



Right to Information Act Review Case Reference: R2409-016

Names of Parties: Adam Holmes and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s37

Background

- 1 In 2024, plans were announced for a consortium of private investors to deliver a new 'Chocolate Experience' tourism development adjacent to the Cadbury factory in Hobart's northern suburbs. The Tasmanian government, in the lead-up to a state election, indicated up to \$12 million to support the development.¹
- 2 On 31 May 2024, Mr Adam Holmes, a journalist with the Australian Broadcasting Corporation, made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Premier and Cabinet seeking:

Communications with Simon Currant, departmental information regarding Chocolate Experience proposal.
- 3 Specifically, Mr Holmes sought:

[1] - *all communication between Simon Currant (and anyone acting on his behalf) and Premier Jeremy Rockliff (2022, 2023, 2024)*

[2] - *all communication between Simon Currant (and anyone acting on his behalf) and DPAC (2022, 2023, 2024)*

[3] - *all departmental communication regarding Chocolate Experience proposal (2022, 2023, 2024)*

[4] - *briefing notes, advice, minutes, records of meetings, agendas regarding Chocolate Experience proposal*
- 4 On 4 June 2024, the Department of State Growth (the Department) accepted the transfer of Parts 3 and 4 of the application pursuant to s14(1) of the Act, as the subject matter of those parts was more closely connected to its functions. Parts 1 and 2 of Mr Holmes' application remained with the Department of Premier and Cabinet and form no part of this external review.
- 5 On 19 September 2024, Mr Holmes applied for external review under s45(1)(f) of the Act, as the statutory timeframe for the Department to release a decision

¹ Policy position, *Our Strong Plan for a Stronger Economy – Chocolate Experience at Cadbury*, Premier of Tasmania, available at www.premier.tas.gov.au/our-plan/our-strong-plan-for-a-stronger-economy/chocolate-experience-at-cadbury, accessed 11 August 2025.

had expired and he was not in receipt of a decision. This application was accepted.

- 6 On 1 November 2024, as the Department had not issued a decision, my office directed the Department to release a decision to Mr Holmes by 15 November 2024.
- 7 On 24 December 2024, the Department released a decision to Mr Holmes in two parts. The Department identified 104 documents containing 452 pages of information and applied exemptions to some relevant information under:
 - section 35 (internal deliberative information);
 - section 36 (personal information);
 - section 37 (information relating to the business affairs of a third party); and
 - section 39 (information obtained in confidence).
- 8 On 11 February 2025, Mr Holmes advised us that he wished to extend his external review to a substantive review. However, he requested that the review focus on only one document. This document was created by BDA Marketing Planning and is titled *Cadbury Tourism Experience Demand Potential Assessment*. It comprises 44 pages of information, with relevant exemptions only relating to s37. Mr Holmes' request was accepted and information relevant to this review will accordingly be confined to this document.

Issues for Determination

- 9 I must determine if the information not released to Mr Holmes is eligible for exemption under s37 or any other relevant section of the Act.
- 10 As s37 is within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s37, I am then required to determine whether it would be contrary to the public interest to release it. I must have regard to all relevant matters and those matters contained in Schedule 1 at a minimum.

Relevant legislation

- 11 Copies of ss33, 37 and Schedule 1 of the Act are included at Attachment 1.

Submissions

Applicant

- 12 On 11 February 2025, Mr Holmes emailed a submission to my office in support of his application. Relevant extracts are set out below:

The following submission is in the context of the BDA study being procured using a \$79,800 “grant” from the Department of State growth (DSG), and as such, substantial weight must be given to its full release as per the public interest test... As is

apparent when reviewing the RTI as a whole, this “grant” and therefore this study was not subject to competitive process, means testing, public scrutiny or specific public disclosure, and was retrospectively fitted under a department funding stream after public officers decided that the grant should be proceeded with, to then be approved by the secretary...

...

Justifications for the s37 redactions ... do not address the specific sections of the BDA study that have been redacted, and instead speak generally...

13 Mr Holmes then quoted from the Department's decision letter and continued:

Paragraph 26 describes in vague terms “much of the statistics and findings” in the study being “market sensitive”, a term which is not defined, although it is assumed this relates to impacting “on the ability to raise capital and engage with investors”. It is unclear how the release of this information would impact upon that “ability”, as it is assumed the relevant third party (SCA) [Simon Currant and Associates] would disclose the findings of this study when engaging with investors, regardless of the study’s public release.

Paragraph 26 continues “... as well as potential for other competitive businesses to utilize the results of the study with a consequent prejudicial impact on SCA’s ability to seek investment in the project”. The type of business that SCA operates is not described, but it can be assumed to be a “developer” or “consultant”. It is difficult to envisage what type of competitor SCA would attract for this specific venture. It is a highly specific proposal (a “chocolate experience”, etc) which relates to the only facility of its type in Tasmania. There is no indication that any other developer or consultant would be considering such a proposal that could be considered a competitor. As is clear in the RTI, SCA brought this proposal to [the Department] having engaged closely with Cadbury parent company Mondelez. There is no suggestion that Mondelez itself had procured SCA’s services, rather SCA appears to have approached Mondelez with this proposal (ie. Mondelez would not be considering any other developer or consultant to partner with).

Paragraph 27 contains a similar justification, “that revealing this information would provide competitors with a real and substantial chance of using that information to SCA’s competitive disadvantage”. As above, it is unclear what type of competitor this proposal would attract. As such, it is unclear

what the purpose is of using “project specific instructions and assumptions that informed the results” as a justification to withhold information.

Paragraph 27 also mentions that these instructions and assumptions are used to gauge “potential public reception to various elements of the proposal”. As is clear in the RTI, the findings of this study are subsequently utilised to demonstrate to DSG public support for the proposal, which is then used to ask for further public funding... Given the use of public funds for the study, and that the results of that study were then used to request further public funds, it is in the public interest that the results and assumptions that this is based upon be publicly disclosed.

Regarding the public interest test, the following weigh in favour of full release:

(a) DSG has attempted to apply broad redactions to a document that was procured using public funds, purportedly due to potential to “expose the third party to competitive disadvantage”. The justifications provided in the decision letter do not weigh against the need for government information to be accessible...

(b) The BDA study provides key justification for a government decision to subsequently provide further public funding to this proposal, which then became an election promise by the Premier. The scale of this proposal is also significant for Tasmania, one of the largest sums of public funds promised to a private developer... As such, the document and assumptions relied upon to demonstrate demand would clearly contribute to a matter of public interest, and far outweighs the above “competitive disadvantage” grounds.

...

(h) the “grant” provided to SCA was done so without competitive process, and so the BDA study was provided to benefit a private entity with the same opportunity not open to others. Disclosure of the contents of the study would therefore promote fair treatment of persons or corporations in their dealings with the government, by positively affecting those who were not given the opportunity to apply for this grant.

Department

- 14 The Department was not required to provide specific submissions for this external review, as it had provided its reasoning in its decision. I will set out relevant extracts from this reasoning.

- 15 In relation to the application of s37, the Department indicated:

The third party identified relevant to this exemption includes [sic] Simon Currant and Associates (SCA).

- 16 The Department then indicated that consultation with SCA had occurred pursuant to s37 of the Act, and continued:

In response to my request for consultation, SCA advised that any information provided in confidence to the Department or identified as commercial in confidence was considered confidential as well as comprising intellectual property owned by Simon Currant, and that disclosure of this information would be considered catastrophic to SCA's business interests...

With regard to the BDA Demand Study, SCA advised that it considers much of the statistics and findings from within the Study to be 'market sensitive', which if released, would have a direct and negative impact on its ability to raise capital and engage with investors (a process which is still underway), as well as potential for other competitive businesses to utilize the results of the study with a consequent prejudicial impact on SCA's ability to seek investment in the project.

SCA also advised that the findings of the study were tailored to project specific instructions and assumptions that informed the results provided by BDA Marketing, who used those instructions to specifically test elements of the proposal and its implementation, as well as the potential public reception to various elements of the proposal. SCA therefore consider that revealing this information would provide competitors with a real and substantial chance of using that information to SCA's competitive disadvantage.

...

... I am satisfied that disclosure could cause significant competitive disadvantage to SCA by giving their competitors insight into their business practices, and many of the financial and project specific details that are still being worked through and negotiated with various stakeholders, and that this information is therefore exempt under s37.

- 17 The Department then addressed the application of the public interest test to the information it had identified as exempt under s37:

The results of the consultation undertaken with SCA indicated that the information in issue is both commercially sensitive and confidential, on the basis that it relates to a project that is still

under development. The information includes commercially sensitive concept designs, and financial breakdowns of work undertaken on the proposal to date.

I consider that SCA would incur significant competitive advantage [sic] should this information be released as ongoing negotiations are occurring with other potential partners and investors, who might consequently be deterred from becoming involved in the project.

I also do not consider it appropriate for third parties to have their commercial position put in jeopardy simply by virtue of their engagement with government, particularly where the detail and implementation of a proposal, as well as its funding sources, are still subject to development and negotiation. In my view, release of SCA's business information, would be a breach of trust that would significantly impair the Department's relationship with that business.

Further, such conduct would be likely to damage the Department's reputation on a broader scale, diminishing its capacity to engage effectively with future third party businesses who would be less likely to provide critical commercial information or enter into similar cooperative arrangements on the basis that such information might be released.

On balance, I accept SCA's characterisation of the information as being of a type not available to its competitors, and that release of the information would result in competitive disadvantage for them. Accordingly, this information should not be released.

Analysis

Section 37 – Information relating to business affairs of third party

- 18 Section 37(1) of the Act provides for information to be exempt from disclosure if it is related to the business affairs of a third party, when a public authority obtains that information from a person or organisation other than the person making the application for assessed disclosure, if either:
 - (a) *the information relates to trade secrets; or*
 - (b) *the disclosure of the information would be likely to expose the third party to competitive disadvantage.*
- 19 The Department has restricted its submissions to s37(1)(b), and there is no suggestion that trade secrets are involved, so I will confine my analysis to the issue of competitive disadvantage.

- 20 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991* (Tas), the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman*² 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...

- 21 At [59], Porter J added:

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

- 22 At [41] the Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.
- 23 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*³ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and my office has taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the New South Wales Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that I am also not subject to the supervisory jurisdiction of the Supreme Court of Tasmania.
- 24 Accordingly, the value of *Forestry Tasmania v Ombudsman* as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.
- 25 The Department provided my office with unredacted copies of the 308 pages of information released as Part 1 of the response to Mr Holmes' application. The document which is the subject of this external review begins at page 169 and concludes at page 213. For ease of reference, I will use the Department's page numbering to refer to the relevant information within the document.
- 26 The Department has applied s37 to exempt 32 pages of information in their entirety and to partially exempt information on one further page.

² [2010] TASSC 39.

³ [2017] NSWCA 275.

27 Section 47(4) of the Act provides:

Where the Ombudsman is determining a matter brought by an applicant, the public authority or Minister concerned has the onus to show that the information should not be disclosed and it is open to the Ombudsman to determine the outcome of a review on the basis that the onus is not discharged.

- 28 The specific document was created in August 2022. Some pages contain graphs derived from publicly available statistics and other pages refer to the results of market research where general concepts are explored, many of which have been the subject of media releases and articles.⁴ A small amount of information relates to potential pricing and revenue projections which has not been publicly released.
- 29 The Department's broad submission is that release of much of the information would provide competitors with a real and substantial chance of using that information. While I accept there is competition in the tourism sector, I note that potential competitors are not identified, even in a general sense. The tourism development has been described as 'a unique visitor attraction'⁵ and so I am not persuaded that direct competition in providing this specific type of experience is relevant. The likelihood of competitive disadvantage to SCA is consequently significantly reduced.
- 30 Accordingly, subject to the following exceptions, I am not satisfied the Department has discharged its onus under s47(4) to show that the information should not be disclosed.
- 31 The exceptions to my determination are pages 186, 202, 203, 205-207, 209, 210, 212 and 213, which contain financial projections. I am satisfied it is a real possibility and not a remote chance of competitive disadvantage to SCA if this information was released and find the relevant pages are *prima facie* exempt under s37(1)(b).

Public interest test

- 32 I now turn to the public interest test under s33 and to assessing whether, after taking into account all relevant considerations and Schedule 1 matters, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt.
- 33 Matter (a) – *the general public need for government information to be accessible* – was identified by the Department as relevant. As this matter is in

⁴ For example, Policy position, *Our Strong Plan for a Stronger Economy – Chocolate Experience at Cadbury*, Premier of Tasmania, available at www.premier.tas.gov.au/our-plan/our-strong-plan-for-a-stronger-economy/chocolate-experience-at-cadbury, and Bailey, S. and Wilson, A., 'It's reigniting an absolute icon': Chocolate Experience at Cadbury's to bring back spirit of beloved tours (10 March 2024), The Mercury, www.themercury.com.au/news/tasmania/tourism-giant-simon-currant-pitches-chocolate-experience-project-to-go-next-to-cadbury/news-story/6a25a99a25fce5bf81f1e71cd441ba7a, both accessed 11 August 2025.

⁵ See Note 4, Premier's Policy position.

line with the object of the Act as set out in s3, I agree that it weighs in favour of disclosure.

- 34 Matter (b) – *whether the disclosure would contribute to or hinder debate on a matter of public interest* – was identified as a relevant matter by the Department. The scale of the proposed ‘Chocolate Experience’ and the allocation of public funding in support of the project has been the subject of media attention⁶ and community debate. Release of the commercial basis for and assumptions behind visitor and revenue estimates can only contribute to debate on the subject. This matter weighs in favour of disclosure.
- 35 Matter (c) – *whether the disclosure would inform a person about the reasons for a decision* – was identified by the Department as relevant. I agree with this, and also consider matter (d) – *whether the disclosure would provide the contextual information to aid in the understanding of government decisions* – to be relevant. Both matters weigh in favour of disclosure, as the information may allow for a more in-depth understanding of the decision to commit public funds to the development.
- 36 Matter (f) – *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation* – was not discussed by the Department but I consider it relevant. Disclosure of further information used to inform the Department’s decision can only enhance public scrutiny of government spending and further the object of the Act as set out in s3(1)(a). This matter weighs in favour of disclosure.
- 37 Matter (h) – *whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government* – was identified as relevant by the Department, which argued it is not appropriate for third parties to have their commercial position put in jeopardy simply by virtue of their engagement with government... I agree that this matter is relevant, however as I indicated in the previous decision of *John Perry and City of Launceston*:⁷

...there has been a legislated right to information held by Tasmanian public authorities for over thirty years. Businesses and corporations should understand that any information they share with public authorities when seeking to obtain government grants may become subject to assessed disclosure under the Act. This further entails that such information may be made publicly available, because this is part of the cost of doing business in Tasmania...

⁶ Holmes, A., *Rockliff promise of ‘world’s tallest chocolate fountain’ came out of nowhere, but documents show years of grants and lobbying* (6 July 2025), ABC News online, www.abc.net.au/news/2025-07-06/rti-jeremy-rockliff-chocolate-experience-tasmania-hobart/105496508, accessed 11 August 2025.

⁷ January 2025, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

I therefore consider this matter weighs against disclosure of some information, but only slightly. I make the same assessment in relation to matter (m) – *whether the disclosure would promote or harm the interests of an individual* – and matter (s) – *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation* – and for the same reasons. These matters were also considered relevant by the Department.

- 38 Matter (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* – was identified as relevant by the Department. Given that SCA is already well progressed in its development of this project and does not have direct competition in relation to the development of a ‘Chocolate Experience’ in Tasmania, I do not consider the relevant information is likely to cause major harm to SCA’s competitive position. There is a genuine chance of some harm, however, so I consider this matter weighs against disclosure.
- 39 The public interest test requires a consideration of competing factors on a case-by-case basis, where not all relevant matters have equal weight when applied to the issue in question. On balance, I am satisfied the following specific financial information is exempt under s37(1)(b):
- on page 186 – only the pricing table;
 - on page 203 – only the dollar values in all three tables;
 - on page 205 – only the three ticket revenue figures;
 - on page 206 – only the nine ticket revenue figures;
 - on page 207 – only the six ticket revenue figures;
 - on page 209 – only the 15 ticket revenue figures;
 - on page 210 – only the 15 ticket revenue figures;
 - on page 212 – only the dollar values, including those in the tables; and
 - on page 213 – only the ticket revenue figure.
- 40 The remainder of the information is not exempt and should be released to Mr Holmes.

Preliminary Conclusion

- 41 For the reasons set out above, I determine exemptions claimed pursuant to s37 are varied.

Conclusion

- 42 As the above preliminary decision was adverse to the Department, on 13 August 2025 it was made available to it pursuant to s48(1)(a) of the Act to seek its input before finalisation.

43 On 1 September 2025, the Department advised:

The Department asked Simon Currant to make representations directly to your office. The Department does not intend to make any submissions in addition to anything Mr Currant may have advised.

44 Neither Mr Currant nor Simon Currant and Associates made submissions.

45 Accordingly, and for the reasons set out above, I determine exemptions claimed pursuant to s37 are varied.

46 I apologise to the parties for the delay in finalising this external review.

Dated: 4 September 2025



Leah Dorgelo
ACTING OMBUDSMAN

ATTACHMENT 1 – Relevant Legislation

Section 37 – information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(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 substantial concern to the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

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

(e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its 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 third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43, 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 workdays the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

- (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.

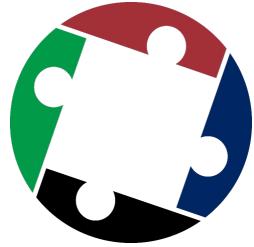
SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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: R2307-015

Names of Parties: Andrew McCullagh and Northern Midlands Council

Reasons for decision: s48(3)

Provisions considered: s30, s31, s36

Background

- 1 Mr Andrew McCullagh (the Applicant) has been an elected member of the Northern Midlands Council (Council) since 2022.
- 2 On 19 April 2023, Mr McCullagh lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) seeking *information relating to planning matters and internal communications*. Specifically, Mr McCullagh sought:
 1. *Please provide all information (each and every document & email correspondence) relating to the development of 26-28 Charles St Cressy. Such should include, the original application, the refusal (if any) of the original application, the approval documentation and any other information of relevance to this matter.*
 2. *Please provide copies of any legislation change relating to “seasonal worker” accommodation or similar that may have occurred between Jan 2021 and March 2023 that may have effected [sic] the above application.*
 3. *Please provide all emails and/or written correspondence that may have occurred between any Councillor, the General Manager, the Mayor, or the GM’s secretary that was sent by way of the Council email system between Dec 1, 2022 and February 28 2023 to former Councillor Ian Goninan.*
- 3 On 1 May 2023, Council emailed the Applicant with a request that he nominate which development application at 26-28 Charles St, Cressy was the subject of Part 1 of the application. Mr McCullagh responded:

I referred specifically to the original and secondary applications.

For clarity it was for the purpose of seasonal worker accommodation.

It seemingly had two applications, as the first was refused.

As such can I have copies of BOTH applications referring to Seasonal Accommodation lodged for 26-28 Charles St Cressy in the year 2022.

- 4 On 3 July 2023, Ms Victoria Veldhuizen, a delegate for Council, issued a decision. In response to Part 1 of Mr McCullagh's request, Ms Veldhuizen released 38 documents in whole or in part and relied upon ss31 (legal professional privilege) and 36 (personal information) of the Act to exempt some information in the documents.
- 5 In response to Part 2 of the application, Ms Veldhuizen refused the request. She set out that this was because the information sought was not within Council's possession and provided a link to a website which contains all Tasmanian legislation.
- 6 In relation to Part 3 of the application, all responsive information was assessed as being exempt in full pursuant to ss30 (information relating to the enforcement of the law) and 36 (personal information) of the Act.
- 7 On 13 July 2023, Mr McCullagh sought internal review and referred specifically to Part 3 of the request. On 24 July 2024, Ms Maree Bricknell, a delegate for Council, released the internal review decision. Ms Bricknell affirmed the *response made by the initial RTI officer to you under the Act* and indicated that her decision was made *for the same reasons*.
- 8 On 25 July 2023, Mr McCullagh sought external review, which was accepted pursuant to s44 of the Act. On 30 September 2024, Mr McCullagh confirmed he wished for the entire decision to be reviewed, not just the part which related to Part 3 of his application.

Issues for Determination

- 9 I must determine whether the information not released by Council is eligible for exemption under section 30, 31, 36 or any other relevant section of the Act.
- 10 As s36 is contained within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s36, 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 1.

Relevant legislation

- 11 Copies of ss30, 31 and 36 are at Attachment A.
- 12 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

13 Mr McCullagh made no submissions in relation to this external review.

Council

14 Council was not required to make specific submissions but provided some reasoning for its position in both the initial decision and in a response to my office in relation to the acceptance of the external review.

15 As part of the initial decision, Council reasoned in relation to Part 3:

The information sought has been reviewed and assessed as exempt pursuant to sections 30(1)(a)(ii) (information relating to the enforcement of the law and would be reasonably likely to prejudice the enforcement or proper administration of the law in a particular instance), 30(1)(d) (information relating to the enforcement of the law and would be reasonably likely to endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person) and 36 (personal information of a person) of the Act.

I have assessed whether disclosure of exempt information on the basis of personal information would be in the public interest and have concluded disclosure is not in the public interest taking into account the matters relevant in Schedule 1 of the Act. I have concluded that:

- a) *Disclosure of the information doesn't promote the general public need for government information to be accessible as it relates to discrete private information with Council (item 1(a));*
- b) *Disclosure of the information would not inform a person of the reasons for a Council decision, not provide contextual information to aid in understanding government decisions (items 1(c) and (d));*
- c) *While disclosure may inform the public about rules and practices of government in dealing with the public, this would be to a limited degree. The information does not relate to a particular process or procedure and disclosure would be of limited use in assisting the public to understand Council's rules and practices (item 1(e));*
- d) *The matters relate to the subject individual in his personal capacity, not as a councillor. As a result, I do not consider the information is of public interest, nor would it contribute to public debate (item 1(b)); and*

- e) *There is potential that disclosure may harm the interests of an individual (item 1(m)).*

Accordingly, I have concluded that disclosure of the exempt information is not in the public interest and will not be disclosing the same.

- 16 On 15 September 2023, Council provided further reasoning to my office regarding its decision on Part 3 of the request:

Section 30(1)(a) ... exemption applies to these documents as the information (letter and statutory declarations) was not attached to the Code of Conduct Panel's Determination Report and has not been disclosed by council... It would compromise the proper functioning and jurisdiction of the Code of Conduct Panel for [the information] to be publicly disclosed and interrogated.

Further, any document contained within the addendum Code of Conduct determination is required to remain confidential per section 28ZK(8) of the Local Government Act 1993.

Further, it is a breach of section 339(2A) of the Local Government Act 1993 for a person to make improper use of information acquired by that person in relation to a Code of Conduct investigation... a reasonable apprehension exists that any information obtained in accordance with this RTI request could result in improper use as defined.

Section 30(1)(d) ... exemption applies... There are previous issues and an acrimonious relationship between Mr McCullagh and Mr Goninon...

Analysis

- 17 As part of the response to Part 1 of the application, Council provided my office with a list of four 'bundles' of documents which were released to Mr McCullagh. Exemptions were only applied to information in two of the bundles, headed *PLN21-0339* and *26-28 Charles Street, Cressy – Property File*. Council subsequently provided my office with a list of the nine documents comprising 46 pages of information in relation to which exemptions had been applied. For ease of reference, I shall use the numbering from this list of nine documents.
- 18 In response to Part 3 of the application, Council provided my office with a list of nine documents comprising 36 pages of information, none of which were released to Mr McCullagh. For ease of reference, I will also use Council's numbering in relation to these documents.

Section 30 – Information relating to enforcement of the law

Section 30(1)(a)(ii)

19 Council has claimed information in three documents is exempt pursuant to s30(1)(a)(ii). For this section to apply, I must be satisfied that disclosure of the information would, or would be reasonably likely to, prejudice:

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

20 The word prejudice is not defined in the Act and therefore is to be given its ordinary meaning. The Macquarie dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally*.¹

Email from Simmons Wolfhagen dated 28 July 2022 with copy of TASCAT's directions.

21 This email is listed as Document 8 of Part 1 at pages 39-43. Council has applied both s30(1)(a)(ii) and s31 to exempt the entire five page document. The document consists of a short introduction which forwards to Council the directions issued by the Tasmanian Civil and Administrative Tribunal (TASCAT) on 27 July 2022, along with Council's grounds of refusal of a development proposal, which are dated 21 July 2022.

22 The document is purely administrative and contains no information identified as confidential in nature. Council has not indicated how or why such a document may prejudice the administration of the law. Pursuant to s47(4) of the Act, Council has the onus to show why the information should not be released and I determine that that onus has not been discharged. The document is not exempt under s 30(1)(a)(ii) of the Act and will be considered again under ss31 and 36.

Email from Mayor Knowles dated 13 December 2022

23 This is Document 3 in Part 3 at pages 5-22. Council has applied s30(1)(a) to exempt the entire 18 page document, however has referred to *prejudicing the proper administration of the law* so I will assess the exemption applied as s30(1)(a)(ii).

24 The email forwards six statements in the form of statutory declarations, and information regarding a forthcoming hearing of a Code of Conduct Panel. This Code of Conduct hearing occurred on 18 January 2023. I note that the Determination Report of the Code of Conduct Panel was tabled at the ordinary meeting of Council which occurred on 20 February 2023, where Mr McCullagh was present in his capacity as a Councillor. This report is also available online.

25 Confidential information relating to Code of Conduct hearings is contained in an addendum to a Determination Report. Council has relied upon s28ZK of the *Local Government Act 1993* to submit that the statements should not be released. This section requires any addendum to a determination report to be

¹Definition of prejudice, Macquarie Dictionary, available at www.macquariedictionary.com.au, accessed on 22 October 2024.

tabled at a closed meeting of a council,² and additionally that any person who receives an addendum must keep that addendum confidential.³

- 26 Division 3 of the *Local Government Act 1993* deals with Code of Conduct complaints and does not provide that investigations of such complaints generally are excluded from the provisions of the Act. However, Parliament's requirement for any addendum to a Determination Report to be tabled at a closed meeting of a council indicates a clear intention that such documents are to remain confidential.
- 27 I am not assessing an addendum, however, and it is unclear whether this information is contained in any addendum created. The authors of the statements are known and their general content has been published by the Code of Conduct Panel in its Determination Report, so the likelihood of the release of this information deterring future participation in the process is significantly reduced. I am not persuaded that Council has discharged its onus under s47(4) of the Act to show the information should not be disclosed. Accordingly, I determine the information is not exempt under s30(1)(a)(ii) but will be further considered under s30(1)(d) and s36.
- 28 The email itself and the attachment containing details of the Code of Conduct hearing are administrative in nature and so are not exempt under s30(1)(a)(ii) but will also be further considered under s30(1)(d).
- 29 I briefly address Council's submission that the information should remain exempt because, in light of Mr McCullagh's demonstrated history of publicly disseminating information on his Facebook pages, there is a reasonable apprehension that any information Mr McCullagh received as a result of this right to information application could be used improperly, in contravention of s339(2A) of the *Local Government Act 1993*. This section provides that:

A person must not make improper use of any information acquired by the person in relation to a code of conduct investigation.

- 30 Improper use of information is defined as including using the information to cause any loss or damage to a council or person. A breach of this section carries a penalty of up to 50 penalty units.
- 31 Consistent with the view I expressed in my decision of *Karl Willrath and Dorset Council* (August 2023),⁴ the mere act of disclosure of the information under this Act cannot amount to an improper use of information. If a person validly exercises their legal right under the Act to access information, it could not be improper. Disseminating and commenting on any information would similarly not be an improper use of information, provided any comments were not defamatory or otherwise contrary to law. The penalty provided under s339(2A)

² *Local Government Act 1993*, s28ZK(5)(b).

³ *Local Government Act 1993*, s28ZK(8).

⁴ Available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

of the *Local Government Act 1993* would appear to be sufficient deterrent to anybody considering making improper use of information.

Email from Mayor Knowles dated 13 January

- 32 This is Document 4 in Part 3 at pages 23-26. It forwards a Zoom link to the Code of Conduct hearing and amends the time of that hearing. Its release cannot prejudice the administration of the law, as there is nothing confidential in the email and the Code of Conduct complaint has been considered and the determination tabled. This document is not exempt under s30(1)(a)(ii) and will be considered further under s30(1)(d).

Section 30(1)(d)

- 33 Council has further relied upon s30(1)(d) to exempt the previous two emails and attachments from Mayor Knowles.
- 34 For this section to apply, I must be satisfied that disclosure of the information would, or would be reasonably likely to, endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person.
- 35 As I have said in previous decisions,⁵ the phrase *emotional or psychological safety* needs to be read in its context, including the preceding words. It is my view that these words denote a risk of harm sufficiently serious as to be commensurate with the endangerment of a person's life or physical safety.
- 36 Similarly, the words *increase the likelihood of harassment or discrimination of a person* should be read in the same context.
- 37 This approach is consistent with Parliament's expressed intention that the Act be interpreted so as to further its object by giving members of the public the right to obtain information held by public authorities and to obtain information about the operations of Government. It is also expressly stated in s3(4) that *discretions conferred should be exercised so as to facilitate and promote ... the provision of the maximum amount of official information*.
- 38 The words *would, or would be reasonably likely to*, in s30(1)(d) require an objective assessment of whether there is a reasonable possibility of endangering a relevant aspect of a person's safety, as opposed to a possibility that is remote or unlikely.
- 39 The Federal Court has said, in an analysis of corresponding Commonwealth legislation, that a personal or subjective belief is not determinative. Rather, it is necessary to determine whether the documents have such a character that

⁵ See, for example, R2202-124 *Karl Willrath and Dorset Council* (August 2023) and O1801-016 *Simon Cameron and Department of Natural Resources and Environment Tasmania* (January 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

their release would, or could be reasonably expected to, endanger the life or physical safety of any person⁶ or increase the likelihood of harassment.

- 40 In this case, Council submitted that there are *previous issues* and an acrimonious relationship between Mr McCullagh and Mr Goninon but provided no details or reasons why the release of the statements would raise the risk of harassment to any person to the extent required for information to be exempt. Accordingly, I find that Council has not discharged its onus under s47(4) of the Act to show that the information should not be disclosed. Exemptions in Division 1 of Part 3, which are not subject to the public interest test, must be applied only when absolutely necessary, to ensure the object of the Act is upheld. I determine the emails are not exempt under s30(1)(d). I will consider this information under s36, however, as the full statements have not previously been released and so further assessment is warranted.
- 41 I note that Council has identified Documents 1, 2, 5, 6, 7, 8 and 9 in part 3 of the application as also being exempt under s30(1)(d), but has addressed the public interest test in s33 in relation to these documents. Given Council's reference to s36 in other parts of the Schedule as well as in the initial decision to Mr McCullagh, I am satisfied that the reference to s30(1)(d) was an error and Council intended to assess these documents under s36, as I will do.

Section 31 – Legal professional privilege

- 42 For information to be exempt under s31, I must be satisfied that it *is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.*
- 43 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between clients and their lawyers and to enable lawyers to give proper legal advice.⁷ It is a common law principle which protects the confidentiality of communications made between lawyer and client, if they were made for the dominant purpose of giving or obtaining legal advice.⁸

Email from Simmons Wolfhagen dated 28 July 2022 with copy of TASCAT's directions.

- 44 I have already determined this document is not exempt under s30 of the Act. I now must consider whether it is exempt under s31, as Council has indicated.
- 45 The email is from Council's lawyers, Simmons Wolfhagen, to Council, however it merely forwards directions issued by TASCAT on 27 July 2022 in relation to a planning matter, as well as Council's revised grounds of refusal dated 21 July

⁶ *Centrelink v Dykstra* [2002] FCA 1442 at [24]-[25], when considering s37(1)(c) in the *Freedom of Information Act 1982* (Cth).

⁷ *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ.

⁸ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 per Gleeson CJ, Gaudron and Gummow JJ.

2022 and filed at TASCAT. Nothing in the email or attachments is included for the dominant purpose of seeking or providing legal advice and in fact is described by Simmons Wolfhagen as for *information and records*. As such the document is not exempt under s31 and will be further considered in relation to s36.

Email to Northern Midlands Council Planning dated 23 June 2022

- 46 This is Document 9 in Part 1 (pages 44 – 46) and consists of an introductory email attaching a letter from Glynn Williams Legal to the General Manager of Council. Council applied s31 to exempt the letter in its entirety.
- 47 Glynn Williams Legal represents a third party, not Council. It wrote on behalf of its client to Council regarding a matter under the *Land Use Planning and Approvals Act 1993*. This is not a communication between a lawyer and their client for the dominant purpose of seeking or providing legal advice and so the letter is not exempt under s31 of the Act. It will be further considered in relation to s36.

Section 36 – Personal information of a person

- 48 Council has relied upon s36 to exempt certain information as personal information. In addition, there are seven documents in Part 3 where information was originally proposed by Council to be exempt under s30, which will be assessed here, and there are two documents I have found to be not exempt under s31, which I will also assess under this section. Finally, I will assess the six statements in the form of statutory declarations which are attached to the email from Mayor Knowles dated 13 December 2022 and which I determined are not exempt under s30(1)(a)(ii).
- 49 For information to be exempt under s36 of the Act I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 50 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.*

- 51 Council has identified information of this nature across four broad areas:
 - public officers and employees;
 - external professionals from Simmons Wolfhagen Lawyers, Glynn Williams Legal and 6ty^o Architects and Planners;

- information responsive to part 1 of the application; and
 - information responsive to part 3 of the application.
- 52 The information consists of details such as the names, emails, position titles and direct telephone numbers of public officers and external professionals; contact details for members of the community who have made representations to Council; and information within statements prepared for a code of conduct hearing.
- 53 It is clear that the information falls within the definition of personal information in s5 of the Act and there is no suggestion that the persons concerned have been dead for more than 25 years. I am satisfied that the information is *prima facie* exempt under s36 of the Act.
- 54 The two documents in Part 1 which I have determined are not exempt under s31 of the Act contain similar personal details and I am likewise satisfied that this information is *prima facie* exempt under s36.

Public interest test

- 55 That the information may be considered personal information and *prima facie* exempt does not preclude it from release if doing so would not be contrary to the public interest.

Public officers and employees

- 56 It has been my consistent position,⁹ as well as standard Australian practice, that the personal information of public officers which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether a public officer is a current or former employee is irrelevant to the assessment under s36 of the Act.
- 57 The exception to this practice is direct and mobile phone numbers and emails, which I have consistently found to be exempt under s36 where these are not routinely provided to the public. It is valid for public authorities to limit the release of direct contact details of staff to ensure public enquiries are able to be directed through appropriate channels.
- 58 Accordingly, except for telephone numbers and emails not routinely provided to the public, personal information of employees of public authorities, including Council and TASCAT, is not exempt under s36 and is to be released to Mr McCullagh.

⁹ See, for example, R2203-003 *Anthony Scott Bell and Department of State Growth* (August 2024) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

External professionals

59 It has also been my consistent position¹⁰ that personal information of external professionals acting in their professional capacity is not exempt, except for contact details not normally publicly available. It is not apparent why identifying legal or other professionals would be contrary to the public interest and Council has made no submission in support of the proposed exemption. Accordingly, with the exception of direct person telephone and email contact details, information relating to legal and other professionals from 6ty^o, Simmons Wolfhagen Lawyers and Glynn Williams Legal in Part 1, Documents 8 and 9, is not exempt and are to be released to Mr McCullagh.

Information responsive to Part 1 of the application

- 60 I now turn to the matters in Schedule 1 of the Act which are relevant to the assessment of the public interest regarding the information of members of the community identified in Part 1 of Mr McCullagh's application. This part concerns information which forms a part of a planning and development dispute with a proposed change from a single dwelling to communal use of a site.
- 61 Council has applied s36 to exempt personal information of community members opposed to the proposed development who have contacted Council, either individually, through their legal representative, or whose personal information is contained within a petition.
- 62 I note that representations objecting to the proposal have previously been published by Council, however the information in question here relates to separate correspondence from those objectors who did not agree to participate in mediation. There is also a petition signed by many of the same people who signed a previous petition which was published by Council with telephone numbers redacted.¹¹ This previous petition was determined to be non-compliant with s57 of the *Local Government Act 1993*.¹²
- 63 Matter (a) – the general public need for government information to be accessible – is always relevant and weighs in favour of disclosure.
- 64 When considering matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – I acknowledge that development in an existing residential area is a matter of public interest. However, I do not consider that to identify individuals when their general concerns are already public knowledge will notably contribute to community debate on this particular issue.

¹⁰ See, for example, R2202-024 *Clive Stott and TT-Line Company Pty Ltd* (June 2022) at [44] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

¹¹ Northern Midlands Council, agenda for ordinary meeting of council, 27 June 2022, available at www.northernmidlands.tas.gov.au/council/your-council/council-meetings accessed on 31 October 2024.

¹² Northern Midlands Council, agenda for ordinary meeting of Council, 11 April 2022, available at www.northernmidlands.tas.gov.au/council/your-council/council-meetings accessed on 31 October 2024.

- 65 Accordingly, I am not persuaded that the release of the individuals' personal information would contribute significantly to debate and so this factor weighs only slightly in favour of disclosure.
- 66 I consider matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – to be relevant and weigh against disclosure. Planning and development disputes in residential areas have the potential to become heated, with proponents and opponents often living in close proximity to each other. Release of identifying information may increase the likelihood of friction within the community and cause harm to the interests of individuals, particularly where details such as telephone numbers are disclosed.
- 67 I also consider matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – to be relevant and also weigh against disclosure. The purpose for which the information was provided to Council goes beyond the initial public representations surrounding a proposed development and includes objections to any mediation. Further, the publication of the telephone numbers of those who signed a petition may discourage other community members, fearing harassment, from making their opinions known to councils in future. This has the potential to affect the range of information and opinions available to a council, not just in relation to development but extending to other matters for which local government has responsibility.
- 68 On balance, I have determined that all the remaining personal information of representors and other members of the community which is contained in the information responsive to Part 1 of the application, as well as all telephone numbers recorded on the petition, is exempt and not required to be released to Mr McCullagh. This includes those *Applicants to Join* and correspondents who are identified in Documents 8 and 9.

Information responsive to Part 3 of the application

- 69 I have previously determined that the most relevant exemption provision under which to assess this information, including the statements attached to Mayor Knowles' email, is s36. Part 3 of the application sought any communication between various Council officers and former Councillor Ian Goninon between 1 Dec 2022 and 28 February 2023.
- 70 Council considered that matter (a) was not relevant as it does not promote the general public need for government information to be accessible as it relates to discrete private information with Council. I do not agree with this assessment. Matter (a) essentially restates the object of the Act and, as such, will always be a relevant consideration and weigh in favour of disclosure. The information in this case was sent or received by way of Council's email server and relates to Council's official business.
- 71 Matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant. A Code of Conduct hearing into the alleged actions of an elected councillor is undoubtedly a matter of public

interest, not least for residents and ratepayers of the Council concerned, and the evidence given during that hearing would contribute to public debate.

- 72 However, I note that the hearing occurred on 18 January 2023 and the Code of Conduct Panel's determination was tabled, along with reasons and a summary of relevant evidence, at the ordinary meeting of Council held on 20 February 2023.¹³ Accordingly, I am not persuaded that the release of the statements would add significantly to public debate and so this factor weighs only slightly in favour of disclosure.
- 73 Matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – is a relevant matter when assessing the statements submitted to the Code of Conduct hearing. I note that s28ZH(7) of the *Local Government Act 1993* provides that a Code of Conduct hearing is closed to the public. I also consider it relevant that s28ZJ(1) of that Act does not require that all evidence introduced at the hearing be reproduced verbatim. Although these sections do not explicitly exclude Code of Conduct hearings from the operation of the Act, it is apparent that Parliament intended that such hearings be conducted with a degree of confidentiality.
- 74 In this case, a summary of the evidence relied upon by the panel has been publicly released as part of the determination report. I am of the view that the administration of justice in relation to Code of Conduct matters in local government may be adversely affected if the totality of evidence can be routinely discovered through the right to information process when the probative value of that evidence may have been minimal, or not considered by the panel to be determinative. For these reasons I consider this matter weighs against disclosure.
- 75 Matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – was identified as a relevant matter by Council. I partly agree with this assessment. Witnesses who have provided evidence, in the expectation that their evidence will be considered in a closed hearing, may fear harassment if they are widely perceived to be favouring one side in a complaint, particularly if their evidence is only peripheral to the substantive issues or not ultimately considered. I consider this matter weighs against the disclosure of the statements.
- 76 Council submitted that there is *a potential that disclosure of the information in this part may harm the interests of Mr Gonion, including as result of Mr McCullagh's propensity to disclose information released to him via the RTI process*. Council further submitted that *it is reasonably open to conclude that if the information was disclosed, there is an increased likelihood of harassment of Mr Gonion by Mr McCullagh and referred to previous issues and an acrimonious relationship between Mr McCullagh and Mr Gonion*. Council also

¹³ Northern Midlands Council, minutes of ordinary meeting of Council, 20 February 2023, available at www.northernmidlands.tas.gov.au/council/your-council/council-meetings accessed on 14 January 2025.

noted that it had consulted with Mr Goninon pursuant to s36(2) and that Mr Goninon did not wish for the information to be released.

- 77 I note and acknowledge Council's concern and I also note Mr Goninon's objection to the release of the information, although this objection is not, on its own, determinative of whether release is ultimately contrary to the public interest. However, I have had the opportunity to peruse the information in question. In my view, it is mundane, uncontroversial and quite innocuous. I am not persuaded that its release to Mr McCullagh has the potential to cause harm to Mr Goninon's interests and consider this matter weighs only slightly against disclosure of information other the statements.
- 78 Matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – is relevant and weighs against disclosure of the statements. Members of the community may be less prepared to provide statements for use in Code of Conduct matters if they are not reassured that their confidentiality will be maintained. This may lead to a consequent reduction in the quantity and quality of evidence available to panel members in the future, leading inevitably to poorer decisions.
- 79 Having considered all relevant matters I have determined that, with some exceptions, the information Council has identified as responsive to Part 3 of the request is not exempt and is to be disclosed to Mr McCullagh. Those exceptions are:
- the statements attached to the email of Mayor Knowles dated 13 December 2022;
 - direct contact details of public officers and external professionals not normally provided to the public;
 - the name and contact details of Mr Goninon's assistant; and
 - Mr Goninon's direct email.

Further issue

- 80 In the information released to Mr McCullagh in response to Part 1 of his application, Council appears to have removed some information it determined to be exempt from disclosure by applying white redactions to a white page. I am concerned that this approach is not consistent with s18(2) of the Act, which requires that a copy of information provided to applicants with exempt information deleted must include a note to the effect that the copy is not a complete copy of the original information.
- 81 Council's approach in this case of using white redactions on a white page is unnecessarily confusing for applicants. I have consistently taken the position that it is appropriate that clear redactions, usually in black, are applied to information determined to be exempt. This ensures that it is explicit that the redacted version of the document is incomplete. I urge Council to clearly identify redacted information in future.

Preliminary Conclusion

82 In accordance with the reasons set out above, I determine:

- exemptions claimed pursuant to ss30 and 31 are not made out; and
- exemptions claimed pursuant to s36 are varied.

Response to Preliminary Conclusion

83 As the above preliminary decision was adverse to Council, it was made available to it on 4 February 2025 under s48(1)(a) of the Act to seek its input prior to finalising the decision.

84 On 24 February 2025, Council advised that it *does not wish to raise any other matters, or make additional submissions, in response to this application for external review*. Accordingly, my findings remain unchanged.

Conclusion

85 For the reasons set out above, I determine:

- exemptions claimed pursuant to ss30 and 31 are not made out; and
- exemptions claimed pursuant to s36 are varied.

86 I apologise to the parties for the delay in finalising this decision.

Dated: 24 February 2025



Richard Connock
OMBUDSMAN

ATTACHMENT A

Section 30 - Information relating to enforcement of the law

(1) 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 (1) 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 1 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 36 - Personal information of person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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
FINAL DECISION



Right to Information Act Review

Case Reference: R2401-005

Names of Parties: B and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s30, s34, s35, s36 and s39

Background

- 1 In 2022 B spent a period of time in Country A. Upon his re-entry to Australia B was questioned by the Australian Border Force (ABF).
- 2 On 10 August 2023, B made an application to the Department of Police, Fire and Emergency Management (the Department) for assessed disclosure of information under the *Right to Information Act 2009* (the Act). He sought information in the following terms:

Any reports, emails or other correspondence which the Tasmania Police received from the Australian Federal Police and/or Australian Border Force in relation to [B]'s arrival and conduct at the Melbourne Airport on 27 May 2022.

Any reports, emails or other correspondence which the Tasmania Police sent to the Australian Federal Police and/or Australian Border Force in relation to [B]'s arrival and conduct at the Melbourne Airport on 27 May 2022.

- 3 On 26 September 2023, Sergeant Jessica Walshe, a delegate under the Act for the Department, issued a decision on B's application. She determined to disclose three pages of information in part, applying exemptions pursuant to ss34 (information communicated by other jurisdictions), 35 (internal deliberative information), and 39 (information obtained in confidence). She further decided that the remaining information assessed as responsive to the application was exempt in full pursuant to ss34 and 39.
- 4 In relation to s34, Sergeant Walshe decided:

The assessed information contains reports which were provided in confidence to Tasmania Police by a Commonwealth jurisdiction. Agencies such as Tasmania Police and other jurisdictions, regularly exchange information in their business of detecting, preventing and

investigating crime. The information assessed was provided in confidence to Tasmania Police by another jurisdiction and I am satisfied that its disclosure would be reasonably likely to:

- *prejudice relations between another jurisdiction and Tasmania Police;*
- *damage the ability for Tasmania Police to obtain similar information in the future; and*
- *damage the law enforcement business interests of Tasmania Police and another jurisdiction.*

Therefore, an exemption pursuant to section 34(1) of the Act has been applied to that information.

In applying the exemption, I have considered the decision of Mickelberg and Australian Federal Police [1984] AATA 425 (2 October 1984) in which the Administrative Appeals Tribunal stated:

“... in the public interest it is essential that law enforcement agencies have speedy, accurate and secure systems of communication, both within an agency and between agencies especially where agencies have different fields of responsibility.”

5 In relation to s35, Sergeant Walshe decided:

Information contained within the officer’s email includes the officer’s personal opinions. It is an opinion that has been made in the course of the deliberative process related to the functions and official business of Tasmania Police. Having considered the aforementioned factors, I am satisfied that some aspects of the information is [sic] exempt pursuant to Section 35(1)(a) of the Act.

6 In relation to s39, Sergeant Walshe decided:

The assessed information includes information provided by Australian Border Force ('ABF') and Australia Federal Police ('AFP') to Tasmania Police, in confidence. This is highly sensitive information that naturally attracts a degree of confidentiality and concern for the party providing it.

Tasmania Police relies on the provision of information for ABF and AFP in its business of law enforcement. When reports are made to Tasmania Police, often the information is provided in confidence, in the belief that the source of the information will not be released to a third party.

I am satisfied that it would be contrary to the public interest to disclose that type of information without consent of the person supplying it, as to do so would be reasonably likely to reduce its future supply.

In the Tasmanian decision of SNF and Tasmania Police (2015), the Ombudsman stated:

" ... On the material presented, I am satisfied that if confidential information provided to Tasmania Police was routinely disclosed under the RTIA Act [sic] it would be reasonably likely to impair the ability to obtain similar information in the future ... My end conclusion is that it would be contrary to the public interest for such release to occur. The information at issue is exempt information under s.39 of the RTIA."

Therefore, an exemption pursuant to Section 39(1) of the Act has been applied to that information.

- 7 In applying the public interest test to the above exemptions, Sergeant Walshe wrote:

I consider the following matter in Schedule 1 of the Act (the public interest test) to favour disclosure of the exempt information:

- a) *the general public need for government information to be accessible.*

Conversely, I consider the following matters in Schedule 1 of the Act to favour non-disclosure of the exempt information:

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

I am satisfied that it would be contrary to the public interest to disclose information that has been provided in confidence to Tasmania Police by third parties, who reasonably expected that it would not be disclosed. There is a reasonable public expectation that this information would not be disclosed.

- n) *whether the disclosure would prejudice the ability to obtain similar information in the future.*

I am satisfied that it would be contrary to the public interest to disclose information that is provided in confidence to Tasmania Police. There is a reasonable public expectation that this information would not be

disclosed, and its release would be likely to harm the ability to obtain similar information in the future and therefore hinder the investigation process. Further to this if the information were released:

- *Persons who report information to Tasmania Police would not reasonably expect their information to be used or disclosed for any reason other than the investigation and/or any subsequent court proceedings; and*
- *It would be reasonably likely to hinder Tasmania Police in its business of preventing, detecting and/or investigating matters.*

u) Whether the information is wrong or inaccurate.

Information contained within the email includes an officer's personal opinions made at a time when the investigation was not yet complete, and all facts not known. It is not [sic] a statement of fact but rather the view of one officer expressed for the future information and benefit of others. I am satisfied 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 to be disclosed, it may prevent the frank exchange of ideas and opinions between officers in the future. This may lead to less robust decision making, which is against the public interest and to the detriment of the investigation process.

I consider the remaining matters in Schedule 1 of the Act to be irrelevant to your application.

On balance, therefore, I am satisfied that it would be contrary to the public interest to disclose the exempt personal information.

- 8 B requested an internal review of this decision on 30 October 2023.
- 9 On 28 November 2023, Inspector Gary Williams, another delegate under the Act of the Department, issued an internal review decision to the applicant. In his decision, Inspector Williams affirmed the decision of Ms Walshe in relation to ss34, 35, and 39.
- 10 Inspector Williams further decided that information which had originated with the Australian Federal Police (AFP) and ABF should be exempt pursuant to s30(1)(e), on the basis that its release would amount to a disclosure of *information gathered, collated or created for intelligence*.

- 11 On 3 January 2024, B made an application for external review. This was accepted pursuant to s44, noting that the application was made within 20 working days of the receipt of an internal review decision.

Issues for Determination

- 12 I must determine whether the information is eligible for exemption under ss30(1)(e), 34, 35, 39 or any other relevant section of the Act.
- 13 As ss34, 35 and 39 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt, I must then determine whether it is contrary to the public interest to disclose it. I must have regard to, at least, the matters contained in Schedule 1 in making this assessment.

Relevant legislation

- 14 The Department has relied on ss30(1)(e), 34, 35, and 39 in its decision to exempt information. I attach copies of these sections to this decision at Attachment 1.
- 15 Copies of ss33, 36 and Schedule 1 of the Act are also attached.

Submissions

Applicant

- 16 In his initial application for assessed disclosure, B's representative wrote:

At about 5.30am on 27 May 2022, [B]... arrived at Melbourne Airport from ... after spending about 28 days in [Country A]. Prior to leaving..., [B] escorted a United States (US) National to the US embassy in... That party spoke to embassy staff at length about what [B] and they had experienced in [Country A].

A written report outlining their experiences was also submitted by the US National to the US embassy. [B] considered the contents of this report accurate and contained information he believed was of a sensitive nature. [B] also contacted the National Security Hotline (Australia) and informed the operator of his pending return to Australia and the fact that a written report relating to his experiences was on hand at the US Embassy in...

On his return, he was questioned by Australian Border Force (ABF) officers about a range of subjects related to this trip. [B] answered certain questions and handed over his mobile phone for inspection. However, [B] did not

answer more specific questions related to his experiences in [Country A] and referred ABF Officers to the above-mentioned written report. [B] did not believe the environment, being the "public baggage search area", an appropriate forum to discuss sensitive issues. [B] was eventually allowed to re-enter Australia.

However, on recommencing work... [B] was subject to an investigation by his employer where it was alleged that he refused to cooperate with ABF officers and used his current standing as ... and prior AFP employment to refuse a search of his electronic devices. [B] rejected the allegations and [his employer] found them to be unsubstantiated.

The allegation that [B] used his standing as ... and prior AFP employment to refuse a search of his electronic devices is not accurate, especially as the Information Report by the ABF states at page 4: "[B] was reluctant to give the PIN to his phone initially. After thorough explanation as to the reasons for looking at the phone [B] gave officers the PIN." There is no mention of the allegation that [B] used his current or previous office to obstruct ABF officials.

I have also obtained a "case summary" (via Freedom of Information) authored by an Australian Federal Police officer stating, among other things, that "[B] stated to ABF that he was a current ... with ... and a former AFP Officer, [B] refused to co-operate with ABF member allowing them access to search his mobile phone." Again, this is at odds with the ABF Information Report.

My client is concerned that the case summary provided by the AFP portrays a different story to the Information Report by the ABF and seeks clarity in respect of the accuracy of the record of events that transpired at the Melbourne Airport.

- 17 In his application for external review, B submitted (verbatim):

On 27.05.22, I returned to Australia via Melbourne, where I was questioned and searched by Australian Boarder Force (ABF) officers. The exchange was protracted and unpleasant, however, I cooperated too an extent and provided my mobile phone for inspection. With respect to the above-mentioned security concerns, I refused to discuss these matters with ABF officers as it was not the appropriate environment. I undertook to discuss these

matters with more appropriate federal agencies. I was then allowed to cross the border. On return to work, I self-reported these matters to ... management. On 02.06.22, I was required to respond to an internally raised ... complaint ... that alleged, "You refused to cooperate with Australian Border Force officers and used your current standing ... and prior Australian Federal Police Employment to refuse a search of your electronic devices"... Sometime after I received this complaint, I was interviewed by two Hobart based Australian Federal Police (AFP) officers, the lead interviewer was a Sergeant... During the interview, several matters were discussed, including my interaction with the ABF at Melbourne Airport. Sgt... read from a document that had been authored by the ABF; this is relevant, see below. On 13.06.22, I responded to the above-mentioned internal complaint, denied the allegations, and explained the circumstances... The complaints were found to be Unsubstantiated, and the adjudicating officer lawfully provided me with a copy of their decision... I was extremely concerned by the "second part" of allegation that I had used my standing ... and prior Australian Federal Police Employment to refuse a search of my electronic devices, as this simply did not happen, and nothing even remotely happened that could have given rise to such allegations. As a result, I made FOI requests to the ABF and AFP where I received the following documents: 1. ABF Information Report... this is a redacted summary of my interactions with the ABF at Melbourne Airport. I also recognised it as the document that Sgt... was reading from during my interview with the AFP, so I am assuming ... also had possession of this document. Of note, the document states: i) while I had said I was a ... and previous Australian Federal Police Officer (p. 3 and 4), at no point does it state that I used this information to prevent a search of my "electronic devices" and; ii) that I reluctantly handed over my mobile phone for examination (p. 4), but at no point does it state that I refused to do so. 2. AFP Case Summary and AFP-... email chain... The AFP Case Summary is authored several hours after my arrival and at p.2, it states "[B] stated to ABF that he was ... and a former AFP Officer, [B] refused to co-operate with ABF members allowing them access to search his mobile phone." This is in contrast to the ABF IR, that stated I had provided access to my mobile phone. This Case Summary is then replicated in a series of emails also

attached that were shared internally within the AFP and then with... As a result, of the conflicting information contained in the ABF IR and the AFP Case Summary and AFP-... email chain regarding my conduct, I made the below requests to ... with the view to ascertaining the basis on which ... launched a complainant against me. I also wished to ascertain the basis on which it was alleged that I used my current standing as ... and prior Australian Federal Police Employment to hinder ABF officers... It is my belief that ... had access to the ABF IR at the time of raising an internal complaint; this is problematic as the second half of the allegation, that being I: "... used [my] current standing ... and prior Australian Federal Police Employment to refuse a search of [my] electronic devices" is baseless considering the ABF IR. If the ABF IR had been available to ..., and the organisation proceeded with a complainant anyway, I believe this represents an abuse of process, that is, launching proceedings that the proceeding authority knows is doomed to fail. Further, I wish to locate the location that led to the allegation I used my office to hinder Commonwealth Officials; information that is again not reflected in the ABF IR. I believe that is a strong public interest in providing the information on which the complaint against me was made, as it may expose malpractice, negligence, code of conduct breaches and be a catalyst for better practice in the future...

The Department

- 18 No submissions, beyond the reasoning in the original decision and internal review decision, were received from the Department in the course of this external review.

Analysis

- 19 In my analysis of the relevant information, I refer to the following categories for ease of reference:
 - emails;
 - the AFP Minute; and
 - the ABF Information Report.
- 20 In addition to these three key categories of documents, there were several documents that appeared to be scanned versions of B's documentation taken upon his re-entry to Australia.

- 21 While the Department claimed these were exempt in full, it is not apparent why this would be the case as they are documents in B's possession. However, the Department was entitled to refuse to provide these documents under s12(3)(c)(i) on the basis that they were available to B, so I will not further discuss them in this external review.

Section 30 - Information relating to enforcement of the law

Intelligence information

- 22 In his internal review decision of 28 November 2023, Inspector Williams decided that, in addition to the exemptions already applied in the original decision, s30(1)(e) ought to apply to the AFP Minute and the ABF Information Report.
- 23 Section 30(1)(e) provides that information is exempt if its *disclosure would, or would be reasonably likely to disclose information gathered, collated or created for intelligence...*
- 24 As the word *intelligence* is not defined in the Act, it should be afforded its ordinary meaning.
- 25 The Macquarie Dictionary defines intelligence as: *knowledge of an event, circumstance, etc., received or imparted; news; information: military intelligence; intelligence relating to bushfire occurrences, or the gathering or distribution of information, especially secret or military information which might prove detrimental to an enemy.*¹
- 26 Given that the s30(1)(e) exemption is not usually subject to the public interest test, it is important that it is not applied unless truly necessary, so as to not contradict the objects of the Act in s3.
- 27 This document is essentially a recounting of B's story, told to AFP officers during a 'debrief'.
- 28 Intelligence information in this section of the Act is contextualised as including, but not being limited to, *databases of criminal intelligence, forensic testing or anonymous information from the public*. In this context, I consider that this document does not amount to *intelligence* information, but is rather a factual retelling of a story told by the applicant. There is no information in this document that is particularly sensitive or 'secret' (save one sentence, which I will discuss further in relation to a different part of the s30 exemption below), nor does it constitute information that is of a character similar to those examples given by the section of the Act.
- 29 As such, subject to my analysis below, this document is not exempt and should not be withheld from the applicant pursuant to s30(1)(e).

¹ Definition of *intelligence*, Macquarie Dictionary, accessed 14 March 2025, www.macquariedictionary.com.au.

- 30 Further, I am similarly not satisfied that the ABF Information Report is a document that is validly exempt pursuant to s30(1)(e). Like the AFP Minute, the ABF Information Report consists largely of a recording of what B had said during their interaction, or contains other innocuous factual information. I am not satisfied that this information rises to the level of *intelligence* in the context of the Act and its ordinary meaning.
- 31 As such, and again subject to my analysis below, this document is not exempt pursuant to s30(1)(e). The exception to this finding is in relation to the information on page 4, below the sentence *Phone was assessed but there were no grounds to download* to above the sentence *Nothing of ABF interest was located on this occasion*, which I am satisfied does constitute intelligence information and is exempt pursuant to s30(1)(e).

Prejudice to the investigation of a breach or possible breach of the law

- 32 While I was largely not satisfied that s30(1)(e) was applicable to the AFP Minute and the ABF Information Report, I will now consider whether other subsections of s30 are relevant to parts of each document.
- 33 Section 30(1)(a)(i) provides that information will be exempt where it would be *reasonably likely to prejudice the investigation of a breach or possible breach of the law*.
- 34 Similarly, s30(1)(f) provides that information is exempt where its disclosure would be *reasonably likely to hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete*.
- 35 In relation to the AFP Minute, the second last sentence of the first paragraph is information which, if released, I am satisfied would be reasonably likely to prejudice the ongoing investigation of breaches or possible breaches of the law. As such, I consider this information to be correctly exempt pursuant to ss30(1)(a)(i) & (f).
- 36 In relation to the ABF Information Report, there are a number of pieces of information that I consider are correctly exempt pursuant to ss30(1)(a)(i) & (f).
- 37 In the unredacted information provided to my office there are two copies of the ABF Information Report. For the reference of the Department, I refer below to the location of information in the ABF Information Report that appears first in the documents provided to my office, but the corresponding information in the duplicated copy is also exempt from provision to the applicant.
- 38 The information that I consider is exempt pursuant to ss30(1)(a)(i) & (f) is:
 - On page 1, the information directly following the words *Activity Direction: Inbound* until before *Item Quantity:*

- On page 1, the information directly following the words *Port: 2M – Melbourne* until before *Region Code*:
 - On page 2, the information directly following the words *Items declared: NIL*
 - On page 3, the information below the word *Poland* until above the sentence *Questioning revealed the following*:
 - On page 6, the information from the top of the page until the heading *Third Party*.
 - On each page, the webpage URL at the bottom of the page.
- 39 Having considered each of these pieces of information, I am satisfied that were they to be released, they would be reasonably likely to prejudice or hinder an investigation of breaches or possible breaches of the law.

Section 34 – Information communicated by other jurisdictions

- 40 In the original decision of 29 September 2023, Sergeant Walshe decided that most of the emails, the entirety of the AFP Minute, and the entirety of the ABF Information Report were exempt pursuant to s34 and should not be released to the applicant.
- 41 Sergeant Walshe's reasoning was that the disclosure of this information would prejudice relations between another jurisdiction and Tasmania Police.
- 42 This was affirmed without variation in the internal review of 28 November 2023.
- 43 Section 34(1)(a) provides that information is exempt if it would prejudice relations between States, the Commonwealth, or another country, in any combination. This part of s34 is not applicable to prejudice that may arise between another jurisdiction and a public authority like Tasmania Police, and as such is not applicable in these circumstances.
- 44 While she did not specifically identify the relevant part of s34, it is clear that Sergeant Walshe intended to rely on s34(1)(b), which provides that information is eligible for exemption if it was *communicated in confidence* by another jurisdiction, and its disclosure *would be reasonably likely to impair the ability of a public authority... to obtain similar information in the future*.
- 45 I am satisfied that each of the relevant documents was communicated in confidence to the Department. The emails discuss matters arising out of the AFP Minute and ABF Information Report, both of which are marked *Protected*, and discuss matters that would reasonably imply a degree of confidentiality in their communication.

- 46 I am not, however, satisfied that all of the information in these documents, if disclosed, *would be reasonably likely to impair the ability... to obtain similar information in the future.*
- 47 At the initiation of this external review, and as described in his submissions, B provided a number of documents to my office that he had obtained separately pursuant to the *Freedom of Information Act 1982* (Cth).
- 48 Included in these documents was a substantially unredacted copy of both the emails and the ABF Information Report.
- 49 Given that the substance of these documents has been communicated to the applicant already, I am not satisfied that their disclosure will impair the ability of Tasmania Police to obtain similar information in the future. This is because these documents have already been substantially disclosed and there has been no such detrimental impact on the sharing of information as a result.
- 50 I also am not satisfied that, even if B had not received this information previously, the substance of these documents is of a character which, if disclosed, would impact the ability of the Department to obtain the same type of information in the future. Barring the information which I have already decided is exempt pursuant to s30, the information contained in the emails and ABF Information Report is factual and generally only amounts to a recounting of circumstances which are already known to the applicant.
- 51 I am not satisfied that the release of this information to the applicant would detrimentally impact on the sharing of similar factual briefing information with Tasmania Police in the future.
- 52 With respect to the AFP Minute, I make a similar finding. While this document has not already been made available to the applicant in the same way as the others, it similarly contains purely factual information that is already known to the applicant, the like of which would not prejudice similar information being shared with Tasmania Police in the future, and as such is not exempt pursuant to s34.

Section 35 – Internal deliberative information

- 53 It was decided in the original decision of Sergeant Walshe that a single line of one of the emails constituted a record of an opinion of an officer arising in the conduct of the *deliberative process related to the functions and official business of Tasmania Police*, and was thus exempt pursuant to s35.
- 54 Section 35(1)(a) of the Act provides that information may be exempt if it consists of an *opinion... 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...*

- 55 While I am satisfied that the relevant part of this email does constitute an opinion of an officer of a public authority, I am not satisfied that it constitutes an opinion formed in the course of, or for the purpose of the deliberative process. The sentence is merely a comment on the way the information in the email might be received at a meeting and is not of such substance to constitute a contribution to the deliberative processes related to the official business of Tasmania Police.
- 56 This information is therefore not exempt and should be released to the applicant.

Section 39 – Information obtained in confidence

- 57 In the original decision of Sergeant Walshe, it was decided that most of the emails, all of the AFP Minute, and all of the ABF Information Report were also exempt in full pursuant to s39 of the Act.
- 58 This was affirmed without variation in the external review of 28 November 2023.
- 59 Section 39 provides that: *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..., and*
- a) *the information would be exempt information if it were generated by a public authority...; or*
 - b) *the disclosure of the information would be reasonably likely to impair the ability of a public authority... to obtain similar information in the future.*
- 60 For the reasons I have described above in relation to s34, while I am satisfied that this information was communicated in confidence, I am not satisfied that its disclosure would be reasonably likely to impair the ability of Tasmania Police to obtain similar information in the future. As such, s39(1)(b) is not applicable.
- 61 While the Department made reference only to s39(1)(b) in its original decision, I find it appropriate to also give consideration to s39(1)(a).
- 62 Section 39(1)(a) will apply where the subject information would otherwise be exempt under the Act. Having reviewed the information, subject to my analysis below, there is a small amount of information contained in these documents that would be otherwise exempt under the Act had it been generated by a public authority such as the Department.
- 63 There are two pieces of information in the ABF Information Report that would satisfy this test. They are:
- on page 4, the information directly following the words ...*place in [Country A]* until above the words *During the examination...*

- on page 5, the sentence directly following the words ...*his trip to [Country A]*.
- 64 I am satisfied that this information would be eligible for exemption under s35 because it constitutes an opinion prepared in the course of the deliberative process as a part of the official duties of those officers who prepared the ABF Information Report.
- 65 This information is thus *prima facie* exempt pursuant to s39.
- 66 Because s39 is contained in Part 3 of Division 2 of the Act, it is subject to the public interest test in s33, requiring consideration, at least, of the factors in Schedule 1 of the Act.
- 67 I consider that matter (a) *the general public need for government information to be accessible* is relevant and will always weigh in favour of disclosure.
- 68 Matter (c) *whether the disclosure would inform a person about the reasons for a decision* is also relevant. B has, in his submissions, made clear that the information he seeks is for the purpose of understanding the reasons behind a decision to initiate a review into himself by his workplace, and the information which triggered this review. However, the opinions contained in these reports do not reveal such reasons, so this consideration is of neutral weight.
- 69 Matter (j) *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* is also relevant. Routine disclosure of these opinions, formed in the early stages of an investigation, may cause harm to the effective functioning of the law enforcement process. Such disclosure may lead to an unwillingness amongst officers to make or document initial assessments or suspicions during investigations, as these are often based on limited evidence and may prove unfounded following further investigation. Provided proper procedural fairness occurs during any subsequent law enforcement action, I consider that this matter weighs against disclosure due to the public interest in ensuring effective investigation of breaches of the law.
- 70 Matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* is another key consideration. B has sought this information from Tasmania Police, and it is plain that it would promote his interests as an individual if it were disclosed. This factor weighs in favour of disclosure.
- 71 I have also considered matter (n) *whether the disclosure would prejudice the ability to obtain similar information in the future*. As with factor (j), disclosure of these opinions, formed during the early stages of inquiry, may prejudice the ability of the Department to obtain such information, were its disclosure to lead to an unwillingness from either agency to

share this information with the Department, or officers to record these opinions in first instance. This factor weighs against disclosure.

- 72 Having considered these factors, I am satisfied that it would be contrary to the public interest to disclose these two pieces of information. As such, this information is exempt under s39(1)(a) and is not required to be provided to the applicant.

Section 36 – Personal information of a person

- 73 Given that I have determined that much of the information responsive to B's application should now be released, it is necessary to consider whether s36 of the Act is applicable to any of this information.
- 74 Section 36 provides that information may be exempt from disclosure if it is the personal information of a person other than the applicant.
- 75 Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 76 There are several pieces of information contained in the emails that meet this definition and I consider them *prima facie* exempt. These are the names of officers, their email addresses, and their telephone (including mobile) numbers.
- 77 Section 36 is also contained within Part 3 of Division 2 of the Act and is subject to the public interest test in s33, I must again consider, at least, the Schedule 1 factors.
- 78 However, before considering the public interest test, I note it has been my consistent position that the names and work related personal information of public officers performing their regular duties are not exempt under s36 unless there are specific and unusual circumstances to justify the exemption.² This applies to signatures and also to past employees of public authorities if the information came into existence while the person was a public officer. This is consistent with current Australian practice.³
- 79 The exception to this is the direct contact details of employees where these are not routinely provided to the public. I have consistently found that it is valid for public authorities to limit the release of direct contact details for their staff to ensure public enquiries are directed through appropriate channels.⁴

² See, for example, *Tarkine National Coalition and Department of Natural Resources and Environment Tasmania R2202-101* (October 2023) and *Thomas Bade and Huon Valley Council R2209-004* (December 2024), both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

³ *Hunt and Australian Federal Police* [2013] AICmr66 at [73].

⁴ See, for example, *Thomas Bade and Huon Valley Council R2209-004* (December 2024).

80 Accordingly, the names of the relevant officers, and landline telephone numbers routinely provided to the public, are not exempt and can be released to B. In relation to mobile phone numbers, these are not likely to be provided to the public and are exempt under s36 due to the risk of harm to the relevant individuals if this information was released.

Preliminary conclusion

81 In accordance with the reasons set out above, I determine the following:

- exemptions claimed pursuant to ss30 and 39 are varied;
- exemptions claimed pursuant to ss34 and 35 are not made out; and
- exemptions pursuant to s36 are applied.

Submissions to the preliminary conclusion

82 As the preliminary decision was adverse to the Department, it was made available to it on 24 March 2025 pursuant to s48(1)(a) of the Act to seek its input prior to finalisation.

83 On 4 April 2025, my office received submissions from the Department in response to my preliminary decision. These submissions specifically addressed my application of s36 as above at paragraphs [73]-[80]. The Department did not make submissions on the remainder of the decision and indicated that it supported my findings *in full*.

84 Sergeant Lee Taylor, on behalf of the Department, submitted that information identifying third parties that B interacted with while in Country A, or other third parties identified in relation to these activities, should be exempt pursuant to s36, being personal information of a person other than the applicant.

85 Sergeant Taylor submitted:

Information provided by or about a third party must be protected given the sensitivity and privacy surrounding the subject and may cause considerable concern if released without consent. This is most certainly the case when the information concerns a third parties' involvement in a foreign country's civil and or military affairs.

...

I am aware that [B] will know the identities of these parties even under redaction, however, it is my submission to exempt these details due [sic] the nature and sensitivity of the information, so the identities of these parties are not inadvertently disclosed to the 'world at large'.

- 86 Having reviewed the information in light of this submission, I am satisfied that there is information in both the AFP Minute and the ABF Information Report that would constitute personal information of a person other than the applicant, and as such is *prima facie* exempt pursuant to s36 of the Act. This information is:
- in the APF Minute, the names of each person mentioned in connection with B's time in Country A; and
 - in the ABF Information Report, under the heading *TRAVEL*, the names of each person mentioned in connection with B's time in Country A.
- 87 Because s36 is contained in Part 3 of Division 2 of the Act, it is subject to the public interest test in s33, requiring consideration, at least, of the factors in Schedule 1 of the Act.
- 88 Matter (a) *the general public need for government information to be accessible* is relevant and always weighs in favour of disclosure.
- 89 Matter (m) whether *the disclosure would promote or harm the interests of an individual or group of individuals* is relevant. While B has requested information and it would promote his interests if he were to be provided with it, the interests of the named parties must also be considered. In light of the context within which they have been named, being an international conflict, and without information to the contrary, I am satisfied it would harm the interests of these individuals for their names to be disclosed. This is particularly so where information made available under the Act is not restricted in its use, and may, as put by Sergeant Taylor in his submissions, be disclosed to the '*world at large*'.
- 90 Matter (j) *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* is also relevant. The named individuals in these documents have not and cannot be contacted in connection with this process, and as such cannot be afforded procedural fairness insofar as giving their views on the disclosure or otherwise of their names through this process. This factor weighs against disclosure.
- 91 Having considered these factors, I am satisfied that it would be contrary to the public interest to disclose these names. As such, this information is exempt under s36 and is not required to be provided to the applicant.

Conclusion

- 92 In accordance with the reasons set out above, I determine the following:
- exemptions claimed pursuant to ss30 and 39 are varied;
 - exemptions claimed pursuant to ss34 and 35 are not made out; and

- exemptions pursuant to s36 are applied.

93 I apologise to the parties for the delay in finalising this decision.

Dated: 14 April 2025

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

Attachment 1
Relevant Legislation

Section 30 – Information relating to enforcement of the law

- (1) 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
- ...
- (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
- (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete. ...

Section 34 – Information communicated by other jurisdictions

- (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
- (ii) a person on behalf of the public authority –
- by –
- (iii) the Government or an authority of the Commonwealth, of another State or of another country; or
- (iv) 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. ...

Section 35 – Internal deliberative information

- (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.
- (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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Information obtained in confidence

- (1) 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. ...

Section 39 – Information obtained in confidence

- (2) 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.
- (3) 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.

Section 33 – Public interest test

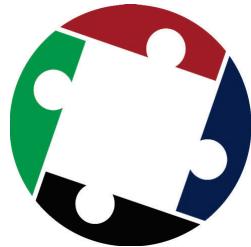
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding 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.

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.



Right to Information Act Review Case Reference: R2407-016

Names of Parties: C and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s27, s35, s36

Background

- 1 C is a business owner with a strong professional interest in Tasmania's timber resources.
- 2 On 1 June 2024, C made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Natural Resources and Environment (NRE) concerning the general topic of:

Information pertaining to Special Species Management [sic] Plan (SSMP) five-yearly operational review.

- 3 On 1 July 2024, forestry functions were transferred from NRE to the Department of State Growth (the Department). C's application had been previously transferred to the Department on 24 June 2024, after NRE identified it would be unable to finalise a decision before functions were transferred.
- 4 C's application sought:
 1. *All information held by NRE related to the five-yearly operational review of the Special Species Management Plan (2017) conducted in 2022.*
 2. *A list of Special Species Industry participants/organisations consulted by NRE as part of the five-yearly review process prior to the review being finalised, including the date of consultation.*
 3. *All information and correspondence exchanged between NRE and the office of the Forestry Portfolio Minister (including from the Minister directly or staff) regarding the five-yearly operational review of the SSMP.*
 4. *All information and correspondence exchanged between NRE and the office of the Forestry Portfolio Minister (including from the Minister directly or staff) concerning*

and/or related to the supply and management of Huon Pine for the period 01/01/2019 and 01/01/2024.

5. *All information and correspondence exchanged between NRE (and its predecessor) and Sustainable Timber Tasmania (STT) regarding the five-yearly operational review of the SSMP.*
 6. *All information and correspondence exchanged between NRE (and its predecessor) and Sustainable Timber Tasmania (STT) concerning and/or related to the supply and management of Huon Pine for the period 01/01/2019 and 01/01/2024.*
- 5 On 3 July 2024, in the absence of agreement from C, the Department applied to my office for an extension of time to provide a decision, and an extension was granted to 22 July 2024.
- 6 On 24 July 2024, C made an application for external review, which was accepted under s45(1)(f) of the Act as they had not received a decision and the period for a decision to be provided had elapsed.
- 7 On 22 August 2024, Ms Inga Tomkins, a delegate under the Act for the Department, issued a decision. Ms Tomkins identified 144 pages of information responsive to C's application and applied ss27, 35 and 36 to exempt some information.
- 8 On 18 October 2024, this office wrote to the Department to direct it to undertake an internal review, as this had not already occurred. On 18 November 2024, Ms Alison Lander, another delegate for the Department, released an internal review decision. Ms Lander released some additional information and again applied ss27 (internal briefing information of a Minister), 35 (internal deliberative information) and 36 (personal information) to exempt some information.
- 9 On 2 December 2024, C advised my office that they wished to continue with the external review and also raised an issue regarding the sufficiency of the searching carried out by the Department in response to their application.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss27, 35 and 36, or under any other relevant section of the Act. I must also determine whether searches carried out by the Department were sufficient to identify information responsive to C's application.
- 11 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public

interest to release it, having regard at least to the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 Copies of ss27, 35 and 36 are at Attachment A.
- 13 Copies of s33 and Schedule 1 are also at Attachment A.

Submissions

Applicant

- 14 In an email dated 6 October 2024, C made a number of submissions relating to the external review. In relation to the Department's application of s27, they submitted:

I request that the Ombudsman also consider the use of section 27 to withhold information. In doing so, I ask that the context of the information and RTI request are taken into account. Information relating to royalty options (or lack of) that has been redacted has been openly discussed at previous meetings I have had with the government department. Additionally, document 17 makes the recommendation to the Minister that "state growth are not broadly aware of special species end users advising they are unable to purchase special species timber.[sic] This is preposterous, and Departmental commissioned industry demand analyses showed that STT was not meeting demand and that there were considerable problems with businesses being able to obtain the required resources.

I should know I have been ... on every government body/committee etc, for the past decade, and I am intimately aware of the sector's supply issues.

- 15 In relation to the Department's application of s35, C submitted:

The Department's use of section 35 in Document 15a is troubling, and certainly, a long bow is being drawn here to invoke it. It must be remembered that this operational review was a requirement established under the SSMP – an instrument established through legislation. Classing an operational review as deliberative information is bizarre and does not make any sense.

...

...the Department advised that the Operational Review of the SSMP addressed the following operational matters:

- *The species and land to which the SSMP applies*
- *The existing regulatory framework*

- Management strategies – including defining appropriate silvicultural techniques and outlining how natural and cultural values will be managed through special species harvesting operations
- Approvals and process – particularly FPPs and landowner approvals

These matters are factual and are a matter of public record through the existing SSMP, legislation and reports.

The Operational review, according to the Department, involved a consideration of the matters above and resulted in a recommendation to the Minister that the SSMP was contemporary and fit for purpose and that changes to the plan were not required. A review of the SSMP would be considered operational in nature and would be expected to have been published as part of the Department's obligations under the RTI Act. Any review would contain an assessment of matters of fact and whether or not the relevant parts of the plan required changing/updating.

The release of this information is strongly favoured as the SSMP has been beleaguered by administrative and legislative roadblocks since its inception in 2017. To date, not one application to harvest timber under the plan has been approved by the government. For the past five years, the industry has flagged the significant issues facing the implementation of the SSMP both with DSG/NRE and the various portfolio ministers. Former Forestry Minister Barnett publicly acknowledged these difficulties on several occasions following the SSMP release in 2017. Most recently (mid-2024), both the current Forestry and Parks Minister's offices have acknowledged the significant problems associated with implementation and that legislative changes will be required in moving forward.

It is inconceivable that the agency responsible for Forest Policy and the operational review of the SSMP was unaware of these concerns, and it is equally inconceivable that the agency found the SSMP required no changes or updated resource assessments.

The decision maker claims that the section 35 exemption has been applied as the documents in question are "draft documents". The advice from the Department was that the SSMP operational review had been completed. If the documents in question are only drafts, where are the final documents? Additionally, how could a recommendation be

made to the Minister on the basis of a draft of an uncompleted document?

- 16 C continued and addressed the operation of the public interest test:

In any case, exempting the entire SSMP review from release under section 35 is conditional and subject to the public interest test. There are significant public interest matters relating to the SSMP, and a considerable number of factors in Schedule 1 of the Act weigh in favour of release, but few, if any, support withholding the information.

The following matters weigh strongly in favour of release:

- (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*
- (k) *Whether the disclosure would promote or harm the economic development of the State*
- (m) *Whether the disclosure would promote or harm the interests of an individual or group of individuals*

I contend that the decision maker has erred in withholding this information under section 35.

- 17 On 2 December 2024, after receiving the internal review decision from the Department, C emailed further submissions to my office. In relation to the Department's searching C submitted:

...

The dates specified in the request (01/01/2019 to 01/01/2024) are related specifically to exchanges of information between the Department, the Minister, and STT regarding the review of the

management plan and the management of Huon Pine. This date range did not apply to point 1 of the initial request.

By confining the entirety of the RTI request specifically to that date range, the Department has erred in its response, and I request that further searches be conducted up to the date of the RTI application and any relevant information released.

The Department claims that document 16 is the final internal review of the SSMP. As you would be aware, document 16 is a minute from the Deputy Secretary to the former Minister. This minute is dated 19/1/2023. [sic] The minute provides advice, background information and a recommendation to the Minister regarding the SSMP review. It is clearly not an operational review in itself. In their email correspondence to me on May 9th, 2024, NRE Tas advised me that they had completed the SSMP operational review in late 2022 – before the date at [sic] this minute.

Additionally, Document 15 (June 16th 2022) contains an attachment titled “Special Species Management Plan review 2022”. I assume that this attachment is document 15.a [sic]... This document is clearly not a draft as no DRAFT watermark is evident ... and the title does not indicate it is a draft.

It would be unusual for such a review not to be a standalone document, as opposed to something included in the body of a briefing minute. If document 15a is not the internal operational review of the SSMP, it begs the question, which document is it, and has it even been included in the scope of the RTI?

18 C then addressed the application of the public interest test:

... The decision maker stated, “Forestry is a matter of general public interest, however the management of special species timber is a much narrower one, and I am not convinced there is a general public debate on this topic.”

I would completely disagree with this statement...

The speciality timber sector in Tasmania is significant, with over 2000 FTE and 8,500 part-time and income-earning hobbyists. In fact, the participation numbers alone are larger than those of the broader eucalypt-based industry. The largest event on the Tasmanian tourism calendar is the Australian Wooden Boat Festival, which is the largest boat festival in the southern hemisphere and showcases maritime skills and heritage associated with boats built from Tasmanian speciality timbers. According to the TICT, his [sic] festival has a direct contribution

of \$30 million to the state's economy and an indirect contribution of \$80 million.

Furthermore, the SSMP created significant public interest and debate when it was introduced in 2017, with the public consultation process receiving over 1000 responses. As the SSMP applies not only to forestry land but also other land tenures within the state's reserve system, the implementation and content of this plan are of interest to a significant portion of the public; from people who both support or oppose such a plan.

...

The decision and recommendations arrived at by the Department in document 16 require an explanation of how the Department found that the SSMP was found to be contemporary, fit for purpose and that no changes or updated resource assessments were required... [T]he Department had been made aware on numerous occasions during the period from 2020 to the operational review that there were significant problems with the implementation of the SSMP...

As it currently stands, the latest advice I received following a meeting with the Forestry and Parks ministers earlier this year was that legislative change was required to remove barriers to harvesting under the SSMP.

So, how the Department arrived at its recommendations to the Minister as presented demands an explanation, and it is most certainly in the public interest to have this information released if it can in any way provide contextual information and enhance government scrutiny in this regard. It is certainly a giant leap from the decision maker's claim that document 15a was "very preliminary" and "early thinking" to the claim that the SSMP operational review had been magically completed, was contained in document 16, and no other record could be found.

...

So, to sum up on this point, it remains a complete mystery as to how the Department arrived at its conclusions and recommendations provided to the Minister in Document 16...

Accordingly, any information that can explain or provide context as to how the Department or Minister has arrived at the conclusions presented is in the public interest to release. This includes the thinking of departmental offices [sic] charged with conducting the SSMP operational review.

- 19 On 9 December 2024, C made a further submission regarding the Department's searching, having identified a possible letter written by the

responsible Minister to NRE during May 2023 which had not been identified during the Department's search.

- 20 On 21 January 2025, C made a further submission regarding the public interest:

[T]he Ministerial Special Species Working Group ... is involved with the recent socio-economic study/supply chain analysis into the special species sector. A draft copy of the report was distributed to working group members late last year. The report showed that the sector was at risk of collapse due to catastrophic reductions in timber supply, with some businesses facing closure and/or staffing reductions. The draft report found that numbers in the sector were similar to the 2009 study numbers – approximately 2000 FTE and 8,500 part-time commercial and income-earning hobbyists.

...

These preliminary findings are at odds with information released so far under this RTI application. The forest policy unit's review of the special species management plan in late 2022 found that it was contemporary fit for purpose, and no changes were required. This advice was provided to the then Minister in 2023. Further advice from state growth included claims that they were broadly unaware of any timber shortages in the sector.

The subsequent government decisions that have been made based on the policy section's advice have directly impacted thousands within the sector. I would, therefore, argue that the public interest in this case should override the exemptions claimed.

- 21 C also made submissions regarding the Department's *inconsistent* application of s36, but did not pursue this after further information was released on internal review.

Department

- 22 The Department was not required to provide specific submissions in response to this external review, as it had provided its reasoning in its decisions. Relevant extracts from those decisions are set out below.
- 23 In relation to its application of s27, in the original decision Ms Tomkins noted:

5. The information in issue is contained within Ministerial Minutes prepared by Departmental officers of a public authority, all of which were prepared for the purpose of briefing the Ministers in relation to the Special Species Management Plan (SSMP) review and special species timber future options. The information contains opinion, advice and recommendations, and

a record of consultation and deliberations between the department and Ministers in respect of briefing the Ministers regarding the review and future options.

...

8. I have reviewed the information to identify whether it contains factual information. I have identified information of this kind within the documents and have disclosed it in the information released to you...

24 This reasoning was expanded by Ms Lander in the internal review decision:

5. Documents 16 and 17 are Minutes prepared by departmental officers for the purpose of providing the Minister for Resources with a briefing, and comments from the Minister to departmental officers. Document 16 is an update to the Minister about the Special Species Management Plan Operational Review, and constitutes the final version of that review. Document 17 was prepared to provide the Minister with advice about possible future options for managing special species timber.

...

8. I am satisfied that the remaining information is factual information that is inextricably linked with advice or recommendations, or is purely advice, or purely recommendation, or a record of deliberation between the Minister and the department and is therefore exempt internal briefing information...

25 In relation to the application of s35, Ms Tomkins noted:

29. The information being withheld as internally deliberative information is contained in working draft documents prepared by departmental officers. This information includes opinions, advice and recommendations in relation to royalty options for special species harvesting and the SSMP review and reporting requirements.

30. I acknowledge there is public interest in the release of information relating to the decision making of government, in order to promote transparency and accountability. However, I also consider that there is a significant public interest in protecting the deliberative process. This process would be negatively impacted if information was disclosed that does not accurately or clearly represent the final decision by the department.

