefing or report that consists of some facts, some opinion, and ultimately concludes with recommendations. The recommendations include that the matter be reviewed and forwarded to the Office of the Director of Public Prosecutions for legal opinion if deemed appropriate.

34 The information that has been exempted under s35 on page 20 and towards the end of page 21 is not "purely factual information" within the meaning of

Re *Waterford and the Treasurer* of *the Commonwealth* of *Australia (No I) (1984)* AATA 518 at 14 [6] Re *Waterford and Department* of *Treasury (No 2) (1985)* 5 ALD 588

s35(2) as explained above. Rather, it is more an opinion. I am satisfied this information is, on the face of it, exempt under s35. However, as s35 falls under Division 2 of Part 3 of the Act, any exemption must be subject to the public interest test, which will be considered later below.

35 The next consideration under s35 relates to pages 26 to 29. I will consider this in two parts. The first part will be the information claimed exempt on pages 26 and 28-29. I will then consider the information claimed exempt on page 27 separately.

36 The relevant information on pages 26 to 29 is: the first two paragraphs on page 26; the information above the heading `Medical' on page 28; and all but the last paragraph on page 29.

37 This information consists of an opinion, advice, or recommendation prepared by an officer of a public authority. It is deliberative, or pre-decisional, in that it is being used to seek advice (internally, and ultimately from the Office of the Director of Public Prosecutions) on whether or not a definitive action (steps towards commencing proceedings) should be taken. I am satisfied this information is exempt under s35. As s35 falls under Division 2 of Part 3 of the Act, any exemption must be subject to the public interest test, which will be considered below.

38 On page 27, s35 has been relied on by Tasmania Police to exempt half of the information in the eighth dot point. This is a factual account of the information that an interviewee gave at the Glenorchy Police Station. It is not deliberative in nature, but is a factual representation of what was provided to police in that interview. I am not satisfied this information meets the requirements of s35 and I determine it is not exempt under s35. However, part of this information includes a name of another third party, so I have considered this further below under s36.

39 Page 73 consists of a police report of an "Historical Rape Complaint" made by T at the Hobart Police Station. The relevant information that has been claimed exempt is all of paragraph five and the first two sentences of paragraph seven.

40 The first sentence of paragraph 5 is "purely factual information" regarding T having attended Glenorchy and Hobart CIB. As such, it is not exempt: s35(2).

41 The balance of the information claimed exempt on page 73 is in the nature of opinion regarding the credibility or reliability of T's evidence. For equivalent reasons to those set out earlier regarding similar information, this is exempt under s35(1), subject to the public interest test which I will consider later below.

42 Page 82 is a page of handwritten notes dated 17 April 2003 pertaining to a returned phone call from then Commonwealth (and former Tasmanian) Director of Public Prosecutions (DPP). Tasmania Police has relied on s35 to exempt this information. This page is not exempt under s35 since s35(I)

ceases to apply after I O years from the date of the creation of the information: s35(4).

43 The final reliance on s35 has been applied by Tasmania Police across all of pages 96 to 108. These pages consist of the "Reasons for Decision" by the Parole Board for it making an order that a named prisoner be released on parole. The reasons are dated 2002 so, being older than 10 years, are not exempt under s35 due to s35(4).

44 I note in passing that, leaving aside the 10 year rule, there are various other reasons why the Parole Board's reasons for a parole order such as this should not be claimed exempt under s35 without further consideration. For example, the parole order is not a pre-decisional part of the Board's "deliberative processes" as required for exemption under s35(I). Rather, it is a final order given "in the exercise of an adjudicative function" so the order and the reasons explaining it are not exempt under s35(I) due to s35(3)(a).

45 Furthermore, the Parole Board's power to order that a prisoner be released on parole is in the *Corrections* Act *1997,* s72(3)(a). If the Parole Board makes such an order, it is to publish its reasons for the order (and give a copy to certain victims of the prisoner): *Corrections Act 1997,* s72(7)(b).

46 A number of the Parole Board's decisions can be found on its website dating from 2003.[7] However, I cannot see any 2002 decisions still published there. Accordingly, Tasmania Police is to provide to T a copy of pages 96 to 108 containing the Parole Board's decision.

Issue 4: Is the remaining bulk of the information exempt under s36 on the basis it forms personal information of *another person?*

47 The only remaining exemptions relied on are under s36. For information to be exempt under s36 it must be information that, if disclosed, would reveal the "personal information" of a person other than the person making the application under sl3.