31. The information being withheld is pre-decisional in nature. It consists of draft opinions and recommendations that represent

initial thoughts and therefore may contain speculative content. Disclosing this information has the potential to hinder the ability of officers to candidly discuss and refine ideas.

32. Officers must feel free to provide their opinions, advice and recommendations, and to participate openly in deliberative processes, in order for decisions and actions resulting from those processes to be robust. Internal decision-making which involves frank and candid discussions tends to lead to better decision-making, and better decisions are in the public interest.

- 26 In the internal review, Ms Lander expanded upon the public interest considerations:

18. Forestry is a matter of general public interest, however the management of special species timber is a much narrower one and I am not convinced there is general public debate on this topic. I also note that the applicant is a member of ... a stakeholder representative group that provides advice to the Minister, and therefore is already a participant in any relevant debate with access to information and the opportunity to lobby for their position. However, I consider item (b) weighs generally in favour of disclosure.

19. There is no information to suggest that a decision has been made about the management of royalties for special species timber. The document contains information that may provide an advantage for future competitive processes, and the options have not been progressed to the Minister for formal consideration.

...

The applicant is a stakeholder representative on an advisory panel and a significant lobbyist for [their] specific area of interest in respect of forestry management. The preliminary nature of the information in these documents, and the evident likelihood of further stakeholder input and consultation on these topics lead me to conclude that item (f) weighs only very weakly in favour of disclosure.

...

23. I am of the view that the information in this instance is 'early thinking' in a process of developing a position on the best path forward and it is against the public interest to release.

- 27 In response to C's concerns regarding the searching undertaken by the Department, on 24 January 2025 Ms Lander submitted:

The search was undertaken for records held in the department's records management system, Content Manager (CM). Given the timeframe and the movement of forestry functions from this department and then back again, all relevant business information was logged into CM to assist with ensuring the smooth transfer of records. Notwithstanding this, an email search was undertaken by relevant staff. The search used the terms 'Special Species Management Plan', 'SSMP', 'Huon Pine supply', 'Huon Pine management', 'Huon Pine'. The search also involved looking through relevant document containers that held information uncovered as part of these initial searches, to determine whether any other records not picked up by these keyword searches were relevant to the request.

- 28 In relation to the possible letter written by the responsible Minister during May 2023, on 7 March 2025 Ms Lander submitted:

I note that there are many ways in which a Minister may task the Department, not all of which would necessarily be in writing, such as by a verbal direction at a meeting. Thus, the absence of written evidence of a direction by a Minister is not in itself an indication that a search for relevant information was deficient.

- 29 Ms Lander also advised that information concerning the general subject matter, but which the Department considered to be outside the scope of C's application had been located and released to C as an active disclosure.

Analysis

- 30 The Department provided my office with a single collated document containing unredacted copies of 28 identified documents containing 148 pages of information. For ease of reference, I will use the Department's page numbering in this document to refer to the information.

Section 27 – Internal briefing information of a Minister

- 31 Section 27 of the Act relevantly provides that:

(1) *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.

(2)...

(3) Subsection (1) 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.

(4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

- 32 Document 16 is a Minute to the Minister for Resources from Ms Deidre Wilson, Deputy Secretary Primary Industries and Water, dated 21 December 2022 and noted by the Minister on 19 January 2023. Section 27 has been applied to exempt information at page 139 under the heading *Minister's notation*.
- 33 Document 17 is a Minute to the then Minister for Resources from Mr Alastair Morton, Director Resources Policy dated 29 October 2021 and noted by the Minister on 17 January 2022. The Department has applied s27 to exempt information at page 143 under the heading *Minister's notation* and at pages 145, 146 and 147 under the heading *Existing approach and opportunities*.
- 34 There is no dispute that Documents 16 and 17 were prepared by an officer of a public authority, and noted by Ministers, in the course of, or for the purpose of, providing the Ministers with a briefing in connection with the Ministers' parliamentary duties.
- 35 When considering whether the redacted information is purely factual, I refer to *Re John Edward O'Brien Waterford and the Treasurer of the Commonwealth of Australia*, where the Administrative Appeals Tribunal (AAT) observed that the word *purely* in this context has the sense of 'simply' or 'merely' and that the material must be factual in quite unambiguous terms¹.
- 36 When considering whether the redacted information is opinion, I note the word opinion is not defined in the Act, so I turn to the ordinary meaning of the word. The Macquarie Dictionary² relevantly defines opinion as:
1. judgement or belief resting on grounds insufficient to produce certainty.
 2. a personal view, attitude or estimation...

¹ [1984] AATA 518 at [14]

² Definition of opinion, available at the Macquarie Dictionary (online version), www.macquariedictionary.com.au, accessed 2 April 2025.

3. *the expression of a personal view, estimation, or judgement...*

- 37 The information not released by the Department in both documents consists of options put forward for Ministerial consideration, hypothetical scenarios and opinion of the authors, along with the Ministers' responses. I am satisfied that the factual information contained in these options cannot be disclosed without revealing the nature or content of the opinion, consultation or deliberations of the briefing.
- 38 I note C's submissions of 6 October 2024 and 2 December 2024, where he vehemently disagrees with the conclusions set out in these documents. However, it is not my role to adjudicate on the accuracy of information. Nor is it my role in an external review to consider the correctness or otherwise of any government action or policy set out in the substance of a document subject to review. My primary statutory function is to review the decisions made by public authorities under the Act and to determine whether specific information should be released.
- 39 I further note in passing that s27(5) provides that nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information. I accept that the Minister does not wish to disclose the redacted parts of the briefing or the notations by the relevant Ministers.
- 40 Accordingly, I determine that the redacted information in Documents 16 and 17 is exempt under s27 and is not required to be disclosed to the Applicant.
- 41 Section 27 is not subject to the public interest test.

Section 35 – Internal deliberative information

- 42 For information to be exempt under this section, I must be satisfied that it consists 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.
- 43 When one of these criteria is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process relating to the official business of a public authority, a Minister or the Government.
- 44 The exemption does not apply to the following (relevantly):
- purely factual information (pursuant to s35(2));
 - information that is older than 10 years (pursuant to s35(4)).

Document 14

- 45 This is a four-page document (pages 128 – 131) headed *Royalty Option for Special Species Harvesting* and is identified as a draft. It is unsigned and the Department has identified it was created on 8 December 2023. I am satisfied that the redacted information on pages 129 – 131 consists of options and recommendations prepared by an officer of a public authority. I am further satisfied that the document was prepared as part of the official business of the Department and is *prima facie* exempt under s35(1)(a) of the Act.

Document 15a

- 46 This is a six-page document (pages 133 – 138) headed *Special Species Management plan Review and reporting requirements* [sic]. It is unsigned but is clearly an early draft, with incomplete sections, errors in punctuation, and personal notes by the drafter. I am satisfied that the redacted information consists of an opinion prepared by an officer of the Department in the course of its official business.
- 47 Accordingly, this document is also *prima facie* exempt under s35(1)(a) of the Act.

Public interest test

- 48 I now turn to my assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. This requires, at least, the consideration of the factors in Schedule 1 of the Act.
- 49 I consider Schedule 1 matter (a) – the general need for government information to be accessible – is always relevant and weighs in favour of disclosure.
- 50 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is also relevant and weighs in favour of disclosure. Forestry policy in Tasmania is a matter of significant public interest, controversy, protest and debate. Information which reveals the thought processes behind government policy can only contribute to that debate.
- 51 I note that the Department, whilst considering that this factor weighs generally in favour of disclosure, has drawn a distinction between forest policy in general and the management of special species timber specifically, being unconvinced there is general public debate regarding the latter. I disagree with this position. Releasing additional information can only stimulate and widen a debate, may encourage more people to contribute, and therefore canvass a greater diversity of opinion. C, as part of their submissions, provided my office with a copy of a 14-page document titled *Summary report of public representations – Special Species Management Plan* produced by the Department. Page 2 of this document indicates that 4,255 submissions regarding the Plan were received by the Department between 14 July and 28 August 2017. This indicates that a

significant number of people consider issues surrounding special species timber worthy of debate.

- 52 Schedule 1 matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – is relevant and weighs in favour of disclosure. Understanding the Department's priorities and the development of advice and recommendations may assist in understanding the decisions that determined final policy positions in this area.
- 53 Schedule 1 matter (k) – whether the disclosure would promote or harm the economic development of the State – is relevant, given C's submissions regarding the contribution of the special species timber industry to both employment and tourism, and weighs in favour of disclosure.
- 54 Schedule 1 matter (l) – whether the disclosure would promote or harm the environment and or ecology of the State – is relevant, given the subject of the information is not just forestry policy in general but the management of those timber species which have been identified as special species. This matter weighs in favour of disclosure.
- 55 Schedule 1 matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – is relevant. There is information in Document 14 which considers possible royalty returns which could be expected on various potential timber sales which, if disclosed, could impact upon Sustainable Timber Tasmania's negotiating position and financial return in any future tender process. This matter weighs against disclosure.
- 56 As part of the public interest test, I also take into account the very early draft nature of some of the information in question, as well as the inherent reasons for the inclusion of s35 in the Act. This section allows for the early 'thinking processes' of public authorities to be exempt where appropriate and options tested internally prior to reaching a final policy position. The effectiveness of these thinking processes would be undermined if all initial ideas for policy direction, even if ultimately not pursued, were routinely disclosed. This must, however, be balanced against the objects of the Act to promote transparency in government operations, particularly where much of the information is objectively factual, dated or uncontroversial.
- 57 I note that some of the information contained in Document 15a dates from 2016 and it is difficult to see how the release of a settled government position from nine years ago would be of any concern. Other information in this document refers to assessments carried out in 2015 and 2017, reports of which are available on the website of the Department and are therefore already in the public domain.
- 58 The assessment of the public interest always involves a consideration of competing priorities. On balance, in this case I do not believe that the Department has discharged its onus under s47(4) to demonstrate that the

release of much of the information in the two documents would be contrary to the public interest.

- 59 I do accept, however, that the release of very early, incomplete sections of the documents as well as options for future harvesting royalties would be contrary to the public interest. This information is speculative and neither purely factual nor a finalised position of Government.
- 60 Accordingly, the following information is exempt and is not required to be released to C:

Document 14

- on page 129, under *Harvesting Costs*, the first and second paragraphs;
- on page 130, under *Potential Royalty Regime*, all text except the first paragraph;
- on page 131, under *Initial Recommendation(s)*, the second paragraph.

Document 15a

- on page 133, under *Special Species Management plan Review and reporting requirements* [sic], between the words *annual reports* in the seventh dot-point and the words *in order to determine*;
 - on page 134, from the words *Tasmania's formal reserve system* to the heading *Policy for Maintaining a Permanent Native Forest Estate*;
- 61 The remainder of the information in documents 14 and 15a is not exempt and is to be released to C.

Section 36 – Personal information of a person

- 62 For information to be exempt under this section of the Act I must be satisfied that its release would reveal the identity of a person other than C, or that the information would lead to that person's identity being reasonably ascertainable.
- 63 Section 5 of the Act defines personal information 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.*

- 64 In its initial decision the Department identified and exempted information of this kind, such as names, signatures, position titles, email addresses, mobile phone and work landline numbers of a number of public officers. On internal review, the Department released much of this information to C but maintained the exemption on some mobile and landline telephone numbers.

- 65 As I have consistently stated in previous decisions, it is standard Australian practice that the personal information of public officers performing their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. I commend the Department for correcting its approach and releasing information of this kind on internal review.
- 66 The exception to this general practice is direct and mobile phone numbers of public officers, which I have consistently found to be exempt under s36 where these are not routinely provided to the public. I am satisfied that there is potential for harm with the release of this information, and it is valid for public authorities to limit the release of direct contact numbers for staff to ensure public enquiries are able to be directed through appropriate channels.
- 67 The telephone numbers which the Department has not released are all direct contact numbers of public officers, which I determine are exempt under s36 and are not required to be released to the Applicant.

Sufficiency of search

- 68 C made submissions regarding what they perceived to be inadequate searching carried out by the Department, and identified information of a type which they believed should exist but which had not been provided in response to his application.
- 69 Section 45(1)(e) of the Act enables an applicant to seek external review if they believe, on reasonable grounds, that there has been an insufficiency in the searching for the information. The question of reasonable grounds is an objective one that requires consideration of the relevant facts and circumstances surrounding the application.
- 70 My office has issued a *Guideline in relation to searching and locating information*, No. 4/2010, under s49(1)(c) of the Act (Search Guideline), the purpose of which *is to assist public authorities and Ministers to conduct a search in response to an application for assessed disclosure in a thorough, documented and disciplined manner*. I have considered the searching carried out by the Department and am satisfied that those searches generally accord with the Search Guideline. The Department provided advice as to the search terms used, the locations searched and undertook additional searching in response to questions raised by C and my office.
- 71 Accordingly, I am satisfied that the searches performed were sufficient to identify relevant information in the possession of the Department.

Preliminary Conclusion

- 72 For the reasons set out above, I determine that:
- exemptions claimed pursuant to ss27 and 36 are affirmed;
 - exemptions claimed pursuant to s35 are varied; and

- the Department undertook a sufficient search for relevant information.

Conclusion

- 73 As the above preliminary decision was adverse to the Department, it was made available to it on 17 April 2025 to seek its input prior to finalisation, pursuant to s48(1)(a) of the Act.
- 74 On 29 April 2025, the Department advised that it did *not wish to provide a submission in relation to this preliminary decision*. Accordingly, my findings remain unchanged.
- 75 For the reasons set out above, I determine:
- exemptions claimed pursuant to ss27 and 36 are affirmed;
 - exemptions claimed pursuant to s35 are varied; and
 - the Department undertook a sufficient search for relevant information.

Dated: 29 April 2025



Richard Connock
OMBUDSMAN

Attachment A – Relevant legislation

Section 27 - Internal briefing information of a Minister

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or a recommendation prepared by an officer of a public authority or a 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.
- (2) Subsection (1) 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.
- (3) Subsection (1) 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.
- (4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.
- (5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 - Internal deliberative information

- (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.
- (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 (1) 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 person

(1) 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision;
 - or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 - Public interest test

(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.

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.



Right to Information Act Review

Case Reference: R2401-006

Names of Parties: Chris Billing and City of Launceston

Reasons for decision: s48(3)

Provisions considered: s37

Background

- 1 The Building Better Regions Fund (the BBRF) was a former federal grant program designed to deliver funding for infrastructure projects and community development throughout regional Australia. On 19 December 2019, the Office of the Coordinator General (the OCG) submitted an application for funding to the Federal Government through the BBRF on behalf of City of Launceston (Council). This BBRF application included information that Mr Chris Billing, the external review applicant in this matter and the director of Creative Property Holdings (CPH), had provided to the OCG.
- 2 On 11 October 2023, the primary applicant in this matter submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Council. As part of this application, the primary applicant requested *Council's application for the \$10m Building Better Regions Fund grant* (the BBRF application).
- 3 On 6 December 2023, Council's Acting Chief Executive Officer, Mr Shane Eberhardt, issued a decision to the primary applicant. As part of this decision Mr Eberhardt decided to release the BBRF application to the primary applicant in full (with the exception of the redaction of one telephone number on page 20).
- 4 On 8 January 2024, Mr Billing submitted an application for external review to Ombudsman Tasmania of Mr Eberhardt's decision. Mr Billing contended that information contained in the BBRF application was confidential and commercially sensitive, and that its release would be likely to expose CPH to a competitive disadvantage. This application for external review was accepted pursuant to s45(2)(a) of the Act on the basis that Mr Billing is a person who was required to be consulted under s37(2) but Council had not formally undertaken this consultation.

- 5 My office requested that Council consult with the applicant in accordance with s37(2) of the Act, as it had failed to do so prior to issuing its 6 December 2023 decision, and to advise whether this changed its decision.
- 6 After consulting as requested, Council advised me on 15 March 2024 that it had not altered its decision and did not consider any information exempt in the BBRF application.
- 7 I note that Ombudsman Tasmania has received four further applications for external review from other parties objecting to the release of the substantial majority of the BBRF application. This decision will consider whether the BBRF document should be released with reference to submissions made by Mr Billing only. Decisions on the other four applications will be issued simultaneously, however, to ensure consistency.

Issues for Determination

- 8 I am to determine whether the information proposed to be released by Council is eligible for exemption under s37, or any other relevant section of the Act.

Relevant legislation

- 9 As s37 is contained in Division 2 Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that should I determine that information is *prima facie* exempt from disclosure under s37, I must then determine whether it would be contrary to the public interest to release it to the applicant. In making this assessment I must have regard to, at least, the matters listed in Schedule 1 of the Act.
- 10 I attach a copy of s37 of the Act to this decision at Attachment 1. Copies of s33 and Schedule 1 are also included at Attachment 1.

Submissions

Applicant

- 11 Mr Billing, through his legal representative, submitted that the BBRF application is exempt in full pursuant to s37(1)(b) of the Act, on the basis that the release of this information would be likely to cause Mr Billing or CPH a competitive disadvantage. His legal representative argued:

My clients did not prepare the BBRF Application, however, provided proprietary, confidential, and commercial information which has been used in the BBRF Application. In particular, my clients provided strategic initiatives, financial projections and costings and information relating to potential tenants (including a related entity of CPH known as EBNZR Pty Ltd trading as “Foundry”). In respect

of those potential tenants, marketing expansion strategies and future plans were also provided. Furthermore, contractual negotiations (for which those contractual obligations remain ongoing) were included in the information provided by my clients in respect of project(s) the subject of the BBRF Application.

It is submitted that the BBRF Application contains commercially sensitive information, which is applicable to my clients, and that the disclosure of the information contained in the BBRF Application has the potential to cause my clients a competitive disadvantage, as there is a likelihood that competitors will be able to use this information to garner an advantage over my clients.

Despite the potential perception that the BBRF Application is an aged matter, there are significant and sensitive negotiations which are ongoing in respect of the project(s) which are the subject of the BBRF Application. My clients are at a critical juncture whereby the disclosure of this information may cause significant loss and competitors to gain an advantage.

Whilst my client acknowledges that the Launceston Creative Precinct has been the subject of media coverage, there are aspects of my clients' project(s) which remain highly confidential, provision of details of which, if released to the public, may risk its viability as there is a likelihood that other persons or entities may leverage the information to undermine or tarnish my client's reputation. Additionally, by releasing highly confidential information in this manner, there is a likelihood that investors and/or financiers will withdraw from any further involvement in respect of the project(s) or at a minimum there will be a 'cooling effect' on negotiations. This would be of detrimental impact to my clients as it would lead to project delays and/or cancellation, which in turn is likely to cause significant loss and competitors to gain an advantage.

Council

- 12 Council did not make submissions or outline its reasoning for deciding to release the BBRF in full, beyond setting out that it was *not persuaded that the information is exempt from release*.

Analysis

Section 37 – information relating to business affairs of third party

- 13 Section 37(1) of the Act provides that information is exempt from disclosure if it is:
- a) *A trade secret of a public authority; or*
 - b) *the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*

- 14 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman* [2010] TASSC 39, Porter J held at [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.

- 15 At [59] Porter J added:

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

- 16 At [41] the Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.
- 17 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*¹ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the Ombudsman Act 1978, and that the Tasmanian Ombudsman is also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.
- 18 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to

¹ [2017] NSWCA 275 (24 October 2017).

the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

Third party onus under s37(1)(b)

- 19 Section 47(5) of the Act provides as follows:

Where an external party seeks review of a decision by a public authority or Minister to disclose personal or business information of that external party, the external party has the onus to show that there are grounds that the information should not be disclosed and it is open to the Ombudsman to overturn a decision if that onus is not discharged.

- 20 Mr Billing submits that s37(1)(b) of the Act applies to exempt the BBRF application from disclosure, however he does not specify whether it is exempt in part or in full. Having reviewed the document, it is clear to me that the BBRF is not exempt in full pursuant to s37(1)(b) of the Act. The entire document does not solely relate to CPH and its involvement with this project is publicly known, so I cannot accept that it could be exempt in its entirety on the basis that it would cause CPH to be exposed to competitive disadvantage.
- 21 It could only then, at best, be exempt in part. However, the submissions provided by Mr Billing are broad and general in nature and fail to identify which specific aspects of the BBRF should be considered exempt from disclosure pursuant to s37(1)(b). They also fail to make explicit how the release of those specific pieces of information would be likely to expose CPH to a competitive disadvantage pursuant to s37(1)(b) of the Act. It is not independently obvious that some aspects are likely to be disadvantageous and it is not appropriate for me to make assumptions in this regard. Mr Billing acknowledges that much of this information is dated (the BBRF application was submitted in 2019) but has indicated that the release of some information would still prejudice some ongoing negotiations. Without further indication as to which aspects of the application he refers, however, I am not able to assess this claim further.
- 22 As a result, I am not able to be satisfied that this information is exempt and that Council's decision to release this document was in error. The Act is explicit that discretions conferred are to be exercised so as to release the maximum amount of official information and Mr Billing has not discharged his onus to show why specific information should not be released.

Preliminary Conclusion

- 23 Accordingly, for the reasons given above, I determine that the BBRF application (with the exception of the telephone number on page 20) is

not exempt pursuant to s37(1)(b) of the Act. It should be released to the original applicant.

Submissions to the Preliminary Conclusion

- 24 As the above preliminary decision was adverse to Mr Billing, it was made available to him on 29 November 2024 under s48(1)(b) of the Act to seek his input prior to finalisation. On 10 January 2024, my office received submissions from Mr Billing's legal representative. An annotated version of the BBRF application was also provided, which identified 26 specific pieces of information which Mr Billing contended were exempt pursuant to s37(1)(b) of the Act. Mr Billing's legal representative requested that the contents of the letter *be withheld from any written decision of the Ombudsman and no extracts be included in any published or otherwise publicly available documents prepared by the Ombudsman's Office*.
- 25 Accordingly, I will not set out the relevant submissions or refer to them in any detailed analysis. I have, however, carefully considered them in reaching my final decision.

Further Analysis

- 26 Having reviewed the submissions and proposed exemptions, I can see that the release of this information would reveal an unannounced site for the proposed project detailed within the BBRF application. The release of this information has the potential to impact ongoing negotiations regarding that site. Due to this, I am satisfied that this information identified by Mr Billing is *prima facie* exempt pursuant to s37(1)(b) of the Act. This is because the information, if released, would be likely to cause Mr Billing a competitive disadvantage.

Public interest test

- 27 For the purposes of this public interest assessment, I find it helpful to characterise the information identified as *prima facie* exempt pursuant to s37(1)(b) of the Act, as information revealing a previously undisclosed site for the project detailed within the BBRF application.
- 28 I find that matter (a) - the general public need for government information to be accessible – is relevant and I weigh this matter in favour of disclosure.
- 29 I find that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. The project detailed within the BBRF application has been reported in Tasmanian media outlets previously and funding arrangements for this project are a matter of public interest. I am satisfied that the release of information revealing a potential site for the project would contribute to public debate about this matter.

- 30 I also find that matters (c) – whether disclosure would inform a person about the reasons for a decision, (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – and (f) – whether disclosure would enhance scrutiny of government decision-making processes – are relevant and weigh in favour of disclosure. The release of this information would inform the public about a project that has attracted government investment. However, the relevant information does not reveal information that explicitly explains *why* the Council was successful in attracting this investment over other projects, and so I only weigh these factors marginally in favour of disclosure.
- 31 However, I also find that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. As I have discussed, the release of information revealing a potential site for the project detailed within the BBRF application would likely impact negotiations and the interests of individuals, and has the potential to harm these interests. Accordingly, I find that this matter weighs against disclosure.
- 32 I also find that matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – to be relevant and to weigh against disclosure. Should the release of information revealing a potential site for the project detailed within the BBRF application impact upon negotiations Mr Billing is a party to, it would likely impact upon the likelihood of this project proceeding, and this could harm Council's interests.
- 33 Overall, it is a difficult balance to strike, however after considering the applicant's submissions in response to my preliminary decision, I am satisfied that it would be contrary to the public interest to release information revealing this unannounced site. I consider that the information marked up by Mr Billing was confined to the minimum necessary to remove reference to this site and is proportionate. Accordingly, the information annotated in the version of the BBRF provided by Mr Billing is exempt from disclosure pursuant to s37(1)(b).

Conclusion

- 34 For the reasons set out above, I determine that information is exempt pursuant to s37.
- 35 The remainder of the BBRF application (with the exception of the telephone number on page 20) is not exempt and should be released to the original applicant.

Dated: 20 January 2025

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

Section 37 - Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "**third party**") and –

- (a) the information relates to trade secrets; or
- (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

- (a) until 10 working days have elapsed after the date of notification of the third party; or
- (b) if during those 10 working days the third party applies for a review of the decision under section 43, 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; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision;
- or
- (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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.



Right to Information Act Review Case Reference: R2501-011

Names of Parties: D and Department of Justice

Reasons for decision: s48(3)

Provisions considered: s36, s39

Background

- 1 On 15 March 2021, the Governor of Tasmania ordered a Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the Commission).
- 2 D (the Applicant) is a victim-survivor who made a submission to the Commission detailing child sexual abuse by E which occurred during their time at school. D believes they were not the only victim of E.
- 3 On 11 September 2024, D contacted the Secretary of the Department of Justice (the Department) regarding their submission to the Commission, requesting:

Please could you investigate why the [Commission] didn't provide either my statement or the other persons' statements about [E] to the police, and whether you can arrange for the other persons' statements to be found and provided to me in deidentified form which I understand would be a lawful disclosure. I am seeking to understand as much as possible as to what happened to me to assist with my recovery, and for a fair determination of the State's liability to me. It also concerns me that other information about other perpetrators may have also mistakenly not been passed on.

- 4 On 16 October 2024, Mr Oliver Hinss, Director, Commission of Inquiry Response Taskforce, advised D that the Department had determined to treat their letter as an application for assessed disclosure under the *Right to Information Act 2009* (the Act). The Department waived the fee.
- 5 On 26 November 2024, Ms Natalie Warn, a delegate under the Act for the Department, released a decision. Ms Warn identified 14 documents from the Commission located in State Archives which were responsive to the application. Of these, the Department determined that:
 - Documents 1-11 (information D had provided to the Commission) should be released in full;

- some information in Documents 12 (an attachment to an email D had provided to the Commission) and 13 (a file note of a conversation with D) was exempt pursuant to s36 (personal information of a person other than the applicant); and
 - Document 14 (a submission from another individual to the 2020 Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse, which was provided to the Commission) was exempt in full pursuant to ss36 and 39 (information obtained in confidence).
- 6 On 9 December 2024, D sought internal review, questioning the exemptions used and the searches undertaken by the Department. On 20 December 2024, Ms Michelle Lowe, another delegate under the Act for the Department, released the internal review decision. Ms Lowe primarily upheld the exemptions, however released a small amount of information in Document 14.
- 7 When conducting the internal review, the Department indicated that it had undertaken further review of its searching for relevant information but this had not been fully completed. It was awaiting a further response from State Archives but opted to review the documents already identified prior to receiving this response, to reduce delay to the applicant.
- 8 On 19 January 2025, D sought external review in relation to exemptions applied to Document 14, which was accepted under s44 of the Act. They did not seek review of the sufficiency of searching for relevant information by the Department.

Issues for Determination

- 9 I must determine whether the information not released by the Department is eligible for exemption under ss36, 39 or any other relevant section of the Act.
- 10 As these sections are contained in Division 2 of Part 3 of the Act, my assessment of the exemptions is subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under these 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 1.

Relevant legislation

- 11 Copies of ss36 and 39 are at Attachment A.
- 12 Copies of s33 and Schedule 1 are also at Attachment A.

Submissions

Applicant

- 13 In their request for internal review, D submitted:

The first page of the decision, para 5-7, notes I have requested other person's statements. It says "... I have decided to exempt in full a statement provided by a third party, which is also exempt from disclosure under section 36 of the Act." It seems impossible that every word of the third-party statement could be considered 'personal information' and exempted. The decision does not say whether the required s 36 consultation with the third party occurred, or how the consultation informed the decision if it did occur.

The second page of the decision says "with respect to the part of your request for information provided to the Commission by other persons, the Department has located records relevant to your request. I have decided to exempt this information in full...under section 39." ... I cannot determine whether the second page is similarly repeating a reference to the DOE [Department of Education] Inquiry rather than the COI [the Commission], or if there are other third-party statements to the COI found which have been exempted in full and not listed in the Schedule.

The Schedule only records whether documents were released or exempt, and not the section or sections that applied to each document, so I do not know from the decision or schedule if the DOE statement was considered under both s 36 and s 39...

...
If it is the case that Document 14 was the only third-party statement found, I believe the search method needs to be reviewed and improved as far as possible, as I know a friend of mine also made a third party statement, the COI told me they had more than one other statement... and the COI file note released to me (Document 13) says the COI Team Leader told me "the COI had reason to believe other reports had been made."

...
There is no discussion of the type of content of Document 14, whether it was given in confidence or not, and why release of deidentified parts of it would discourage people from making such submissions in future. I believe it is likely the authors of such statements would expect de-identified parts of their submission could be used for legitimate purposes, such as benefitting victim-survivors and accountability for systems and perpetrators. When making my own submission, I explicitly asked for anonymity and that my consent be sought before use. However, I knew bigger factors such as public interest considerations could also apply to use of my submission.

- 14 D then made submissions regarding the Department's application of the public interest test:

I believe the Schedule 1 public interest factors were not fully considered or properly applied. I agree with the single Schedule

1 factor listed in the decision in favour of disclosure (that information be accessible). But I disagree with the single factor listed against disclosure (the assertion that the disclosure would prejudice obtaining such information in future). I do not believe any of the Schedule 1 factors weigh against disclosure of the deidentified information I seek. I also believe other Schedule 1 factors promote disclosure, and the overall balance is in favour of disclosure:

“(c) whether the disclosure would inform a person about the reasons for a decision” – it could inform me about relevant things such as the state of knowledge about E at the time.

“(h) whether the disclosure would promote or hinder equity and fair treatment of persons ...in their dealings with government” – this could be promoted in terms of fair treatment of me in seeking information about concerns raised about the State employee who abused me.

“(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law” – the disclosure could provide me with information that may indicate the State knew, or should have known, of risks the State employee posed towards me.

“(m) whether the disclosure would promote or harm the interests of an individual or group of individuals” – it could promote my interests as above and could not harm E’s...

- 15 When applying for external review, D made a number of additional submissions:

I emphasise that I do not seek any identifying information of other victims of E. I seek information provided to the COI about E in deidentified form, so I have a better understanding of the context in which E offended against me and others. I believe this will assist in my psychological recovery, and also potentially identify where system failures have led to such information not being provided to police.

...

...On 20 December, I received the [internal review] decision and revised redactions to Document 14, which now also disclosed the date of the document, and the first line of text (“I request that my submission is confidential.”)

...

I seek external review of the decision in relation to Document 14 on the same grounds as my internal review application letter...

...The [internal review] decision is clearer than the original decision, but the findings of fact or analysis of why the

exemptions and public interest are made out for section 36 and section 39 are limited and often hypothetical. For example, in the context I am seeking deidentified information, there are a range of statements which I do not believe are substantiated or merited, including:

"the disclosure of the information would be likely to impair the ability to obtain similar information in future".

"disclosure could result in the unfair treatment or [sic] the author or third parties" – apart from anything else, this seems to assume that identifying information will be provided to me, and then be disclosed publicly, which is not true.

Disclosure would be "in express contradiction to their wishes", when no consultation has occurred to clarify the author's wishes.

- the decision clarifies the consultation required by section 36 with the third party still has not occurred.

...

The reason given in the decision is that consultation is not 'appropriate or practical' and the author 'may be surprised and/or retraumatised' by being consulted. I believe that is not relevant to whether consultation is 'practicable', and the assumption about the possible impact of consultation is well-intentioned but misguided. These assumptions disempower people who presumably made submissions to improve systems and people's lives. The consultation could have reassured the person that no identifying information would be disclosed.

The COI was concerned that victim-survivors have a right to information relating to their abuse under the Act, but noted this is difficult in practice... Recommendation 17.8 relates to a review and reform of the RTI Act so that "people's rights to obtain information [relating to their abuse] are observed in practice" and "this access is as simple, efficient, transparent and trauma informed as possible."... This supports the interest in victim-survivors having reasonable access to information in support of transparency and accountability.

...

Department

- 16 The Department was not required to make specific submissions to this external review, as it provided reasons as part of its decisions, relevant extracts of which are set out below.
- 17 The Department's original decision addressed the operation of s36:

I have decided to release these records to you in full, save for the names, dates of birth and other identifiable information of

third party individuals... In addition, I have decided to exempt in full a statement provided by a third party.

...
With respect to the disclosure of names, dates of birth and other identifiable information of third parties, I consider that the following Schedule 1 factor weighs in favour of disclosure:

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

I consider that the following Schedule 1 factor weighs against disclosure:

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

After consideration, I am of the opinion that the factorsavouring disclosure are outweighed by those against disclosure and it is not in the public interest to provide the personal information of third parties.

18 The Department than considered the application of s39 to Document 14:

I consider that the following Schedule 1 factor weighs in favour of disclosure:

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

I consider that the following Schedule 1 matter weighs against disclosure:

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

I consider that the information provided to the Commission by third parties was provided in confidence and there is a reasonable expectation that this information remains confidential. I further consider that if this information was disclosed, it would likely impair the ability of a public authority or Minister to obtain similar information in the future.

19 In the internal review decision, the Department expanded upon its reasoning:

[Document 14] clearly contains personal information of the writer and perpetrator which I am satisfied is exempt information. Although I do not agree that the document is exempt in full under section 36 alone, I note that the information is written in such a way that it is possible other details will allow the author, any third parties referred to, and/or the perpetrator to be identified.

...

I am satisfied that the substantive information in the submission is exempt information under section 39 of the Act. I am satisfied that the submission was provided in confidence and that if this information was released, others may be discouraged from providing submissions to future inquiries.

I note also that the submission contains a clear request from the writer that it be treated in confidence.

Your request for an internal review noted that the original decision does not indicate whether consultation was undertaken with the third party concerned. I can confirm that consultation was not undertaken. I can also advise that for the purposes of this internal review, I have also not undertaken consultation with the author of the submission.

I have taken the view that it is not appropriate or practical to consult on this occasion. It is unclear to the Department how this submission came to form part of the Commission's records. The author may not be aware that their submission was put before the Commission and may be surprised and/or retraumatised by the fact that release is being considered by the Department. As noted, the author has made specific note in their written submission that it is confidential.

20 The Department went on to consider the public interest test:

I note your view that [matter (h)] could be promoted in terms of fair treatment of you. However, I have significant concerns that release of the confidential information contained in document 14 could result in the unfair treatment of the author or other third parties referred to should they be identified. This concern is also relevant to the extended family of those involved who may or may not be aware of the submission or alleged grooming or child abuse.

I note your comments in relation to [matter (j)]. I note also that the perpetrator is deceased. However, in my view there is also a substantial risk that the Department will be exposing details that would identify victims of sexual offences without their consent and in express contradiction to their wishes. A foreseeable consequence of this type of disclosure is that it could discourage other victim-survivors or people with lived experience from making submissions to inquiries, reporting their abuse to authorities, or seeking help. These risks are elevated when there has been no finalised legal process in respect of criminal conduct.

I have noted your comments in relation to [matter (m)] in that it could promote your interests and could not harm the perpetrator's interest as he is deceased.

...I believe there is a risk of harm to other individuals who may be identified as victims by release of the confidential submission. I further believe that the disclosure of the experiences of victim-survivors or people with lived experience of child sexual abuse – without their consent and where they have specifically requested their information be keep [sic] confidential – would harm the interests of these individuals both as a group and individually.

In my view, I also need to consider the interests of other third parties and note that the perpetrator's family must also be considered...

- 21 With regard to the Commission and the then Department of Education (now the Department for Education, Children and Young People), the Department advised:

In relation to the Commission, I note that the FAQs [Frequently Asked Questions] also refer to respecting the preferences of victim-survivors and considering the impact that information it has received may have on other investigations, legal proceedings and the wider community. The Commission also reserved the right not to publish any submission or statement if it considered it inappropriate to do so, including because the author requested not to have their information disclosed and asked that their identity be kept confidential.

The FAQs for [the Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse] note that due to the way the inquiry was conducted, and the confidential basis in which a range of individuals engaged with the authors, there are legal impediments to releasing parts of the Inquiry Report. The FAQs go on to note "these individuals did not necessarily give permission for their information to be shared or made public, we need to respect their privacy and protect their right to share their experiences, if they wish to do so."

- 22 In a further letter to D dated 11 February 2025, and also provided to my office, the Department addressed the searches conducted:

I can confirm that following receipt of your request for an internal review, the State Archivist was advised of your concerns in relation to the sufficiency of the search and the additional information you provided that may have assisted in conducting further searches.

...

The State Archivist has indicated that the records of the Commission of Inquiry are broken down into 5 categories, all of which have been individually searched for information that is potentially responsive to your request. Those searches returned the documents that have been previously disclosed (either in full or in part) to you.

I am further advised that ... State Archives:

Conducted another search of all records using the name of the person you have identified as a perpetrator of child sexual abuse (the perpetrator) and found no further documents than the ones that have been disclosed

Conducted a further search for records relating to [School] and from this nothing further was identified that related to the perpetrator.

I am also advised that the searches are conducted with software that uses OCR technology (optical character recognition). This means that the software can search 'inside' of documents to find words or phrases, and the search is not limited to, for example, just the titles or names of files and folders. It is also important to note that the technology can 'read' handwriting or documents that have been scanned and saved.

All 5 categories of records have been searched with this technology and no additional documents have been identified.

Analysis

- 23 As D is only seeking review of the Department's decision in relation to Document 14, I will confine my analysis to that document.
- 24 Other than the words *I request that my submission is confidential*, the Department assessed the information in Document 14 as exempt in part under s36 and in full under s39. I will therefore begin my analysis with discussion of s39.

Section 39 – Information obtained in confidence

- 25 Section 39 of the Act 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.

- 26 The Department relies on s39(1)(b). For the information to be *prima facie* exempt under this section, I must first be satisfied that it was communicated to the Department in confidence. The Department has identified the document as a submission from an individual to the 2020 Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse, which was later supplied to the Commission. The Department set out in the internal review that the *submission outlines historical allegations against the same perpetrator named in documents 12 and 13 above. It also refers to a sexual relationship with a friend of the writer who was a young person under 17 years of age.*
- 27 The first line of the substantive document, released by the Department, is a request for confidentiality. Given this clear request, the sensitive nature of the information and confidential treatment of submissions made to the relevant inquiry, I am satisfied that it was communicated in confidence.
- 28 However, for the document to be *prima facie* exempt, I must also be satisfied that disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in future. Again, given the nature of the information contained in the document and the circumstances of its provision, I am satisfied that its disclosure would be reasonably likely to have this effect.
- 29 Accordingly, I am satisfied the information in Document 14 which has not been released by the Department is *prima facie* exempt under s39(1)(b).

Section 33 – Public interest test

- 30 As mentioned, exemptions under s39 are subject to the public interest test set out in s33 of the Act. It is therefore now necessary to assess whether, after taking into account all relevant matters, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt. In making this assessment I am required to have regard to, at least, the matters in Schedule 1 of the Act.
- 31 Schedule 1 matter (a) – the general public need for government information to be accessible – was identified by the Department as weighing in favour of disclosure. I agree with this assessment because this matter is essentially a restatement of the object of the Act and so will almost always be a relevant factor.
- 32 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – was not identified as a relevant matter by either D or the Department. I consider that the experiences of victim-survivors as described to the Commission, and the response of those relevant institutions to abuse allegations, is clearly a matter of wide debate and

significant public interest in the Tasmanian community. As such, the disclosure of relevant information can contribute to that debate and so I consider this matter weighs in favour of disclosure.

- 33 Schedule 1 matter (c) – whether the disclosure would inform a person about the reasons for a decision – was identified by both D and the Department as a relevant consideration. I agree with this assessment and consider it weighs in favour of disclosure.
- 34 Schedule 1 matter (f) – whether the decision would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – is relevant if the document were to provide greater context surrounding the institution at the time of the abuse D endured. I consider this factor weighs in favour of disclosure.
- 35 Schedule 1 matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – was considered by D to weigh in favour of, and by the Department to weigh against, disclosure. I note the Department has indicated other persons are mentioned in Document 14, one of whom was under 17 years of age at the time. On balance, I consider this factor weighs against disclosure due to the type of document under consideration for release. Despite D's valid concerns regarding wishing to obtain information about the knowledge and response of government to abuse occurring in institutional settings, respecting requests for confidentiality from those making submissions to a government inquiry into such abuse achieves a greater promotion of the fair treatment of such persons in dealing with government.
- 36 Schedule 1 matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – was identified as a relevant factor by both D and the Department. I consider that if confidential information provided to commissions of inquiry, or law enforcement in general, was routinely released through the right to information process, the willingness of the community to volunteer information would be adversely affected, with consequent detriment to the ability to investigate serious criminal conduct and institutional failures. On balance, I consider this factor weighs against disclosure.
- 37 Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – was identified as relevant by both D and the Department. Whilst I appreciate that release may promote D's recovery, on balance, I consider that the potential harm to the named victims of child sexual abuse in the document is of greater importance and weighs against disclosure. I agree with the Department's submission that disclosure of this document may result in victims of child sexual abuse being identified against their wishes, with consequent harm to their interests and mental health.

- 38 I note that E is deceased and acknowledge the Department's view that there is a risk of harm to E's family. It has been my clear position in previous decisions¹ that the interests of victims are given more weight than those of perpetrators and their associates. While I give greater weight to the interests of D than those of E and E's family, this does not override my assessment that, overall, the weight of this factor is against disclosure in this instance.
- 39 Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – was identified by the Department as weighing against disclosure. I agree with this assessment. Commissions of Inquiry and similar investigations, as well as Tasmania Police and other investigative agencies, rely upon victims and witnesses to come forward, tell their stories and provide information. Often the experiences victim-survivors have endured and relate are harrowing. Reluctance to come forward is common and victim-survivor accounts are often only provided following assurances of confidentiality and that the information shared will be used only for specific purposes.
- 40 I give great weight to the author's unequivocal *request that my submission is confidential*. I am of the view that if victim-survivors' specific requests of this nature are able to be routinely re-visited or disregarded, and information is released into the public domain through the right to information process despite such requests, this possibility will weigh heavily on the mind of any person who has information relevant to future inquiries. This could have a major chilling effect upon their willingness to provide any assistance, which is clearly contrary to the broader public interest. I determine this matter weighs strongly against disclosure.
- 41 Determining the proper result of public interest test in this matter is difficult, as I am very mindful of the importance of this information to D in the context of their recovery from major trauma. However, on balance, I give the greatest weight to the chilling effect which would be the very likely result of the release of extremely sensitive and personal information provided by other victim-survivors with an explicit request for confidentiality. I therefore determine that the information in Document 14 which has not been released is exempt pursuant to s39(1)(b) of the Act.

Additional matter

- 42 In their submission, D referred to my previous decisions of *Camille Bianchi and Department of Health* (November 2021) and *L and Department of Police, Fire and Emergency Management* (June 2023)² as supporting release of the information.

¹ See, for example, *Q and Northern Midlands Council* (September 2023) and *Camille Bianchi and Department of Health* (November 2021), both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

² Both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 43 Without discussing the information contained in Document 14, which I have found to be exempt, I can say in response that I do not agree that these matters are particularly analogous in relation to s39. This section did not need to be considered in *L*, as the statement of the complainant was determined, at paragraph 42, to be exempt in full under s36 for many of the same reasons I have addressed here.
- 44 With regard to *Bianchi*, the letter claimed by the public authority to be exempt was provided to it on an unsolicited basis, intending to raise concerns anonymously but not confidentially (provided the relevant person's identity was not revealed). While it was found not to be exempt under s39, due to the explicit request for confidentiality here and the submission being solicited by a government inquiry, a similar finding would not be appropriate in this matter due to the differing circumstances.

Section 36 – Personal information of person

- 45 As I have determined the unreleased information in Document 14 is exempt under s39, it is not necessary for me to determine if it is also exempt under s36. However, I consider it is appropriate to make some comments.
- 46 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 47 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.
- 48 I have examined Document 14 and am satisfied that it contains personal information of the writer which is *prima facie* exempt under s36. I also agree with the Department's conclusion *...that the document is written in such a way that it is possible other details will allow the author, any third parties referred to, and/or the perpetrator to be identified.*
- 49 Section 36(2) of the Act provides:

(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 provides his or her view as to whether the information should be provided.

- 50 In its internal review decision, the Department confirmed that the consultation with the author of Document 14 required by s36(2) was not undertaken because of *the view that it is not appropriate or practical to consult on this occasion*.
- 51 Section 36(2) provides that consultation should be undertaken if *practicable*, which is not defined in the Act and so is to be given its ordinary meaning. The Macquarie Dictionary relevantly defines “practicable” as:
 1. *capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible.*³
- 52 I encourage the Department to approach the question of consultation in sensitive circumstances in accordance with the clear wording of the Act. It does not appear that consultation was not practicable but it was not pursued by the Department for reasons relating to the potential to re-traumatise victim-survivors. I agree with D that giving victim-survivors agency by seeking their views, as is required by the explicit terms of the Act, is an appropriate course when consultation is necessary.
- 53 However, in this matter I accept that consultation was not mandated due to the Department’s primary reliance on s39. If s36 is the only exemption relied upon, consultation must occur when practicable. But if s36 is an alternative or secondary exemption, I consider that it is at the discretion of the public authority as to whether to undertake this consultation and it was reasonable not to do so in this matter.

³ Macquarie Dictionary online, available at www.macquariedictionary.com.au, accessed on 28 May 2025.

Preliminary Conclusion

54 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to s39 are affirmed.

Response to the Preliminary Conclusion

55 On 6 June 2025, the above preliminary decision was made available to both D and the Department to seek their input prior to finalisation, in accordance with s48(1)(b) of the Act.

56 On 13 June 2025, Ms Kristy Bourne, Secretary of the Department, made submissions and on 16 June 2025, D also made submissions. I have carefully considered these submissions and relevant extracts of both are set out below.

Applicant

57 D made comments regarding consultation:

...I do not understand why you think the department should have consulted the writer, but you haven't taken that step (even if s.39 does not explicitly require it). It should be considered good practice to consult under s.39 – to check the person who provided it still does want it treated confidentially. That is what happened in Bianchi's case. If confidential information was disclosed with agreement of the person after consultation, there would be no reason to think this would impair the ability to obtain similar information in future...

I also find it frustrating that the theoretical harm that might be caused another always seems to outweigh the harm you are causing me. Also what use are these submissions if they do not actually help other victim/survivors or prevent further harm to be done to children.

...

Department

58 The Department also addressed the issue of consultation:

I maintain that third party consultation was not practicable on this occasion. In particular, I note that the definition of 'practicable' as set out in your decision includes '...especially with the available means or with reason or prudence ...'.

In considering the Department's position, I note that the definition of 'prudence' from the Macquarie Dictionary is 'cautious practical wisdom' good judgement; discretion'.

I consider that the Department's decision not to engage in third party consultation was taken with reason and prudence. When making this decision, the Department considered a number of factors including:

1. The document in question (document 14) was a submission from an individual to the 2020 Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse, which was later supplied to the Commission of Inquiry into Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the Commission).

The Department of Justice is unaware as to whether the author of the document agreed, or is even aware, that the submission was supplied to the Commission of Inquiry after being submitted to the Department of Education inquiry. For the author to then be contacted by the Department of Justice seeking views on whether it should be provided to a right to information applicant, may be very distressing, particularly given the author's request that '... my submission is confidential'.

2. The Department has no means to determine the author's current state of wellbeing. The ongoing trauma experienced by victim-survivors is well documented, as is the mental and emotional toll that the Commission has taken on those that came forward to provide information. It does not seem reasonable or prudent for the Department of Justice to seek contact with a third party out of the blue without an understanding of what effect this may have upon them. This was a particularly strong factor in the Department's deliberations, particularly when considered alongside point 1 above that the author may be unaware that their submission was provided to the Commission.

3. The only contact details the Department has for the author of document 14 is that of an email address from over four years ago, when the submission was originally made. There is no contact telephone number. Given the circumstances outlined in (1) and (2) above, had the Department decided to proceed with third party consultation, it would have been by means of an email address that may have been accessible by other persons. In addition, trauma-informed practice would advise that this sort of request is not sent by email without firstly advising the person of the content of the email and seeking an appropriate time for it to be sent, which the Department was unable to do.

In summary, whilst I agree with the outcome of your decision, I consider that the Department did give due consideration to the issue of third party consultation, and did in fact act in accordance with the clear wording of the Act, in that third party consultation was not practicable on this occasion.

Further Analysis

- 59 While the submissions from both parties have focused on consultation, it is important to re-iterate that s39 of the Act does not require a public authority to consult with a person who provided information in confidence.
- 60 While s36(2) of the Act provides that consultation with a third party regarding the release of personal information should occur *if practicable*, the question of whether such consultation is practicable is ultimately a matter for a public authority to determine on a case-by-case basis, taking into account the unique circumstances which will apply to each individual situation. I do acknowledge the practical difficulties and the trauma-informed approach the Department is attempting to take in relation to highly sensitive information and difficult circumstances.
- 61 I note that, even if consultation does occur, the result of such consultation is not in itself determinative. The public interest test in s33 must be applied before a determination is able to be made, and alternative exemptions may apply.
- 62 I am also very conscious of D's submissions, which reveal the importance of this information to their personal recovery and legitimate concerns regarding apparent assumptions of the views of victim-survivors rather than seeking their response through consultation. I am, however, required to balance this importance with the interests of other victim-survivors and the effect of release of information provided in confidence could have upon future investigative inquiries. I also cannot discuss all of the matters and relevant circumstances I have considered, as this would reveal the content of the information I have found to be exempt.
- 63 After careful consideration, I am ultimately not persuaded that it would be appropriate to alter my determinations and reasoning as set out in the preliminary decision.

Conclusion

- 64 For the reasons set out above, I determine that exemptions claimed pursuant to s39 are affirmed.

Dated: 20 June 2025



Richard Connock
OMBUDSMAN

Attachment A – Relevant Legislation

Section 36 – Personal information of person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –

- (i) during 20 working days after the notification of the decision;
or
- (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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.

Section 33 – Public interest test

- (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.

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.

**Right to Information Act Review****Case Reference:** R2405-017**Names of Parties:** Damien Matcham and Brighton Council**Reasons for decision:** s48(3)**Provisions considered:** s32, s36

Background

- 1 Mr Damien Matcham has a keen interest in the governance of Brighton Council (Council). On 10 April 2024, Mr Matcham submitted an assessed disclosure request to Council under the *Right to Information Act 2009* (the Act) requesting:
 1. *A copy of any and all documentation regarding the renaming of "Lennox Park".*
 2. *A copy of any and all documentation regarding not funding the Bridgewater PCYC and how much has been saved since council stopped the funding.*
 3. *A list of Key Management Personnel/Senior Executives remuneration and salary packages for the last five (5) financial years broken down by salary, superannuation, vehicle costs (purchase & disposal costs, FBT, Depreciation, Fuel Repairs & Maintenance, Insurance costs) including the General Manager.*
 4. *A copy of and all documentation regarding the new \$105,000 Brighton Hub sign.*
 5. *A list of all Brighton Council employees for the last three (3) financial years and the current financial year broken down by Name and Position held.*
- 2 On 22 May 2024, Mr James Dryburgh, Council's General Manager and Principal Officer under the Act, issued a decision on Mr Matcham's assessed disclosure application.
- 3 Council's decision set out that it did not have information responsive to item one of Mr Matcham's application, as it said that there was no name change occurring.
- 4 In relation to item two, Council's decision held that s32(a) of the Act (closed sessions of Council) applied to exempt from disclosure information contained in section 16.1 of the Finance Committee Meeting

minutes dated 14 February 2023. Council also claimed that s36 of the Act (personal information) applied to exempt information identified as responsive to items three and five of Mr Matcham's application.

- 5 Council identified The Brighton Estate Place Marketing Strategy and extracts from minutes of four ordinary Council meetings as being responsive to Mr Matcham's application and decided to release these in full.
- 6 Mr Matcham was not satisfied by Council's decision and, on 22 May 2025, wrote to Ombudsman Tasmania to seek an external review of this decision. Mr Matcham's application was accepted pursuant to s45(1)(a) on the basis that he was in receipt of a decision by Council's Principal Officer, and he sought review within 20 working days of receiving notice of that decision.

Issues for Determination

- 7 I must determine whether Council was entitled to rely on ss32 and 36 of the Act to justify the non-disclosure of information identified as responsive to Mr Matcham's application.
- 8 As s36 is contained within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under s36, 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 1 of the Act.

Relevant legislation

- 9 I attach copies of ss32 and 36 to this decision at Attachment 1. Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 10 Mr Matcham included the following when he submitted his application for external review (verbatim):

Once again Brighton Council is hiding behind sections of the RTI Act 2009 to not release what should be public information. Other Councils across Tasmania list all the full breakdown of salaries and remuneration packages of senior executives as they are all "key personnel".

Again, this is just one (example) again of Brighton Council not releasing information that they have managed to keep "top-secret" for over 30 years now, we have a right to know what the Deputy General Manager, and all the other

senior executives are paying themselves from our rate-payers/public monies. This is also clearly a conflict of interests and also pecuniary conflicts of interests for any Principal Officer and or Acting Principal Officer when determining such questions requested under the RTI Act 2009, and is not being managed sufficiently as a PUBLIC AUTHORITY.

With regard to my RTI Act 2009 (Question 2) you will note that hasn't even attempted to be answered as requested. This is just another example of how Brighton Council plays games with RTI Act 2009 requests and need to be held to account as a PUBLIC AUTHORITY with over \$234 Million in cash-surpluses, so really it is all just a game of cat and mouse to them, otherwise they would effectively and efficiently properly address RTI Act 2009 applications, and in-particular requests for impecunious applicants as well as in the general public interest or benefit.

This is also within the objects of the RTI Act 2009 and should all be fully open, and fully disclosed. What are they so scared and frightened of?

Council

- 11 Council did not make any submissions relevant to its external review, beyond what was set out in its decision. In that Mr Dryburgh said:

I have conducted a search of our records and provide the following responses to the above:-

- 1. Council has not renamed "Lennox Park".*
- 2. The Brighton Community Grants Program was reviewed in February 2023 (Agenda & Minutes attached). The Major Impact grant replaced individualised funding in Council's annual budget for the PCYC. Section 32(1)(a) of the Act applies to exempt information as it is an official record of a closed meeting of a Council (extract attached). No monies have been saved as the funds have been redirected to fund a Youth Worker (Minutes of 7/11/2023 attached).*
- 3. Council identified the General Manager as holding a Senior Position in accordance with Section 72(cd) of the Local Government Act 1993, in 2005 when the Act was amended in relation to obligations for preparation of its Annual Reports. A statement in accordance with Section 72(cd) of the Local Government Act 1993, are [sic] recorded in Council's Annual Reports which you may find available on Council's website www.brighton.tas.gov.au*

these go back to the 2004-05 financial year, when the Act was amended.

The remainder of #3 is exempt under Section 36 of the Act i.e. Information is exempt information if its disclosure under the Act would involve the disclosure of the personal information of a person other than the person making an application under Section 13, as disclosure of this request is contrary to the public interest test, in that the disclosure:-

- (a) Would harm the interests of an individual or group of individuals;*
- (b) Would have a substantial adverse effect on the industrial relations of a public authority; and*

4. Minutes attached. The Brighton Estate Place Making Strategy may be found on Council's website. <https://www.brighton.tas.gov.au/community/have-your-say/>

5. Council's organisation structure may be found on the Brighton Council website

<https://www.brighton.tas.gov.au/organisational-structure/> however 'the remainder of your request is exempt under Section 36 of the Act i.e. Information is exempt information if its disclosure under the Act would involve the disclosure of the personal information of a person other than the person making an application under'

Section 13, as disclosure of this request is contrary to the public interest test, in that the disclosure:-

- (a) Would harm the interests of an individual or group of individuals;*
- (b) Would have a substantial adverse effect on the industrial relations of a public authority . . .*

Analysis

Section 32 – Information related to closed meeting of Council

12 Section 32(1) of the Act provides:

- (1) Information is exempt information if it is contained in –*
 - (a) the official record of a closed meeting of a council; or*
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or*

- (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
- (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- 13 Subsections 32(2), (3) and (4) restrict the application of this section to information which is less than 10 years old, was brought into existence for submission to the closed meeting for consideration and is not purely factual.
- 14 Section 32 also defines a closed meeting of Council as:
- a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the Local Government Act 1993 and includes a closed meeting of a council committee.*
- 15 Council has applied s32(1)(a) to exempt from disclosure information responsive to item two of Mr Matcham's application in full. This information consists of minutes of a closed session of an ordinary Council meeting held on 20 March 2023. Having reviewed this information, I am of the view that it clearly consists of an official record of a closed meeting of Council.
- 16 Further, though the information identified as exempt contains purely factual information, its disclosure would disclose deliberations and decisions that have not been officially published, and therefore, s32(4) is not relevant to my assessment of whether it should be released. Council is under no obligation to provide this information to Mr Matcham, as it is exempt from disclosure pursuant to s32(1)(a) of the Act.

Section 36 – Personal information of person

- 17 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than the applicant, or that the information would lead to that person's identity being reasonably ascertainable.
- 18 Section 5 of the Act defines personal information 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 who has not been dead for more than 10 years.*

19 Council has identified 30 pages of information as being responsive to items three (20 pages) and five (10 pages) of Mr Matcham's application and has held that this information is exempt from disclosure in full pursuant to s36.

20 I now turn to assess whether this information is so exempt.

Item three

21 The information responsive to item three consists of the following:

- Profit and loss statements for the years ending 30 June 2020 to 2024
- Fringe Benefits Tax Working Sheet for the years:
 - 1/04/2019 - 31/03/2020
 - 1/04/2020 - 31/03/2021
 - 1/04/2021 - 31/03/2022
 - 1/04/2022 - 31/03/2023
 - 1/04/2023 - 31/03/2024
- Fringe Benefits Tax Statements for the years:
 - 2019 until the 31st March 2020
 - 2020 until the 31st March 2021
 - 2021 until the 31st March 2022
 - 2022 until the 31st March 2023
- Vehicle Running Sheet for Fringe Benefits Tax from 1st April 2023 until the 31st March 2024
- Capital purchase transaction sheet
- Disposal schedule
- Summary sheet documenting the remuneration and salary packages of senior executives from the 2019/202 financial year to the 2023/24 financial year

22 Having reviewed the information, I consider that the vast majority is not information which, if released, would make the identity of a person other than the applicant reasonably ascertainable. The vast majority consists of various types of financial information including profit and loss statements, fringe benefit tax analysis of senior executives, a disposal schedule detailing the sale of Council owned vehicles, and other similar types of financial information. It does not consist of information that qualifies for exemption under s36 of the Act and should be released to Mr Matcham.

- 23 My finding in this regard, however, does not extend to some of the information contained in a page of information detailing the earnings and superannuation contributions of key management personnel. I am satisfied that the names of key management personnel and the dollar figures representing their earnings and superannuation contributions, is information that is *prima facie* exempt pursuant to s36 of the Act.
- 24 The release of the names of key management personnel would clearly identify those individuals. The release of their earnings and superannuation contribution would also make the identities of the relevant senior executives reasonably ascertainable to persons with knowledge of Council's organisational arrangements.

Item five

- 25 The information responsive to item five consists of Council's organisational charts from October 2020 to April 2024, which set out the names and position titles of staff employed by Council during this period.
- 26 I am satisfied that this information is *prima facie* exempt under s36, as it either names, or renders the identity of individuals reasonably ascertainable by setting out their position title.

Section 33 – Public Interest Test

- 27 As noted, s36 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I considered *prima facie* exempt from disclosure.

Information already in the public domain

- 28 The personal information of Council's current and former General Managers should be treated in a different manner to other employees, as the substance of all of the information responsive to items three and five which relates to those office holders is already in the public domain. This includes the position title listed adjacent to the bottom row of the 2020/21 table depicting Council's senior executives' earnings and superannuation contributions. This information is not exempt and should be released to Mr Matcham.
- 29 I also consider that the position titles of public officers contained in organisational charts are not exempt, as this information is very similar to the type of information contained in the organisational chart published on Council's website.¹ It is not apparent why this information would be exempt and it should be released to Mr Matcham.

Names of Council staff other than the General Manager

- 30 I agree with Council that Schedule 1 matters (m) – *whether the disclosure would promote or harm the interests of an individual or group*

¹ Organisational Chart, <https://www.brighton.tas.gov.au/wp-content/uploads/2024/10/Brighton-Council-Organisational-Chart-2024.pdf>, accessed 9 May 2025.

of individuals, and (q) – *whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority*, are relevant and weigh against disclosure in this instance. I accept that the release of Council employees' names would impact upon the privacy of those employees. Depending on individual circumstances, the release of this information could expose these people to a risk of harm or harassment.

- 31 It is my usual position that the names of public officers should be released where this information is linked with the performance of their official duties.² However, item five of Mr Matcham's application merely contains a request for all Council employees' names. Mr Matcham's request does not link this request to any particular official duty. Without the request for the names of public officers being linked to the performance of their specific regular duties, my usual position does not apply.
- 32 While it remains open to a public authority to release organisational charts or key management personnel data which includes staff names, I do not consider it appropriate to have a standard position on their release. I am aware of other instances in which broad access to such data has been restricted due to harassment of staff occurring. The most notable example is the State Government's decision to restrict the public's access to the Tasmanian Government Directory Service from full access to a database of contact details for Tasmanian public servants to general contact details only, for safety reasons.
- 33 Council has raised staff safety concerns here and there is no apparent link to any specific official staff member duties in Mr Matcham's request. As a result, I do not consider that any of the Schedule 1 matters weigh in favour of disclosure, other than matter (a) – *the general public need for government information to be accessible*.
- 34 Therefore, on balance, I find that it would be contrary to the public interest to release the names of Council staff that I identified as *prima facie* exempt to Mr Matcham. This information is exempt under s36.

Earnings and superannuation contributions of key management personnel

- 35 Though I accept Council's argument that Schedule 1 matters (m) and (q) are also relevant considerations which weigh against disclosure of earnings and superannuation data relating to senior executives to some extent, I am not satisfied that it would be contrary to the public interest to release this information.
- 36 Notwithstanding that someone's personal income is clearly personal information, Council is obliged by s72(1)(cd) of the *Local Government*

²*Linda Poulton and Department of Natural Resources and Environment* (24 November 2023) at [96], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Act 1993 to publish this information in its annual report. I note that Council commenced doing so in its 2023-24 report and Mr Matcham's request for past data of a similar kind appears to be reasonable. I am not persuaded that it would be contrary to the public interest or lead to any substantial harm to release this information, due to the requirements of the Local Government Act.

- 37 It is not exempt and should be released to Mr Matcham.

Preliminary Conclusion

- 38 In accordance with the reasons set out above, I determine that Council's use of s32 is upheld and s36 is varied.

Response to the Preliminary Conclusion

- 39 As the above preliminary decision was adverse to Council, it was made available to it on 16 May 2025 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 40 On 3 June 2025, Council provided the following substantive submission in response to my preliminary decision:

It is Council's submission that the information contained in the other documents listed at paragraph 21 of the Preliminary Decision (i.e profit and loss statements, FBT Statements, Vehicle Running Sheets, CPT sheet and Disposal schedule) should be exempt on the same basis. These documents refer to positions held within Council, therefore the identities of these persons would also be reasonably ascertainable to persons with knowledge of Council's organisational arrangements (via personal knowledge or reading Council's meeting minutes).

Therefore, unless the titles of the Council employees were redacted or deidentified, then Council's position is that this information should not be released to the applicant.

- 41 Upon reviewing Council's submission, I am persuaded that it would be contrary to the public interest to release the position titles contained in the documents identified at paragraph 21 of my decision.
- 42 The release of this information would leave the identity of these people reasonably ascertainable to someone with knowledge of Council, and its organisational structure. I agree that this would be consistent with the other findings in my decision and that this information is exempt under s36.

Conclusion

- 43 For the reasons given above, I determine that exemptions claimed under s32 are upheld and those claimed under s36 are varied.

Dated: 11 June 2025

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

32. Information related to closed meetings of council

- (1) Information is exempt information if it is contained in –
 - (a) the official record of a closed meeting of a council; or
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
 - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b) ; or
 - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) 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.
- (3) Subsection (1) does not include information solely because it –
 - (a) was submitted to the closed meeting of a council for consideration; or
 - (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –
if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.
- (4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.
- (5) In this section –
closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the Local Government Act 1993 and includes a closed meeting of a council committee.

36. Personal information of person

- (1) 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

33. Public interest test

- (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

Schedule 1 – Matters relevant to the 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.

**Right to Information Act Review****Case Reference:** R2405-018**Names of Parties:** Damien Matcham and Brighton Council**Reasons for decision:** s48(3)**Provisions considered:** s36

Background

- 1 Mr Damien Matcham is a longstanding resident of the Brighton Council (Council) local government area. He has an interest in various matters concerning the administration of the Council, including the expenditure of public funds on entitlements for Council officers.
- 2 On 24 April 2024, Mr Matcham submitted an assessed disclosure application to Council under the *Right to Information Act 2009* (the Act), requesting the following information:

Amounts by name and position (as held at the time) for the payout or cashing out of sick leave, annual leave, long service leave, and any other types of leave within Brighton Council for the previous seven (7) financial years and the current financial year up to 24 April 2024.
- 3 In response to Mr Matcham's application, Council generated a 139 page table (the Table), corresponding to the parameters of his request. The Table consists of four columns labelled 'Employee', 'Position', 'Leave Type', and 'Amount'. There are 9,412 rows of information relating to leave payments to Council employees.
- 4 On 22 May 2024, Council's General Manager, Mr James Dryburgh, issued a decision to Mr Matcham. Mr Dryburgh determined that the Table was, in its entirety, exempt from disclosure under s36 of the Act as personal information of persons other than the applicant.
- 5 Mr Matcham was not satisfied by Mr Dryburgh's decision and sought external review, also on 22 May 2024. Mr Matcham's application was accepted pursuant to s45(1)(a) of the Act, on the basis that he had sought external review within 20 working days of receiving a decision from Council's Principal Officer.

Issues for Determination

- 6 The issue for determination is whether Council is entitled to rely on s36 to not disclose information identified as responsive to Mr Matcham's assessed disclosure application.
- 7 As s36 is subject to the public interest test in s 33, if I find that it does apply, I must then determine whether the release of the relevant information would be contrary to the public interest. In making this assessment, I am to have regard to, at least, the matters in Schedule 1 of the Act.

Relevant legislation

- 8 Section 36 of the Act is Attachment 1 to this decision, copies of s33 and Schedule 1 are also included at Attachment 1.

Submissions

The Applicant

- 9 On 22 May 2024, Mr Matcham made submissions accompanying his application for an external review to this office. These submissions set out (verbatim):

Once again Brighton Council is hiding behind sections of the RTI Act 2009 to not release what should be public information. Other Council's across Tasmania list all the full breakdown of salaries and remuneration packages of senior executives as they are all "key personnel".

Again this is just one (example) again of Brighton Council not releasing information that they have managed to keep "top-secret" for over 30 years now, we have a right to know what the Deputy General Manager, and all the other senior executives are paying themselves from our rate-payers/public monies. This is also clearly a conflict of interest and also pecuniary conflicts of interest for any Principal Officer and or Acting Principal Officer when determining such questions requested under the RTI Act 2009, and is not being managed sufficiently as a PUBLIC AUTHORITY.

...

This is also within the Objects of the RTI Act 2009 and should all be fully open, and fully disclosed.

...

Council

- 10 Council did not make submissions to this external review, beyond the reasoning of its decision. Mr Dryburgh set out his finding in that decision that:

This request is exempt information [sic] under Section 36 of the Act i.e. Information is exempt information if its disclosure under the Act would involve the disclosure of the personal information of a person other than the person making an application under Section 13. Disclosure of this information requested is contrary to the public interest test, in that the disclosure:-

- (a) Would harm the interests of an individual or group of individuals [matter (m) in Schedule 1]; and*
- (b) Would have a substantial adverse effect on the industrial relations of a public authority [matter (q) in Schedule 1]; and*
- (c) The above matters would far outweigh the benefit to the public interest (if any).*

Analysis

Section 36 – Personal Information

- 11 Council has claimed that the Table is exempt under s36. For this section to apply, I must be satisfied that the Table contains personal information of a person other than the applicant. Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.*

- 12 When assessing whether information in the table renders the identity of persons other than the applicant apparent or reasonably ascertainable, I will first assess the column headings and then the information contained under each of these headings.

Column headings

- 13 It is clear that the column headings ‘Employee’, ‘Position’, ‘Leave Type’, and ‘Amount’ do not contain personal information. Therefore, this information is not exempt pursuant to s36 and should be made available to Mr Matcham.

Column contents

- 14 The ‘Employee’ column contains the names of various Council employees. The release of this information would clearly reveal the identity of the named persons, and it is therefore *prima facie* exempt from disclosure pursuant to s36 of the Act.
- 15 The ‘Position’ column contains the position titles held by the relevant employees. I am satisfied that this information, in and of itself, would leave the identity of the individuals holding those positions reasonably ascertainable to someone familiar with Council’s organisational structure, if it were released. Accordingly, I find that this information is also *prima facie* exempt from disclosure pursuant to s36 of the Act.
- 16 The ‘Leave Type’ column lists eight different leave types, namely:
 - Annual Leave
 - Compassionate Leave
 - Leave Without Pay
 - Long Service Leave
 - Pandemic Leave
 - Sick Leave
 - Taken Final Pay Balance
 - Time in Lieu
- 17 I am not satisfied that this information, if released, would reveal the identity of a person other than the applicant, or leave their identity reasonably ascertainable. It is merely a list of categories of leave and should be released to Mr Matcham.
- 18 The ‘Amount’ column contains a list of dollar figures which relate to the leave payout to the relevant employee, the vast majority of which are of a value lower than \$10, 000.00. Due to the volume and similarity of these figures, I am not satisfied that the identity of any particular individual could be ascertained from the release of this information.
- 19 My finding in this regard does not extend to dollar figures that are \$10,000.00 or greater. There are relatively few payouts in this category. This information reveals specific granular information about individual payments to Council staff who are rendered more identifiable by the higher value, when combined with other knowledge of staff movements. Accordingly, I am satisfied that the dollar figures of values over \$10,000.00 are *prima facie* exempt pursuant to s36 of the Act.

Section 33 – Public Interest Test

- 20 As noted, s36 is subject the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release information which I found to be *prima facie* exempt. Namely the:
- names of Council employees listed in the ‘Employee’ column;
 - position titles listed in the ‘Position’ column; and
 - dollar figures representing the value of payouts greater than \$10,000.00 listed in the ‘Amount’ column.
- 21 Council’s decision held that Schedule 1 matters (m) and (q) were relevant and weighed against disclosure.
- 22 I agree with Council that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The information I have identified as *prima facie* exempt is sensitive in nature in that it reveals personal financial and employment records of individual employees. While high level reporting of the expenditure of rate payer funds on employee salary and benefits is appropriate, this must be balanced with the reasonable expectation of privacy regarding the specific leave and financial arrangements of individual employees. Some leave types, such as compassionate and personal leave, can relate to highly personal and distressing situations for individuals. I consider that the release of this information could harm the interests of relevant employees.
- 23 I also agree with Council that Schedule 1 matter (q) – whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority – is relevant and weighs against disclosure. As noted, this information is sensitive, and its release has the potential to contribute to a breakdown in the relationship between Council and its current employees. It may also negatively impact Council’s ability to recruit staff in the future, if it becomes known to the wider public that Council releases such granular details of employee leave and financial entitlements.
- 24 I also find that Schedule 1 matters (a) – the general public need for government information to be accessible, and (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – to be relevant and to weigh in favour of disclosure. There is a high degree of justified public interest in the release of information which relates to the expenditure of rate payer money. There is no question that the information I have identified as *prima facie* exempt pursuant to s36 reveals the way public money is being spent.
- 25 These matters do not weigh as strongly here as in some instances, however, as information about the amount spent on employee salary

and entitlements is already provided in Council's annual reports. While this information is aggregated, it does ensure that the public is regularly informed about this type of government information.

- 26 Finally, I note that, though it is my usual position that the names of public officers should be released where this information is linked with the performance of their official duties, in this instance the information does not link an employee to any particular official duty and relates to their personal employment arrangements. As such, my usual position in relation to officers of public authorities does not apply.
- 27 There is a difficult balance to strike, but overall, I find that it would be contrary to the public interest to release any of the information I have found to be *prima facie* exempt pursuant to s36. None of this information should be released to Mr Matcham.

Preliminary Conclusion

- 28 Accordingly, for the reasons given above, I determine that Council's use of s36 should be varied.

Conclusion

- 29 As the above preliminary decision was adverse to Council, it was made available to Council on 27 May 2025 to seek its input prior to finalisation, pursuant s48(1)(a) of the Act.
- 30 On 30 May 2025 Council advised that it would not be making any submissions in response to my preliminary decision.
- 31 Accordingly, my findings remain unchanged. I determine that Council's use of s36 should be varied.
- 32 I apologise to the parties for the delay in finalising this decision.

Dated: 30 May 2025



Richard Connock
OMBUDSMAN

Attachment 1

Section 36 – Personal information of person

- (1) 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; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –

- (i) during 20 working days after the notification of the decision;
or
- (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public Interest Test

- (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.

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.

**Right to Information Act Review****Case Reference:** R2403-008**Names of Parties:** Damien Matcham and Department of Health**Reasons for decision:** s48(3)**Provisions considered:** s35, s36

Background

- 1 In September 2022, IPN Medical Centres, the then operator of Bridgewater's only medical clinic, Greenpoint Medical Centre (Greenpoint), announced that it would be closing Greenpoint. This was of substantial concern to Bridgewater's local residents. After months of campaigning by the local community, Your Hobart Doctor announced its plans to takeover Greenpoint.
- 2 Mr Damien Matcham is a resident of Hobart's northern suburbs with an interest in local affairs. On 21 November 2023, Mr Matcham submitted an assessed disclosure application under the *Right to Information Act 2009* (the Act) to the Department of Health (the Department). He requested the following:
 1. *Any and all information regarding Greenpoint Medical Services and Your Hobart Doctor/Dr Mark Baldock concerning the provision of any and all primary health related services and programs for the Bridgewater Community.*
 2. *Copy of the current Australia (National) Health Care agreement between the Commonwealth and the Tasmanian Government.*
- 3 On 9 February 2024, the Department issued a decision to Mr Matcham on his assessed disclosure application. In this decision, it identified 26 pages of information responsive to item 1 of Mr Matcham's request, and partially released this information to him. The information not released was determined to be exempt under s35(1)(b) (internal deliberative information) and s36 (personal information).
- 4 The Department refused item 2 of Mr Matcham's assessed disclosure application pursuant to s12(3)(c)(i) of the Act, on the basis that information responsive to this aspect of Mr Matcham's assessed disclosure application was otherwise publicly available. It provided a web link to the relevant information.

- 5 On 18 February 2024, Mr Matcham wrote to the Department seeking an internal review of the decision. On 19 March 2024, the Department issued an internal review decision to Mr Matcham, which affirmed the original decision.
- 6 On 21 March 2024, Mr Matcham wrote to my office to seek an external review. This application was accepted pursuant to s44(1)(b)(i) on the basis that Mr Matcham sought external review within 20 working days of being issued with the relevant internal review decision.

Issues for Determination

- 7 I must determine whether information not released by the Department is eligible for exemption under ss35 or 36 of the Act.
- 8 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that information is *prima facie* exempt from disclosure under any of these 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 1.

Relevant legislation

- 9 I attach copies of ss35 and 36 to this decision at Attachment 1. Copies of sections 33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Mr Matcham

- 10 Mr Matcham did not make submissions relevant to this external review.

The Department

- 11 The Department did not make submissions beyond the reasoning contained in its original and internal review decisions.
- 12 Regarding s35, the Department's internal review decision set out:

The information consists of draft documents and email exchanges between officers of a public authority discussing the complaints management and resolution processes regarding the applicants' [sic] complaints made to the public authority, as well as draft documents and email exchanges relating to the procurement process to engage a consultant medical practitioner to review the applicant's medical file.

The email exchanges form part of the deliberative process comprising exchange of views about a draft while moving towards a determined outcome. The information is for the deliberative process comprising advice and as a record of

consultation is sufficient to meet the requirement of section 35(1).

While the information that is the subject of the exchange comprises factual information, this information is closely linked and inextricably bound up with the decision-maker's deliberative processes. I am satisfied that the information consists of opinion, advice or recommendation for the purpose of the deliberative processes related to the official business of the public authority.

- 13 The Department's internal review decision asserted that s36 applied to information responsive to Mr Matcham's assessed disclosure application:

It is, generally considered that the names and related information of State Service employees acting in the course of their duties and who are publicly identifiable will be disclosed if the person is not placed at risk by disclosure.

In 'BA' and Merit Protection Commissioner, the Australian Information Commissioner reconsidered several earlier cases dealing with the disclosure of certain vocational information whereby:

... the notion of disclosure to the world at large has a different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information. ...

... There is also a growing and understandable concern that personal information that is made available on the web can be misused or used differently by others ...

These statements about the impact of technology and current attitudes to privacy, in particular, are relevant to employees' personal information, regardless of whether they are public or private sector employees

In addition to the statements in 'BA', the disclosure of the identity of officers now has much greater privacy impacts than in the past. Before the broad community use of social media, the disclosure of an officer's name on a document might have permitted an applicant to determine an individual's telephone number or address. Today, an individual's identity may be connected effortlessly with a vast range of personal information available through social

networks, such as: photographs; friends' and family members' identities and photographs; employment histories; social activities and interests; personal opinions, including political opinions, and so on.

Under the Act, disclosure to an applicant of the information is considered to be, in effect, disclosure to the world at large because no restrictions can be placed on the use that may be made of the information to which access is given.

Conversely, the Department of Health is a public authority that for business and security reasons does not display personal employee contact details in the public view function of the directory. Additionally, the area of work associated with the delivery of a health service warrants a cautionary approach to the management of personal information.

Under s8 of the Corrections Act 1997 provides for information pertaining to the management and operation of the correctional facility to be treated as confidential.

It is for this reason I am satisfied the information regarding the officers and other parties is personal information and exempt information.

The personal information regarding the subject of the request is not exempt information.

- 14 As to whether it would be contrary to the public interest for information identified as *prima facie* exempt pursuant to ss35 and 36, the Department's internal review decision set out:

The (a), (m), (p), and (q) matters of Schedule 1 have been applied in relation to the Public Interest Test as required by s33 to the personal information of the information custodian.

I accept that the disclosure of the information reflects public interest with the community having an understanding of and an involvement in the democratic processes. I am satisfied the information held by the public authority should be accessible (a).

However, as to matter (m), I consider disclosure would harm the interests of third parties by the mere fact that disclosure of the information could create apprehension in the mind of the person concerned is enough to render disclosure unreasonable.²⁶ As to (p), this matter relates to the broader issue of human resources. If the public

authority officers become aware that their communication and comments are attributed to them, they may not be as open and frank in their communications as they otherwise would. This would have a significant adverse effect on the public authority's ability to manage matters.

I consider that for (q), disclosure would have an adverse effect on the industrial relations of the public authority. Industrial relations covers the operation of the public authority. The public authority maintains specific channels for the public at large to make contact. The disclosing of names and other details would enable members of the public to contact individual public authority officers directly outside the public authority's preferred contact points.

The predicted effect must bear on the public authority's operations, that is, the public authority is undertaking its expected activities in an expected manner. The candour of officers is essential when a public authority is undertaking an investigation and assessment of a child that are [sic] under a care and protection order. In such cases officers may be reluctant to provide information and cooperate with investigators if they were aware that the subject matter would be disclosed.

The actions of officers that impede or hamper the operations of the public authority should be viewed as creating an adverse effect.

In my view, it is contrary to the public interest to disclose the information relating to third parties. It is not contrary to the public interest to disclosure [sic] the personal information of the applicant.

Analysis

Section 35 – Internal deliberative information

15 For information to be exempt under s35 of the Act I must be satisfied that it consists of:

- an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(a)); or
- a record of consultations or deliberations between officers of public authorities (s35(1)(b)); or
- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).

16 When the requirements of one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the

course of, or for the purpose of, the deliberative process relating to the official business of the Department.

- 17 The information is not exempt under s35 if it is:
 - purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information that is older than 10 years (s35(4)).
- 18 As to the meaning of purely factual information, I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No.1)* where the Administrative Appeals Tribunal (AAT) observed that the word purely in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms.¹
- 19 The meaning of the phrase in the course of, or for the purpose of, the deliberative process has also been considered by the AAT. In *Re Waterford and the Department of Treasury (No 2)* it adopted the view that these are an agency's thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²
- 20 Then, if I am satisfied that it is for a deliberative purpose related to official business, I must have regard to the public interest test in s33 of the Act.
- 21 The Department has sought to exempt from disclosure information on pages 1, 2, 13, 17 and 18 of the information responsive to Mr Matcham's request, pursuant to s35(1)(b) of the Act.

Pages 1 and 2 – Draft Media Releases

- 22 The Department has applied s35(1)(b) to drafts of a media release, the finalised version of which was published online on 9 November 2023.³ As these are draft media releases that were subject to review and editing by public officers at the Department, I am satisfied that they are *prima facie* exempt in full pursuant to s35(1)(b). This is because they are records of deliberations between officers that were made in the course of the deliberative processes related to the Department's official business.

¹ (1984) AATA 518 at [14].

² (1985) 5 ALD 588 at [58].

³ Media Release dated 9 November 2023, *New provider to takeover Greenpoint Medical Centre*, available at [2023_11_09_New_provider_to_takeover_Greenpoint_Medical_Centre.pdf](https://www.health.vic.gov.au/-/media/health/victoria/our-work/medical-centres-and-clinics/greenpoint-medical-centre-new-provider-to-takeover-greenpoint-medical-centre.pdf), accessed 12 June 2025.

- 23 The Department has sought to exempt part of the second paragraph of an email sent between officers of the Department on 3 November 2023 at 1:52pm. The relevant information is purely factual, relating to the existence of a confidentiality agreement in place between Your Hobart Doctors and IPN and it is not apparent why s35 would be applicable. I am not satisfied that the Department has discharged its onus under s47(4) of the Act to show why this information would be exempt and it should be released to Mr Matcham.

Pages 17 and 18

- 24 The Department has sought to exempt parts of emails between staff of the non-government organisation Primary Health Tasmania and officers of the Department, sent on 13 October 2023. As these emails were not internal but were sent between the Department and an external organisation, they cannot be exempt under s35. Accordingly, they should be released to Mr Matcham.

Public interest test – Section 35

- 25 I will now turn to assess whether it is contrary to the public interest to release the draft media releases which I have found to be *prima facie* exempt pursuant to s35(1)(b) of the Act.
- 26 The only Schedule 1 matter that I have found to be relevant to my assessment is matter (a) – the general public need for government information to be accessible. I find this matter to be relevant and to weigh in favour of disclosure.
- 27 Though I do not find any Schedule 1 matters to weigh against disclosure, in relation to draft versions of subsequently finalised documents it is my usual position that early drafts with only slight variations to the final will be exempt under s35.⁴ It would be inappropriate and unhelpful for numerous slightly different drafts of a document to be released as a standard practice, and this is consistent with the s35 exemption.
- 28 Accordingly, I am satisfied that the draft media release documents are exempt from release under s35(1)(b).

Section 36 – Personal information

- 29 For information to be exempt under s36 of the Act, it must reveal the personal information of a person other than the applicant. Section 5(1) of the Act defines personal information as *any information or opinion in any recorded format about an individual*:

⁴ See *Rebecca White and Premier of Tasmania* (April 2024) at [31] and *Rick Snell and Department of Premier and Cabinet* (13 January 2025) at [33], both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

(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.

- 30 The Department has applied s36 to information revealing the names of officers of public authorities, Commonwealth public servants and from third party non-government organisations. The Department has also sought to exempt their contact details, namely:
- direct email addresses;
 - direct mobile phone numbers; and
 - office phone numbers and email addresses.

- 31 I am satisfied that all of this information is personal information and is *prima facie* exempt under s36. I will address each relevant category of information below, in determining whether it would be contrary to the public interest to release it.

Names of public officers – Tasmanian and Commonwealth

- 32 As I have consistently noted in previous decisions, I do not consider that s36 of the Act operates to exempt the names of officers of public authorities undertaking their regular duties from disclosure, unless unusual circumstances exist to justify such an exemption. It is not apparent that the circumstances of this case are unusual and the Department has not provided any reasoning to justify such an exemption. The same considerations apply for Commonwealth public servants. Accordingly, I am not satisfied that this information is exempt under s36 and it should be made available to the applicant.

Contact details of public officers – Tasmanian and Commonwealth

- 33 As I have done in previous decisions, in determining whether contact details of public officers should be exempt pursuant to s36 of the Act, I find it necessary to distinguish between direct contact details of public officers which are not publicised, and information that allows public officers to be contacted through publicised office emails and phone numbers.
- 34 Unlike office emails and phone numbers, there is potential for harm with the release of an employee's direct email or mobile phone number, as they may become exposed to intimidation and harassment by members of the public as a result of this information being released. Further, it is valid for public authorities to limit the release of direct contact details of staff to ensure public enquiries are directed through appropriate channels.
- 35 Accordingly, I am satisfied that it would be contrary to the public interest to release the direct contact details of public officers, including their

email addresses and phone numbers. This information should not be made available to Mr Matcham. My finding in this regard does not extend to information revealing office contact details, including the Department's email addresses and office phone numbers which are made available to the public.

Personal information of other third parties

- 36 The Department has also sought to exempt from disclosure the personal information of people employed by Primary Health Tasmania, IPN Medical Centres and Health Consumers Tasmania.
- 37 All of the third party staff named in the bodies of the relevant emails are senior professionals undertaking their regular work duties, all of whom have an online presence publicly linking them to their organisations. Accordingly, I am not satisfied that the release of their names would be likely to cause any harm to them or negatively impact their privacy. They are not exempt and should be released to Mr Matcham.
- 38 In relation to the names of third party staff carbon copied into the correspondence, however, I am not so satisfied. Their connection to the project is less clear and there may be a negative impact on their interests if the information was released. I consider that their names are exempt under s36 and not required to be released to Mr Matcham.
- 39 In relation to contact details of third party staff, for the same reasons I set out earlier regarding public officers, I am satisfied that this information is exempt under s36. Care should be taken to ensure that information revealing direct contact emails of third parties who are not public officers is not released, as doing so would impact their privacy and may expose them to a risk of harm.

Preliminary Conclusion

- 40 In accordance with the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss35 and 36 of the Act are varied.

Conclusion

- 41 As the above preliminary decision was adverse to the Department, it was made available to it on 19 June 2025 under s48(1)(a) to seek its input before finalisation. The Department advised on 14 July 2025 that it would not be making any submissions responding to my preliminary decision.
- 42 Accordingly, for the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss35 and 36 of the Act should be varied.

Dated: 14 July 2025

A handwritten signature in blue ink, appearing to read "Grant Davies".

Dr Grant Davies
OMBUDSMAN

Attachment A

Relevant Legislation

Section 35 – Internal Deliberative Information

- (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.
- (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 (1) 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

- (1) 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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

- (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.

Schedule 1 – Matters relevant to the 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.

**Right to Information Act Review****Case Reference:** R2312-008**Names of Parties:** Ella Haddad and Department of Premier and Cabinet**Reasons for decision:** s48(3)**Provisions considered:** s30, s31, s36, s39

Background

- 1 The Honourable Ms Ella Haddad MP, then Shadow Attorney General, and Shadow Minister for Justice, Corrections, Housing, Equality, and Multicultural Affairs, submitted an assessed disclosure application on 25 September 2023 under the *Right to Information Act 2009* (the Act) to the Department of Premier and Cabinet (the Department). She sought, for the period of 30 June 2021 to 25 September 2023:

Information (including correspondence) relating to workplace complaints made by ministerial staff, electorate staff, ministerial drivers or parliament staff regarding any Minister.

- 2 On 8 December 2023, having previously sought updates from the Department, Ms Haddad, through her representative Ms Celeste Miller, made an application to this office for external review on the basis that the statutory timeframe had elapsed and she was not in receipt of a decision.
- 3 On 21 December 2023, the Department issued to Ms Haddad a decision on the application.
- 4 In that decision Ms Carmen Kelly, a delegate under the Act for the Department, identified nine bundles of documents as responsive to the application.
- 5 In relation to Bundle 1, Ms Kelly decided that the information should be exempt from release in full pursuant to ss30 (information relating to the enforcement of the law), 36 (personal information), and 39 (information provided in confidence).
- 6 In relation to Bundles 2-8, Ms Kelly decided that the information should be exempt from release in full pursuant to ss36 and 39.
- 7 In relation to Bundle 9, Ms Kelly decided that the information should be exempt from release in full pursuant to s31 (legal professional privilege).

- 8 On 17 February 2024, Ms Miller, on behalf of the applicant, confirmed with my office that she wished to proceed with an external review of the Department's 21 December 2023 decision.
- 9 The application for external review of the 21 December 2023 decision was accepted pursuant to s46(2), being a decision issued after a valid application was made to my office on the grounds of deemed refusal pursuant to s45(1)(f).

Issues for Determination

- 10 I must determine whether the information is eligible for exemption under ss30, 31, 36, or 39 or any other relevant section of the Act.
- 11 As ss36 and 39 are contained in Division 2 of Part 3 of the Act, my assessment of them is subject to the public interest test in s33. This means that should I determine that the information is *prima facie* exempt under one of these sections, I must then determine whether it would be contrary to the public interest to disclose it.

Relevant legislation

- 12 I attach copies of ss30, 31, 36 and 39 to this decision at Attachment 1.
- 13 I also attach copies of s33 and Schedule 1 of the Act.

Submissions

Applicant

- 14 No submissions in relation to the substance of the application were made by Ms Haddad.

The Department

- 15 The Department was not required to provide specific submissions in relation to this external review, beyond the reasoning of its decision.
- 16 In her decision of 21 December 2023, Ms Kelly determined that s30 applied to exempt information in Bundle 1 in its entirety.
- 17 She did so on the basis that the information was *concerning a current claim being managed by DPAC [the Department] under the Worker's Rehabilitation and Compensation Act 1988 (the WRCA)* and that *As a current claim, it is required to be confidentially administered in accordance with the WRCA, and in [her] view the disclosure of any details concerning the claim would be reasonably likely to prejudice those factors listed under section 30(1)(a)(ii),(iv) and (d).*
- 18 In applying s31, Ms Kelly determined that the entirety of Bundle 9 was to be exempt from provision to the applicant on the basis that *these documents were brought into existence for the sole or dominant purpose of giving or receiving legal advice.*

- 19 Ms Kelly determined that the entirety of Bundle 1 – 8 was exempt from provision to the applicant pursuant to s36.
- 20 She did so on the basis that *the information is strictly sensitive personal and confidential information of persons other than the applicant, and the information concerned would reasonably be expected to be of concern to those third parties.*
- 21 Ms Kelly also determined that the entirety of Bundle 1-8 was exempt from provision to the applicant pursuant to s39 on the basis that *this information, either in whole or in part, would divulge information communicated in confidence by or on behalf of a person to a public authority or Minister. This information was brought into existence on a strictly confidential and personal basis.*
- 22 In relation to Bundle 1, she found that *the information was provided confidentially and contains sensitive and personal medical and other information relating to a person other than the applicant. It is clear from the provisions of the WRCA that worker's compensation claims are lodged and managed on a confidential basis.*
- 23 In relation to Bundles 2 – 8, she determined that *this information contains sensitive personal and confidential information that has been treated with the highest level of confidentiality and security by the Secretary of the Department and the Premier's Office.*
- 24 She further found that *the disclosure of the information... would be reasonably likely to impair the ability of DPAC to obtain similar information in the future, as it may inhibit persons from making worker's compensation claims and workplace complaints if the information they have divulged on a confidential basis were to be disclosed to third parties under the Right to Information Act.*
- 25 In applying the public interest test Ms Kelly wrote:

In my view there is clearly a high level of political, media and public interest in the current Code of Conduct for Ministers review being undertaken at the request of the Premier by Raymond Finkelstein AO KC. This is evidenced by questions in Parliament, articles in The Mercury and The Australian newspapers (including an article in The Australian on October 31, 2023 by Matthew Denholm titled 'Letter exposed 'toxic culture' in A-G's office'), articles on the ABC News online website, articles on the ABC 1V News and Tasmanian commercial 1V channels.

I have carefully considered each of the matters in Schedule 1 as part of my assessment of the public interest test.

Factors in favour of release

In relation to the matters listed in Schedule 1 of the Act, I consider that the following factors weigh in favour of disclosure of the information not released:

- (a) the general public need for government information to be accessible;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (g) whether the disclosure would enhance scrutiny of government administrative processes.

The object of the Act is to disclose information where possible and to give members of the public the right to obtain information about the operations of Government and increase the accountability of the executive to the people of Tasmania. As a general rule, disclosure is to be favoured over non-disclosure unless there are valid reasons for deciding that disclosure would be contrary to the public interest.

I consider that these factors weigh in favour of disclosure because of the general public need for government information to be accessible; the information may provide contextual information to aid in the understanding of government decisions; and enhance the scrutiny of government administrative processes.

Factors against release

In relation to the matters listed in Schedule 1 of the Act, I consider that the following factors weigh against disclosure of the information:

- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform the person about the reasons for a decision;
- (f) whether the disclosure would enhance the scrutiny of government decision-making processes and thereby improve accountability and participation;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals; and
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future.

I consider that it would be contrary to the public interest to release this information, as the disclosure is likely to harm the individuals concerned and the disclosure would not enhance the scrutiny of government decision-making processes or improve accountability and participation.

I understand that this matter is currently being reviewed by a legal practitioner for the Premier, and this review is not yet complete. The disclosure of the information would hinder the debate, harm the administration of justice, including affording procedural fairness to the affected individuals. The information that I have is that the disclosure would harm the interests of the individuals by impacting upon their physical, emotional or psychological safety, and increase the likelihood of harassment or discrimination. The disclosure would hinder equity and fair treatment of persons in their dealings with government by releasing their personal and confidential information and negatively impact upon individuals being afforded procedural fairness.

I consider that it would be contrary to the public interest to release this information, as disclosing the personal and confidential information of a complainant or complainants would not enhance the scrutiny of government decision-making and may harm the individual or group of individuals. Further, disclosing the information would prejudice the current review being undertaken for the Premier.

I reiterate that, given the highly sensitive and confidential personal nature of the information in items 2-8 in the attached schedule, the highest level of security has been assigned to it in the Department's electronic document management system, with access granted to only the Secretary and a couple of other senior officers in the Department. I have access to the document only as the Delegated Officer undertaking this assessment. The

Worker's Compensation claim information is similarly kept confidential to only those officers managing the worker's compensation claim on a strictly need-to-know basis.

In my view, releasing the information listed as items 1-8 in the attached schedule would prejudice the ability to obtain similar information in the future, as individuals would be reluctant to make worker's compensation claims or complaints, if their personal and confidential information was to be released to third parties under the Right to Information Act.

Analysis

Section 30 – Information relating to enforcement of the law

- 26 In her decision of 21 December 2023, Ms Kelly decided that the entirety of Bundle 1 was exempt from release pursuant to s30 of the Act. Relevantly, Ms Kelly identified s30(1)(a)(ii) and (iv), and s30(1)(d) as applicable.
- 27 The documents in this bundle are a workers compensation claim form, medical certificates, file notes, and timelines in relation to the claim.
- 28 Section 30(1)(a)(ii) and (iv) provide that *information is exempt information if its disclosure under [the] Act would, or would be reasonably likely to, prejudice the enforcement or proper administration of the law in a particular instance or the impartial adjudication of a particular case.*
- 29 Section 30(1)(d) provides that *information is exempt information if its disclosure under [the] Act would, or would be reasonably likely to, endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person.*
- 30 In relation to s30(1)(a)(ii) and (iv), the prejudice that is said to arise must at least be reasonably likely. No specific prejudice was identified by Ms Kelly in her decision of 21 December 2023, however it was noted that the claim was a current one and, as such, any disclosure of this information would lead to prejudice in the handling of a live claim.
- 31 I am not, however, satisfied that prejudice to the enforcement of the law or impartial adjudication in this particular case can be said to be reasonably likely.
- 32 Given that there has been a considerable period of time between the decision of Ms Kelly and this decision, I am of the view that any prejudice that may have arisen as a result of disclosing this information while the workers compensation claim was ongoing and unfinalised cannot be said to arise today when it would likely be concluded.

- 33 Therefore, ss30(1)(a)(ii) and (iv) do not apply to exempt the information contained in Bundle 1.
- 34 Similarly, in relation to s30(1)(d), I am not satisfied that the Department has discharged its onus under s47(4) of the Act to show that disclosure of this information would be reasonably likely to endanger the emotional or psychological safety of the claimant. While I accept that some detriment to the claimant may arise were this information to be disclosed, no specific reasons have been advanced as to why their emotional or psychological safety are likely to be endangered. The bar for s30(1)(d) to apply is high, as it would defeat the objects of the Act in s3 and the aim of the *provision of the maximum amount of official information* if this exemption were applied too freely. This is especially so, as it is not usually subject to the public interest test
- 35 Accordingly, I am not satisfied that the possible detriment to the claimant in these circumstances meets the threshold of s30(1)(d). Psychological or emotional harm requires more than discomfort from such details being shared and no further indication of such harm has been provided by the Department. Without further evidence to the contrary, I determine that s30(1)(d) does not apply to exempt the information contained in Bundle 1.
- 36 However, I do not dispute that this is information of a personal and confidential nature, and will give further consideration to the alternative exemption proposed by the Department under s39 in the latter part of this Analysis.

Section 31 – Legal professional privilege

- 37 In her decision of 21 December 2023, Ms Kelly decided that the entirety of Bundle 9 was exempt pursuant to s31 of the Act.
- 38 Section 31 provides that *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*. This exemption is not subject to the public interest test.
- 39 For information to be protected by legal professional privilege regarding legal advice, it must be the case that its dominant purpose was to seek or receive legal advice.¹
- 40 Bundle 9 contains 22 pages of email correspondence, including relevant attachments, between the Department and the Office of the Solicitor-General. This communication includes requests for legal advice from the Department, and the provision of legal advice in response to these

¹ See *Kelvin Derksen Luelf and Derwent Valley* (18 October 2024) [96], citing *Janiece Bryan and Glenorchy City Council* (30 June 2023) [30], both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions; see also *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 [44].

requests from the Solicitor-General. This part of the information is plainly within the scope of legal professional privilege.

- 41 There is also further correspondence between the Department and the Solicitor-General in relation to the selection of a reviewer. While this is less clearly formal advice about the law, I consider that it remains within the scope of legal professional privilege, noting that what constitutes legal advice goes beyond just formal advice as to the law.²
- 42 I form this view as ultimately, the Department is seeking the advice of the Solicitor-General in relation to the selection of the most appropriate person to ensure a legally correct review, advice that is of a sufficiently legal character to be within the scope of legal professional privilege.
- 43 Therefore, I am satisfied that the entirety of Bundle 9 is exempt from provision to the applicant pursuant to s31 of the Act.

Section 39 – Information obtained in confidence

- 44 The Department has relied upon s39 to exempt in its entirety the information contained in Bundles 2-8. It has further relied upon s39 to exempt the information in Bundle 1 in the alternative.
- 45 Section 39 provides that:

Information is exempt information if its disclosure under [the] 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.*

- 46 I will consider the application of s39 to each bundle individually.

Bundle 1

- 47 I am satisfied that disclosure of the information contained in Bundle 1 would divulge information communicated in confidence to the Department.
- 48 Further, I am satisfied that disclosure of this information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.
- 49 This bundle contains confidential and personal medical information arising out of the workers compensation claim. Were it the case that

² *DSE (Holdings) v Intertan Inc* (2003) 135 FCR 151 [45].

such information was regularly made available publicly, I am satisfied that persons would be less willing to come forward and make such claims, thus impairing the Department's ability to obtain such information and appropriately respond to workplace injuries.

- 50 Therefore, this information is *prima facie* exempt, subject to the public interest test.

Bundle 2

- 51 Bundle 2 consists of a single email chain which makes reference to a meeting between Sarah Bolt, Anti-Discrimination Commissioner and the relevant complainant.
- 52 I am satisfied that disclosure of the information contained in Bundle 2 would divulge information communicated in confidence to the Department.
- 53 However, I am not satisfied that disclosure of this information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.
- 54 While this communication does make reference to a confidential interaction and a confidential document arising out of that interaction, this document is not included in the bundle and details of the interaction are not provided. It is of an administrative nature and I am not satisfied that the disclosure of this limited information would be reasonably likely to prevent the Department obtaining similar information in the future.
- 55 I will consider the application of s36 to the personal information of the complainant later in this decision but I am not satisfied that s39 applies to the small amount of information in Bundle 2. It is therefore not exempt and should be provided to the applicant, subject to my analysis of s36 below.

Bundle 3

- 56 Bundle 3 contains a file note recording the meeting between the Anti-Discrimination Commissioner and the relevant complainant.
- 57 I am satisfied that disclosure of the information contained in Bundle 3 would divulge information communicated in confidence to the Department.
- 58 I am further satisfied that disclosure of most of this information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.
- 59 As with Bundle 2, information that merely confirms the occurrence of this meeting is not sufficiently confidential or sensitive so as to amount to information that would, if disclosed, impair the ability to obtain such information in the future.

- 60 The remainder of the document, however, contains highly sensitive information in relation to the relevant complaint. Were this to be disclosed, the chilling effect on other persons who may wish to come forward with workplace complaints could be significant.
- 61 As such, the information following the heading 'Key Points' until the final sentence of the document is *prima facie* exempt pursuant to s39 of the Act. The remainder of the information in this document is not exempt and should be provided to Ms Haddad, subject to my assessment under s36 below.

Bundle 4

- 62 Bundle 4 contains a letter from the complainant to the Anti-Discrimination Commissioner outlining their complaint. I am satisfied that disclosure of the information contained in Bundle 4 would divulge information communicated in confidence to the Department.
- 63 Further, disclosure of most of this information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.
- 64 The substance of this letter contains details relating to the particulars of the relevant workers compensation claim, and other personal details of the complainant. I am satisfied that the chilling effect on other complainants were this information to be disclosed is significant, and as such I determine that the information from below the words 'Parliamentary Services.' until the words 'Thank you for your work...' is *prima facie* exempt under s39 of the Act.
- 65 The remainder of the information in this document is not exempt and should be provided to Ms Haddad, subject to my assessment under s36 below.

Bundle 5

- 66 This bundle contains a letter from Ms Bolt to the relevant complainant outlining general information for options in response to their complaint. It was not communicated in confidence to a public authority, so would only be eligible for exemption under s39 if it contained details of information the complainant had provided to Ms Bolt.
- 67 Due to its general nature and the lack of detail regarding the specifics of the complainant's concerns, I am not satisfied that this communication reveals information provided in confidence to a public authority.
- 68 The information contained in this bundle is innocuous factual information. Therefore, this information is not exempt pursuant to s39 and, and subject to my analysis below of s36, can be provided to the applicant.

Bundle 6

- 69 The document contained in this bundle is a letter from a State Government Department Secretary to Ms Jenny Gale, then Secretary of the Department and Head of the State Service.
- 70 I am satisfied that disclosure of some of the information contained in Bundle 6 would divulge information communicated in confidence to the Department. This information is:
- all of the second paragraph, except for the first sentence;
 - all of the third paragraph, except for the first three words;
 - in the fourth paragraph, from after the words ‘spoke to’ until the words ‘to confirm’;
 - in the fourth paragraph, from after the words ‘Chief of Staff’ to the end of the paragraph;
 - in the sixth paragraph, from after the words ‘Departmental Liaison Officers’ to the end of the paragraph;
 - in the seventh paragraph, all three dot points;
 - the eighth paragraph;
 - in the tenth paragraph, the first sentence of the first dot point and all of the second dot point;
 - the eleventh paragraph; and
 - in the twelfth paragraph, the second and third sentences.
- 71 While this is an internal communication within the Tasmanian State Service, I am satisfied that its disclosure would reveal information provided in confidence by the complainant and individual staff members responding to issues raised by the complainant.
- 72 Further, because this information pertains to a sensitive workplace complaint against a Minister, I am satisfied that its disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in the future. As discussed previously, the disclosure of such details would be likely to deter individuals from making similar complaints in the future.
- 73 Therefore, this information is *prima facie* exempt pursuant to s39.

Bundle 7

- 74 Bundle 7 contains a letter from the Premier, the Honourable Jeremy Rockliff MP to the Minister who was the subject of the workplace complaint.
- 75 Similarly to Bundle 6, this information originated from the relevant Minister himself and could only be exempt where it reveals information

provided in confidence by the complainant. The information contained in the dot points of the second paragraph is of such a character and, if disclosed, would be reasonably likely to impair the ability of the Department to obtain similar information in the future.

- 76 This information is, therefore, *prima facie* exempt pursuant to s39 of the Act.

Bundle 8

- 77 Bundle 8 contains a covering letter from the Premier to Ms Gale and an attachment.
- 78 As this is an internal government communication, it could only be eligible for exemption under s39 if it revealed confidential information provided by the complainant. I am not satisfied that this is the case for the covering letter, as it only provides high level information about the complaint and does not provide any detail. It may be released to the applicant, subject to my consideration of s36 below.
- 79 The attachment, however, is a duplicate of one of the documents contained in Bundle 1, and as such is *prima facie* exempt for the reasons set out above.

Public interest test

- 80 As s39 is contained in Division 2 of Part 3 of the Act ,it is subject to the public interest test in s33. Accordingly, I must consider, at least, the factors contained in Schedule 1 of the Act.
- 81 Matter *(a) the general public need for government information to be accessible* will always be relevant and weighs in favour of disclosure.
- 82 Matter *(b) whether the disclosure would contribute to or hinder debate on a matter of public interest* is relevant. Details about this workplace complaint would contribute to the debate about a matter of public interest. The *Motion for Respect: Report into Workplace Culture in the Tasmanian Ministerial and parliamentary Services* saw great public interest and debate, and the connection between this complaint and that report lead me to conclude that this factor weighs in favour of disclosure.
- 83 Matter *(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* is also relevant. Disclosure of details of a workplace dispute that are not necessarily substantiated nor have been the subject of a formal finding would not afford procedural fairness to the relevant Minister. This factor weighs against disclosure.
- 84 Matter *(m) whether the disclosure would promote or harm the interests of an individual or group of individuals* is relevant. Disclosure of the specific details of a complaint made in confidence, without the express

consent of either party to the complaint, is likely to harm the interests of the parties. This factor weighs against disclosure.

- 85 Matter (n) whether the disclosure would prejudice the ability to obtain similar information in the future is particularly relevant. As I have noted above, the chilling effect of disclosing the specific details about a workplace complaint through the Act is significant. I am of the view that, were it to be the case that specific details of workplace complaints were made available regularly under the Act, others would be notably less likely to come forward with complaints. The degree of confidentiality within which this complaint was made and the high probability of deterrence of others means that this factor weighs heavily against disclosure.
- 86 Having considered these factors, it is my view that matter (n) is determinative, and therefore all of the information identified as prima facie exempt above is exempt from disclosure pursuant to s39 of the Act.

Section 36 – Personal information of person

- 87 The Department has also relied on s36 in the alternative to exempt in its entirety the information contained in Bundles 1 – 8.
- 88 Section 36 provides that *information is exempt information if its disclosure under [the] Act would involve the disclosure of the personal information of a person other than the person making an application.*
- 89 Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 90 I am not satisfied that this exemption can be applied to all of the information Bundles 1 – 8, as much of the information would not make the identity of a person other than the applicant reasonably ascertainable if de-identified.
- 91 It is not necessary to again consider information I have already determined to be exempt under s39, so I will confine my discussion of s36 to the remaining information not otherwise exempt.
- 92 Of the information that I have not found exempt pursuant to s39 above, the following information would disclose personal information of a person other than the applicant and is thus prima facie exempt pursuant to s36:
- in all documents:
 - all instances of the relevant complainant's name and gender identifying pronouns, including email addresses; and

- all instances of the relevant Minister's name, gender identifying pronouns and position titles.
- 93 There is also further information which meets the definition of personal information, being the names and signatures of the Anti-Discrimination Commissioner, the then Secretary of the Department, and the then Secretary of another Department.
- 94 However, I note it has been my consistent position that the names and work-related personal information of public officers performing their regular duties are not exempt under s36 unless there are specific and unusual circumstances to justify the exemption.³ This applies to signatures and also to past employees of public authorities if the information came into existence while the person was a public officer. This is consistent with current Australian practice.⁴
- 95 In line with my consistent position, the names and signatures of these public officers are not exempt under s36 and should be released to Ms Haddad.

Public interest test

- 96 As s36 is also subject to the public interest in s33, I must again consider, at least, the factors contained in Schedule 1 of the Act.
- 97 As noted, matter (a) *the general public need for government information to be accessible* will always be relevant and weighs in favour of disclosure.
- 98 Matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* is relevant. Disclosure of the personal information of parties to a workplace complaint without the express consent of either party is likely to harm their interests. This factor weighs against disclosure.
- 99 Matter (n) *whether the disclosure would prejudice the ability to obtain similar information in the future* is also relevant. As above, the chilling effect of disclosing the specific details about a workplace complaint through the Act is significant. This includes the relevant personal identifying information of the parties to the complaint. This factor weighs against disclosure.
- 100 Having considered these factors, it is my view that it would be contrary to the public interest to disclose this personal information. It is therefore exempt pursuant to s36 of the Act.

³ See, for example, *Tarkine National Coalition and Department of Natural Resources and Environment Tasmania R2202-101* (October 2023) and *Thomas Bade and Huon Valley Council R2209-004* (December 2024), both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

⁴ *Hunt and Australian Federal Police* [2013] AICmr66 at [73].

Preliminary conclusion

101 In accordance with the reasons set out above, I determine the following:

- exemptions claimed pursuant to s30 are not made out;
- exemptions claimed pursuant to s31 are upheld; and
- exemptions claimed pursuant to ss36 and 39 are varied.

Submissions to the preliminary conclusion

102 As the preliminary decision was adverse to the Department, it was made available to it on 2 May 2025 pursuant to s48(1)(a) of the Act to seek its input prior to finalisation.

103 On 6 May 2025, my office received submissions from the Department in relation to the preliminary decision.

104 Ms Gemma Smith, a Program Manager at the Department, submitted that information which would identify the work area of the relevant complainant should be exempt pursuant to s39 of the Act, as it is information which could identify the complainant and lead to other persons being unwilling to come forward with similar complaints.

105 She further submitted that the release of information identifying the author of the letter contained in Bundle 6 would likely lead to the identity of either the complainant or the relevant Minister being reasonably ascertainable. She submitted that this result would be counter to the intention of my decision in relation to information found to be exempt under s39.

106 She continued, in relation to this letter, that its confidential nature was indicated by words written within the letter and the unprompted and candid nature of the correspondence. Due to this, she submitted that it should be exempt in full pursuant to s39 of the Act.

107 Finally, she submitted, that in my application of s36, the position title of the relevant complainant should also be exempt to ensure that their identity is not ascertainable.

Further Analysis

108 In relation to s36, I agree with the submissions of Ms Smith and find that the complainant's position title should also have been considered exempt for the same reasons as their name, gender identifying pronouns and address.

109 In relation to s39, having reviewed the relevant information in light of Ms Smith's submissions, I am satisfied that there is further information that is *prima facie* exempt. This is:

- In Bundle 6:

- in the second sentence of the fifth paragraph, the two words preceding the word *meeting*;
 - in the first sentence of sixth paragraph, the final six words;
 - in the second paragraph on the third page, the thirteenth word of the first sentence and the second word of the fourth sentence;
 - in the third paragraph on the third page, the word following *workplace for the current* in the first sentence; and
 - the signature, name, position title and department name at the bottom of the letter.
- In Bundle 7:
 - the final five words of the first sentence.
 - In Bundle 8:
 - the fifth to seventh words in the first sentence of the third paragraph.

- 110 I consider this information *prima facie* exempt for the same reasons outlined in my decision above; were these pieces of information to be made available to the applicant, it would be likely to deter individuals from making similar complaints in the future.
- 111 I do not, however, consider that the letter in Bundle 6 should be exempt in its entirety as submitted by the Department. While it is true that the letter is one carrying a degree of confidentiality, I am not satisfied that release of the remaining parts of the letter would have the chilling effect on leaders as put to me.
- 112 A Department Secretary has duties regarding ensuring the safety of their employees and I am not satisfied that such staff would be deterred from undertaking these duties if the release of any part of such inter-departmental communication occurred. Where the communication does not reveal information provided in confidence but only that a senior executive is performing their regular duties regarding a sensitive matter, exemptions under s39 are not applicable.
- 113 Section 39 is subject to the public interest test in s33, requiring consideration of, at least, the matters contained in Schedule 1.
- 114 Again matter (a) *the general public need for government information to be accessible* will always be relevant and weighs in favour of disclosure.
- 115 Matter (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest* remains relevant to this information. As above, details about this workplace complaint would contribute to the debate about a matter of public interest.

- 116 Matter *(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* is also relevant for the same reasons as described at [83]. Disclosure of details of a dispute that are not entirely substantiated would not afford procedural fairness to the relevant Minister. This factor weighs against disclosure.
- 117 Matter *(m) whether the disclosure would promote or harm the interests of an individual or group of individuals* is relevant. Disclosure of the specific details of a complaint made in confidence, without the express consent of either party to the complaint, is likely to harm the interests of the parties. This factor weighs against disclosure.
- 118 Matter *(n) whether the disclosure would prejudice the ability to obtain similar information in the future* is particularly relevant. Again, the chilling effect of the release of this information is significant. I am satisfied that this additional information, if released, would make it likely that the parties to the relevant complaint could be identified. Were this the case, I am satisfied that other persons would be deterred from coming forward with complaints of a similar nature. This factor weighs heavily against disclosure.
- 119 Having considered these factors, I am satisfied that it would not be in the public interest to release this additional information. It is therefore exempt from provision to the applicant.

Conclusion

- 120 In accordance with the reasons set out above, I determine the following:
- exemptions claimed pursuant to s30 are not made out;
 - exemptions claimed pursuant to s31 are upheld; and
 - exemptions claimed pursuant to ss36 and 39 are varied.
- 121 I apologise to the parties for the delay in finalising this decision.

Dated: 22 May 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 30 – Information relating to enforcement of the law

- (1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –
- (a) prejudice –
 - ...
 - (ii) the enforcement or proper administration of the law in a particular instance; or
 - ...
 - (iv) the impartial adjudication of a particular case; 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...

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 36 – Personal information of a person

- (1) 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 .
- ...

Section 39 – Information obtained in confidence

- (2) 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.
- (3) 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.

Section 33 – Public interest test

- (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.

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.



Right to Information Act Review

Case Reference: R2411-010

Names of Parties: Environmental Defenders Office and Environment Protection Authority

Reasons for decision: s48(3)

Provisions considered: s37

Background

- 1 Salmon farming is a major industry in Tasmania that has attracted considerable public, political and media attention, particularly in recent years. The environmental impacts of salmon farming in Macquarie Harbour, and the decline of the endangered Maugean skate population are matters of particular interest.
- 1 The Australian Marine Conservation Society and the Humane Society International Australia are not-for-profit organisations seeking to protect marine ecosystems. They engaged the Environmental Defenders Office (EDO) to act on their behalf to request information that each Macquarie Harbour salmon farm environmental licence holder is required to submit to the Environmental Protection Authority (EPA) in accordance with the Environmental Licence Condition DO 2 and 3.
- 2 On 27 August 2024, Mr James Johnson, on behalf of the EDO, submitted an application for assessed disclosure pursuant to s13 of their *Right to Information Act 2009* (the Act) to the EPA.
- 3 The request was as follows:
 1. *Documents provided in response to Conditions DO2 and DO3 which have been imposed on each Macquarie Harbour salmon farm environmental licence holder, being:*
 - (a) *Dissolved oxygen mitigation plan (due 24 April 2024); and*
 - (b) *Water quality monitoring plan (due 24 April 2024).*

2. *Covering letters accompanying, and any emails forwarding, the documents referred to in paragraph 1 above to the EPA.*
 3. *All communications from the Director to any licensee in accordance with condition DO2 and/or DO3 advising in writing an amended date for provision of the reports required by those conditions.*
- 4 On 23 September 2024, Ms Heather Neate, a delegate under the Act for the EPA, issued a decision. The decision concluded that the EPA:
 - would release 6 pages of information relevant to the request, redacting some personal information;
 - would defer the release, pursuant to s17(1)(a) of the Act, of the draft Dissolved Oxygen Mitigation Plan and Water Quality Monitoring Plan — Macquarie Harbour (the Draft Plan), as it intended to release the finalised plan in due course; and
 - determined that the detailed Funding Application to the Fisheries Research Development Corporation for the Macquarie Harbour Oxygenation Trial would have to be sought through a further assessed disclosure application to the responsible agency – the University of Tasmania.
- 5 On 2 October 2024, the EDO requested an internal review of the EPA's decision on the grounds that the delegate did not provide the requested information, and did not provide reasoning for refusing to provide the requested information.
- 6 On 28 October 2024, Ms Fionna Bourne, a delegate under the Act for the EPA, issued the internal review decision. Ms Bourne upheld the original decision. The decision set out that:
 - under s17(1)(a) of the Act, the release of the Draft Plan would be deferred; and
 - the Funding Application to the Fisheries Research Development Corporation was out of scope of the original request for information.
- 7 On 22 November 2024, Mr Johnson applied to this office for external review of the decision on behalf of the EDO. The application was accepted under s44 of the Act, on the basis he was in receipt of an internal review decision and his application for external review was made within 20 working days after receipt of that decision.
- 8 On 12 December 2024, my office wrote to the Chief Executive Officer of the EPA to ascertain if an early resolution to the external review application was possible. Specifically, my office sought an indication as to

whether the EPA would reassess and make a fresh decision in relation to the Draft Plan, given it did not appear to be indicating that the Draft Plan would ever be subsequently released but only the finalised version of the plan would be.

- 9 On 6 February 2025, EPA Chief Executive Officer Mr Wes Ford issued a fresh decision in relation to the Draft Plan. Mr Ford decided that the Draft Plan, in its entirety, was exempt from release pursuant to s37(1)(b), as information relating to the business affairs of a third party.
- 10 On 4 March 2025, Mr Johnson confirmed that the EDO sought external review of this fresh decision.

Issues for Determination

- 11 I must determine whether the information which is the subject of this review is exempt under s37 or any other relevant section of the Act.
- 12 As s37 is within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s37, 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 1.

Relevant legislation

- 13 A copy of s37 is included as Attachment 1. Copies of s33 and Schedule 1 are also included.

Submissions

Applicant

- 14 On 4 March 2025, Mr Johnson made the following submissions:

As to release of the document, Mr Ford concluded on 6 February 2025 that the Draft Plan as submitted contains information about how the Parties will be operating in Macquarie Harbour, a salmonid production location for all of the Parties, and the methods those parties will be employing to sustainably manage production in that environment; and that that could harm the competitive position of those organisations.

We note that the approved plan has now been made public by the EPA and any potential harm to the competitive position of the organisations, which we do not concede existed or was substantial, has been removed. The approved operating methods are now public. Commercial competitors can study them at their leisure on the EPA's website. There is no prejudice to the companies in releasing the original plan

they submitted eleven months ago, which does not regulate their operations.

15 On 9 April 2025, Mr Johnson provided additional submissions. The key parts of these submissions are as follows:

This reason is fundamentally flawed because the final plan had been approved by this time. The final plan is dated January 2025 and, as was foreshadowed by the EPA, has been released publicly. The final plan contains information about how the Parties will be operating in Macquarie Harbour. The Draft Plan was a proposal only. Certainly, at the time of the EPA's decision, the Draft Plan did not contain information about how the parties would be operating. The approved plan, publicly released, contains that information.

...

In the context where the final plan had been approved at the time of the decision, there was no basis for refusal to disclose a draft of that plan even before reaching the “public interest” discretion stage of consideration. No lobbying would conceivably be carried out on the strength of a draft plan which was superseded.

Mr Johnson went on to submit that the EPA decision failed to give effect to the object of the Act to provide the maximum amount of official information.

EPA's submissions

16 The EPA did not make specific submission in response to this external review, beyond the reasoning of Mr Ford's 6 February 2025 fresh decision. In that decision, Mr Ford reasoned:

The information you have requested, if disclosed, would divulge information acquired by EPA which relates to the business affairs of a third party, being Petuna Pty Ltd, Tassal Group Limited and Huon Aquaculture Company Pty Ltd (the Parties) as the Draft Plan was submitted jointly by these corporate entities. This information would be likely to expose a third party to a competitive disadvantage.

The Parties that submitted the Draft Plan to the EPA in accordance with Environmental Licence Conditions DO 2 and 3 operate in a highly competitive national and international market. The Draft Plan as submitted contains information about how the Parties will be operating in Macquarie Harbour, a salmonid production location for all of the Parties, and the methods those parties will be employing to sustainably manage production in that environment. The Parties supply of salmonid products to the Australian consumer via the major

supermarket chains is in competition to international suppliers. There are numerous organisations that regularly try to affect the competitive position of the Parties through attempting to influence the major supermarket chains purchasing practices via shareholder lobbying in advance of Annual General Meetings of those major supermarket chains. This lobbying is directly aimed at affecting the competitive position of the Parties viz a viz their international suppliers against whom the organisations are not carrying out similar actions aimed at their competitive position.

This information may be exempt information if, after taking into account all relevant matters including those specified in Schedule 1 of the Act, I conclude that it is contrary to the public interest to disclose the information.

17 When considering the public interest test, Mr Ford set out that:

Disclosure of information relating to the business affairs of Petuna Pty Ltd, Tassal Group Limited and Huon Aquaculture Company Pty Ltd (the Parties) could harm the competitive position of those organisations (matter (w)) the business or financial interests of an organisation (matter (s)), are considerations against disclosure.

The impact on the Parties competitive position and business or financial interests are discussed earlier in this decision.

A further consideration against disclosure is that it may prejudice the ability to obtain similar information in the future (matter (n)). The EPA relies on its capacity to receive and comment on draft management plans that are required to be developed under Environmental Licences, Permits, Environment Protection Notices and other like legislative instruments issued under the Environmental Management and Pollution Control Act 1994. The provision of draft management plans, like the Draft Plan in question, ensures that the document that is prepared by the entity with the legal obligation to prepare it provides the best form of environmental management for the issues contained proposed to be managed via the Draft Plan, and that it meets all the legal requirements associated with the production of the Draft Plan. This is often an iterative process to ensure the Draft Plan approved by the EPA provides the best environmental outcomes are provided via the implementation of a well thought out management plan. If drafts of the Draft Plans were to be released this is likely to inhibit the ability of the EPA to receive draft management plans in the future, leading to a reduction in the capacity for the EPA to

appropriately and efficiently regulate industrial activities going forward.

After careful consideration of the “Matters relevant to the assessment of public interest” contained in schedule 1 of the Act, I am of the view that it would be contrary to the public interest to disclose the information contained in the Draft Plan.

I have also considered the matters in Schedule 2 of the Act, “Matters irrelevant to assessment of public interest”, and I confirm my decision has not been influenced by any of the four matters specified.

It is my view that the release of the information contained in the Draft Plan is not in the public interest.

Analysis

Section 37 – information relating to the business affairs of a third party

- 18 Section 37(1) provides that information is *prima facie* exempt if it is related to the business affairs of a third party, when a public authority obtains that information from a person or organisation other than the person making the application for assessed disclosure, and either:
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information would be likely to expose the third party to competitive disadvantage.
- 19 The EPA has restricted its submissions to s37(1)(b), and there is no suggestion that trade secrets are involved, so I will confine my analysis to the issue of competitive disadvantage.
- 20 The meaning of competitive disadvantage was considered by the *Supreme Court of Tasmania in Forestry Tasmania v Ombudsman*:¹

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.²

...

¹ [2010] TASSC 39

² See Note 1, per Porter J at [52]

The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage.³

- 21 The Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.⁴
- 22 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*⁵, it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts. I have since considered and taken legal advice on the position in Tasmania. I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to section 33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Supreme Court of Tasmania.
- 23 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases competitive disadvantage and likely to expose, all of which are instructive and with which I agree.
- 24 The EPA has claimed that the Draft Plan is exempt in full pursuant to s37(1)(b), setting out its view that it would be contrary to the public interest to release this information as it would harm the competitive position of Petuna Pty Ltd, Tassal Group Limited and Huon Aquaculture Company Pty Ltd (the salmon companies).
- 25 The Draft Plan contains information which is substantially similar to the published *Dissolved Oxygen Mitigation Plan & Water Quality Monitoring Plan* dated January 2025, which has been released in full and is already in the public domain on the EPA's website. The wording, images and structure of the Draft Plan and the published plans are nearly identical, with the final report in limited sections providing greater detail.
- 26 For all practical purposes the Draft Plan information is in the public domain, and it is not clear how the Draft Plan could contain commercially sensitive information not already disclosed due to the high degree of similarity.
- 27 The reasoning provided by Mr Ford is broad and general in nature and fails to identify which specific aspects of the Draft Plan should be considered exempt from disclosure pursuant to s37(1)(b).

³ See Note 1, per Porter J at [59]

⁴ See Note 1, per Porter J at [41], applying *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 31, per Deane J at 346; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 per Heerey J at [91]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 [750]

⁵ [2017] NSWCA 275 (24 October 2017).

- 28 I am not satisfied that the EPA has provided sufficient information to show how the salmon companies' commercial position in their national or international markets would be disadvantaged due to the release of the Draft Plan. This information is almost entirely in the public domain for their competitors to consider.
- 29 When considered in this context I agree with the EDO that it is hard to understand how the release of any of the information contained in the Draft Plan would be likely to subject the salmon companies to a competitive disadvantage. Accordingly, I am not satisfied that the EPA has discharged its onus pursuant to s47(4) to show how this information could be exempt from disclosure under s37 of the Act. Accordingly, I find that the Draft Plan is not exempt and should be made available to the applicant.
- 30 It is not necessary for me to assess the public interest test in s33, as I have not found any information to be *prima facie* exempt under s37(1)(b).

Preliminary Conclusion

- 31 Accordingly, for the reasons set out above, I determine that information in question is not exempt from disclosure pursuant to s37(1)(b) of the Act.

Submissions to the Preliminary Conclusion

- 32 As the above preliminary decision was adverse to the public authority, it was made available to the EPA on 17 April 2025 under s48(1)(a) of the Act to seek its input prior to finalisation. On 12 May 2025, my office received submissions from the new EPA Chief Executive Officer, Ms Catherine Murdoch.
- 33 The EPA submitted in relation to s37(1)(b) of the Act:

The preliminary decision relates to this decision by Mr Ford. Paragraphs 26 and 27 of the preliminary decision emphasises [sic] that the Draft Plan is substantially similar to the final version that "...has been released in full..." and that "For practical purposes the Draft Plan information is in the public domain, and it is not clear how the Draft Plan could contain commercially sensitive information not already disclosed...". Considerable weight has been put on the publication of the final version of the plan in determining whether commercial disadvantage could arise.

I wish to draw your attention to a factual error in these findings. While the final plan is dated January 2025 it was not approved by the EPA or in the public domain at the time of Mr Ford's decision.

The ‘January 2025’ date refers to when that version of the plan was finalised by its author. It was submitted to the EPA on 30 January 2025 for approval. Staff of the EPA then reviewed the submitted documents. It is common for these reviews to take several weeks due to the technical content of such plans and the expert advice needed to assess them.

On 17 February 2025 Mr Ford has given provisional approval for the Draft Plan, subject to them addressing several issues, and indicated his intent to publish it. The submitted document then required some editing before it was released on the EPA website on or shortly after 20 February 2025.

For completeness, I attach the email from ... Salmon Tasmania dated 30 January 2025 submitting the final version of the Draft Plan and its attachments; the letter of provisional approval from Mr Ford, dated 17 February 2025; and an internal memo dated 20 February 2025 discussing the proposed changes to the EPA website content for publishing of the plan.

I ask that the preliminary decision be reconsidered with this correction of the timing in mind.

- 34 Ms Murdoch then made submissions in relation to s17(1)(a), which contained her view that:

In the event that, in light of this correction, the reasons given by Mr Ford are still not persuasive that an exemption under s 37(1)(b) applies, I submit that in the alternative it was open to Mr Ford to instead defer disclosure of the Draft Plan pursuant to s17(1)(a) of the Act until the final version of the plan was released, as had been decided in the internal review. It would then have been clear whether the information in the Draft Plan contains commercially sensitive information not already disclosed.

Further analysis

- 35 I have carefully considered the EPA’s submissions and the information provided by Ms Murdoch. I acknowledge that, at the time of Mr Ford’s fresh decision on the Draft Plan dated 6 February 2025, the *Dissolved Oxygen Mitigation Plan and Water Quality Monitoring Plan* had not been approved or published.
- 36 However, I do not consider that this has a material impact on my proposed findings in this matter. I must consider the circumstances as are in existence at the time of my decision and acknowledge that this may result in a different conclusion due to changes occurring in the interim.

- 37 It remains the usual practice of the EPA to publish such draft plans and this information's entrance to the public domain was always planned. Accordingly, a clear explanation of how the release of particular parts of the Draft Plan would be reasonably likely to expose the salmon companies to competitive disadvantage was required for the EPA to discharge its onus to show why this information would be exempt under s37(1)(b).
- 38 Ms Murdoch did not provide further submissions to justify the exemption of the Draft Plan under s37(1)(b). The fact remains that the wording, images and structure of the Draft Plan are nearly identical to the final published plan, now available on the EPA website. The information in the Draft Plan is, for all practical purposes, in the public domain. I remain unpersuaded that the release of the information contained in the Draft Plan would be likely to cause any competitive disadvantage to the salmon companies.
- 39 Ms Murdoch submitted that it was open for Mr Ford to apply s17(1)(a) to defer disclosure of the information, on the basis that the final version on the plan would be released within 12 months of the information request. While this is an option in the Act and Mr Ford initially sought to rely on s17, he ultimately did not do so and issued a fresh decision on 6 February 2025 relying on the exemption in s37(1)(b). Consequently, I am limited in this review to an assessment of the appropriateness of that decision only.
- 40 I do not consider it possible for these provisions to be used interchangeably, as deferral under s17 requires the information to be shortly released in almost identical form and exemption under s37 requires the information to be of such commercial sensitivity that it would be contrary to the public interest to release it.
- 41 Accordingly, my proposed findings remain unchanged.

Conclusion

- 42 For the reasons given above, I determine that the exemptions claimed pursuant to s37 are set aside.

Dated: 16 May 2025



Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant legislation

Section 37 - Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

- (a) the information relates to trade secrets; or
- (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
 - (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

- (a) until 10 working days have elapsed after the date of notification of the third party; or
- (b) if during those 10 working days the third party applies for a review

of the decision under section 43 , 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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision;

or

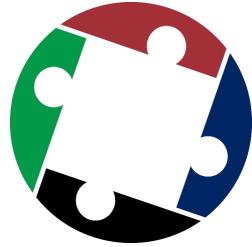
ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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 inform

OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review

Case Reference: R2409-025

Names of Parties: F and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: ss30, 35 and 36

Background

- 1 Following a report to Tasmania Police that she had been the victim of a financial crime, F submitted an application for assessed disclosure on 19 August 2024 under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department). She sought answers to the following questions:
 1. *Who has used my bank details?*
 2. *Whose or which address or IP address was used?*
 3. *What information has been provided by service providers like TPG, SuperLoop and Aussie Broadband to police?*
- 2 On 27 August 2024, Ms Roslyn French, a delegate of the Department under the Act, issued a decision on F's application.
- 3 In that decision, Ms French determined there was no relevant information located in relation to questions 1 and 2. In relation to question 3, Ms French released a document entitled *Intel Submission Disclosure Report* in part. She decided that some of the relevant information in the document was exempt under ss30(1)(e) – information relating to the enforcement of the law, 35 – internal deliberative information), and 36 (personal information).
- 4 Further, she determined other information was exempt in full by reason of s18 of the *Telecommunications (Interception) Tasmania Act 1999* (the Telecommunications Act).
- 5 On 27 August 2024, F wrote to the Department to request an internal review of that decision.

- 6 On 24 September 2024, an internal review decision was provided to F by Inspector A Bennett of the Department. In that decision, Inspector Bennett affirmed, without variation, the original decision of Ms French.
- 7 On 25 September 2024, F made an application for external review to my office.
- 8 Her application for external review was accepted pursuant to s44, as the application was made within 20 working days of her having received an internal review decision.

Issues for Determination

- 9 I must determine whether any of the information is eligible for exemption under ss30, 35, 36 or any other relevant section of the Act.
- 10 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

- 11 The Department has relied on ss30, 35, and 36 in its decision to exempt information. I attach copies of these sections to this decision as Attachment 1.
- 12 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

The applicant

- 13 No submissions were received from the applicant in relation to this external review.

The Department

- 14 The Department did not provide specific submissions in relation to this external review, beyond the reasoning of its decisions. I will extract relevant excerpts of these decisions.
- 15 Ms French's decision of 27 August 2024 stated in relation to s30(1)(e):

The information assessed includes information contained within the Intel Submission Disclosure Report. The information assessed includes information, which is classified as intelligence, in that it is information of a confidential nature that has been collected, analysed, and subsequently developed into a product to assist Tasmania Police in its business of law enforcement.

As some of the information collated as [sic] intelligence, exemptions pursuant to Sections [sic] 30(1)(e) of the Act have been applied to some of that information.

16 In relation to s35, Ms French stated:

The information contained within the Intel Submission Disclosure Report includes officer's personal opinions of Tasmania Police Officers. The aforementioned information would disclose the internal thinking process of a public authority and contains non-factual opinions and deliberations of Tasmania Police Officers.

The absolute accuracy cannot be substantiated and would reasonably be likely to compromise future internal avenues of enquiry.

17 In relation to s36, Ms French set out:

The information assessed includes the personal information of persons other than yourself. The personal information provided by or about a person is a vital tool in assisting Tasmania Police with the prevention, detection, and investigation of daily life incidents. The supply and source of information must be protected so that similar information is forthcoming and 'free flowing' in the future without any reasonable concern from the person providing it.

Section 36(2) of the Act directs that I consult with third parties whose information is held by Tasmania Police and where it is my belief that the party may be reasonably concerned about the release of that information. I have chosen not to consult with several third parties, named within the information as it would be impractical to consult with them as they have not provided additional relevant information in relation to the matter.

*I have not provided the personal information provided about a third party who has not provided consent. I am satisfied this information is *prima facie* exempt pursuant to section 36 of the Act, subject to the public interest test at Schedule 1 of the Act.*

I am aware that you may have knowledge of the third parties' names and contact details. The omission of this information is purely for the benefit and privacy of those parties from their identities being disclosed to the 'world at large'.

18 In applying to public interest test to both ss35 and 36, Ms French wrote:

Section 33 of the Act states that the information described in Sections 34 to 42 is only exempt if it is considered, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information. The public interest test requires consideration of the matters specified in Schedule 1 of the Act but is not restricted to just those matters. Matters specified in Schedule 2 of the Act are irrelevant in this instance.

I consider the following matters in Schedule 1 of the Act (the public interest test) to favour disclosure of the exempt information:

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

(m) whether the disclosure would promote or harm the interest of an individual or group of individuals.

Conversely, I consider the following matters in Schedule 1 of the Act to favour non-disclosure of the exempt information:

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

(m) whether the disclosure would promote or harm the interest of an individual or group of individuals.

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

I am satisfied that it would be contrary to the public interest to disclose third parties' personal information that is private and provided in confidence to Tasmania Police. This information would not be expected to be disclosed for another purpose, without consent. The release of this information would be reasonably likely to harm the interest of the individuals named and the ability to obtain similar information in the future, which in turn would harm the administration of justice and enforcement of law.

(u) whether the information is wrong or inaccurate.

Information contained within the Intel Submission Disclosure Report includes investigating officer's personal opinions made at the time of entry without completion of the investigation/enquiry and knowledge of all facts. I am satisfied 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.

I consider the remaining matters in Schedule 1 of the Act to be non-relevant to your application.

On balance, I am satisfied that it would be contrary to the public interest to disclose the exempt information.

- 19 In relation to the refusal to provide information due to s18 of the Telecommunications Act, Ms French wrote:

Pursuant to Section 18 of Telecommunications (Interception) Act 1999, I am unable to disclose any information relating to information provided by service providers as the Act states;

18. Confidentiality

(1) Except as allowed by this Act, a person who is or was engaged in the administration of this Act must not disclose any information or record obtained by the person because of the person's engagement in the administration of this Act except where the disclosure is made under this Act or under the Commonwealth Act.

Penalty: Fine not exceeding 100 penalty units or a term of imprisonment not exceeding 12 months, or both.

(2) Subsection (1) applies despite the provisions of another Act that may allow a person to disclose the information or record because the person was engaged in the administration of the other Act and those provisions do not apply in respect of that information or record.

- 20 In their decision of 24 September 2024, Inspector Bennett wrote in relation to the application of s18 of the Telecommunications Act by Ms French:

Further the attendant Delegate compared and considered this provision of the Telecommunications (Interception) Act alongside the public interest test contained within Division 2 Exemptions subject to public interest test of the Right to Information Act 2009.

Analysis

- 21 The Department claimed that information in a two page documented entitled *Intel Submission Disclosure Report* was exempt in part under ss30, 35 and 36 of the Act. I will address the appropriateness of the application of each exemption in turn.

Section 30 - Information relating to enforcement of the law

- 22 The Department claimed two sentences of the relevant document are exempt pursuant to s30(1)(e) of the Act. One is following the heading *Validity* and the other is the final sentence of the document.
- 23 Section 30(1)(e) provides that information is exempt if its *disclosure would, or would be reasonably likely to 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.*

- 24 The Macquarie Dictionary defines intelligence as:

knowledge of an event, circumstance, etc., received or imparted; news; information: military intelligence; intelligence relating to bushfire occurrences, or the gathering or distribution of information, especially secret or military information which might prove detrimental to an enemy.¹

- 25 Because s30(1)(e) is not usually subject to the public interest test, it is important it is not applied unless necessary, to uphold the objects of the Act in s3 to *release the maximum amount of official information*.
- 26 The redacted sentence under the heading *Validity* is an assessment of the reliability of the information contained within the report. I am satisfied s30(1)(e) applies in the exemption of this particular sentence. This information is clearly of a character which the Act contemplates as intelligence, because it is an assessment of the evidential value of the information or gathered confidential information for use in an investigative process.
- 27 The final sentence of the document relates to intelligence information noted on a Department system relevant to the management of this matter. I am satisfied its release would disclose intelligence information and that this might negatively impact the law enforcement work the Department undertakes.
- 28 As such, both sentences are exempt pursuant to s30(1)(e) and are not required to be provided to the applicant.

Section 35 – Internal deliberative information

¹ Definition of intelligence, Macquarie Dictionary Online, accessed 21 July 2025, www.macquariedictionary.com.au.

- 29 The Department also claimed the final sentence of the *Intel Submission Disclosure Report* was exempt pursuant to s35(1)(a) of the Act as internal deliberative information. As I have already determined this information is exempt under s30(1)(e) it is not necessary for me to assess whether this exemption is also applicable.

Section 36 – Personal information of person

- 30 The Department also claimed information identifying persons other than F was exempt from release pursuant to s36 of the Act.
- 31 Section 36 provides that information may be exempt from disclosure if it is the personal information of a person other than the applicant.
- 32 Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information and who is alive or has not been dead for more than 25 years.
- 33 The relevant information consists of the names or titles of individuals other than the applicant and is clearly personal information. I am satisfied it is *prima facie* exempt under s36.
- 34 Because s36 is contained in Part 3 of Division 2 of the Act, it is subject to the public interest test in s33, requiring consideration of all relevant matter and those in Schedule 1 of the Act at a minimum.
- 35 I consider Schedule 1, matter (a) *the general public need for government information to be accessible* is relevant and will always weigh in favour of disclosure.
- 36 Matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* is also relevant and the key consideration in this assessment. While it would clearly promote the interests of F to obtain this information, I consider this is outweighed by the harm which could occur to the relevant named individuals. I accept, as was noted by the Department, the identity of the people identified may be known to the applicant. However, without their consent for this information to be released, it is likely to harm their interests for a police report document naming them to be disclosed. There is no restriction on the use of information disclosed under the Act and the relevant report relates to allegations of criminal conduct.
- 37 Given the above, I am satisfied it would be contrary to the public interest to release this information. It is exempt pursuant to s36 of the Act and is not required to be provided to the applicant.

Telecommunications (Interception) Tasmania Act 1999

- 38 In her decision of 27 August 2024 Ms French cited only s18 of the Telecommunications Act in support of her exemption in full of some of the relevant information.

- 39 Inspector Bennett noted Ms French had also considered the public interest test in relation to this consideration and affirmed her finding.
- 40 Section 18 of the Telecommunications Act provides:

18. Confidentiality

(1) Except as allowed by this Act, a person who is or was engaged in the administration of this Act must not disclose any information or record obtained by the person because of the person's engagement in the administration of this Act except where the disclosure is made under this Act or under the Commonwealth Act.

Penalty: Fine not exceeding 100 penalty units or a term of imprisonment not exceeding 12 months, or both.

(2) Subsection (1) applies despite the provisions of another Act that may allow a person to disclose the information or record because the person was engaged in the administration of the other Act and those provisions do not apply in respect of that information or record.

- 41 The Telecommunications Act does not explicitly provide for the exclusion of the Act, though it does specifically reference its application despite the provisions of other legislation.
- 42 As the Act is not explicitly excluded, I consider this uncertainty should be dealt with in the same manner as other inconsistent legislative provisions – as was discussed in the recent external review of *Meg Webb and Department of Police, Fire and Emergency Management*.² Information cannot be considered exempt under another piece of legislation but the provisions of that legislation can be considered in assessing whether an exemption under the Act is relevant.
- 43 Section 30(1)(a)(ii) of the Act provides that information is exempt if its disclosure would, or would be reasonably likely to, *prejudice the enforcement or proper administration of the law in a particular instance*.
- 44 As it is clear the release of relevant information would constitute an offence under the Telecommunications Act, I am satisfied it would prejudice the proper administration of the law in this instance if the information were released under the Act.
- 45 As such, I consider that the information withheld in its entirety by the Department pursuant to s18 of the Telecommunications Act is exempt under s30(1)(a)(ii) and is not required to be provided to the applicant.

Preliminary Conclusion

- 46 In accordance with the reasons set out above, I determine that:

² 11 June 2025 at [44]-[48], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

- exemptions claimed pursuant to ss30(1)(e) and 36 are upheld; and
- information is not exempt under the *Telecommunications (Interception) Act 1999* but is exempt under s30(1)(a)(ii).

Conclusion

- 47 On 20 August 2025, the above preliminary decision was made available to both F and the Department to seek their input prior to finalisation, in accordance with s48(1)(b) of the Act.
- 48 On 21 August 2025, the Department confirmed it did not intend to provide any submissions in relation to the decision. F did not respond to the initial or a follow up request for input, electing not to provide any submissions either.
- 49 Consequently, my proposed findings and reasoning remains unchanged.
- 50 In accordance with the reasons set out above, I determine that:
- exemptions claimed pursuant to ss30(1)(e) and 36 are upheld; and
 - information is not exempt under the *Telecommunications (Interception) Act 1999* but is exempt under s30(1)(a)(ii).
- 51 I apologise to the parties for the delay in finalising this decision.

Dated: 9 September 2025



Leah Dorgelo
ACTING OMBUDSMAN

Attachment 1

Relevant Legislation

Section 30 – Information relating to enforcement of the law

- (1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –
- (a) prejudice –
 - (ii) the enforcement or proper administration of the law in a particular instance; 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
- ...

Section 35 – Internal deliberative information

- (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.
- (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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Personal information

- (1) 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. ...

Section 33 – Public interest test

- (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.

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.



Right to Information Act Review

Case Reference: R2403-007

Names of Parties: Graham Murray and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s19, s45(1)(e)

Background

- 1 Mr Graham Murray is a supporter of the cable car project that had previously been proposed for kunanyi/Mount Wellington in Hobart. This project was a matter of considerable public interest in the Tasmanian community. The City of Hobart (Council), the public authority responsible for the assessment of the project, ultimately voted to reject it on 27 July 2021. The Tasmanian Civil and Administrative Tribunal upheld Council's decision on 3 November 2022.
- 2 On 19 September 2022, a question was posted on the @hobartcablecarsupporters Facebook page querying whether trees were felled during a clearing of the Halls Saddle site on kunanyi/Mount Wellington by Council (the question).
- 3 Council officers produced a briefing note detailing Council's response to the question (the original briefing note) and provided it to elected members. This response incorrectly attributed the question to Mr Murray. Mr Murray subsequently became aware of the original briefing note, and he wrote to Council requesting that all copies of it be retracted. Council agreed to re-issue the briefing.
- 4 On 17 February 2024, Mr Murray lodged an assessed disclosure application with Council requesting the following:
 1. *Information surrounding this original briefing to elected members that included my name, including (but not limited to) the correspondence itself, mailing list, emails, texts, internal discussions, file notes, notes included in content management systems, internal clearance information and a list of every staff member and their position details included in the drafting and clearance of the briefing.*

2. *Information surrounding the CEO's retraction and reissue of this briefing to elected members, including (but not limited to) the correspondence itself, mailing list, emails, texts, internal discussions, file notes, notes included in content management systems, internal clearance information and a list of every staff member and their position details included in the redrafting and clearance of the amended briefing. This request includes all Council background and internal discussion relating to the email apology to me issued by the CEO including a list of who was involved in discussions around this retraction.*
3. *An audit list of who has accessed any of these documents within the Council's content management system, including details about when and why this information was accessed.*
4. *Information detailing if and when any of the documents detailed in the prior points have been released to any non-employees, including (but not limited to) the correspondence itself, mailing list, emails, texts, internal discussions, texts, notes included in content management systems, internal clearance information and a list of every staff member and their position details included in the drafting and clearance of the information released. Any third-party private citizen information can be redacted to avoid delays in requiring consultation with private citizens.*
- 5 On 20 March 2024, Mr Murray applied to my office for an external review pursuant s45(1)(f) of the Act, as he had not received a decision on his assessed disclosure application. This application was accepted as the prescribed fee had been paid, more than 20 working days had elapsed since submitting his request, and he was yet to receive a decision from Council.
- 6 On 10 May 2024, Mr Murray was issued with a 'preliminary assessment' of his assessed disclosure request from Council. Council acknowledged that this was an unusual step and set out that its purpose was to *resolve a series of issues you have raised in your application.*
- 7 As the preliminary assessment did not constitute a decision, on 24 May 2024 my office wrote to Council issuing a direction pursuant to s47(1)(e) of the Act, requiring it to issue a decision by 6 June 2024.
- 8 On 3 June 2024, Council issued Mr Murray with a decision on his assessed disclosure application. Council identified 13 documents as being responsive to items one and two of Mr Murray's assessed

disclosure application and released these to him in full. Council, however, was unable to locate the re-issued briefing (responsive to item two of Mr Murray's request) referred to in those documents. Council relied on s19 of the Act to justify not undertaking further searches for the amended brief on systems it currently uses, as it considered this would be a substantial and unreasonable diversion of its resources from its other work. It further relied on s10(2) of the Act to refuse Mr Murray's request, insofar as it related to information that it considered might reside on 'back-up' systems that are no longer in use.

- 9 Regarding request item three, Council relied on s19 of the Act to refuse to extract an audit log detailing those who accessed relevant documents in Council's TRIM document management system.
- 10 Council's decision set out that no information responsive to request item four was located.
- 11 On 6 June 2024, Mr Murray confirmed that he wished to continue with his external review following receipt of Council's decision, pursuant to s46(2) of the Act. He raised concerns regarding the refusal of his application and that Council's searching for information had been insufficient.

Issues for Determination

- 12 I must determine whether Council was entitled to rely upon s19 to refuse items two and three of Mr Murray's application. I must also determine whether Council's search for information responsive to items two and four of Mr Murray's application was sufficient pursuant to s45(1)(e).

Relevant legislation

- 13 I have attached copies of s19 and s45 to this decision at Attachment 1.

Submissions

Mr Murray

- 14 Mr Murray made submissions in support of his external review request on 6 June 2024. He set out that he did not accept Council's assertion that extracting an audit list of who accessed documents from Council TRIM document management system would result in a substantial and unreasonable diversion of resources from its other work:

I have stated previously that a check of the audit log in TRIM is as simple as right clicking on a document file and selecting audit events from the menu. I do not accept the assertion about complexity and resource implications from the Council. I respectfully request Council is required to extract these before it potentially loses the records through its IT works.

Council

- 15 Council's 3 June 2024 decision set out that it relied on s10(2) and s19 of the Act to conduct no further searching for evidence the amended brief was communicated to elected members:

As detailed in the 'background' component to this decision (the Decision) and as also contained in Mr Young's email of May 10 (the preliminary assessment) a total of 13 records were identified and provided in unredacted form as part of the preliminary assessment. The specifics of those documents, and copies of them, can be found in the associated attachment to this Decision and require no further comment.

To be expressly clear, no additional records within the search parameters (as defined in the Application) were identified on our record management systems, as previously advised, and the 13 records were provided under the preliminary assessment in their original form without any redaction.

The 13 documents should be taken as covering the field for elements 1 and 2 of the Application as they represent the totality of search results across all of Council's present record management systems, which were also in use in 2022, except for archived Outlook accounts, which are now a 'back up system' per section 10.

A search of Ms Grigsby's former account was also undertaken as a gesture of good faith but again no additional materials were located. It was open to consider withholding some of the disclosed materials under section 35 as they are clearly drafts or 'deliberative' documents, but those concerns were outweighed by considerations of transparency and procedural fairness in allowing for a fuller understanding of how your matter came about and was resolved.

Missing or Incomplete Records:

It would seem from reading the 13 disclosed documents that there should be a record – an 'EM Request' detailing where an amended briefing was re-circulated to councillors following your complaint. As detailed in the May 10 disclosure this record cannot be found. Perhaps the information was conveyed verbally, or the record has been mis-classified. An offer was made on May 3 under section 13 to attempt to agree for a refined search of 'backup systems,' noting that this had already occurred for

Mr Grigsby's Outlook account, and that should no record be located Mr Stretton was open to looking at alternative options outside of the RTI Act to address your concerns.

In the absence of agreed search parameters for the missing 'EM Request,' which if in existence will most likely be on a legacy system it has been determined that additional searching (other than that which has occurred across the existing suite of document management systems) would be an unreasonable diversion of resources when considered against the resourcing required to undertake a broad scale search in the knowledge that the same key staff are in the process of de-commissioning TRIM (which I believe has a fixed deadline due to licence expiration) while also migrating council records to our new management system.

It has been determined that no further efforts will be made to search for that record on other backup systems in consideration of (section 10(2) [sic] or further searching on existing systems on the assumption that the document has been mis-identified as in the absence of a targeted search as It would be an unreasonable diversion of resources per section 19. Mr Stretton remains open to a resolution outside of RTI, as previously noted should you so choose.

Further Schedule 3 Considerations:

However, on the off chance that it was mis-classified and exists on a primary record management system section 19 has been considered with specific reference to the operation of Schedule 3. It was determined that 1(c) of the Schedule should be considered regarding the unreasonable diversion of resources and that the parties had been unable to negotiate under section 13, which (h) in the Schedule allows to be considered.

Given for the potential for the record to not exist in a form within the Act's application (f) was also a valid consideration in that Council cannot prove a negative – namely that the record doesn't and never did exist, which is relevant to considerations under (d).

Ultimately, (c), (d) (f) and (h) displaced any consideration under (b) is it's clear that the Applicant views the missing record as 'demonstrably important.'

- 16 On 26 February 2025, Council wrote to my office to provide, in response to my office's request, submissions about the steps it took when searching for the missing amended briefing note responsive to item two of Mr Murray's assessed disclosure application.
- 17 First, Council said that the last version of the amended briefing note that could be located was attached to an email sent from the then Manager Strategic Communications and Marketing to Council's then CEO's Chief of Staff on 28 September 2022 at 3:33pm. Council submissions were that the amended briefing note started with the correction and an apology, had Mr Murray's name removed, and corrected a typographical error.
- 18 Council's submissions then went on to set out its efforts to locate evidence showing that the amended briefing note had in fact been reissued from Council's then CEO to Council's elected members:

Mr Murray's 2024 application referred to on or around September 2022 him raising a briefing to elected members ... falsely quoting my name ... with then CEO Kelly Grigsby ... He said he had been provided an apology but did not include that with his RTI application, nor forward it.

Hence, the Chief of Staff of the City's CEO, at my request, located and provided to me on 2 May 2024:

- *an email from Mr Murray to the City's then CEO raising his concern (27 September 2022 6:46 PM); and*
- *reply from the CEO's Office apologising to him (28 September 2022 4:05 PM).*

I then followed up by emails to the Chief of Staff on 2 and 6 May 2024 seeking further searches.

The email of 28/09/2022, 3:33PM, including the amended briefing note it attached, was amongst emails located by the Chief of Staff undertaking further searches at my request on 6 May 2024. The Chief of Staff provided me the information they located which was all released to Mr Murray later that week, 10 May 2024. I can provide any of the above emails to you.

The email 28/09/2022, 3:33PM (including its attached amended briefing note) was one of those emailed to Mr Murray on 10 May 2024 by Mr Young (heading in Mr Young's email "Preliminary Assessment & Disclosure"). Mr Young's email of 10 May 2024 (including its attachments) was also attached to the decision Mr Young emailed Mr Murray on 3 June 2024.

Searches for correspondence sending the amended briefing note to Elected Members [EMs]

The amended briefing note attached to the email 28/09/2022, 3:33PM corresponds to the “correct copy” referred to in the final paragraph of this email from the Office of the CEO to Mr Murray:

...

The document has been updated and your name has been removed. A correct copy will be provided to Elected Members noting and apologising for the error...

However, despite subsequent searching, including fresh searching as recently as 21 and 24 February 2025, we have been unable to find any record actioning provision of the amended [“correct copy”] briefing note to the Elected Members of that previous term of Council.

Prior emails referred to earlier above indicated that, once approved, the amended briefing note would be emailed to the City’s then Elected Members via the Elected Members’ [EM] Requests address. EM Requests was the same method by which the original briefing note had been sent to them.

The Elected Members’ [EM] Requests email was searched by its current administrator, the City’s Corporate Governance Specialist – the administrator from September 2022 having left the Council not long after. But the searches found no record sending the amended briefing note to Elected Members. These searches were:

- pursuant to requests by Mr Young in mid-2024; then
- on 21 and 24 February 2025, pursuant to requests by me.

Each of the three addressees sending or receiving the 28/09/2022, 3:33PM email has searched on 21 and 24 February 2025, but can find no record on-forwarding that email or its attachment (the amended briefing note document), such as to the Elected Member Requests email or that of its then Principal Advisor Customer Relations [who was soon to leave the City]. They could find nothing further relevant after 3:33PM except the email sent to Mr Murray, 28 September 2022, 4:05 PM.

In 2024 the CEO's searching extended from their office to the archived email of Ms Grigsby, The Manager Strategic Communications and Marketing was not asked to search in 2024. Presumably this was because:

- any relevant communications they might have had were thought to have been likely included in the searches by the Chief of Staff or EM Requests' current administrator;
- due to s19 as per the decision Mr Young sent to Mr Murray on 3 June 2024;
- the decision being overdue; or
- they being [sic] on leave.

Searches by the Manager on 21 and 24 February 2025, pursuant to requests by me, have located some additional emails between them and staff no longer with the City, potentially responsive to item 1. We can assess these if still required, although they appear to relate largely to preparation of draft versions the briefing notes where the final versions have been provided to Mr Murray.

The City's other mechanisms for written communications to its Elected Members were also searched on 6 May 2024 by Council's Senior Advisor Governance, at my request.

In the email search trail to 6 May 2024 are the results of Council's Senior Advisor Governance searching, at my request, the alternative mechanisms by which written information might have been provided to Elected Members, if not sent via EM Requests. Namely the Senior Advisor Governance's searches (for any reference to @Hobartcablecarsupports and 'Halls Saddle'), found nothing in:

- the Elected Members' Bulletin for the period mid August – mid October 2022;
- the Corporate Governance Unit's resource mailbox, the channel via which such information would have come to the unit for inclusion into the Elected Members' Bulletin; nor
- the HUB, Council's restricted-access intranet portal used for distribution of information only for Elected Members.

I have personally read today the Elected Members' Bulletin (a weekly email from the CEO to Elected Members) for Friday 30/09/2022 and confirm it contains no relevant information. However, it is in the name of an Acting CEO, rather than that of Ms Grigsby.

This prompted my query to the CEO's Office who have checked and advised today that the Acting CEO acted from Tuesday 27 September to Friday 30 September 2022 inclusive.

Conclusion as to the amended briefing note

The absence of the then CEO Ms Grigsby from Tuesday 27 September to Friday 30 September 2022 inclusive (with another person acting in her role throughout that period) seems the most likely explanation for:

- *why clearance from Ms Grigsby to send the amended briefing note corrected copy to Elected Members was not sought; and*
- *the City's apparent failure to send that amended briefing note it had prepared to its then Elected Members.*

That clearance from her could have been held over pending her return to work Monday 3 October 2022 seems likely given, for example, these references to her personally:

1. *Mr Murray had emailed 27 September 2022 6:46 PM, commencing, Dear Ms Grigsby, ...*
2. *At 28 September 2022, 11:20 AM the City's Manager Strategic Communications and Marketing wrote to the CEO's staff:*

If Kelly is happy to approve the reply and the attached I will ask that [the Principal Advisor Customer Relations then administering EM Requests] provides the attached as an amended version via the EM inbox.

3. *Mr Murray's 2024 RTI application referred to on or around September 2022 him raising a briefing to elected members ... falsely quoting my name ... with then CEO Kelly Grigsby ...*

If that clearance was held over pending Ms Grigsby's return, presumably the week commencing Monday 3 October 2022, it seems most likely that either seeking

clearance by her of the amended briefing, or her attention to it, was inadvertently neglected/forgotten then, at what was no doubt a very busy time managing other matters. For example:

- *There was a City Planning Committee Meeting Monday, 3 October 2022 at 5:00pm.*
- *The agenda papers for the Council Meeting of 10 October 2022 were legally required to be published by Wednesday 5 October.*
- *October 2022 was the month of 4-yearly local government elections.*

I have checked today the agenda and minutes of the open (which are both publicly available) and closed portions of the next Council meeting (10 October 2022) but none contain information responsive to the application.

It is possible that Ms Grigsby distributed a hard copy of the amended briefing to Elected Members in conjunction with one of those meetings, or verbally communicated the correction and apology to them, but we have found no record indicating that.

The last record we have been able to find attaching the amended briefing note (starting with the correction and apology quoted earlier and with Mr Murray's name removed from it) is the email 28/09/2022, 3:33PM from Council's Manager Strategic Communications and Marketing to the CEO's Chief of Staff. That email's second line simply stated "Updated and attached", without further reference as to who, after Ms Grigsby's approval of the amended briefing, would action distribution to Elected Members.

That was susceptible to some ambiguity and different interpretations by the parties to the email. It was reasonable for the Manager to leave it with the Chief of Staff, pending Ms Grigsby's approval. But it is also possible the Chief of Staff assumed that the Manager (having addressed points previously raised by the Chief of Staff), had, or would now, send the amended/updated document to EM Requests.

In terms of searching efforts, having prepared the amended briefing in 2022, and then on 10 May 2024 provided it to Mr Murray in response to his RTI application (along with all other information the Chief of Staff's

searching had located), the City had every incentive to locate a record showing it had taken the final step foreshadowed in the 28 September 2022, 4:05PM email to Mr Murray by providing the amended briefing to Elected Members.

The fact the City was, and remains today, unable to do so is not for lack of searching, such as described above.

- 19 As part of the same correspondence, Council made the following submissions detailing the searches it had conducted for information responsive to item four of Mr Murray's application:

The EM Requests email sending the original document to Elected Members Tue 27/09/2022 1:54 PM was released to Mr Murray under the Act 10 May 2024. That email stated it was:

... from officers to all elected members regarding a social media post by The Cable Car Supports group on Facebook concerning the area of Halls Saddle.

Similarly, the email from the Office of the CEO to Mr Murray 28 September 2022 4:05 PM stated:

...

The document you refer to was provided only to City of Hobart Elected Members to clarify and correct the information and questions that were posted on the @hobartcablecarsupporters site on 18/9/22.

The City has no intention to comment or release this information publicly.

...

As detailed earlier, our searches (including fresh searches 21 and 24 February) found no evidence that the amended briefing note ever progressed beyond the internal email sent by the Manager to the CEO's Office Wed 28/09/2022, 3:33PM, let alone to EM Requests and then on to Elected Members.

Hence, our searches did not reveal release of the documents outside of Council. Elected Members are part of Council, though not strictly its employees.

Mr Young's 10 May 2024 decision referred to the apology sent to Mr Murray on September 28, 2022: I've not

provided that as I take it as ‘otherwise available’ per section 12(3)(c)(i). The same section would apply to other responsive information if previously obtained by Mr Murray.

- 20 In relation to its decision to refuse to extract audit logs of who accessed the documents provided to Mr Murray, Council noted:

Audit List(s) TRIM:

Regards TRIM Mr Stretton’s view remains unchanged from those [sic] articulated in his preliminary decision. As previously advised TRIM is in the process of being decommissioned with this the primary focus of relevant staff, along with the associated mass-migration of council records and the pending ‘go live’ of our new system. In the absence of a negotiated refined scope, under section 13, such a process would be an unreasonably and substantial diversion of resources per section 19.

Noting that the same staff are also required to deliver business as usual IT services alongside the present Digital Transformation Strategy.

Mr Stretton is advised that a record on this point doesn’t presently exist, it’s noted that the Act doesn’t require the creation of new information to satisfy an Application. It may be possible to divert resources to create such a record (in the interests of good governance but noting the Act doesn’t require it) but I find that such a diversion would be unreasonable within the meaning of section 19, given the significant work that IT staff are presently engaged with and that any ‘audit’ would most likely ultimately only reveal information that was already known to the Applicant from a reading of the 13 disclosed records in terms of the identity of those involved with the viewing or preparation of the briefing paper as documented via the disclosed Outlook records.

Had Mr Stretton formed a view that an ‘audit’ of TRIM was both possible in the manner suggested and reasonable, he would have still held concerns under section 36 regarding the potential disclosure of ‘personal information,’ and would have been required to seek the views on potential disclosure from past and present staff, this in and of itself may have constituted a further unreasonable diversion of resources under section 19 – especially in the absence of a negotiated outcome under section 13.

An apparent unwillingness on the part of the Applicant to consider refining elements of their request (as is their right) to address these potential resourcing issues reinforces the initial view, as contained in the preliminary assessment, hasn't displaced their view on section 19 concerns noting that Council is also not required to 'create' information under the Act.

Analysis

Preliminary Matter 1 – Council's use of section 10 (Electronic information)

21 A public authority may refuse an application under section 10(1) if the application is for information stored in an electronic form, and –

- 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 .*

22 Further, section 10(2) provides that:

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 .

23 Council relied on s10(2) to refuse to conduct further searching of 'back-up' systems for the missing document establishing that the re-issued briefing note had been communicated to elected members.

24 Council said that it had conducted a search of its former CEO's archived email account in an attempt to locate this information. However, its decision also seemed to indicate that the archiving of email accounts of former employees, even very recently departed senior officers, would render these contained in 'back-up' systems for the purposes of the Act. Accordingly, it concluded that Mr Murray was not entitled to this information under the Act by reason of s10(2), though it did say it searched for it regardless as a *gesture of good faith*:

Once it became clear that there appeared to be a missing record a search of a 'back up' system – as defined under section 10(2), namely the archived Outlook account of Ms Grigsby occurred – as it was thought this may quickly resolve the matter.

25 Council's application of s10 is not a matter which can be formally reviewed during this external review. However, I am concerned that it

considers information contained within the archived email accounts of very senior Council officers who have only recently left Council to be in 'back-up' systems.

- 26 The implication of such a wide interpretation of back-up systems is that the public's right to information which would be reasonably expected to be in a public authority's possession would be impeded, as s10(2) provides that a *person is not entitled to information contained in back-up systems*.
- 27 Section 10(2) should only be used sparingly, otherwise the object and purpose of the Act would not be fulfilled. It reduces the searching requirement for public authorities to their live systems, rather than any additional information which may be kept as a failsafe. Care should be taken when changing document management systems to ensure that information remains accessible under the Act. Section 10(2) was not intended to be immediately applicable to all material which relates to past employees or previous records keeping programs, and transitional arrangements which take into account the right to information under the Act should be made. This may include the migration of material to new systems, and the retention of an old system or emails from past employees for a certain period.
- 28 While Council did search the relevant email archive relating to its past CEO, this should not have been considered a good faith gesture but a standard requirement regarding searching for relevant information. I urge Council to use s10(2) in a manner which aligns with the object of the Act more closely in future.

Section 19 – Requests may be refused if resources unreasonably diverted

- 29 Council made a decision to refuse aspects of Mr Murray's request pursuant to s19. For an application to be refused under 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*. In doing so I must have regard to the nine matters in Schedule 3, as required by ss19(1)(a) and (c). When it is proposed that a decision will be made to refuse information under s19, pursuant to s19(2) the applicant must be given a reasonable opportunity to consult Council...with a view to [the applicant] being helped to make an application in a form that removes the ground for refusal.
- 30 Council has relied on s19 in relation to items two and four of Mr Murray's application, to justify not undertaking further searching for information responsive to Mr Murray's application on information management systems it currently uses. It has further relied on s19 to refuse to assess TRIM audit lists, which Council identified as being responsive to item three of Mr Murray's assessed disclosure application.

31 I now turn to assess the appropriateness of Council's use of s19 in these instances.

Items two and four of Mr Murray's application

32 Council relied on s19 to refuse to conduct further searching in relation to the following aspects of Mr Murray's request for information:

- evidence that the missing amended briefing note was communicated to elected members (item two); and
- Information detailing if and when any of the documents detailed in the prior points (the original and amended briefing notes) have been released to any non-employees (item four).

33 Council has sought to rely on s19 in a manner which does not align with its intended purpose. A s19 refusal is an option available to public authorities which permits them to refuse to identify, locate or collate information responsive to an assessed disclosure request in certain circumstances. Council has searched for information and has not refused these aspects of Mr Murray's request. It contends that it has conducted appropriate searches and that it would not be reasonable to continue to search further.

34 When a public authority concludes that undertaking further searching is unreasonable in the circumstances, it is not necessary to rely on s19 to cease searching efforts. A statement should just be made in the relevant decision that the public authority considers that it has searched sufficiently but has not been able to locate relevant information. An applicant then has the option to seek external review if they dispute that the information is not in the public authority's possession (s45(1)(d)) or consider that the searching for relevant information was not sufficient (s45(1)(e)).

35 Accordingly, I will review Council's position under s45(1)(e), rather than s19, later in my decision and will consider its submissions regarding the reasons it did not consider further searches appropriate or necessary.

Item three of Mr Murray's application

36 Council has sought to rely on s19 to refuse to locate or extract TRIM audit lists responsive to item three of Mr Murray's application. As previously noted, in order to do so it must show that it consulted with Mr Murray in order try to remove the need to rely on s19 and justify its refusal with reference to the matters in Schedule 3 of the Act.

37 Though the notice of assessment issued to Mr Murray on 10 May 2025 and the decision issued to Mr Murray on 3 June 2025 refer to consultations or negotiations having occurred, these consultations appear to relate to Council's request that Mr Murray consent to a more targeted search for evidence being conducted as to whether the

amended briefing note had been provided to elected members. The negotiations do not appear to have related to reducing the volume of work required to extract, and assess for release under the Act, the TRIM audit lists.

- 38 Further, upon reviewing the decision issued to Mr Murray, it is apparent that no consideration of the matters contained in Schedule 3 was conducted such as to establish that the work involved in assessing this information for release would substantially and unreasonably divert the resources of Council from its other work. The only comments made by Council are that it would be problematic to extract and assess this information, given the age and capability of the TRIM platform. However, I note that in submissions to my office, Mr Murray rejects this assertion.
- 39 As it has not sufficiently addressed the mandatory requirements of s19, Council is not currently entitled to rely on that provision to refuse to locate and assess information responsive to item three of Mr Murray's application. Council has not properly consulted with Mr Murray and has not set out sufficient reasons to explain why dealing with the request would substantially and unreasonably divert Council's resources from its other work, having due regard to all matters contained in Schedule 3 of the Act.

Section 45(1)(e) – sufficiency of search

- 40 Section 45(1)(e) provides that an applicant, who has sought information in accordance with s13, may apply to the Ombudsman if, following a decision, they believe on reasonable grounds, that the public authority's search for information was insufficient.
- 41 Part 5 of the Ombudsman's *Guideline in Relation to Searching and Locating Information*¹ (the Guideline) provides that, regardless of the method of searching undertaken by the public authority for information responsive to an assessed disclosure application, the public authority should be able to demonstrate:
 - the date of each individual search action undertaken;
 - the nature of the search undertaken - for example, discussion with a named person or search in an identified location or on an identified database;
 - the outcome of the action; and
 - the identity and position of the person who performed the action.

¹ Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications

Council's searches for the amended briefing note

- 42 Having reviewed Council's submissions, which are quoted earlier in this decision, I accept that Council searched extensively for evidence that the missing amended briefing note was communicated to elected members.
- 43 First, Council's submissions assert that the Elected Members' Requests portal records were searched by its current administrator, Council's Corporate Governance Specialist, in mid- 2024 at the request of Mr Wes Young, and then again on 21 and 24 February 2025 pursuant to requests by Dr Tom Baxter. Council says that these searches proved unsuccessful.
- 44 Second, Council submitted that the last version of the amended briefing note that could be located was attached to an email from its Manager Strategic Communications and Marketing to Council's then Chief Executive Officer's Chief of Staff on 28 September 2022 at 3:33pm. I agree with Council that it appears likely that, had the amended briefing note been communicated to Elected Members, it would have been forwarded from this email address. However, the relevant email records were searched on 21 and 24 February 2025 by Dr Baxter, but no evidence of the amended briefing note being issued to elected members could be found.
- 45 Third, the archived emails of Ms Kelly Grigsby, Council's former Chief Executive Officer, were also searched on the 21 and 24 February. Again, these searches proved unsuccessful.
- 46 Fourth, Council communicated to my office that, on 6 May 2024, Council's Senior Advisor Governance searched, at Dr Baxter's request, for any reference to @Hobartcablecarsupports and 'Halls Saddle' in:
 - the Elected Members bulletin (for the period mid- august to mid- October 2022);
 - the Corporate Governance Unit's mailbox (as the channel by which such information would be submitted for inclusion into the elected members bulletin); and
 - the HUB – Council's restricted-access intranet portal used for distribution of information only for Elected Members.
- 47 Finally, Dr Baxter himself submitted to my office that he had read the Elected Members bulletin for Friday 30 September 2022 and could not locate relevant information.
- 48 That Council is unable to locate evidence establishing that the amended briefing note was in fact communicated to elected members does not appear to be a result of a lack of searching. Indeed, having reviewed Council's submissions it seems likely that this communication never occurred in a written format.

- 49 However, Council's apparent omission to circulate the amended briefing is not the focus of this external review. I can only consider whether Council conducted a sufficient search for relevant information following Mr Murray's request.
- 50 In some instances, Council's submissions did not contain the detail that is required for a compliant search record according to the Guideline. For instance, Council's submissions do not explicitly set out who performed the searches of email records relating to the Manager Strategic Communications, and the then Chief of Staff to Council's Chief Executive Officer, as is required by the guideline. However, the submissions were a highly detailed account of extensive searches having been undertaken.
- 51 On balance, I am satisfied that Council undertook a sufficient search for information establishing that the missing amended briefing note was communicated to elected members. It is not apparent that further searching would reveal more information and Council is not required to make additional attempts in this regard.

Information responsive to Item 4 of Mr Murray's application

- 52 As part of his request, Mr Murray sought the following:

Information detailing if and when any of the documents detailed in the prior points have been released to any non-employees, including (but not limited to) the correspondence itself, mailing list, emails, texts, internal discussions, texts, notes included in content management systems, internal clearance information and a list of every staff member and their position details included in the drafting and clearance of the information released. Any third-party private citizen information can be redacted to avoid delays in requiring consultation with private citizens.

- 53 Mr Murray's request is somewhat unclear as a result of his inclusion of the words *any of the documents detailed in the prior points*. However, I understand these words to mean that Mr Murray is requesting information detailing if and when either the original briefing note or the amended briefing note was communicated to third parties who are not employees of Council. I now turn to assess Council's search for information detailing whether each of these documents were communicated to third parties.