48 The Act, s5(I) defines "personal information" to mean any information or opinion about an individual from which their identity is either apparent or reasonably ascertainable. The definition excludes a person who has been dead for more than 25 years.

49 Tasmania Police has relied on this exemption across a large range of pages: I, 3-7, 17-22, 24-29, 32, 34, 36, 42, 45, 50-53, 56-57, 59, 62-53, 73, 81, 93, 113, 125, 132, 139, 141-150, and 153. The recorded police interview is also considered under s36.

50 I will not consider each of these pages individually as they all largely relate to only a few categories of personal information. These categories are personal information relating to: the alleged perpetrator; third parties; signatures; and other contact details such as email addresses and phone and fax numbers.

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[7] www.justice.tas.gov.au/paroleboard/decisions/decisions_2002

Alleged Perpetrator

51 The former name of the perpetrator alleged by T is well known to her, and she named him in her application. Accordingly, it may seem odd to exempt his personal information, especially his name. However, if this information is released to the applicant, legally it is not limited solely to her, but could potentially become viewable by the world at large. So the alleged perpetrator's personal information requires further consideration under s36.

52 Based on the wording of s36(I), I am satisfied that the name, address, date of birth, physical description, or any other reasonably identifiable information about the alleged perpetrator is exempt under s36. This is not, however, to extend to the headings or titles of the information on these pages from which he is not reasonably identifiable.

53 As s36 falls under Division 2 of Part 3, any exemption must be subject to consideration of the public interest test, which will be considered below.

Third Parties

54 The third parties in this instance are few and largely relate to witnesses, other victims, or people working on behalf of the alleged perpetrator (eg, as a lawyer). With the exception of the references to Lucille Butterworth (such as on pages 26 and 73) and Amanda Carter, I am satisfied the names of third parties meet the requirements of s36(l). The names of Lucille Butterworth and Amanda Carter are outside the s5(I) definition of personal information since they have been dead for over 25 years, so they are not exempt under s36.

55 I determined earlier that on page 27 the eighth dot point was not exempt under s35. Part of this information includes the surname of a third party that is exempt under s36.(I)

56 As s36 falls under Division 2 of Part 3, any s36 exemption must be subject to the public interest test, which will be considered below.

Signatures

57 Tasmania Police relied on exemptions under s36 for the signatures of multiple persons, which can be a form of personal information. Every signature that has been exempted, however, is accompanied with the person's printed name which has been released. Given that, I am not sure of the purpose under s36 in then claiming exemption of their signature.

58 Perhaps refusal to release signatures was an attempt to avoid their subsequent misuse. If so, I do not consider it justified since that would presuppose, in the absence of specific evidence, that a person will then misuse the signature. Given that would likely constitute a crime (within the realm of forgery, fraud and/or impersonating a police officer) the risk of possible misuse does not outweigh the public interest in more fulsome release, including signatures (particularly of persons where their name has already been released).

59 I am satisfied there is no need to consider the signatures further at this point and they should be released in full. This is consistent with my decision in *Webb and DPIPWE (3o January 2020) 01811-065* at paragraphs 35-37.

Phone numbers and email addresses

60 Tasmania Police has applied s36 to various different phone numbers, fax numbers, and email addresses. The phone numbers are for government or business offices. These are not exempt under s36 are to be released in full.

61 The email addresses may be considered personal information under s36, however, based on similar reasoning set out above under `Signatures', I do not think their redaction justified. Except in extraordinary circumstances, the public interest (eg, access and accountability) in release of a public servant's work email address outweighs any argument for it to be withheld. These email addresses are not exempt under s36 are to be released in full.

Police interview with the alleged perpetrator

62 I note from the original decision of Tasmania Police that it consulted with the alleged perpetrator concerning the interview with him recorded 7 March 2016 and he consented to it being released. Tasmania Police exempted it anyway and T's internal review application argued that due to the perpetrator's consent, the entire interview should be released. The internal review decision refused this as, in its words, "The interview contains other non-public authority third parties which is exempt as personal information".

63 The alleged perpetrator's consent to release of the interview, while not binding on Tasmania Police, is a significant consideration in determining if an exemption should apply.