Council's search for information detailing if and when the original briefing note was communicated to third parties

- 54 As indicated, Council wrote to my office on 26 February 2025 to set out the steps it had taken to identify information responsive to item four of Mr Murray's request. However, Council's response related only to its efforts

to locate information detailing whether the amended brief had been communicated to third parties. It did not contain any commentary about the steps taken to locate information detailing whether the original brief had been sent to third parties.

- 55 Further, Mr Murray has asserted to my office, and to Council, that he is aware that the original briefing note was communicated to a private citizen in January 2024 through a separate assessed disclosure process.
- 56 Given this assertion by Mr Murray, and as Council has provided my office with no indication of the steps it took to locate any information detailing if and when the original brief had been sent to third parties, I cannot be satisfied that the searching undertaken by Council to locate this information was sufficient. Council is required to conduct further searching for this information.

Council's search for information detailing if and when the amended briefing note was communicated to third parties

- 57 I discuss Council's submissions and search records in relation to the amended briefing note, which has not been able to be located, above. Council has not found any evidence of the amended briefing note progressing beyond an email sent to Council's Chief Executive Officer on 28 September 2022, at 3:33pm, including no evidence it was sent to third parties.
- 58 An email from the Office of the CEO to Mr Murray on 28 September 2022 notes that Council did not intend to release the briefing note publicly.
- 59 Further, Council's view that, had the amended briefing note been communicated to any third parties, it would have been identified from Council's searches of the archived emails of Council's then Chief Executive Officer's Chief of Staff appears to be reasonable.
- 60 Accordingly, I again find that Council's searches for information responsive to this part of item four of Mr Murray's request were sufficient.

Preliminary Conclusion

- 61 I determine that:
 - Council is not entitled to rely on s19; and
 - Council's search for information was insufficient in relation to part of item four of Mr Murray's request but was otherwise sufficient.
- 62 I direct Council to reassess the parts of Mr Murray's request originally refused under s19 and to conduct further searching in relation to item four of his request.

Response to the Preliminary Conclusion

- 63 As the above preliminary decision was adverse to Council, it was made available to it on 12 May 2025 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 64 On 18 June 2025, my office received submissions from Council responding to my preliminary decision. Council's submissions:
- argued that Council's search for information detailing if and when the original briefing note was communicated to third parties was sufficient;
 - altered Council's position in relation to the TRIM lists to argue that this information does not exist; and
 - expressed concerns that untested allegations made by Mr Murray about Council would be included in the final decision.
- 65 In relation to its search for information regarding the original briefing note and the TRIM audit lists, Council provided the following:

We submit that our searches have been sufficient, as summarised in our past decisions (including that of 4 April 2025) and other communications in relation to this matter. For example, the CEO's letter to you of 4 June 2025 summarises, particularly under its heading "Incidental Matters" (and supplemented by earlier aspects of the letter), sufficient searches in TRIM. Further to the letter of 4 June 2025, the attached example screenshot of a TRIM search for "Halls Saddle Site" shows no information responsive to this application (but some from 2020 predating its scope). Hence, this suggests the original briefing document (Attachment filename "Halls Saddle Site responses[1].docx") was not filed in TRIM – and similarly for the amended version

These searches support the views of the media manager and CEO's Chief of Staff that the original briefing document naming Mr Murray and the amended version were not likely to have been filed in TRIM. The Elected Member Requests email account had been established to provide a centralised mechanism for, and repository of, such communications from/to Elected Members with the City's administration (as apparent from, for example, some of the April 2025 releases to Mr Murray). As stated to Mr Murray by the CEO's office 28 September 2022, the briefing document was provided to the City of Hobart's then Elected Members to clarify and correct information and questions that were posted on Facebook page, and

the City had no intention to comment or release this information publicly.

Neither the original briefing document (Attachment filename “Halls Saddle Site responses[1].docx”) nor amended version having been filed in TRIM clearly prevents clicking on either in TRIM to create / extract an audit list as suggested by Mr Murray’s submissions quoted at para 14 of the [Ombudsman’s preliminary decision].

- 66 On 20 June 2025, Council wrote to my office making further submissions that it had located correspondence showing that the original briefing note, with Mr Murray’s name redacted (rather than being deleted), was communicated to a third party in January 2024. Council advised that evidence of this information being communicated to a third party was located in a folder, not on TRIM or on a different official document management system.

Further Analysis

Sufficiency of search

- 67 I accept Council’s position, as explained in its correspondence to my office of 4 and 20 June 2025, that the original briefing note with Mr Murray’s name redacted (rather than being deleted), was most likely communicated to a third party in January 2024. Council’s efforts in identifying this correspondence and in searching for evidence that the original briefing note was communicated to a third party, leave me ultimately satisfied that Council has conducted a sufficient search for information responsive to Mr Murray’s assessed disclosure application.

Section 19

- 68 Council advised that evidence of the original briefing note being communicated to a third party was not located on TRIM. Given that neither the amended or original briefing note, or the information provided to Mr Murray, were saved to Council’s document management systems, I am satisfied that the requested TRIM audit lists do not exist. As such, I maintain my finding Council was incorrect to rely upon s19 to refuse this aspect of Mr Murray’s application. It is not required to take any further action, however, due to the seeming non-existence of this information.

Council’s failure to keep records

- 69 It is likely that this external review would not have been necessary, had Council kept proper records of its actions under the Act and in relation to Mr Murray. Documents were not saved correctly, could not be located and much of Council’s submissions constituted educated guesses regarding what had occurred due to record keeping issues. This is highly unsatisfactory. Tasmanians have a legislated right to access government held information. This right is frustrated when public authorities fail to

demonstrate proper record keeping practices. Council is also reminded that a failure to ensure proper record keeping may constitute a breach of its obligations under the *Archives Act 1983 (Tas)*. I am concerned by Council's poor record keeping processes in this instance and will be monitoring its record keeping practices in the future to try to ensure that obligations under the Act are met.

Untested allegations outside the scope of this review

- 70 Council contested the veracity of particular allegations contained in Mr Murray's submissions that were quoted in my preliminary decision and requested that they be removed from the finalised version. These allegations were outside the scope of this external review and I am not making any finding on their substance. So, in recognition of this, I have removed the aspects of Mr Murray's submissions which contained those allegations from my final decision. This action should not be taken as providing any opinion regarding their accuracy.

Conclusion

- 71 For the reasons given above, I determine that Council is not entitled to rely on s19 but the relevant information does not exist and no further action is required. I further determine that Council did not initially undertake a sufficient search for information responsive to the request but had taken appropriate steps to rectify this by the conclusion of the external review.
- 72 I apologise to the parties for my delay in finalising this external review.

Dated: 11 July 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

19. Requests may be refused if resources unreasonably diverted

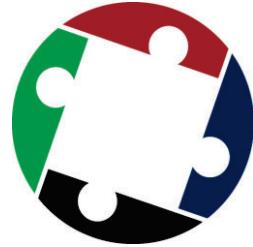
- (1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –
- (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
 - (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions – having regard to –
 - (c) the matters specified in Schedule 3 – the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.

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

45. Other applications for review

- (1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –
- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
 - (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
 - (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
 - (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
 - (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
 - (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.
- (2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –
- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or

- (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.
- (3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.



Right to Information Act Review

Case Reference: R2311-013

Names of Parties: Heidi Sandwell and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s19, s31, s32, s35, s38, s40, s41

Background

- 1 The applicant in this matter, Ms Heidi Sandwell, is a representative of the accommodation booking platform Airbnb Incorporated (Airbnb). Airbnb has an interest in decisions made by the City of Hobart (Council) to increase the rates payable for short stay accommodation in the City of Hobart local government area. The applicant has been represented by Mr Mark Smyth and Mr Major Zhang of the law firm Herbert Smith Freehills during this external review.
- 2 On 24 July 2023, Ms Sandwell submitted her assessed disclosure application to Council. There were difficulties with Council's payment arrangements in relation to the prescribed fee and payment was unable to be made, and the application accepted, until 23 August 2023. Ms Sandwell sought the following:

Information relating to the adoption of differential rates for residential property used for short stay visitor accommodation by the Hobart City Council.

Document categories

Documents falling within the following categories (in each case excluding documents that have been made publicly available at <http://hobart.infocouncil.biz/>):

- 1 *Correspondence between Council Staff during the Relevant Period in relation to:*
 - (a) *differential rating for residential properties used for short stay visitor accommodation;*
 - (b) *the August 2022 Resolution; and*
 - (c) *the Rates Resolution.*
- 2 *Council documents recording any consultation, including with the community, in relation to the Rates Resolution.*
- 3 *Briefing documents prepared by Council Staff in relation to the August 2022 Resolution and the Rates Resolution.*

4 Council documents created during the Relevant Period in relation to:

- (a) differential rating for residential properties used for short stay visitor accommodation;*
- (b) the August 2022 Resolution; and*
- (c) the Rates Resolution.*

3 The applicant confirmed that her application *seeks documents beyond those that are publicly available* and the following clarifying definitions were included in Attachment 1:

Council means the Hobart City Council.

Council Staff includes current and former staff of the Council.

Relevant Period means the period from 1 July 2022 to 19 June 2023 (inclusive).

August 2022 Resolution means the resolution recorded at item 11 of the Minutes of the 1 August 2022 Council Meeting.

Rates Resolution means the City of Hobart Rates Resolution 2023-24 adopted by the Council on 19 June 2023.

- 4 On 4 September, 26 September and 10 October 2023, Mr Smyth wrote to Council to query Council's failure to release the decision on Ms Sandwell's application consistent with the statutory time frames or respond to his correspondence. He also wrote in relation to another assessed disclosure application which does not form part of this external review.
- 5 On 10 October 2023, Mr Wes Young, Manager Legal and Corporate Governance for Council, responded by email to Mr Smyth. Mr Young, after advising he had recently been appointed to the role, relevantly wrote:

On behalf of Council I'd like to note that your concerns are well understood and that we are experiencing unprecedented demand for RTIs. We also have some resourcing issues – not that those matters are strictly relevant to the application of the Act.

The officer handling your matter is on leave, (returning Oct 29) but my understanding was that we wanted to work with the applicant to refine the scope of at least one of the applications to materials relevant to the specific rating classification that your client is interested in, along with materials that informed that council decision? I asked that you be contacted to explore that option – I'm assuming this hasn't occurred?

If that's the case, it would still be beneficial to the parties to explore that option ahead of commencing an assessment on the application as presently framed, as it may be viewed as 'voluminous' or may 'unreasonably divert resources' etc.

I'm not saying that's where our thinking is, but just wanting to look at options for how we can refine and expedite your request(s) and get things back on track.

- 6 On 11 October 2023, Mr Smyth responded, in part:

We have some concerns that Council is foreshadowing a view that the Applications may unreasonably divert resources, in circumstances where the Council appears still to commence its assessment of the Applications, and has not indicated what aspects of the document categories raise those concerns, following a very substantial and unexplained delay and beyond the statutory period.

We would be happy to discuss those matters over a call, or for the Council to identify (whether by email or in that call) the specific document categories that the Council considers would result in an unreasonable diversion of resources and the Council's proposed refinements to their scope.

We note that this is the first substantive response received from the Council in respect of the Applications, despite the Council having received both Applications by early August 2023.

- 7 On 18 October 2023, Council's then Acting Chief Executive Officer, Ms Jacqui Allen, issued a decision on Ms Sandwell's assessed disclosure application. As part of this decision, Ms Allen indicated that *21 pieces of potentially disclosable information, as held in our document management systems* had been identified as responsive to Ms Sandwell's application. However, no information, schedule of documents, or justification for the application of exemptions was provided to Ms Sandwell.
- 8 It was apparent, however, that Ms Allen relied upon the following provisions of the Act to either refuse to accept aspects of Ms Sandwell's application or to not disclose information responsive to it:
 - s12(3)(c)(i) – *application may be refused as information otherwise available;*
 - s32 – *information related to closed meetings of council;*
 - s31 – *legal professional privilege;*
 - s35 – *internal deliberative information;*
 - s39 – *information obtained in confidence;* and
 - s27 – *internal briefing information of a Minister.*
- 9 On 14 November 2023, the applicant sought external review. In an accompanying letter Mr Smyth wrote:

The Application concerns the Council's decision to adopt the Rates Resolution 2023-24 on 19 June 2023 (Rates

Resolution), which has been in force since 1 July 2023. The Rates Resolution, among other things, varied the General Rate imposed by the Council on land used for residential short stay visitor accommodation purposes to 10.42 cents in the dollar, being double the General Rate applicable to land used for residential purposes more generally. The discrepancy in those General Rates has had a disproportionate impact on property owners who are using their property for short stay visitor accommodation, and has accordingly had an ongoing impact on Airbnb's business.

*The Council provided notice of its decision in respect of the Application by letter dated 18 October 2023 (**Decision**), more than three months after the Application was submitted, in which it determined that it would not disclose any documents in response to the Application. Airbnb considers that the Council's reasoning highlights a number of issues with its approach to the Application, and seeks external review of the Decision.*

- 10 The review application was accepted, but there was then delay from Council in responding to requests by this office made on 6 December 2023 and 11 January 2024 seeking copies of the information that had been identified, collated and assessed for the purposes of Ms Allen's decision making.
- 11 On 11 January 2024, Mr Young responded:

My office attempted to work with the applicant to narrow the scope of the request, as in my opinion it was unreasonably broad and sought to have Council provide material via RTI that was already publicly available – such as Council's rate decision(s), which the Local Government Act requires us to publish. The applicant refused to narrow the scope of the request.

If memory serves, there were no redactions for this application. The applicant was simply informed that much of the material was outside of scope as it's 'otherwise available' given the Local Government Act either requires publication explicitly (rates decision), or is otherwise available and can be found on our website in the relevant ordinary minutes as it relates to Council setting its rates -as again the Local Government Act requires us to publish both an ordinary agenda and minutes.

There was a series of materials that if memory serves were held back as they were prepared for a closed meeting of council, noting that the Right to Information Act provides for that.

Based on the above it would be helpful if you could provide me with some guidance as to how to proceed, noting that most of the information sought was already published on our website in an unredacted format this was communicated to the applicant when I was attempting to narrow the scope of the request to materials not already otherwise available.

- 12 On 15 January 2024, my office clarified the request for information to be provided by Council, as follows:

To assist with the external review, we have asked the City of Hobart (Council) to provide our office with a copy of the information identified by Council as being relevant to the assessed disclosure and not already released to the applicant. This is a routine step in relation to external reviews and is consistent with the Ombudsman's powers under s47 and is necessary for the Ombudsman to undertake the exercise of external review. Section 47(2)(a) provides:

The Ombudsman has full and free access to the records of a public authority or Minister that are related to an application for review and may require that access to be in a particular form...

- 13 On 18 January 2024, Mr Young provided 'meeting' materials that were originally withheld on the basis as being produced for a closed council meeting. He also wrote that:

Council still views the material as confidential on the basis that it's both internal deliberative (s35) as it was provided ahead of Council making its annual rates resolution (which was published). Council also takes a view that officers provided the workshop materials in confidence (s39)(b) as officers need to provide advice/modelling on the rates resolution as part of each annual budget. To our mind this is relevant to 39(b) as the public disclosure of such modelling may have a chilling effect on our ability to receive similar advice in future.

- 14 Four Microsoft PowerPoint presentations were provided as part of this correspondence, including:

- 1 Elected members workshop 2023-24 Budget 27 March 2023
- 2 Elected members workshop 2023-24 Budget 29 May 2023
- 3 Elected members workshop 2023-24 Budget 15 May 2023
- 4 Council workshop – Rating strategy February 2023

- 15 There was no new decision released at that time amending the principal officer's original decision and, consequently, no assessment or reasons justifying the exemptions claimed over the documents was provided.
- 16 Also on 18 January 2024, my office again sought the balance of information identified as being assessed by Ms Allen:

To further assist with this external review, may I ask that Council:

- *identify what parts of the request, as per the list, are publicly available;*
- *to clarify the 21 pieces of information referenced in the decision;*
- *to provide a schedule of documents that identifies the information considered;*
- *and to indicate what information is considered exempt and what section of the Act has been applied to that exemption.*

If the four power point presentations are part of the information considered by Council can Council please highlight the information considered to be exempt and indicate what section of the Act has been applied to that exemption for each of the presentations.

- 17 On 19 January 2024, a link was shared by Mr Young, who wrote:

I've just had IT send you a link to this email that hopefully gives you access to all of the non-public facing records we have on this matter – noting the previous discussion on 21 items – there are a couple more here on account of how we store things, but I don't think anything turns on that point.

- 18 Mr Young also noted that information available on the website had not been provided. In relation to the exemptions applied, he wrote:

Noting my previous email(s) I'm of the view that the City relying on an exemption on [sic] basis of prepared for a closed meeting of council is no longer sustainable (s32) and was based on flawed advice I received at the time. We are content to withdraw that ground for exemption. That new advice also logically throws into question some of the other exemptions that Council considered as the material wasn't created for the purpose of a closed meeting per se. To my mind that also negates an argument for exemption under s27, s31 and s32 and we also withdraw those arguments.

We maintain the view that all of the records were exemptible from disclosure as [sic] are entirely internally deliberative in nature (s35), noting that it contains opinions, advice etc that have informed council deliberations at a workshop per s35(1)((a)(b) & (c). We also maintain a view that the entirety of the records are also caught by s39 as they were provided in confidence as part of an internal deliberative process ahead of the preparation of a proposed rates resolution for an open council meeting (as required under the Local Government Act).

Therefore, our revised position is that all of the documents withheld (as contained in the link we just provided) fall within both s35 and 39 as they are advices, opinions or modelling based on advice/opinion that was provided in a confidential setting with a reasonable expectation that it would remain confidential. Further to that Council is of the view that releasing such information risks undermining the ability to ensure that Council receives fearless and frank advice on this matter going forward, noting it's an annual occurrence.

I did have s19 concerns on this noting how broad the proposed scope was but proceeded to accept the application as framed (following the applicant's refusal to narrow the scope) as I thought such a refusal was unreasonable.

For completeness, I believe we did put out some information packs for ratepayers that detailed the process Council works through as part of the rates decision.

- 19 Despite setting out Council's updated position, which departed from the decision of the former principal officer, Mr Young did not actually provide a fresh decision justifying this course.
- 20 As a result of Council's departure from the original decision, on 7 February 2024, a direction was issued to Council's now current Chief Executive Officer and therefore principal officer, Mr Michael Stretton, for better reasons pursuant to s47(1)(n) of the Act.
- 21 On 16 February 2024, Mr Stretton responded to some ancillary matters raised in the letter of 7 February 2024. He indicated that Council was addressing matters of concern about its right to information procedures. An extension of time was subsequently sought, and granted, due to staffing challenges at Council.
- 22 On 8 March 2024, Mr Young, in correspondence addressed to Mr Smyth and my Senior Investigation and Review Officer, sought:
 - a. a copy of the applicant's external review application;

- b. the applicant's priority request;
 - c. the reasons for the granting of the priority processing by the Ombudsman, and
 - d. clarification about a definition from the applicant.
- 23 Council's requests for copies of the external review application and priority application were declined by this office, but a copy of the priority policy was provided. Mr Smyth directly provided a copy of the external review application to Council and clarification as to the definitions question. There was further communication from Council to Mr Smyth seeking clarification.
- 24 On 13 March 2024, a Schedule of Documents was provided and Mr Stretton wrote in his reply:
- Apologies for the delay as officers needed to work through several matters in relation to the schedule of documents, which required the input of specific staff who were unavailable until recently. The schedule of information is attached to this email. As you can see it's quite comprehensive and careful consideration was required regarding closed council materials and legal privilege.*
- Officers are also progressing the associated 'better reasons' and it is my desire that this will be provided within the next 24 hours, noting that your office has been most accommodating on the matter of our resourcing constraints.*
- You rightly point out that Council has had an extension of time for this matter and has had to also manage resourcing constraints. I can confirm per your suggestion of March 11 that this matter was progressed as a priority but that needed to be balanced with resourcing constraints and a desire to be as thorough as practicable when it came to both the schedule and then the better reasons.*
- 25 By 26 March 2024, nothing further had been received from Council. My office wrote to Mr Stretton regarding the continued non-compliance with the directions and the statutory timeframes.
- 26 On 27 March 2024, *Better Reasons Part One* was released to Mr Smyth and provided to this office. In the accompanying cover letter, Mr Stretton indicated that Council intended to:

...provide a Part 2 addressing remaining exemptions and the public interest test as soon as possible (including assessment of Council's Risk and Audit Panel agenda papers, which may involve s 32 in addition to later exemption provisions).

We will also further consider / assess the contents of documents listed in the schedule as assessed against the Act's later exemptions provisions and public interest test.

- 27 On 28 March 2024, my office wrote to Council asking that the balance of the better reasons be provided not later than 10 April 2024.
- 28 On 10 April 2024, Mr Young sought a further extension of time to 14 April 2024 in order to comply with the direction for better reasons and this was granted.
- 29 On 12 April 2024, Mr Smyth made an initial response to Better Reasons Part One to this office.
- 30 On 16 April 2024, Mr Young wrote to Mr Smyth to release some information in full. They were, following the numbering in Council's schedule:
 - the three documents numbered 9-10 (comprising both documents in class eight); and
 - the document numbered 28.
- 31 On 19 April 2024, Mr Young sent *Tranche 2 Documents and Reasons* to Mr Smyth. This was accompanied by Mr Stretton's Better Reasons Part Two and an updated Schedule of Documents listing 31 documents identified and assessed for release under the Act, along with a link to information released.
- 32 In his Better Reasons Part Two Mr Stretton set out *why redactions have been made to information released in Tranche 2, which was assessed to be outside the scope of (i.e., not responsive to) Airbnb's application due to its content*. Mr Stretton also claimed that some information was exempt pursuant to the *Local Government Act 1993*.
- 33 Following the release of Better Reasons Part Two and additional information to the applicant, and consistent with the statutory objectives to facilitate early resolution of external reviews, the parties were encouraged by my office to engage directly with a view to further progressing the application.
- 34 On 15 May 2024, Mr Smyth wrote to Mr Stretton outlining the applicant's position in response to Better Reasons Part One and Part Two (set out below in Submissions).
- 35 On 21 May 2024, this office further encouraged the parties to progress the matter to ascertain if the disputed matters could be resolved or narrowed.
- 36 Following communication between the parties, Mr Smyth provided a response to this office on 5 June 2024 (see Submissions below). Mr Smyth confirmed that the applicant's position summarised in his

correspondence of 15 May 2024 remained an accurate summary. He advised my office that the:

remaining areas of disagreement between the parties accordingly concern the Council's approach to categories 1 and 4, and category 3 of our client's application.

He then went on to address his client's concerns with the approach taken by Council.

- 37 As avenues for further dispute resolution had been exhausted, the matter proceeded in the usual course. The applicant later sought priority consideration of this external review, and this was granted on 19 January 2024.

Issues for Determination

- 38 The issues for determination are whether Council correctly relied upon s19 to refuse to accept aspects of Ms Sandwell's application, and whether Council correctly relied upon ss31, 32, 35, 38, 40, and 41 to exempt relevant parts of the requested information.
- 39 As ss35, 38, 40 and 41 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if information is found to be *prima facie* exempt under s35, 40 or 41, I must determine whether it would be contrary to the public interest to disclose it by having regard to, at least, the relevant matters contained in Schedule 1 of the Act.

Relevant legislation

- 40 I attach copies of ss19, 31, 32, 35, 38, 40 and 41 to this decision at Attachment 1. Copies of s33 and Schedules 1 and 3 are also included at Attachment 1.

Submissions

Council

- 41 Better Reasons Part One sets out Council's submissions as to why categories 1 and 4 of Ms Sandwell's request were refused pursuant to s10, or in the alternative had s10 not applied, why s19 applies.
- 42 As I will discuss in the Analysis section of my decision, though Council has used ss10 and 19 interchangeably, it appears to have intended to rely on s19 to determine that it would be an unreasonable diversion of its resources to search through the vast number of search results for relevant information responsive to Ms Sandwell's request. In relying on s19 Council set out:

Had s 10 not applied, then I would have applied to document categories 1 and 4 the Schedule 3 factors in the same way I have above, but pursuant to s 19(1)(c).

Section 19(2) requires ‘... first giving the applicant a reasonable opportunity to consult....’ prior to refusal under s 19 of an application that would substantially and unreasonably divert Council’s resources. I think the emails of 8 March set out above, combined with earlier exchanges between the parties’ same legal advisers prior to the original decision, constitute giving the applicant such an opportunity.

In the earlier correspondence, Mr Young had emailed Freehills saying he was new in the role, and that the officer handling the matter was away [overseas] on leave.

Mr Young’s email sought to work with Airbnb to refine the scope of one of Airbnb’s 2 RTIs, noting the unreasonable diversion of resources risk. He imposed no deadline, stating:

The officer handling your matter is on leave, (returning Oct 29) but my understanding was that we wanted to work with the applicant to refine the scope of at least one of the applications to materials relevant to the specific rating classification that your client is interested in, along with materials that informed that council decision? I asked that you be contacted to explore that option – I’m assuming this hasn’t occurred?

If that’s the case, it would still be beneficial to the parties to explore that option ahead of commencing an assessment on the application as presently framed, as it may be viewed as ‘voluminous’ or may ‘unreasonably divert resources’ etc.

I’m not saying that’s where our thinking is, but just wanting to look at options for how we can refine and expedite your request(s) and get things back on track.

Happy to have a quick call to discuss if you feel it would be of benefit.

Freehills replied noting the possibility of a refusal under s19 and open to further discussion. However, Freehills said that given the delayed processing of the Application, they had instructions to proceed to external review which they would do absent reply within 3 days.

Mr Young's email had given the option '... to work with the applicant to refine the scope of at least one of the applications to materials relevant' and flagged the s 19 risk:

... it would still be beneficial to the parties to explore that option ahead of commencing an assessment on the application as presently framed, as it may be viewed as 'voluminous' or may 'unreasonably divert resources' etc.

In these circumstances, faced with the Freehills' reply containing what he could have interpreted as a 3-day ultimatum, Mr Young was entitled to then focus work on the Application on assessing information and drafting an assessed disclosure decision for consideration by the newly acting CEO, which was then provided to Airbnb. Airbnb pursued its right to external review by the Ombudsman.

Absent s 10, the above would have led me to refuse under s 19(1)(a), 'to provide the information without identifying, locating or collating the information' in document categories 1 and 4, beyond identification of the estimated number of potentially responsive items as earlier listed.

However, s 10, under which I have refused document categories 1 and 4, does not contain a requirement equivalent to s 19(2). So, having refused document categories 1 and 4 under s 10, I need not address s 19 further.

- 43 Council's set out the following in relation to its application of Schedule 3 matters:

In regard to matter (a), the terms of the request, I found a distinction between the Application's document categories 2-3, and categories 1 and 4. Categories 2 and 3 of Airbnb's Application were drafted in sufficiently precise terms to enable manual searching requiring reasonable time and effort. Whereas document categories 1 and 4, even with their Definitions, were far wider and more global or general, in the nature of catch-all drafting, as one might expect from a "fishing" expedition.

Nevertheless, electronic searching was undertaken for their most precisely unique word in the Application's description of document categories 1 and 4 – "differential". As set out earlier, this returned an estimate for Schedule 3 matter (d)'s number of sources of information of 9,652 items. Consequently, for matter (a), as demonstrated by the search results, the breadth of categories 1 and 4 do not in practice, "permit the public authority...., as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort."

Matter (b) provides, 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.

The Application did not contain, or otherwise provide, evidence of 'the demonstrable importance' to Airbnb of it obtaining any of the document categories, let alone its widely drafted 'catch-all' document categories 1 and 4. In particular, I do not consider that Council's internal correspondence and internal documents have such demonstrable importance to Airbnb as to materially affect what would otherwise be a reasonable time and a reasonable effort in resourcing this Application, with consequent impact on Council's attending to its other legal obligations.

This is not a case on par with some where matter (b) might apply, such as certain requests for personal information of demonstrable importance to the applicant, for example, a victim of alleged historical abuse requesting Council search its records for relevant historical files.

...

For the purposes of Schedule 3 matters (c), I considered the number of items for the three search words, as set out earlier.

For the purposes of Schedule 3 matters (c) and (i), I noted that in Murray and City of Hobart O1809-151 [10 June 2022] the Ombudsman found that the work required to process 6,375 emails would be a substantial and unreasonable diversion of Council's resources, and consequently upheld its refusal to do so as appropriate. Murray involved approximately two thirds of the 9,652 items estimated as responsive to categories 1 and 4 of Airbnb's Application.

I noted that since Murray, this Council has fewer resources (including due to key staff turnover) available for dealing with:

- *a significantly increased number of RTI applications; and*
- *significantly more RTI applications than any other Tasmanian council, as evidenced by public reporting under the Act, s 53, and Council's current RTI caseload.*

For Schedule 3 matter (e) “the timelines binding the public authority” have already been well exceeded – and endeavouring to process and assess the number of items estimated as responsive to document categories 1 and 4 would always have been completely incompatible with those timelines.

For Schedule 3 matter (g), Airbnb made a different RTI application to Council at a similar time to this one, which I understand Council officers addressed. However, I would not describe that application as in respect of the same or similar information as this one.

Schedule 3 matter (h) is the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application. The outcome of attempts is best summarised in Freehills’ response to Mr Young on 8 March 2024:

...

*“We confirm that categories 1 and 4 respectively refer to “correspondence” and “Council documents” in relation to **any** of subcategories (a), (b) or (c), and is **not** limited to only correspondence or documents that concern all three subcategories.”*

As demonstrated by the schedule and extract of it set out earlier in these reasons, Freehills’ position would require Council to process / assess not only search results for (a) $n = 9,652$ estimated items containing “differential”; but also each of:

(b) $n = 186,786$ estimated items containing “resolution” and

(c) n = estimated 371,236 items containing “rates” returned of and items respectively.

This outcome, and in my view, for the earlier reasons, even processing (a) alone (n = 9,652 estimated items containing “differential”) is untenable.

- 44 Better Reasons Part One also set out that Council applied s31 of the Act to email chains that contained information that was communicated for the dominant purpose of seeking legal advice, and that therefore were of such a nature that they would be privileged from production in legal proceedings on the ground of legal professional privilege.
- 45 As for Council’s application of s32, Better Reasons Part One included:

. . . the LG Act [Local Government Act 1993], s 338A(1) offences set out earlier, and LGMP Regulations [Local Government (Meeting Procedure) Regulations 2015], r 15(9), require care to avoid disclosing closed Council information exempt under s 32. While the above LG Act provisions are subject to the RTI Act, in my respectful view relevant provisions of the latter include ss 22(3)-(4), 32 and 48(4). Parliament has taken the view that closed Council information should only become public after 10 years of its creation [s 32(2)] or earlier if so determined by the elected councillors.

Exempt under s32(1)(b) are most of the contents of closed Council agenda papers, prepared for that purpose by council officers.

- 46 Council’s Better Reasons Part Two went on to assert that s32 also applied to the agenda and minutes of Council’s Risk and Audit Panel meeting.
- 47 Council also held that in the alternative, these documents were exempt from disclosure pursuant to ss38, 35, 40, or 41:

Minutes of Council’s Risk and Audit Panel are submitted to a closed Council meeting, raising the operation of the s 32 exemption provision for “Information related to closed meetings of council”.

In this case, the closed Council meeting to which the minutes of 7 June were provided was far later than the Application’s Relevant Period – so were outside of the application’s scope in any event.

Various other exemption provisions of the RTI Act [sic] the alternative, had s 32 not applied to the Risk and Audit Panel

report documents, I would proceed to consider and, in my preliminary view, likely apply a number of other exemption provisions of the Right to Information Act which, unlike s 32, are subject to a public interest test. These include sections:

- 38(a)(ii) “*Information relating to business affairs of public authority*”;
- s35 “*Internal deliberative information*”
- s40 “*Information on procedures and criteria used in certain negotiations of public authority*” and
- s41 “*Information likely to affect State economy*” (which relates to “*the economy of the State or any part of the State*” – the latter being relevant in this case).

Had these exemptions provisions other than s32 been applied, we would have needed to apply the public interest test.

We will not do so now, given time constraints, etc. Suffice it to say here that maintaining the confidentiality of Risk and Audit Panel papers and proceedings, including under the RTI Act, is necessary for a council’s administration to have the confidence to frankly and fearlessly provide risk and audit panel members with a variety of commercial-in-confidence documentation needed for the panel to acquit its functions to ‘review the council’s performance in relation to [specified matters]’ (s 85A).

The Applicant

48 The applicant’s position in relation to issues arising during this external review is best reflected in Mr Smyth’s letter to Council dated 15 May 2024, responding to Council’s better reasons. The substance of this letter was provided to my office on 5 June 2025, and sets out the following (emphasis original):

Categories 1 and 4

The Part 1 reasons identify the volume of search results arising from searches for the words “differential”, “resolution” and “rates” as the basis for refusing those categories, relying on s 10 of the RTI Act. While the reasons on their face purport to explain these search terms as having been chosen for being “the most distinctive words in each of (a)-(c)”, that approach is not consistent with the requirement for a public authority to use search terms that

are likely to identify the documents in question, including formulating and using different searches where necessary (see Bienstein and Attorney-General (Commonwealth of Australia) [2008] AATA 490 at [50]).

The Council alone has knowledge of the type and extent of documents that would have been prepared by Council Staff meeting the description of categories 1 and 4, and the identity of those staff. It would have been a simple matter for the Council to make enquiries of those staff to determine what documents falling with [sic] these categories were created during the Relevant Period. To the extent that any further searches were required following those enquiries, appropriate search terms could have been formulated from a preliminary review of the material already identified, to ensure that any other documents falling within categories 1 and 4 had been captured.

Our client has concerns that, by not taking any of those steps and instead performing one set of searches using single-word search terms which are inherently broad in scope, the Council has not made reasonable efforts to locate documents for categories 1 and 4. The volume of search results relied on by the Council as demonstrating a “substantial and unreasonable diversion of resources” was the inevitable consequence of the broad search terms used, which by their nature would have captured numerous documents that were entirely irrelevant to the subject matter of categories 1 and 4. Any difficulty arising from the volume of material would have been avoided by taking the practical steps mentioned above.

Category 3

Our client does not accept the Council’s interpretation of category 3, which excludes “responses to requests for information by individual councillors” and instead treats documents of that description as forming part of category 4 (at [87]-[89] of the Part 1 reasons). This narrow approach to category 3 has no basis in the drafting of the category, which captures “briefing documents prepared by Council Staff”, and makes no reference to “councillors” at all, let alone the distinction between councillors collectively and individual councillors. To the extent that there was any ambiguity in category 3 on this issue, which our client does not accept, it would have been a simple matter for the Council to seek clarification as to its intended scope, as it had already done on 8 March 2024 in respect of other

categories. It is unclear why the Council did not take that step.

Audit Panel documents

The Part 2 reasons describe the minutes of the Council's Audit Panel as exempt from disclosure under s 32 of the RTI Act, as a "closed meeting of council", relying on the description of those meetings as "closed meetings" in the Audit Panel's terms of reference.

Our client does not accept that characterisation of Audit Panel meetings for the purpose of s 32 of the RTI Act, particularly where s 32 specifically defines "closed meeting of a council" by reference to the Local Government Act 1993 (Cth) (LGA) and regulations made under it, including reg 15 of the Local Government (Meeting Procedures) Regulations 2015 (Tas). An Audit Panel is plainly neither "the council" nor a "council committee" as those terms are used in the LGA, and the use a [sic] "closed meeting" label in its terms of reference cannot be relied upon to bring such meetings within the scope of s 32 of the RTI Act.

Nor does our client accept the Council's proposition, at [14] of its Part 2 reasons, that s 388A(3) of the LGA imposes a general requirement for an "audit panel" to indefinitely maintain confidentiality over information conveyed to it. That provision is expressly made subject to "another Act or any other law" (including the RTI Act).

Additionally, we note that the Council's Part 2 reasons at [17] refer to the Audit Panel meeting of 7 June 2023 as being "far later than the Application's Relevant Period". As you know, the "Relevant Period" described in our client's application is defined as "the period from 1 July 2022 to 19 June 2023 (inclusive)" (emphasis added).

Preliminary matters

Information subject to this external review

- 49 On 12 July 2024, Council provided my office with a schedule of documents identifying information it had assessed for release under the Act, as part of processing Ms Sandwell's assessed disclosure application. For consistency and ease of reference, I have used the numbering system provided in this schedule throughout my decision.
- 50 Upon reviewing the information referred to in the schedule, I can see that the relevant parts of documents 2–10, 22, 22.5, 22.6, 22.7, 25–28,

35, 37, 38 were released in full. As such, this information will not be considered in this external review.

- 51 Council's Better Reasons Parts One and Two, and the schedule of documents Council provided to my office, indicate that information contained in documents 12–20, 23 and 30–34 was considered exempt in full pursuant to either s31, s32, s35, s38, s40, s41 of the Act. As such, assessing whether this information is eligible for exemption will be the primary focus of this external review.
- 52 Council has refused to assess categories 1 and 4 of Ms Sandwell's assessed disclosure application pursuant to ss10 and 19 of the Act. 'Documents' 40, 41, and 42 of the schedule provided to my office detailed the searches undertaken by Council for information responsive to those categories which informed Council's reliance on ss10 and 19.

Unclear status of four documents

- 53 The status of four documents provided to Ombudsman Tasmania were not readily apparent from the better reasons or schedule of documents that had been provided to Ombudsman Tasmania by Council, including:
 - A. Pages from Agenda Council 19 August 2019 re Audit Panel, ToR etc.pdf
 - B. Pages from Minutes Open Council 19 August 2019 re Audit Panel.pdf
 - C. DRAFT - F23 61856 (Revision 21) Minutes - Risk and Audit Panel - 7 June 2023.docx
 - D. Pages 1, 2, 62 from Risk and Audit Panel Agenda 7 June 2023_Redacted.pdf
- 54 My office sought clarification from Council as to the status of these documents, and was advised that documents A, B, and D were considered outside the scope of Ms Sandwell's application. As such, these documents will not form part of this external review.
- 55 However, as part of correspondence to my office on 25 January 2025, Council did advise that document C was responsive to Ms Sandwell's application subject to redactions pursuant to s32 and s35 in full, and s31 in part. As such, this document will form part of this external review, and I will assess it under the relevant exemptions later in my decision.

Section 10 electronic information

- 56 Council has relied on s10 to refuse to assess information responsive to categories 1 and 4 of Ms Sandwell's request. Consistent with previous decisions,¹ I find that it is outside of my jurisdiction under the Act to

¹ *Graham Murray and City of Hobart* (10 June 2022) at [33], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

review Council's decision to apply section 10. A decision is only reviewable under the Act, if it is one of the three types of decision referred to in s22 of the Act or if it falls within the grounds in s45(1). A decision under s10 is not one of the decisions referred to in these sections, and as such, I am unable to review Council's application of s10 of the Act as part of this external review.

- 57 However, at different times in the progress of the assessed disclosure application, Council has relied on s19 in the alternative to s10. A decision to refuse an application (or part thereof) under s19 is reviewable, and I therefore address that below.
- 58 I take the opportunity, consistent with my powers to provide guidance on the operation of the Act, to clarify the difference between the two provisions and to highlight that they are not interchangeable. Each provision has discrete and distinct work to do which is apparent when applying the ordinary principles of statutory interpretation.
- 59 Section 10 contemplates information stored in obsolete or highly complex computer systems and information which has been disposed of or is stored only in back systems. It provides that:
 - (1) *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.*
- 60 It is apparent from the wording of this section, that a public authority could refuse an assessed disclosure application when both of those prescribed circumstances in 10(1)(a) and (b) arise.
- 61 In relying on either limb of s10(1), a public authority therefore must be able to clearly establish all of the pre-conditions, in order to refuse an application before assessing it. Compliance with the explicit intention in s3 of the Act, that the maximum amount of official information be released, means that this refusal provision should only be invoked when genuinely necessary. It is very much the exception that a public authority would hold information in a format from which it could not be easily extracted and assessed under the Act.

- 62 I further note that, although not a reviewable decision under the Act, concerns about such an administrative decision could come before me under the *Ombudsman Act 1978* as a complaint.
- 63 By contrast s19 – *requests may be refused if resources unreasonably diverted* – directs a public authority to the steps required to be taken before refusing to provide information for this reason. It is appropriate to consider this provision when there is no particular technical expertise required to extract the relevant information, but the public authority considers that the time that would be taken to do so would amount to an unreasonable diversion of its resources from its other work.
- 64 It is important to distinguish between complex electronic systems from which the public authority cannot extract information without engaging external technical assistance (s10 may apply) and record keeping systems from which it may be cumbersome or time consuming to extract information but can be achieved using the normal processes of the public authority (s19 may apply).
- 65 As noted, Council has applied s10 and s19 as though the provisions were interchangeable, which is not the case. However, it appears that Council intended to rely on s19 to determine that it would be an unreasonable diversion of its resources to search through the vast number of search results for relevant information responsive to Ms Sandwell's request. There is no question that Council was able to use its regular technical expertise to undertake these searches of its electronic records, as it sets out that it did this, so s10 could not be applicable. Accordingly, I will consider Council's decision to refuse part of this application under s19 only and will disregard the arguments relating to s10.

Analysis

Section 19 – Requests may be refused if resources substantially and unreasonably diverted

- 66 Council has determined to refuse two parts of Ms Sandwell's request – categories 1 and 4 – pursuant to s19 of the Act. Section 19(1) provides that a public authority can refuse to provide information responsive to an assessed disclosure application, without identifying, locating or collating it, when the work involved in providing it would substantially and unreasonably divert its resources from its other work or the performance of its other functions. It further provides that, when deciding whether to refuse to provide information, the public authority must have regard to the matters set out in Schedule 3 of the Act.
- 67 Section 19(2) of the Act provides, that in order to rely on s19(1) to refuse to accept aspects of an assessed disclosure application, a public authority must provide the applicant with a:

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

- 68 This consultation is mandatory and a public authority is not permitted to refuse an application pursuant to s19 if it has not occurred.

Did Council provide the Applicant with a reasonable opportunity to consult with it, in order to help the Applicant make an application in a form that would remove the ground for refusal, as is required by s19(2)?

- 69 I do not accept that, initially at least, Council provided Ms Sandwell with a reasonable opportunity to consult with it in order to help her frame her assessed disclosure application in a way that would remove the ground for refusal under s19.
- 70 At no stage between the application fee being paid by the applicant on 23 August 2023 and the original decision being issued by Ms Allen on 18 October 2023 can it be said that Council discharged its requirements under s19(2) of the Act.
- 71 However, as discussed in the Background, due to concerns with Council's changed reasoning since Ms Allen's decision, Council has now provided Better Reasons Parts One and Two, which effectively replace that decision.
- 72 Better Reasons Part One was issued on 27 March 2024 and maintained Council's reliance on s19.
- 73 My office identified an opportunity for the early resolution of this matter and encouraged the parties to communicate directly with each other to resolve issues of dispute, including Council's continued reliance on s19.
- 74 On 15 May 2024, Mr Smyth wrote to Council to object to Council's continued use of s19, specifically setting out that he was concerned that Council had not taken sufficient steps to ensure the identification of the documents sought by the applicant.
- 75 On 27 May 2024, Council wrote to Mr Smyth setting out that it objected to his position. Council explained that it considered that it had entered the most distinctive words from each of the applicant's sub-categories and that these searches produced so many results that Council was entitled to rely upon s19 of the Act.
- 76 By virtue of the Better Reasons Part Two, Mr Smyth's correspondence to Council on 15 May 2024, and Council's correspondence to the applicant's legal representatives on 27 May 2024, I am satisfied that Council has discharged its onus under s19(2) to consult with Ms Sandwell.

Having regard to the matters in Schedule 3, as is required under ss19(1)(a) and (c), would the work required of Council substantially and unreasonably divert its resources from its other work?

- 77 For an information request to be refused under s19(1)(a) of the Act, the public authority in possession of the information must be satisfied that the work involved in providing the information would result in both a substantial and unreasonable diversion of its resources from its other work. In coming to this conclusion, it must have regard to the nine matters in Schedule 3, as required by s19(1)(c).
- 78 Regarding matter (a) – *the terms of the request, especially whether it is of a global kind or a generally expresses request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority...as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort* – Council described Ms Sandwell's request for information as insufficiently precise and amounting to some kind of *fishing expedition*. I do not agree. I am satisfied that the terms of categories 1 and 4 of Ms Sandwell's request are sufficiently precise to enable Council to identify the types of documents sought by the applicant, particularly as the terms 'August 2022 resolution' and 'rates resolution' are given detailed definitions at attachment 1 of Ms Sandwell's assessed disclosure application.
- 79 In relation to whether the application is a 'fishing expedition', it is not a requirement of an assessed disclosure request that it be seeking specific known documents or be made for a purpose a public authority considers worthy. Applicants often will not know the precise documents a public authority holds and may seek all information on a topic of interest. Provided the size of the application is not unreasonable or the effort to respond to the request unmanageable, 'fishing' is an entirely permissible use of the right to information system.
- 80 Regarding matter (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* – Airbnb is an online platform where individuals can list their properties (or rooms within their properties) as short-term rentals. Airbnb is concerned by Council's plans to increase the rates it charges for properties being used for short stay accommodation, as this may disincentivise property owners from listing their properties on its platform. This is of critical concern to Airbnb, and as Ms Sandwell is a representative of Airbnb Australia, I am satisfied that schedule 3 matter (b) is relevant.
- 81 With regard to matter (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 – at the time of receiving Ms Sandwell’s application Council was experiencing high staff turnover and had fewer resources and subject matter expertise in its legal team to process RTI requests than it had previously. However, as I have found in previous decisions, concerns about limited resources do not allow public authorities to avoid their obligations under the Act.²

- 82 Where resourcing restraints are relevant, it is open to Council to identify other strategies to help process requests, including to negotiate extensions of time with the applicant. But a request for information of an objectively reasonable size and complexity cannot be refused due to ongoing or temporary lack of resourcing by a public authority of its right to information function. I give this matter limited weight for these reasons.
- 83 Regarding matter (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* – I can see that Council has identified over 500,000 records as being responsive to the individual search terms ‘differential’, ‘resolution’, and ‘rates’. It seems that this large volume of documents, identified as responsive to these single word search terms, is the primary basis for Council relying on s19 to refuse to process information responsive to categories 1 and 4 of Ms Sandwell’s application.
- 84 It is not surprising that single word searches on Council’s document management system resulted in such vast amounts of documents being identified by Council, especially for terms like ‘rates’. I am not satisfied by the lack of further steps taken by Council to try to remove the need for refusal under s19.
- 85 After the single word searches identified so many documents, I would have expected Council to refine its search. For instance, Council could have searched, for example, ‘August 2022 Resolution’, or ‘rates resolution’ rather than simply searching for ‘resolution’. Such efforts would surely have identified fewer, and presumably more relevant, documents of the type sought by the applicant. Further, it would be open to Council officers to search through relevant document management systems and subject matter repositories, and to ask relevant key personal with subject matter knowledge where information that the applicant is seeking could be found. Searches of this kind would be considered the bare minimum in these circumstances and, without them being conducted, I place very little weight in Council’s assertion that over 500,000 documents are potentially responsive to Ms Sandwell’s application.

² C and Sustainable Timber Tasmania (21 February 2023) at [61], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 86 Regarding matter (e) – *the timelines binding the public authority or Minister* – I note that it is always open to a public authority to negotiate an extension of time with the applicant to progress an assessed disclosure application, and that Council, throughout this external review, has not always adhered to timeframes set either by the Act or by my office.
- 87 With regard to matter (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* – I note that my discussion regarding matter (d) is relevant in that I find it highly unlikely that it will take more resources than those estimated by Council to process Ms Sandwell's assessed disclosure application. As I have discussed, broad single word searches for documents on its data management system are insufficient, and I find it unlikely that over 500,000 documents are in fact responsive to Ms Sandwell's application. Far fewer documents are likely to be actually responsive to Ms Sandwell's application, so there can be very little certainty around the resources required.
- 88 With regard to matter (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* – Council concedes that, though Airbnb made a separate assessed disclosure application at a similar time to submitting the assessed disclosure application relevant to this external review, its content was not similar to the subject application.
- 89 With regard to matter (h) – *the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application* – I note that consultations under s19(2) were not conducted prior to the original decision issued by Ms Allen. But I do accept that, though limited, adequate consultation occurred as part of the early resolution process that subsequently occurred. These negotiations did not result in Ms Sandwell re-framing her request.
- 90 With regard to matter (i) – *the extent of the resources available to deal with the specified application* – my comments regarding matter (c) are relevant.
- 91 Council's application of s19 is ultimately based on the volume of information it considers may be responsive to categories 1 and 4 of Ms Sandwell's application. While I do not disagree the assessment of 500,000 documents would be a substantial and unreasonable diversion of its resources from its other work, I am not persuaded that Council's calculation of this figure is reasonable. I can place very little weight on

the volume estimation due to the inappropriately broad search terms Council indicated it has used.

- 92 As the volume of information is the key matter in this assessment, Council's failure to provide a reasonable estimate means that I cannot be satisfied that processing Ms Sandwell's application would result in a substantial and unreasonable diversion of Council's resources from its other work. I therefore find that Council is not entitled to rely on s19 of the Act to refuse to provide information responsive to categories 1 and 4 of Ms Sandwell's assessed disclosure application.

Section 31 – Legal Professional Privilege

- 93 Information is exempt from disclosure under s31 of the Act:

. . . if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.

- 94 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.³ It is also codified in Chapter 3, Part 10, Division 1 of the *Evidence Act 2001* (Tas) as client legal privilege. Legal professional privilege can be characterised as either advice privilege or litigation privilege. Advice privilege attaches to information communicated in confidence between a legal advisor and client for the dominant purpose of giving or obtaining legal advice.⁴
- 95 Council appears to have applied s31 to exempt in full Document 30, Document 31 (including five attachments), Document 33 (including an attachment), Document 33 (including an attachment), Document 34 and Document 35.

Document 30

- 96 Document 30 consists of an email chain made up of the following 11 emails:

1. Mr Nicholas Andrew to Mr Adrian Hutchinson, dated 26 May 2023 at 11:23am;
2. Mr Hutchinson to Mr Andrew, dated 26 May 2023 at 12:51pm;
3. Dr Tom Baxter to Ms Kelly Grigsby, dated 26 May 2023 at 1:02pm;
4. Mr Michael Reynolds to Dr Baxter, dated 26 May 2023 at 3:46pm;

³ AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) [2006] FCA 1234 18 September 2006 at [44].

⁴ See Note 3 at [41].

5. Dr Baxter to Mr Reynolds and Mr Andrew, dated 26 May 2023 at 4:50pm;
 6. Mr Andrew to Dr Baxter and Mr Reynolds, dated 26 May 2023 at 5:12pm;
 7. Dr Baxter to Mr Andrew, Ms Allen, Mr Reynolds, and Mr Hutchinson, dated 28 May 2023 at 12:17pm;
 8. Dr Baxter to Mr Reynolds, Ms Grigsby, Mr Hutchinson, Ms Lara MacDonell, Ms Allen, and Mr Andrew dated 28 May 2023 at 9:23pm;
 9. Ms Grigsby to Dr Baxter, Mr Reynolds, Mr Hutchinson, Ms Lara MacDonell, Ms Jacqui Allen, Mr Andrew, dated 29 May 2023 at 9:11am;
 10. Dr Baxter to Mr Reynolds, Ms Grigsby, Mr Hutchinson, Ms Lara MacDonell, Ms Allen, Mr Andrew, Mr David Morris dated 29 May 2023 at 9:14am; and
 11. Mr Morris to Dr Baxter, Ms Grigsby, Mr Reynolds, Mr Hutchinson, Ms MacDonell, Ms Allen, Mr Andrew 29 May 2023 at 9:53am.
- 97 Dr Baxter is part of Council's legal team and either authored, received or was copied into each of the above mentioned emails. These emails were sent for the dominant purpose of obtaining legal advice and, as such, I find that they are all exempt in full pursuant to s31 of the Act. Council is not required to provide these to Ms Sandwell.

Document 31

98 Document 31 consists of an email chain made up of the following 19 emails and 5 attachments:

1. Ms MacDonell to Mr Morris, dated 20 May 2022 at 4:59pm;
2. Mr Morris to Ms MacDonell, dated 24 May 2022 at 11:29am;
3. Ms MacDonell to Mr Morris, dated 8 June 2022 at 3:21pm,
4. Ms MacDonell to Mr Morris, dated 10 June 2022 at 3:53pm;
5. Mr Morris to Ms MacDonell, dated 15 June 2022 at 2.12pm;
6. Ms MacDonell to Mr Paul Jackson, dated 23 June 2022 at 2:20pm;

7. Ms MacDonell to Mr Jackson, dated 24 June 2022 at 9:34am;
 8. Mr Jackson to Ms MacDonell, dated 24 June 2022 at 9:52am;
 9. Ms MacDonell to Mr Jackson, dated 24 June 2022 at 4:15pm;
 10. Mr Jackson to Mr Morris, dated 24 June 2022 at 5:31pm;
 11. Mr Morris to Mr Jackson, dated 27 June 2022 at 10:09am;
 12. Ms MacDonell to Mr Morris, dated 31 May 2023 at 9:24am;
 13. Mr Morris to Ms MacDonell, dated 31 May 2023 at 10:54am;
 14. Ms MacDonell to Mr Morris, dated 1 June 2023 at 8:43am;
 15. Mr Morris to Ms MacDonell, dated 6 June at 4:35pm;
 16. Ms MacDonell to Mr Morris, dated 6 June at 4:57pm;
 17. Mr Morris to Ms MacDonell, dated 9 June 2023 at 12:07pm;
 18. Ms MacDonell to Mr Morris, dated 9 June 2023 at 12:12pm; and
 19. Mr Morris to Ms MacDonell, dated 13 June at 1:11pm (including five attachments).
- 99 Upon reviewing this information, I find that emails 6 to 9 and are not exempt from disclosure pursuant to s31 of the Act. These emails and attachments were not sent between a lawyer and client for the purpose of obtaining legal advice nor do they restate legal advice received. Accordingly, they cannot be considered exempt from disclosure pursuant to s31. Instead, I find that these internal emails and attachments are more appropriately assessed under s35 of the Act (internal deliberative information) and I will do so later in my decision.
- 100 However, I do find that the emails 1 to 5, 10 to 19 (including attachments 1, 2, 4 and 5) are exempt from disclosure under s31 of the Act in full, as this is information that was communicated between a lawyer (Mr David Morris) and client (Council) for the dominant purpose of giving or obtaining legal advice.
- 101 Regarding attachment 3 to email 19, I find that this is information of a personal nature which appears to have been included in error and is

outside the scope of Ms Sandwell's request, as such Council is not required to release under the Act.

Document 32

102 Document 32 consists of an email chain made up of the following six emails and one attachment:

- 1 Mr Reynolds to Ms MacDonell and Dr Baxter, dated 9 June 2023 at 8:41pm
- 2 Dr Baxter to Ms Kate Hanslow, Mr Morris, Mr Reynolds, dated 9 June 2023 at 8:51pm
- 3 Mr Morris to Dr Baxter, Ms Grigsby, Mr Reynolds, Mr Hutchinson, Ms MacDonell, Ms Allen, Mr Andrew dated 29 May 2023 at 9:53am
- 4 Dr Baxter to Ms Hanslow and Mr Morris, dated 10 June 2023 at 12:29am
- 5 Dr Baxter to Ms Hanslow and Mr Morris, dated 11 June 2023 at 2:45pm
- 6 Mr Morris to Dr Baxter, dated 13 June 2023 at 1:14pm
- 7 Attachment

103 Upon reviewing these emails and the attachment, I find that each of them are exempt from disclosure under s31 of the Act in full, as they are emails that were communicated between a lawyer and client for the purpose of giving or obtaining legal advice.

Document 33

104 Document 33 consists of an email from Mr Morris to Dr Baxter and Ms McDonell dated 19 June 2023. Attached to this email is a formal letter of advice authored by Mr Morris. This email was communicated between a lawyer and client for the purpose of giving legal advice. As such this information is exempt pursuant to s31 of the Act, and Council is not obliged to provide this email nor its attachment to Ms Sandwell.

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105 In correspondence to my office dated 28 January 2025, Council set out that it was its position that the final dot point on page 7 of this document was exempt from release pursuant to s31 of the Act. This information was not created and communicated for the dominant purpose of giving or obtaining legal advice, nor does it restate advice given, it simply has some connection to legal matters. As such, I am not satisfied it is of a nature which could be exempt under s31, as being subject to legal professional privilege. However, Council contends that this document is

also eligible for exemption pursuant to ss32 and 35 of the Act, and so I will assess it under those sections later in my decision.

Section 32 – Information related to closed meetings of council

106 Section 32(1) of the Act provides:

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

107 Subsections 32(2), (3) and (4) restrict the application of this section to information which is less than ten years old, was brought into existence for submission to the closed meeting for consideration, and is not purely factual. However, s32(4) also qualifies this, setting out that some purely factual information may be exempt if *its disclosure would disclose a deliberation or decision of a closed meeting which has not been officially published.*

108 Council relied on s32(1) to exempt the following information from disclosure in full:

- *Document 12 Report to CLOSED Council City of Hobart Rating and Valuation Review - [ss 22(3)-(4)] (Closed) - 20 March 2023*
- *Document 13 Extract of CLOSED Council Agenda for Closed 20 March 2023 meeting*
- *Document 14 Extract of CLOSED Council Minutes of Closed 20 March 2023 meeting*

- *Document 15 Report to CLOSED Council City of Hobart Rating and Valuation Review - [ss 22(3)-(4)] (Closed) - 24 April 2023*
- *Document 16 Extract of CLOSED Council Agenda for Closed 24 April 2023 meeting*
- *Document 17 Extract of CLOSED Council Agenda [minutes] for Closed 24 April 2023 meeting*
- *Document 18 [ss 22(3)-(4)] January 2023*
- *Document 19 [ss 22(3)-(4)] March 2023*
- *Document 20 [ss 22(3)-(4)] April 2023*
- *Document 23 Minutes of Risk and Audit Panel Meeting*
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109 In my analysis of this information, I will categorise it into minutes, agendas and other documents.

Documents 13 and 16 (Agendas of closed Council meetings)

110 Council has identified two extracts of closed council meeting agenda documents as being responsive to Ms Sandwell's request. These are Documents 13, relating to the closed Council meeting of 20 March 2023, and 16, relating to the closed Council meeting of 24 April 2023.

Purely Factual Information

111 Upon reviewing these documents, I can see that the following information in Document 13 is purely factual and would not disclose a deliberation of a closed session of Council which has not been published:

- all information contained on the cover page;
- all information contained within the header of each page;
- all information contained within the order of business on page 2, except for all information contained within points 7 to 9;
- all information on page 5;
- all information in the headings 'REPORT TITLE' and 'REPORT PROVIDED BY' on page 6;
- all information on page 11;
- all of attachment B; and
- all of attachment C.

112 As such, I find that this information is not exempt under s32(1) of the Act, as it is specifically excluded from the operation of this section by s32(4).

113 I can also see that the following information in Document 16 is purely factual and would not disclose a deliberation of a closed session of Council which has not been published:

- all information contained within the cover page;
- all information contained within the header of each page;
- all information contained within the order of business on page 2, except for information contained in points 6, 7 and 9;
- all information on page 18;
- all information in the headings 'REPORT TITLE' and 'REPORT PROVIDED BY' on page 19;
- all information below the signatures on page 24;
- all of attachment B; and
- all of attachment C.

114 However, I find that the remainder of the information contained within Documents 13 and 16 is exempt from disclosure pursuant to s32(1)(b) of the Act, as it is information proposed by an officer of a council for the purpose of being submitted to a closed meeting of council for consideration, and that officer contributed to the contents of those records. Council is not obliged to provide this information to the applicant.

Documents 14 and 17 (Minutes of closed Council meetings)

115 Council has identified extracts of the minutes of two closed Council meetings as being responsive to Ms Sandwell's request. These are Documents 14 (relating to the closed meeting of Council of 20 March 2023) and 17 (relating to the closed meeting of Council of 24 April 2023).

116 Upon reviewing these documents, I can see that the following information in Document 14 is purely factual information:

- all information on the cover page;
- all information in the header on each page; and
- all information in the order of business, except for the information in points 7, 8, and 9.

117 I can also see that the following information in Document 17 is purely factual information:

- all information on the cover page;

- all information in the header on each page; and
- all information in the order of business except for information in points 6, 7, and 9.

118 However, I find that the remainder of the information in Documents 14 and 17 is not purely factual and is exempt from disclosure pursuant to s32(1)(a) as it is the official record of a closed meeting of Council.

Other documents

119 Council has identified seven other documents which it considers to be exempt pursuant to s32 of the Act and responsive to Ms Sandwell's request. These include Documents 12, 15, 18, 19, 20, 23 and *DRAFT - F23 61856 (Revision 21) Minutes - Risk and Audit Panel - 7 June 2023.docx*.

Documents 12, 15, 18, 19 and 20

120 Council has sought to exempt documents 12, 15, 18, 19, and 20 from disclosure pursuant to s32(1) of the Act. Upon reviewing this information, I can see that the content of the documents mirrors the contents of documents that were contained in the agendas of closed meetings of Council held on 20 March 2023 and 24 April 2023. As such, I am satisfied this information was prepared for consideration at a closed meeting of Council. This information is exempt from disclosure pursuant to s32(1)(b).

Document 23

121 Council has applied s32(1) of the Act to exempt from disclosure the minutes of Council's Risk and Audit Panel meeting of 7 June 2023. These minutes were then subsequently provided to a closed meeting of Council that was held on 11 December 2023 for its consideration.

122 For s32(1)(a) to apply, I must be satisfied that Council's Risk and Audit Panel minutes are an official record of a closed meeting of Council. Section 32 defines *closed meeting of a council* as a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the *Local Government Act 1993* (Local Government Act) and includes a closed meeting of a Council committee.

123 The Risk and Audit Panel meeting is clearly not a closed meeting of Council in the ordinary sense, but it must be considered whether it is a Council committee and a meeting would be part of the definition of a closed meeting of Council under s32 of the Act.

124 The Local Government Act provides that Council committees and Special Committees are established pursuant to ss23 and 24 of that Act respectively. However, Risk and Audit Panels are established under s85 of the Local Government Act. As the Risk and Audit panel is not

established pursuant to ss23 or 24, I do not consider it to be a Council committee for the purposes of s32. Consequently, the minutes of these meetings are not exempt pursuant to s32(1)(a) of the Act.

- 125 I am also not satisfied that s32(1)(b) applies to this information. Section 32(1)(b) provides that information will be exempt from release if it was brought into existence *for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record*. Though these minutes were submitted to closed meetings of Council for consideration, it was not the sole purpose of their creation, which was to simply record what was discussed at the Risk and Audit Panel meeting.
- 126 Council also argued that this information is nonetheless outside the scope of Ms Sandwell's request, as the date of the closed meeting at which the minutes were considered by Council is outside the relevant period defined by Ms Sandwell's assessed disclosure application.
- 127 As the minutes themselves are dated 7 June 2023, and this is within the relevant period as defined by Ms Sandwell's assessed disclosure application, I cannot accept Council's argument in this regard.
- 128 Notwithstanding, I do find that the substantial majority of the information contained in this document is outside the scope of Ms Sandwell's request, as the content of this document is not the type of information sought by her.
- 129 With the exception of all information contained in and under the heading 7. *Financial Management*, which I consider contains information responsive to Ms Sandwell's request, Council is under no obligation to provide this document to Ms Sandwell. The section relating to Financial Management is not exempt under s32 but will be considered under s35 in the following Analysis.

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- 130 In correspondence to my office dated 28 January 2025, Council advised that a draft of unconfirmed minutes of the Risk and Audit Panel meeting held on 7 June 2023 (Document 23) was considered responsive to Ms Sandwell's assessed disclosure application. Council asserted that s32 and s35 applied to exempt this document from disclosure in full, and s31 applied to exempt it in part. I now turn to assess whether s32 applies to this document in full.
- 131 As discussed above, I did not consider this draft of unconfirmed minutes of the Risk and Audit Panel meeting held on 7 June 2023 (Document 23) was information eligible for exemption under s31. Council proposed an alternative exemption under s32. As I have just found in relation to Document 23, I do not accept that Risk and Audit Panel meetings could

be considered closed meetings of Council for the purposes of s32, nor do I consider finalised minutes (and therefore also draft minutes) of such meetings to be eligible for exemption pursuant to s32(1)(b). As such, this document is not exempt under those provisions.

- 132 However, Council contends that if this document is not exempt pursuant to ss31 or 32, that it should be considered for exemption under s35 of the Act, and I will assess it again in the following part of my Analysis.

Section 35 – Internal Deliberative Information

- 133 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:

- an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or
- a record of consultations or deliberation between officers of public authorities (s35(1)(b)); or
- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).

- 134 Once the requirements of one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the public authority, Minister or of the Government. This exemption does not apply to the following:

- purely factual information (s35(2));
- a final decision, or order or ruling given in the exercise of an adjudicative function (s35(3)); or
- information that is older than ten years (s35(4)).

- 135 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No1)* where the Commonwealth Administrative Appeals Tribunal observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.⁵

- 136 Associate Professor Moira Paterson, in her text, Freedom of Information and Privacy in Australia 2.0, refers to the decision in *Re Waterford* and concludes that, regarding factual information:

*In other words . . . it must be capable of standing alone.
The material must not be so closely linked or
intertwined to the deliberative process as to form part of
it.*⁶

⁵ (1984) AATA 518 at 14.

⁶ LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

137 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative processes’ has also been considered by the Administrative Appeals Tribunal. 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*.⁷

138 Earlier in this decision I found that it would be more appropriate for the following emails sent internally within Council to be assessed pursuant s35 of the Act:

- Ms MacDonell to Mr Jackson, dated 23 June 2022 at 2:20pm;
- Ms MacDonell to Mr Jackson, dated 24 June 2022 at 9:34am;
- Mr Jackson to Ms MacDonell, dated 24 June 2022 at 9:52am; and
- Ms MacDonell to Mr Jackson, dated 24 June 2022 at 4:15pm.

139 First, I note that s35(2) of the Act provides that information cannot be exempt under s35 of the Act if it is purely factual information. Accordingly, the identities of those who sent and received the above-mentioned emails, the date and time these emails were sent, information contained in the subject lines of these emails, the names of attachments, and salutations are not exempt from disclosure under s35.

140 Second, having reviewed the information contained in the bodies of these emails, I can see that it reveals deliberations between Mr Jackson and Ms MacDonell about how to present information on a rates notice. Accordingly, I am satisfied that the bodies of these emails are *prima facie* exempt from disclosure pursuant to s35(1)(b) of the Act as a record of consultations or deliberations between officers of Council, made in the course of, or for the purpose of, the deliberative processes related to the official business of Council.

Handwritten and electronic draft minute (DRAFT - F23 61856 (Revision 21) Minutes - Risk and Audit Panel - 7 June 2023.docx)

141 Council has also identified a draft handwritten minutes document of the Risk and Audit Panel meeting held on 7 June 2023, and an electronic draft copy of minutes of this meeting. This contains the earlier iterations of the minutes that were reviewed, subsequently edited, and then finalised.

142 As these iterations were subject to review by Council staff, I am satisfied that they are *prima facie* exempt from disclosure pursuant to

⁷ (1985) 5 ALD 588.

s35(1)(b) of the Act as a record of deliberations between officers of Council, that was made for the purpose of the deliberative processes related to the official business of Council.

Document 23 - all information contained within and under the heading 7. Financial Management

- 143 I noted earlier in my decision that I would consider all information contained under the heading 7. *Financial Management* for eligibility for exemption under s35 of the Act.
- 144 Having reviewed this information I can see that it consists of a record of what the Risk and Audit Panel discussed at its meeting, and a list of ten separate resolutions agreed to. I am satisfied that this information is *prima facie* exempt pursuant to s35(1)(b) of the Act.

Attachment 1: Rates Resolution 2023-24 Draft

- 145 This is a draft version of Council's 2023-24 rates resolution. It details the rates to be charged for various categories of land use and Council services for the 2023-24 financial year. It is a draft document which would have been subject to subsequent review and editing by Council officers and Councillors before being finalised and published online.
- 146 I am satisfied that this document is *prima facie* exempt from disclosure pursuant to s35(1)(b), as it is a record of consultations or deliberations between officers of Council made for the purpose of the deliberative processes related to the official business of Council.

Section 33 – Public interest test

- 147 I now turn to consider whether it would be contrary to the public interest to release the documents I have identified as *prima facie* exempt from disclosure under s35 of the Act. In making this assessment I am required to consider, at least, all of the matters in Schedule 1 of the Act.
- 148 For the purposes of this public interest assessment, I find it helpful to characterise the information I have found to be *prima facie* exempt as:
 - information relating to legal advice (in emails between Mr Jackson and Ms MacDonell and information in the last dot point of page 7 of the draft minutes of the Risk and Audit panel meeting held on 7 June 2023); and
 - draft information unrelated to legal advice (in the electronic and handwritten draft minute documents of the Risk and Audit Panel meeting held on 7 June 2023 and in attachment 1 of the Rates Resolution 2023-24 Draft); and
 - finalised information in Document 23 *Information relating to legal advice*

- 149 I now turn to consider whether it would be contrary to the public interest to release information contained in the body of emails between Mr Jackson and Ms MacDonell from Document 31, and information in the last dot point on page 7 of draft minutes of the Risk and Audit panel meeting held on 7 June 2023, which I consider *prima facie* exempt under s35(1)(b) of the Act. This information contains discussion about legal advice received by Council.
- 150 I find that Schedule 1 matter (a) – the general public need for government information to be accessible – to be relevant and to weigh in favour of disclosure.
- 151 I find Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – to be relevant and to weigh in favour of disclosure. The debate regarding the impact increased levels of short-term accommodation have had on the supply of housing for local residents, and the flow on impact on housing affordability in Hobart has been significant. The release of details of legal advice related to Council's decision to introduce a varied rate for properties intended to be used for short term accommodation would therefore contribute to a matter of public interest and inform the public of the reasons for Council's decision to introduce those varied rates.
- 152 I find that Schedule 1 matter (c) – whether the disclosure would inform a person about the reasons for a decision – to be relevant and to weigh in favour of disclosure. In relation to both the emails and the draft minutes, the information reveals communications between public officers that details how Council came to a decision subject to legal advice.
- 153 However, the key matter weighing against disclosure is matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and enforcement of the law – which is relevant and weighs very heavily against disclosure.
- 154 This information consists of internal correspondence between Council officers which closely relates to legal advice sought and received by Council. Based on the established doctrine of legal professional privilege, Council has the right to expect that legal advice sought and received will remain confidential, unless it decides to waive its privilege. The release of Council's internal correspondence that closely relates to privileged information, risks undermining the confidentiality of the legal advice it has received, and this key legal principle.
- 155 Having considered all relevant matters, I consider that it would be contrary to the public interest to release the emails between Mr Jackson and Ms MacDonell, and the information in the last dot point on page 7 of the draft minutes of the Risk and Audit panel meeting held on 7 June 2023. This information is exempt pursuant to s35(1)(b) and not required to be provided to Ms Sandwell.

Information not related to legal advice Electronic and handwritten draft minute documents of the Risk and Audit panel meeting held on 7 June 2023.

- 156 Again, in relation to this information, I consider Schedule 1 matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 157 I find that Schedule 1 matters (c) – whether disclosure would inform a person about the reasons for a decision, and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant. This information provides context in relation to an important decision which has significant consequences for the community. However, these are draft minutes that were subsequently reviewed, edited, and finalised. The finalised minutes agreed to by panel members as reflective of discussions had at the meeting are the documents that would provide the most relevant reasons and context. Therefore, in relation to the draft minutes, I find that Schedule 1 matters (c) or (d) weigh only slightly in favour of disclosure due to their unfinalised nature.
- 158 As I outlined in my previous decision of *Rebecca White and Premier of Tasmania*,⁸ unless there are reasons to justify release, it has been my practice to find that early working drafts of documents are usually exempt under s35 because it would be inappropriate for numerous slightly different drafts of a document to be released as a standard practice.
- 159 In this instance, the relevant information comprises working drafts which mimic the finalised versions in content but are unfinalised. There would be no benefit in their disclosure.
- 160 Accordingly, I find that it would be contrary to the public interest to release the handwritten and electronic draft minutes of the Risk and Audit panel meeting held on 7 June 2023 and the information in attachment 1 of the Rates Resolution 2023-24 Draft. This information is exempt under s35(1)(b) and is not required to be provided to Ms Sandwell.

Document 23 - all information contained within and under the heading ‘7. Financial Management’

- 161 Again, I find Schedule 1 matter (a) – the general public need for government information to be accessible – to be relevant and weigh in favour of disclosure.
- 162 I find that Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – to be relevant and to weigh in favour of disclosure. This information reveals

⁸ (April 2024) at [31] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

what the Risk and Audit Panel discussed at this meeting. The topics discussed vary but can all be characterised as being related to Council's finances. I also note that this information consists of the Risk and Audit Panel's resolutions responding to the financial matters discussed at the meeting. I find that Council's management of its finances to be a matter of legitimate public interest and debate.

- 163 I find that Schedule 1 matters (c) – whether the disclosure would inform a person about the reasons for a decision, and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – to be relevant and to weigh in favour disclosure. This information reveals recommendations made to Council by the Risk and Audit Panel committee about how to manage its finances going forward, and offers its support for particular policies which were proposed by Council.
- 164 However, I note that Risk and Audit Panel meetings are closed to the public. This helps to facilitate robust debate among panel members about Council's finances, and appropriate strategies. Were details of discussion at these meetings made publicly available, it may have the effect of stifling debate or undermining the efficacy of this process. Accordingly, I consider that Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in future – to weigh slightly against release. As this is a Council committee comprised of senior officials, I am confident that any chilling effect would be very minor due to their obligations to act ethically and with Council's best financial interests in mind regardless of community scrutiny.
- 165 I also consider that Schedule 1 matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – is relevant and weighs against disclosure. Council undertakes various business activities which involve commercial negotiation, property transactions and other like activities which can be compromised by the release of certain information. This must be balanced with the need for transparency regarding the financial activities and spending of public authorities, but a degree of confidentiality regarding some financial information is appropriate. In this instance, however, this matter only weighs slightly against disclosure as the relevant information does not involve information which is likely to harm Council's business or financial interests to any significant degree.
- 166 Though there is a difficult balance to strike, I find that it would not be contrary to the public interest to reveal most information contained in section 7 of these minutes. In democratic systems of government public scrutiny should not prevent robust debate between public officials about

how public funds should be managed. This information is not exempt and Council is to make most of it available to the applicant.

- 167 My finding in this regard does not extend to the final dot point on page 7, which I found exempt from disclosure earlier in my decision.

Sections 38 (information relating to the business affairs of a public authority), 40 (information on procedures and criteria used in certain negotiations of public authority), and 41 (information likely to affect State economy)

168 Council relied upon ss35, 38(a)(ii), 40, and 41 in the alternative to its primary reliance on s32 to exempt Risk and Audit Panel minutes and agenda documents from disclosure in full. I have assessed this information for release pursuant to s35, and so I now turn to consider whether ss38(a)(ii), 40, or 41 applies to it.

169 Section 38(a)(ii) provides that information of a business, commercial or financial nature is exempt if, in the case of a public authority engaged in commerce (such as Council), its release would be likely to expose the public authority to competitive disadvantage.

170 Section 40 (information on procedures and criteria used in certain negotiations) provides that *information is exempt if it consists of instructions for the guidance of officers of a public authority on the processes to be followed or the criteria to be applied –*

- (a) *in negotiations, including financial, commercial and labour negotiations; or*
- (b) *in the execution of contracts; or*
- (c) *in the defence, prosecution and settlement of cases; or*
- (d) *in similar activities –*

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

171 Section 41 (Information likely to affect State economy) provides that:

- (1) *information is exempt information if the information consists of details concerning any proposed action or inaction by the Parliament, the Government, a Minister or a public authority in the course of, or for the purpose of, managing the economy of the State or any part of the State and its disclosure is likely to –*
 - (a) *give any person an unfair advantage; or*
 - (b) *expose any person to an unfair disadvantage.*
- (2) *Information is exempt information if its disclosure would reasonably be expected to have a substantial adverse effect*

on the ability of the Government or any public authority to manage the economy of the State or any part of the State.

- 172 Council provided very little reasoning in its Better Reasons Part Two as to why ss38, 40 and 41 would apply to the Risk and Audit Panel minutes and agendas to justify their non-disclosure, nor has it specified which exemption applies to which specific pieces of information within these documents.
- 173 Having reviewed it, it is not readily apparent to me why or how these exemption provisions would apply to this information. Without arguments from Council clearly setting out its reasoning as to why these exemptions would be relevant to this information, I find that Council's onus under s47(4) is not discharged, and that it has been unable to establish that any aspect of this information is exempt from disclosure pursuant to either ss38(a)(ii), 40, and 41 of the Act.

Other matters

Category three documents

- 174 As outlined above, Ms Sandwell's assessed disclosure application contained requests for four separate categories of information, with the third category requested being:

Briefing documents prepared by Council Staff in relation to the August 2022 Resolution and the Rates Resolution.

- 175 Council considered 'briefing documents' to mean documents that were provided to Council as a collective rather than to individual Councillors. This position was set out in paragraph 88 of Better Reasons Part One:

I say councillors 'collectively', because the LG [Local Government] Act, s 28(2) refers to functions of 'The councillors of a council collectively', which it distinguishes from those of 'A councillor, in the capacity of an individual councillor' (s 28(1)). Hence, the 'briefing documents' set out in the schedule were prepared for and provided to the councillors 'collectively' by way of a briefing to them. Whereas responses to requests for information by individual councillors were considered to form part of document category 4.

- 176 In an email to Council dated 15 May 2024, which was later provided to my office, the applicant's legal representatives contested Council's position regarding category three of Ms Sandwell's request:

Our client does not accept the Council's interpretation of category 3, which excludes "responses to requests for information by individual councillors" and instead

treats documents of that description as forming part of category 4 (at [87]-[89] of the Part 1 reasons). This narrow approach to category 3 has no basis in the drafting of the category, which captures “briefing documents prepared by Council Staff”, and makes no reference to Councillors at all, let alone the distinction Councillors collectively and individual Councillors.

To the extent that there was ambiguity in category 3 on this issue, which our client does not accept, it would have been a simple matter for Council to seek clarification as to its intended scope, as it had already done so on 8 March 2024 in respect of other categories. It is unclear why the Council did not take that step.

- 177 On 27 May my office was copied into correspondence from Council to the applicant's representatives outlining that it maintained its position regarding its interpretation of the scope of category 3 of Ms Sandwell's request:

Category 3 sought “3. Briefing documents prepared by Council Staff in relation to the August 2022 Resolution and the Rates Resolution” ...”. The key word there is “Briefing”.

Our reasons explained, for transparency, the approach we took. Briefing documents are those provided to all councillors so that they can (collectively, or as a whole) make decisions under the Local Government Act as the Council. Hence the provision of briefing documents (e.g., briefing papers, powerpoint slides) to you. Precursors to the public briefing documents, the agenda papers for the June Council meeting at which the Rates Resolution passed.

The Local Government Act does not grant to an individual councillor power to make decisions for their council. This more limited role of councillors is in contrast to a Minister of the Crown (the context where the RTI Act, s 27 uses the word “briefing”). A Minister invariably has decision-making powers as an individual under relevant legislation, in addition to their role within Cabinet.

Thus, Council Staff give “briefings” to councillors collectively. While an individual councillor may request information, its provision does not constitute a briefing.

In our view, given the precision with which the Application was drafted (and for other interpretive reasons noted in our Part 1 reasons at paragraph [89]), it was open to us to take the approach we did in considering your Category 3 definition of “briefing documents” in the way we did.

Our interpretation did not exclude non-briefing documents in their entirety, but placed them within Category 4.

- 178 It is unfortunate that Council has failed to reconsider its interpretation of Category 3 of Ms Sandwell’s request. This is especially the case in light of Ms Sandwell’s legal representatives making it abundantly clear to Council what the intended scope of Ms Sandwell’s request was in the abovementioned correspondence. However, I do note that Council has indicated it has included the relevant information responsive to Category 4 of the request.
- 179 As determined earlier, Council is currently not entitled to rely upon s19 to refuse Category 4 of Council’s request. Therefore, I am satisfied that the information being sought by Ms Sandwell will be assessed under the Act when Council implements this external review decision. It is therefore unnecessary for me to deal with this matter any further as part of this review.

Right to information procedures

- 180 A number of concerning matters arose in relation to Council progressing the applicant’s assessed disclosure application. For example, the delay in receipting the fee, Council’s delay in issuing an original decision, Council misconstruing the applicant’s request for information, Council’s erroneous application of s10, problems sharing copies of Council’s records with my office, failure to abide by due dates set by my office to facilitate the timely progression of this external review, among other things. These issues, in their totality, contributed to significant delays in finalising this external review.
- 181 Those matters have been addressed with Council directly and assurances have been provided by Mr Stretton that Council is committed to improving its practices and procedures to ensure compliance with the Act. I find it unnecessary therefore to discuss those matters further at this time, but I acknowledge their impact on the applicant.

Preliminary Conclusion

- 182 Accordingly, for the reasons set out above, I determine that:

- Council was not entitled to rely on section 19;

- exemptions claimed pursuant to ss31, 32 and 35 are varied; and
- exemptions claimed pursuant to ss38, 40 and 41 are not made out.

Submissions to the Preliminary Decision

- 183 As the above preliminary decision was adverse to Council, it was made available to it on 17 April 2025 under s48(1)(a) of the Act to seek its input prior to finalisation. On 29 May 2025, my office received submissions from Council responding to my preliminary decision.
- 184 First, Council set out that some 110, 000 documents had been identified as potentially being responsive to Ms Sandwell's application as a result of further searching undertaken by Council after being issued my preliminary decision. However, Council did note that it was unclear how many of those records were duplicates, given system constraints mean that duplicates are often returned when a search term is used to identify relevant documents in Council databases.
- 185 Council then went on to offer a compromise, setting out that it was open to *re-running a search for all further internal materials relating to the residential rate and associated short-stay rate for the defined period*, noting that:

The Applicant obviously has a keen interest in matters relating to residential rate and associated rating of short-stay accommodation within the defined timeframe. Council has previously released (to the Applicant) all materials relevant to the preparation of the Rates Resolution (for all rating classifications) and associated briefings to our councillors (other than legal advice from Mr Morris) who is Council's external lawyer.

Council would be open to re-running a search for all further internal materials relating to the residential rate and associated short-stay rate for the defined period. At the time of writing, I do not know the precise number of records such a search may return but was advised it would be approximately 7,000, based on the attached spreadsheet.

Given these records would primarily be internal records and represent the balance of materials on those two rating classifications they are unlikely to require third-party consultation under section 36 or relate to the business affairs of a third party under section 37, although we do receive 'public submissions' on such matters from time to time.

Conclusion

- 186 I acknowledge Council for its efforts in conducting further and more refined searches for information that may be potentially responsive to Ms Sandwell's application. The further searching conducted is more in line with what is expected of Council, in establishing a valid estimation of the work required to progress this assessed disclosure application. I also acknowledge and am encouraged by its apparent willingness to make further efforts to remove the ground of refusal as required under s19(2) of the Act.
- 187 However, noting that no submissions were made to in relation to the exemptions I found applied to requested information, and that Council has indicated that it is willing to recommence s19(2) negotiations with the applicant, my preliminary conclusion remains unchanged.
- 188 On 29 May 2025, upon request, a draft final decision was also made available to Ms Sandwell's representatives, to seek their input prior to finalisation. On 13 June 2025, Ms Sandwell's representatives advised my office that their client did not wish to make any submissions responding to my draft final decision.
- 189 Accordingly, and for the reasons given above, I determine that:
- Council was not entitled to rely on s19 to refuse Ms Sandwell's application;
 - exemptions claimed pursuant to ss31, 32 and 35 are varied; and
 - exemptions claimed pursuant to ss38, 40 and 41 are not made out.
- 190 I direct Council to reassess the parts of Ms Sandwell's request refused pursuant to s19 in accordance with the provisions of the Act.
- 191 I apologise to the parties, but in particular to the applicant, for the inordinate delay in finalising this external review.

Dated: 16 June 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 19 Requests may be refused if resources unreasonably diverted

- (1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –
- (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
 - (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions – having regard to –
 - (c) the matters specified in Schedule 3 – the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.
- (2) A public authority or Minister must not refuse to provide information by virtue of subsection (1) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal

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 32 Information related to closed meetings of council

- (1) Information is exempt information if it is contained in –
- (a) the official record of a closed meeting of a council; or
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
 - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
 - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) 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.
- (3) Subsection (1) does not include information solely because it –
- (a) was submitted to the closed meeting of a council for consideration; or
 - (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –
- if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.

(4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.

(5) In this section –

closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the Local Government Act 1993 and includes a closed meeting of a council committee.

Section 35 Internal deliberative information

(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.

(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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 38 Information relating to the business affairs of a public authority

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

- (i) 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.

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

Information is exempt information if it consists of instructions for the guidance of officers of a public authority on the processes to be followed or the criteria to be applied –

- (a) in negotiations, including financial, commercial and labour negotiations; or
- (b) in the execution of contracts; or
- (c) in the defence, prosecution and settlement of cases; or
- (d) in similar activities –

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

Section 41 Information likely to affect State economy

(1) Information is exempt information if the information consists of details concerning any proposed action or inaction by the Parliament, the Government, a Minister or a public authority in the course of, or for the purpose of, managing the economy of the State or any part of the State and its disclosure is likely to –

- (a) give any person an unfair advantage; or
- (b) expose any person to an unfair disadvantage.

(2) Information is exempt information if its disclosure would reasonably be expected to have a substantial adverse effect on the ability of the Government or any public authority to manage the economy of the State or any part of the State.

Schedule 1- Matters Relevant to the 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;

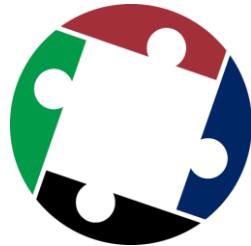
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors 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.

Schedule 3- Matters Relevant to Assessment of Refusing Application

1. 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: R2506-017

Names of Parties: Isla MacGregor and Department for Education, Children and Young People.

Reasons for decision: s48(3)

Provisions considered: s35, s36

Background

- 1 Women Speak Tasmania is an organisation which states it is *passionate about safeguarding the rights of girls and women, supporting single-sex spaces and opportunities.*¹ There has been controversy surrounding Women Speak Tasmania from other parts of the community regarding the perceived exclusion and lack of recognition of the existence of transgender and gender diverse individuals by members of the group.²
- 2 Women Speak Tasmania booked a meeting room at the Burnie Library on 21 March 2024 to hold a public forum on the topic of 'Puberty Blockers', and again booked a room at the Devonport Library on 7 April 2025 for a forum titled 'Women's Rights in the Modern World.' On both occasions, the Department for Education, Children and Young People (the Department) cancelled the bookings.
- 3 On 28 March 2025, Ms Isla MacGregor, who is affiliated with Women Speak Tasmania, submitted an application for accessed disclosure pursuant to the *Right to Information Act 2009* (the Act) to the Department.
- 4 Women Speak Tasmania requested:
written information (including emails, notes, messages) that relate to the booking and cancellation of events on 21 March 2024 in Burnie and 7 April 2025 in Devonport by Womenspeak Tasmania including Emma Shaw and Lynne Robertson.

¹ Women Speak Tasmania website, www.womenspeaktas.au, accessed 23 July 2025.

² MacDonald, L., 'Anti-trans group invited to help develop trans-inclusive posters for public toilets (8 June 2019), ABC News online, <https://www.abc.net.au/news/2019-06-08/tas-women-speak-involvement-in-tras-positive-posters-questioned/11193168>', accessed 11 August 2025.

- 5 On 13 May 2025, Ms Roxana Jones, a delegate for the Department under the Act, released a decision. Ms Jones determined to release the requested information in part and relied on exemptions in ss35 and 36 of the Act to exempt the remainder of the information.
- 6 On 20 May 2025, Ms MacGregor applied for an internal review of the decision. On 16 June 2025, Ms Kathleen Bradfield, another delegate for the Department under the Act, released her decision. Ms Bradfield determined to uphold the original decision with some minor alterations.
- 7 On 19 June 2025, Ms MacGregor applied to this office for external review of the decision. The application was accepted pursuant to s44 of the Act.

Issues for Determination

- 8 I must determine whether the information not released by the Department is eligible for exemption under ss35 or 36 or any other relevant section of the Act. As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessments are made subject to the public interest test in section 33.
- 9 This means, should I determine any of the requested information is *prima facie* exempt from disclosure under ss35 or 36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment, I must have regard to all relevant matters and those contained in Schedule 1 of the Act.

Relevant legislation

- 10 I have attached a copy of ss33, 35, 36 and Schedule 1 of the Act to this decision at Attachment 1.

Submissions

Applicant

- 11 On 19 June 2025, Ms MacGregor made the following submissions:

To achieve accountability for this, we need to demonstrate that the true and genuine reason for Libraries Tasmania's cancellation of our bookings was our political belief and activity.

The misuse of redactions by the Department of Education is a major detriment to us and to the public in achieving accountability. The prevention of, and accountability for, unlawful discrimination is always a matter of public interest.

Section 35 Internal Deliberative

The Department of Education has heavily relied on Section 35 to redact information. We believe that this exemption has highly

likely been inappropriately applied, especially when considering the public interest test aspects.

I have reviewed several of the Ombudsman's previous decisions related to this exemption and understand the definition of deliberative information, including that the scope includes "thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action".

In a discrimination matter such as ours, evidence of thinking processes is critical as they can show the how and why a decision was reached; in our case, the rationale, how and why our bookings were cancelled.

Deliberative information "thinking processes" – are exactly what is needed to achieve accountability for unlawful conduct, including prejudices, biases, false assumptions, differing treatment and inaccuracies that can led to unlawful discrimination.

We also suspect that the public interest test has been incorrectly applied.

It is clearly in the public interest to have government decisions made that are lawful. It is in the public interest that information be disclosed that provides maximum insight into the thought processes behind Library Tasmania's decision to cancel our bookings, especially when those thought processes are likely to shed insight into the true and genuine reason for conduct that has the potential to be unlawful.

It is clearly in the public interest to have accountability for unlawful discrimination and to understand processes so they can be improved to prevent discrimination in the future.

I also note the following from recent Ombudsman decisions related to Section 35:

- *In a decision related to the release of COVID information that the Ombudsman has stated that "whether disclosure would inform a person about the reasons for a decision – is relevant and weighs in favour of disclosure" and that the "disclosure of information contained in the meeting notes would reveal information detailing how the Department made various decisions about how to respond to the COVID-19 pandemic."*
- *A sentence that was "merely a comment on the way the information in the email might be received at a meeting and is not of such substance to constitute a contribution*

to the deliberative processes related to the official business of Tasmania Police” was not exempt and should be released to the applicant. (B and Department of Police, Fire and Emergency Management)

- *Whether the disclosure would inform a person about the reasons for a decision is relevant and weighs in favour of disclosure*
- *“Relevant commentary … which would provide additional information to inform debate, and provide context around decision-making” weighs in favour of disclosure*
- *That “commentary contained in Mr Mayell’s email may not form part of the official published reasoning detailing why the grant was awarded to New Norfolk Distillery, however such commentary still amounts to internal correspondence and deliberations that, at the very least, have the potential to influence government decision making” and this weighted in favour of disclosure (Rebecca White and the Premier of Tasmania)*
- *That “public officers should be aware that their internal correspondence relating to their regular working duties may become subject to release under the Act and should continue to perform their duties confidently regardless of this” (Rebecca White and the Premier of Tasmania).*
- *That “some internal discussion and officer opinions expressed during a public authority or Minister’s officers’ ‘thinking process’ can be validly exempt under s35. Particularly in relation to contentious projects, I accept that a chilling effect on the documentation of discussions may occur if all internal discussion was automatically released to all parties. But this must be balanced with the need for transparency concerning those thinking processes and must not be given major weight, or the intention of the Act to release the maximum amount of official information would be hampered.” (Rebecca White and the Premier of Tasmania)*

Section 36 – Personal Information

The Department of Education has also relied on Section 35 [sic] to redact information. We believe that this exemption has highly likely been inappropriately applied, especially when considering the public interest test aspects and the consistent position communicated by the Ombudsman on this matter.

We understand that the Ombudsman has repeatedly stated that personal information of public officers performing their regular duties (such as their name, signature, position information and work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption and that exception to this general practice is direct and mobile phone numbers of public officers. We do not believe that there are any specific or unusual circumstances that apply in this situation.

On occasion, the Department of Education has redacted large chunks of information through Section 36. Given the narrow definition of what can be rightfully exempted under this section, it is implausible to see how large chunks of information can solely contain direct phone numbers for public officers or that unusual circumstances apply.

Importantly, we are not seeking the names or contact details on individuals external to the Department of Education, such as the individuals who made complaint about our bookings.

Department's submissions

- 12 The Department was not required to provide any submissions in response to this external review, beyond the reasoning of its decisions. Extracts of the internal review decision are set out below.
- 13 Regarding s35 – internal deliberative information, Ms Bradfield set out:

The exempt information consists of emails between public officers and contains opinions, advice and/or recommendations between public officers to identify a potential course of action and is part of the deliberating process. Deliberating process is another way of saying ‘thinking process’. Examples can include internal correspondence, notes, emails etc

The “thinking process” is necessary for public officers to provide their free and frank advice in writing. Written advice can better cover complexities by allowing time for reflection and the working through of a problem in stages with possible better outcomes. Internal deliberations are of particular importance for officers and enable best possible outcomes.

I am satisfied that the information at issue meets the conditions to be exempt information under this section of the Act.

14 After considering the public interest test, Ms Bradfield concluded:

The overriding consideration in this section is the general public need for government information to be accessible (matter (a)).

I acknowledge your request that this internal review consider the need for maximum insight into the thought processes that Libraries Tasmania used in cancelling the bookings made. I am of the view that the public interest considerations in Schedule 1 of the Act are relevant and that they form the basis for no further disclosure.

I have considered all the factors in Schedule and I consider sub-section (m) to be the most pertinent consideration in deciding whether to release this material. That is, whether the disclosure would promote or harm the interests of an individual or a group of individuals.

The material is sensitive and was intended for the Library's planning, decision-making and resourcing. I consider that the information has the potential to be misused or inappropriately used if it were distributed more widely than between the public officers involved. I consider that it is appropriate that the material is protected for internal deliberation, given its sensitivity and limited purpose.

I also considered the following two clauses and found that the disclosure may have these effects:

(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;

Taking all matters into account in Schedule 1, I consider that it is contrary to the public interest to disclose the exempt information under section 33 of the RTI Act.

15 Regarding s36 – personal information, Ms Bradfield set out:

Section 36(l) provides that information is exempt if its disclosure under the Act would involve the disclosure of the personal information of a person other than the person making an application for assessed disclosure.

The information I find exempt are names and phone numbers of public officers and members of the public. I am satisfied

the information constitutes personal information for the purpose of this section of the Act.

I am aware that you have knowledge of some members of the public's names. I have however removed names in some cases to protect parties from their identities being disclosed to the public sphere.

16 After considering the public interest test, Ms Bradfield concluded:

Schedule 1 of the Act includes matters to be considered, but is not limited to those matters, and I find to be of particular relevance:

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

(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;

(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;

I find 'harm' to be an important factor in assessing whether it is in the public interest to release or disclose personal information.

Where information is exempt under s36(l) of the Act, I have identified the potential 'harm' related to the release of some personal information and have decided that the information not be disclosed. If the personal information of some individuals were disclosed to the broader public, this could result in potential harm - including but not limited to emotional, financial or reputational - to individuals or a group of individuals.

Taking into consideration the publication by Womenspeak of communications with Libraries Tasmania on their website, I have decided to also redact names of public officers as I consider the release of these names could increase the likelihood of harassment or discrimination should the information be released.

There could be no significant benefit to the public interest in disclosing this personal information. I have therefore decided that on balance, considerations against disclosure of the exempt information outweigh any public interest in favour of

its disclosure. I have therefore decided that it would be contrary to the public interest to disclose the information. This information qualifies as exempt information under section 36 of the Act.

I also note that you have referenced that in your view, extensive chunks of information were redacted upon the basis of Section 36 in the original decision. I note that I have redacted a number of larger sections of information and wish to highlight that this is in the great majority related to duplication of material. Where personal information has been redacted, this is in most cases names, email addresses and personal phone numbers.

Analysis

- 17 The Department has sought to exempt information across the 132 pages of documents found to be relevant to Ms MacGregor's application. For ease of reference, I will use the Department's page numbering system to refer to the information in my analysis.

Section 35 – Internal Deliberative Information

- 18 For information to be exempt from disclosure under s35 of the Act, I must be satisfied it consists of:
 - an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities (s35(1)(b));
 - or a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 19 Once the requirements of one of those subsections is met, I must then be satisfied the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department. Section 35(1) of the Act does not apply to the following:
 - purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3));
 - or information which is older than 10 years (s35(4)).
- 20 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*³

³ [1984] AATA 518 at [14].

where the Commonwealth Administrative Appeals Tribunal (AAT) observed the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.

- 21 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)*,⁴ 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.
- 22 The Department has applied the s35 exemption to 32 pages of information, consisting of emails between public officers in the course of their employment. I am satisfied the majority of relevant information found across 28 of the pages constitutes records of opinions, professional advice, deliberations and discussion of possible actions to be undertaken by the public authority in the course of a deliberative process related to its official business. I am also satisfied the information is not more than 10 years old. Therefore, I consider it is *prima facie* exempt pursuant to s35(1)(a) and (b) of the Act.
- 23 However, I find not all the information contained within the relevant documents is *prima facie* exempt. This information contains factual accounts of actions taken, requests for input from fellow public officers and email salutations.
- 24 Consequently, the following information across the remaining four pages is not exempt and should be released to Ms MacGregor:
 - page 40 – email of 19 March 2024 at 2.48pm, the last sentence of the first paragraph;
 - page 42 – email of 19 March 2024 at 12.35pm, the last sentence of the first paragraph. Email of 19 March 2024 at 12.30pm, the second paragraph;
 - page 83 – email of 17 March 2025 at 10.25pm, the first three words; and
 - page 116 – emails of 20 March 2025 at 1:11 and 1:28pm, the first two words in both emails.

Public interest test

- 25 I now turn to my assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. In making this assessment I am required to have regard to the matters in Schedule 1 and any other information relevant to my decision.

⁴ [1984] AATA 67 at [58].

- 26 Schedule 1 matter (a) – *the general public need for government information to be accessible* – is essentially a restatement of the object of the Act. As such it will almost always be relevant and weighs in favour of disclosure.
- 27 Schedule 1 matter (b) – *whether the disclosure would contribute to or hinder debate on a matter of public interest* – is relevant. Gender identity and inclusion has been a matter of broad public debate and protests and counter protests have taken place within Tasmania.⁵ The release of further information would contribute to this debate and this matter weighs in favour of disclosure.
- 28 Schedule 1 matters (c) – *whether the disclosure would inform a person about the reasons for a decision*, and (d) – *whether the disclosure would provide the contextual information to aid in the understanding of government decisions*, are relevant and weigh in favour of disclosure. The information request relates to decisions of the Department to cancel the two Women Speak Tasmania bookings at Libraries Tasmania, so further information about these decisions would provide insight into the reasoning and context.
- 29 Schedule 1 matter (m) – *whether the disclosure would promote or harm to the interest of an individual or a group of individuals*, was considered *the most pertinent consideration in deciding whether to release this material* by the Department. It found that it weighed against disclosure. While I agree that it is relevant, I do not agree that it weighs against disclosure in relation to s35. The Department does not appear to have considered the value of this information to Ms MacGregor and Women Speak Tasmania. It would clearly promote their interests to receive more information about the cancellation of these bookings. I do not consider this is outweighed by harm to the interests of Department staff, who are performing their regular duties in the knowledge that the work they do is on behalf of the people of Tasmania and subject to the right to information under the Act. Overall, I consider that this matter weighs in favour of disclosure.
- 30 Schedule 1 matter (n) – *whether the disclosure would prejudice the ability to obtain similar information in the future*, is also relevant. The debate surrounding gender identity and the views of groups such as Women Speak Tasmania can become fractious, with strong opinions and clashes at protests between different groups occurring.⁶ While public servants are required to give measured advice and follow correct processes regardless of whether the subject matter is controversial or debated, a chilling effect on the expression of initial ideas and

⁵ Seeder, B., *Competing protests over trans rights to take place outside Tasmanian Parliament* (5 September 2023), The Examiner, www.examiner.com.au/story/8127743/anger-as-tasmanian-parliament-sanctions-clashing-trans-protests/, accessed 11 August 2025.

⁶ See Note 5.

assessments can occur if all information relating to early thinking processes is released. Though this is only slightly, due to the obligation for public officers to be frank and fearless and need for transparency in government operations, I accept this matter weighs against disclosure in relation to this information.

- 31 Schedule 1 matter (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*; has been identified by the Department as relevant, however I do not agree. The type of assessment contemplated in this factor is analogous to examinations, audits or tests, not the assessment of whether a booking could be accepted under Department policies.
- 32 I also consider it relevant to consider the draft nature of some of the information in question. As outlined in the previous external review decision of *Rebecca White and Premier of Tasmania*⁷, unless there are reasons to justify the release, it has been consistent practice to uphold a public authority's finding that early working drafts of documents are exempt under s35. This is because it would be inappropriate for numerous slightly different drafts of a document to be released as a standard practice.
- 33 As outlined in the previous external review decision of *Rebecca White and Department of Premier and Cabinet*,⁸ I consider the inherent reasons for Parliament's inclusion of s35 in the Act, to allow for thinking processes to be explored and options discussed and tested, even if not subsequently adopted, prior to settling on a final direction, also weigh against the release of some of the information. However, this must always be balanced with the need for transparency regarding government operations.
- 34 The assessment and weighting of the various public interest matters involves a consideration of competing factors and recognising not every factor is of equal weight in each circumstance. After considering all relevant matters, including all those set out in Schedule 1 of the Act, I give the greatest weight to the inherent reasons for the s35 exemption. The limited information which has not been released relates to early thinking process of public officers and allows for the exploration, discussion and testing of ideas prior to a final decision.
- 35 Accordingly, I am satisfied the majority of the information under consideration is exempt under s35 and it is not required to be released. My finding does not apply to the following information, which is not exempt and should be released to Ms MacGregor:

⁷ (April 2024), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

⁸ (March 2025), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- page 41 – email dated 19 March 2024 at 1.02pm, except for the first paragraph;
- page 68 – email dated 13 March 2025 at 9.39am;
- page 82 – email dated 17 March 2024 at 11.40am;
- page 97 – email dated 19 March 2025 at 12.09pm; and
- page 106 – email dated 19 March 2025 at 9.47am.

Section 36 – Personal Information of a Person

- 36 For information to be exempt under s36, I must be satisfied its release would reveal the identity of a person other than Ms MacGregor. Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 37 The Department has identified information of this kind, such as names, position titles, email addresses, work phone numbers, and mobile phone numbers of public officers. The Department has also identified information from members of the public who had written to the Department with their concerns regarding Women Speak Tasmania's bookings.
- 38 Aside from some limited exceptions, I am satisfied the relevant information falls within the definition of personal information in s5 of the Act. I consider the information is *prima facie* exempt under s36 of the Act.
- 39 This finding does not apply to certain information which does not contain personal information of any person. The following information is not exempt and should be released to Ms MacGregor:
- page 31 – email of 18 March 2024 at 9.21am, paragraph two, first sentence of paragraph three, paragraph four, the first sentence till the comma if paragraph five, the final line of email body and the sign off *thanks*;
 - pages 75-76 (duplicated on pages 113-115) – email of 14 March 2025 at 2.26pm, all information except the name of the individual;
 - page 89 – email of 18 March 2025 at 1.15pm, paragraph two; and
 - page 91 – email of 12 March 2025 at 8.33am, all information except for paragraph one and the words after the second comma in paragraph five.

Public interest test

- 40 That the information is personal information and *prima facie* exempt does not preclude it from release, if doing so would not be contrary to

the public interest. Accordingly, I must consider again the public interest test and all relevant matters, including all those in Schedule 1 of the Act.

Public officers and employees

- 41 The relevant personal information includes the names of public officers, their email addresses, their telephone (including mobile) numbers and (in two instances) their signatures.
- 42 It has been the consistent position of my office, as well as standard Australian practice, that the personal information of public officers which relates to the performance of their regular duties (such as their name, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption.⁹
- 43 The Department considers there are specific and unusual circumstances in this instance, due to the controversy, harassment risks and heightened emotions regarding the gender identity and inclusion debate. I agree the situation differs to most matters before me and the usual approach may not be appropriate. I will undertake a full public interest test assessment to ascertain if it would be contrary to the public interest to release the relevant personal information.
- 44 The release of signatures of public officers was considered in similar circumstances in the previous external review decision of *Selby Cooper and Department of State Growth*:¹⁰

In relation to s36, I have carefully considered the Department's submissions regarding the signatures of staff members associated with the ATOEP [Automated Traffic Offence Enforcement Program] in Document 1. I have also reviewed recent decisions by the Office of the Australian Information Commissioner, particularly 'AEH' and the Department of Veterans' Affairs (No. 2) (Freedom of information) [2023]¹¹, which addressed concerns about disclosing staff signatures due to the contentious and emotionally charged nature of their work. In that case, both the staff and the Department raised concerns that disclosure could expose staff to targeted harassment.

In 'AEH' the Australian information Commissioner considered whether the staff names and signatures were publicly known or linked to the subject matter. The Commissioner found that the

⁹ See, for example, Tarkine National Coalition and Department of Natural Resources and Environment Tasmania R2202-101 (October 2023) and Thomas Bade and Huon Valley Council R2209-004 (December 2024), both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

¹⁰ (June 2025) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [71]-[74].

¹¹ 'AEH' and the Department of Veterans' Affairs (No. 2) (Freedom of information) [2023] AICmr 75 (28 August 2023)

individuals were only likely to be recognised in connection with the documents by a limited group within the Department, not the broader public.¹²

I am persuaded in this case that similar concerns apply. I accept the contentious nature of work the Department undertakes regarding the ATOEP and that safety risks are heightened due to this. I acknowledge the fact that the staff members names and position titles are visible in the unredacted parts of the documents, making the additional information provided by the release of signatures minimal. Furthermore, the presence of the redaction over the signature block indicates the document has been signed by the relevant public officers, even if the signature itself is not provided.

Accordingly, I have reconsidered the public interest test regarding signatures and attach greater weight to matter (m) regarding the harm to the interests the two relevant staff in Document 1. I find that disclosing their signatures would be contrary to the public interest and they are exempt under s36.

- 45 The Department has sought to exempt the names, signatures, position titles and contact details of non-decision-making staff, while releasing the names of the decision-makers throughout the information found relevant to the applicant's request.
- 46 Schedule 1 matter (a) – *the general public need for government information to be accessible* – is essentially a restatement of the objects of the Act. As such it will almost always be relevant and weighs in favour of disclosure. The relevant individuals are public officers performing their regular duties and there is an expectation of transparency regarding their professional actions and decisions.
- 47 Schedule 1 matter (g) – *whether the disclosure would enhance scrutiny of government administrative processes* – also weighs in favour of disclosure, as it allows the identification of which public officers were involved in the matter.
- 48 I agree with the Department that Schedule 1 matter (m) – *whether the disclosure would promote or harm the interests of an individual or group of individuals* – is the key consideration in this public interest test assessment. The release of the information would promote the interests of Women Speak Tasmania and provide more information about what occurred in relation to the cancellation of these bookings. However, the relevant information relates only to non-decision-making staff and its redaction would not significantly alter the intelligibility of the information.

¹² See Note 11 at [27].

- 49 Due to this minimal promotion of the interests of Ms MacGregor and Women Speak Tasmania, I consider this is outweighed by the harm to the interests of relevant staff which could occur if this information is released. The issue of gender identity in recent years has been the subject of significant public debate, including protests, polarised opinions and documented instances of harassment and violence. The Department has recorded an incident report regarding an abusive phone call relating to the cancellation of the Women Speak Tasmania booking at Burnie Library and decided to hire a security guard for the morning of the 20 March 2024. I consider releasing the personal information of non-decision-making employees in the relevant documents may expose those employees to targeted criticism, harassment or personal risk.
- 50 Schedule 1 matter (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* – has been identified by the Department as relevant. I am not persuaded the disclosure of the names of public officers performing their contracted duties would have the required *substantial adverse effect*. The effect must be substantial and more than speculative or minor and the disclosure of personal information of employees undertaking their regular duties under the Act has been a longstanding practice without such impacts. While I acknowledge the Department considers its ability to manage physical and psychological safety risks for its employees may be impacted if this information was released, I consider such concerns are more appropriately considered in relation to matter (m). I accordingly treat this matter as a neutral consideration.
- 51 The assessment of the public interest test will always involve the balancing of competing priorities and consideration of the specific circumstances relevant to each piece of information against which an exemption has been claimed. In this specific case, I give the greatest weight to matter (m) and consider the potential harm to the interests of non-decision-making public officers outweighs other factors.
- 52 Accordingly, with the exception of their position titles, I determine that the relevant personal information of public officers is exempt under s36 and it is not required to be released to the Ms MacGregor.

Personal information of members of the public

- 53 The Department has claimed that personal information relating to two members of the public is exempt under s36. Both individuals wrote to the Department expressing their concerns about the Women Speak Tasmania bookings. Ms MacGregor indicated in her submissions that she did not seek the names or contact details of members of the public, so this information can be redacted by agreement.

54 This leaves a small amount of information from one member of the public which is not their name or contact details but information in their correspondence which would render their identity reasonably ascertainable. I consider this information is also exempt under s36, as its release may harm the interests of the individual and may limit the ability of public authorities to receive input from the community if they were publicly identified. It is not required to be released to Ms MacGregor.

Preliminary Conclusion

55 For reasons set out above, I determine that exemptions claimed pursuant to ss35 and 36 are varied.

Conclusion

56 As the above preliminary decision was adverse to the Department, it was made available to it on 14 August 2025 under s48(1)(a) to seek its input before finalisation. The Department advised on 28 August 2025 that it would not be making any submissions responding to my preliminary decision. The preliminary decision was made available to Ms MacGregor on 28 August 2025 under s48(1)(b) to seek her input before finalising the decision. Ms MacGregor advised she would not be making any submissions to my preliminary decision.

57 Accordingly, for the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss35 and 36 of the Act should be varied.

Dated: 1 September 2025



Leah Dorgelo
ACTING OMBUDSMAN

Attachment 1

Relevant Legislation

Section 35 – Internal deliberative information

- (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.

(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 (1) 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

(1) 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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

- (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.

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: R2405-016

Names of Parties: Meg Webb and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s30, s31, s35, s36

Background

- 1 In October 2010, Ms Susan Neill-Fraser was convicted of the murder of her de facto partner, Mr Robert Chappell. Subsequent appeals have not overturned the conviction.
- 2 The Honourable Meg Webb MLC (the Applicant) is an independent member of the Parliament of Tasmania representing the electorate of Nelson in the Legislative Council. She has expressed a concern that Ms Neill-Fraser's conviction may have been a miscarriage of justice.
- 3 On 16 October 2023, Ms Webb made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department). Ms Webb sought:

All information in the possession of Tasmania Police and FSST [Forensic Science Service Tasmania] concerning:

- *The crime scene report of FSST scientist Ana Herta dated 12 June 2009 which is referred to in various subsequent FSST reports (e.g. 14 December 2009 and 22 March 2019).*
- *Any emails or other documentation (including any item examination notes) which refer to this report, the work of Ana Herta in the Sue Neill-Fraser case (including draft or finalised statements or reports) or the relevant contents of her 12 June 2009 crime scene report.*
- *All information by way of records, notes, forms, emails, documents, photos etc. completed by, taken or involving Ms Zoe Tuppen from FSST who accompanied Ms McHoul onto the Four Winds yacht in 2009.*
- *The single person DNA profiles for A, B, C, D, F and G (and on which items they were located) regarding the forensic analysis in the Neill-Fraser matter, which is partially reported in the Forensic Biology Report 1 July 2009, including details of any matches to individuals on*

DNA databases (local and national). (Please note, E is Meaghan Vass and H and I are not considered relevant).

- 4 On 18 December 2023, Ms Roslyn French, a delegate under the Act for the Department, issued a decision. Ms French identified and released 608 pages of information in whole or in part and applied ss30, 31, 35 and 36 to exempt some information. Ms French also claimed some information on page 336 as exempt under s63 of the *Forensic Procedures Act 2000* and nominated s30(1)(e) of the Act as an alternative exemption.
- 5 On 22 January 2024, Ms Webb sought internal review and in consultation with Inspector Scott Mackenzie, another delegate under the Act for the Department, some minor refinements to the scope of the request were made.
- 6 On 15 April 2024, Inspector Mackenzie issued the internal review decision. The Inspector released two further documents in part, having applied s36 to exempt some information. A delay in the parliamentary email system meant that the decision was not received by Ms Webb until 22 April 2024.
- 7 Inspector Mackenzie determined that some information had been incorrectly considered to be exempt under s35. Part of this information was released to Ms Webb and part was determined to be exempt under s30(1)(e).
- 8 Finally, Inspector Mackenzie upheld the application of s63 of the Forensic Procedures Act and also proposed an alternative exemption under s30(1)(e) of the Act.
- 9 On 20 May 2024, Ms Webb applied for external review. This was after the expiry of the 20 working day period provided in s44(2) of the Act for external review applications to be made. After considering the circumstances which led to the delay in Ms Webb receiving the internal review decision, the Department, at the request of my office, re-issued the internal review decision in identical terms on 21 June 2024. Ms Webb confirmed she still sought external review, and this could now be accepted under s44 of the Act.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss30, 31, 35, 36 or any other relevant section of the Act. As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment of these exemptions is subject to the public interest test in s33.
- 11 This means that, should I determine the requested information is *prima facie* exempt from disclosure under ss35 or 36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 I include copies of ss30, 31, 35 and 36 of the Act at Attachment 1.

13 Copies of s33 and Schedule 1 are also at Attachment 1.

Submissions

Applicant

14 In her application to the Department for internal review, Ms Webb made a number of submissions, including:

...there was no schedule of documents provided as is usual best practice... Given this was a detailed and complex response, a Schedule of Documents would have been particularly helpful. The absence of a Schedule of Documents made it difficult to identify the date of the document in some instances and analyse the response easily. This made it extremely difficult to link the material provided with the information sought.

Page 58 of the [Ombudsman's] Manual states that the Schedule of Documents should be supported by reasons which elaborate upon the brief information given in the Schedule.

...

In contrast, there have been no specific reasons given for each of the exemptions claimed... Rather, a general overview only is provided...

15 Ms Webb elaborated on this issue in her application for external review, setting out that:

In the absence of a clear Schedule of Documents, it was impossible to know what some of the provided documents were, who they were authored by, the date of production etc. For example, it was very difficult to identify critical documents such as the two versions of the major FSST Forensic Biology Report from 2009. It was only upon careful and close inspection that we were able to determine that the first draft of the document had been released, a document I understand may not have been previously disclosed.

Further, it was also difficult to understand whether attachments to documents had actually been provided in the response.

...

I would argue that standard practice should be elevated to recommended/best practice as a matter of public interest and in accordance with the objectives of the Act.

...

It would be particularly useful to have a Schedule of Documents released as part of the routine disclosure process in complex

responses involving multiple documents, photos, images and multiple versions of reports, for example.

- 16 In her application for internal review, Ms Webb also made submissions regarding the related issue of the Department's reasoning regarding its application of exemptions, particularly those made pursuant to s35 of the Act, which included the following:

The response cover letter ... stated that the information contained within the forensic examinations, exhibits and results, emails and crime scene notes included public officers' personal opinions and deliberations. She was satisfied that it would be contrary to the public interest to disclose the aforementioned information as it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of entry cannot be substantiated and may be misinterpreted.

This argument raises concerns, as it is necessary to first determine whether the exemption applies or not. If it does apply, it is then necessary to consider the public interest test... a determination must then occur as to whether it would be contrary to the public interest to disclose it.

...
There are no properly stated reasons for the exemptions and reasons claimed (in accordance with the requirements of s.22 of the Act).

...
There is inadequate explanation in this disclosure of how the public interest has been taken properly into account for relevant exemptions such as ss.30 – see subsections (2) and (3), 35 and 36.

...
Section 22(2)(d) states that if the decision involves or relies upon consideration of the public interest in the application of a provision of the Act, the decision must state the public interest considerations upon which that decision was based. The letter of response states the following:

Section 35 and 36 exemptions require consideration of the public interest test. In this instance, I am satisfied it would be contrary to the public interest to disclose the exempt information.

There is then an analysis of the public interest test ... which states the law correctly but then provides a general and superficial analysis – certainly not a line by line assessment.

- 17 Ms Webb then identified some information claimed to be exempt which appeared to be over ten years old, and therefore not eligible for exemption under s35, before continuing:

In addition ... when considering the issue of public interest pursuant to s.33, Schedule 2(1)(d) (Matters irrelevant to the Public Interest) provides that the decision maker is not to consider whether the disclosure might cause the applicant to misinterpret or misunderstand the information contained in the request document because of an omission or for any other reason...

The RTI 444/23 response ... twice refers to the dangers of misinterpretation ... in relation to the s.35(1) exemption and the public interest test.

...

This raises concerns over whether the irrelevant matters listed in Schedule 2 were considered appropriately or not...

- 18 Ms Webb addressed what she considered to be the relevant matters to be considered under the public interest test, indicating:

Only one matter, the general public need for government information to be accessible ... is listed as favouring disclosure when there are numerous other matters which should have been considered. The ... response letter states that the delegate considered that the remaining matters in Schedule 1 of the Act to be irrelevant to my application. It is very difficult to understand how matter (j), for instance, which relates to the administration of justice could be irrelevant to this disclosure.

I consider that there are several other issues in Schedule 1 that should have been considered such as....:

- b) ...the Sue Neill-Fraser case was, and remains, a matter of public interest;*
- c) ...the information would assist in understanding a decision of guilty in the Sue Neill-Fraser matter and the failure of subsequent appeals;*
- d) ...an understanding of critical forensic issues in this case would assist in understanding the government's reluctance to intervene in this matter...;*
- e) ...the response would help to demonstrate the independence/impartiality, or otherwise, of the FSST from its parent organisation, the Tasmania Police;*
- f) ...the provision of the forensic information in the case including critical DNA results would certainly enhance scrutiny of*

important decisions made in the Sue Neill-Fraser investigation and prosecution;

g) ...the disclosure would enhance scrutiny and understanding of the current administrative processes and interface between FSST and Tasmania Police – such interface is critical to criminal justice...;

h) ...RTI is one of the few tools available to persons who may have been wrongly convicted. The ability of convicted persons to access information which may be critical to their ability to launch an appeal against conviction must be a public interest consideration;

j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – this is a critical consideration and highly relevant to this matter;

m) ...the disclosure would promote the interests of Sue Neill-Fraser, her family. It would promote the importance of the rule of law and reassure the community that the government and its agencies are transparent and accountable; and

o) ...the disclosure would not impact on the effectiveness of crime scene investigation or DNA testing and reporting, other than in a way that such scrutiny may enhance future operations and public confidence

- 19 Ms Webb went on to address the Department's consideration of factors weighing against disclosure:

The section in the ... cover letter of response dealing with the public interest test lists provisions (n) and (u) as favouring non-disclosure.

It is unclear how the information sought by me would prejudice the ability to obtain similar information in the future. The information was gained by forensic examination of exhibits and their analysis. It is not subject to the willingness of community members or witnesses to come forward in future investigations, for example. The public would surely expect transparency and accountability, where appropriate, in relation to forensic testing and police investigation in relation to serious crime matters where a person may have been wrongly imprisoned for 13 years...

The response also states that the criterion in (u) as to whether the information is wrong or inaccurate favours non-disclosure. Surely the consideration should not be one of "absolute accuracy" as has been stated. It is appreciated that the material

is scientific material that has to be interpreted and considered by the courts, including by way of cross-examination and other expert evidence. It appears curious to suggest that the release of forensic/scientific information recorded by qualified scientists from a NATA accredited laboratory would prevent the frank exchange of ideas and opinions between public officers in the future. Forensic reports are generally provided with appropriate assumptions, limitations and qualifications.

- 20 Ms Webb also made submissions regarding the Department's application of s31 (legal professional privilege) to exempt some information:

I would ask that the materials redacted by claiming the s.31 exemption relating to LPP be reviewed to ensure that no information has been withheld inappropriately.

In relation to the LPP issue, I refer in particular to pages 431 to 432 from July 2018 which importantly seem to relate to additional forensic testing and a letter from the Neill-Fraser legal team...

I also ask the p.457 be reviewed to ensure that appropriate redaction has occurred. This relates to the provision of forensic testing results in February 2021. Such information would not be privileged from production in legal proceedings.

Department

- 21 The Department was not required to provide specific submissions for this external review, as it had provided its reasoning in its decisions.
- 22 In its initial decision, the Department provided reasoning in a section headed *Section 30(1)(e) Exemption*, however it actually addressed the operation of s30(1)(c) in the following terms:

The information assessed includes information contained within the forensic biology report and an email from Pam Scott of Forensic Science Service Tasmania (FSST). The information assessed includes methods and procedures that are necessary for FSST to use in the analysing and testing of exhibits and this information is exempt pursuant to Section 30(1)(c) of the Act...

Exemptions applied pursuant to Section 30 of the Act are not subject to the public interest test at Schedule 1. Notwithstanding that, I am [sic] satisfied that disclosure of any information relating to any such methods and procedures, would assist persons in obtaining authoritative knowledge of those methods and procedures and hence compromise their future effectiveness.

- 23 In relation to exemptions applied under s31, the Department's initial decision included the following:

The information assessed includes correspondence prepared by the Office of the Director of Public Prosecutions in reference to investigations managed by DPFEM, none of which would have been subject to release during any subsequent court proceedings. Consequently, an exemption pursuant to Section 31 of the Act has been applied to that information.

Exemptions applied pursuant to Section 31 of the Act are not subject to the public interest test at Schedule 1. Notwithstanding that, I am satisfied that disclosure of this information by DPFEM, in its business of law enforcement, would be contrary to the public interest.

- 24 The matter of legal professional privilege was also addressed by the Department in its internal review decision as follows:

I have reviewed all exemptions under section 31 and can confirm that all correspondence is between the legal practitioner and the client (in this case, DPFEM).

I also wish to refer you to the definition of confidential communication as defined in section 117 of the Evidence Act 2001 ... It is defined as:

confidential communication means a communication made in such circumstances that, when it was made –

- (a) the person who made it; or
- (b) the person to whom it was made –

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

I have reviewed the communication that was exempted under section 31 of the Act in the original decision... on pages 431, 432 and 457.

My fresh decision is that in any ordinary circumstances, it would be fair to suggest that any communication between the Director of Public Prosecutions and their client has implied obligations not to disclose contents outside of the investigative structure. Additionally, in this case, all communications explicitly state, "This email and any attachments are confidential..." Therefore, I am without a doubt that they are classified as confidential communications. The content of these emails will remain redacted.

- 25 In relation to exemptions applied under s35 of the Act, the Department's initial decision concluded that:

Information contained within the forensic examinations, exhibits and results, emails and crime scene notes include public officer's [sic] personal opinions and internal deliberations. I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of entry cannot be substantiated and may be misinterpreted.

- 26 The initial decision then considered the application of s36, asserting that:

... the personal information provided by or about a person is a vital tool in assisting Tasmania Police with the prevention, detection, and investigation of daily life incidents. The supply and source of information must be protected so that similar information is forthcoming and 'free flowing' in the future without any reasonable concern from the person providing it.

... I can advise that I consulted with five third parties. One third party responded in writing and did consent to their information provided to be released in full and two third parties consented to part of their information provided be released. Two third parties did not respond to this office, which, naturally does not imply consent.

- 27 The Department then addressed the public interest test in s33 in relation to all the information it assessed as exempt under ss35 and 36, relevantly indicating:

I consider the following matters in Schedule 1 of the Act ... to favour disclosure of the exempt information:

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

Conversely, I consider the following matters in Schedule 1 of the Act to favour non-disclosure of the exempt information:

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

I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as it is third parties' personal information that is private, and information provided in confidence that would reasonably not be expected to be disclosed. The release of this information would be reasonably likely to harm the ability to obtain similar information in the future and therefore hinder the investigation process.

(u) whether the information is wrong or inaccurate.

Information contained within the forensic examinations, exhibits and results, emails and crime scene notes include [sic] public officer's personal opinions and internal deliberations made at the time of entry without completion of the investigation/enquiry and knowledge of all facts. I am satisfied 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 public officers in future leading to less robust decision making against the public interest.

I consider the remaining matters in Schedule 1 of the Act to be non-relevant to your application.

- 28 The Department's application of s35 was also addressed by Inspector Mackenzie in his internal review decision as follows:

Ms French [in the initial decision] used arguments that it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of the entry cannot be substantiated and may be misinterpreted. Although I concede the wording of her reasoning could be misconstrued, I am inclined to interpret the statement in what I consider was the intent of the wording and the most likely and reasonable explanation of her reasoning. Applying what is reasonable, I interpret what Ms French was reasoning as that she had applied section 35 because it would disclose the internal thinking process of a public authority, and then she was applying section 35 because the accuracy was unsubstantiated, which is a consideration for public interest under Schedule 1(u).

Having said that ... I wish to specifically address the points at which you have requested a review...

Pages 459-460 – I note that the redactions in the body of this email were exempted under section 35(1). You are correct in saying that section 35(4) of the Act means that this exemption cannot be applied. I have reviewed the document again and provided a fresh decision. The material that was originally redacted using section 35(1), is still in fact exempt from release under section 30(1)(e). The relevant material relates to information gathered for forensic testing. I have released the second paragraph which was originally redacted under s35, as I am of the opinion that this exemption does not apply to this section of the information...

...

I acknowledge the presence of irrelevant considerations in Schedule 2, and I concur that a misinterpretation of information is not pertinent to a non-disclosure. In my fresh decision, I have considered this along with all other considerations in Schedule 1.

- 29 Regarding the lack of a schedule of documents, Inspector Mackenzie submitted as part of his internal review that:

While the [Ombudsman's] Manual suggests the use of a Schedule of Documents, it's important to note that neither the Manual nor the Act mandates its inclusion. In this particular case, the information sought is so broad and voluminous, a Schedule of Documents would not be practical without a devotion of significant resources to achieve. Moreover, within DPFEM, the practice of explicitly identifying sections on redacted documents offers more contextual guidance than a Schedule of Documents would. Other agencies tend to redact documents by simply marking the document with a black redaction, which a Schedule of Documents would then assist to identify which redactions would apply to which pages of the documents. DPFEM's approach ensures that the exemptions are clearly marked on each page. This approach, combined with the Statement of Reasons, complements the report provided with the disclosure...

In conclusion, the absence of a Schedule of Documents in the original disclosure was not unreasonable, unlawful, and aligns with standard practice within DPFEM. For those reasons, it is not included within my fresh decision.

Analysis

- 30 The Department provided my office with unredacted copies of the 608 pages of information originally released to Ms Webb, along with attachments to pages 434 and 441, which were released as a result of the internal review. For ease of reference, in my analysis I will use the Department's page numbering to refer to the relevant information.
- 31 In her application for external review, Ms Webb set out her four narrow areas of concern. These were:
- the failure to provide a schedule of documents;
 - the alleged failure to provide a statement of reasons with relevant decisions;
 - the use of 'not relevant' to redact information responsive to her request; and
 - the use of s31 to redact entire pages of information.

- 32 However, given that one of those areas concerned the adequacy of the Department's reasoning, I consider it appropriate to conduct an external review of the Department's entire internal review decision.

Preliminary issue one – Failure to provide a schedule of documents

- 33 Ms Webb raised concerns that the Department did not provide her with a schedule of documents to accompany the release of information. Provision of a schedule is not a mandatory requirement under the Act, and I note Inspector Mackenzie's internal review comment regarding the reasons this did not occur - namely the significant resources needed to compile a schedule for this broad and voluminous application.
- 34 A schedule of documents is, however, of great assistance to an applicant when a large amount of information is released, and I encourage the Department to consider providing one where practicable in future.
- 35 I chose not to exercise my power under s47(1)(n) to direct the Department to provide a schedule of documents to Ms Webb, however, as I considered that the Department had adequately identified the type and purpose of redactions in the relevant material through notations on the documents.

Preliminary issue two – Failure to provide a statement of reasons

- 36 Ms Webb raised concerns in her request for internal review, as well as in her application to my office for external review, that the Department had not provided her with properly stated reasons for the exemptions it had applied to the information.
- 37 Section 22(2)(a) of the Act provides that a public authority or Minister must state the reasons for a decision to exempt information and, if applicable, the public interest considerations upon which that decision was based. I note that Ms French, in her original decision, did provide brief reasons for the exemptions she applied to the information and these reasons were challenged by Ms Webb in her request for internal review.
- 38 Inspector Mackenzie, in the internal review decision, generally adopted the reasoning of the initial decision except for those matters he addressed as a direct response to Ms Webb's submissions. Section 43(5) of the Act does provide that an internal review decision is to be given in the same manner as a decision in respect of the original application, however it is appropriate to confine an internal review to a more limited basis than the original decision if these are the only matters in dispute. In this matter the Inspector indicates that there was some consultation with the Applicant on 20 March 2024 regarding the scope of review and it was appropriate for him to provide a specific response to concerns Ms Webb raised.
- 39 There was ultimately only a small amount of information to which exemptions were applied and a clear indication was provided of the section of the Act being relied upon for each exemption on each document. Appropriate reasoning was

set out in the initial decision, including the public interest factors considered, and adopted in the internal review.

- 40 While I agree with Ms Webb that the internal review decision should have been more ‘stand alone’ rather than referring back to the original decision regarding exemptions applied, I am ultimately satisfied that the reasoning provided by the Department, while not fulsome, was adequate.

Preliminary issue three – Redaction of information as ‘not relevant’

- 41 In her application for external review, Ms Webb also raised a concern regarding the Department’s use of the words *Not Relevant* in relation to a number of redactions, where the information was considered to be beyond the scope of the original request, in particular on page 446.
- 42 It is common practice for information which is not within the parameters of an assessed disclosure request to be redacted and marked ‘out of scope’ or ‘not relevant’, as has occurred here. While the release of the maximum amount of official information should occur pursuant to s3, the removal of information which is not responsive to the request for information is permitted under the Act.
- 43 The assessment as to whether information is out of scope of a request is not one which attracts a right of review under Part 4 of the Act, but I have examined the relevant information and am satisfied that the Department’s determination is one reasonably available to it due to the parameters of Ms Webb’s request.

Preliminary issue four – Forensic Procedures Act 2000

- 44 On page 336, the Department applied a redaction which is labelled s63 *Forensic Procedures Act [2000]*. This section, relevantly, provides:

63 – Disclosure of information

- (1) *Except as otherwise provided by this section, a person who has access –*
- (a) *to any information stored on the DNA database system; or*
- (b) *to any other information revealed by a forensic procedure carried out on a person under this Act or a corresponding law –*

must not intentionally or recklessly disclose, or cause the disclosure of, that information.

Penalty: Fine not exceeding 100 penalty units or imprisonment for a term not exceeding 2 years, or both.

...

(4) Subsection (1) does not apply to information that cannot be used to discover the identity of any person.

- 45 The *Forensic Procedures Act 2000* does not specifically provide for the exclusion of the Act, and information responsive to an application for assessed disclosure must be assessed against the provisions of the Act before it can be claimed to be exempt. Information cannot be “exempt” under the *Forensic Procedures Act* but its provisions can be considered in assessing whether an exemption under the Act is relevant.
- 46 In both the original and internal review decisions, the Department set out that the relevant information is also exempt under s30(1)(e) of the Act. For information to be exempt under this section, I must be satisfied that its disclosure would, or would be reasonably likely to, *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.*
- 47 There is no information before me to indicate the purpose for which the information in the relevant document was gathered, collated or created. This being the case, I am not satisfied there is a sufficient nexus between this information and the general category of intelligence information provided for in s30(1)(e), notwithstanding the reference in the section to forensic testing.
- 48 I consider that the more appropriate provision of the Act is s30(1)(a)(ii) and so I will assess the information under that section in the following analysis.

Section 30 – information relating to enforcement of the law

Section 30(1)(a)(ii)

- 49 The Department has determined not to disclose the DNA profiles in a table on page 336 of the information on the basis that its release would be incompatible with an offence provision in s63 of the *Forensic Procedures Act 2000*. As discussed, I consider the most appropriate exemption for consideration in these circumstances would be s30(1)(a)(ii).
- 50 For information to be exempt under s30(1)(a)(ii), I must relevantly be satisfied that disclosure of the information under the Act would, or would be reasonably likely to, prejudice:
 - (ii) the enforcement or proper administration of the law in a particular instance.*
- 51 The word ‘prejudice’ is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally.*¹
- 52 There is, in my view, no question that the disclosure of the DNA profiles in this table would reveal information stored on the Tasmanian DNA database system.

¹ Definition of prejudice, Macquarie Dictionary online, available at www.macquariedictionary.com.au accessed on 2 May 2025.

This would constitute an offence under s63(1) of the Forensic Procedures Act, unless it fell into the relevant scenarios provided for in s63(2) or (3) of that Act. There is no indication that these circumstances are applicable to this information.

- 53 In her application for internal review, Ms Webb raised s63(4) of the Forensic Procedures Act, which provides that *Subsection (1) does not apply to information that cannot be used to discover the identity of any person*, and submitted:

Hence, if the information does not identify an actual individual, it should be disclosed.

Additionally, where large tracts of information in this response have been redacted on the basis of s.63 of the Forensic Procedures Act 2000, we would seek a review of the entire response with a view to providing all information in redacted sections which does not identify a specific individual i.e. the name of the person can be simply redacted.

- 54 I do not agree with this submission. The purpose of a DNA database is to store genetic information which can then be matched to a sample and so used to discover the identity of an individual. Merely redacting a name does not, in my view, mean that a DNA profile cannot be used to discover the identity of a person.
- 55 This being the case, I am not persuaded that the dis-application provision in s63(4) is relevant. I consider that to release the relevant DNA information on page 336 would be reasonably likely to prejudice the proper administration of the law, namely s63 of the Forensic Procedures Act. I therefore determine the information previously claimed to be exempt under that Act is exempt under s30(1)(a)(ii).
- 56 The factors in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 30(1)(c)

- 57 The Department has sought to exempt further information under s30(1)(c). For information to be exempt under this subsection, I must be satisfied that its disclosure *would, or would 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.*
- 58 The Department has applied s30(1)(c) to exempt information on pages 430 and 464. The redacted information on page 430 concerns differences in procedure involving a newer testing product and general information regarding adding or removing profiles from a national DNA database. There is no sensitive

information included and no indication that disclosure of the information will prejudice the effectiveness of any procedures used by Forensic Services.

- 59 The information on page 464 claimed by the Department to be exempt is even more innocuous and merely refers to some advantages of the newer test. It is difficult to see how the release of this information will allow any person to circumvent any method or procedure. I consider that the Department has not satisfied its onus under s47(4) of the Act to show why this information should be exempt. I determine that the information on these two pages should be released to Ms Webb.

Section 30(1)(e)

- 60 The Department, on internal review, amended the exemptions claimed on pages 459 and 460. Information which was initially claimed to be exempt under s35 was identified as being over ten years old and therefore not eligible for exemption under that section. The Department then applied s30(1)(e) to exempt the same information.
- 61 As noted, for information to be exempt under s30(1)(e), I must be satisfied that its release would *disclose information gathered, collated or created for intelligence, including but not limits to databases of criminal intelligence, forensic testing or anonymous information from the public.*
- 62 The word ‘intelligence’ is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as:
- 4. *knowledge of an event, circumstance, etc., received or imparted; news; information:* military intelligence; intelligence relating to bushfire occurrences.
 - 5. *the gathering or distribution of information, especially secret or military information which might prove detrimental to an enemy.*
 - 8. Obsolete *interchange of information, thoughts, etc., or communication.*²
- 63 I have examined the relevant information and am satisfied that it was gathered, collated or created for the overarching purpose of intelligence and is therefore exempt from disclosure under s30(1)(e). The factors listed in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 31 – Legal professional privilege

- 64 The Department sought to exempt some information under s31. For information to be exempt under that section, I must be satisfied that it is of *such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.*

² Definition of intelligence, Macquarie Dictionary online, available at www.macquariedictionary.com.au accessed on 7 May 2025.

- 65 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between clients and their lawyers, to enable lawyers to give proper legal advice.³ It is a common law principle which protects the confidentiality of communications made between lawyer and client if they were made for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation.⁴ This privilege also applies to advice provided by in-house lawyers.⁵
- 66 The Department has applied s31 to exempt information on pages 431, 432 and 457. Upon reviewing the information, it is clear that those pages contain emails exchanged between Tasmania Police, Forensic Services and the Office of the Director of Public Prosecutions concerning forthcoming litigation. There is no indication that privilege has been waived and, accordingly, I determine that the information is exempt under s31.
- 67 This being the case, there is no need for me to address the Department's submission regarding *confidential communication as defined in section 117 of the Evidence Act 2001*.
- 68 Legal professional privilege does not attach to a document or email per se, but to the communication recorded within it.⁶ Therefore, my finding in this regard does not extend to information contained in the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers contained in these emails. This information was not communicated between a lawyer and client for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation. This information is not exempt and should be released to Ms Webb.

Section 35 – Internal deliberative information

- 69 The Department has sought to exempt information pursuant to s35. For information to be exempt from disclosure under that section, I must be satisfied that it consists of:
- an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities (s35(1)(b)); or

³ *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ.

⁴ *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, where the High Court re-affirmed the 'dominant purpose test' established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁵ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30.

⁶ *Commissioner of the Australian Federal Police v Propend Finance* (1997) 188 CLR 501 per McHugh J.

- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 70 Once the requirements of one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process related to the official business of the Department.
- 71 Section 35(1) of the Act does not apply to the following:
- purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information which is older than 10 years (s35(4)).
- 72 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*⁷ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be factual in quite unambiguous terms.
- 73 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)*,⁸ 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*.
- 74 The Department has applied s35 to exempt information on the following pages: 128, 130-142, 177, 179, 200, 272, 274, 337, 340-342, 354, 408, 411, 456, 538, 549 and 577.
- 75 I have examined the relevant documents and note that the Department did not adopt a consistent manner of identifying the date each document was created. It appears the information contained in the following documents and claimed to be exempt under s35 was created on:
- | | |
|------------------------------------|-----------------|
| • page 138 | 29 January 2009 |
| • pages 128, 130-137, 139-140, 408 | 27 January 2009 |
| • pages 177, 179 | 30 January 2009 |
| • pages 200, 272, 274, 340, 342 | 12 March 2009 |
| • page 341 | 11 March 2009 |
| • page 354 | 13 March 2009 |

⁷ [1984] AATA 518 at [14].

⁸ [1984] AATA 67 at [58].

- page 538 1 July 2009
 - pages 549, 577 10 June 2009
- 76 Section 35(4) of the Act provides that information more than ten years old is not eligible for exemption under s35, and accordingly these documents are not exempt and should be released to Ms Webb.
- 77 In addition, I have examined pages 141 and 142 and am unable to determine when the very small amount of information claimed to be exempt under s35 was created, though it seems likely to have been in early 2009. I therefore determine that the Department has not discharged its onus under s47(4) of the Act to show that the information should not be disclosed and it is not exempt under s35, and these two pages should be released to Ms Webb.
- 78 I have examined the remaining pages 337, 411 and 456, to which the Department has applied s35 to exempt some information. They contain communications between Tasmania Police, Forensic Services and the Office of the Director of Public Prosecutions containing opinions of officers relating to the official business of the Department. I am satisfied that the information is not more than ten years old and is therefore *prima facie* exempt under s35(1)(a).

Section 33 – Public interest test

- 79 Section 35 is subject to the public interest test contained in s33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. In making this assessment I am required to have regard to, at least, the matters in Schedule 1.
- 80 Schedule 1, matter (a) – the general public need for government information to be accessible – is essentially a restatement of the objects of the Act and as such will almost always be relevant and weigh in favour of disclosure.
- 81 Schedule 1, matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant. The trial and conviction of Ms Neill-Fraser, along with her subsequent appeals, generated a considerable amount of national public debate involving prominent members of the legal profession, journalists, activists and politicians. More importantly, continued public confidence in the outcome of criminal trials is a matter of significant public interest. This matter therefore weighs in favour of disclosure.
- 82 Schedule 1, matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – was identified by Ms Webb as a *critical consideration and highly relevant to this matter*. I agree that this matter is relevant but consider that it weighs against disclosure, rather than in favour as argued by Ms Webb. While I agree that the prevention of miscarriages of justice is crucial, it is also essential for investigators and prosecutors to be able to have a robust exchange of ideas and opinions regarding the meaning and significance of various pieces of evidence. If investigators believe these discussions could be

routinely released through the right to information process, they are likely to be inhibited, resulting in less rigorous analysis and potentially flawed investigative outcomes.

- 83 Ms Webb also identified Schedule 1 matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – as relevant because the *ability of convicted persons to access information which may be critical to their ability to launch an appeal must be a public interest consideration*.
- 84 I do not agree with this submission. I do accept that the ability of convicted persons to appeal their convictions is important, however I note that this matter has been the subject of several appeal hearings. It should be noted that evidence relied upon by the Crown is able to be examined and challenged by opposing counsel at both trial and appeal. The right to information process is not the key mechanism to obtain relevant information in such matters.
- 85 Despite this, I agree that these matters weigh in favour of release, as scrutiny of relevant government information when there are concerns of miscarriages of justice is important.
- 86 Schedule 1, matter (u) – whether the information is wrong or inaccurate – was referred to by the Department because the accuracy of the information was *unsubstantiated*. Given that the Department is uncertain whether the information is in fact wrong or inaccurate, I do not accept this factor is relevant.
- 87 I note that Schedule 2, matter 1(b) provides that it is an irrelevant consideration in the public interest test whether disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information. I caution the Department to ensure that it does not place weight on irrelevant matters, such as any assumption that those receiving the information would not understand its unproven or theoretical nature. Parliament has explicitly instructed that this must not be taken into account.
- 88 The assessment of whether disclosure of information is contrary to the public interest will always involve the balancing of competing priorities and consideration of the specific circumstances relevant to each piece of information against which an exemption has been claimed. In this case, I give the greatest weight to matter (j), allowing for robust and confidential discussions, opinions and recommendations between investigators.
- 89 Accordingly, I determine that the information on pages 337 and 456 is exempt under s35(1)(a) and is not required to be released. However, the information on page 411 is not exempt and should be released to Ms Webb.

Section 36 – Personal information of person

- 90 For information to be exempt under s36 of the Act, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

91 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years

92 The Department has applied s36 to exempt information on numerous pages. Exemptions have been applied to direct phone, mobile and email contact details of members of Tasmania Police and Forensic Services, the name of an external professional, and members of the community. It has also applied s36 to exempt the dates of birth of some named persons. I am satisfied that this information falls within the definition of personal information in s5 of the Act and there is no suggestion that any of the persons concerned have been dead for more than 25 years. Accordingly, I am satisfied that the information is *prima facie* exempt under s36 of the Act.

Public interest test

93 That the information may be considered personal information and therefore *prima facie* exempt does not preclude it from being released, if doing so would not be contrary to the public interest.

Officers and employees of public authorities

94 It has been my consistent position, as well as standard Australian practice, that the personal information of officers and employees of public authorities which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether an officer is a current or former employee is not relevant to the assessment under s36 of the Act.

95 One exception in this regard are direct and mobile phone numbers and email addresses, which I have consistently found to be exempt under s36 where they are not routinely released to the public. It is valid for public authorities to limit the release of direct contact details of staff to ensure public enquiries are able to be directed through appropriate channels.

96 Accordingly, except for direct contact details not normally released to the public, the personal information of employees of public authorities is not exempt and should be released to Ms Webb.

External parties

97 On pages 397, 399, 400 and 501, the Department has applied s36 to exempt the personal information of a scientist of the NSW Forensic and Analytical Science Service. This person has a public profile in the field, is acting in their

professional capacity, has agreed to be bound by the NSW Expert Witness Code of Conduct and has signed an Expert Certificate regarding an analysis performed in 2017.

- 98 There is no reason to believe the release of this person's information relating to their professional duties would be of any concern. The information is therefore not exempt under s36 and should be released to Ms Webb.

Community members

- 99 The Department has applied s36 to exempt the personal information of community members, including names, dates of birth and addresses. There is no information to indicate the circumstances under which these details were provided to, or obtained by, investigators. I am satisfied that the information would not add significantly to the released information, and there is the possibility of harm to the community members if their personal information is released. Accordingly, with one exception, the remaining personal information identified by the Department is exempt under s36 and is not required to be disclosed. That exception relates to an address on pages 505, 541, 542 and 551 which has already been released to Ms Webb on page 142.

Preliminary Conclusion

- 100 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to ss30, 31, 35 and 36 are varied.

Response to the Preliminary Conclusion

- 101 As the above preliminary decision was adverse to the Department, it was made available to it on 16 May 2025 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 102 On 28 May 2025, Sergeant Lee Taylor, in a letter dated 19 May 2025, advised that the Department *supports the conclusions of the preliminary decision, and will provide the required information to the applicant.*
- 103 On 28 May 2025, upon her request, the preliminary decision was also made available to Ms Webb to seek her input prior to finalisation, in accordance with s48(1)(b) of the Act.
- 104 On 6 June 2025, Ms Webb identified a number of *Key Issues* and made submissions in relation to those issues. Relevant extracts from those submissions are set out below.
- 105 Ms Webb again raised the Department's use of the term *Not Relevant*, in particular in relation to page 446:

In my application for Internal Review I referred to the use of "NR" at pp.5-6 and referred to the critical issue of the hair at p.446... This issue relates to a FSST forensic report from 24 February 2021 which refers to the testing of item 177 "Hair in paper fold" or "Hair root" with the results redacted.

...

It would be appreciated if you could again check this particular item to ensure that information relevant to the request has not been inappropriately redacted.

- 106 Ms Webb then commented upon the quality of some of the documents originally provided to her:

Inspector Mackenzie agreed that pages 437, 439, 441 and 453 were unreadable in the assessed disclosure and provided a fresh copy of those documents...

- 107 Regarding the lack of a schedule of documents, Ms Webb commented:

...The nature of the exemptions might be clear but the nature of the document, the date it was created, the version of the document and the author of the document are not necessarily clear in the absence of a schedule. It was also very difficult to determine which documents were attachments to other disclosed documents.

It is sometimes impossible to know what documents are without some contextual information...

It is also not immediately apparent which particular pages are responding to each of the four sections contained in the original RTI request.

I would ask that your Office consider making the provision of a Schedule of Documents ... a mandatory aspect of assessed disclosures where a large volume of material is involved.

- 108 Ms Webb also contested the application of the public interest test in s33 of the Act:

You stated that if investigators believed ... discussions could be routinely released through the RTI process, they are likely to be inhibited, resulting in less rigorous analysis and potentially flawed investigative outcomes.

I would also ask that you consider that the investigation under scrutiny is completed and most actions occurred many years ago, particularly in 2009 and the immediately following years. There is also a strong public interest regarding the accountability of the investigating agency and others for the ethical, efficient and effective discharge of their functions

Further Analysis

- 109 Ms Webb's submissions closely mirror the concerns she raised when requesting internal and external reviews, which were before me when I made my preliminary decision and it is not necessary for me to repeat discussion of

these points. However, I consider it appropriate for me to make some brief comments following these further submissions.

- 110 Parliament did not make the provision of a schedule of documents a mandatory component of a release of information following an application for assessed disclosure. I do have power under s47(1)(n) of the Act to direct a public authority to provide better reasons for a decision, including (if necessary) a schedule of relevant information, however I did not consider such a step was necessary on this occasion. I have consistently encouraged public authorities to provide such a schedule where practicable in order to assist applicants and will continue to do so into the future. I accept that Ms Webb would have found a schedule particularly useful in this matter.
- 111 I have carefully considered Ms Webb's submissions regarding the public interest test, particularly in relation to the application of s35 and I note that only two documents were ultimately found to be exempt under this section. Also, section 35 cannot be applied to exempt information created in 2009 and this older internal deliberative information will be released to Ms Webb. I have not altered my conclusions regarding the weighting of the public interest factors on further review.
- 112 I have again reviewed the information considered by the Department to be not relevant and remain of the view that this determination is one that was reasonably available to the Department.
- 113 Finally, Ms Webb's concerns regarding the quality of some documents were addressed in Inspector Mackenzie's internal review and therefore not required to be again addressed by me. It is clearly poor practice that information was provided in an unreadable format but this was promptly rectified and it is not apparent at this time that any other action is needed.
- 114 Ultimately, I am not persuaded I should alter my determinations and reasoning as set out in the preliminary decision.

Conclusion

- 115 For the reasons set out above, I determine that exemptions claimed pursuant to ss30, 31, 35 and 36 are varied.
- 116 I apologise to the parties for the delay in finalising this decision.

Dated: 11 June 2025



Richard Connock
OMBUDSMAN

Attachment 1 – Relevant legislation

30. Information relating to enforcement of the law

(1) 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 (1) 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 1 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.

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.

35. Internal deliberative information

(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.

(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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

36. Personal information of person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

33. Public interest test

- (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.

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.

**Right to Information Act Review****Case Reference:** R2503-001**Names of Parties:** James Davis and Circular Head Council**Reasons for decision:** s48(3)**Provisions considered:** s32, s37, s45(1)(e)

Background

- 1 Mr James Davis holds concerns about the proposed northern and western boundary consolidation and lease expansion of Stanley Caravan Park, which operates on Circular Head Council (Council) owned land.
- 2 On 21 November 2024, Mr Davis submitted an assessed disclosure application to Council under the *Right to Information Act 2009* (the Act) which Council accepted on 25 November 2024. Mr Davis' application was particularly detailed and contained requests for the following information:

1. Lease Agreement and Related Documents:

- A complete copy of the lease agreement signed around June 2023 with the commercial operator of the Stanley Caravan Park, including all annexures, schedules, and attachments.
- Copies of addendums, amendments, or stipulations related to the expansion and consolidation of the titles on the northern and western sides.
- Details of any restrictions or special conditions on the use of the northern and western areas as stipulated in the lease agreement.
- Copies of any conflict-of-interest declarations or notifications made by council staff or councillors involved in the lease agreement.
- Copies of the meeting minutes between the General Manager, the Mayor & Deputy Mayor pertaining to the discussions and decisions of the lease, specifically the weekly meetings that are held between the parties.

2. Financial Details:

- *Full financial details related to the lease, including terms, payment schedules, rental amounts, and any other financial obligations which are not fully described in the above requested "Lease Agreement and Related Documents"*
- *The previous rental amount prior to the new lease agreement.*
- *The current rental amount agreed upon in the new lease.*
- *Valuation reports of the land on the northern and western sides, both before and after the proposed consolidation.*

3. Approvals and Council Proceedings:

- *Documentation of all approvals granted for the lease agreement and boundary consolidation on the northern and western sides, including dates and the authorities that granted them.*
- *Meeting minutes, agendas, and notes from all council meetings and workshops where the lease and boundary consolidation of the northern and western areas were discussed, including the workshop held in late 2022 at the Stanley Caravan Park.*
- *Identification of council staff, councillors, and any external parties (including legal representatives) who participated in the preparation, negotiations, discussions, and the execution of the lease agreement.*

4. Public Consultation and Community Feedback:

- *Copies of all written objections and letters of support received regarding the lease and the proposed boundary amendments on the northern and western sides, as per Section 178 of the Local Government Act 1993.*
- *Details of all advertisements placed to notify the public of both the lease and boundary consolidation of the northern and western areas, including:*
- *Copies of the advertisements as they appeared in the newspapers.*
- *Copies of invoices or receipts for the advertisements, showing they were published twice as required.*
- *A copy of the original notice and plan made available at the council offices around 2 August 2023.*

- Please note we are requesting the advertisements & records for both the Lease, AND the modifications. Under Section 178 of the Local Government Act, all leases greater than 5 years must be tabled in a public forum.

5. Environmental and Traffic Studies:

- Copies of any environmental impact studies conducted in relation to the expansion of the Stanley Caravan Park on the northern and western sides.
- Copies of any traffic management plans developed to handle additional capacity resulting from the expansion.
- Copies of any relevant surveys or assessments completed as part of the planning process.
- Copies of any environmental impact studies done in relation to the expansion of the caravan park to the crown managed land - dune & waterfront.

6. Legal Documents and Correspondence:

- A copy of the original deed of release from the Australian National Railways concerning the intended and permitted use of the land when it was transferred to the council.
- All associated correspondence, contracts, or legal documents related to the lease, boundary consolidation, and expansion on the northern and western sides.
- Copies of documents regarding the excision of the TasWater sewer pump station from the caravan park area.

Additional Information:

In the interest of transparency and public awareness, I am also seeking information that clarifies the sequence of events and decision-making processes related to the lease agreement and boundary consolidation (which is not contained in the above requests}. Specifically, I am requesting all documentation (including but not limited to internal Council communications, reports, or memos} pertaining to:

- any understanding or agreement that the lease was executed with the anticipation that the boundary consolidation and expansion would proceed; and
- the timing of such an understanding.

- 3 Council issued its original decision on Mr Davis' assessed disclosure application in three parts. These were:
 - Part one – issued on 20 December 2024, in which 101 pages of information were released in full and one page was released partially redacted;
 - Part two – issued on 10 January 2025, in which 25 pages of information were released in full; and
 - Part three – issued on 24 January 2025, in which 17 pages of information were released in full and 85 pages were released fully or partially redacted.
- 4 The Part three decision set out that information relevant to Mr Davis' assessed disclosure application was exempt from disclosure, however did not make explicit which exemption provisions in the Act were being used to justify the non-disclosure. Mr Davis was not satisfied with Council's original decision and sought internal review on 29 January 2025.
- 5 As he had not yet received an internal review decision, Mr Davis wrote to my office on 28 February 2025 seeking an external review. Mr Davis' application for external review was accepted pursuant to s44(1)(b)(ii) of the Act on the basis that more than 20 working days had elapsed since submitting his application for internal review and he was not yet in receipt of an internal review decision.
- 6 On 6 March 2025, Council issued its internal review decision to Mr Davis. As was the case with its original decision, Council's internal review decision failed to set out which exemption provisions applied to the requested information to justify its non-disclosure, which is required under s22(2)(a) of the Act. It also failed to comply with other requirements set out in s22 of the Act, in that it did not include the designation of the person who made the decision (required under s22(2)(b)), nor did it inform Mr Davis of the timeframe within which an application for external review must be made (required under s22(2)(c)(iii)). As Council's decision was insufficient, my office wrote to Council on 15 April 2025 and directed it to issue better reasons for its decision in accordance with s47(1)(n) of the Act to rectify these issues.
- 7 On 1 May 2025, Council wrote to Mr Davis and my office and provided the requested more comprehensive reasons. These reasons, dated 28 April 2025, set out that Council had identified 29 documents as being relevant to Mr Davis' application. Of these, Council explained that redactions had been applied to three (emphasis original):

With respect to redactions:

- *Redactions applied to Record 6 – Tax Invoice – Stanley Caravan Park Advertisement were made on the grounds that*

*the information was not within the scope of the request and, additionally, are exempt under **Section 37** of the Act (confidential information of a business, commercial or financial nature).*

- *Redactions applied to Record 001 – Deed of Assignment of Lease and Record 024 – Rental Adjustment were made under the **Public Interest Test**, in accordance with **Sections 33 and 36** of the Act, where disclosure would be contrary to the public interest due to the personal or commercial nature of the information. Please find at Attachment 1 outcomes of the Public Interest Test with reasons.*
- 8 However, in *Attachment 2 – Schedule of Information Provided* to its decision, Council also advised that it had applied s32 (information relating to closed meetings of council) to exempt information in *Record 001 – Deed of Assignment of Lease*. Council confirmed the remaining 26 documents had been released to Mr Davis in full.
- 9 Mr Davis confirmed he wished to continue with his external review request following the receipt of Council's more comprehensive reasons and also raised concerns about the sufficiency of searching undertaken by Council for relevant information.
- 10 Mr Davis also sought to have his external review expedited. Mr Davis' application for priority was accepted due to an upcoming deadline to lodge an action with the Tasmanian Civil and Administrative Tribunal (TASCAT). In a further attempt to expedite this external review, Mr Davis reduced its scope. He advised us that he sought review only of Council's search for information establishing whether Council complied with notice obligations set out in s178 of the *Local Government Act 1993* (the LGA) and redactions applied to particular aspects of the requested lease agreement.

Issues for Determination

- 11 After reviewing the refined scope of Mr Davis' external review, I am only required to determine whether information not released by Council is eligible for exemption under ss32 and 37. I must also determine whether Council's search for information was sufficient under s45(1)(e).
- 12 As s37 is contained in Division 2 of Part 3 of the Act, my assessment regarding this exemption is subject to the public interest test in s33. This means that, should I determine any of the requested information is *prima facie* exempt from disclosure pursuant to s37, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to the matters contained in Schedule 1 of the Act and any other matter I consider relevant.

Relevant legislation

- 13 I attach copies of ss32, 33, 37 and Schedule 1 of the Act to this decision at Attachment 1.

Submissions

Applicant

- 14 Regarding Council's search for information, Mr Davis submitted:

Is there any further documentation that exists from post 28th of June 2023, that shows the council conformed with the s178 requirements [of the Local Government Act 1993], such as the boundary notice, and the required two s178 notifications in the paper, only a single paper notification has been provided, no photos or statements from the staff member who may have placed signage, we believe these documents may not exist. If it does not exist. We would like confirmation.

I can explain this in further detail if you like, they have provided some photos of some signage, and a second newspaper notification, however they are dated Feb 2023, prior to the June 28th 2023 agreement, and fall under a different act rather than complying with Section 178, it is related to the LUPAA [Land Use Planning and Appeals Act 1993] notification.

- 15 As for the lease agreement, Mr Davis noted he was seeking a review of exemptions applied to Items 4.1, 4.2, 4.3, 5.5, 8, 8.1, 8.2, 8.3, 8.4, 8.7 of the schedule on pages 4 to 6 of the lease agreement. Mr Davis also noted he was seeking a review of exemptions applied to the following clauses within the lease agreement:

Page 19 - Clause 3.9 - Prudent Business Management / Maintain Goodwill

Page 21 - Clause 3.17 - Yield Possession

Page 22 - Clause 3.19 - Adjoining Property

Page 23 - Clause 4.6 - Nuisance etc

Page 25 - Clause 4.12 - General Use of Premises

Page 25 - Clause 4.13 - Prohibitions

Page 27 - Clause 4.20 - Premise Layout and Foreshore Issues

Page 38 - Clause 10 (all) - Option for renewal (excluding any financial information)

Page 49 - Clause 18 (all) - Special Conditions (excluding any financial information)

Page 54 - Clause 19 (all) - Development (excluding any financial information)

Page 59 - Clause 24 - Essential Terms (if relevant to the lease area, lease term)

Page 59 - Clause 25 - Notices (if relevant to our request)

Page 60 - Clause 26(all) - Additional Clauses (excluding any financial information).

Council

- 16 Council's additional reasons dated 28 April 2025 set out the following with regard to redactions applied to the lease agreement:

Redactions applied to Record 001 – Deed of Assignment of Lease and Record 024 – Rental Adjustment were made under the Public Interest Test, in accordance with Sections 33 and 36 of the Act, where disclosure would be contrary to the public interest due to the personal or commercial nature of the information. Please find at Attachment 1 outcomes of the Public Interest Test with reasons.

- 17 Page 7 of the reasons also set out that s32(1)(a) and (b), and s37 applied to exempt information in the lease agreement from disclosure.
- 18 Council's reasons contained the following public interest test assessment which provided the basis for its determination as to why it would be contrary to the public interest to release information identified as *prima facie* exempt:

<i>The following matters are matters to be considered when assessing if disclosure of particular information would be contrary to the public interest</i>	<i>Pass/Fail</i>	<i>Comment if fail test</i>
(a) the general public need for government information to be accessible	Pass	Agree where we can we need to provide the information
(b) whether the disclosure would contribute to or hinder debate on a matter	Fail	The information is commercially sensitive (like rent amounts or proprietary terms), sharing it might

<i>of public interest</i>		<i>unfairly disadvantage the parties involved or damage relationships, which could detract from productive discussion.</i>
<i>(c) whether the disclosure would inform a person about the reasons for a decision</i>	<i>Fail</i>	<i>If the information contains sensitive or confidential details that aren't central to explaining the decision (like private negotiations or commercially sensitive data), disclosing it could do more harm than good without improving understanding.</i>
<i>(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions</i>	<i>Pass</i>	<i>Sharing the information helps the public see the bigger picture—like the factors, processes, or reasoning behind a government decision—then it supports transparency. For example, in the lease and deed, include:</i> <ul style="list-style-type: none"> • <i>Why the lease was offered</i> • <i>How the terms were set</i> • <i>How it fits into broader policies, strategies or objectives (e.g., economic development or land use planning)</i>
<i>(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public</i>	<i>Pass</i>	<i>Sharing the information helps the public understand how decisions are made, rules are applied, or how the Council treats individuals or organisations, it supports accountability.</i>
<i>(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation</i>	<i>Fail</i>	<i>Disclosure could hinder government operations (e.g., by exposing confidential or commercially sensitive data), it might outweigh the benefits of scrutiny.</i>
<i>(g) whether the disclosure would enhance scrutiny of government administrative processes</i>	<i>Fail</i>	<i>It involves confidential, irrelevant, or highly technical details that don't reflect on the government's processes, disclosure might be unnecessary.</i>
<i>(h) whether the disclosure would promote or hinder</i>	<i>Fail</i>	<i>Releasing the information gives certain individuals or corporations an unfair</i>

<i>equity and fair treatment of persons or corporations in their dealings with government</i>		<i>advantage, such as disclosing confidential details of negotiations or competitive advantages, it could harm fairness.</i>
<i>(i) whether the disclosure would promote or harm public health or safety or both public health and safety</i>	Pass	
<i>(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law</i>	Fail	<i>Undermines procedural fairness by giving one party an unfair advantage.</i>
<i>(k) whether the disclosure would promote or harm the economic development of the State</i>	Pass	<p><i>Releasing the information might harm the state's economy if it:</i></p> <ul style="list-style-type: none"> * <i>Discourages investment or business partnerships by exposing confidential or commercially sensitive details.</i> * <i>Undermines competitive advantage for businesses or the government.</i> * <i>Risks negative publicity that could affect public confidence in government or specific projects.</i>
<i>(l) whether the disclosure would promote or harm the environment and or ecology of the State</i>	Pass	
<i>(m) whether the disclosure would promote or harm the interests of an individual or group of individuals</i>	Fail	<p><i>Sharing the information might harm individuals or groups if it:</i></p> <ul style="list-style-type: none"> * <i>Reveals private, sensitive, or confidential information about them.</i> * <i>Exposes them to risks, such as financial harm, reputational damage, or unfair treatment.</i> * <i>Interferes with their ability to fairly negotiate or protect their rights.</i>
<i>(n) whether the disclosure</i>	Fail	<i>Information contains confidential or</i>

<i>would prejudice the ability to obtain similar information in the future</i>		<p><i>commercially sensitive details, disclosing it could make future parties less willing to provide such information to the government.</i></p> <p><i>Businesses might fear that their competitive information, pricing, or strategies could be exposed, making them reluctant to engage in agreements or negotiations.</i></p>
(o) <i>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</i>	Pass	
(p) <i>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</i>	Pass	
(q) <i>whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority</i>	Pass	
(r) <i>whether the disclosure would be contrary to the security or good order of a prison or detention facility</i>	Pass	
(s) <i>whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation</i>	Fail	<p><i>Disclosing commercially sensitive terms (like pricing, competitive strategies, or proprietary information) could harm the negotiating position or business interests of the parties involved.</i></p> <p><i>It might lead to financial loss if competitors use the disclosed</i></p>

		<p><i>information to their advantage.</i></p> <p><i>Public authorities could lose revenue or credibility if the disclosed information undermines confidence in their processes.</i></p>
(t) whether the applicant is resident in Australia	Pass	
(u) whether the information is wrong or inaccurate	Pass	
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided	Pass	
(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	Fail	<p><i>The Lease and Deed contains pricing details, trade secrets, or specific contractual terms, disclosure could allow competitors to undercut the business or use the information to their benefit.</i></p>
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person	Fail	<p><i>Pricing, negotiation strategies, or customised terms of the lease that competitors wouldn't usually know could give others an advantage if disclosed.</i></p>
(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	Fail	<p><i>The Lease and Deed contains commercially sensitive terms, such as financial arrangements, strategies, or proprietary processes, it may qualify as exempt because disclosure could harm the private party's interests.</i></p>

Analysis

Section 32 – Information related to closed meetings of council

- 19 In its reasons dated 28 April 2025, Council appears to have relied upon s32(1)(a) and (b) of the Act to exempt parts of the lease agreement from disclosure. As noted previously, this is somewhat unclear as it was only referenced in the schedule to the reasons and not in the substance of the document. I will nonetheless assess whether it is relevant.
- 20 Section 32(1) of the Act provides:
- (1) *Information is exempt information if it is contained in –*
- (a) *the official record of a closed meeting of a council; or*
- (b) *information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or*
- (c) *information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or*
- (d) *information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.*
- 21 Council has not provided any information to my office establishing that this lease agreement was considered at a closed meeting of Council.
- 22 Notwithstanding this, my office has been clear in previous decisions that information is not necessarily exempt from disclosure under s32(1) merely because it was presented at a closed meeting of Council for consideration. The Act sets out that such information will only be eligible for exemption if it was brought into existence for submission to the closed meeting or if its disclosure would reveal a deliberation or decision of the closed meeting which had not been officially published.
- 23 I accept that it was likely this lease agreement was considered at a closed meeting of Council, however I am not satisfied it was *created* for submission at the closed meeting. Instead, this lease agreement was created to record the commercial agreement between Council and the operators of the Stanley Caravan Park which is located on Council owned land.
- 24 Accordingly, Council has not discharged its onus under s47(4) of the Act to establish why this information should not be disclosed. I am not satisfied the lease agreement is exempt under s32 and it should be released to Mr Davis, subject to my consideration of s37.

Section 37 – Business Affairs of a Third Party

- 25 For information to be exempt under s37, I must be satisfied its release would *disclose information related to business affairs acquired by the Department from a third party and that –*
 - a) *the information relates to trade secrets; or*
 - b) *the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*
- 26 Council considers some information contained within the lease agreement to be exempt from disclosure on the basis that, if it was released, it would be likely to expose a third party to a competitive disadvantage.
- 27 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman* [2010] TASSC 39, Porter J held at [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.

- 28 At [59] Porter J added:

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

- 29 At [41] the Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.
- 30 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*¹ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered, and my office has taken legal advice on, the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and the Tasmanian Ombudsman is also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.
- 31 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases

¹ [2017] NSWCA 275 (24 October 2017)

'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

- 32 Mr Davis has confined the scope of his external review to a subset of the redactions applied to the lease agreement. I now turn to assess the appropriateness of the individual applications of the s37(1)(b) exemption by Council.

Page 4 – Items 4, 4.1, 4.2, 4.3

- 33 The information contained within these items reveals the length of the lease agreement. This information is quite innocuous and I am not satisfied it would be likely to expose any party to a competitive disadvantage so as to be exempt from disclosure pursuant to s37(1)(b) of the Act. This information should be made available to Mr Davis.

Page 4 – Item 5.5

- 34 The information contained in section 5.5 of the schedule sets out that the initial payment of consideration from the tenant to Council under this lease agreement is to be made on the date the lease agreement commences. This is not information that would be likely to expose any party to a competitive advantage, so as to be exempt from disclosure pursuant to s37(1)(b) of the Act. This information should be made available to Mr Davis.

Page 5 – Items 8, 8.1, 8.2, 8.3, 8.4, 8.7

- 35 These sections of the schedule reveal some of the information surrounding the tenant's options to renew the lease. This includes the term of a renewal and the date by which the option to renew must be exercised. Again, this is not information that would be likely to expose any party to a competitive advantage so as to be exempt from disclosure pursuant to s37(1)(b) of the Act. This information should be made available to Mr Davis.

Page 19 - Clause 3.9 - Prudent Business Management / Maintain Goodwill

- 36 Clause 3.9 requires the tenants to the lease agreement to conduct their business as would be expected by the ordinary prudent businessperson. There is nothing contained within this information that, if it was released, would be likely to expose the business operators to a competitive disadvantage. Accordingly, I find this information is not eligible for exemption pursuant to s37(1)(b) of the Act and should be made available to the applicant.

Pages 21-22 - Clause 3.17 - Yield Possession

- 37 Clauses 3.17(a), 3.17(b)(i), 3.17(b)(ii), and the majority of 3.17(b)(iv) are rather uncontroversial and set out that the tenant is to surrender Council owned property and fixtures to Council and is responsible for the cost of removing advertising. These clauses also set out that the tenant must remove its own business assets from the property. I find the release of this information would not be likely to cause the tenants a competitive disadvantage if it was released and so it is not exempt and is to be released to the applicant.
- 38 However, my finding in this regard does not extend to clause 3.17(b)(iii) or the first 18 words of 3.17(b)(iv). These words set out conditions that form a significant aspect of the bargain which has been struck between Council and the tenants which could cause competitive disadvantage if released. As such, I am satisfied this information is *prima facie* exempt pursuant to s37(1)(b) of the Act.

Page 22 - Clause 3.19 - Adjoining Property

- 39 Clause 3.19 simply states that if at any time Council owns, leases or occupies adjoining property, the tenant is to allow Council workers access to that land if required. It is not information which if released, would be likely to cause the tenant a competitive disadvantage and should be released to Mr Davis.

Page 23 - Clause 4.6 - Nuisance etc

- 40 Clause 4.6 states that the tenant is not to do or permit anything that may be or become a nuisance. It is an uncontroversial clause that, if released, would not be likely to cause the tenants a competitive disadvantage. It should be released to Mr Davis.

Page 25 - Clause 4.12 - General Use of Premises

- 41 Again, the terms set out in clause 4.12 are uncontroversial. They set out that the tenant is not to use plumbing other than what it is designed for, not waste water, and dispose of materials as required by law. This information would not be likely to cause the tenant a competitive disadvantage if it was released, and so should be released to Mr Davis.

Page 25 - Clause 4.13 - Prohibitions

- 42 Clause 4.13 sets out prohibitions in relation to animals, vehicles, parking and public auctions. None of this is information, which if released, would be likely cause the tenant a competitive disadvantage. This information should be released to Mr Davis.

Pages 27-28 - Clause 4.20 - Premise Layout and Foreshore Issues

- 43 Clause 4.20 places conditions in relation to the use of the property and in relation to its foreshore location. There is nothing sensitive about this

information and its release would not cause the tenant a competitive disadvantage. This information is not exempt pursuant to s37(1)(b) and should be released to Mr Davis.

Page 38 - Clause 10 (all) - Option for renewal (excluding any financial information)

- 44 Clause 10 sets out the circumstances in which the tenant can extend the lease agreement and the conditions that will apply to the extended agreement. Though this is a significant aspect of the bargain struck between Council and the tenant, I am not convinced its release would be likely to expose the tenant to a competitive disadvantage. As such, this information is not exempt pursuant to s37(1)(b) and should be made available to Mr Davis.

Pages 49-54 - Clause 18 (all) - Special Conditions (excluding any financial information)

- 45 The substantial majority of information contained within clauses 18 to 18.9 can be released as it is not information which would cause the tenant or any other third party a competitive disadvantage if it was made publicly available.
- 46 My finding however does not extend to the dollar figure representing the rent payable in clause 18.1(e) on page 50, however Mr Davis does not seek financial information in this clause. Accordingly, this figure should be redacted by consent.
- 47 The other exception relates to all information contained within the heading and body paragraphs of clause 18.4. This information reveals a significant aspect of the bargain struck between the tenants and Council and is *prima facie* exempt under s37(1)(b) for the same reasons for the relevant subclauses in clause 13.7.

Pages 54-56 - Clause 19 (all) - Development (excluding any financial information)

- 48 I am not satisfied any information contained in clause 19 of the lease agreement is exempt from disclosure pursuant to s37(1)(b). Clause 19 reveals details of the tenant's obligation to fund the upgrade of facilities at the caravan park. However, the details of the tenant's obligation contained in clause 19 are high level and do not consist of information, which if released, would be likely to cause the tenants a competitive disadvantage. The two dollar figures in 19.2(a)(ii) and 19.4 are not sought by Mr Davis, so would be redacted by consent.