64 The only reason for exemption of the interview claimed by Tasmania Police in its review decision is the personal information of other third parties mentioned. It is inappropriate to exempt the entire 20-minute interview based on its limited reference to personal information of other non-public authority third parties. All the more so here given that the quality of this recording is so poor that it is very difficult to make out responses by the alleged perpetrator. This is confirmed from outside Tasmania Police at page 8 (an exempt document).

65 In this instance, the appropriate approach is for Tasmania Police to extract/redact from the recording prior to its release personal information of other non-public authority third parties, leaving in that of the alleged perpetrator who consented and T. This should not be an unduly onerous task given that the poor quality audio in the recording limits the extent to which it discloses `personal information' as defined in s5(1). For example, paragraph (a) of that definition applies only where an individual's "identity is apparent or reasonably ascertainable from the information".

66 I therefore direct Tasmania Police under s47(l)(q) to:

- reassess the interview recording;
- copy then redact from it exempt information under s36; then
- release the redacted balance to T.

T should be advised of where in the recording extracts have been redacted under s36 and why.

Issue 5: If exemptions are found to apply for s35 or s36, does *the public interest test, on balance, support exemption or* release?

67 I will consider the public interest test in two parts — in relation to s35 and then s36.

Section 35

68 I have made determinations above that s35 does apply to some of the information on pages 26, 28, 29 and 73. This information is contained in a Tasmania Police internal briefing/report which concludes by recommending it be sent to the DPP for legal advice if deemed appropriate.

69 I have considered the matters of the public interest test in Schedule I of the Act (see attached). I find that three Schedule I matters favour release, namely matters (a), (g), and (m). I find these matters favour release for the following reasons:

(a) Matter (a) is broadly worded and release of this information would promote the general need for information to be accessible.

(g) Release of this information would enable enhanced scrutiny of Tasmania Police administrative processes.

(m) Release would promote the interests of T, mostly in enabling her to better understand what occurred based on the information she provided. In particular, release would enable T to read what Tasmania Police officers saw as limitations in a prosecution to the value of the evidence she provided. That should help her to better understand why, after advice from the Office of the DPP, her report of a rape was not pursued to prosecution .

70 In favour of exemption, I also find three matters, namely (h), (j), and (m). I find these matters favour exemption as the primary material is based on an allegation which, following advice from the Office of the DPP, was not prosecuted. Hence, the alleged perpetrator has not had the opportunity to defend the allegation in court. Therefore, release and potential public dissemination of this information would hinder:

- equity and fair treatment of the alleged perpetrator (matter (h));
- their right to procedural fairness (matter (j)); and
- their interests (matter (m)).

71 Furthermore, there is a risk that the release of deliberative or pre-decisional information of the above nature could, in terms of matter (j), harm the administration of justice, including undermining the need to afford procedural fairness to the alleged perpetrator who was not charged with regard to T's complaint. Given that charges were not pursued, I regard matter (j)'s reference to "enforcement of the law" as less likely to be undermined by disclosure in this case (as distinct from one where law enforcement proceedings are ongoing).

72 I have also considered the need to interpret the Act so as to further its object, and exercise discretions pursuant to s3(4)(b). The appropriate balance can be struck by releasing to T most of the information redacted due to s35 on pages 26, 28, 29 and 73, but only where that can be done without prejudicing the rights of the alleged perpetrator (to procedural fairness and the presumption of innocence in relation to T's allegations) or third parties.

73 Therefore, I find that it would be contrary to the public interest to disclose at this time any of the information redacted by Tasmanian Police at page 28. Exemption under s35(I) ceases to apply after 10 years from the date of the creation of the information (which was dated 23 June 2016): s35(4).

74 I find it would not harm the public interest to disclose to T the balance of the information which I have found would otherwise be exempt under s35(I). That balance is the information which Tasmania Police found to be exempt under s35 on pages 26, 29 and 73, subject to the following proviso.

75 Parts of the information on pages 26, 29 and 73 (ie, names other than that of the applicant) may still be exempt under s36 and, pursuant to s36-related reasons, it may harm the public interest to disclose those parts. I therefore direct Tasmania Police release to T the information it redacted due to s35 on pages 26, 29 and 73, but only after redacting all occurrences of the names of:

- the alleged perpetrator; or
- third parties (unless they have been dead longer than 25 years),

if I find that those names are exempt under s36 *and* their disclosure would be contrary to the public interest. I turn now to that latter section 36 issue.