Page 59 - Clause 24 - Essential Terms (if relevant to the lease area, lease term)

- 49 Clause 24 is very high level. The release of this information would not expose the tenants to a competitive disadvantage and, accordingly, is

not exempt under s37. This information should be made available to Mr Davis.

Page 59 - Clause 25 - Notices (if relevant to our request)

- 50 Clause 25 sets out the obligations on each party when communicating to each other in relation to the lease agreement. Again, there is nothing so sensitive about these clauses that, if they were released, would be likely to expose the tenants to a competitive disadvantage. This information should also be released to Mr Davis.

Pages 60-62 - Clause 26(all) - Additional Clauses (excluding any financial information)

- 51 Clause 26 contains provisions which set out jurisdiction, consents, additional rights of each party, warranties, waivers, performance obligations, documentation, costs, and further actions. The language used in these clauses is generic and would be common to many contracts. These clauses do not contain any information that, if released, would expose the tenants to a competitive disadvantage. This information should be released to Mr Davis.

Section 33 - Public Interest Test

- 52 As noted, s37 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the following information, which I have found to be *prima facie* exempt pursuant to s37(1)(b). This consists of:
- clause 3.17(b)(iii);
 - the first eighteen words of 3.17(b)(iv); and
 - the heading and body paragraphs of clause 18.4.
- 53 In undertaking the public interest test assessment, I am required to consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act but may consider other relevant factors.
- 54 As noted in the submissions sections of this decision, Council considered Schedule 1 matters (a), (d), and (e), to be relevant and weigh in favour of disclosure. It further identified matters (b), (c), (f), (g), (h), (j), (k), (m), (n), (s), (w), (x), and (y) to be relevant and weigh against disclosure.
- 55 While it is appropriate that Council has considered the relevance of every matter in Schedule 1, I note that it is extremely rare that all the matters are relevant in a particular instance. When matters do not have specific relevance they should be considered neutral considerations in the assessment.
- 56 I do not agree with Council that all matters are relevant in this instance, particularly as this external review only relates to a smaller subset of the

information originally assessed by Council. In this instance, I consider matters (c), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p), (q), (r), (t), (u), (v), and (y) to be neutral considerations in this assessment rather than weighing for or against disclosure.

- 57 While I will not consider these matters further, I will note my particular disagreement with Council's reasoning in relation to Schedule 1 matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law. Council argued this matter weighed against disclosure as release of this information under the Act *undermines procedural fairness by giving one party an unfair advantage*. This is incorrect. The Act provides a legislated right to government held information and the exercise of this right in and of itself does not give rise to any unfair advantages or undermine procedural fairness. Parliament has legislated this process to access government information and to increase accountability regarding government action, including transactions with third party businesses. Such businesses should be aware that greater scrutiny is effectively the price of doing business with government and, while this may be different to private business dealings, it is not unfair.
- 58 Regarding the pertinent parts of Schedule 1, I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 59 I disagree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – weighs against disclosure. Council has argued the release of commercially sensitive information would disadvantage the parties and detract from productive discussion.
- 60 While I accept there may be concern about the release of certain types of information and this would be relevant to other matters for consideration during the public interest test, I do not accept the release of such information would hinder the debate of this issue. The disclosure of additional information almost always contributes to debate on an issue, as it can be conducted in a more informed manner. The lease concerns the use of public land and the conditions of such use. These are clearly matters of public interest and a matter of debate in the local community. While I accept that the Stanley Caravan Park is not the subject of significant public discourse, the broader topic of appropriate use of public land and scrutiny of the actions of local government councils is a matter of such debate. As such, I find Schedule 1 matter (b) weighs in favour of disclosure.
- 61 I agree with Council that Schedule 1 matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – is relevant and weighs in favour of disclosure. The release of this information would reveal the terms of the agreement that was reached between Council and the tenant. Its release would

inform the public of the bargain struck between Council and the tenant, therefore aiding the public in understanding the government's decision to lease the relevant land to the tenant.

- 62 I disagree with Council that Schedule 1 matter (g) – whether the disclosure would enhance scrutiny of government administrative processes, is relevant and weighs against disclosure. The provision of further information about an agreement regarding the lease and use of public land clearly enhances such scrutiny. I therefore find Schedule 1 matter (g) weighs in favour of disclosure.
- 63 I agree with Council that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant but do not agree that it weighs against disclosure. It would clearly promote Mr Davis' interests to obtain this information due to his concerns about the lease arrangements and process. Council has only considered the interests of the relevant tenants, but these business interests are more appropriately considered in relation to matters (s), (w) and (x). Accordingly, I consider matter (m) weighs in favour of disclosure.
- 64 I disagree with Council that Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – is relevant and weighs against disclosure. I do not accept this argument because individuals, businesses and corporations stand to profit from entering into business relationships with government in the right circumstances. I am not persuaded individuals or businesses will forfeit an opportunity to profit from those partnerships simply because their business dealings may be subject to public release under Tasmania's right to information scheme. Accordingly, I do not accept the disclosure of information I have identified as *prima facie* exempt would prejudice Council's ability to obtain similar information in the future. Schedule 1 matter (n) is not relevant and does not weigh against disclosure.
- 65 I agree with Council that Schedule 1 matters (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation, (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, and (x) – whether the information is related to the business affairs of a person which is generally available to the competitors of that person, are relevant and weigh against disclosure. The information I have identified as *prima facie* exempt reveals substantial aspects of the bargain struck between the tenant and Council. If this information was to be released, competitors may be given an advantage and the tenants disadvantaged. I find Schedule 1 matters (s), (w) and (x) are relevant and weigh against disclosure.

66 Overall, this is a difficult balance to strike, however, after considering all relevant matters, I find it would be contrary to the public interest to release the limited information I have found to be *prima facie* exempt pursuant to s37(1)(b) or the Act. Council is not required to provide this information to Mr Davis.

Section 45(1)(e) – Sufficiency of search

67 On 17 April 2025, Council provided my office with a search record detailing the steps it took in locating information relating to Mr Davis' assessed disclosure application. This search record detailed the:

- date Council conducted the relevant searches;
- outcome of each search undertaken;
- nature of any additional searches, where necessary;
- time taken to conduct each individual search for information; and
- initials of the person conducting each search.

68 After reviewing this search record, my office sought further information from Council regarding some aspects. My officer wrote to Council on 26 May 2025 requesting its advice about the steps it took in locating information relating to item 2 of Mr Davis' assessed disclosure application.

69 In particular, further advice was requested about the searches 'JD' undertook in locating information relating to public consultation and community feedback.

70 On 28 May 2025, Council advised us that 'JD' and Council's Manager – Governance and Information Systems consulted the following staff within Council:

- Manager Planning and Regulatory Services
- Planning Officer
- IDS Administration Officer
- Contracts Officer
- Executive Officer

71 'JD' spent 10.5 hours consulting with the relevant staff members with knowledge of the consultation undertaken by Council and searching appropriate databases for relevant information. Council also advised its permanent archives and document management systems were searched using key words associated with Stanley Caravan Park.

72 Mr Davis had raised concerns about documentation relating to a boundary notice being missing and Council further advised us this

information could not be located as the relevant action did not appear to have occurred.

- 73 Section 5 of my Guideline in Relation to *Searching and Locating Information*² (Search Guideline) advises delegates on what is expected of public authorities when searching for information relevant to assessed disclosure applications. Having considered the steps Council took in locating relevant information, I am satisfied Council's searches have been conducted in accordance with the Search Guideline.
- 74 Accordingly, I am satisfied Council's search for information relevant to Mr Davis' request was appropriate and compliant.

Preliminary Conclusion

- 75 For the reasons given above, I determine that:

- exemptions claimed pursuant to s32 do not apply;
- exemptions claimed by Council pursuant to s37 should be varied; and
- Council's search for information was sufficient.

Submissions to the Preliminary Conclusion

- 76 As the preliminary decision was adverse to Council, it was made available to it on 6 August 2025 pursuant to s48(1)(a) of the Act to seek its input prior to finalisation. Council elected not to make any submissions.
- 77 I also made my preliminary decision available to Mr Davis to seek his input prior to finalisation on 12 August 2025. Mr Davis advised he was *satisfied that the release of operational and administrative clauses addresses our purposes* and did not wish to make submissions responding to my decision.
- 78 However, Mr Davis did request (emphasis original) *that I provide a short statement confirming records do not exist*, given I had found Council's search for information relating to item 2 of Mr Davis' assessed disclosure application was sufficient.
- 79 As my review was in relation to searching, it would not be appropriate for me to make such a statement as I did not make any finding as to whether particular records were ever created. I was satisfied that Council searched sufficiently for information. This was due to the search records discussed earlier in this decision and Council's provision of clear advice to my office that it does not hold further relevant records and that it had *not located any documentary evidence confirming that physical signage was placed on the boundary of the impacted property*.
- 80 Council indicated it was reviewing what had occurred and did not advise

² Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications
Page 21 of 26

whether the relevant action did not occur, occurred and was not documented, or occurred and was documented but the relevant documentation was misplaced. It was not necessary for this question to be definitively answered for me to be satisfied regarding the sufficiency of Council's search for information, so I have not delayed finalisation of my decision to obtain further clarity on this point. Mr Davis can, of course, seek such a statement or further clarification from Council regarding the exact reason the information cannot be located and I encourage Council to provide such further detail once it has concluded its review.

- 81 Due to this, and the acceptance of the parties of my preliminary decision, my findings and conclusions remain unchanged.

Conclusion

- 82 For the reasons given above, I determine that:

- exemptions claimed pursuant to s32 do not apply;
- exemptions claimed by Council pursuant to s37 should be varied; and
- Council's search for information was sufficient.

Dated: 20 August 2025

A handwritten signature in blue ink, appearing to read "Grant Davies".

Dr Grant Davies
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 32 – Information related to closed meetings of council

- (1) Information is exempt information if it is contained in –
 - (a) the official record of a closed meeting of a council; or
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
 - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
 - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) 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.
- (3) Subsection (1) does not include information solely because it –
 - (a) was submitted to the closed meeting of a council for consideration; or
 - (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –
if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.
- (4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.
- (5) In this section –
closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the Local Government Act 1993 and includes a closed meeting of a council committee

Section 37 – Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "**third party**") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f) , decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

- (a) until 10 working days have elapsed after the date of notification of the third party; or
- (b) if during those 10 working days the third party applies for a review of the decision under section 43 , 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –

- (i) during 20 working days after the notification of the decision;
or
- (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public Interest Test

- (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.

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
FINAL DECISION



Right to Information Act Review

Case Reference: R2311-005

Names of Parties: Jeff Briscoe and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s45(1)(e)

Background

- 1 Mr Jeff Briscoe is a former Alderman of the City of Hobart (Council) and has been involved in a campaign which sought to prevent the removal of a statue of Dr William Crowther from Franklin Square in central Hobart.
- 2 On 5 October 2023, Mr Briscoe made an application to Council for assessed disclosure of information under the *Right to Information Act 2009* (the Act) in the following terms (verbatim):

All email or other communications between the Lord Mayors office or the CEO office or hcc officials or elected members or communications from to] public that resulted in Cr Elliot being questioned by Wes Young about whether or not funds from my gofundme heritage fund to save Dr Crowther statue from being destroyed were going to be paid to Cr Elliot. This inferred that I would be paying an elected offical who is in a decision making role about the statue. If it was true this could be characterised as an illegal act. I am seeking information on or who authorised or asked Wes Young to undertake this investigation/questioning of Cr Elliot.

- 3 On 5 October 2023 Mr Wes Young, Manager Legal and Corporate Governance for Council, contacted the applicant seeking to refine the scope of his application in accordance with s13(7), and in light of issues that he had identified.
- 4 On 20 October 2023, after some further exchange of correspondence, Mr Briscoe advised that he wished to proceed with his application in its current form without amendment.
- 5 On 25 October 2023, Ms Jacqui Allen, the then Acting Chief Executive Officer and principal officer of Council, issued a decision to Mr Briscoe. She set out that:

Following collation and assessment, I have elected to release all correspondence between [Mr Briscoe], myself and Mr Young (Manager Legal and Corporate Governance) as they related to the making of [Mr Briscoe's] application, which are attached.

Regards [sic] the balance of the Application, only one document was identified as within scope. It's noted there was no other relevant information, such as text messages, identified on our systems.

The single, relevant document was an email from Mr Young to Councillor Elliot on a range of matters, and contained legal advice within the meaning of Section 31. It also contained matters of an internal deliberative nature (Section 35) that were outside the scope of the Application.

Having considered previous Ombudsman's decisions, I formed a view that the primary purpose of that email was not the provision of legal advice but a range of internal deliberative matters that also contained the provision of legal advice on a matter within the scope of the Application.

I've therefore elected to release that email having redacted matters that were outside of the Application's scope and redacting the component that comprised legal advice, which is attached.

- 6 An internal review was requested by Mr Briscoe on 2 November 2023, however, on 3 November 2023 Ms Allen advised that she was the principal officer under the Act (and conducted the first review) and so review would need to be sought externally.
- 7 On 8 November 2023, the applicant made a request for external review, which was accepted pursuant to s45(1)(a), noting that the application was made within 20 days of the receipt of a decision made by the principal officer of a public authority (Ms Allen).
- 8 On 17 December 2024, my office communicated to the parties an initial draft of an external review decision, where I found generally that Council's use of s31 to exempt the relevant section of the 29 September 2023 email that comprised legal advice was reasonable. I noted in this preliminary decision that it remained open to Council to release the relevant section were privilege to be waived over that information.
- 9 Following receipt of this preliminary decision, Council consulted with Councillor Louise Elliot, being the recipient of the email advice, and elected to waive privilege and release the relevant email. It was provided to Mr Briscoe in an unredacted form on 15 January 2025.
- 10 Simultaneously, Mr Briscoe provided submissions to my office on 9 January 2025, in which he highlighted that the primary purpose of his

application for external review was to ascertain whether the relevant search for information was sufficient. He relevantly wrote (verbatim):

I was anticipating that the Ombudsman's office would be able to request all communication that I was seeking (by requesting and seeking and gaining access to the file and all communication and/or file notes) and that was the point of seeking an my external review. I know that a copy of all the emails of staff and elected members of the relevant time were available and provided to the Ombudmans office. (I was informed of this at a meeting of the 1Dec 2023)

- 11 After considering this submission of Mr Briscoe and reviewing the terms of his original request for external review, I determined that I could widen the external review to include consideration of whether Council's search for information has been sufficient pursuant to s45(1)(e) of the Act. Further enquiries were consequently undertaken by my office with Council in this regard.
- 12 On 21 January 2025, my office made a request to Council to provide search records in a form compliant with the Ombudsman's *Guideline in Relation to Searching and Locating Information*¹ (*Guideline*).
- 13 Council provided a response by email on 12 February 2025, outlining the search undertaken by Mr Young at the time Mr Briscoe's application for assessed disclosure was initially lodged. These submissions addressed the context surrounding Mr Briscoe's original application, but did not specifically identify, in line with the *Guideline*, the search actions taken, the outcome of those actions, or other relevant information.
- 14 As such, my office requested Council to either provide a compliant search record or undertake a fresh search in compliance with the *Guideline*.
- 15 On 28 February 2025, Dr Tom Baxter, Project Officer Legal of Council, advised that he had undertaken a fresh search, and in doing so located four items of additional information responsive to Mr Briscoe's original assessed disclosure application. At this same time Dr Baxter provided to my office a copy of a search record for his fresh search.
- 16 Council again sought the views of Councillor Elliot in relation to the release of this information to Mr Briscoe. She was content for the information (insofar as it related to her personal information) to be released to Mr Briscoe.

¹ Ombudsman Tasmania, 'Guideline in Relation to Searching and Locating Information' (No. 4/2010), revised 24 January 2013, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications.

- 17 Mr Michael Stretton, current principal officer and Chief Executive Officer of Council, released this additional information to Mr Briscoe in its entirety on 19 March 2025.

Issues for Determination

- 18 I must determine whether there has been a sufficient search by Council for information responsive to Mr Briscoe's original assessed disclosure application.

Relevant legislation

- 19 A copy of s45(1)(e) is attached.

Submissions

- 20 No specific submissions were received in relation to the issue of the sufficiency of search from either party, beyond what has been set out in the Background.

Analysis

- 21 Section 45(1)(e) of the Act provides for external review where an *applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority*.
- 22 Guidance on what will constitute a sufficient search in this context is provided in the *Guideline*.
- 23 The first search was conducted by Mr Young. That search identified one responsive document. No details were provided to my office to indicate the way the first search was conducted. It appears clear that Mr Young conducted a search of his own email files, and I can infer from the decision of Ms Allen that at least some search was conducted of text message storage. However, I cannot be confident any search beyond this was conducted due to the lack of search records.
- 24 A second search was conducted during the course of this external review by Dr Baxter, as identified above. Dr Baxter, in his record of search, noted that he had *searched Wes Young's emails* for 90 minutes. This search resulted in four additional items being identified as responsive to Mr Briscoe's application. Dr Baxter also indicated that he was *confident that he found all of the emails in Mr Young's account responsive to the application, because his email to Cr Elliot Friday, 29 September 2023 10:11 AM, subject "Re: Catch Up" was only his second week of working for the City*.
- 25 Because Mr Briscoe's original application specifically related to Mr Young's 'questioning' of Cr Elliot, it does not seem unreasonable that the searching in this respect was constrained to Mr Young's emails. While this does present a narrow approach to searching in this matter, I

consider that both searches, when taken together, are sufficient. The topic was highly confined and it follows that the required searching for information would also be more limited. I also acknowledge the willingness of Council to release the relevant information in full as part of this external review. However, I further note that this approach was not initially taken and may have precluded the need for any external review if greater engagement with Mr Briscoe had occurred at an earlier time.

- 26 I am, therefore, satisfied that the supplementary searches undertaken in relation to Mr Briscoe's application amount to a sufficient search.

Other Matters

Conflict of Interest

- 27 On 5 October 2023, Mr Young made contact with the applicant raising certain issues with the application for assessed disclosure as it then stood. He also undertook searches for relevant information.
- 28 On 6 October 2023, Mr Briscoe contacted Ms Allen raising the potential for a conflict of interest were Mr Young to be involved with the application, given the requested information involved Mr Young and came about through Mr Briscoe's concerns about comments made by him.
- 29 On 13 October 2023, and in reply to Ms Allen, Mr Briscoe further pressed his objection in relation to Mr Young's involvement in the assessment of his application.
- 30 A decision was made in relation to Mr Briscoe's request on 25 October 2024, and was signed by Ms Allen.
- 31 While not a matter I am able to review in this decision, I note that Mr Young's communication with the applicant in the early stages, his undertaking of relevant searches and the notation on Ms Allen's decision that he was the contact person, indicates that Mr Young remained involved with the matter. I further note that the searching for information by another Council officer during this external review located additional information to the searches undertaken by Mr Young.
- 32 While I make no finding regarding what has occurred, I urge Council to more closely consider its processes around the management of conflicts of interest in future, to ensure appropriate practices are in place.

Redactions

- 33 The 29 September 2023 email originally claimed to be exempt by Council was printed and redacted using a black marker pen before being provided to Mr Briscoe. The redaction was inexact, and some words remained legible in sections where redaction was attempted.

- 34 Such a method of redaction is not sufficient, and I urge Council to ensure this practice ceases. While there is not a prescribed method of redaction, whichever method used should be thorough and effective. Electronic methods of redaction are encouraged, as manual redaction with marker pens can lead to inadvertent release of exempt or out of scope information, as occurred originally here.

Preliminary conclusion

- 35 In accordance with the reasons set out above, I determine that Council did not initially undertake a sufficient search for information responsive to the request but had taken appropriate steps to rectify this by the conclusion of this external review.

Conclusion

- 36 As the preliminary decision was not adverse to Council, it was made available to both parties to the review on 2 April 2025 pursuant to s48(1)(b) of the Act to allow for input prior to its finalisation.
- 37 On 3 April 2025, Council advised that it did not wish to make submissions in relation to the preliminary decision.
- 38 On 22 April 2025, Mr Briscoe provided submissions to my office. In these submissions he repeated his dissatisfaction with the conduct of Council, but ultimately concluded that *with the Ombudsman's intervention the Council did provide further relevant information* and that he had separately *expressed serious concerns in writing to the CEO*. He indicated his acceptance of my preliminary decision and thanked me and my office for our efforts in relation to his application.
- 39 Accordingly, for the reasons set out above, I determine that Council did not initially undertake a sufficient search for information responsive to the request but had taken appropriate steps to rectify this by the conclusion of this external review.
- 40 I apologise to the parties for the delay in finalising this review.

Dated: 29 April 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 45(1)(e) – Other applications for review

1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –

...

e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or

...



Right to Information Act Review

Case Reference: R2401-007

Names of Parties: John Perry and City of Launceston

Reasons for decision: s48(3)

Provisions considered: s37, s38, s39, s41

Background

- 1 The Building Better Regions Fund (the BBRF) was a former federal grant program designed to deliver funding for infrastructure projects and community development throughout regional Australia. On 19 December 2019, the Office of the Coordinator General (the OCG) submitted an application for funding to the Federal Government through the BBRF on behalf of the City of Launceston (Council).
- 2 On 11 October 2023, the primary applicant in this matter submitted an application for assessed disclosure under the *Right to Information Act 2009* (The Act) to Council. As part of this application, the primary applicant requested *Council's application for the \$10m Building Better Regions Fund grant* (the BBRF application).
- 3 As the Coordinator-General, Mr John Perry was consulted by Council pursuant to s37(2) of the Act to obtain his view in relation to whether the BBRF application should be disclosed to the primary applicant. Mr Perry objected to the release of parts of the BBRF application, but Council notified him on 6 December 2023 that it had nonetheless decided to release its copy of the BBRF application to the primary applicant in full (with the exception of the redaction of one telephone number on page 20).
- 4 On 8 January 2024, Mr Perry submitted an application for external review to Ombudsman Tasmania requesting a review of Council's decision. This application for external review was accepted pursuant to s45(1A)(a) of the Act on the basis that Mr Perry is an external party as defined by s5 of the Act, and a decision on the primary applicant's application for assessed disclosure had been made by Council's principal officer in accordance with s22 of the Act.
- 5 Mr Perry's external review application was submitted on the basis that he considered parts of the BBRF application exempt from disclosure

pursuant to s37 (information relating to the business affairs of a third party), s38 (information relating to the business affairs of a public authority), s39 (information obtained in confidence) and s41 (information likely to affect the State economy).

- 6 I note that Ombudsman Tasmania received four further applications for external review from other parties objecting to the release of the substantial majority of the BBRF application. Decisions on the other four applications will be issued simultaneously with this decision to ensure consistency, and further discussion will follow about the impact of these concurrent reviews.

Issues for Determination

- 7 I must determine whether information proposed to be released by Council is eligible for exemption under ss37, 38, 39 and 41.
- 8 As ss37, 38, 39 and 41 are contained in Division 2 of Part 3 of the Act, my assessments are made subject to the public interest test in s33. This means that, should I determine that information is *prima facie* exempt under any of these sections, I must then determine whether it is contrary to the public interest to disclose it, by having regard to at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 9 I attach a copy of ss33, 37, 38, 39, 41 and Schedule 1 of the Act to this decision at Attachment 1.

Submissions

Mr Perry

- 10 Mr Perry made the following observations criticising Council's decision to release the BBRF application:

. . . the decision appears to have been based on two fundamentally incorrect propositions:

1) proponents and the City of Launceston, ourselves and others have been involved in a revised proposal for the Launceston Creative Precinct and a number of parties have been involved in critical negotiations over the past eight months or so which are still going on at present in relation to this revised proposal. I am particularly surprised by the decision in this regard, because some of those negotiations actually involve the City of Launceston.

2) The time frame elapsed (stated as 4 years) is irrelevant for the purposes of deciding whether information was provided in confidence or not, or indeed as to whether

it is commercially sensitive and would cause harm should it be released. As we note in the attached marked-up BBRFA, there is information contained therein, that is not publicly known and which remains commercially sensitive and would cause harm to other affected entities including the potential to seriously undermine or impact current negotiations.

- 11 Mr Perry set out why he believed the release of information contained within the BBRF application would be likely to expose the OCG to a competitive disadvantage, so as to be exempt from disclosure pursuant to s37(1)(b) of the Act:

I noted to the City of Launceston that there may be some difficulty with the contention that the disclosure of this particular business information would expose my office to competitive disadvantage as considered by the RTI Act. However, I did also emphasise that my office is tasked with attracting business and investment to Tasmania, and that in many (if not most) cases, Tasmania is competing with other jurisdictions in that endeavour. Accordingly, I also noted that it would also be true to say that the disclosure of the commercially sensitive business information of those organisations working with my office to bring projects to fruition would be highly detrimental to my office's reputation (and the State's reputation by extension) with the flow-on effect of diminishing our capacity to attract business interest and work openly and productively with potential proponents. It is absolutely the case that the area of investment attraction is highly competitive between states and territories of Australia also with other regions and the release of commercially sensitive information of businesses working with the State of Tasmania, will damage our competitive position. And on this basis, I request your external review and that the commercially sensitive information marked up in the attached BBRFA be withheld.

- 12 Regarding s38 of the Act (business affairs of a public authority), Mr Perry submitted:

I consider that the disclosure of the information at this stage [of negotiations] would have the very real probability of prejudicing Council's ability to finalise its development plans and negotiate good terms for certain elements of the proposal. The same applies to the State with respect to the potential for a bus terminus on that land given that the proponent has recently entered into an agreement to purchase land which could also include a bus terminus and

commercial negotiations are ongoing in relation to that aspect also.

- 13 Mr Perry argued that some information contained in the BBRF application is exempt from disclosure under s39(1)(b) of the Act. He asserted that:

The information was voluntarily provided to my office on the assumption that it would be kept confidential. The premature revealing of their potential participation in this project could cause significant harm to the businesses, including damaging their relationships with their staff. Exposing those businesses to that kind of harm would have the effect of deterring other proponents from sharing information in future cases. This would have a negative impact on the public interest by limiting the quantity and quality of information available to public authorities to develop proposals and negotiate with third parties.

- 14 Mr Perry also argued that some information contained in the BBRF application is exempt from disclosure under s41 of the Act:

I note that this section relevantly includes information consisting of ‘details concerning proposed action by a public authority in the course of, or for the purpose of, managing the economy of any part of the State where disclosure is likely to give any person an unfair advantage or expose any person to unfair disadvantage.’ While the proposal is focused on enhancing the vibrancy of the Launceston CBD, successful implementation would provide flow-on stimulus for the economy of the region. Disclosure of the information would be highly likely to jeopardise the capacity to bring the proposal about, negatively impact the businesses identified as participating, and prejudice any negotiating advantage Council or the State might have.

- 15 In addition to the above submissions regarding exemption provisions, Mr Perry also expressed concern at what he considered to be a gap in the Act:

This process around the BBRFA has reinforced a seeming gap in the RTI Act, in that the City of Launceston consulted with me specifically under s37 of the Act but I understand it did not consult with affected private organisations whose commercially sensitive information had been included in the BBRFA. Section 37 provides that certain types of third party business information may be exempt from disclosure including trade secrets or information which, if disclosed,

would expose the third party to competitive disadvantage. A potential difficulty with the application of this section to the BBRFA is that the information in the application is predominantly not the business information of my office. My office certainly prepared and lodged the BBRFA on Council's behalf, but the sensitive information included in the application belongs predominantly to the various businesses making up the project while some and a range of other information belongs to the City of Launceston.

Council

- 16 Council did not make submissions or outline its reasoning for deciding to release the BBRF application in full and was not required to do so as part of this external review.

Analysis

Preliminary issue 1 – References to ‘unannounced site’ within my decision

- 17 This decision will refer to an unannounced site for project(s) contained within the BBRF application. Though my preliminary decision issued to the parties named this site, the finalised decision does not. This is because Mr Chris Billing, another concurrent external review applicant regarding Council's decision, made submissions which satisfied me that information identifying that site should not be released as it is exempt pursuant to s37(1)(b) of the Act. I will elaborate on this relevant finding in the *Submissions to the preliminary conclusion* section of this decision.

Preliminary issue 2 – links to supporting documentation

- 18 The BBRF application contains links to various documents that support Council's application. On pages 15 and 16 under the heading *Evidence to support claims* there are nine links to economic assessments to support claims made in the Assessment Criterion 1 section of the BBRF application. Across pages 16 and 17 under the heading *Evidence to support claims* there are links to seven documents that support claims made by Council in the Assessment Criterion 2 section of the BBRF application. Across pages 17 and 18 under the heading *Evidence to support claims* there are 10 links to documents to support claims made in Assessment Criterion 3 and on page 19 there are links to two documents under the heading *Evidence to support claims* that support claims made in assessment criteria 4. There are also 12 links to documents contained in the *Application Finalisation* section of the application across pages 19 and 20.
- 19 Council has not assessed these documents for disclosure, but rather has confined its assessment to the BBRF application document itself and the covering letter. It has advised my office that this is because the copy of

the BBRF application it has in its possession does not include this supporting documentation. Accordingly, my external review is confined to a review of Council's assessment of the BBRF application and covering letter.

- 20 Mr Perry's submissions appear to object to the release of information attached to the BBRF, which is accessible through the links, rather than the names of the links themselves. And, with the exception of references to the unannounced site, Macquarie House, Foundry, Hassell and Creative Property Holdings, it is not readily apparent which exemption provision in the Act might apply to exempt from disclosure information contained within the links themselves.
- 21 As such, with the exception of references to the unannounced site, Macquarie House, Foundry, Hassell and Creative Property Holdings, information contained within the links themselves should be released. I will consider the references to the unannounced site, Macquarie House, Foundry, Hassell and Creative Property Holdings elsewhere in my decision.

Section 37 – information relating to business affairs of third party

- 22 Section 37(1) of the Act provides that information is exempt from disclosure if it is:
 - a) *A trade secret of a public authority;*¹ or
 - b) *the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*²
- 23 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman [2010] TASSC 39*, Porter J held at [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.

¹ Section 37(1)(a)

² Section 37(1)(b).

At [59] Porter J added:

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

- 24 At [41] the Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.
- 25 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*³ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that the Tasmanian Ombudsman is also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.
- 26 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.
- 27 As noted previously, Mr Perry provided my office with a marked up version of the BBRF application to indicate the parts he argues are exempt. However, it is not always clear on what grounds Mr Perry is claiming exemption. Accordingly, the proceeding analysis is based on my assumptions as to which specific aspects of the BBRF application Mr Perry is attempting to claim are exempt under s37.

Project title and description

- 28 Mr Perry suggests that the second sentence of this paragraph is commercially sensitive and contains details about the project that have not yet been made publicly available. It is a general description and the reason for the grant application.
- 29 Though I accept that this sentence contains information that is yet to be made public, I am not satisfied that Mr Perry has discharged his onus to establish why this information should be considered exempt under s37(1)(b) of the Act. The concept of the proposed development is known, and the relevant businesses or property owners have agreed to be part of the development. It is not apparent why the revelation of such high-level detail would cause competitive disadvantage to them. Accordingly, I am satisfied that it should be made available to the primary applicant by Council.

³ [2017] NSWCA 275 (24 October 2017).

Provide a detailed description of your project including the project scope and key activities

- 30 Mr Perry suggests information contained in the first paragraph under the heading *Provide a detailed description of your project including the project scope and key activities* should be exempt from disclosure. Mr Perry asserts this on the basis that the release of this information would put the proponent group at a commercial disadvantage by negatively impacting negotiations, and because this information contains details of the project not previously made public.
- 31 Mr Perry has not provided any detail as to how negotiations would be impacted by the release of this information and, accordingly, I cannot be satisfied that he has discharged his onus to establish why this information would be reasonably likely to cause competitive disadvantage to a third party. Mr Perry is not one of these third parties and the announcement of expansion projects is not inherently disadvantageous to businesses. This information should be made available to the primary applicant by Council.
- 32 Mr Perry asserts that the total construction footprint of the project, which is detailed at the end of the second paragraph, is exempt from disclosure on the basis that this information is market sensitive and that its release would disadvantage the developer. Again, I find that Mr Perry, who is not the relevant developer, has failed to provide sufficient information to discharge his onus of establishing why the release of this information would commercially disadvantage the developer, as he claims.
- 33 Mr Perry submits that the entirety of the 3rd and 4th paragraphs of this section of the BBRF application should not be disclosed. These paragraphs provide high-level detail of the project including where the project will be developed, its size, the types of services that the project will support and total construction budgets.
- 34 Mr Perry asserts that these paragraphs contain market sensitive information, and that if this information was released, it would likely cause the proponent a competitive disadvantage so as to be exempt from disclosure pursuant to s37(1)(b) of the Act.
- 35 Having reviewed these paragraphs, I am not satisfied that Mr Perry has discharged his onus to establish why any of this information, were it released, would expose any party to a competitive disadvantage. Accordingly, I am satisfied that this information can be released.
- 36 Mr Perry further asserts that information contained the 5th and 6th paragraph of this section of the BBRF application should not be disclosed. This information details the size of the expansion to the Macquarie House start-ups hub and details relating to its expansion. It also includes information revealing organisations that will manage this expansion and what it will cost.

- 37 I note that the Greater Launceston Innovation Hub has already been announced publicly,⁴ as have the partners to this project named up in the 6th paragraph of this section of the BBRF. As such, I do not see how releasing this information would cause any party competitive disadvantage. I find that all information contained in paragraph six of this section of the BBRF application is not exempt from disclosure pursuant to s37(1)(b) of the Act.

Managing project benefits

- 38 Mr Perry asserts that information contained within each of the paragraphs under the heading *Managing Project Benefits* is exempt from disclosure pursuant to s37(1)(b) on the basis that it will prejudice commercial negotiations that are well underway and therefore cause a competitive disadvantage. As has been the case previously, Mr Perry's annotation on the copy of the BBRF application provided to my office fails to sufficiently explain how exactly the release of these details will impact negotiations. Accordingly, I find that this information is not exempt pursuant to s37(1)(b) of the Act.
- 39 Mr Perry also asserts that a reference to the unannounced site should be deemed exempt from disclosure, however Mr Perry appears to consider this information exempt from disclosure pursuant to s39 of the Act. I will consider this information for release later in my decision.

Project outputs

- 40 Mr Perry submits that this information is exempt from disclosure pursuant to s37(1)(b) of the Act as it contains details specific to commercial activities that will compete with existing service providers. Mr Perry submits that this section of the BBRF application contains information not previously made publicly available and that the release of this information would damage existing negotiations.
- 41 This information details that the project will deliver a five-story creative precinct that includes public infrastructure, an education campus, commercial office space, and food and beverage space. It also details that adjacent to the creative precinct will be student accommodation.
- 42 It also provides details regarding the unannounced site.
- 43 Finally, it details that the Macquarie House extension will result in the construction of a three-storey building; the ground floor will be home to the Greater Launceston Innovation Hub and the Internet of Things prototyping labs. The two other floors will include office space.
- 44 Mr Perry has failed to make explicit how the release of information detailing specific commercial activities to be undertaken as part of the project will result in nearby businesses being likely to suffer a commercial disadvantage. Nor has Mr Perry been able to make clear to me how exactly the release of this information will, as he puts it, damage

⁴ News report of press release from then Deputy Premier, Michael Ferguson MP, *Launceston to Get New Tech Innovation Hub for Entrepreneurs*, www.miragenews.com/launceston-to-get-new-tech-innovation-hub-for-1098701/, accessed 1 November 2024.

negotiations that are currently underway so as to qualify for exemption under 37(1)(b) of the Act. He has not discharged his onus under s47(4) and, accordingly, I find all the information contained under the heading *Project outputs*, which Mr Perry proposed for exemption, should be released.

Project management

- 45 Mr Perry submits that information in each of the paragraphs under the heading *Project Management* should not be disclosed. This information includes references to the unannounced site and Macquarie House and the planned developments at these sites.
- 46 Mr Perry asserts that the release of this information, when combined with other details, will allow the identification of an unnamed site. Mr Perry further submits that releasing details relating to the planned developments at those sites would mean nearby competitors would be likely to suffer a competitive disadvantage and would negatively impact ongoing negotiations.
- 47 As I have discussed, I am not satisfied that the mere reference to the unannounced site and Macquarie House or proposed developments will result in any party being likely to suffer a competitive disadvantage so as to be exempt pursuant to s37(1)(b). I am also not satisfied that the release of any of the other information identified by Mr Perry for exemption would be likely to expose a third party, such as nearby businesses, to a competitive disadvantage. Accordingly, this information is not exempt from disclosure pursuant to s37(1)(b) of the Act.

Project milestones

- 48 Mr Perry submits that numerous references to the unannounced site, the Creative Quarter and Macquarie House should be considered exempt from disclosure in this section of the BBRF application.
- 49 As indicated previously in this decision, I am not satisfied that Mr Perry has established that a mere reference to these sites will cause any third party to be likely to suffer a competitive disadvantage. Accordingly, I am not satisfied that Mr Perry has discharged his onus to show why this information should be considered exempt from disclosure.
- 50 Mr Perry also submits that information contained in the description of construction milestones related to proposed developments at the unannounced site, the Creative Quarter and Macquarie House is exempt from disclosure.
- 51 I am not satisfied that the release of any of this information would lead to any party being likely to suffer a competitive disadvantage so as to be exempt from disclosure under s37(1)(b). Accordingly, I find that it is not exempt from disclosure and should be made available to the primary applicant.

Project location – project site 1, 2, 3 and project geolocation

- 52 Mr Perry submits that addresses, geolocation figures, percentage figures and references to the unannounced site should not be released to the primary applicant. Mr Perry argues that the release of details which reveal sites for the project would impact negotiations. Mr Perry also argues that the release of details which reveal the percentage of grant money being spent at each site would put commercial partners at a disadvantage in their contracting.
- 53 Again, I am not satisfied that Mr Perry has discharged his onus to show that revealing project sites or percentages of project value would impact contracting so as to cause proponents a competitive disadvantage, especially due to the long delay since the BBRF was lodged. I do not consider this information exempt pursuant to s37(1)(b) of the Act.

Project budget

- 54 Mr Perry asserts that dollar figures contained in the various boxes under the heading *Project Budget* should not be released. Mr Perry asserts that the release of this information will disadvantage proponents in their current and future procurement processes but does not explain how. Accordingly, I find that Mr Perry has not discharged his onus to establish why this information should be exempt from disclosure pursuant to s37(1)(b) of the Act. Especially due to the significant passage of time and high-level nature of the figures, it is not apparent to me why this information could cause competitive disadvantage.

Your contribution, other non-government contribution, and other non-government contribution grants

- 55 Mr Perry submits that references to the unannounced site and the Creative Quarter should not be released. As discussed above, I am not satisfied that Mr Perry has discharged his onus to establish that this information is exempt from disclosure under s37(1)(b) of the Act. There is a dollar figure contained in the description section of the box under the heading *Other non-government contributions*. Mr Perry does not explain how the release of this figure would be likely to cause a competitive disadvantage. Accordingly, he has not discharged his onus under s47(4) to establish why this information is exempt pursuant to s37(1)(b) of the Act, and therefore it should be released.

Assessment criterion 1

- 56 Mr Perry submits that references to the unannounced site, the Creative Quarter, and their ongoing operations budget contained in the first paragraph of this section of the BBRF application is exempt, presumably under s37(1)(b) of the Act. Mr Perry also objects to the release of expected economic outputs averaged over the 2.5-year phase at the Creative Quarter site.
- 57 Again, Mr Perry has not discharged his onus to establish that the release of information identifying the unannounced site and Creative Quarter, or related to expected economic outputs will cause any party a competitive

disadvantage. Mr Perry has not made specific submissions addressing these points. Accordingly, I am not satisfied that this information is exempt, and it should be made available to the applicant.

- 58 Mr Perry also asserts that information contained in the second and third paragraphs of this section of the application is exempt. The information relates to expected staffing levels, student numbers and the economic impact of the project for the region.
- 59 Again, I am unclear how the release of information contained in the second or third paragraphs of this section of the BBRF application attracts exemption under s37(1)(b) of the Act. It should be released to the primary applicant.

Assessment criterion 2

- 60 Mr Perry submits that substantial amounts of information in this section of the BBRF application should not be disclosed. Having reviewed this material, I acknowledge that it discusses the commercial operations of the project, the number of students and graduates the project will generate and how this will strengthen the local economy. It also references how the project is expected to refurbish the unannounced site.
- 61 Again, however, I am not satisfied that Mr Perry has discharged his onus to establish how or why exactly the release of this information would be likely to cause any party a competitive disadvantage. Accordingly, I find that this information is not exempt from disclosure under s37(1)(b) of the Act, and therefore should be made available to the primary applicant.

Assessment criterion 3

- 62 Mr Perry submits that information revealing undisclosed sites, partners in the project, timelines for construction, proposed commercial operations, and funding arrangements should not be disclosed. The information is similar to other information I have already assessed above.
- 63 Again, I am not satisfied that Mr Perry has discharged his onus to establish how or why exactly the release of this information will be likely to cause any party a competitive disadvantage.

Assessment criterion 4

- 64 Mr Perry submits that substantial amounts of information in this section of the BBRF application, which discusses funding arrangements, proposed commercial arrangements and additional sites for the project, should not be released.
- 65 There does not appear to be anything particularly controversial about this information and, again, I am not satisfied that Mr Perry has discharged his onus to illustrate why the release of any of this information would cause any party a competitive disadvantage, so as to be exempt from disclosure pursuant to s37(1)(b) of the Act.

Section 38 – Information relating to business affairs of public authority

66 Section 38(a) of the Act provides that information is exempt from disclosure 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...*

The interpretation of the term competitive disadvantage in s38 of the Act is the same as in s37, which is discussed above.

- 67 Mr Perry asserts that aspects of the BBRF application are exempt from disclosure pursuant to s38(a)(ii) of the Act, on the basis that their release would be likely to expose the OCG and Council to a competitive disadvantage. However, I am unclear as to which specific aspects of the BBRF application Mr Perry asserts are exempt pursuant to s38(a)(ii) in the absence of precise submissions. Nonetheless, I am able to make the following findings.
- 68 The OCG is responsible for attracting and securing investment in major development projects in Tasmania. In collaboration with Council, the OCG submitted the BBRF application to the Federal Government to secure funding for a major project in the Launceston CBD. As such, I am satisfied that the OCG and Council are both engaging in commerce, and that all information contained within the BBRF application that Mr Perry asserts is exempt is of a business and/or commercial nature.
- 69 However, I am not satisfied that the release of any of the information contained within the BBRF application would be likely to cause the OCG or Council a competitive disadvantage.
- 70 In his submissions, Mr Perry asserted that if information contained within the BBRF application was released, it would have the very real probability of prejudicing Council's or the OCG's ability to finalise development plans and negotiate good terms for certain elements of the proposal. However, I also note that Council, which also stands to benefit from this project proceeding, does not object to this information being released. This is also a government project and there is limited competition in the public sector due to the nature of the work. All public authorities in Tasmania and around Australia are subject to the Act or similar access to information schemes, so this also does not create a disadvantage regarding investment in Tasmanian government projects.

- 71 Council stands to be the greatest beneficiary from the developments detailed within the BBRF application going ahead due to the location of the project. Without any indication from Council that it objects to the release of the BBRF application, I find it hard to accept the proposition that its release would negatively impact Council's negotiating position and therefore be likely to expose Council, or the OCG, to competitive disadvantage. I am not satisfied that s38 is relevant or applies to exempt any information from disclosure in this instance.

Section 39 – Information obtained in confidence

- 72 For information to be exempt from disclosure under s39(1), I must be satisfied that its disclosure 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.*
- 73 Having reviewed the submissions received by Mr Perry, and after having particular regard to comments he provided in the marked up version of the BBRF application supplied to my office, it appears that he is claiming that s39(1)(b) applies to exempt any reference to the unannounced site and the Macquarie House startups hub, their addresses or their geolocation. Mr Perry submits that the disclosure of this information would be reasonably likely to impair the ability of the OCG to obtain similar information in the future, as its release would contribute to the breakdown in relationship between businesses currently operating at these sites and their employees and clients.
- 74 I acknowledge there is at least the potential for such a breakdown in the relationships between the relevant businesses and their staff and clients should references to the unannounced site, Macquarie House startups hub, or any information revealing these sites including addresses and geolocation figures, be released. Mr Perry asserts that staff of relevant businesses are not yet aware of the proposed developments contained in the BBRF application, or the impact these developments may have on their employment. I also accept that their clients may be concerned by the impact the proposed developments might have on the relevant business's ability to provide services.
- 75 However, there has been a legislated right to information held by Tasmanian public authorities for over thirty years. Businesses and corporations should understand that any information they share with public authorities when seeking to obtain government grants may become subject to assessed disclosure under the Act. This further entails that such

information may be made publicly available, because this is part of the cost of doing business with government in Tasmania. I made a similar finding at paragraph 94 of my recent decision of Robert Hogan and the University of Tasmania⁵:

I am not persuaded by any argument the University has presented that disclosure of the information would prejudice the University's ability to obtain similar information in the future. The University should be aware that the operation of the Act cannot be circumvented by contract. I find it highly unlikely that the third party would not be aware that entering into arrangements with public authorities in Tasmania may result in disclosure of the resulting reports and information. This is the nature of doing business with government, and such contractors and consultants who do business with government, particularly professional enterprises who are as experienced as Deloitte, will be well aware of this.

- 76 Further, it is part of the day-to-day business of any employer to manage its relationships with its employees and clients. In this instance, I consider that the relevant businesses are able to mitigate against the possible harm the release of references to the unannounced site, Macquarie House startups hub, addresses or geolocation of these sites contained might have on their relationship with their employees and clients by openly communicating with them about their decision to be part of the proposed development.
- 77 I am not persuaded that businesses would be less likely provide similar information to the OCG in the future, as businesses often stand to profit by being involved in these types of developments. The relevant detail regarding the businesses also relates to how the grant money would be spent, if received, rather than revealing confidential information about the business' current practices.
- 78 As such, I am not satisfied that any potential harm these businesses might suffer from the release of information identifying proposed sites for the development contained in the BBRF application would be of a kind that would be reasonably likely to impair the OCG's ability to obtain the same or similar information in the future. I find that references to the unannounced site, Macquarie House startups hub, their addresses, and the geolocation figures of these sites, are not exempt and should be released.

⁵ 23 October 2023, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Section 41- Information likely to affect State economy

79 Information is exempt from disclosure under s41 of the Act if:

- (1) . . . *the information consists of details concerning any proposed action or inaction by the Parliament, the Government, a Minister or a public authority in the course of, or for the purpose of, managing the economy of the State or any part of the State and its disclosure is likely to –*
 - (a) *give any person an unfair advantage; or*
 - (b) *expose any person to an unfair disadvantage.*
- (2) . . . *its disclosure would reasonably be expected to have a substantial adverse effect on the ability of the Government or any public authority to manage the economy of the State or any part of the State.*

- 80 I acknowledge Mr Perry's submissions detailing his concerns about how the release of the BBRF application could potentially jeopardise the project, and therefore jeopardise the economic stimulus for the region that the proposed developments detailed within the BBRF application are expected to bring. However, these arguments seem to be predicated on the idea that the release of this information would impact upon the OCG's ability to negotiate terms in its favour for the development. These arguments speak to the OCG suffering a competitive disadvantage by the release of information contained within the BBRF application and were dealt with earlier in my analysis of the OCG's reliance on s37(1)(b) and s38(a)(ii) of the Act.
- 81 However, for completeness, I am also not satisfied that any potential economic stimulus the region might enjoy from the developments detailed in the BBRF application will be jeopardised if they are released. The fact that Council itself does not object to the release of these details speaks to the lack of sensitivity surrounding them, and the minimal risk that the release of this information poses to the regional economy. As such, I am not satisfied that the release of information contained within the BBRF application would result in any business or party suffering an unfair disadvantage, nor am I satisfied that its release would reasonably be expected to have a substantial adverse effect on the ability of the OCG or Council to manage the Tasmanian economy.

Preliminary Conclusion

- 82 Accordingly, for the reasons discussed above, I determine that the relevant information is not exempt under ss37, 38, 39 or 41. It should be released to the original applicant.

Submissions to the preliminary conclusion

- 83 As the above preliminary decision was adverse to Mr Perry, it was made available to him on 29 November 2024 under s48(1)(b) of the Act to seek his input prior to finalisation. No submissions were received by Mr Perry.
- 84 However, as mentioned earlier in this decision, Ombudsman Tasmania received four further applications for external review from other parties objecting to the release of information contained within BBRF application.
- 85 One of those applications for external review was made by Mr Chris Billing. On 10 January 2024, Mr Billing's legal representatives provided my office with a marked up version of the BBRF application identifying 26 specific pieces of information which Mr Billing contended were exempt from disclosure pursuant to s37(1)(b) of the Act. Upon reviewing this information, I could see that it identified information which overlapped to an extent with information that Mr Perry objected to the release of, namely information revealing the unannounced site.
- 86 Despite my reservations about whether Mr Perry had discharged his onus to establish why any information contained within the BBRF application should be considered exempt from disclosure under the Act, it is vital that a consistent approach is taken in relation to this information being considered in the five concurrent external reviews.
- 87 Accordingly, I will restate my reasoning from my decision in Chris Billing and City of Launceston of 20 January 2025 and make identical findings as follows:

*Having reviewed the submissions and proposed exemptions [from Mr Billing], I can see that the release of this information would reveal an unannounced site for the proposed project detailed within the BBRF application. The release of this information has the potential to impact ongoing negotiations regarding that site. Due to this, I am satisfied that this information identified by Mr Billing is *prima facie* exempt pursuant to s37(1)(b) of the Act. This is because the information, if released, would be likely to cause Mr Billing a competitive disadvantage.*

Public interest test

*For the purposes of this public interest assessment, I find it helpful to characterise the information identified as *prima facie* exempt pursuant to s37(1)(b) of the Act, as information revealing a previously undisclosed site for the project detailed within the BBRF application.*

I find that matter (a) - the general public need for government information to be accessible – is relevant and I weigh this matter in favour of disclosure.

I find that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. The project detailed within the BBRF application has been reported in Tasmanian media outlets previously and funding arrangements for this project are a matter of public interest. I am satisfied that the release of information revealing a potential site for the project would contribute to public debate about this matter.

I also find that matters (c) – whether disclosure would inform a person about the reasons for a decision, (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – and (f) – whether disclosure would enhance scrutiny of government decision-making processes – are relevant and weigh in favour of disclosure. The release of this information would inform the public about a project that has attracted government investment. However, the relevant information does not reveal information that explicitly explains why the Council was successful in attracting this investment over other projects, and so I only weigh these factors marginally in favour of disclosure.

However, I also find that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. As I have discussed, the release of information revealing a potential site for the project detailed within the BBRF application would likely impact negotiations and the interests of individuals, and has the potential to harm these interests. Accordingly, I find that this matter weighs against disclosure.

I also find that matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – to be relevant and to weigh against disclosure. Should the release of information revealing a potential site for the project detailed within the BBRF application impact upon negotiations Mr Billing is a party to, it would likely impact upon the likelihood of this project proceeding, and this could harm Council's interests.

Overall, it is a difficult balance to strike, however after considering the applicant's submissions in response to my preliminary decision, I am satisfied that it would be contrary to the public interest to release information revealing this unannounced site. I consider that the information marked up by Mr Billing was confined to the minimum necessary to remove reference to this site and is proportionate. Accordingly, the

*information annotated in the version of the BBRF provided by
Mr Billing is exempt from disclosure pursuant to s37(1)(b).*

Conclusion

- 88 For the reasons set out above, I determine that information is exempt pursuant to s37.
- 89 I am not satisfied that information is exempt pursuant to ss38, 39, or 41 and the remainder of the relevant information should be released to the original applicant.

Dated: 20 January 2025



Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

Section 37 - Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "**third party**") and –

- (a) the information relates to trade secrets; or
- (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

- (a) until 10 working days have elapsed after the date of notification of the third party; or
- (b) if during those 10 working days the third party applies for a review of the decision under section 43, 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 38 - Information relating to business affairs of public authority

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

Section 39 – Information 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.

Section 41 – Information likely to affect State Economy

- (1) Information is exempt information if the information consists of details concerning any proposed action or inaction by the Parliament, the Government, a Minister or a public authority in the course of, or for the purpose of, managing the economy of the State or any part of the State and its disclosure is likely to –
- (a) give any person an unfair advantage; or
 - (b) expose any person to an unfair disadvantage.
- (2) Information is exempt information if its disclosure would reasonably be expected to have a substantial adverse effect on the ability of the Government or any public authority to manage the economy of the State or any part of the State.

Section 33- Public interest test

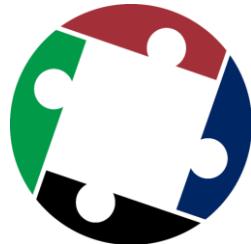
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding 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.

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.



Right to Information Act Review

Case Reference: R2402-008

Names of Parties: Kiera Salerno and Tasracing Pty Ltd

Reasons for decision: s48(3)

Provisions considered: s30, s31, s35, s36, s45

Background

1 On 23 November 2023, Ms Kiera Salerno, submitted an assessed disclosure application under the *Right to Information 2009* (the Act) to Tasracing Pty Ltd (Tasracing). This application was accepted by Tasracing on 4 December 2023. Ms Salerno made the following requests for information as part of this application:

1. *Information relating to Rodney Burles, including investigation brief, date of appointment, investigation outcome. Any other investigator that may have been briefed or considered to undertaken [sic] the independent investigation at GAP [Greyhound Adoption Program Tasmania] or involving Kiera Salerno.*
2. *Any and all information around engagement of security guards at GAP/1164 Midland Highway Mangalore, including the brief provided to security, the cost to have security personnel either by the hour or the cost to date, the reason for change in hours including the move to 24/7 presence.*
3. *Any and all information relating to the installation of three new security cameras at GAP/1164 Midland Highway Mangalore, including cost of installation, date of installation, reason for installation. To be included is a snapshot of what each of the cameras can see at this date or earlier, but not later than the date of this request.*
4. *Any and all information relating to the change of circuit board to the electronic gate at GAP/1164 Midland Hwy including cost, contractor engaged, reason for change.*
5. *Minutes of GRC meeting held in [sic] 14 June and September 2023.*

6. Any and all updates regarding the construction of admin building and additional kennel facility since the approval of the Council domestic application.
 7. Brief to Deputy Premier Michael Ferguson or his office regarding the employment status of GAP Manager Lianne Salerno.
 8. Any and all information related to my animal welfare concerns, complaints raised by me and any other information related to my employment status.
 - 2 On 30 November 2024, Mr Nick Walker of Tasracing wrote to Ms Salerno to ask that she provide specific details regarding your animal welfare concerns or rephrase the request to clarify which information you are seeking.
 - 3 On 1 December 2023, Ms Salerno wrote to Tasracing, requesting that she be able to rephrase item 8 of her request to:

Animal welfare concerns in the following meetings, emails and text messages sent:

 - *Meeting held at GAP with Martin Lenz and GAP team 27 June 2023*
 - *Email titled “Urgent action requested at GAP” sent to Andrew Jenkins and Board members 27 July 2023*
 - *Text message sent to Susan Gittus 14 Aug 2023*
 - *Text message sent to Susan Gittus 28 Aug 2023*
- This request was accepted by Tasracing.
- 4 On 2 February 2024, Mr Walker issued a decision to Ms Salerno on her assessed disclosure application. Mr Walker decided that:
 - all information responsive to item 1 of Ms Salerno's application was exempt from disclosure pursuant to s31 of the Act (legal professional privilege);
 - information responsive to item 2 was exempt from disclosure in part pursuant to ss35 (internal deliberative information) and 36 (personal information) of the Act;
 - information responsive to request item 3 was exempt from disclosure pursuant to ss30 (information relating to the enforcement of the law) and 31 of the Act;
 - no information responsive to request item 4 was identified;

- information responsive to item 5 of Ms Salerno's assessed disclosure application was deemed partially exempt from disclosure pursuant to s36 of the Act;
 - information responsive to request item 6 was released to Ms Salerno, with redactions applied to information outside the scope of Ms Salerno's request;
 - no information responsive to item 7 or 8(a) of Ms Salerno's application was identified; and
 - information responsive to request items 8(b), (c) and (d) was released to Ms Salerno in full.
- 5 Ms Salerno was not satisfied with Mr Walker's decision and, on 5 February 2024, requested an internal review. On 16 February 2024, the Chief Executive Officer of Tasracing, Mr Andrew Jenkins, issued an internal review decision to Ms Salerno which upheld Mr Walker's original decision. Mr Jenkins also provided copies of one email and two text messages which were not provided to Ms Salerno when she was issued her original decision.
- 6 Ms Salerno was not satisfied with Mr Jenkins' internal review decision and, on 17 February 2024, submitted an application for external review to Ombudsman Tasmania. This application was accepted pursuant to s44(1) of the Act, on the basis Ms Salerno was in receipt of an internal decision made by Tasracing's principal officer, and she had applied for external review within 20 working days of receiving that decision.

Issues for Determination

- 7 I must determine whether the information not released by Tasracing is eligible for exemption under ss30, 31, 35, 36 or 45 of the Act.
- 8 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessments regarding them are made subject to the public interest test in section 33. This means that, should I determine that any of the requested information is *prima facie* exempt from disclosure pursuant to ss35 or 36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to all relevant matters including, at least, the matters contained in Schedule 1 of the Act.
- 9 I must also determine whether Tasracing's search for information responsive to Ms Salerno's assessed disclosure application was sufficient, pursuant to s45(1)(e) of the Act.

Relevant legislation

- 10 I attach a copy of ss30, 31, 35, 36 and 45 of the Act to this decision at Attachment 1. Copies of section 33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Ms Salerno

- 11 Ms Salerno's application for external review contained the following commentary:

Much of the information requested is of public interest as it relates to questionable expenses funded by taxpayer money, this spending detracts from animal welfare, which Tasracing cites as "a priority". The external review is also requested as a result of contradictory statements made publicly by the CEO and CVO [Chief Veterinary Officer] of Tasracing during the GBE [Government Business Enterprise] scrutiny meeting in November 2023.

Tasracing

- 12 Mr Walker's original decision held that information responsive to item one of Ms Salerno's application was exempt in full pursuant to s31 of the Act:

Any information held by Tasracing which falls within the above category is legally privileged and is therefore exempt from being disclosed in accordance with section 31 of the Act. The relevant information is within documents relating to engaging Burles Consulting to conduct an investigation to facilitate the provision of legal advice to Tasracing.

- 13 Regarding information responsive to item two, Mr Walker held that information was partially exempt pursuant to ss35 and 36:

The enclosed emails provided as PDF above request. However, the personal information of people referred to in the correspondence who are not public officers has been redacted in these copies. Personal information is exempt information in accordance with section 36 of the Act.

Personal information being exempt under section 36 of the Act is subject to the public interest test under section 33 of the Act. My analysis of the public interest test in this matter is outlined below after considering the relevant matters in Schedule 1 of the Act, showing that there are more matters against disclosure of the information than in favour:

Sub-section in favour of disclosure	Sub-sections not in favour of disclosure
(a) The general public need for government information to be accessible.	(b) The disclosure would not contribute to debate on a matter of public interest.
	(c) The information would not inform a person about the reasons for a decision
	(d) The disclosure would not provide contextual information to aid in the understanding of a Tasracing decision
	(h) it would not be fair for people to have their personal information disclosed in a response to an application for assessed disclosure as a result of their dealings with a state-owned company.

One other email exists dated 23 August 2023 which references security personnel at the GAP facility.

However, this will not be released. These contain an opinion and recommendation prepared by an officer of Tasracing in the course of deliberative processes related to the business of Tasracing in running the GAP facility. This type of information is exempt under section 35 of the Act. However, this exemption is subject to the public interest test under section 33 of the Act.

My analysis of the public interest test for the additional email relating to this request is outlined below after considering the relevant matters in Schedule 1 of the Act, and others, showing that there are more matters against disclosure of the information than in favour:

Sub-sections in favour of disclosure	Sub-sections not in favour of disclosure
(a) The general public need for government information to be accessible.	(b) Disclosure would not contribute to a matter of public debate
(c) The disclosure would inform a person about reasons for a	(m) Disclosure of an email with security details regarding the

decision.	GAP facility could harm the safety and welfare of GAP workers if publicly known
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There may be other emails on file which relate to security guards at the GAP facility which you were copied into, such as emails from the United Workers Union sent to Tasracing on your behalf. It is understood that such emails would not be included as part of your request. Please advise if this understanding is not correct.

- 14 Information responsive to item 3 of Ms Salerno's application was considered exempt in full under s31 of the Act:

A snapshot of what each of the CCTV cameras can see as at the date of the Application or earlier will not be provided on the basis that it is exempt in accordance with section 30(1)(c) of the Act. This would prejudice the effectiveness of CCTV security as a method to prevent offences such as trespass and protect staff and dogs at Tasracing's GAP facility.

There is [sic] a number of emails which exist in relation to this request which will not be provided on the basis of legal professional privilege in accordance with section 31 of the Act, which relate to obtaining legal advice.

- 15 Mr Walker's original decision held that information responsive to item five of Ms Salerno's application was exempt pursuant to s36 of the Act:

Minutes for these two GRG meetings are enclosed information of people referred to in these documents who are not public officers is redacted. Personal information is exempt information in accordance with section 36 of the Act.

Personal information being exempt under section 36 of the Act is subject to the public interest test under section 33 of the Act. My analysis of the public interest test in this matter is outlined below after considering the relevant matters in Schedule 1 of the Act, showing that there are more matters against disclosure of the information than in favour:

Sub-sections in favour of disclosure	Sub-Sections not in favour of disclosure
(c) The general public need for	(d) The disclosure would

government information to be accessible	not contribute to debate on a matter of public interest.
	(e) The information would not inform a person about the reasons for a decision.
	(f) The disclosure would not provide contextual information to aid in the understanding of a Tasracing decision.
	(j) it would not be fair for people to have their personal information disclosed in a response to an application for assessed disclosure as a result of their dealings with a state-owned company.

- 16 Tasracing also made the following submissions when it provided my office with a schedule of documents and unredacted copies of information responsive to items two and five of Ms Salerno's application, which was considered partially exempt under ss35 and 36:

[Part 1 of schedule of documents] – *Emails 30-31 August 2023*

The personal information of employees from Elite Security was redacted from the emails provided to the applicant. The names of these people are personal information, and they are considered exempt information in accordance with section 36(1) of the Act. These people are not public officers, and when considering the public interest test, as set out in the letter to the applicant dated 2 February 2024 (Letter), a decision was made not to release their names.

The name of a current security contractor was also redacted from this information prior to it being released as it is not relevant to the applicant's request. This is the name of a contractor which Tasracing uses at other sites, not the GAP site, which the request specifically related to.

[Part 2 of schedule of documents] – *Emails 30-31 August 2023*

The email of 31 August 2023 sent at 11.19am is also in the email chain above, and names have been redacted from this email before being released to the applicant on the same basis as set out above. The email of 30 August 2024 in this email chain has already been discussed as part of the response to Item 1 [part 1 of the schedule of documents] above.

[Part 3 of schedule of documents] – *Email meeting request 23 August 2023*

The email meeting request sent from Claire Willemse of Tasracing to colleagues was not released to the applicant on the basis that the information is exempt in accordance with section 35 of the Act. The information contains an opinion and recommendation from Ms Willemse in relation to an operational matter of Tasracing. Ms Willemse expresses that in her opinion a meeting should occur to discuss the security of Tasracing's GAP site to ensure that the facility is running safely and securely. She sent a meeting request to colleagues to recommend that a discussion occurs regarding this.

An analysis of the public interest test was undertaken when considering to [sic] release this information, and the details of this process are set out in the Letter to the applicant. After some consideration, it was decided that this information would not be released to the applicant. Disclosure of this information would reveal weaknesses in security at the GAP site, which if released would place the safety and security of staff, visitors and dogs living on the site at risk. A relevant factor in reaching this decision was incidents of trespass which have occurred at the property, and these incidents have involved the applicant, who is residing next door to Tasracing's GAP facility. On reflection, there is a strong argument that this email does not strictly fall within the applicant's request, as it relates to a meeting request to discuss security matters generally, and not engaging security guards.

[Part 4 of schedule of documents] – *GRG Minutes for 14 June 2023*

A copy of the approved minutes for the Greyhound Reference Group meeting on 14 June 2023 was released to the applicant with redactions. The redactions related to

the personal information of people in attendance at this meeting who are members of racing clubs or who are otherwise not public officers. The information was redacted in accordance with section 36(1) of the Act on the basis that it is personal information and is therefore exempt information. The key relevant third parties were notified before deciding whether the [sic] disclose the information in accordance with section 36(2) of the Act, and the third parties responded that they did not wish for their names to be disclosed due to privacy concerns. This response was considered, along with the analysis of the public interest test set out in the Letter to the applicant before a decision regarding redacting the information was made.

[Part 5 of schedule of documents] – GRG Minutes for 13 September 2023

A copy of the approved minutes for the Greyhound Reference Group meeting on 13 September 2023 was also released to the applicant with redactions. The redactions related to the personal information of people in attendance at this meeting who are members of racing clubs or who are otherwise not public officers. As with Item 4 [part 4 of the schedule of documents], the information was redacted in accordance with section 36(1) of the Act on the basis that it is personal information and is therefore exempt information. The relevant third parties were notified before deciding whether the disclose the information in accordance with section 36(2) of the Act, and the third parties responded that they did not wish for their names to be disclosed due to privacy concerns. This was considered, along with the analysis of the public interest test set out in the Letter to the applicant, before a decision regarding redacting the information was made.

Analysis

Preliminary matters

- 17 Before I review the exemptions applied by Tasracing to information responsive to Ms Salerno's assessed disclosure application, I find it necessary to comment on a number of matters related to this external review.

Errors contained within Tasracing's original decision

- 18 Mr Walker's assessment of whether releasing information responsive to item five of Ms Salerno's application, which was identified as *prima facie*

exempt from disclosure pursuant to s36 of the Act, would be contrary to the public interest appears to contain a minor drafting error. Though Mr Walker cited Schedule 1 matters (c), (d), (e), (f), and (j) as being relevant, and weighing either in favour or against disclosure, he has decided these matters are relevant on incorrect grounds.

- 19 For instance, Mr Walker decided that Schedule 1 matter (c) - whether the disclosure would inform a person about the reasons for a decision - was relevant and weighed in favour of disclosure because *there is a general public need for government information to be accessible*. The general public need for government information to be accessible is always relevant, however this consideration is contemplated under Schedule 1 matter (a), not (c), as drafted by Mr Walker. Other similar errors were made by Mr Walker in his public interest assessment, including in relation to his reliance on Schedule 1 matters (d), (e), (f), and (j). Though this is not a major drafting error, it can cause confusion for applicants when attempting to interpret a decision. I encourage Tasracing's delegates to be mindful of accurate drafting in the future.

Out of scope information responsive to item six of Ms Salerno's assessed disclosure application

- 20 Mr Walker identified eight project update reports as being responsive to item 6 of Ms Salerno's assessed disclosure application as these reports contained information pertaining to the construction of the administration building and additional kennel facility. Mr Walker provided these project update reports to Ms Salerno with redactions applied to information pertaining to other Tasracing construction projects as this information was outside the scope of Ms Salerno's request. Having reviewed the information contained within the project update reports that has been redacted by Tasracing, I agree that this information is outside the scope of Ms Salerno's request. As such, Tasracing is under no obligation to provide this information to Ms Salerno.

Sufficiency of search

- 21 Tasracing's original decision, which was upheld on internal review, held that information responsive to items 4, 7 and 8(a) of Ms Salerno's assessed disclosure application did not exist. In progressing this external review, my office made enquiries of Tasracing about the search it undertook in trying to locate information responsive to these parts of Ms Salerno's application.
- 22 Though it does not appear that Tasracing recorded the searches it conducted at the time of processing Ms Salerno's application, Tasracing was able to provide my office with a copy of the enquiries it made by way of email to relevant staff who it believed would have had copies of information responsive to request items 4, 7 and 8(a) of Ms Salerno's

assessed disclosure application. From the information provided to my office, I am able deduce:

- the date Tasracing made these enquiries;
- the nature and scope of those enquiries;
- the outcome of those enquiries; and
- and who made those enquiries;

all of which is information relevant to my assessment as to whether or not Tasracing's search for information was sufficient.

23 The information provided reveals that Tasracing made an appropriate attempt at locating information responsive to Ms Salerno's items 4, 7 and 8(a) of Ms Salerno's application. Accordingly, I am satisfied that Tasracing conducted a sufficient search for this information in accordance with my Guideline in Relation to Searching and Locating Information.

Tasracing's failure to keep records

- 24 Item 3 of Ms Salerno's assessed disclosure application included a request for a snapshot of the field of view of each of the newly installed security cameras at the Greyhound Adoption Program premises from the date of Ms Salerno's application (23 November 2023) or earlier, but not later.
- 25 My office contacted Tasracing to request a copy of the screenshots requested by Ms Salerno, so that I could assess them for release under the Act. Tasracing advised that after assessing Ms Salerno's request a decision was made not to release these screenshots as they were considered exempt from disclosure under s31 of the Act. As Tasracing had decided it was not going to release this information, it failed to save copies of it, despite the fact that there was potential for its decision to be made subject to an external review.
- 26 In an attempt to rectify its error, Tasracing provided my office with screenshots containing the current field of view captured by the three newly installed security cameras. Mr Jenkins has given an undertaking to my office that the positioning of the cameras has not changed since their installation, and therefore their current field of view is identical to what would have been captured on the date of Ms Salerno's assessed disclosure request, or earlier.
- 27 Though strictly not within the scope of Ms Salerno's request, as they are from after the date of her assessed disclosure application, I have nonetheless decided that the screenshots provided to my office by Tasracing should form part of this external review. In effect, these screenshots are what was requested by Ms Salerno, and it is

appropriate, in the circumstances, for this information to be assessed under the Act.

- 28 Tasracing's failure to retain records of information that may become subject to an external review is not satisfactory. I welcome Mr Jenkins' undertaking that in the future Tasracing will save CCTV footage as soon as possible upon receiving assessed disclosure applications requesting it, to avoid the inadvertent loss of this information prior to an applicant exhausting their review rights under the Act.

Section 30 – Information relating to the enforcement of the law

- 29 Tasracing determined in its original decision that the security camera screenshots requested by Ms Salerno were exempt from disclosure pursuant to s30(1)(c) of the Act, on the basis that the release of this information *would prejudice the effectiveness of CCTV security as a method to prevent offences such as trespass and protect staff and dogs at Tasracing's GAP facility.*
- 30 For information to be exempt from disclosure pursuant to s30(1)(c), I must be satisfied that its disclosure would, or would 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 be reasonably likely to, prejudice the effectiveness of those methods or procedures.*

- 31 Having reviewed the security camera screenshots, I agree with Tasracing. These security cameras have been installed in an attempt to prevent and detect crime, notably trespass, and the images they capture can be used to investigate such crime.
- 32 Further, were these images to be released, I am satisfied that it would be reasonably likely that the camera's effectiveness in preventing, detecting, or investigating crime would be prejudiced, as the security cameras effectiveness in preventing, detecting, or investigating crime is reliant on their field of view remaining secret. If their field of view was made public, those looking to avoid being captured by these cameras, potentially for nefarious reasons, would be able to do so. Accordingly, I find the security camera screenshots requested by Ms Salerno are exempt from disclosure pursuant to s30(1)(c) of the Act.

Section 31 – Legal professional privilege

- 33 Information is exempt from disclosure under s31 of the Act:

. . . if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.

- 34 Tasracing asserts that legal professional privilege applies to exempt 20 documents from disclosure in full.
- 35 This information consists of a document titled *Engagement of investigator – Rodney Burles – Tasracing 17 July 2023* (the engagement letter), the documents attached to it, the interim report into allegations of bullying and inappropriate behaviour by Tasracing employees (the investigation report), and five separate email chains. Two of these email chains were provided to my office on 31 July 2024, while a further three email chains were provided on 25 November 2024.
- 36 Before assessing whether this information would attract legal professional privilege, I must first determine whether ‘copied’ documents attached to the engagement letter can attract legal professional privilege, given they are copies of original versions of documents that did not attract privilege when they were created.

Can documents attached to the investigation brief provided to Mr Burles be considered privileged?

- 37 The question of whether copies of documents or communications can attract legal professional privilege was settled by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (Propend) where it held that copies of documents and communications brought into existence for the dominant purpose of obtaining or providing legal advice were privileged, even if the original versions of those documents or communications were not:¹

... if a solicitor makes a copy of a document that was not privileged, the copy will be privileged if it was created for the sole purpose of obtaining or giving confidential legal advice or for the confidential use of legal advisers in pending litigation. Similarly, if the client makes a copy of a document solely for that purpose or use, the copy will be privileged ...

- 38 The Office of the Victorian Information Commissioner also provides the following advice about s32 of the Victorian *Freedom of Information Act 1982*, the equivalent provision to s31 of Tasmania’s Right to Information Act, on its website:²

When copies of documents are attached to a request for legal advice, those attachments will be subject to privilege if the dominant purpose for which the copies were created was to seek legal advice. This is the case even if the original documents were not privileged.

¹ (1997) 141 ALR 545, 585

²Freedom of Information Act Guideline, Section 32 - Documents affecting legal proceedings, available at: <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-32/>, date accessed: 10 October 2024.

- 39 In light of the above guidance, I consider that the documents attached to the engagement letter can attract legal professional privilege, provided I find that the engagement letter containing those attachments was communicated by Edge Legal to Tasracing for the dominant purpose of providing legal advice.

Does legal professional privilege attach to the engagement letter, the documents attached to it, and the investigation report?

- 40 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.³ It is also codified in Part 10, Division 1 of the *Evidence Act 2001* (Tas) (the Evidence Act) as client legal privilege.⁴ Legal professional privilege can be split into two limbs: advice privilege and litigation privilege. Advice privilege is codified in s118 of the Evidence Act, while litigation privilege is codified in s119 of the Evidence Act.⁵
- 41 Advice privilege attaches to confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice.⁶ Litigation privilege extends to protect from disclosure confidential communications passing between a client, their lawyer and third parties for the dominant purpose of use in or in relation to pending or anticipated proceedings.⁷
- 42 Having determined that copied documents may attract privilege, I must now determine whether, in fact, advice privilege or litigation privilege applies to the engagement letter and its attachments, and the investigation report.
- 43 Tasracing sought legal advice from Edge Legal relating to allegations of bullying and inappropriate behaviour by multiple Tasracing employees. In order to provide this legal advice, Edge Legal sought the expertise of an independent investigator, Mr Rodney Burles, to conduct an investigation into these allegations and provide his opinion as to whether they could be substantiated. Though Mr Burles (who is not a lawyer) was engaged by Edge Legal, Tasracing remained Edge Legal's client and that Edge Legal had outsourced work does not alter the characterisation of the legal advice it provided to Tasracing as privileged.
- 44 The engagement letter for Mr Burles, the documents attached to it, and the investigation report were all communicated between Edge Legal and Tasracing for the dominant purpose of providing legal advice to Tasracing in anticipation of legal proceedings. I am satisfied that the only

³AWB LTD v Cole and Another (No 5) (2006) 234 ALR 651, 662 at [44].

⁴ Evidence Act 2001 (Tas) pt10 div1.

⁵ Evidence Act 2001 (Tas) s118-119.

⁶ See note 5, at [41].

⁷ Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd [2020] FCA 1232, at [41].

reason Tasracing has this information in its possession is due to the provision of this advice from Edge Legal.

- 45 As such, I am satisfied that the information would be privileged from production in legal proceedings on the ground of legal professional privilege and is therefore exempt from disclosure pursuant to s31 of the Act. Tasracing is not required to provide this information to Ms Salerno.

Does legal professional privilege attach to the email chains provided to Ombudsman Tasmania on 31 July and 25 November 2024?

- 46 Tasracing provided five separate email chains to my office which it considered exempt from disclosure pursuant to s31 of the Act. Two were provided on 31 July 2024, and a further three were provided on 22 November 2024.
- 47 I am satisfied that the substantial majority of this information is exempt pursuant to s31. These are emails that were sent between Tasracing, its lawyers and investigator Rodney Burles for the dominant purpose of giving or obtaining legal advice in anticipation of legal proceedings. However, my finding in this regard does not extend to:
- the email sent from Mr Jenkins to Mr Lenz on 17 July 2023 at 7:52 pm
 - the email sent from Mr Aaron Neilson and Mr Jenkins on 25 July 2023 at 2:33 pm
 - the email sent from Mr Brendan Steley and Mr Martin Lenz on 29 June 2023 at 9:25 am
- 48 The email sent from Mr Jenkins to Mr Lenz and the email sent from Mr Steley to Mr Lenz were sent internally between Tasracing public officers. Because these emails do not restate or share the substance of legal advice Tasracing has received from its lawyers, they cannot be considered exempt from disclosure pursuant to s31 of the Act. However, as this information consists of emails sent internally within Tasracing, I will assess them for release under s35 of the Act.
- 49 On 28 November 2024, my office received correspondence from Tasracing advising that the email sent from Mr Neilson to Mr Jenkins was in fact not responsive to Ms Salerno's assessed disclosure application. As it was therefore outside the scope of Ms Salerno's request, it cannot form part of this external review.

Section 35 internal deliberative information

- 50 Tasracing has applied s35 of the Act to exempt from disclosure information contained within an email sent from Ms Claire Willemse to Mr David Manshanden and Mr Jenkins, all of Tasracing. Further, I have found it more appropriate to assess for release two emails originally assessed for release pursuant to s31 by Tasracing, under s35, those

being Mr Jenkins' email to Mr Lenz on 17 July 2023 at 7:52 pm, and Mr Steley's email to Mr Lenz on 29 June 2023 at 9:25 am.

- 51 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
 - an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberation between officers of public authorities (s35(1)(b)); or
 - a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 52 Once the requirements of one of those subsections is met, then I must be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of Tasracing.
- 53 Section 35 of the Act does not apply to the following:
 - purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information that is older than 10 years (s35(4)).
- 54 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.⁸
- 55 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'.⁹

Part 3 of schedule of documents - Email meeting request 23 August 2023

- 56 Part 3 of Tasracing's schedule of documents consists of the email sent from Ms Willemse to Mr David Manshanden and Mr Jenkins that was mentioned above. This email contains Ms Willemse's concerns about the current security of the GAP premises, and her request for a meeting to

⁸ *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14].

⁹ *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588 at [58].

discuss those concerns. This email appears to be responsive to item 2 of Ms Salerno's assessed disclosure application.

- 57 Having reviewed this information, I am satisfied that the body of this email, consisting of the two substantive paragraphs contained within it, is *prima facie* exempt from disclosure pursuant to s35(1)(b) on the basis that it consists of consultations between public officers regarding the official business of Tasracing. The remainder of the information contained in this email including address lines, subject lines, and all meeting request information is purely factual. Accordingly, it is not exempt pursuant to s35(1)(b) of the Act and should be made available to Ms Salerno.

Email sent from Mr Jenkins to Mr Lenz on 17 July 2023 at 7:52 pm and the email sent from Mr Steley to Mr Lenz on 39 June 2023 at 9:25 am

- 58 Upon reviewing this information, it is clear that most of it is not of a deliberative nature, and therefore does not qualify for exemption pursuant to s35. As such, the substantial majority of information contained within these emails is not exempt and should be released.
- 59 However, I find that the last sentence of the first paragraph after the dot points contained in Mr Steley's email to Mr Lenz is deliberative in nature and is related to the official business of Tasracing. As such, I find it *prima facie* exempt under s35(1)(b) of the Act.

Public interest test

- 60 As noted, s35 of the Act is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt pursuant to s35. In making this assessment, I am required consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.

Part 3 of schedule of documents - Email meeting request 23 August 2023

- 61 Mr Walker's original decision, which was affirmed on internal review by Mr Jenkins, considered Schedule 1 matters (a) and (c) to be relevant and to weigh in favour of disclosure. It considered Schedule 1 matters (b) and (m) to be relevant and to weigh against disclosure.
- 62 I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 63 I agree that matter (c) – whether the disclosure would inform a person about the reasons for a decision – is relevant and weighs in favour of disclosure. The information I have found to be *prima facie* exempt from disclosure details Ms Willemse's concerns regarding security of the GAP premise. This information likely informed Tasracing's decision about

whether to improve security at the GAP premises. Accordingly, I find that this information could help to inform a person about the reasons for a decision.

- 64 I agree that matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. If this information was released it could make weak points in the security of the GAP premises public knowledge, and this could pose a security risk to the GAP premises, those who work there, and the dogs that are kept there.
- 65 I disagree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is not relevant and therefore weighs against disclosure. I acknowledge that security at the GAP premises specifically is not a matter of public debate, but animal welfare concerns within the racing industry certainly are. Accordingly, I find that that Schedule 1 matter (b) is relevant and weighs in favour of disclosure, as information detailing whether greyhounds in Tasracing's care are being held securely would contribute to debate regarding this matter of public interest.
- 66 There is a difficult balance to strike between releasing information about the security of the GAP premises, which is clearly a matter of public interest, and releasing information that may expose it to the risk of trespass or other crime. However, after balancing all relevant considerations, I am satisfied that it would be contrary to the public interest to disclose information which reveals weak points in security at the GAP premises. Accordingly, the information I identified as being *prima facie* exempt pursuant to s35(1)(b) of the Act should not be released to Ms Salerno.

Mr Steley's email to Mr Lenz dated 29 June 2023 at 9:25 am

- 67 Having turned my mind to each of the matters in Schedule 1, I find that the following are relevant and weigh in favour of disclosure regarding this email:
 - 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; and
 - c) Whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.
- 68 The breakdown of the relationship between the Salernos and Tasracing has been documented publicly in the Mercury newspaper, and Lianne Salerno has publicly indicated that she was considering legal action in

relation to the termination of her employment.¹⁰ As such, I find that the release of information that reveals how Tasracing managed the breakdown of that relationship would contribute to a debate on a matter of public interest, and would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

- 69 However, I also find that Schedule 1 matters (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 – and (q) – whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority – to be relevant and to weigh against disclosure. While the release of this information would provide insight into how Tasracing has managed its relationship with Ms Salerno in the context of a workplace dispute, public authorities also need to have some confidential internal deliberative communication to effectively manage their staff and such disputes. The weight of these factors is reduced, though, due to the brief and innocuous nature of the information sought to be redacted.
- 70 There is a difficult balance to strike, however after considering all matters relevant to this public interest assessment, I find that it would not be contrary to the public interest for the last sentence of the first paragraph after the dot points contained in Mr Steley's email to Mr Lenz to be released.

Section 36 – personal information of a person

- 71 For information to be exempt under s36 of the Act, I must be satisfied that it contains information that is the personal information of a person other than the applicant. Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.

Part 1 of schedule of documents – Emails between Tasracing employees regarding engaging security

- 72 Part one of Tasracing's schedule of documents consists of three emails between Tasracing employees about security at the GAP premises.. These emails appear to be responsive to item 2 of Ms Salerno's assessed disclosure application. Contained within these emails are the names and position titles of security personnel which Tasracing has claimed are exempt from disclosure pursuant to s36 of the Act. I am satisfied that this is personal information and is *prima facie* exempt from disclosure pursuant to s36 of the Act.

¹⁰ Abey, D., *Greyhound adoption program manager Lianne Salerno sacked by Tasracing* (5 May 2024), The Mercury, www.themercury.com.au/news/tasmania/greyhound-adoption-program-manager-lianne-salerno-sacked-by-tasracing/news-story/14597423cd736f26476f5fea9d029d2b.

73 Tasracing has also not released a reference to a security agency which it engaged to operate at other Tasracing sites. Tasracing determined that this information was outside the scope of Ms Salerno's request, as she requested information relating to security at the GAP premises. I agree with Tasracing's decision on this matter, and therefore this redaction will not form part of this external review, and Tasracing is under no obligation to provide this information to Ms Salerno.

Parts 4 and 5 of the schedule of documents – Greyhound Reference Group Minutes for 14 June and 13 September 2023

74 Parts four and five of Tasracing's schedule of documents consist of the approved minutes for the Greyhound Reference Group meetings on 14 June and 13 September 2023. These documents appear responsive to item 5 of Ms Salerno's assessed disclosure application. Tasracing has applied s36 of the Act to exempt from disclosure the names of people attending these meetings, and the names of two other individuals referred to in the minutes of the meetings. I am satisfied that this is personal information and is *prima facie* exempt from disclosure pursuant to s36 of the Act.

75 However, having reviewed these minutes, I see that Tasracing has also redacted information that is clearly not the personal information of a person other than the applicant, and therefore cannot be exempt from disclosure pursuant to s36 of the Act. It is also not readily apparent to me how any other exemption provision contained within the Act applies to this information. Tasracing has not discharged its onus under s47(4) of the Act to show why this information should be exempt, and, accordingly, I find that the following information should be released to Ms Salerno:

- From the Greyhound Reference Group 14 June 2023 meeting minutes, Mr Jenkins' updates regarding:
 - the funding deed due to expire in 2029 on page three;
 - the north-west track development on page four; and
 - the parliamentary review into greyhound racing and the viability of the sport on page five.
- From Greyhound Reference Group 13 September 2023 meeting minutes:
 - Mr Michael Gordan's comments about an industrial relations complexity on page two; and
 - Mr Jenkins' comments on when he expects the integrity racing bill to be passed through Parliament on page five.

Section 33 - Public Interest Test

76 There are three categories of information to be assessed in relation to s36:

- the names of security staff and their position titles;
- the names of people who attended the 14 June and 13 September 2023 Greyhound Reference Group meetings; and
- the names of two individuals referred to in the minutes of the 14 June and 13 September 2023 Greyhound Reference Group meetings.

The names of security staff and their position titles, and the names of people who attended the 14 June and 13 September 2023 Greyhound Reference Group meetings

77 Tasracing considered Schedule 1 matter (a) to be relevant and weigh in favour of disclosure. It also considered Schedule 1 matters (b), (c), (d), and (h) to be relevant and weigh against disclosure.

78 I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.

79 I do not agree that Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs against disclosure. I accept that the release of this information would not contribute to a debate on a matter of public interest, however I am not satisfied that the release of this information would hinder any kind of debate either. Accordingly, I find that this matter neither weighs in favour nor against disclosure.

80 For the same reasons, I do not agree that Schedule 1 matter (c) – whether the disclosure would inform a person about the reasons for a decision, or (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – weigh against disclosure but are neutral.

81 However, I do agree that Schedule 1 matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – is relevant and weighs against disclosure in relation to the names of the security guards. The release of the names of security guards would not add any value to the information identified for release however would negatively impact the interests of those security guards in that the release of their names would infringe upon their privacy, and exacerbate the risks individuals face in such a role.

- 82 My finding in this regarding does not extend to position titles of those security guards, as the release of this information would not negatively impact their interests.
- 83 Nor do I find that it extends to the 14 June and 13 September 2023 Greyhound Reference Group meetings. All government held information is made subject to potential release under the Act. The relevant individuals have volunteered to take on public facing roles at their respective racing clubs and none of the information contained in the minutes is particularly sensitive. Accordingly, I find that Schedule 1 matter (h) does not weigh against disclosure in relation to *names of people* who attended the 14 June and 13 September 2023 Greyhound Reference Group meetings.
- 84 However, I do recognise that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs slightly against disclosure in relation to information revealing the names of people who attended the 14 June and 13 September 2023 Greyhound Reference Group meetings. Greyhound racing clubs, much like other clubs and associations, often rely on volunteers to fill administrative roles. If the names of volunteers were regularly released under the Right to Information scheme, particularly in relation to sensitive or controversial matters, such clubs and associations may find it harder to recruit people to fill those vital administrative roles. As this external review does not relate to particularly sensitive subject matter, however, I find that this matter weighs only slightly against disclosure.
- 85 In light of the above, I find that it would be contrary the public interest for the names of security staff to be released. They are not decision makers, and the release of their names would not add value to the information being released. Further, the release of their names would negatively impact their privacy and would exacerbate the risks they already face in this role. This information should not be released to Ms Salerno.
- 86 However, I do not find that it would be contrary to the public interest for information revealing security guard position titles to be released. Nor do I find that it would be contrary to the public interest to release information revealing the names of people who attended the 14 June and 13 September 2023 Greyhound Reference Group meetings. This information should be made available to Ms Salerno.

The names of two individuals referred to in the minutes of the 14 June and 13 September 2023 Greyhound Reference Group meetings

- 87 Tasracing has also redacted the names of two individuals referred to in the minutes. One person is a veterinarian, and the other is a former media officer at Greyhound Clubs Tasmania. Having reviewed the minutes, I can see that each individual has been named in relation to

their professional duties. Their names have been raised in a public forum and it is not apparent to me how the release of their name in these circumstances would be of concern to them. Accordingly, I find that it would not be contrary to the public interest for this information to be released, and therefore should be made available to Ms Salerno.

Preliminary Conclusion

88 Accordingly, for the reasons given above, I find that:

- exemptions claimed pursuant to s30 are affirmed;
- exemptions claimed pursuant to ss31, 35 and 36 are varied; and
- Tasracing's search for information responsive to Ms Salerno's assessed disclosure application was sufficient.

Submissions to the preliminary conclusion

89 As the above preliminary decision was adverse to Tasracing, it was made available to it on 21 February 2025 under s48(1)(b) of the Act to seek its input prior to finalisation.

90 On 21 March 2025, my office received submissions from Tasracing responding to my preliminary decision. Though Tasracing's submissions began with an indication that it only sought to make submissions opposing the release of information relating to the *two individuals referred to in the minutes of the 14 June and 13 September 2023 Greyhound Reference Group (GRG) meetings*, the full submissions actually focused on why the names of racing club volunteers identified in the minutes should not be released. In any event, Tasracing's submissions asserted that I should place greater weight on Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals.

91 The principal concerns raised by Tasracing related to the emotionally charged debate around animal welfare which accompanies the racing industry. The submissions set out that *people involved in racing clubs and organisations are often subject to online bullying and defamatory comments, particularly on social media*. Then, after setting out other safety and privacy concerns which I have considered but will not quote here, Tasracing noted that:

the format of minute taking at GRG meetings has since changed so that individuals in attendance are not named. Any of the comments are recorded as comments made by the relevant club to avoid any of the abovementioned concerns.

92 After considering Tasracing's submissions and acknowledging the tensions associated with the racing industry, I have reconsidered my weighting of Schedule 1 matter (m) and have afforded greater weight to risks of harm in relation to racing club volunteers named in these

Greyhound Reference Group meeting minutes. As such, I find that it would be contrary to the public interest to release these names in the attendance section of each set of minutes, and throughout the discussion section of those minutes. This information is exempt under s36 and is not required to be provided to Ms Salerno.

93 However, I maintain my finding that the names of the veterinarian and former media officer at Greyhound Clubs Tasmania are not exempt and can be released. I still consider that they have been named in association with their professional duties, and it is not readily apparent why the release of their names would be of concern to them.

Conclusion

94 Accordingly, for the reasons given above, I find that:

- exemptions claimed pursuant to s30 are affirmed;
- exemptions claimed pursuant to ss31, 35 and 36 are varied; and
- Tasracing's search for information responsive to Ms Salerno's assessed disclosure application was sufficient.

Dated: 25 March 2025

A handwritten signature in black ink, appearing to read "R. Connock".

Richard Connock
OMBUDSMAN

Attachment 1
Relevant Legislation

Section 30 Information relating to enforcement of the law

(1) 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 (1) 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 1 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

(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.

(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 (1) 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

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 45 Other applications for review

- (1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –
- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43; or
 - (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22; or

- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3), has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

(2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –

- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
 - (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.
- (3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.
- (4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

Section 33 Public interest test

- (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.

Schedule 1- Matters relevant to the 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.

**Right to Information Act Review****Case Reference:** R2410-008**Names of Parties:** Louise Elliot and City of Hobart**Reasons for decision:** s48(3)**Provisions considered:** s19

Background

- 1 The applicant in this matter is Ms Louise Elliot, who is an elected member of the City of Hobart (Council). There has been tension between Ms Elliot and Council as a result of Council's poor handling of Ms Elliot's attempt to book the Hobart Town Hall Ballroom for an event in November 2023. A report on Council's blocking of Ms Elliot's booking was tabled by Council's Chief Executive Officer on 3 July 2024 and a formal apology given.¹ I also undertook an investigation in relation to implications of this incident under the *Personal Information Protection Act 2004*, which found that Council had breached two Personal Information Protection Principles and made recommendations for further training of staff in this area.²
- 2 On 19 July 2024, Ms Elliot submitted an assessed disclosure application under the *Right to Information Act 2009* (the Act) to Council requesting the following:

All written information to and from the organisation, including emails, file notes, documents, letters, texts, chats - related to:

Agenda Item 24 Inclusive and Welcoming City File Ref: F23/15195; 16/119 from the Feb 2023 Council meeting (likely to include (but not limited to) Kelly Grigsby, Jacqui Allen, Kat Panjari, Neil Noye, Ryan Posseit, Zelinda Sherlock, Anna Reynolds, Helen Burnet, Tom Baxter, Fiona Cleary, ynn [sic] Jarvis and 'Working It Out' - workingitout.org.au, Rodney Croome)

¹ Report available in the Agenda of a Special Council Meeting – Wednesday, 3 July 2024, available at www.hobartcity.com.au, accessed 2 May 2025.

² Report after investigation pursuant to section 21 of the *Personal Information Protection Act 2004* - Hobart City Council, available at www.ombudsman.tas.gov.au/publications.

Agenda Item 8 Respectful Behaviour LG(MP)R 15(2)(g) in the Closed Council meeting of September 2023 that was moved to debate in the Open Meeting (likely focus for search to include (but not limited to) Kelly Grigsby, Jacqui Allen, Kat Panjari, Ryan Posselt, Zelinda Sherlock, Anna Reynolds, Helen Burnet, Wes Young, Fiona Cleary, Kimbra Parker Lynn Jarvis and 'Working It Out' - workingitout.org.au, Rodney Croome)

A copy of all written communication to and from the HCC and Working It Out, Lynn Jarvis, Equality Tasmania or Rodney Croome that references my name. Likely to include (but not limited to) search of CEO generic email address, Kelly Grigby, Kat Panjari, Jacqui Allen, Neil Noye, Anna Reynolds, Helen Burnet, Zelinda Sherlock, Ryan Posselt, Wes Young, Tom Baxter, Kimbra Parker, Fiona Clearly, Renato Langiu.

A copy of all written information including communication related to a training workshop for EMs that was approved by Council in Feb 2023 meeting referred to as "equality, inclusion and gender diversity training through a formal workshop. Specifically, their obligations as they relate to the Council's Social Inclusion Policy and the Anti-Discrimination Act 1998 (Tas)." Focus for search likely to include (but not limited to) Office of the CEO, Kelly Grigsby, Kat Panjari, Jacqui Allen, Kimbra Parker, Zelinda Sherlock, Ryan Posselt, Anna Reynolds, Helen Burnet, Lynn Jarvis, Sarah Bolt, Working It Out, Equal Opportunity Tasmania, Rodney Croome.

- 3 Following receipt of Ms Elliot's assessed disclosure application, Council attempted to negotiate with Ms Elliot to try to reduce the scope of her request. This was because it considered that processing her request in its original form would result in an unreasonable and substantial diversion of its resources from its other work and the request would be likely to be refused under s19 of the Act.
- 4 Although Ms Elliot refined her request to some extent, these negotiations were ultimately unsuccessful. On 20 September 2024, Council's Chief Executive Officer, Mr Michael Stretton, issued a decision to Ms Elliot. This decision refused her assessed disclosure application pursuant to s19 of the Act.
- 5 Mr Elliot subsequently applied for external review of this decision, which was accepted pursuant to s45(1)(a) of the Act.
- 6 My office identified opportunities for early resolution of the matter and forwarded a preliminary view to Council on 1 August 2024, inviting it to

issue a fresh decision which did not rely on s19 or provide further reasoning to justify reliance on this provision.

- 7 On 8 August 2024, Council declined to issue a fresh decision but provided further submissions in support of its reliance on s19 to refuse Ms Elliot's application for information.

Issues for Determination

- 8 There are two issues for determination regarding the use of s19 and this review:

- whether, prior to refusing the application for assessed disclosure, Council gave Ms Elliot a reasonable opportunity to consult with a view to helping her make an application in a form that would remove the ground for refusal as required under s19(2); and (if necessary)
- whether the work involved in dealing with the application would substantially and unreasonably divert the resources of Council from its other work, having regard to the factors in Schedule 3 of the Act.

Relevant legislation

- 9 Relevant to this review is s19 of the Act, which incorporates Schedule 3. I attach copies of both as Attachment 1.

Submissions

Ms Elliot

- 10 Ms Elliot did not make submissions on the substantive issues relevant to this external review.

Council

- 11 Council's original decision provided the following reasoning that is relevant to this external review:

Grounds upon which your application for assessed disclosure can be refused: s.19

The Act requires, prior to refusal of an Application, that the Applicant be given the opportunity to refine their Application in a way that would remove the ground for refusal in accordance with s.19(2). The Officer consulted with you on two occasions in an attempt to determine whether you were willing to narrow the scope of your Application.

The result of that consultation was that you provided date parameters for the four identified criteria, however you

were unwilling to narrow the scope and in fact sought to widen the scope in your response dated 5 September 2024 by adding ‘text messages via mobile phone, messages on other messaging platforms such as Facebook and What's App’, although this has been taken by me, as an attempt to clarify rather than simply widen the scope.

In any event, prior to you providing that response, the Officer cautioned that:

‘.... if the scope is unable to be properly defined, then it is impossible for [the Officer] to know what searches are to be conducted. Having the scope of an application remain extremely large and ambiguous, risks the outcome that it may be determined in accordance with s.19 of the Act, having regard to the matters prescribed in Sch.3 of the Act.’

12 Council's decision went on:

Section 15(2) allows 10 working days for discussions to be entered into to refine the scope in accordance with s.13(7). Payment for your application occurred on the afternoon of Friday 23.8.24. Negotiations on the scope of the application occurred between Tuesday 27.8.24 and Monday 5.9.2024 (an inclusive total of 9 working days after receipt of the application). The Officer corresponded with you on three occasions overall including on 11.9.2024 to inform you that the scope you provided on 5.9.2024 was sufficiently detailed to enable searches to be conducted.

The application as initially received did not contain the minimum information prescribed by the Regulations in accordance with cl.5(e). Some of that information was provided by you on 27.8.2024 and then subsequently amended on 5.9.2024.

13 Council also made substantial submissions in response to my preliminary view, though not all submissions were relevant to the issues for determination in this decision. The following submissions, which relate to Council's view that the scope of Ms Elliot's assessed disclosure application was not clearly defined, were relevant:

I still hold the view that the application scope is ambiguous.

The Applicant requested the information for a particular stated purpose which was linked to a very short

timeframe. She made this clear in her approach to me and to the Manager of Legal and Corporate Governance, when she initially falsely alleged that it had not been processed within the statutory 20 day timeframe. This led to a number of emails between Council and the Applicant about her expectations, including in relation to this application.

The Applicant sought access to the information to inform her proceedings conducted in EOT/TASCAT. The Applicant made it abundantly clear that this was the reason for her RTI application and that time was of the essence. As a model processor, I considered that it was of importance to the Applicant that her application be processed expeditiously.

For a person so motivated to obtain the information expeditiously, it was surprising that she did not engage sufficiently in the negotiation and consultation process. I believe that it was incumbent upon the Applicant to ensure that the application was validly made and that her request for information was not ambiguous, a warning that was clearly given by the officer as part of the negotiation and consultation processes. I would have expected that the Applicant, had she been motivated to do so, would have employed her best efforts to refine the scope, if that was indeed her intention.

The ambiguity arose from her initial application where, for each of the four relevant parts of her request, which I refer to below as A, B, C and D, the Applicant stated respectively:

Part A - "...likely to include (but not limited to) ...";

Part B - "...(likely focus for search to include (but not limited to) ..",

Part C - "...likely to include (but not limited to) .." and

Part D - "...focus for search likely to include (but not limited to) ..".

The phrase '(but not limited to)' left these parts unlimited, or as the officer stated 'at large'. The application scope thus extended to every person employed by Council, former staff of Council, private individuals, government organisations and non-government organisations that deal with Council and that had a touchpoint related to equity, diversity, inclusion, anti-discrimination, fair dealing,

gender, councillor development training, and so on. In my view, this ‘at large’ scope is ambiguous, because it leaves it open to such an extent that the relevant search parameters cannot truly be constrained, and nor, therefore defined.

Despite the fact that in each of those four relevant parts, the Applicant specifically named a number of Council staff, former staff, independent government entities, non-government entities and private individuals, these were simply examples but not as a confined group. In other words, the searches involve every person and every entity.

The initial Application also lacked relevant dates however the dates were somewhat refined by the Applicant initially and then subsequently redefined in her correspondence of 5 September 2024. What was raised and yet never refined, was the scope of persons and entities to which the Applicant’s request applied to [sic]. This is the very crux of the ambiguity.

That is, what remained undefined were the particulars related to the Council staff, former staff, individuals, government agencies and non-government agencies in which the application parameters were to be applied. To say that the application was not ambiguous, in my view demonstrates a mis-understanding of the role and function of the Council in its interactions with the vast number of customers and clients it deals with.

Hobart City Council has a diverse community made up of permanent residents and non-permanent residents. It is home to large educational institutions that reflect a high degree of diversity and transition within the community. There are 24,907 recorded ratable properties within the local government area and I oversee 760 staff. The relevant population is much vaster. The lack of qualification of the relevant persons/entities subject to the request means that the searches applicable to the request would be so broad that there would not be a reasonable way of containing the applicable records unless the date parameters were so diminutively constrained.

The request parameters were also difficult to quantify as they sought information related to Council’s file on being an “inclusive and welcoming city”, its agenda item dealing with “respectful behaviour” all communications between Council and “Working it Out … that references [the

[Applicant's] name”, and all information related to “training workshops for elected members... [about] equality, inclusion, gender diversity, elected member obligations relating to Council’s Social Inclusion Policy and [the] Anti-Discrimination Act”. It should be noted that Council identifies as an “inclusive and welcoming city”, ergo, much of our correspondence reflects this sentiment – a matter known to all elected members of the Council, including the Applicant. Again, using terminology that is likely to return an infinite number of results that would go well beyond the particulars of the Applicant’s subject matter, would create a perverse result.

In fact, this process clearly demonstrated, noting not all searches are yet completed, a return of 60,214 records, which would take a senior staff member at least 293 consecutive days to review. That assumption is based upon an unlikelihood that each document did not exceed one page in length. The time taken was based upon the decision in Carlo di Falco and Tasmania Police (Aug 2020) where at [27] it states: ‘time taken to read a document is 7 minutes per page, drawing from the Office of the Australia Information Commissioner’s position’. As there are only 251 consecutive working days in a year, forgoing any public holidays, an assessment of the records based upon the current criteria would exceed 410 working days.

It therefore warrants consideration of whether the Applicant’s conduct in failing to refine the scope of her application and in accusing the officer involved in the consultation process of wrongdoing, is inimical.

14 Council’s submissions went on:

I note your preliminary [view] acknowledged that Council “at least to some extent ... appears to have genuinely engaged with Ms Elliot with a view to narrowing the scope of her assessed disclosure request.” Despite the persistent manner in which the Applicant continues to accuse staff of wrongdoing towards her, both myself and my staff consistently engage with the Applicant, always treating the Applicant with respect, conducting our dealings with her in a transparent and professional manner and we try to facilitate timely and reasonable outcomes to her many and ongoing requests for information and statutory legal matters.

When considering the processing times and negotiation and consultation processes involved in this application and all other relevant factors, the Applicant has not since her response of 5 September 2024, attempted in any way whatsoever, to engage with me or the officer involved in the negotiation and consultation of this application, to attempt to better particularise her scope.

I would go so far as to say that the Applicant is incredibly astute at communicating her wishes, when she chooses to do so. In my opinion, her silence in a matter speaks as much to her wishes, as does her verbalisation of her views. To this end, her silence and/or lack of a clear and clarifying response, is a response. It is a response tantamount to a refusal to engage further in the process.

Even setting aside the particular attributes of the Applicant, it is my opinion that the RTI Act does envisage a reasonable timeframe, given all relevant processing date parameters, for negotiation and consultation on the scope.

As a model processor, the officer attempted to negotiate with the Applicant about the scope of her application in the hope that it would be better particularised and subsequently crystallised into a workable position. I feel that the negotiation on scope and the consultation on volume gave a sufficiently clear warning to the Applicant that volume was a real concern that potentially triggered assessment under s.19(1).

Given the factors of time and the presence of engagement between the officer and the Applicant, I was comfortable that negotiation and consultation did occur.

This is reaffirmed by your statement:

“The Ombudsman advises that section 15(2) of the Act contemplates a 10 working day timeframe for public authorities to negotiate with applicants under s13(7) of the Act to define what exactly is being sought by way of an assessed disclosure application, where the information being sought by the application is not sufficiently defined. “

I press that because the Applicant continued to use words in her application “but not limited to” that it gave rise to the application not being sufficiently defined.

I refute in part your further statement that:

“The negotiations subject to this external review do not relate to a request that is insufficiently defined, but rather

relate to the request being so large, that Council considered that to process it would substantially and unreasonably divert its resources from its other work.”

The Applicant’s failure to appropriately define the scope as a direct result of negotiation conducted pursuant to s.13(7) of the Act, subsequently led to a voluminous amount of records being returned on the search criteria a matter which was foreseen by the officer and communicated to the Applicant. The reference to “at large” served as a repeated warning to the Applicant of the likelihood of the failure to adequately refine the scope as resulting in a s.19(1) outcome because the parameters were ambiguous.

Analysis

Preliminary matter – Council’s consideration of the timeframe contained within s15(2) of the Act.

- 15 Council insists that negotiations entered into between Council and the applicant were subject to the 10 working day timeframe contained within s15(2), but I do not agree with this interpretation of the Act. The 10 working day timeframe contained in s15(2) of the Act is only relevant to negotiations that are entered into under s13(7), which occur prior to the acceptance of an application which is not clearly defined. If an application remains lacking in definition after this negotiation, it must be accepted after a maximum of 10 working days but a public authority can refuse it pursuant to s20(b).
- 16 The 10 working day timeframe contained in s15(2) of the Act is not relevant to consultations after an application is accepted, such as under s19 (which relates to whether the application would constitute an unreasonable diversion of its resources from its other work). As Council is clearly seeking to rely on s19, it is not apparent why the 10 working day timeframe in s15(2) would be applicable. It is unfortunate that Council’s erroneous focus on this deadline appears to have led to a truncated negotiation with Ms Elliot under s19(2). The negotiation still occurred, however, so I can proceed to assess if it was adequate in the following analysis.

Section 19

- 17 Council refused to assess Ms Elliot’s assessed disclosure application pursuant to s19(1)(a) on the basis that doing so would *substantially and unreasonably divert its resources from its other work.*
- 18 However, and importantly for this external review, s19(2) of the Act requires that before making such a decision, that the applicant is to be afforded a *reasonable opportunity to consult...with a view to the*

applicant being helped to make an application in a form that would remove the ground for refusal.

Did Council provide Ms Elliot with a reasonable opportunity to consult with it in order to help him make an application in a form that would remove the ground for refusal, as is required by s19(2)?

- 19 Council provided my office with copies of its email correspondence which comprised the s19(2) consultation prior to Council's decision.
- 20 On 27 August 2024, Ms Belinda Charlton, Council's Principal Advisor Legal and Property, wrote to Ms Elliot to request her advice as to what she meant by the term 'chats' as contained within her assessed disclosure application, and to request that she provide date parameters for each item of information requested as part of her assessed disclosure application.
- 21 Ms Elliot responded to Council that day clarifying that she was seeking *all information since my election to Hobart City Council (October 2022) to date*. Ms Elliot went on to explain that she would expect this to include emails, letters, text messages, other messages sent through other messaging platforms.
- 22 On 2 September 2024, Ms Charlton wrote to Ms Elliot to advise that she would take the term 'chats' to mean the *chat function incorporated into Council's corporate use of the Microsoft Teams software system*. Ms Charlton also advised Ms Elliot of her concern regarding Ms Elliot's correspondence of 27 August, in which she explained that she was seeking emails, letters, text messages, other messages sent through other messaging platforms. Ms Charlton felt that this instruction made her request ambiguous:

on the one hand it could be seen as an attempt to broaden the scope of the application. Alternatively, it can be read as requiring all records held by Council that reference you in any capacity, since October 2022.

- 23 On 5 September 2024 Ms Elliot refined her request further. Ms Elliot now sought:
 1. *All written information to and from the organisation, including emails, file notes, documents, letters, text messages via mobile phone, messages on other messaging platforms such as Facebook and What's App, chats (including Microsoft team chat function) - related to:*
 - *Agenda Item 24 Inclusive and Welcoming City File Ref: F23/15195; 16/119 from the Feb 2023 Council meeting (likely to include (but not limited to) Kelly Grigsby, Jacqui Allen, Kat Panjari, Neil Noye, Ryan Posselt, Zelinda Sherlock, Anna*

Reynolds, Helen Burnet, Tom Baxter, Fiona Cleary, Lynn Jarvis and 'Working It Out' - workingitout.org.au, Rodney Croome). Search dates between 1 December 2022 and 1 July 2023.

- *Agenda Item 8 Respectful Behaviour LG(MP)R 15(2)(g)in the Closed Council meeting of September 2023 that was moved to debate in the Open Meeting (likely focus for search to include (but not limited to) Kelly Grigsby, Jacqui Allen, Kat Panjari, Ryan Posselt, Zelinda Sherlock, Anna Reynolds, Helen Burnet, Wes Young, Fiona Cleary, Kimbra Parker Lynn Jarvis and 'Working It Out' - workingitout.org.au, Rodney Groome). Search dates between 1 April 2023 and 1 January 2024.*
 - 2. *A copy of all written communication to and from the HCC and Working It Out, Lynn Jarvis, Equality Tasmania or Rodney Groome that references my name. Likely to include (but not limited to) search of CEO generic email address, Kelly Grigby, Kat Panjari, Jacqui Allen, Neil Noye, Anna Reynolds, Helen Burnet, Zelinda Sherlock, Ryan Posselt, Wes Young, Tom Baxter, Kimbra Parker, Fiona Clearly, Renato Langiu. Search dates between 1 November 2022 and 1 July 2024.*
 - 3. *A copy of all written information including communication related to a training workshop for EMs that was approved by Council in Feb 2023 meeting referred to as "equality, inclusion and gender diversity training through a formal workshop. Specifically their obligations as they relate to the Council's Social Inclusion Policy and the Anti-Discrimination Act 1998 (Tas}." Focus for search likely to include (but not limited to) Office of the CEO, Kelly Grigsby, Kat Panjari, Jacqui Allen, Kimbra Parker, Zelinda Sherlock, Ryan Posselt, Anna Reynolds, Helen Burnet, Lynn Jarvis, Sarah Bolt, Working It Out, Equal Opportunity Tasmania, Rodney Croome. Search dates between 1 November 2022 and 1 July 2024.*
- 24 Ms Charlton emailed Ms Elliot on 11 September 2024 to notify her that she had begun searching for information responsive to her refined request. She thanked Ms Elliot for *particularising the dates*, but noted that it was her view that Ms Elliot had left the remainder of her application '*at large*.' As discussed above, Council subsequently explained to my office that Ms Charlton's reference to '*at large*' reflected Council's view that Ms Elliot's assessed disclosure request was

insufficiently defined because the words ‘*but not limited to*’ meant that it was impossible to determine the scope of persons and entities to which the Applicant’s request applied. Ms Charlton also advised that once she had located information responsive to Ms Elliot’s request, that she would be able to advise Ms Elliot of *next steps and potential time frame*.

- 25 No further correspondence was issued to Ms Elliot from Council until 20 September 2024, when it made its decision to refuse her assessed disclosure application pursuant to s19 of the Act.
- 26 Between accepting Ms Elliot’s fee payment on 23 August 2024 and issuing its decision to Ms Elliot on 20 September 2024, Council contacted Ms Elliot on only two separate occasions (27 August and 2 September 2024) to ask that she refine her request. On each occasion Ms Elliot engaged with Council and refined her request as requested. Contrary to Council’s contention, it is not apparent that at any stage Ms Elliot indicated, through either her words or her actions, an unwillingness to engage with the consultation process under s19(2).
- 27 Council did not clearly articulate to Ms Elliot that it considered the scope of her request, as refined in her email of 5 September 2024, too broad and that processing it would result in substantial and unreasonable diversion of its resources from its other work. Ms Elliot was not given the opportunity to advise whether she would continue to narrow the scope of her request. Indeed, Ms Elliot’s words and actions to that point in time indicate that she was likely to have agreed to do so, if requested.
- 28 However, that option was not provided to Ms Elliot. I find that Council’s failure to seek further clarification meant that Ms Elliot was not provided a *reasonable* opportunity to consult with Council with a view to the applicant being helped to make an application in a form that would remove the ground for refusal under s19(1).
- 29 My decision might have been different had Ms Elliot had been failing to respond to Council’s requests to refine the scope of her application, or if Ms Elliot had expressly indicated that she was not willing to do so. Absent these circumstances, I cannot be satisfied that Council discharged its obligations under s19(2) and provided Ms Elliot a reasonable opportunity to consult with a view to helping remove the ground for refusal.
- 30 As I have found that Council has not met one of the mandatory steps under s19(2), it is not able to rely on s19 to refuse the request. Consequently, it is unnecessary for me to consider whether assessing information responsive Ms Elliot’s application would substantially and unreasonably divert Council’s resources from its other work.

Preliminary Conclusion

- 31 In accordance with the reasons set out above, I determine that Council was not entitled to refuse Ms Elliot's assessed disclosure application pursuant to s19.
- 32 I direct Council to reassess Ms Elliot's application in accordance with the provisions of the Act.

Submissions to the Preliminary Conclusion

- 33 As the above preliminary decision was adverse to Council, it was made available to it on 7 May 2025 under s48(1)(b) of the Act to seek its input prior to finalisation.
- 34 On 28 May 2025, my office received the following submissions from Council:

Legislative Interpretation Considerations and s.13, s.15 and s.20 of the RTI Act

The Ombudsman's preliminary decision appears to rely on an Interpretation of section 13(7) being constrained to operate only in relation to applications either 'not yet made' or 'not yet accepted' by the public authority who is in receipt of the application.

The City acknowledges section 15(3) makes it clear an application 'received' by the public authority that is then subject to negotiations pursuant to section 13(7) is 'taken to be' an 'accepted' application after the 10 day period prescribed in section 15(2) expires. However, it is the City's view that there is nothing which arises in either sections 13 or 15 that prohibits acceptance of the application by the public authority at an earlier time, including during the conduct of section 13(7) consultation. The limitation is simply placed upon the duration of time permitted for negotiations pursuant to sections 13(7) to refine the scope.

The Ombudsman's preliminary decision states:

"Council insists that negotiations entered into between Council and the applicant were subject to the 10-working day time frame contained within s15(2), but I do not agree with this interpretation of the Act. The 10-working day timeframe contained in s15(2) of the Act is only relevant to negotiations that are entered into under s13(7), which occur prior to the acceptance of an application which is not clearly defined. If an application remains lacking

in definition after this negotiation, it must be accepted after a maximum of 10 working days but a public authority can refuse it pursuant to s20(b)."

I am of the view that the Ombudsman's preliminary finding relating to the interpretation of section 13(7) is too narrow, particularly because section 13(7) states:

"A public authority may negotiate with an applicant to refine his or her application for assessed disclosure of information."

The section does not state that negotiations undertaken pursuant to section 13(7) are specifically limited to negotiations relating to 'applications not yet accepted' by the public authority.

Taking into account the purpose of the Act and applying section 4(1) of the Act, where the interpretation to be applied operates unless the provision is "inconsistent with or repugnant to the true intent and object of the particular Act", it is open to interpretation that an application may be accepted from the date of receipt unless by operation of section 13(3) the application does not provide the "minimum information as prescribed in the regulations".

Once the minimum information prescribed by the Regulations is provided, there is nothing to prevent the public authority accepting the application from that time, whilst still conducting negotiations as to scope.

Section 8A of the Acts Interpretation Act 1931 (Tas) requires interpretation of a provision within an Act is to have regard to the 'purpose or object' of the Act.

It is also noted that section 4(1) of the Acts Interpretation Act states:

"Except where otherwise expressly provided, the provisions of this Act shall be applied in the interpretation and construction of every Act whenever passed (including this Act) and of all regulations made under any Act, except in so far as-

(a) any provision of this Act is inconsistent with or repugnant to the true intent and object of the particular Act or regulation to be interpreted; or, in case of a regulation, with the true intent and object

of the Act under which such regulation purports to have been made."

It is apparent there are two distinct and potentially opposing views to the operation of section 13(7) of the Act and its relationship to sections 15(2) and 15(3)(b). What is clear is that an application once accepted is required by section 15(1) to be determined "not later than 20 working days after the acceptance of the application".

The City received the application from Ms Elliot on 23 August 2024 as an incomplete application. The request lacked dates, which are required by the Regulations to make it a legally valid application. The City immediately sought date parameters from the applicant to ensure the application contained the minimum amount of information prescribed in the Regulations required by the operation of section 13(3).

The applicant provided dates, to satisfy the minimum information required by the Regulations, which the applicant later changed. The application was accepted on 5 September 2024.

An additional step in the process was to refine the scope of the application as the application was initially lodged 'at large' and was 'ambiguous'. The application 'remained at large' and 'ambiguous' and in fact was 'increased' by the applicant.

The applicant did not agree to refine the scope in a manner that would either reduce the scope or remove the ambiguity, but instead sought to enlarge its scope.

The Ombudsman's view that it was open to Council to simply refuse the application under section 20(b) may have led to an alternative request for review.

In regard to section 15(1), a public authority "must take all reasonable steps to enable an application to be notified of a decision on an application for an assessed disclosure of information as soon as practicable but in any case not later than 20 working days after the acceptance of the application".

The City conducted negotiations with the applicant in relation to the scope of the application within a 10-working day period. The City completed the determination within the maximum 20-day processing period.

It was determined after permitting the applicant 10-working days to refine the scope, that the scope remained 'at large' and 'ambiguous'. I remained of the view that the volume of records was too excessive for the City to reasonably process, assess, consult and determine within the statutory timeframe.

Operation of Section 19

As I previously noted, the City identified over 60,000 references to the key words associated with the applicant's request. I was of the view that reviewing these references would be an unreasonable diversion of the City's resources. I made this determination having regard to the matters specified in Schedule 3 of the Act and formed the same conclusion.

I note this view is supported by the Ombudsman's decisions in Rosalie Woodruff MP and the Department of Natural Resources and Environment Tasmania, and in the decision of Robin Smith and City of Launceston.

The decisions related to these matters upheld that the relevant authorities had conducted consultation with the applicant, that those negotiations had not led to any reasonable reduction in scope, or one that was not simply a minor reduction in scope.

The City advised Ms Elliot on 2 September 2024 that:

"Having the scope of an application remain extremely large and ambiguous, risks the outcome that it may be determined in accordance with s. 19 of the Act, having regard to the matters prescribed in Sch.3 of the Act ...".

Further, the City stated that:

"Whilst the scope of the application is solely a matter for you, please be mindful of the matters that I have raised above. I would encourage you to better crystalise your application so that I can begin searching for the relevant information within the statutory timeframe. If, however, you elect not to further refine the scope of your application, then I will make my determination based upon the information you have supplied to date."

After the above advice was given to the applicant on 2 September 2024, I made the decision having received no further reduction in the scope from the applicant, on 20 September 2024, some 15 working days later.

I suggest the applicant had from the correspondence dated on 27 August 2024 through to my issuing of the decision on 20 September 2024, reasonable time to refine her scope. This is a period of 18 days, (not including the date of the decision) to refine her scope before my decision was published.

Reasonable Opportunity to Consult

Prior to refusing the application under section 19(1) of the Act, I considered whether the applicant had been afforded a "reasonable opportunity to consult with a view to the applicant being helped to make an application in a form that would remove the ground for refusal".

I considered 10-working days to be a reasonable period of consultation to provide the applicant in circumstances where there is no prescribed period under section 19(2).

Given the application was to be determined within 20-working days, and the applicant had specifically requested her application be determined ahead of other applications, a matter specifically addressed in my correspondence to the applicant of 23 August 2024, 'What is a reasonable time?' the time to consult can only be inferred as reasonable.

In drawing upon other provisions of the Act including section 15(2), 10 days consultation is considered reasonable. This is supported by the decision in Woodruff, where the applicant was given five days to refine her scope, which was subsequently renegotiated to 10 days in total. The application was determined one day after the expiry of that 10-day period and the Ombudsman upheld the Department's refusal under section 19 of the Act.

Further Analysis

- 35 I do not agree that, as contended by Council, there are two distinct and potentially opposing views to the operation of section 13(7) of the Act and its relationship to sections 15(2) and 15(3)(b) or that this would be determinative in this review even if there were.
- 36 As detailed in my preliminary decision issued to Council, the timeframe contained in section 15(2) applies to negotiations conducted under s13(7) of the Act. Negotiations conducted under s13(7) are conducted to crystalise what is being sought by an applicant, where the terms of a request are so unclear that it is unable to be determined what is being sought. That this is the type of negotiation contemplated under s13(7)

(and therefore subject to the timeframe contained in s15(2)) is further supported by the words contained in s20(b) of the Act (emphasis added):

If an application for an assessed disclosure of information is made by an applicant for access to information which is an application which . . . in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7)

- 37 The negotiations entered into between Council and Ms Elliot however, were not conducted under s13(7) and there was no claim that s20(b) was applicable. The relevant negotiations were conducted under s19(2), as Council was trying to refuse Ms Elliot's application under s19. Council's concern was the excessive volume of information requested and not a lack of understanding of the parameters of the request.
- 38 There is no section of the Act which could be said to establish that s19(2) negotiations are subject to the 10 working day time frame contained in s15(2). As such, I remain of the view that Council was wrong to consider the fact that negotiations under s19(2) had lasted 10 working days was a relevant consideration in determining whether Ms Elliot had been provided a reasonable opportunity to consult with Council in order to remove the grounds of refusal under s19.
- 39 The required negotiations under s19(2) may be completed within a matter of hours, or may take months, depending on the way a public authority and applicant engage with each other and whether extensions to timeframes are agreed. The key consideration in the s3 object of the Act is facilitating the *provision of the maximum amount of official information*. If an extension to timeframes needs to be sought to attempt to remove a ground of refusal of an application, this would clearly accord with the objects of the Act above rigid adherence to timeframes.
- 40 That is not to say that consultations under s19(2) are required to be lengthy or a public authority must engage in indefinite discussions with an applicant. It is the content of the negotiation, rather than the length, which is determinative of whether a reasonable opportunity to consult has been afforded to an applicant.
- 41 Notwithstanding this, I again acknowledge that Council made some genuine efforts to negotiate with Ms Elliot. As noted in my preliminary decision, my finding may well have been different had Ms Elliot been failing to respond to Council's requests to refine the scope of her application, or if Ms Elliot had expressly indicated that she was not willing to continue to negotiate. This is especially the case given that Ms Elliot's request, as it stands, does appear to capture a large amount of information, which may very well result in it being eligible for refusal

under s19 due to the substantial and unreasonable diversion of Council's resources from its other work.

- 42 However, as Council has not indicated that it has conducted any further consultation with Ms Elliot and no other circumstances have changed, I remain unpersuaded that the requirements of s19(2) have been met. Accordingly, I remain unable to accept refusal under s19(1) is appropriate, due to Council's failure to fully complete this mandatory step.

Conclusion

- 43 For the reasons given above, I determine that Council was not entitled to refuse Ms Elliot's assessed disclosure application pursuant to s19.
- 44 I direct Council to reassess Ms Elliot's application in accordance with the provisions of the Act.

Dated: 30 May 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 19 Requests may be refused if resources unreasonably diverted

- (1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –
- (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
 - (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions – having regard to –
 - (c) the matters specified in Schedule 3 – the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.
- (2) A public authority or Minister must not refuse to provide information by virtue of subsection (1) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.

Schedule 3 Matters Relevant to Assessment of Refusing Application

- (1) 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: R2405-016

Names of Parties: Meg Webb and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s30, s31, s35, s36

Background

- 1 In October 2010, Ms Susan Neill-Fraser was convicted of the murder of her de facto partner, Mr Robert Chappell. Subsequent appeals have not overturned the conviction.
- 2 The Honourable Meg Webb MLC (the Applicant) is an independent member of the Parliament of Tasmania representing the electorate of Nelson in the Legislative Council. She has expressed a concern that Ms Neill-Fraser's conviction may have been a miscarriage of justice.
- 3 On 16 October 2023, Ms Webb made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department). Ms Webb sought:

All information in the possession of Tasmania Police and FSST [Forensic Science Service Tasmania] concerning:

- *The crime scene report of FSST scientist Ana Herta dated 12 June 2009 which is referred to in various subsequent FSST reports (e.g. 14 December 2009 and 22 March 2019).*
- *Any emails or other documentation (including any item examination notes) which refer to this report, the work of Ana Herta in the Sue Neill-Fraser case (including draft or finalised statements or reports) or the relevant contents of her 12 June 2009 crime scene report.*
- *All information by way of records, notes, forms, emails, documents, photos etc. completed by, taken or involving Ms Zoe Tuppen from FSST who accompanied Ms McHoul onto the Four Winds yacht in 2009.*
- *The single person DNA profiles for A, B, C, D, F and G (and on which items they were located) regarding the forensic analysis in the Neill-Fraser matter, which is partially reported in the Forensic Biology Report 1 July 2009, including details of any matches to individuals on*

DNA databases (local and national). (Please note, E is Meaghan Vass and H and I are not considered relevant).

- 4 On 18 December 2023, Ms Roslyn French, a delegate under the Act for the Department, issued a decision. Ms French identified and released 608 pages of information in whole or in part and applied ss30, 31, 35 and 36 to exempt some information. Ms French also claimed some information on page 336 as exempt under s63 of the *Forensic Procedures Act 2000* and nominated s30(1)(e) of the Act as an alternative exemption.
- 5 On 22 January 2024, Ms Webb sought internal review and in consultation with Inspector Scott Mackenzie, another delegate under the Act for the Department, some minor refinements to the scope of the request were made.
- 6 On 15 April 2024, Inspector Mackenzie issued the internal review decision. The Inspector released two further documents in part, having applied s36 to exempt some information. A delay in the parliamentary email system meant that the decision was not received by Ms Webb until 22 April 2024.
- 7 Inspector Mackenzie determined that some information had been incorrectly considered to be exempt under s35. Part of this information was released to Ms Webb and part was determined to be exempt under s30(1)(e).
- 8 Finally, Inspector Mackenzie upheld the application of s63 of the Forensic Procedures Act and also proposed an alternative exemption under s30(1)(e) of the Act.
- 9 On 20 May 2024, Ms Webb applied for external review. This was after the expiry of the 20 working day period provided in s44(2) of the Act for external review applications to be made. After considering the circumstances which led to the delay in Ms Webb receiving the internal review decision, the Department, at the request of my office, re-issued the internal review decision in identical terms on 21 June 2024. Ms Webb confirmed she still sought external review, and this could now be accepted under s44 of the Act.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss30, 31, 35, 36 or any other relevant section of the Act. As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment of these exemptions is subject to the public interest test in s33.
- 11 This means that, should I determine the requested information is *prima facie* exempt from disclosure under ss35 or 36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 I include copies of ss30, 31, 35 and 36 of the Act at Attachment 1.

13 Copies of s33 and Schedule 1 are also at Attachment 1.

Submissions

Applicant

14 In her application to the Department for internal review, Ms Webb made a number of submissions, including:

...there was no schedule of documents provided as is usual best practice... Given this was a detailed and complex response, a Schedule of Documents would have been particularly helpful. The absence of a Schedule of Documents made it difficult to identify the date of the document in some instances and analyse the response easily. This made it extremely difficult to link the material provided with the information sought.

Page 58 of the [Ombudsman's] Manual states that the Schedule of Documents should be supported by reasons which elaborate upon the brief information given in the Schedule.

...

In contrast, there have been no specific reasons given for each of the exemptions claimed... Rather, a general overview only is provided...

15 Ms Webb elaborated on this issue in her application for external review, setting out that:

In the absence of a clear Schedule of Documents, it was impossible to know what some of the provided documents were, who they were authored by, the date of production etc. For example, it was very difficult to identify critical documents such as the two versions of the major FSST Forensic Biology Report from 2009. It was only upon careful and close inspection that we were able to determine that the first draft of the document had been released, a document I understand may not have been previously disclosed.

Further, it was also difficult to understand whether attachments to documents had actually been provided in the response.

...

I would argue that standard practice should be elevated to recommended/best practice as a matter of public interest and in accordance with the objectives of the Act.

...

It would be particularly useful to have a Schedule of Documents released as part of the routine disclosure process in complex

responses involving multiple documents, photos, images and multiple versions of reports, for example.

- 16 In her application for internal review, Ms Webb also made submissions regarding the related issue of the Department's reasoning regarding its application of exemptions, particularly those made pursuant to s35 of the Act, which included the following:

The response cover letter ... stated that the information contained within the forensic examinations, exhibits and results, emails and crime scene notes included public officers' personal opinions and deliberations. She was satisfied that it would be contrary to the public interest to disclose the aforementioned information as it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of entry cannot be substantiated and may be misinterpreted.

This argument raises concerns, as it is necessary to first determine whether the exemption applies or not. If it does apply, it is then necessary to consider the public interest test... a determination must then occur as to whether it would be contrary to the public interest to disclose it.

...
There are no properly stated reasons for the exemptions and reasons claimed (in accordance with the requirements of s.22 of the Act).

...
There is inadequate explanation in this disclosure of how the public interest has been taken properly into account for relevant exemptions such as ss.30 – see subsections (2) and (3), 35 and 36.

...
Section 22(2)(d) states that if the decision involves or relies upon consideration of the public interest in the application of a provision of the Act, the decision must state the public interest considerations upon which that decision was based. The letter of response states the following:

Section 35 and 36 exemptions require consideration of the public interest test. In this instance, I am satisfied it would be contrary to the public interest to disclose the exempt information.

There is then an analysis of the public interest test ... which states the law correctly but then provides a general and superficial analysis – certainly not a line by line assessment.

- 17 Ms Webb then identified some information claimed to be exempt which appeared to be over ten years old, and therefore not eligible for exemption under s35, before continuing:

In addition ... when considering the issue of public interest pursuant to s.33, Schedule 2(1)(d) (Matters irrelevant to the Public Interest) provides that the decision maker is not to consider whether the disclosure might cause the applicant to misinterpret or misunderstand the information contained in the request document because of an omission or for any other reason...

The RTI 444/23 response ... twice refers to the dangers of misinterpretation ... in relation to the s.35(1) exemption and the public interest test.

...

This raises concerns over whether the irrelevant matters listed in Schedule 2 were considered appropriately or not...

- 18 Ms Webb addressed what she considered to be the relevant matters to be considered under the public interest test, indicating:

Only one matter, the general public need for government information to be accessible ... is listed as favouring disclosure when there are numerous other matters which should have been considered. The ... response letter states that the delegate considered that the remaining matters in Schedule 1 of the Act to be irrelevant to my application. It is very difficult to understand how matter (j), for instance, which relates to the administration of justice could be irrelevant to this disclosure.

I consider that there are several other issues in Schedule 1 that should have been considered such as....:

- b) ...the Sue Neill-Fraser case was, and remains, a matter of public interest;*
- c) ...the information would assist in understanding a decision of guilty in the Sue Neill-Fraser matter and the failure of subsequent appeals;*
- d) ...an understanding of critical forensic issues in this case would assist in understanding the government's reluctance to intervene in this matter...;*
- e) ...the response would help to demonstrate the independence/impartiality, or otherwise, of the FSST from its parent organisation, the Tasmania Police;*
- f) ...the provision of the forensic information in the case including critical DNA results would certainly enhance scrutiny of*

important decisions made in the Sue Neill-Fraser investigation and prosecution;

g) ...the disclosure would enhance scrutiny and understanding of the current administrative processes and interface between FSST and Tasmania Police – such interface is critical to criminal justice...;

h) ...RTI is one of the few tools available to persons who may have been wrongly convicted. The ability of convicted persons to access information which may be critical to their ability to launch an appeal against conviction must be a public interest consideration;

j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – this is a critical consideration and highly relevant to this matter;

m) ...the disclosure would promote the interests of Sue Neill-Fraser, her family. It would promote the importance of the rule of law and reassure the community that the government and its agencies are transparent and accountable; and

o) ...the disclosure would not impact on the effectiveness of crime scene investigation or DNA testing and reporting, other than in a way that such scrutiny may enhance future operations and public confidence

- 19 Ms Webb went on to address the Department's consideration of factors weighing against disclosure:

The section in the ... cover letter of response dealing with the public interest test lists provisions (n) and (u) as favouring non-disclosure.

It is unclear how the information sought by me would prejudice the ability to obtain similar information in the future. The information was gained by forensic examination of exhibits and their analysis. It is not subject to the willingness of community members or witnesses to come forward in future investigations, for example. The public would surely expect transparency and accountability, where appropriate, in relation to forensic testing and police investigation in relation to serious crime matters where a person may have been wrongly imprisoned for 13 years...

The response also states that the criterion in (u) as to whether the information is wrong or inaccurate favours non-disclosure. Surely the consideration should not be one of "absolute accuracy" as has been stated. It is appreciated that the material

is scientific material that has to be interpreted and considered by the courts, including by way of cross-examination and other expert evidence. It appears curious to suggest that the release of forensic/scientific information recorded by qualified scientists from a NATA accredited laboratory would prevent the frank exchange of ideas and opinions between public officers in the future. Forensic reports are generally provided with appropriate assumptions, limitations and qualifications.

- 20 Ms Webb also made submissions regarding the Department's application of s31 (legal professional privilege) to exempt some information:

I would ask that the materials redacted by claiming the s.31 exemption relating to LPP be reviewed to ensure that no information has been withheld inappropriately.

In relation to the LPP issue, I refer in particular to pages 431 to 432 from July 2018 which importantly seem to relate to additional forensic testing and a letter from the Neill-Fraser legal team...

I also ask the p.457 be reviewed to ensure that appropriate redaction has occurred. This relates to the provision of forensic testing results in February 2021. Such information would not be privileged from production in legal proceedings.

Department

- 21 The Department was not required to provide specific submissions for this external review, as it had provided its reasoning in its decisions.
- 22 In its initial decision, the Department provided reasoning in a section headed *Section 30(1)(e) Exemption*, however it actually addressed the operation of s30(1)(c) in the following terms:

The information assessed includes information contained within the forensic biology report and an email from Pam Scott of Forensic Science Service Tasmania (FSST). The information assessed includes methods and procedures that are necessary for FSST to use in the analysing and testing of exhibits and this information is exempt pursuant to Section 30(1)(c) of the Act...

Exemptions applied pursuant to Section 30 of the Act are not subject to the public interest test at Schedule 1. Notwithstanding that, I am [sic] satisfied that disclosure of any information relating to any such methods and procedures, would assist persons in obtaining authoritative knowledge of those methods and procedures and hence compromise their future effectiveness.

- 23 In relation to exemptions applied under s31, the Department's initial decision included the following:

The information assessed includes correspondence prepared by the Office of the Director of Public Prosecutions in reference to investigations managed by DPFEM, none of which would have been subject to release during any subsequent court proceedings. Consequently, an exemption pursuant to Section 31 of the Act has been applied to that information.

Exemptions applied pursuant to Section 31 of the Act are not subject to the public interest test at Schedule 1. Notwithstanding that, I am satisfied that disclosure of this information by DPFEM, in its business of law enforcement, would be contrary to the public interest.

- 24 The matter of legal professional privilege was also addressed by the Department in its internal review decision as follows:

I have reviewed all exemptions under section 31 and can confirm that all correspondence is between the legal practitioner and the client (in this case, DPFEM).

I also wish to refer you to the definition of confidential communication as defined in section 117 of the Evidence Act 2001 ... It is defined as:

confidential communication means a communication made in such circumstances that, when it was made –

- (a) the person who made it; or
- (b) the person to whom it was made –

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

I have reviewed the communication that was exempted under section 31 of the Act in the original decision... on pages 431, 432 and 457.

My fresh decision is that in any ordinary circumstances, it would be fair to suggest that any communication between the Director of Public Prosecutions and their client has implied obligations not to disclose contents outside of the investigative structure. Additionally, in this case, all communications explicitly state, "This email and any attachments are confidential..." Therefore, I am without a doubt that they are classified as confidential communications. The content of these emails will remain redacted.

- 25 In relation to exemptions applied under s35 of the Act, the Department's initial decision concluded that:

Information contained within the forensic examinations, exhibits and results, emails and crime scene notes include public officer's [sic] personal opinions and internal deliberations. I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of entry cannot be substantiated and may be misinterpreted.

- 26 The initial decision then considered the application of s36, asserting that:

... the personal information provided by or about a person is a vital tool in assisting Tasmania Police with the prevention, detection, and investigation of daily life incidents. The supply and source of information must be protected so that similar information is forthcoming and 'free flowing' in the future without any reasonable concern from the person providing it.

... I can advise that I consulted with five third parties. One third party responded in writing and did consent to their information provided to be released in full and two third parties consented to part of their information provided be released. Two third parties did not respond to this office, which, naturally does not imply consent.

- 27 The Department then addressed the public interest test in s33 in relation to all the information it assessed as exempt under ss35 and 36, relevantly indicating:

I consider the following matters in Schedule 1 of the Act ... to favour disclosure of the exempt information:

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

Conversely, I consider the following matters in Schedule 1 of the Act to favour non-disclosure of the exempt information:

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

I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as it is third parties' personal information that is private, and information provided in confidence that would reasonably not be expected to be disclosed. The release of this information would be reasonably likely to harm the ability to obtain similar information in the future and therefore hinder the investigation process.

(u) whether the information is wrong or inaccurate.

Information contained within the forensic examinations, exhibits and results, emails and crime scene notes include [sic] public officer's personal opinions and internal deliberations made at the time of entry without completion of the investigation/enquiry and knowledge of all facts. I am satisfied 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 public officers in future leading to less robust decision making against the public interest.

I consider the remaining matters in Schedule 1 of the Act to be non-relevant to your application.

- 28 The Department's application of s35 was also addressed by Inspector Mackenzie in his internal review decision as follows:

Ms French [in the initial decision] used arguments that it would disclose the internal thinking process of a public authority and the absolute accuracy at the time of the entry cannot be substantiated and may be misinterpreted. Although I concede the wording of her reasoning could be misconstrued, I am inclined to interpret the statement in what I consider was the intent of the wording and the most likely and reasonable explanation of her reasoning. Applying what is reasonable, I interpret what Ms French was reasoning as that she had applied section 35 because it would disclose the internal thinking process of a public authority, and then she was applying section 35 because the accuracy was unsubstantiated, which is a consideration for public interest under Schedule 1(u).

Having said that ... I wish to specifically address the points at which you have requested a review...

Pages 459-460 – I note that the redactions in the body of this email were exempted under section 35(1). You are correct in saying that section 35(4) of the Act means that this exemption cannot be applied. I have reviewed the document again and provided a fresh decision. The material that was originally redacted using section 35(1), is still in fact exempt from release under section 30(1)(e). The relevant material relates to information gathered for forensic testing. I have released the second paragraph which was originally redacted under s35, as I am of the opinion that this exemption does not apply to this section of the information...

...

I acknowledge the presence of irrelevant considerations in Schedule 2, and I concur that a misinterpretation of information is not pertinent to a non-disclosure. In my fresh decision, I have considered this along with all other considerations in Schedule 1.

- 29 Regarding the lack of a schedule of documents, Inspector Mackenzie submitted as part of his internal review that:

While the [Ombudsman's] Manual suggests the use of a Schedule of Documents, it's important to note that neither the Manual nor the Act mandates its inclusion. In this particular case, the information sought is so broad and voluminous, a Schedule of Documents would not be practical without a devotion of significant resources to achieve. Moreover, within DPFEM, the practice of explicitly identifying sections on redacted documents offers more contextual guidance than a Schedule of Documents would. Other agencies tend to redact documents by simply marking the document with a black redaction, which a Schedule of Documents would then assist to identify which redactions would apply to which pages of the documents. DPFEM's approach ensures that the exemptions are clearly marked on each page. This approach, combined with the Statement of Reasons, complements the report provided with the disclosure...

In conclusion, the absence of a Schedule of Documents in the original disclosure was not unreasonable, unlawful, and aligns with standard practice within DPFEM. For those reasons, it is not included within my fresh decision.

Analysis

- 30 The Department provided my office with unredacted copies of the 608 pages of information originally released to Ms Webb, along with attachments to pages 434 and 441, which were released as a result of the internal review. For ease of reference, in my analysis I will use the Department's page numbering to refer to the relevant information.
- 31 In her application for external review, Ms Webb set out her four narrow areas of concern. These were:
- the failure to provide a schedule of documents;
 - the alleged failure to provide a statement of reasons with relevant decisions;
 - the use of 'not relevant' to redact information responsive to her request; and
 - the use of s31 to redact entire pages of information.

- 32 However, given that one of those areas concerned the adequacy of the Department's reasoning, I consider it appropriate to conduct an external review of the Department's entire internal review decision.

Preliminary issue one – Failure to provide a schedule of documents

- 33 Ms Webb raised concerns that the Department did not provide her with a schedule of documents to accompany the release of information. Provision of a schedule is not a mandatory requirement under the Act, and I note Inspector Mackenzie's internal review comment regarding the reasons this did not occur - namely the significant resources needed to compile a schedule for this broad and voluminous application.
- 34 A schedule of documents is, however, of great assistance to an applicant when a large amount of information is released, and I encourage the Department to consider providing one where practicable in future.
- 35 I chose not to exercise my power under s47(1)(n) to direct the Department to provide a schedule of documents to Ms Webb, however, as I considered that the Department had adequately identified the type and purpose of redactions in the relevant material through notations on the documents.

Preliminary issue two – Failure to provide a statement of reasons

- 36 Ms Webb raised concerns in her request for internal review, as well as in her application to my office for external review, that the Department had not provided her with properly stated reasons for the exemptions it had applied to the information.
- 37 Section 22(2)(a) of the Act provides that a public authority or Minister must state the reasons for a decision to exempt information and, if applicable, the public interest considerations upon which that decision was based. I note that Ms French, in her original decision, did provide brief reasons for the exemptions she applied to the information and these reasons were challenged by Ms Webb in her request for internal review.
- 38 Inspector Mackenzie, in the internal review decision, generally adopted the reasoning of the initial decision except for those matters he addressed as a direct response to Ms Webb's submissions. Section 43(5) of the Act does provide that an internal review decision is to be given in the same manner as a decision in respect of the original application, however it is appropriate to confine an internal review to a more limited basis than the original decision if these are the only matters in dispute. In this matter the Inspector indicates that there was some consultation with the Applicant on 20 March 2024 regarding the scope of review and it was appropriate for him to provide a specific response to concerns Ms Webb raised.
- 39 There was ultimately only a small amount of information to which exemptions were applied and a clear indication was provided of the section of the Act being relied upon for each exemption on each document. Appropriate reasoning was

set out in the initial decision, including the public interest factors considered, and adopted in the internal review.

- 40 While I agree with Ms Webb that the internal review decision should have been more ‘stand alone’ rather than referring back to the original decision regarding exemptions applied, I am ultimately satisfied that the reasoning provided by the Department, while not fulsome, was adequate.

Preliminary issue three – Redaction of information as ‘not relevant’

- 41 In her application for external review, Ms Webb also raised a concern regarding the Department’s use of the words *Not Relevant* in relation to a number of redactions, where the information was considered to be beyond the scope of the original request, in particular on page 446.
- 42 It is common practice for information which is not within the parameters of an assessed disclosure request to be redacted and marked ‘out of scope’ or ‘not relevant’, as has occurred here. While the release of the maximum amount of official information should occur pursuant to s3, the removal of information which is not responsive to the request for information is permitted under the Act.
- 43 The assessment as to whether information is out of scope of a request is not one which attracts a right of review under Part 4 of the Act, but I have examined the relevant information and am satisfied that the Department’s determination is one reasonably available to it due to the parameters of Ms Webb’s request.

Preliminary issue four – Forensic Procedures Act 2000

- 44 On page 336, the Department applied a redaction which is labelled s63 *Forensic Procedures Act [2000]*. This section, relevantly, provides:

63 – Disclosure of information

- (1) *Except as otherwise provided by this section, a person who has access –*
- (a) *to any information stored on the DNA database system; or*
- (b) *to any other information revealed by a forensic procedure carried out on a person under this Act or a corresponding law –*

must not intentionally or recklessly disclose, or cause the disclosure of, that information.

Penalty: Fine not exceeding 100 penalty units or imprisonment for a term not exceeding 2 years, or both.

...

(4) Subsection (1) does not apply to information that cannot be used to discover the identity of any person.

- 45 The *Forensic Procedures Act 2000* does not specifically provide for the exclusion of the Act, and information responsive to an application for assessed disclosure must be assessed against the provisions of the Act before it can be claimed to be exempt. Information cannot be “exempt” under the *Forensic Procedures Act* but its provisions can be considered in assessing whether an exemption under the Act is relevant.
- 46 In both the original and internal review decisions, the Department set out that the relevant information is also exempt under s30(1)(e) of the Act. For information to be exempt under this section, I must be satisfied that its disclosure would, or would be reasonably likely to, *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.*
- 47 There is no information before me to indicate the purpose for which the information in the relevant document was gathered, collated or created. This being the case, I am not satisfied there is a sufficient nexus between this information and the general category of intelligence information provided for in s30(1)(e), notwithstanding the reference in the section to forensic testing.
- 48 I consider that the more appropriate provision of the Act is s30(1)(a)(ii) and so I will assess the information under that section in the following analysis.

Section 30 – information relating to enforcement of the law

Section 30(1)(a)(ii)

- 49 The Department has determined not to disclose the DNA profiles in a table on page 336 of the information on the basis that its release would be incompatible with an offence provision in s63 of the *Forensic Procedures Act 2000*. As discussed, I consider the most appropriate exemption for consideration in these circumstances would be s30(1)(a)(ii).
- 50 For information to be exempt under s30(1)(a)(ii), I must relevantly be satisfied that disclosure of the information under the Act would, or would be reasonably likely to, prejudice:
 - (ii) the enforcement or proper administration of the law in a particular instance.*
- 51 The word ‘prejudice’ is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally.*¹
- 52 There is, in my view, no question that the disclosure of the DNA profiles in this table would reveal information stored on the Tasmanian DNA database system.

¹ Definition of prejudice, Macquarie Dictionary online, available at www.macquariedictionary.com.au accessed on 2 May 2025.

This would constitute an offence under s63(1) of the Forensic Procedures Act, unless it fell into the relevant scenarios provided for in s63(2) or (3) of that Act. There is no indication that these circumstances are applicable to this information.

- 53 In her application for internal review, Ms Webb raised s63(4) of the Forensic Procedures Act, which provides that *Subsection (1) does not apply to information that cannot be used to discover the identity of any person*, and submitted:

Hence, if the information does not identify an actual individual, it should be disclosed.

Additionally, where large tracts of information in this response have been redacted on the basis of s.63 of the Forensic Procedures Act 2000, we would seek a review of the entire response with a view to providing all information in redacted sections which does not identify a specific individual i.e. the name of the person can be simply redacted.

- 54 I do not agree with this submission. The purpose of a DNA database is to store genetic information which can then be matched to a sample and so used to discover the identity of an individual. Merely redacting a name does not, in my view, mean that a DNA profile cannot be used to discover the identity of a person.
- 55 This being the case, I am not persuaded that the dis-application provision in s63(4) is relevant. I consider that to release the relevant DNA information on page 336 would be reasonably likely to prejudice the proper administration of the law, namely s63 of the Forensic Procedures Act. I therefore determine the information previously claimed to be exempt under that Act is exempt under s30(1)(a)(ii).
- 56 The factors in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 30(1)(c)

- 57 The Department has sought to exempt further information under s30(1)(c). For information to be exempt under this subsection, I must be satisfied that its disclosure *would, or would 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.*
- 58 The Department has applied s30(1)(c) to exempt information on pages 430 and 464. The redacted information on page 430 concerns differences in procedure involving a newer testing product and general information regarding adding or removing profiles from a national DNA database. There is no sensitive

information included and no indication that disclosure of the information will prejudice the effectiveness of any procedures used by Forensic Services.

- 59 The information on page 464 claimed by the Department to be exempt is even more innocuous and merely refers to some advantages of the newer test. It is difficult to see how the release of this information will allow any person to circumvent any method or procedure. I consider that the Department has not satisfied its onus under s47(4) of the Act to show why this information should be exempt. I determine that the information on these two pages should be released to Ms Webb.

Section 30(1)(e)

- 60 The Department, on internal review, amended the exemptions claimed on pages 459 and 460. Information which was initially claimed to be exempt under s35 was identified as being over ten years old and therefore not eligible for exemption under that section. The Department then applied s30(1)(e) to exempt the same information.
- 61 As noted, for information to be exempt under s30(1)(e), I must be satisfied that its release would *disclose information gathered, collated or created for intelligence, including but not limits to databases of criminal intelligence, forensic testing or anonymous information from the public.*
- 62 The word ‘intelligence’ is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as:
4. *knowledge of an event, circumstance, etc., received or imparted; news; information:* military intelligence; intelligence relating to bushfire occurrences.
 5. *the gathering or distribution of information, especially secret or military information which might prove detrimental to an enemy.*
 8. Obsolete *interchange of information, thoughts, etc., or communication.*²
- 63 I have examined the relevant information and am satisfied that it was gathered, collated or created for the overarching purpose of intelligence and is therefore exempt from disclosure under s30(1)(e). The factors listed in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 31 – Legal professional privilege

- 64 The Department sought to exempt some information under s31. For information to be exempt under that section, I must be satisfied that it is of *such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.*

² Definition of intelligence, Macquarie Dictionary online, available at www.macquariedictionary.com.au accessed on 7 May 2025.

- 65 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between clients and their lawyers, to enable lawyers to give proper legal advice.³ It is a common law principle which protects the confidentiality of communications made between lawyer and client if they were made for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation.⁴ This privilege also applies to advice provided by in-house lawyers.⁵
- 66 The Department has applied s31 to exempt information on pages 431, 432 and 457. Upon reviewing the information, it is clear that those pages contain emails exchanged between Tasmania Police, Forensic Services and the Office of the Director of Public Prosecutions concerning forthcoming litigation. There is no indication that privilege has been waived and, accordingly, I determine that the information is exempt under s31.
- 67 This being the case, there is no need for me to address the Department's submission regarding *confidential communication as defined in section 117 of the Evidence Act 2001*.
- 68 Legal professional privilege does not attach to a document or email per se, but to the communication recorded within it.⁶ Therefore, my finding in this regard does not extend to information contained in the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers contained in these emails. This information was not communicated between a lawyer and client for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation. This information is not exempt and should be released to Ms Webb.

Section 35 – Internal deliberative information

- 69 The Department has sought to exempt information pursuant to s35. For information to be exempt from disclosure under that section, I must be satisfied that it consists of:
- an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities (s35(1)(b)); or

³ *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ.

⁴ *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, where the High Court re-affirmed the 'dominant purpose test' established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁵ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30.

⁶ *Commissioner of the Australian Federal Police v Propend Finance* (1997) 188 CLR 501 per McHugh J.

- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 70 Once the requirements of one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process related to the official business of the Department.
- 71 Section 35(1) of the Act does not apply to the following:
- purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information which is older than 10 years (s35(4)).
- 72 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*⁷ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be factual in quite unambiguous terms.
- 73 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)*,⁸ 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*.
- 74 The Department has applied s35 to exempt information on the following pages: 128, 130-142, 177, 179, 200, 272, 274, 337, 340-342, 354, 408, 411, 456, 538, 549 and 577.
- 75 I have examined the relevant documents and note that the Department did not adopt a consistent manner of identifying the date each document was created. It appears the information contained in the following documents and claimed to be exempt under s35 was created on:
- | | |
|------------------------------------|-----------------|
| • page 138 | 29 January 2009 |
| • pages 128, 130-137, 139-140, 408 | 27 January 2009 |
| • pages 177, 179 | 30 January 2009 |
| • pages 200, 272, 274, 340, 342 | 12 March 2009 |
| • page 341 | 11 March 2009 |
| • page 354 | 13 March 2009 |

⁷ [1984] AATA 518 at [14].

⁸ [1984] AATA 67 at [58].

- page 538 1 July 2009
 - pages 549, 577 10 June 2009
- 76 Section 35(4) of the Act provides that information more than ten years old is not eligible for exemption under s35, and accordingly these documents are not exempt and should be released to Ms Webb.
- 77 In addition, I have examined pages 141 and 142 and am unable to determine when the very small amount of information claimed to be exempt under s35 was created, though it seems likely to have been in early 2009. I therefore determine that the Department has not discharged its onus under s47(4) of the Act to show that the information should not be disclosed and it is not exempt under s35, and these two pages should be released to Ms Webb.
- 78 I have examined the remaining pages 337, 411 and 456, to which the Department has applied s35 to exempt some information. They contain communications between Tasmania Police, Forensic Services and the Office of the Director of Public Prosecutions containing opinions of officers relating to the official business of the Department. I am satisfied that the information is not more than ten years old and is therefore *prima facie* exempt under s35(1)(a).

Section 33 – Public interest test

- 79 Section 35 is subject to the public interest test contained in s33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. In making this assessment I am required to have regard to, at least, the matters in Schedule 1.
- 80 Schedule 1, matter (a) – the general public need for government information to be accessible – is essentially a restatement of the objects of the Act and as such will almost always be relevant and weigh in favour of disclosure.
- 81 Schedule 1, matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant. The trial and conviction of Ms Neill-Fraser, along with her subsequent appeals, generated a considerable amount of national public debate involving prominent members of the legal profession, journalists, activists and politicians. More importantly, continued public confidence in the outcome of criminal trials is a matter of significant public interest. This matter therefore weighs in favour of disclosure.
- 82 Schedule 1, matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – was identified by Ms Webb as a *critical consideration and highly relevant to this matter*. I agree that this matter is relevant but consider that it weighs against disclosure, rather than in favour as argued by Ms Webb. While I agree that the prevention of miscarriages of justice is crucial, it is also essential for investigators and prosecutors to be able to have a robust exchange of ideas and opinions regarding the meaning and significance of various pieces of evidence. If investigators believe these discussions could be

routinely released through the right to information process, they are likely to be inhibited, resulting in less rigorous analysis and potentially flawed investigative outcomes.

- 83 Ms Webb also identified Schedule 1 matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – as relevant because the *ability of convicted persons to access information which may be critical to their ability to launch an appeal must be a public interest consideration*.
- 84 I do not agree with this submission. I do accept that the ability of convicted persons to appeal their convictions is important, however I note that this matter has been the subject of several appeal hearings. It should be noted that evidence relied upon by the Crown is able to be examined and challenged by opposing counsel at both trial and appeal. The right to information process is not the key mechanism to obtain relevant information in such matters.
- 85 Despite this, I agree that these matters weigh in favour of release, as scrutiny of relevant government information when there are concerns of miscarriages of justice is important.
- 86 Schedule 1, matter (u) – whether the information is wrong or inaccurate – was referred to by the Department because the accuracy of the information was *unsubstantiated*. Given that the Department is uncertain whether the information is in fact wrong or inaccurate, I do not accept this factor is relevant.
- 87 I note that Schedule 2, matter 1(b) provides that it is an irrelevant consideration in the public interest test whether disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information. I caution the Department to ensure that it does not place weight on irrelevant matters, such as any assumption that those receiving the information would not understand its unproven or theoretical nature. Parliament has explicitly instructed that this must not be taken into account.
- 88 The assessment of whether disclosure of information is contrary to the public interest will always involve the balancing of competing priorities and consideration of the specific circumstances relevant to each piece of information against which an exemption has been claimed. In this case, I give the greatest weight to matter (j), allowing for robust and confidential discussions, opinions and recommendations between investigators.
- 89 Accordingly, I determine that the information on pages 337 and 456 is exempt under s35(1)(a) and is not required to be released. However, the information on page 411 is not exempt and should be released to Ms Webb.

Section 36 – Personal information of person

- 90 For information to be exempt under s36 of the Act, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

91 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years

92 The Department has applied s36 to exempt information on numerous pages. Exemptions have been applied to direct phone, mobile and email contact details of members of Tasmania Police and Forensic Services, the name of an external professional, and members of the community. It has also applied s36 to exempt the dates of birth of some named persons. I am satisfied that this information falls within the definition of personal information in s5 of the Act and there is no suggestion that any of the persons concerned have been dead for more than 25 years. Accordingly, I am satisfied that the information is *prima facie* exempt under s36 of the Act.

Public interest test

93 That the information may be considered personal information and therefore *prima facie* exempt does not preclude it from being released, if doing so would not be contrary to the public interest.

Officers and employees of public authorities

94 It has been my consistent position, as well as standard Australian practice, that the personal information of officers and employees of public authorities which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether an officer is a current or former employee is not relevant to the assessment under s36 of the Act.

95 One exception in this regard are direct and mobile phone numbers and email addresses, which I have consistently found to be exempt under s36 where they are not routinely released to the public. It is valid for public authorities to limit the release of direct contact details of staff to ensure public enquiries are able to be directed through appropriate channels.

96 Accordingly, except for direct contact details not normally released to the public, the personal information of employees of public authorities is not exempt and should be released to Ms Webb.

External parties

97 On pages 397, 399, 400 and 501, the Department has applied s36 to exempt the personal information of a scientist of the NSW Forensic and Analytical Science Service. This person has a public profile in the field, is acting in their

professional capacity, has agreed to be bound by the NSW Expert Witness Code of Conduct and has signed an Expert Certificate regarding an analysis performed in 2017.

- 98 There is no reason to believe the release of this person's information relating to their professional duties would be of any concern. The information is therefore not exempt under s36 and should be released to Ms Webb.

Community members

- 99 The Department has applied s36 to exempt the personal information of community members, including names, dates of birth and addresses. There is no information to indicate the circumstances under which these details were provided to, or obtained by, investigators. I am satisfied that the information would not add significantly to the released information, and there is the possibility of harm to the community members if their personal information is released. Accordingly, with one exception, the remaining personal information identified by the Department is exempt under s36 and is not required to be disclosed. That exception relates to an address on pages 505, 541, 542 and 551 which has already been released to Ms Webb on page 142.

Preliminary Conclusion

- 100 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to ss30, 31, 35 and 36 are varied.

Response to the Preliminary Conclusion

- 101 As the above preliminary decision was adverse to the Department, it was made available to it on 16 May 2025 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 102 On 28 May 2025, Sergeant Lee Taylor, in a letter dated 19 May 2025, advised that the Department *supports the conclusions of the preliminary decision, and will provide the required information to the applicant.*
- 103 On 28 May 2025, upon her request, the preliminary decision was also made available to Ms Webb to seek her input prior to finalisation, in accordance with s48(1)(b) of the Act.
- 104 On 6 June 2025, Ms Webb identified a number of *Key Issues* and made submissions in relation to those issues. Relevant extracts from those submissions are set out below.
- 105 Ms Webb again raised the Department's use of the term *Not Relevant*, in particular in relation to page 446:

In my application for Internal Review I referred to the use of "NR" at pp.5-6 and referred to the critical issue of the hair at p.446... This issue relates to a FSST forensic report from 24 February 2021 which refers to the testing of item 177 "Hair in paper fold" or "Hair root" with the results redacted.

...

It would be appreciated if you could again check this particular item to ensure that information relevant to the request has not been inappropriately redacted.

- 106 Ms Webb then commented upon the quality of some of the documents originally provided to her:

Inspector Mackenzie agreed that pages 437, 439, 441 and 453 were unreadable in the assessed disclosure and provided a fresh copy of those documents...

- 107 Regarding the lack of a schedule of documents, Ms Webb commented:

...The nature of the exemptions might be clear but the nature of the document, the date it was created, the version of the document and the author of the document are not necessarily clear in the absence of a schedule. It was also very difficult to determine which documents were attachments to other disclosed documents.

It is sometimes impossible to know what documents are without some contextual information...

It is also not immediately apparent which particular pages are responding to each of the four sections contained in the original RTI request.

I would ask that your Office consider making the provision of a Schedule of Documents ... a mandatory aspect of assessed disclosures where a large volume of material is involved.

- 108 Ms Webb also contested the application of the public interest test in s33 of the Act:

You stated that if investigators believed ... discussions could be routinely released through the RTI process, they are likely to be inhibited, resulting in less rigorous analysis and potentially flawed investigative outcomes.

I would also ask that you consider that the investigation under scrutiny is completed and most actions occurred many years ago, particularly in 2009 and the immediately following years. There is also a strong public interest regarding the accountability of the investigating agency and others for the ethical, efficient and effective discharge of their functions

Further Analysis

- 109 Ms Webb's submissions closely mirror the concerns she raised when requesting internal and external reviews, which were before me when I made my preliminary decision and it is not necessary for me to repeat discussion of

these points. However, I consider it appropriate for me to make some brief comments following these further submissions.

- 110 Parliament did not make the provision of a schedule of documents a mandatory component of a release of information following an application for assessed disclosure. I do have power under s47(1)(n) of the Act to direct a public authority to provide better reasons for a decision, including (if necessary) a schedule of relevant information, however I did not consider such a step was necessary on this occasion. I have consistently encouraged public authorities to provide such a schedule where practicable in order to assist applicants and will continue to do so into the future. I accept that Ms Webb would have found a schedule particularly useful in this matter.
- 111 I have carefully considered Ms Webb's submissions regarding the public interest test, particularly in relation to the application of s35 and I note that only two documents were ultimately found to be exempt under this section. Also, section 35 cannot be applied to exempt information created in 2009 and this older internal deliberative information will be released to Ms Webb. I have not altered my conclusions regarding the weighting of the public interest factors on further review.
- 112 I have again reviewed the information considered by the Department to be not relevant and remain of the view that this determination is one that was reasonably available to the Department.
- 113 Finally, Ms Webb's concerns regarding the quality of some documents were addressed in Inspector Mackenzie's internal review and therefore not required to be again addressed by me. It is clearly poor practice that information was provided in an unreadable format but this was promptly rectified and it is not apparent at this time that any other action is needed.
- 114 Ultimately, I am not persuaded I should alter my determinations and reasoning as set out in the preliminary decision.

Conclusion

- 115 For the reasons set out above, I determine that exemptions claimed pursuant to ss30, 31, 35 and 36 are varied.
- 116 I apologise to the parties for the delay in finalising this decision.

Dated: 11 June 2025



Richard Connock
OMBUDSMAN

Attachment 1 – Relevant legislation

30. Information relating to enforcement of the law

(1) 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 (1) 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 1 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.

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.

35. Internal deliberative information

(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.

(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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

36. Personal information of person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

33. Public interest test

- (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.

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: R2310-016

Names of Parties: Meg Webb and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s30, s31, s35, s36

Background

- 1 In October 2010, Ms Susan Neill-Fraser was convicted of the murder of her de facto partner, Mr Robert Chappell. Subsequent appeals have not overturned the conviction.
- 2 The Honourable Meg Webb MLC (the Applicant) is an independent member of the Parliament of Tasmania representing the electorate of Nelson in the Legislative Council. She has expressed a concern that Ms Neill-Fraser's conviction may have been a miscarriage of justice.
- 3 On 30 January 2023, Ms Webb made a first application (given reference 49/23) for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department) seeking information regarding evidence used or tested in the investigation and trial of Ms Neill-Fraser. Specifically, the application sought (verbatim):

All information in the possession of Tasmania Police and FSST (or archived) concerning:

1. *Item 9 "small blue towel/face washer" seized by Ms Deborah McHoul from FSST on the starboard walkway of the Four Winds yacht just forward from the cockpit as described in handwritten forensic biology Crime Scene notes for 28 and 29 January 2009. Given Barcode "Exhibit 14431-669-2" and mentioned in the 12 June 2009 Crime Scene report by McHoul. Towel is pictured on the deck of the Four Winds in photos taken of the Four Winds at Constitution Dock on 27 January 2009. See page 3 of Crime Scene Report (Forensic Biology Scene Examination Report) of 12 June 2009.*

2. *Rags with possible vomit seized by Ms McHoul from FSST on 4 February 2009 at Goodwood.*

Items 93 and 94 “In laundry, 2 x rags on top in a clear (deleted) plastic bag of rags appear to have brownish ?? vomit stains. Agreed – FSST to dry and ? tox.”

Items 87-94 “gloves, clothing, mask and rags” listed in the Forensic Biology Report 1 July 2009 and as “Not examined”. Given Barcode “Exhibit 14431-726-7”. Listed as **Items 93 and 94** in Crime Scene report 12 June 2009 at page 5 – “pieces of rag – on top of bag of rags in laundry” for each.

3. **Items 98 and 99** of the Forensic Biology Report 1 July 2009.

In relation to the small blue towel (or “face washer”), I request the following:

- All FSST Case notes or records, Item Examination Notes, exhibit lists and testing results (including in later years) regarding the blue towel (toxicology, DNA, testing for blood etc.)
- All photos (digital and hard copy) taken by Constable Melanie Redburn on 27 January 2009 showing the starboard rear deck of the Four Winds including any similar photos proximate/either side of photos 7.17660-80-82 (See Exhibit P03# and P04# at 2010 trial) (i.e., to include those photos not used in court/disclosed)
- Photos taken by Constable Woodhead on 27 January 2009 at Constitution Dock – Nos. 17638_172-174, 178 and 181-184 (digital and hard copy)
- All photos not caught by the above two dot points featuring the blue towel on the deck of the Four Winds yacht including all police crime scene photos taken on the water at Sandy Bay, at Constitution Dock and Goodwood (including meta data) (digital and hard copy)
- Any notes of the crime scene on the Four Winds taken by Constable Redburn on 27 January 2009
- Any relevant diary or workbook notes of Ms McHoul or Mr McKenzie or Grosser for the period 27 January 2009 to 2 July 2009 relating to the blue towel

- *Earlier saved drafts of the Forensic Biology Report dated 1 July 2009 (pages covering Item 9)*
- *Any written instructions from Police or FSST personnel regarding the non-examination or destruction of this exhibit*
- *All emails between FSST members and police (including Simon Conroy, Shane Sinnitt, Melanie Redburn and Heidi Woodhead/Barnes from police forensics) or fellow FSST members (particularly McHoul, Grosser and McKenzie) regarding the blue towel*
- *A copy of continuity forms including details of all persons who accessed the exhibit since its seizure in 2009*
- *A copy of any label on the exhibit bag (e.g., Forensic Continuity Label)*
- *Any documentation concerning the current or recorded status of the exhibit*
- *Any emails, memoranda, briefing notes, investigation reports etc. which mention the blue towel.*
- *Any crime scene notes taken by police crime scene photographers or forensic personnel or draft statements which mention the blue towel.*
- *A copy of any audit or review undertaken of the Sue Neill-Fraser forensic exhibits since 2009.*
- *A copy of any email, document or report which reports the loss or destruction of the blue towel.*
- *A copy of any email, document or report by FSST or Tasmania Police to the ODPP which mentions the blue towel including any briefing in August 2018 when the issue was raised in correspondence to the ODPP by the Sue Neill-Fraser legal team (noting the comments of Brett J in the Jeff Thompson matter that no client/lawyer relationship exists and hence there is no client legal privilege).*
- *All Tasmania police or FSST documents mentioning any crime scene contamination including by way of water bottles, torch, DNA etc.*

In relation to the possible “vomit rags”, I request the following:

- *All FSST Case notes or records, Item Examination Notes, exhibit lists and testing results (including in later years) regarding the rags (including toxicology, DNA, testing for blood etc.)*
- *Any relevant diary or workbook notes of Ms McHoul or Mr McKenzie or Grosser for the period 27 January 2009 to 2 July 2009 regarding the rags*
- *Earlier saved drafts of the Forensic Biology Report dated 1 July 2009 (pages covering Items 93 and 94)*
- *Any written instructions from Police or FSST personnel regarding the non-examination or destruction of these exhibits*
- *All emails between FSST members and police (including Simon Conroy, Shane Sinnitt, Melanie Redburn and Heidi Woodhead/Barnes from police forensics) or fellow FSST members (particularly McHoul, Grosser and McKenzie) regarding these rags*
- *A copy of continuity forms including details of all persons who accessed the exhibits since their seizure in 2009*
- *A copy of any label on the exhibit bags (e.g., Forensic Continuity Labels)*
- *Any documentation concerning the current or recorded status of the exhibits*
- *All photos featuring the rags on the Four Winds yacht including all police crime scene photos taken on the water at Sandy Bay, at Constitution Dock and Goodwood (including meta data) (digital and hard copy)*
- *Any emails, memoranda, briefing notes, investigation reports etc. which mention the rags.*
- *Any crime scene notes taken by police crime scene photographers or forensic personnel or draft statements which mention the rags.*
- *A copy of any audit or review undertaken of the Sue Neill-Fraser forensic exhibits since 2009 which mentions the rags*

- A copy or any email, document or report which reports the loss or destruction of the rags.
- A copy of any email, document or report by FSST or Tasmania Police to the ODPP which mentions the rags including any briefing in August 2018 when the issue was raised in correspondence to the ODPP by the Sue Neill-Fraser legal team (noting the comments of Brett J in the Jeff Thompson matter that no client/lawyer relationship exists and hence there is no client legal privilege).

In relation to the unknown Items 98 and 99 from the Forensic Biology Report 1 July 2009, I request the following:

- Full details of the items and where they were found and by whom, including all crime scene notes, continuity forms and all testing results (DNA, toxicology, testing for blood and fingerprints).

Please note that I can access the disclosed/tendered photos, Forensic Biology Report of 1 July 2009 and the Crime Scene Examination Report of 12 June 2009.

- 4 On 20 February 2023, Ms Webb made a second application (given reference 56/23) for assessed disclosure to the Department, seeking all documentation concerning forensic exhibit receipt, handling, storage, access, retention, security and return or destruction and re-testing for forensic exhibits (particularly those that are potential sources of DNA) for the period January 2009 to the present day. Specifically, this application sought:

All information in the possession of Tasmania Police and FSST concerning:

1. All strategies, policies or procedures dealing with forensic exhibit receipt, handling, storage, access, security, retention, return or destruction or requests for re-testing since January 2009, including but not limited to:
 - a. Any Tasmania police/FSST **Scientific Investigation Strategy** or similar (as in WA) since January 2009;
 - b. Any **Serious Crime Exhibit Retention Management Policy** or similar (as in WA) since January 2009;
 - c. Any **Forensic Discipline Specific Standard Operating Procedures** or similar (as in WA) since January 2009;
 - d. Details (including terms of reference, roles and responsibilities etc.) of any **Forensic Analysis**

Coordination Team (FACT) (as in WA) or similar since January 2009:

2. All strategies, policies or procedures dealing with how it is determined whether to subject an exhibit in a serious crime such as murder to biological testing, including DNA testing, for the period January 2009 to present day;
3. All strategies, policies or procedures for prioritising, sampling, testing and storing exhibits, particularly in serious crimes (as opposed to volume crime) since January 2009;
4. All strategies, policies, procedures or memoranda from Tasmania Police/FSST management on how to deal with missing/lost or destroyed forensic exhibits since January 2009;
5. All documentation since January 2009 relating to compliance with 9.2 of Standards Australia AS 5388.4 concerning "Collection and continuity of forensic material" regarding the "exceptional" or "standard" factors that may have affected decisions as to the examination and sampling of seized items (particularly in serious crimes). (It is noted that, under the Australian Standard, the factors affecting those decisions should be clearly stated in the report or in the relevant case notes. Any deviation from documented methods or procedures shall be stated in the report or in the relevant case notes);
6. The documented acceptance and rejection criteria in place since January 2009 that ensure that the integrity of forensic material is protected and maintained. Such criteria cover the requirements for packaging, transport and storage of forensic material. (See Standards Australia AS5388.1 at 9.1);
7. All applications and submissions made to NATA or correspondence/emails with NATA regarding accreditation or the investigation of any complaints or queries on issues in respect of exhibit receipt, handling, storage, security etc. for the period January 2009 to the present day in relation to Sue Neill-Fraser or other serious crime;
8. All correspondence, emails or submissions to ANZPAA NIFS or any related forensic body or association, such as ANZFSS, either State based, national or international, in relation to the issue or management of forensic exhibits and their handling etc. for the period January 2009 to the present day.