Section 36

76 I have made determinations above that s36 does apply to personal information relating to the categories of `third parties' and the `alleged perpetrator'. I will consider this information together.

77 I have considered the matters in Schedule I and I find that matter (m) favours release of this information. For similar reasons to those described above under the heading "Section 35", I am of the view that the release would promote the interests of T.

78 However, the value to T of this personal information of other individuals is significantly outweighed by those matters favouring exemption, namely matters

(h), (j), (m), and in the case of the third parties, matter (n). The reasons for matters (h), (j), and (m) apply in the same way here as reasoned above for s35.

79 In addition, matter (n) applies. Disclosure (potentially public) of personal information of third parties, or alleged perpetrators, in a matter such as this which does not proceed to prosecution, would prejudice Tasmania Police's ability to obtain similar information in the future from those who would be likely become less likely to cooperate in future investigations.

80 I determine that the personal information of the third parties and the alleged perpetrator is exempt under s36.

Preliminary Conclusion

81 For the reasons set out above, I determine that the use by Tasmania Police of exemptions in:

a. Section 30 is varied in accordance with the above decision.

b. Section 31 is affirmed.

c. Section 35 is varied in accordance with the above decision.

d. Section 36 is varied in accordance with the above decision.

82 I direct Tasmania Police to release to T that information which it had determined was exempt information where I have determined above that it is not.

Submissions to the Preliminary Conclusion

83 The above preliminary decision was adverse to Tasmania Police in that it directed the release of information which it claimed to be exempt. A copy was therefore forwarded to Tasmania Police seeking input before finalising it as required by s48(I)(a). Sergeant Lee Taylor replied very promptly on behalf of Tasmania Police, making submissions into those of the above findings it believed would cause concern. Sergeant Taylor's submissions read as follows.

> ***Points 60 and 61 — Phone numbers and email addresses***
>
> *In relation to points 60 and 61* of *the review, the preliminary decision has been made that the redacted information containing Tasmania Police email addresses and Tasmania Police* phone *numbers are* not *exempt pursuant* to *s36 (Personal Information) of the Act.*
>
> *The decision states at Point 60,* The *phone numbers are* for *government or business offices.* These *are not* exempt *under s36 are to* be *released in full.' Further to this, Point 61 states, The email addresses may* be *considered personal information under s36, however, based on similar reasoning set out* above *under `Signatures, I* do not *think their redaction justified.* Except *in extraordinary circumstances,* the *public interest (eg, access and accountability) in release of a public servant's work* email *address outweighs any argument for it to be withheld. These email addresses are not exempt under s36 are* to *be released in full.'*

I make the submission that the *information redacted in these points should* be *considered as* the *personal information of the officers utilising these facilities.*

The Department of Police, Fire and Emergency Management (DPFEM) and more *specifically Tasmania Police has taken a number* of *precautions* to *maintain the privacy and security of its members.*

Members *of Tasmania Police deal with dangerous situations and dangerous people on a daily basis.* These people *often have varied mental capacities and illnesses and can become a serious safety concern* to the officers who *deal with them, through physical, mental and or emotional harm.*

Further to *this, other members of the community can become fixated on a particular* officer *or unit and harass them through a number of communication platforms including work emails and police `desk' phone numbers which can and does divert* officers away from *their primary functions.*

In an attempt to reduce security breaches including the *harassment* of officers, the DPFEM *provides generic phone numbers (switchboard) and generic email addresses for the public's use. To release this information* to *the general public would give rise to breaches of personal security/safety when other sufficient means have been provided to contact members.*

Tasmania Police make no further submission in relation to the other *points of your Preliminary Decision.*

Further Analysis

84 In summary, **I** accept the matters referred to in Sergeant Taylor's submissions and am persuaded that direct work telephone numbers and the individual email addresses of Tasmania Police officers (collectively, the `contact details') are exempt information under s36. I am so persuaded for the reasons which follow.

85 Personal information is relevantly defined in s5(I) as:

> *... any information* or *opinion in any recorded format about an individual —*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(d)*

86 In the case of the subject emails, the officers' identities are apparent. An individual's identity is reasonably ascertainable from their direct phone number by phoning that number. Hence, both these types of contact details are *personal information* as defined in s5(I).

87 On the other hand, the general 24 hour switchboard number and generic email addresses which DPFEM provides for the public's use are not personal information because they do not constitute information about an individual.

88 Having reached the conclusion that the contact details are personal information, the question then is, whether or not it would be contrary to the public interest to disclose the information.

89 It has been the position of this office that it is not contrary to the public interest to disclose the names of state servants/employees if:

- the servant/employee is acting in the course of their duties;
- the servant/employee is publicly identifiable as being employed in that area; and
- on the face of it, there does not appear to be any personal risk in identifying the servant/employee.'

90 The names of Tasmania Police members are not in issue here, there being no objection to their release, but solely the disclosure of those members' direct contact details. The third dot point in paragraph 89 above, however, has relevance in this regard, given the issues raised by Sergeant Taylor in his submissions. So too does matter (m) of Schedule I: disclosure could well promote or harm the interests of an individual or group of individuals.

91 Sergeant Taylor's submissions persuade me that disclosing the individual contact details of Tasmania Police officers to the applicant, and thus potentially to the world at large, would unduly harm their interests by exposing them to the harassment and the situations to which he refers. That would not only be contrary to public interest matter (m) but also matter (j) in that it would have the potential to harm the administration of justice, including affording procedural fairness and the enforcement of the law.

92 The fact that Tasmania Police provides generic phone numbers and email addresses for the public's use means there is little to be gained, in terms of Schedule I public interest matters, by disclosing the individual contact details. Indeed having considered all of the matters contained in Schedule I, I can find none that favour release of the information. For example, disclosure would not contribute to a matter of public interest, it would not provide any contextual information which would aid in the understanding of a government decision and nor would disclosure promote the administration of justice.

93 Release of the contact details could lead to breaches of personal security/safety, unnecessarily given that Tasmania Police provides sufficient generic phone and email methods for the public to contact its members.

94 Hence, I find that it would be contrary to the public interest to disclose the contact details and they are exempt information pursuant to s36.

95 As noted above at paragraph 90, it is only the contact details of Tasmania Police members — their individual email addresses and direct telephone lines -

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See S *and the Department* of Police, *Fire and Emergency Management (DPFEM)* O1905-210 at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions under "Section 30..." and www.ombudsman.tas.gov.au/ data/assets/pdf file/0010/536995/O1905-210-Decision-online.pdf at [26].

that **I** have determined to be exempt, not their identities. **If** names appear on the header of an email, in its body or in a signature block, these are not exempt; only the address is.

Conclusion

96 For the reasons set out above, **I** determine that the claims for exemption by Tasmania Police on the basis of:

a. Section 30, are varied in accordance with the above decision.

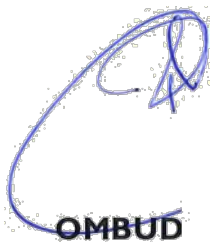
b. Section 3 I, are affirmed.

c. Section 35, are varied in accordance with the above decision.

d. Section 36, are varied in accordance with the above decision.

97 **I** direct Tasmania Police to release to T that which it had determined was exempt information where **I** have determined in this decision that it is not exempt.

Dated: 22 June 2020



Richard C

SMAN

Section 30 — Information relating to enforcement of the law

(I) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to —

(a) prejudice —

(i) the investigation of a breach or possible breach of the law; or

(ii) the enforcement or proper administration of the law in a particular instance; or

(iii) the fair trial of a person; or

(iv) the impartial adjudication of a particular case; or

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

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

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

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

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

(2) Subsection (I) includes information that —

(a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or

(b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or

(c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of

enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or

(f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation —

if it is contrary to the public interest that the information should be given under this Act.

(3) The matters which must be considered in deciding if the disclosure of information under subsection (2) is contrary to the public interest are specified in Schedule I but are not limited to those matters.

(4) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of information under subsection (2) is contrary to the public interest

Section 31 — Legal professional privilege

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

Section 35 — Internal deliberative information

(I) Information is exempt information if it consists of —

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers —

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (I) does not include purely factual information.

(3) Subsection (I) does not include —

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (I) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 — Personal information of a person

(l) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

(2) If —

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party —

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party —

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to —

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of —

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) —

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those I 0 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Under s5(I):

personal information means any information or opinion in any recorded format about an individual —

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

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

SCHEDULE I - Matters Relevant to Assessment of Public Interest

I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(l) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(I) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) 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;

(p) 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;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident, in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) 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;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) 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.