- 5 On 14 March 2023, Ms Webb made a third application (given reference 87/23) for assessed disclosure to the Department, specifically seeking (emphasis original):

All information in the possession of Tasmania Police and FSST concerning:

1. *The “References” listed in BM03 i.e. **The Business Management (Quality) Manual, Forensic Biology Forms, Forensic Biology Methods and Operating Procedures** where they relate to FSST exhibit receipt, handling, decisions re testing, storage, retention, destruction and re-testing.*
2. *All Request for DNA Profiling forms for items 9, 93, 94, 98, 99, 157 and 158 in the FBR.*
3. *All Item Examination Notes and running sheets for items 9, 93, 94, 98, 99, 157 and 158 (and 97) and all DNA results for such items.*
4. *All entries for FSST items 9, 93, 94, 98, 99, 157 and 158 on LIMS or the DPEM Forensic Exhibit Register or any other database used to monitor the management/security of exhibits within TasPOL and FSST (including **Forensic Case File Record, Examination Summaries, Case Management and Exhibit Registers** for these items from the DPEM Forensic Register).*
5. *The FSST Technical Officer and Examining Officer Statement of Duties as at 27 January 2009 to 2 July 2009.*
6. *Copies of all diary or workbook notes, documents, emails, memoranda or information indicating any direction from ODPP or Tasmania Police or other FSST personnel to FSST personnel (including Mr McKenzie, Ms McHoul or Mr Grosser) about the examination/treatment/testing/destruction of items 9, 93, 94, 98, 99, 157 and 158 for the period 27 January 2009 to 2 July 2009.*
7. *A copy of the computer log (server: forensic\biology\misc\samples for long term storage.doc) mentioned in BM03 at p.12 for the period 27 January 2009 to 2 July 2009 for the Sue Neill-Fraser matter.*
8. *A list of all Sue Neill-Fraser exhibit items held in long term storage as at today’s date.*
9. *All Tasmania Police or FSST photographs (including in soft copy with metadata) featuring or containing FSST items 97, 98, 99, 157 and 158.*

10. All Crime Scene Notes or police forensic service notes regarding items 97, 98, 99, 157 and 158.

- 6 On 12 April 2023, Ms Roslyn French, a delegate for the Department under the Act, released a decision on each of the three applications. Ms French determined that there was a clear connection between the requests and refused all three under s19 of the Act, being satisfied that the work involved in providing the requested information would substantially and unreasonably divert the resources of the Department from its other work. The Department offered to provide Ms Webb with a briefing on the chronology of the investigation *as an alternative*.
- 7 On 19 April 2023, Ms Webb applied for internal review due to her concerns with the Department's failure to treat each of her applications separately, in addition to concerns about the refusal of her requests under s19.
- 8 Between 18-24 May 2023, Inspector John King, another delegate under the Act for the Department, consulted with Ms Webb and on 19 May 2023 proposed that applications 49/23 and 87/23 be combined and the scope limited to:

...specific exhibit numbers and the information associated with those exhibit numbers that can be readily assessed via the Forensics Register and Forensic Science Services Tasmania...

Further... that each dot point in your requests will not be addressed ... rather all information linked to the specific exhibits identified in your requests will be discovered and assessed. To clarify this further, I can indicate there is information discoverable linked to exhibits: 9, 87, 88, 98 [sic], 90, 91, 92, 93, 94, 97, 98, 99, 157 and 158.
- 9 On 21 May 2023, Ms Webb sought clarification regarding Inspector King's proposal and, after further communication from Inspector King on 22 May 2023, did not object to this approach.
- 10 On 22 June 2023, Inspector King released two internal review decisions, the first decision combined Applications 49/23 and 87/23 and the second decision related to Application 56/23.
- 11 Following further email communication with Ms Webb, on 29 September 2023 Inspector King released a supplementary internal review decision. In total, Inspector King identified 420 pages of information and applied exemptions under ss30 (information relating to the enforcement of the law), 31 (legal professional privilege), 35 (internal deliberative information) and 36 (personal information) to some information contained in these pages.
- 12 On 27 October 2023, Ms Webb applied for external review, which was accepted under s44 of the Act. Ms Webb also questioned whether the Department had carried out a sufficient search for information.

Issues for Determination

- 13 I must determine whether the information not released by the Department is eligible for exemption under ss30, 31, 35, 36 or any other relevant section of the Act. As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment of these exemptions is subject to the public interest test in s33.
- 14 This means that, should I determine the requested information is *prima facie* exempt from disclosure under ss35 or 36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.
- 15 I must also determine whether the Department undertook sufficient searches, pursuant to s45(1)(e) of the Act, for information responsive to the refined scope of Ms Webb's application.

Relevant legislation

- 16 I include copies of ss30, 31, 35 and 36 of the Act at Attachment 1.
- 17 Copies of s33 and Schedule 1 are also at Attachment 1.

Submissions

Applicant

- 18 As part of her external review application, Ms Webb submitted:

My primary focus after the analysis of the information provided ... is the small blue towel – Item 9 in the Forensic Biology Report (FBR) of 1 July 2009 ... the details of which were omitted from the FBR without any explanation, even to this day...

There has been no statement made that there was no testing/examination of the small blue towel in early 2009.

The information relating to the examination/testing of the blue towel in February 2021 has also not been disclosed

The Request for Examination forms, Item Examination Notes, continuity forms, Case Management Information from the Forensic Register and the results of any testing in the DNA laboratory, where disclosed records that the blue towel was located on 3 February 2009, have not been disclosed nor listed in any Schedule despite the Agreed Scope...

The files relating to the initial examination, Examination No. 17785, are presented in the response dated 22 June 2023 as a PDF icon at p.21, without the provision of the actual documents. It is claimed in the response dated 29 September 2023 that the PDF icons are "a Forensic Database representation of the information already provided. No additional information is available". However, this

statement does not address the fact that no information is, or has been, provided about the initial examination or testing of the blue towel.

- 19 Ms Webb also made submissions regarding the Department's application of the public interest test:

There has been a failure to comply with the provisions of the Act and to apply the public interest test ... in relation to the information sought, and within the Agreed Scope, regarding the small blue towel. The public interest has not been considered pursuant to s.33, s.30(3) and s.22(2)(d) of the Act. Tasmania Police has used a "broad brush" approach for exempting information by failing to raise any matters under Schedule 1 which could be said to be in favour of disclosure.

Many of these factors are considered significant to this application. Tasmania Police have [sic] considered the information "holistically" rather than undertaking a line by line assessment genuinely considering whether the information could be released...

It is submitted that Tasmania Police has also not discharged the onus under s.47(4) of the Act to show why the information sought should not be disclosed, and therefore it should be released.

- 20 Ms Webb then addressed the factors in Schedule 1 of the Act which she considered weighed in favour of disclosure of the requested information, including:

whether the disclosure would inform a person about the reasons for a decision (c) – including the decision to omit the testing results for the small blue towel without explanation from the Forensic Biology Report of 1 July 2009;

whether the disclosure would provide the contextual information to aid in the understanding of government or State decisions (d) – including decisions regarding the independent testing of the small blue towel;

whether the disclosure would inform the public about the rules and practices of government in dealing with the public (e) – including how FSST rules and practices impact on forensic science testing and reporting;

whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation (f) – including the decision to exclude reporting on the small blue towel in the major Forensic Biology Report of 1 July 2009;

whether the disclosure would enhance scrutiny of government administrative processes (g) – including the way in which correspondence on this matter and RTI applications have been handled and delayed;

whether the disclosure would promote or hinder equity and fair treatment of persons in their dealings with government (h) – the proper and ethical functioning of the FSST and proper disclosure practices by the Crown could prevent miscarriages of justice and the enormous expense to the public of appeals, inquiries, RTI applications/reviews etc.;

... (j) – the disclosure could well result in the remedying of a miscarriage of justice in the event of potential future recourses to avenues such as appeal or other formal or legislated mechanisms;

... (m) – the disclosure would certainly promote the interest of Sue Neill-Fraser and her family and supporters, and more broadly those members of the Tasmanian community with a public interest in the administration of Tasmania's justice system;

... there is currently an arguably enormous public interest in ensuring the scientific integrity of DNA testing and that it is carried out properly and reported fully and objectively, as is demonstrated by the Sofronoff and Bennett Commissions of Inquiry in Queensland; and

... (p) – the disclosure could result in significant positive reform within both FSST, Tasmania Police and the office of the DPP in relation to forensic testing and reporting, the handling of RTI applications and Crown disclosure practices.

Department

21 The Department was not required to provide submissions for this external review as it had provided reasoning in its internal review decisions. Relevant extracts of these decisions are set out below.

Decision 56/23

22 Regarding this decision, the Department noted:

Discovery has located 12 documents that are relevant to your request for information surrounding packaging, transport and storage of forensic exhibits. The documents relate to FSST and Tasmania Police... Exemptions have been applied to parts of the document detailing FSST security systems pursuant to section 30(1)(c). I am of the view the [sic] release this information would unnecessarily disclose methods likely to prejudice future investigations.

Decision 49/23 and 87/23

- 23 As part of the final internal review decision dated 29 September 2023, the Department held in relation to the application of ss35 and 36:

Discovered information assessed as opinion or deliberative in nature has been redacted and clearly identified as a section 35(1) exemption. Prior to applying this exemption section 33 of the Act requires an assessment using the public interest test with reference to relevant points in schedule 1. I have determined that in each case section 35(1)(a) has been applied there is a risk that releasing this information could prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority. I have determined that release of this information has the potential to impact future investigations by reducing the opportunity for the frank exchange of ideas and opinions between officers in the future, leading to less robust decision making which is against the public interest and to the detriment of any future investigations.

...

Discovered information has been assessed to identify personal information other than information related to the applicant. Where appropriate, contact has been with those persons to establish their views on release of that information prior to a final decision being made. I have determined that the release of personal information is not relevant to this application and contrary to the public interest due to it being third party information and any release is likely to prejudice the ability to record similar information in the future.

- 24 The Department then went on to consider the application of s31:

Some email exchanges have been identified as Legal Professional Privilege as identified in section 31 of the Act...

Legal professional privilege relevant to the Director of Public Prosecutions has not been waived in this matter. All confidential communications and documents exchanged between the client and their legal representative remain protected by the privilege, as does material created for the dominant purpose of proceedings or anticipated proceedings. These protections ensure [sic] a free discussion about a case without fear of those communications being disclosed in legal proceedings or to third parties.

Analysis

- 25 The Department provided my office with unredacted copies of documents in three bundles, which related to the three batches of information released to Ms Webb. These related to applications 56/23 (first release – part 1), 49/23 and

87/23 (first release – part 2), and 49/23 and 87/23 (second release). Information was provided in a single collated document for each release. For ease of reference, in my analysis I will use the Department's page numbering in each collated document to refer to the relevant information.

- 26 On page 139 of the second release, the Department has applied a redaction which is labelled *s62(1) FP* to the name, rank, signature and badge number of a Tasmania Police officer. I take this to be a typographical error and infer that the Department intended to refer to s63(1) of the *Forensic Procedures Act 2000*. This section, relevantly, provides:

63 – Disclosure of information

(1) Except as otherwise provided by this section, a person who has access –

(a) to any information stored on the DNA database system; or

(b) to any other information revealed by a forensic procedure carried out on a person under this Act or a corresponding law –

must not intentionally or recklessly disclose, or cause the disclosure of, that information.

- 27 The *Forensic Procedures Act 2000* does not specifically provide for the exclusion of the Act, and information responsive to an application for assessed disclosure must be assessed against the provisions in the Act before it can be claimed to be exempt. Information cannot be exempt under the *Forensic Procedures Act* but its provisions can be considered in assessing whether an exemption under the Act is relevant. In this case, I consider that the information claimed by the Department to be exempt is more appropriately assessed under s30(1)(a)(ii) of the Act, in particular whether its release would prejudice the proper administration of the law in a particular instance.
- 28 On pages 38 and 39 of the first release – part 2, the Department has applied s30(1)(e) to exempt what is essentially the same information.
- 29 For information to be exempt under s30(1)(e), I must be satisfied that its release would, or would be reasonably likely to, *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.*
- 30 Given that the information in question relates to the discovery of DNA during the examination of an exhibit which matched an employee of Tasmania Police, I am not satisfied that there is a sufficient nexus between this information and the general category of intelligence information provided for in s30(1)(e).
- 31 I remain of the view that the more appropriate provision of the Act is s30(1)(a)(ii) and so I will assess this information under that section.

Section 30 – Information relating to enforcement of the law

Section 30(1)(a)(ii)

- 32 For information to be exempt under s30(1)(a), I must relevantly be satisfied that disclosure of the information under the Act would, or would be reasonably likely to, prejudice:
- (ii) the enforcement or proper administration of the law in a particular instance.*
- 33 The word prejudice is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally*.¹
- 34 There is, in my view, no question that the disclosure of the relevant Tasmania Police officer's personal information would reveal information stored on the DNA database system, and that this was revealed by the carrying out of a forensic procedure. This would constitute an offence under s63(1) of the *Forensic Procedures Act 2000*, unless it fell into the relevant circumstances provided for in s63(2) or (3) of that Act. There is no indication that it would fall into this category, as it is not apparent that the information has been widely shared in the public domain or that the individual concerned has consented to its release.
- 35 This being the case, to disclose the information in response to an application for assessed disclosure under the Act would be reasonably likely to prejudice the proper administration of s63 of the *Forensic Procedures Act 2000*. I therefore determine the information to be exempt under s30(1)(a)(ii).
- 36 The factors in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 30(1)(c)

- 37 The Department has sought to exempt further information under s30(1)(c), which relates to procedures used by Forensic Science Services Tasmania (FSST). For information to be exempt under s30(1)(c), I must be satisfied that disclosure of the information under the Act *would, or would 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*.
- 38 The Department has applied s30(1)(c) to exempt information on pages 4-7 of the first release – part 1 of information. In the document titled *AD09 FSST Security System* the Department has exempted information under the heading *6.4 Security Access System, 6.5 Keys, 6.6 System Description, 6.7 Local Alarms and 6.8 Gates and Windows*.

¹ Definition of prejudice, Macquarie Dictionary, available at www.macquariedictionary.com.au accessed on 17 March 2025.

- 39 I have examined the information in question and can see that it refers to procedures implemented by FSST to control access to, and thereby preserve the integrity of, laboratory areas. I am satisfied that, if the information were to be disclosed, it would prejudice the effectiveness of these procedures and could compromise the security of the laboratories and the integrity of forensic examinations conducted there. The information is therefore exempt under s30(1)(c).
- 40 The factors in s30(2) are not relevant in this case and therefore this assessment is not subject to the public interest test.

Section 31 – Legal professional privilege

- 41 For information to be exempt under s31, I must be satisfied that it *is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.*
- 42 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between clients and their lawyers to enable lawyers to give proper legal advice.² It is a common law principle which protects the confidentiality of communications made between lawyer and client, if they were made for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation.³ This privilege also applies to advice provided by in-house lawyers.⁴
- 43 The Department has applied s31 to exempt pages 81–117, 120–137 and 147–150 in the second release of information. Upon reviewing the information, it is clear that some information consists of emails sent between officers of Tasmania Police and FSST which do not forward or re-state legal advice. As such, I consider the following information to be more appropriately assessed for disclosure under s35(1)(b) of the Act as records of consultations or deliberations between officers of a public authority:
- on page 95, the email sent on 16 June 2020 at 2:00pm;
 - on page 96, the emails sent on 16 June 2020 at 12:34pm, 12:36pm and 1:36pm;
 - on page 97, the emails sent on 16 June 2020 at 12:14pm, 12:16pm and 12:32pm;

² *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ.

³ *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, where the High Court re-affirmed the ‘dominant purpose test’ as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁴ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30.

- on page 98, the emails sent on 16 June 2020 at 11:35am and 11:43am;
 - on page 147, the email sent on 11 March 2019 at 7:54am;
 - on page 147, the email sent on 27 July 2018 at 2:56pm; and
 - on page 147-148, the email sent on 27 July 2018 at 2:07pm.
- 44 The remainder of the information to which the Department has applied s31 consists of emails and attachments exchanged between Tasmania Police, FSST and the Office of the Director of Public Prosecutions and concerns forthcoming litigation. I note Ms Webb's brief assertion in her initial application 49/23 ...*the issue was raised in correspondence to the ODPP by the Sue Neill-Fraser legal team (noting the comments of Brett J in the Jeff Thompson matter that no client/lawyer relationship exists and hence there is no client legal privilege)*. I have not, however, identified any information of this nature which is claimed by the Department to be exempt under s31.
- 45 There is no indication that privilege has been waived and, accordingly, I determine that, with the exception of the above 12 emails, the information is exempt under s31.
- 46 Legal professional privilege does not attach to a document or email per se, but to the communication recorded within it.⁵ Therefore, my finding in this area does not extend to information contained in the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers contained in these emails. This information was not communicated between a lawyer and client for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation. This information is not exempt and should be released to Ms Webb.

Section 35 – Internal deliberative information

- 47 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
- an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities (s35(1)(b)); or
 - a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 48 Once the requirements of one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

⁵ *Commissioner of the Australian Federal Police v Propend Finance* (1997) 188 CLR 501 per McHugh J.

- 49 Section 35(1) of the Act does not apply to the following:
- purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information which is older than 10 years (s35(4)).
- 50 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*⁶ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.
- 51 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)*,⁷ 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*.

Information in the first release – part 2

- 52 The Department has applied s35 to exempt information on page 36 of this release. In addition, it has exempted other information on the bottom of page 36 and the top of page 37 under s36. However, I am of the view that the more appropriate section pursuant to which I should assess this additional information is s35.
- 53 The information is contained in an email from Detective Sergeant Sinnitt to Mr Jack Shapiro, Principal Crown Counsel at the Office of the Director of Public Prosecutions, and copied to other officers in the Department. It discusses theories regarding an investigation, and with one exception, I am satisfied that it contains an opinion and recommendation prepared by an officer of a public authority and is therefore prima facie exempt under s35(1)(a). That exception is Point 3 under the heading *Based on the following evidence* on page 36, which appears to be a factual statement and is therefore not exempt and should be released to Ms Webb.

Information in the second release

- 54 The Department has applied s35 to exempt information relating to an investigation focus and theory on page 30 in a section headed 5/08/2020 CAG. I am satisfied that this information is prima facie exempt under s35.
- 55 Information has also been exempted under s35 on page 78. It relates to a recommendation for a course of action in relation to exhibits and I am satisfied it is prima facie exempt under s35 (1)(a).

⁶ [1984] AATA 518 at [14].

⁷ [1984] AATA 67 at [58].

- 56 Further information has been exempted under s35 on page 141. This is an email from Mr Carl Grosser, Forensic Scientist, to a number of public officers and contains initial thoughts and opinions regarding an examination of exhibits. I am satisfied that this information is also *prima facie* exempt under s35(1)(a).
- 57 I now turn to the 12 emails which the Department claimed to be exempt under s31 but which I consider more appropriate to assess under s35. I consider that the following three emails do not contain opinion, recommendation or consultation:
- on page 96, the email sent on 16 June 2020 at 12:36pm;
 - on page 96, the email sent on 16 June 2020 at 12:34pm; and
 - on page 147, the blank email sent on 11 March 2019 at 7:54am.

As such, these three emails do not come within the ambit of s35. They are not exempt and should be released to Ms Webb.

- 58 The remaining nine emails do relate to consultations between officers of public authorities and are therefore *prima facie* exempt under s35(1)(b).

Section 33 – Public interest test

- 59 Section 35 is subject to the public interest set out in s33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. In making this assessment I am required to have regard to, at least, the matters in Schedule 1.
- 60 Schedule 1 matter (a) – the general public need for government information to be accessible – is essentially a restatement of the objects of the Act. As such it will almost always be relevant and weigh in favour of disclosure.
- 61 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant. The trial and conviction of Ms Neill-Fraser, along with her subsequent appeals, generated a considerable amount of national public debate involving prominent members of the legal profession, journalists, activists and politicians. More importantly, continued public confidence in the outcome of criminal trials is a matter of significant public interest. This matter therefore weighs in favour of disclosure.
- 62 Schedule 1 matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – was identified as relevant by Ms Webb, who submitted that disclosure could well result in the remedying of a miscarriage of justice and therefore this matter weighed in favour of release. I acknowledge that Ms Webb is speaking in general terms, as she is unaware of the exact nature of the information which was exempted, and I accept that the prevention of miscarriages of justice is vital. However I cannot agree that the balance of considerations in relation to this factor favours release when considered overall.

- 63 I consider that it is essential for both police and forensic investigators to be able to have a robust exchange of ideas and opinions regarding the meaning and significance of various pieces of evidence. If these discussions were to be routinely released through the right to information process they are likely to be inhibited, resulting in less rigorous analysis and discussion and flawed investigation outcomes. It may well be the case that early theories are discarded as more information becomes available, and it should be noted that evidence relied upon at trial and any subsequent appeal is able to be examined and challenged by opposing counsel. I consider that this matter weighs against disclosure when considered overall.
- 64 Schedule 1 matter (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 – was identified by the Department as relevant and weighing against disclosure. I do not agree with this assessment, as the redacted information does not involve these matters. Accordingly, I assess this factor as not relevant.
- 65 The assessment of the public interest test will always involve the balancing of competing priorities and consideration of the specific circumstances relevant to each piece of information against which an exemption has been claimed. In this case I give the greatest weight to matter (j) regarding the importance of allowing confidential early discussion and opinions and recommendations of investigators, and determine that this outweighs other factors.
- 66 Accordingly, with the exception of the following five emails, the relevant information is exempt under s35 and is not required to be released. The five emails which are not exempt are:
- on page 96, the email sent on 16 June 2020 at 2:00pm;
 - on page 96, the email sent on 16 June 2020 at 1:36pm;
 - on page 97, the email sent on 16 June 2020 at 12:32pm;
 - on page 97, the email sent on 16 June 2020 at 12:16pm; and
 - on page 98, the email sent on 16 June 2020 at 11:43am.

Section 36 – Personal information of person

- 67 For information to be exempt under s36 of the Act I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 68 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.

- 69 The Department has applied s36 to exempt some information in all three of the releases. Exemptions have been applied to names of members of the community and to the direct contact details of public officers. I am satisfied that this information, as well as the additional information I determined to be more appropriately assessed under s36, falls within the definition of personal information in s5 of the Act and there is no suggestion that the persons concerned have been dead for more than 25 years. I am satisfied that the information is *prima facie* exempt under s36 of the Act.

Public interest test

- 70 That the information may be considered personal information and therefore *prima facie* exempt does not preclude it from being released if doing so would not be contrary to the public interest.

Officers and employees of public authorities

- 71 It has been my consistent position, as well as standard Australian practice, that the personal information of officers and employees of public authorities which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether an officer is a current or former employee is not relevant to the assessment under s36 of the Act.
- 72 One exception in this regard are direct and mobile phone numbers and email addresses, which I have consistently found to be exempt under s36 where they are not routinely released to the public. It is valid for public authorities to limit the release of direct contact details of staff to ensure public enquiries are able to be directed through appropriate channels.
- 73 Accordingly, except for direct contact details not normally released to the public, the personal information of employees of public authorities is not exempt and is to be released to Ms Webb.

Community members

- 74 The trial and conviction of Ms Neill-Fraser for the murder of Mr Chappell is a matter of public record, as are surrounding events and subsequent appeals. In addition, there has been a significant amount of related commentary in print media, on television and on a number of websites, not just in Tasmania but in the wider Australian community; the identities of those involved, as well as witnesses, legal representatives and others who have taken an interest, have been widely circulated. There is therefore no utility in exempting the identities of those persons when their details are already in the public domain.
- 75 Therefore, the names and initials of Ms Neill-Fraser, Mr Chappell, Ms Meaghan Vass, Mr Stephen Gleeson, Mr Samuel Devine, Ms Barbara Etter and Mr

Christopher Smith are not exempt and should be released to Ms Webb wherever they have been redacted pursuant to s36. The *FPA item no.* on page 26 of the second release referring to Ms Neill-Fraser is similarly not exempt. This determination does not extend to direct contact details such as emails or telephone numbers, which are exempt under s36 and are not required to be released to Ms Webb.

External parties

- 76 Pages 98-131 of the first release – part 1, deal with correspondence between FSST and the National Association of Testing Authorities (NATA). NATA is an accreditation agency which provides *a globally-recognised, peer-reviewed and government endorsed accreditation, which is both nationally and internationally recognised*⁸.
- 77 The Department has applied s36 to exempt the name of the quality manager at NATA, but has released on page 101 the person's identifiable signature. Given that the quality manager is performing his professional duties and is identified professionally elsewhere online, there is no utility in exempting the name, and it should be released to Ms Webb. This does not extend to the manager's direct contact email or telephone number.
- 78 Similarly, on page 114, the name of the CEO of NATA should be released to Ms Webb. This person is prominently identified on NATA's website.
- 79 The information from pages 114-131 refers to an assessment of FSST by NATA. The Department has applied s36 to exempt the name of the NATA lead assessor and client coordinator.
- 80 This employee of NATA has conducted a comprehensive assessment of a public authority which consumed a total of 15 hours over two days, and was apparently authorised to sign the assessment document on behalf of the CEO of NATA. I am of the view that the name of the lead assessor entrusted with this responsibility, acting in their professional capacity, is not exempt. Accordingly, the name should be released to Ms Webb.
- 81 The remainder of the personal information relating to external parties relates to those with only peripheral connections to the subject matter. I am satisfied that it would be contrary to the public interest to release their personal information, due to the potential for harm to their interests. Their information is exempt under s36.

Sufficiency of search

- 82 Given that the Department located and assessed further information after the initial internal review decision had been released, Ms Webb held a legitimate concern as to whether the searches conducted were sufficient to locate all relevant information.

⁸ About us, National Association of Testing Authorities website, <https://nata.com.au/about-us/>, accessed on 8 April 2025

- 83 In response to enquiries from my office, Inspector King indicated that given *the nature and size of this request [he] did not make individual notations of specific documents examined or specific database searches conducted...*
- 84 Inspector King submitted that, following the negotiated reduction of scope with Ms Webb, he conducted searches of the Tasmania Police Forensic Register on 14 individual dates, and further noted that the register contains over 24,000 records. The Inspector's records indicate he also conducted five personal interviews with FSST staff as part of his searching
- 85 The Inspector also submitted that, following correspondence from Ms Webb, he conducted further searches of the Forensic Register, the FSST case file, and the Tasmania Police email system, which resulted in additional information being located.
- 86 In response to Ms Webb's concern that no information had been provided *about the initial examination or testing of the blue towel*, Inspector King confirmed:

Forensic examination data for exhibit 9 from 2009 does not exist given no forensic examination was conducted until 2019.

- 87 The Department did not provide search records in a form similar to the template in my *Guideline in Relation to Searching and Locating Information*⁹, but I am satisfied that an adequate search was ultimately conducted. The Department has cooperated fully with this review, and I do not consider that additional searching is required.

Preliminary Conclusion

- 88 Accordingly, for the reasons set out above, I determine that:
- exemptions claimed pursuant to ss30, 31, 35 and 36 are varied; and
 - the Department conducted a sufficient search for information responsive to Ms Webb's request.

Response to the Preliminary Conclusion

- 89 As the above preliminary decision was adverse to the Department, it was made available to it on 28 April 2025 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 90 On 1 May 2025, Sergeant Lee Taylor advised that the Department *supports the conclusions of the preliminary decision and will provide the required information to the applicant.*
- 91 On 12 May 2025, upon her request, the preliminary decision was also made available to Ms Webb to seek her input prior to finalisation, in accordance with s48(1)(b) of the Act.

⁹ Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications

- 92 On 21 May 2025, Ms Webb made a number of submissions in response, and some relevant extracts from those submissions are set out below. Concerning the blue towel:

I would ask that careful consideration is given to all of my submissions and applications on this matter prior to any publication of a decision. The current decision does not reflect a number of important issues that were raised in the documentation provided to you, such as the significance of the blue towel and possible DNA results, which is particularly important from a public interest perspective.

...

Whilst appreciating the demands on your Office's limited resources, it is unclear the extent to which my applications and submissions from 2023, the detailed chronology provided and the nature and extent of correspondence with DPFEM in this drawn out matter have been considered. Nine months is a long way off the 20 working days envisaged by the Act for the disclosure of information by the public authority.

...

In my submission, there is an overwhelming public interest in determining whether Ms Neill-Fraser has been, over the years, denied an opportunity of overturning her conviction. The matter is not at an end, as she has a further right to appeal to the Supreme Court under the Criminal Code.

...

Appropriate access to exhibits in serious crime, particularly when there may have been a substantial miscarriage of justice, is essential in the interests of transparency and accountability and ongoing confidence in our criminal justice system... such actions are also vital to the prevention of miscarriage of justice cases.

- 93 Ms Webb made further submissions regarding 'questionable' Forensic Register records regarding the blue towel, about a murder in NSW, and about post-conviction DNA testing in the USA, before concluding the first part of her submission:

I still hold serious concerns regarding the sufficiency of the search and disclosure of relevant information as it is clear documents which fall within the agreed scope of the search for information have not been provided, and have therefore still been denied.

- 94 Ms Webb also made submissions headed *Key Issues with the Draft Decision*:

The draft decision does not reflect the critical importance of the small blue towel and the possible impact relating to the actual or perceived independence, integrity, impartiality and competence

of our forensic science services and the integrity of our criminal justice system.

Other key issues regarding this external review are:

- *The nature of the external review or analysis undertaken ... - the review appears to have involved consultation with Inspector King and a check of the unredacted documents without express consideration of other important issues and suggestions raised by me;*
- *The lack of use of the powers in the Act provided under s.47 and as flagged in the relevant Ombudsman Guideline;*
- *The lack of any comment on process, delays and compliance by DPFEM ... regarding timeliness of response, the need for reasons pursuant to s.22 and the inappropriate use of s.19 which significantly delayed matters;*
- *The number of additional pages (152) that were released under internal review when pressed;*
- *The failure to deal with or comment on the practice of providing unreadable photos, labels etc;*
- *The application in the decision of alternate exemption provisions which were not claimed by DPFEM...*
- *The failure to deal with the issue of providing pdf icons without the provision of the actual documents*
- *The lack of detail in the draft decision about the submissions made by me...*
- *Your finding that the search for information in this matter was adequate...*
- *Your consideration of matters regarding the public interest test and your findings in this regard ... A proper examination of this matter and release of requested information could well lead to the identification of critical systemic issues and much needed reform in the criminal justice system.*

95 Ms Webb then made some concluding remarks, including:

This matter may highlight a failure to disclosure by the “Crown” which may have impacted on the fairness of the murder trial of Sue Neill-Fraser in 2010, and further impact public confidence in our justice system.

...

I would request that ... this matter is not finalised in haste. This matter raises fundamental issues affecting confidence and trust in our policing, forensic services and criminal justice system.

... I would ask that the review receive further attention in accordance with Guideline 1/2010 which makes it clear that the Ombudsman is obliged by s.47(6) to use the powers given by s.47 to resolve this application...

Further analysis

- 96 I have again carefully considered the entirety of Ms Webb's extensive submissions over the course of her application and reviews. I have also considered the communications between her and the Department, between my office and the Department, and the reasoning of the Department as set out in its decisions.
- 97 When conducting an external review under the Act, I am undertaking my function to review the decisions of delegated officers under the Act. These relate to specific grounds of external review, in this instance whether the Department is entitled to rely on exemption provisions and whether a sufficient search was undertaken. I am not empowered under the Act to inquire into, for example, investigatory techniques of Tasmania Police or the priorities of FSST when testing exhibits. I acknowledge that some official technical documents may be unfamiliar to an applicant and therefore difficult to understand, however it is not my role to interpret information for the benefit of an applicant. Neither is it my role to explain any possible inconsistencies between documents or to make a finding as to the truth or accuracy of any information released in response to an application under s13 of the Act.
- 98 I acknowledge the *critical importance of the small blue towel* to Ms Webb but do not agree that it would be necessary to seek affidavits and interview officers of the Department regarding testing of this item. As Ms Webb sets out, a clear statement from Inspector King has been provided in relation to testing conducted on the relevant towel which explains the lack of information located regarding testing in 2009.
- 99 I remain of the view that the searching conducted by the Department was sufficient to identify all relevant information, for the reasons previously discussed. I have a wide discretion as to the manner in which I conduct external reviews and I am satisfied that I have performed my role appropriately and within the requirements of the Act and relevant guidelines of my office.
- 100 Regarding the issue of my application of alternate exemption provisions not claimed by the Department, I have not determined that any information is exempt which the Department determined to be otherwise. I considered that the Department had assessed a very small amount of information under a provision which was not the most appropriate, and amended that error. I note

that my variation of the basis for exemptions claimed is not an uncommon occurrence in the external review process and I have the clear power to do so in s47(1)(k). I do not agree with Ms Webb that this is of concern, and further note that across the three releases the overwhelming majority of information was not determined to be exempt.

101 Finally, I note Ms Webb's concerns regarding the Department's use of s19 and the provision of photos and PDF documents. These issues were addressed by the Department in its internal review decision and therefore were not required to be again addressed by me.

102 I have, therefore, not altered the findings set out in the preliminary decision apart from the correction of some typographical errors.

Conclusion

103 For the reasons set out above, I determine that:

- exemptions claimed pursuant to ss30, 31, 35 and 36 are varied; and
- the Department conducted a sufficient search for information responsive to Ms Webb's request.

104 I apologise to the parties for the delay in finalising this decision.

Dated: 27 May 2025



Richard Connock
OMBUDSMAN

Attachment A – Relevant Legislation

Section 30 – Information relating to enforcement of the law

(1) 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 (1) 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 1 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

(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.

(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 (1) 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

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

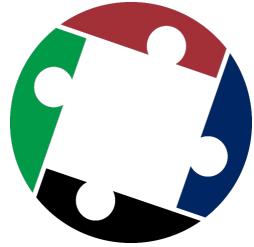
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding 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.

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: R2309-018

Names of Parties: Rebecca White and Department of Premier and Cabinet

Reasons for decision: s48(3)

Provisions considered: s31, s35, s36, s39

Background

- 1 In June 2023, an agreement was made between the Department of Premier and Cabinet (the Department) and Font PR, a public relations company, for Font PR to provide a staff member for short term media liaison and speechwriting support in the Office of the Premier. Concerns were raised about the process to engage the services of Font PR, and whether the engagement would provide Font PR with inappropriate access to confidential information.
- 2 On 7 July 2023 the then leader of the Tasmanian Labor Party and Leader of the Opposition, the Honourable Ms Rebecca White MP (the Applicant), submitted an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) requesting:
 1. *From 1 March, 2023 until the date of this request any correspondence between the Premier or his staff with Font PR.*
 2. *Any documents (including the contract of engagement) in relation to the procurement and engagement process of Font PR as part of the Premier's media unit announced on 30 June, 2023.*
 3. *Any confidentiality agreements relating to the engagement of Font PR as part of the Premier's media unit announced on 30 June, 2023.*
- 3 On 20 September 2023, Ms White sought external review as the timeframe for a decision to be provided by the Department had elapsed and she was not in receipt of a decision. Her application was accepted pursuant to s45(1)(f) of the Act.
- 4 On 13 October 2023, Ms Bridget Hutton, a delegate under the Act for the Premier and the Department, issued a decision after consulting with Font PR

pursuant to s37(2) of the Act. Ms Hutton identified 15 documents as being responsive to Ms White's application. Ms Hutton released two of these documents in full and applied ss31, 35, 36 and 39 to exempt the remaining 13 documents either in full, or in part.

- 5 Following the release of this decision, Ms White elected to extend her external review request to a full review pursuant to s46(2) of the Act.

Issues for Determination

- 6 I must determine whether the information requested by Ms White is eligible for exemption pursuant to ss31, 35, 36, 39 or any other relevant section of the Act.
- 7 As ss35, 36 and 39 are contained in Division 2 of Part 3 of the Act, my assessment in relation to these sections is subject to the public interest test in s33. Should I determine that information is *prima facie* exempt from disclosure under ss35, 36, or 39 of the Act, I am then required to determine whether it would be contrary to the public interest to release this information by applying the public interest test. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 8 Relevant to this review are ss31, 35, 36 and 39 of the Act. I attach copies of these sections to this decision at Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

- 9 Ms White did not make specific submissions in support of her external review application.

Department

- 10 The Department was not required to make submissions, beyond the reasoning of its decision, relevant parts of which are extracted below.
- 11 Regarding legal professional privilege, the delegate reasoned:

I have determined that item 7 is exempt in full under section 31 of the Act as it is a series of email exchanges between the Crown Solicitor, staff of the Department and staff of the Premier's Office relevant to the request. I have determined that item 14 is exempt in full as this is an email exchange between the Solicitor-General and the Premier's Chief of Staff relevant to the request. Further, I have determined that part of item 12, while relevant to the request, is exempt from release under section 31.

In my view, items 7, 12 and 14 contain information of a nature that would be privileged from production in legal proceedings on the ground of legal professional privilege.

The exemption under section 31 of the Act is not subject to the public interest test.

12 Regarding internal deliberative information, the delegate reasoned:

I have determined that items 6 and 13 in the attached schedule are within scope of your request, but are exempt in full under section 35 of the Act as opinion, advice or recommendations prepared by officers of the Department and staff in a Ministerial office in the course of internal consultations and deliberative 'conversations' in formulating advice relating to the official business of the Minister, and are not purely factual.

While it may be considered that some of the information contained in the emails and attachments are [sic] factual, the process by which the information is prepared and presented is consultative and deliberative. Material of a factual nature is not information of a purely factual nature if that material would reveal the consultation and deliberation that has taken place in the course of the deliberative process involved in the functions of a public authority. The factual and deliberative information is inextricably linked, and it would not be practicable to differentiate purely 'factual' information from that which is 'deliberative.'

13 The delegate continued:

I have determined that releasing the information in item 6 would prohibit consultative and deliberative processes between officers in Ministerial Offices, and releasing item 13 would prohibit the frank exchange of views of an officer of the Department and Ministerial staff, when deliberating on official business.

14 Regarding information responsive to Item 9, the delegate reasoned:

I have determined not to release item 9 as it is an iterative draft of the Crown contract for communications support services. I have determined to release the final version of the contract, with minor section 36 (personal information of person) redactions, as item 4.

15 The Department then considered the public interest test:

I have carefully considered each of the matters in Schedule 1 as part of my assessment of the public interest test, including the following 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;
- (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;
- (g) whether the disclosure would enhance scrutiny of government administrative processes; and
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future.

Factors in favour of release

In relation to the matters listed in Schedule 1 of the Act, I consider that the following factors weigh in favour of disclosure of the information not released:

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

The object of the Act is to disclose information where possible and to give members of the public the right to obtain information about the operations of Government and increase the accountability of the executive to the people of Tasmania. As a general rule, disclosure is to be favoured over non-disclosure unless there are valid reasons for deciding that disclosure would be contrary to the public interest.

I have determined to release item 12, with minor section 31 (legal professional privilege) and section 36 (personal information of person) redactions, as in my view, it is in the public interest to do so because the information does contribute to the debate on a matter of public interest; informs a person about the reasons for a decision; provides contextual information to aid in the understanding of government decisions; and enhances the scrutiny of government decision-making or administrative processes.

I have also considered whether the following factors weigh in favour of release:

- (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.

I consider that these factors are of neutral weight in this instance because disclosure of the exempted information would not contribute to the debate on a matter of public interest; inform a person about the reasons for a decision; provide contextual information to aid in the understanding of government decisions; or enhance the scrutiny of government decision-making or administrative processes.

Factors against release

In relation to the matters listed in Schedule 1 of the Act, I consider that the following factors weigh against disclosure of the information:

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

In terms of the documents listed in items 6, 9 and 13 that I have determined are exempt from release under section 35 of the Act, I have determined that releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between officers of the Department and Ministerial staff when deliberating on official business. In my view, the overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when consulting and deliberating on official business. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision-making. Such documents also provide the basis for corporate knowledge management and information sharing. My reasoning for not releasing items 9 and 13 is that these documents are part of deliberations about the iterative drafting process which culminated in item 4, which I have determined to release with minor section 36 (personal information of person) redactions. As I have determined to

release item 4, the case for releasing internal deliberative information in the public interest is diminished.

- 16 The delegate then explained why some personal information contained in the information provided to Ms White was redacted under s36 of the Act:

I have redacted personal mobile numbers and personal email addresses in the items of information that I have released to you, on the grounds that the information is either irrelevant and/or out of scope of your request or exempt under section 36 (personal information) of the Act.

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1(1)(a)) and whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule 1(1)(b)).

On balance, I consider that disclosing the personal contact information of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1(1)(m)) and it is contrary to the public interest to release that information. I note that the redacted information is not material to your request.

- 17 In relation to information obtained in confidence, the delegate reasoned:

I have determined to exempt in full items 10 - 11 in the attached schedule, as these are a confidential email exchange between the Chief Executive Officer of the Integrity Commission and the Secretary of the Department including a confidential file note of the discussion. Part of the Integrity Commission's role is to provide confidential advice to public authorities on issues within its remit. By the nature of the Integrity Commission's role and that the email and file note are clearly marked confidential, I am satisfied that the information was obtained by the Department (a public authority) in confidence and that the disclosure of the information would be reasonably likely to impair the ability of the public authority to obtain similar information in the future.

I have determined to exempt in full item 13 under section 35 (internal deliberative information) and section 39 as the information was communicated in confidence and relates to an assessment of the capacity of individuals in government and individuals within communications services panel organisations to supply high-level media and communications support to the

Tasmanian Government Media Office. To release item 13 would be akin to releasing a confidential selection panel report.

- 18 The delegate then considered the public interest test in relation to this information:

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1(1)(a)); whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule 1(1)(b)); and whether the disclosure would inform a person about the reasons for a decision (Schedule 1(1)(c)). On balance, I consider that disclosing the information within scope of your request would harm the interests of those individuals (Schedule 1(1)(m)); and prejudice the ability to obtain similar information in the future (Schedule 1(1)(n)); and it is contrary to the public interest to release that information.

Analysis

Section 39 – Information obtained in confidence

- 19 Before proceeding to an analysis of the other exemptions claimed by the Department, I address its application of s39. For information to be exempt from disclosure under this section, I must be satisfied (relevantly) that *its disclosure 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.*

Items 10 and 11

- 20 The information which the Department has sought to exempt is described as an email chain between the Chief Executive Officer of the Tasmanian Integrity Commission and the Secretary of the Department, along with a file note of a conversation between the same people.
- 21 Both the Integrity Commission and the Department are public authorities as defined in s6 of the Act and generally s39 only applies to information communicated to a public authority from an external source. I am therefore not satisfied that the information in question falls within the scope of s39 and

consider it to be more appropriately assessed under s35(1) of the Act, which I will do.

Item 13

- 22 This is an email attachment identified as an *Assessment of government and communications panel list for capacity to supply media services*. The Department has applied both s35 and s39 to exempt the document in full, however there is no indication from whom the information in the document was obtained nor under what conditions or expectations of confidentiality. I therefore consider the attachment to be more appropriately assessed under s35 only.

Section 31 - Legal Professional Privilege

- 23 Information is exempt from disclosure under s31 of the Act:
- ...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.*
- 24 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client if they were made for the dominant purpose of giving or obtaining legal advice.¹
- 25 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between lawyers and their clients and to enable lawyers to give proper legal advice.²
- 26 The Department's decision exempted in full, pursuant to s31 of the Act, a series of emails and their attachments, identified as Items 7 and 14 on the schedule of documents provided to my office, between Department staff, then Department Secretary Ms Jenny Gale, the Crown Solicitor, the Solicitor General and the Premier's then Chief of Staff Ms Vanessa Field. Information in part of one sentence in an email in Item 12 was also claimed to be exempt under s31.
- 27 Upon reviewing this information, I can see that some of these emails, though discussing legal advice received by the Department from the Office of the Crown Solicitor, have been sent internally between officers of the Department and go beyond merely forwarding or restating legal advice received. As such, the following emails are more appropriately assessed for disclosure under s35(1)(b) of the Act for being records of consultations or deliberations between officers of a public authority:
- Ms Gale's email to Ms Field dated 27 June 2023 at 5:59pm;

¹ *Esso Australia Resources Ltd v FCT* [1999] HCA 67 at [73] per Gleeson CJ, Gaudron and Gummow JJ

² *Grant v Downs* [1976] HCA 63 at [19] per Stephen, Mason and Murphy JJ

- Ms Kelly's email to Ms Gale dated 27 June 2023 at 3:57pm (except for the second and third sentences in the first substantive paragraph);
 - Ms Kelly's email to Ms Field dated 28 June 2023 at 1:03pm;
 - Ms Field's email to Ms Kelly dated 28 June 2023 at 1:00pm;
 - Ms Kelly's email to Ms Field and Ms Gale dated 28 June 2023 at 12:46pm;
 - Ms Field's email to Ms Kelly and Ms Gale dated 28 June at 10:37am; and
 - Ms Jones' email to Ms Field dated 29 June 2023 at 8:34am.
- 28 The remainder of the information from Item 7, Item 12 and Item 14, which was identified by the Department as being exempt from disclosure pursuant to s31, consists of emails and attachments sent between Ms Field and the Office of the Crown Solicitor and Office of the Solicitor General, or internal forwarding or restating legal advice received.
- 29 Having reviewed this information, I can see that the email from Mr Bendeich to Ms Field dated 28 June 2023 at 2:23pm is purely administrative in nature and is therefore not exempt under s31 and should be released to Ms White. I am satisfied that the bodies of the remaining emails, their subject lines, and their attachments, were communicated for the dominant purpose of providing or obtaining legal advice. As such, this information is exempt from disclosure pursuant to s31 of the Act on the basis that it consists of information that would be privileged from production in legal proceedings on the ground of legal professional privilege.
- 30 Legal professional privilege does not attach to a document per se, but to the communication recorded within it.³ Therefore my finding does not extend to information contained within the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers contained within these emails, as this information was not communicated between a lawyer and client for the dominant purpose of providing or obtaining legal advice. This information is not exempt from disclosure under s31 and should be released to Ms White.

Section 35 - Internal Deliberative Information

- 31 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
- an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or

³ *Commissioner of the Australian Federal Police v Propend Finance* (1997) ALR at [137] per McHugh J

- a record of consultations or deliberation between officers of public authorities (s35(1)(b)); or
 - a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 32 Once the requirements of one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.
- 33 Section 35(1) of the Act does not apply to the following:
- purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information that is older than 10 years (s35(4)).
- 34 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*⁴ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.
- 35 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)*,⁵ 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.
- 36 The Department has sought to apply s35 to exempt some information responsive to Ms White's application. In addition, I have identified further information more appropriately assessed under this section. The relevant information is:
- Item 6 – an email dated 29 June 2023 from a media advisor;
 - Item 7 – the emails identified above;
 - Item 9 – a draft contract for the supply of communications support services;
 - Item 10 – an email chain between the Integrity Commission and the Department;
 - Item 11 – a file note by the CEO of the Integrity Commission; and

⁴ [1984] AATA 518 at [14]

⁵ [1984] AATA 67 at [58]

- Item 13 – an assessment of potential candidates to supply media services.
- 37 I am satisfied that these documents constitute records of opinion, advice, consultations or deliberations between officers of the Department, the Premier's Office and the Integrity Commission in the course of, or for the purpose of, the official business of those public authorities or Ministers. I am further satisfied the information is not more than 10 years old and is therefore *prima facie* exempt pursuant to s35(1)(a), (b) or (c) of the Act.
- 38 I note that Items 10 and 11 refer to information relating to the Integrity Commission. Information in the possession of the Integrity Commission is excluded from the Act pursuant to s6(1)(d), unless the information relates to the administration of the public authority. In this case, the relevant information is in the possession of the Department, not the Integrity Commission, and so is not excluded from the operation of the Act. It is therefore correct for me to assess the information, as the Department has done.
- 39 My finding does not extend to information contained within the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers contained within relevant emails, as this is purely factual information. This should be released to Ms White.

Public interest test

- 40 As s35 is subject to the public interest test in s33, it is necessary to assess whether it would be contrary to the public interest to disclose the information, after taking into account all relevant matters, including at a minimum those listed in Schedule 1.
- 41 Matter (a) – the general public need for government information to be accessible – was considered by the Department to weigh in favour of disclosure. I agree with this assessment as the object of the Act is to disclose information where possible.
- 42 The following matters were considered by the Department to be of neutral weight:
- (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 contextual information in the understanding of government decisions;
 - (f) - whether the disclosure would enhance the scrutiny of government decision-making processes and thereby improve accountability and participation; and

- (g) – whether the disclosure would enhance scrutiny of government administrative processes.
- 43 I do not agree with this assessment. The agreement with Font PR to provide media and communications support to the Premier's Office was a matter of significant public and media interest. Several of the identified documents provide an insight into the 'thinking process' involved in the assessment of issues and potential candidates and so would improve community understanding of the process leading to the ultimate decision. I consider these factors weigh in favour of disclosure, to varying degrees.
- 44 Matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – was not addressed by the Department in relation to s35, however I consider it to be relevant. Item 13 contains an assessment of the experience and suitability of companies and individuals considered during an assessment process. I consider that the public disclosure of this information has the potential to harm the interests of those persons and therefore weighs against disclosure of some information.
- 45 Matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – was identified by the Department as weighing against disclosure. I partly agree with this assessment. The routine release of information such as that in Item 10, shared in the expectation of confidentiality and which is closely connected with legal advice, would inhibit the willingness of all parties to share such information and so reduce the effectiveness of the Integrity Commission by compromising its ability to identify potential issues of concern at the deliberative stage.
- 46 However, as I said in my previous decision of *Todd Dudley and Department of Natural Resources and Environment Tasmania*:⁶
- It is intended that public information should be accessible to the public and the Act sets out that internal deliberative information should be released to an applicant unless this is contrary to the public interest. Public officers should be conscious that their communications could be disclosed under the Act and should continue to perform their duties appropriately and confidently regardless of this.*
- 47 As part of the public interest test, I also take into account the draft nature of some of the information in question. As I outlined in my previous decision of *Rebecca White and Premier of Tasmania*,⁷ unless there are reasons to justify the release, it has been my practice to find that early working drafts of documents are usually exempt under s35 because it would be inappropriate for

⁶ (May 2022) at [89] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

⁷ (April 2024) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

numerous slightly different drafts of a document to be released as a standard practice.

- 48 I consider that the inherent reasons for Parliament's inclusion of s35 in the Act, to allow for thinking processes to be explored and options discussed and tested, even if not subsequently adopted, prior to settling on a final direction, also weigh against the release of some of the information. However, this must always be balanced with the need for transparency regarding government operations.
- 49 The assessment and weighting of the various public interest matters involves a consideration of competing factors and recognising that not every factor is of equal weight in each circumstance. After careful consideration, on balance I am not satisfied that the Department has discharged its onus under s47(4) of the Act to demonstrate that the release of all the exempted information is contrary to the public interest.

Item 6

- 50 This document contains a series of media 'talking points' for 29 June 2023 sent by an officer of the Department to the Department's media unit, and then forwarded outside the Department by the Premier's then Chief of Staff to Ms Danielle McKay of Font PR on the evening of 2 July 2023. As such, there is a question over whether the attachment has lost its status as internal deliberative information.
- 51 However, it is not necessary for me to decide this point. The information contained in the document is an outline of contemporary political issues and suggested responses which appear innocuous, uncontroversial and of a type common to all political media briefings. I also take into account that the information is now over 18 months old and it is not apparent why its disclosure would be of concern to any person. Accordingly, the attachment is to be released to Ms White.

Item 7

- 52 This email chain was originally identified as exempt under s31, however the seven emails identified above were sent internally between officers of the Department. Some discuss the subject and nature of the legal advice sought, however others are merely administrative in nature and do not reveal the substance of the legal advice. The following emails only are not exempt under s35 and are to be released to Ms White:
 - Ms Gale's email to Ms Field dated 27 June 2023 at 5:59pm;
 - Ms Kelly's email to Ms Gale dated 27 June 2023 at 3:57pm, except for the second paragraph;
 - Ms Kelly's email to Ms Field dated 28 June 2023 at 1:03pm, except for the telephone numbers;
 - Ms Field's email to Ms Kelly dated 28 June 2023 at 1:00pm;

- Ms Jones' email to Ms Field dated 29 June 2023 at 8:34am.
- 53 The two remaining mails and attachments in Item 7 which were assessed under s35 are exempt and are not required to be released. They are:
- Ms Kelly's email to Ms Field dated 28 June 2023 at 12:46pm;
 - Ms Field's email to Ms Kelly dated 28 June 2023 at 10:37am.

Item 9

- 54 This is a draft version of the contract for services between the Department and Font PR. The final version of the contract was released to Ms White, with only minor redactions, as Item 4. The draft is either identical or very closely resembles the final version and so is effectively in the public domain. There is no utility in releasing a slightly different early version, so I am satisfied that this version is exempt under s35 and not required to be released to Ms White.

Items 10 and 11

- 55 The information exchanged between the Integrity Commission and Secretary of the Department in Items 10 and 11 is an important facet of decision-making and a function of the Commission, and contains early opinion and tentative information which was freely given in the expectation of confidentiality. The information is exempt under s35(1)(b) and is not required to be disclosed.

Item 13

- 56 This document contains a description of the position to be filled within the Premier's Office, a consideration of possible and unsuitable candidates and other comments regarding the nature of the work. It is clearly a thinking document, undated, and cannot be considered to be a formal or finalised assessment. The majority of the document contains unattributed comments without supporting evidence, which, if released, would be likely to harm the interests of those persons named.
- 57 The first four paragraphs under the heading *Requirement* are merely reflective of an uncontroversial position description. As such they are not exempt and are to be released to Ms White, however the remainder of the document is exempt under s35(1)(a) and is not required to be released.

Section 36 - Personal Information of a Person

- 58 For information to be exempt under s36(1) of the Act, I must be satisfied that it contains information that is the personal information of a person other than the applicant. Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 59 Having reviewed the information subject to this external review, I can see that the Department has applied s36(1) of the Act to information contained within the direct professional contact email addresses of the Premier's former Chief of

Staff Ms Vanessa Field, Ms Nicole Gordon of DPAC, and Mr Brad and Ms Pris Stansfield of Font PR.

- 60 I can also see that the Department has applied s36(1) of the Act to exempt from disclosure Mr Stansfield's, Ms Gordon's, and Ms Field's direct professional contact numbers, as well as publicly available contact numbers for the Office of the Premier and Font PR.
- 61 In assessing this information for release under the Act, I note that the release of information revealing the direct contact phone numbers or direct contact email addresses would not add value to the information provided to the applicant but would impact on the interests of the people concerned as it would negatively impact on their privacy. Accordingly, I find that Mr Stansfield's, Ms Gordon's and Ms Field's direct phone contact numbers are exempt from disclosure pursuant to s36(1) of the Act. I also find that redacted information contained within Ms Stanfield's and Ms Gordon's direct email address is exempt pursuant to s36(1).
- 62 However, my finding in this regard does not extend to information revealing publicly available contact numbers for the Office of the Premier and Font PR. Nor does it extend to Mr Stansfield's direct email address. This information is publicly available on the Office of the Premier's and Font PR's websites, and as such the release of this information will not negatively impact the privacy of the relevant individuals.
- 63 I also find that information revealing the direct professional contact email address of Ms Field should be released. Ms Field has resigned from her role as the Premier's Chief of Staff, and so presumably no longer uses this email. As such, the release of this information will not negatively impact upon her privacy, or any other of her interests.

Preliminary Conclusion

- 64 Accordingly, for the reasons set out above, I determine:
 - exemptions claimed pursuant to ss31, 35 and 36 are varied; and
 - exemptions claimed pursuant to s39 are not made out.

Response to the Preliminary Conclusion

- 65 As the above preliminary decision was adverse to the Department, it was made available to it on 13 February 2025 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 66 On 25 February 2025, Ms Gemma Smith of the Department advised *that the Department of Premier and Cabinet does not wish to provide a submission*. Accordingly, my findings remain unchanged.

Conclusion

- 67 For the reasons set out above, I determine:

- exemptions claimed pursuant to ss31, 35 and 36 are varied; and
- exemptions claimed pursuant to s39 are not made out.

68 I apologise to the parties for the delay in finalising this decision.

Dated: 26 February 2025 (re-issued to make minor corrections pursuant to s48(2) of the Act on 4 March 2025 and 11 March 2025)

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

Attachment 1

Relevant legislation

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

(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.

(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 (1) 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 person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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.

Section 33 - Public interest test

- (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.

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.



Right to Information Act Review

Case Reference: R2309-017

Names of Parties: Rebecca White and the Premier of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s39

Background

- 1 The award of Tasmanian government funding for New Norfolk Distillery to redevelop the Willow Court complex in New Norfolk has been controversial, with the Tasmanian Labor party raising questions about the appropriateness of the grant.¹ The Premier, however, has defended the integrity of the process leading to the New Norfolk distillery being awarded this funding.²
- 2 On 28 July 2023, Ms Rebecca White MP, the then leader of the State Opposition, submitted an assessed disclosure application under the *Right to Information Act 2009* (the Act) to the Office of the Premier. As part of this application, Ms White requested:

Any correspondence to or from the Premier or his office about the proposed New Norfolk Distillery or Willow Court since 1 July 2022.
- 3 On 20 September 2023, Ms White sought external review under s45(1)(f) of the Act. Her application was accepted, as the timeframe for a decision on her assessed disclosure application to be provided by the Department had elapsed, and she had not received that decision.
- 4 On 31 October 2023, Ms Bridget Hutton, the Premier's delegate, issued a decision to Ms White on her assessed disclosure application.

¹ Holmes, A., *Minister's request for 'positive consideration' over grant for Tasmanian Liberal-linked New Norfolk distillery flagged by department, documents reveal* (5 December 2023), ABC, <https://www.abc.net.au/news/2023-12-05/new-norfolk-distillery-grant-guy-barnett-positive-consideration/103188558> .

² Langenberg, A., *Tasmanian premier under scrutiny over \$1.2m grant promise to rum distillery with Liberal Party staffer links* (6 June 2023), ABC, <https://www.abc.net.au/news/2023-06-06/tas-premier-denies-conflict-of-interest-grant-tarrant-derksen/102441260> .

- 5 The Premier's delegate identified 14 documents as being responsive to Ms White's assessed disclosure application, which consisted of the following:
 - Item one: *Email from New Norfolk Distillery to Principal Advisor Premier's Office about Tourism Innovation Grants 2022*
 - Item two: *Attachment - Tourism Innovation Grants Program Proposal*
 - Item three: *Email from New Norfolk Distillery to Premier about Tourism Innovation Grants 2022*
 - Item four: *Attachment - Letter from New Norfolk Distillery to the Premier about recent grant round*
 - Item five: *Email from the Premier's Office to New Norfolk Distillery confirming receipt of email and letter*
 - Item six: *Email chain between Premier's Office advisors about New Norfolk Distillery Tourism Innovation Grants Program*
 - Item seven: *Email from Department of State Growth Liaison Officer to Premier's Office Liaison Officer attaching Minute and attachments*
 - Item eight: *Minute to Premier about Grant funding to New Norfolk Distillery Pty Ltd*
 - Item nine: *Email from Senior Advisor to Premier's Correspondence team about sending a letter from the Premier to New Norfolk distillery*
 - Item 10: *Email from Premier's Office Liaison Officer to Department of State Growth Liaison Officer to attaching signed Minute and attachments*
 - Item 11: *Email from the Premier's Office to New Norfolk Distillery about the attached letter from the Premier*
 - Item 12: *Letter from the Premier to New Norfolk Distillery about awarding grant funding*
 - Item 13: *Letter from New Norfolk Distillery to the Premier about their withdrawal from the grant application process*
 - Item 14: *Email from the Premier's Office to New Norfolk Distillery confirming receipt of email and letter*
- 6 The Premier's delegate's decision held that information was exempt under s35 of the Act (internal deliberative information) in items six and nine, and that information was exempt under s39 (information obtained in confidence) in item two. The Premier's delegate held that information in items one, three, four, five, six, seven, 10, 11, 13 and 14 was outside

the scope of Ms White's request, or in the alternative, was exempt from disclosure under s36 of the Act (personal information). The Premier's delegate also held that she was not required to provide information responsive to items 8 or 12, as this is publicly available.

- 7 Following the release of this decision, Ms White elected to extend her external review request to a full review pursuant to s46(2) of the Act.

Issues for Determination

- 8 I must determine whether the information not released by the Premier's delegate is eligible for exemption under ss35, 36, or 39 of the Act.
- 9 As ss35, 36 and 39 are contained in Division 2 of Part 3 of the Act, should I find that information is *prima facie* exempt under any of these sections, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant Legislation

- 10 I attach copies of ss35, 36 and 39 of the Act to this decision at Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Ms White

- 11 Ms White did not make substantive submissions regarding the validity of the exemptions applied by the Premier's delegate.

The Premier's delegate

- 12 The Premier's delegate did not make submissions beyond the reasoning of her 31 October 2023 decision on Ms White's application.
- 13 The Premier's delegate's decision made the following comments about information identified as exempt under s35 of the Act:

I have determined that parts of items 6 and 9 in the attached schedule are within scope of your Right to Information request, but are exempt under section 35 of the Act as opinion, advice or recommendations prepared by officers in a Ministerial office in the course of internal consultations and deliberative 'conversations' in formulating advice relating to the official business of the Minister, and are not purely factual.

While it may be considered that some of the information contained in the emails is factual, the process by which the information is prepared and presented is consultative and deliberative. Material of a factual nature is not

information of a purely factual nature if that material would reveal the consultation and deliberation that has taken place in the course of the deliberative process involved in the functions of a public authority. The factual and deliberative information is inextricably linked, and it would not be practicable to differentiate purely 'factual' information from that which is 'deliberative.'

The exemption in section 35 of the Act is subject to the public interest test. I have outlined my assessment of the public interest test below.

Applying the public interest test

In my view there is clearly media and public interest in the New Norfolk Distillery project as is evidenced by the number of The Mercury articles about the project since 2019, articles on the ABC News online website and questions asked at 2023-24 Estimates Committee Hearings.

I have carefully considered each of the matters in Schedule 1 as part of my assessment of the public interest test, including the following 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;*
- (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 enhance scrutiny of government decision-making processes and thereby improve accountability and participation;*
- (f) *whether the disclosure would enhance scrutiny of government administrative processes; and*
- (g) *whether the disclosure would prejudice the ability to obtain similar information in the future.*

Factors in favour of release

In relation to the matters listed in Schedule 1 of the Act, I consider that the following factors weigh in favour of disclosure of the information not released:

- (a) *the general public need for government information to be accessible.*

The object of the Act is to disclose information where possible and in particular to give members of the public the right to obtain information about the operations of Government and increase the accountability of the executive to the people of Tasmania. As a general rule, disclosure is to be favoured over non-disclosure unless there are valid reasons for deciding that disclosure would be contrary to the public interest.

I have also considered whether the following factors weigh in favour of release:

- (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; and*
- (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.*

I consider that these factors are of neutral weight in this instance because disclosure of the exempted information would not contribute to the debate on a matter of public interest; inform a person about the reasons for a decision; provide contextual information to aid in the understanding of government decisions; or enhance the scrutiny of government decision-making or administrative processes.

The Minute to the Premier in item 8, provides the background to the application for funding for the New Norfolk Distillery project and discloses the advice from the Department of State Growth to the Premier. In my view, this information provides the basis for the final decision

and diminishes the need to release, in the public interest, the deliberative process leading to this decision.

Factors against release

In relation to the matters listed in Schedule I of the Act, I consider that the following factors weigh against disclosure of the information:

- (n) *whether the disclosure would prejudice the ability to obtain similar information in the future.*

In terms of the documents listed in items 6 and 9 that I have determined are exempt from release under section 35 of the Act, I have determined that releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between Ministerial staff when deliberating on official business. In my view, the overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when consulting and deliberating on official business. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision-making. Such documents also provide the basis for corporate knowledge management and information sharing.

- 14 As to exemptions applied pursuant to s36 of the Act, the Premier's delegate's decision held the following:

I have redacted personal mobile numbers and personal email addresses in the items of information that I have released to you, on the grounds that the information is either irrelevant and/or out of scope of your request or exempt under section 36 (personal information) of the Act.

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule I of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule I(I)(a)) and whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule I(I)(b)). On balance, I consider that disclosing the personal contact information of individuals who are third parties to your request would harm the interests of those individuals (Schedule I(I)(m)) and it is contrary to the public interest to

release that information. I note that the redacted information is not material to your request.

- 15 The Premier's delegate's decision provided the following regarding exemptions applied pursuant to s39 of the Act:

I have determined to exempt parts of item 2 in the attached schedule, as this financial information was provided confidentially to the Department of State Growth as part of a project proposal to a grant program and is not in the public domain. I am satisfied that the information was obtained by the Department of State Growth (a public authority) in confidence and that the disclosure of the information would be reasonably likely to impair the ability of the public authority to obtain similar information in the future.

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule I(I)(a)); whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule I(I)(b)); and whether the disclosure would inform a person about the reasons for a decision (Schedule I(I)(c)). On balance, I consider that disclosing the information within scope of your request would harm the interests of those individuals (Schedule I(I)(m)); would harm the business or financial interests of a person or organisation (Schedule I(I)(s)) and prejudice the ability to obtain similar information in the future (Schedule I(I)(n)); and it is contrary to the public interest to release that information.

Analysis

Preliminary Matter – Out of scope information

- 16 As set out earlier, Ms White's request was for [a]ny correspondence to or from the Premier or his office about the proposed New Norfolk Distillery or Willow Court since 1 July 2022.
- 17 The Premier's delegate's decision set out that some information included in the documents otherwise responsive to Ms White's assessed disclosure application was out of scope or, in the alternative, that s36 applied to exempt that information from disclosure. This information included direct mobile phone numbers and information in email

addresses in items 1, 3, 4, 5, 6, 7, 10, 11, 13 and 14 of the information released to Ms White. All of this information was contained within emails.

- 18 Where an applicant requests correspondence, and the relevant correspondence identified as responsive to the request are emails, I take the scope of the request to include all information contained within those emails. This includes all information contained in signature blocks, salutations, information contained in subject, to, from, and carbon copy fields, and all attachments. As such, it is more appropriate to consider the information identified as out of scope by the Premier's delegate as being within the scope of Ms White's assessed disclosure application but eligible for exemption under s36 of the Act.
- 19 This approach is consistent with s3(4)(b) of the Act which dictates that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information. As such, I will assess this information under the alternative exemption proposed, s36, later in my decision.

Section 35 – Internal Deliberative Information

- 20 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
 - an opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberation between officers of public authorities (s35(1)(b)); or
 - a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 21 Once the requirements of one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the public authority, Minister or of the Government.
- 22 The outlined exemption above does not apply to the following:
 - purely factual information (s35(2)); or
 - a final decision, order or ruling given in the exercise of an adjudicative function (s35(3)(a)); or
 - a reason which explains such a decision, order or ruling (s35(3)(b)); or
 - information that is older than 10 years (s35(4)).
- 23 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*

where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.³

- 24 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*, refers to the decision in *Re Waterford* and concludes that, regarding factual information, it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.⁴
- 25 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’.⁵
- 26 The Premier’s delegate has applied s35(1)(c) of the Act to exempt from disclosure information contained in items six and nine.

Item six

- 27 Item six consists of an email sent from Mr Tony Mayell to Ms Amy Hills, both of the Office of Premier, copying Ms Barbara McGregor into the correspondence. It was sent on 6 February 2023 at 4:17pm. The Premier’s delegate has applied s35 to exempt the substantial majority of the body of this email from disclosure.
- 28 Upon reviewing this information, I can see that it contains deliberations regarding whether the grant application should be approved. I am satisfied that this information is *prima facie* exempt from disclosure pursuant to s35(1)(c) of the Act as it is information which, if released, would reveal the consultations or deliberations between officers of public authorities and Ministers which were conducted 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.

Item nine

- 29 Item nine consists of an email sent from Ms Amy Hills to the Office of the Premier on 20 February 2023 at 1:11pm. Ms McGregor was copied into this correspondence. The Premier’s delegate has applied s35(1)(c) to exempt from disclosure the second and third sentences of the body of this email from disclosure.
- 30 This information consists of Ms Hill’s instructions to Ms McGregor and the ‘corro’ team regarding an approved piece of correspondence

³ (1984) AATA 518 at 14.

⁴ LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

⁵ (1985) 5 ALD 588.

attached to this email. I am satisfied that this information is a record of consultations or deliberations between officers of public authorities and Ministers which were conducted 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. As such, this information is *prima facie* exempt pursuant to s35(1)(c) of the Act.

Public interest test

- 31 Section 35 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt. In making this assessment, I am required to consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.
- 32 In her decision, the Premier's delegate found Schedule 1 matter (a) to be relevant and weighed this matter in favour of disclosure. The premier's delegate found Schedule 1 matters (b), (c), (d), (f), and (g), as weighing neither in favour or against disclosure, while she found Schedule 1 matter (n) to be relevant and weigh against disclosure.
- 33 As the pieces of information from items six and nine I have found to be *prima facie* exempt under s35(1)(c) of the Act are of a different character to each other, I will conduct a separate public interest test assessment for each.

Item six

- 34 I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 35 However, I disagree that matters (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, or (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions, neither weigh in favour or against disclosure.
- 36 In coming to the conclusion that these matters weighed neither in favour or against disclosure, the Premier's delegate set out that the information released in item 8 – a minute to the Premier drafted by the Deputy Secretary of the Department of State Growth, Mr Mark Bowles – provided the relevant background and details leading to the decision that New Norfolk distillery should be awarded the requested funding.
- 37 Having reviewed this minute, I am not satisfied that it provides much detail about *why* Mr Bowles recommended that New Norfolk Distillery be awarded the requested funding. All that can really be discerned from this minute is that New Norfolk Distillery was unsuccessful in applying for funding previously, and that without government funding, New Norfolk

Distillery's project would not go ahead. As the released minute provides little detail as to why the funding was awarded, I give the Premier's delegate's arguments regarding Schedule 1 matters (b), (c) and (d) little weight.

- 38 Instead, I find that the information in item six identified for exemption contains relevant commentary from the Premier's then Principal Advisor, Mr Tony Mayell, which would provide additional information to inform debate, and provide context around decision making. As such, I find that that Schedule 1 matters (b), (c) and (d) weigh in favour of disclosure.
- 39 I also disagree that Schedule 1 matters (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation, or (g) – whether the disclosure would enhance scrutiny of government administrative processes, neither weigh in favour or against disclosure.
- 40 I accept that commentary contained in Mr Mayell's email may not form part of the official published reasoning detailing why the grant was awarded to New Norfolk Distillery, however such commentary still amounts to internal correspondence and deliberations that, at the very least, have the potential to influence government decision making. As such I find that these Schedule 1 matters are relevant and weigh in favour of disclosure.
- 41 I also disagree with the Premier's delegate that Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future - weighs against disclosure.
- 42 The Premier's delegate held that the release of information identified as exempt under s35 would prevent the frank exchange of views between public officers and that this would have a detrimental effect on government decision-making.
- 43 I give this argument little weight. As I have mentioned in numerous previous decisions,⁶ public officers should be aware that their internal correspondence relating to their regular working duties may become subject to release under the Act and should continue to perform their duties confidently regardless of this.
- 44 I do acknowledge, however, that some internal discussion and officer opinions expressed during a public authority or Minister's officers' 'thinking process' can be validly exempt under s35. Particularly in relation to contentious projects, I accept that a chilling effect on the documentation of discussions may occur if all internal discussion was automatically released to all parties. But this must be balanced with the need for transparency concerning those thinking processes and must not

⁶ *Linda Poulton and Department of Justice* (5 June 2024) at [54] citing *Todd Dudley and Department of Natural Resources and Environment Tasmania* (12 May 2022) at [76], both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

be given major weight, or the intention of the Act to release the maximum amount of official information would be hampered.

- 45 After considering all relevant matters, including all those set out in Schedule 1 of the Act, I am not satisfied that it would be contrary to the public interest for the relevant information contained in item six to be released. I determine that this information is not exempt under s35 and should be made available to Ms White.

Item nine

- 46 In relation to the information I found to be *prima facie* exempt in item nine, I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 47 I agree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest, weighs neither in favour nor against disclosure. However, I find that matters (c) – whether the disclosure would inform a person about the reasons for a decision, and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions, are relevant and weigh in favour of disclosure.
- 48 The relevant information in item nine contains Ms Hill's advice to Ms McGregor as to whether the letter (released as item 12) required further editing, and her advice to the 'corro' team about her understanding as to whether, at that point in time, the letter had been approved for publication by the Premier.
- 49 As such, I can see that the release of Ms Hill's correspondence to Ms McGregor would inform the public of reasons for, and the context of, the decision not to edit the letter contained in item 12 further, as had been discussed between Ms McGregor and Ms Hills. Therefore, I find that matters (b) and (c) weigh in favour of disclosure. However, my findings in this regard do not extend to Ms Hill's correspondence to the 'corro' team. I can not see how the release of this information would inform the public of the reasons and context of any decision. I agree that these matters neither weigh in favour nor against disclosure.
- 50 I also partially disagree that matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – weighs neither in favour nor against disclosure. The release of Ms Hills' advice to Ms McGregor would illustrate how it came to be that the letter in item 12 was not edited further, and as such, would enhance scrutiny of Government decision making processes. However, my finding here does not extend to Ms Hill's advice to the 'corro' team. I agree that in relation to this information, matter (f) weighs neither in favour nor against disclosure.

- 51 I agree with the Premier's delegate that matter (g) – whether the disclosure would enhance scrutiny of government administrative processes - is of neutral weight.
- 52 Finally, I, for the same reasons outlined above, disagree with the Premier's delegate that matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future - weighs against disclosure.
- 53 After considering all relevant matters, including all those set out in Schedule 1 of the Act, I am not satisfied that it would be contrary to the public interest for this innocuous information to be released. I find that it is not exempt and should be made available to Ms White.

Section 36 - Personal information of a person other than the applicant

- 54 The Act provides that information may be exempt under s36 if it contains the personal information of a person other than the applicant. Personal information is defined in s5(1) of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 55 The Premier's delegate applied s36 of the Act to exempt from disclosure direct mobile phone numbers and information contained in email addresses contained in items 1, 3, 4, 5, 6, 7, 10, 11, 13 and 14 of the information released to Ms White.
- 56 I will not address each individual application of s36 by the Premier's delegate, rather, I will assess the application of s36 of the Act in relation to the following categories of people:
 - Mr Tarrant Derksen and Mr Kelvin Derksen-Luelf; and
 - the Premier and various public officers.

Mr Derksen and Mr Derksen-Luelf

- 57 The Premier's delegate has applied s36 of the Act to exempt from disclosure information contained in Mr Derksen and Mr Derksen-Luelf's professional email addresses and their mobile phone numbers. After reviewing this information, I am satisfied that most of this information is exempt from disclosure pursuant to s36 of the Act. The release of most of this information would add no value to the information being released and would impact upon Mr Derksen's and Mr Derksen-Luelf's privacy.
- 58 However, my findings in this regard do not extend to information contained in Mr Derksen's professional email address that the Premier's delegate identified as exempt from disclosure pursuant to s36 of the Act. The same information has been released in item eight and it is not clear why the further release of the same information would detrimentally impact Mr Derksen's interests. Accordingly, information contained in

Tarrant Derksen's professional email address that was identified by the Premier's delegate as exempt pursuant to s36 of the Act should be released.

- 59 I uphold the Premier's delegate's determination regarding the remainder of the information relating to Mr Derksen and Mr Derksen-Luelf and find this is exempt under s36 and should not be released to Ms White.

The Premier and various public servants

- 60 The Premier's delegate has applied s36 of the Act to exempt from disclosure information revealing the contact numbers and email addresses of the Premier and various public servants. As I have held in previous decisions,⁷ it is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption. No such circumstances have been set out by the Premier's delegate here.
- 61 As such, I find that it would not be contrary to the public interest for any references to the phone number as contained in the signature block of the email from the Office of the Premier to Mr Derksen dated 6 December 2022 at 10:19am in item 5 to be released.
- 62 This is a publicly available phone number for the Premier's office. As such, it is not apparent why it would be contrary to the public interest for it to be released to the applicant. This information should be released to Ms White
- 63 Further, though the Premier's delegate has not made specific submissions about why this information is exempt under s36 of the Act, I find that the reference to 'JR', this being the Premier Jeremy Rockliff, and the reference to Barb, being Ms Barbara McGregor of the Department of Premier and Cabinet (DPAC), as they are contained in items six and nine respectively, are not exempt from disclosure pursuant to s36 for the same reasons as outlined above.
- 64 However, my findings in this regard do not extend to the following pieces of information, which consist of information revealing the direct email addresses and phone numbers of those working in the Tasmanian public service:
 - any references to the phone number contained in Ms Jayne Richardson's signature block of the email from Ms Richardson to 'Eva' of the Department of State Growth, dated 14 February 2023 at 1:22pm in item 7; and

⁷ *Linda Poulton and Department of Natural Resources and Environment* (24 November 2023) [96], and *Rebecca White and the Premier of Tasmania* (10 April 2024) [35], both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- any references to the information identified as exempt under s36 contained in Ms McGregor's and Mr Tony Mayell's Department of Premier and Cabinet email.
- 65 This information, if released, would reveal direct contact details of members of the State service. As I held in my recent decision of *Anthony Scott Bell and Department of State Growth*,⁸ there is at least the potential for harm to be suffered by those who have their direct contact details released, and it is valid for public authorities to limit the release of direct contact details to ensure enquiries are able to be directed through appropriate channels. As such, I find that this information is exempt pursuant to s36 of the Act, and should not be released to Ms White.
- Section 39 - Information Obtained in Confidence**
- 66 The Premier's delegate has applied s39(1)(b) of the Act to claim information is exempt from disclosure in item two. The relevant information is contained in New Norfolk Distillery's application for funding through the State Government's Tourism Innovation Grants Program. It consists of various dollar figures revealing the expected income the proposed project will generate, expected expenditure, and planned funding arrangements for the project.
- 67 For information to be exempt from disclosure under s39 of the Act, I must be satisfied that it is information that has been communicated in confidence to the Premier and that:
- the information would be exempt information if it were generated by a public authority or Minister (s39(1)(a)); or
 - 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 (s39(1)(b)).
- 68 I am satisfied that the grant application was submitted to the State Government in confidence by New Norfolk Distillery and details in it were made available to the Government for the limited purpose of allowing the Government to evaluate whether its project qualified for the requested funding from the State Government.
- 69 However, I am not satisfied that the release of this information would be reasonably likely to impair the ability of the State Government to obtain similar information in the future. Significant Government funding is available through grants such as the one applied for by New Norfolk distillery. I am not satisfied that information claimed to be exempt under s39(1)(b) of the Act by the Premier's delegate is so sensitive that its release would deter others from making similar applications for similar

⁸ *Anthony Scott Bell and Department of State Growth* (16 August 2024) at [45], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

funding from the State Government in the future, particularly where such funding may be determinative as to whether a project is viable.

- 70 The information claimed to be exempt is a series of dollar figures, but there has been no indication that the release of this information would cause any competitive disadvantage to New Norfolk Distillery or any claim that the information is exempt under s37. The provision of basic financial information is a standard part of a grant application process and I remain unpersuaded that the release of this type of information would impair the ability of a public authority or Minister to obtain similar information in future. Consequently, I find that this particular information is not exempt under s39(1)(b) of the Act and should be made available to Ms White.

Preliminary Conclusion

- 71 Accordingly, for the reasons set out above, I determine that:

- exemptions claimed pursuant to ss35 and 39 are not made out; and
- exemptions claimed pursuant to s36 should be varied.

Conclusion

- 72 As the above preliminary decision was adverse to the Premier's office, it was made available to it on 6 February 2025 under s48(1)(a) of the Act to seek its input before I finalised my decision.

- 73 Ms Gemma Smith, a delegate of the Premier, advised on 27 February 2025 that no submissions would be made in response to my preliminary decision.

- 74 Accordingly, for the reasons set out above, I determine that:

- exemptions claimed pursuant to ss35 and 39 are not made out; and
- exemptions claimed pursuant to s36 should be varied.

- 75 I apologise to the parties for the delay in finalising this decision.

Dated: 28 February 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 35 – Internal Deliberative Information

- (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.
- (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 (1) 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

- (1) 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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

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.

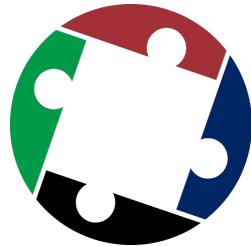
Section 33- Public interest test

- (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.

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.



Right to Information Act Review Case Reference: R2408-001

Names of Parties: Rick Snell and Department of Premier and Cabinet

Reasons for decision: s48(3)

Provisions considered: s35

Background

- 1 Mr Rick Snell (the Applicant) is an Adjunct Associate Professor in the Law School at University of Tasmania, with an interest and expertise in the field of right to information law.
- 2 The Right to Information Uplift Project was initiated to identify opportunities to improve the provision of right to information services by the Tasmania State Service.
- 3 On 9 May 2024, Mr Snell submitted an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Premier and Cabinet (the Department) in the following terms:

I am making a formal request under the Right to Information Act for the information contained below.

I would like the following information:

1. *A copy of the Discussion Paper mentioned in the Minutes of the RTI Uplift Steering Committee of 3 August 2023 and any subsequent versions of the Discussion Paper.*
2. *Any summary or high level Info [sic] graphic produced from the feedback of the survey of delegates mentioned in the above minutes of 3 August 2023.*

I request all fees be waived in the public interest, as these are outcomes of a major government initiative aimed at improving transparency and would encourage public understanding of the issues confronting Tasmania's RTI system.

- 4 On 18 June 2024, Ms Carmen Kelly, a delegate under the Act for the Department, issued a decision to Mr Snell only dated June 2024. Ms Kelly released two documents in whole or in part and relied upon ss 35 and 39 to exempt some information.

- 5 On 20 June 2024 (but dated 20 April 2024), Mr Snell applied for an internal review focused only on the decision not to release any of the information in Chapter 11 of the RTI Uplift Discussion Paper Version 3.3 (as of 9 August 2023).
- 6 On 11 July 2024 the internal review decision was released by Ms Kathrine Morgan-Wicks PSM, Secretary of the Department. Ms Morgan-Wicks determined that disclosure of the information would be contrary to the public interest and the relevant information is exempt under section 35 of the Act.
- 7 On 1 August 2024, Mr Snell sought external review of the application of s35 and his request was accepted pursuant to s44 of the Act.

Issues for Determination

- 8 I must determine whether the information not released by the Department is eligible for exemption under s35, or any other relevant section of the Act.
- 9 As s35 is contained within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under s35, 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 1.

Relevant legislation

- 10 I attach a copy of s35 at Attachment 1.
- 11 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 12 In his application for internal review, Mr Snell relevantly submitted:

...

The decision was based on Section 35 and the conclusion by Ms Kelly that the release of Chapter 11 would hinder rather than facilitate or inform public debate and discussion about improving the RTI process in Tasmania.

Ms Kelly argued that:

"Chapter 11 of the draft Paper includes proposed solutions that are incomplete and that have not been comprehensively tested and explored, not approved at Departmental level, nor committed to by the government."

Any reading, and discussion, of the Draft Discussion Paper and its [sic] draft recommendations would be undertaken with the above disclaimer firmly in mind.

...

To argue that the proposed potential solutions by a high level steering committee tasked with improving the RTI system, with a \$500000 budget would hinder debate should be given minimal weight – if any at all.

If a decisionmaker, and any subsequent reviewer, seriously wishes to maintain this argument then the onus is on them to articulate exactly how, and provide evidence, public debate would be hindered by each of the proposed solutions.

...

The public interest is far better served by releasing the proposed solutions, with any disclaimer or caveats felt necessary, than an unjustified and poorly reasoned conclusion that public debate would be hindered by outlining these proposed draft solutions.

The decisionmaker was required to balance the matters in favour or against release set out in Schedule 1. In performing this balancing the decisionmaker needed to identify why the arguments against release – in this case a simple assertion that release would hinder public debate – should be given more weight than all the other factors. Furthermore even if the reform proposals identified by the Tasmanian Integrity Commission and the Commission of Inquiry contradict or make redundant the Steering Committee's proposals this would simply enhance and inform public debate rather than hinder such debate.

...

The public interest and the RTI Act do not benefit by a blanket and generalised claim for total secrecy for reform proposals generated after careful consideration at a high level within the public service.

13 When seeking external review, Mr Snell further relevantly submitted:

...

I have focused this review on whether the Secretary has overcome the very high thresholds in declaring that on balance the public interest requires the withholding of proposed solutions to the problems with the operation of Tasmanian RTI.

The Secretary has provided little detailed reasoning, evidence or justification for the decision to provide blanket exemptions to proposed solutions by a high level Steering Committee (including a representative from your office).

The Secretary failed to consider each exemption line-by-line.

The Secretary failed to give significant weight to the public's right to know how their legal right to access information will be impacted and/or reformed by proposed changes to the administration and functioning of Tasmanian RTI.

- 14 Mr Snell then made extensive submissions in relation to the Department's application of the public interest test:

...

Furthermore the Secretary does not allocate significant weight to the fact that RTI grants a legal right to information and there is significant public interest associated with how the internal rules and practices (and proposed reforms) impact upon the administration and delivery of that right.

...

The Secretary needed to assess each of the proposed solutions line-by-line and articulate specific arguments and evidence as to why the release of each solution would not contribute to informing a wider public debate about the RTI Act and transparency initiatives.

The release of the proposed solutions will contribute further to a debate about what reforms to the RTI Act and departmental practice and culture are being contemplated and have been drawn from the analysis, statistics and survey of other jurisdictions.

The argument that the proposed solutions largely align with the recommendations made by the Commission of Inquiry and the Tasmanian Law Reform Institute ignores the contributions these proposed solutions might make to further inform and focus public debate and discussion.

On the other hand the proposed solutions significantly contribute to both Schedule 1(a) and (b) by demonstrating reforms that are urgently needed. Indeed the proposed solutions contribute not only to the recommendations of the Commission of Inquiry and the Tasmanian Law Reform Institute but add weight and credence to other calls for reforms. When added to the recommendations of the Environmental Defenders Office report on RTI and the findings and recommendations of the Tasmanian Integrity Commission and the reforms consistently highlighted by your office over the last decade the proposed solutions add considerable support to the calls for reforms.

In the alternative if the proposed solutions do not fully align and/or cover all the other suggested reforms already in the public arena then their release allows parliamentarians, media,

the public and offices like yours to more fully assess their merits and feasibility.

The Secretary needed to provide more justification for non-release than a simple assertion "I do not consider that the release of the proposed solutions will contribute to that debate any further."

...

The Tasmanian Integrity Commission revealed that the adoption of a particular internal practice can seriously undermine both legal rights and impact upon RTI performance. It is critical that all of the proposed solutions be shown to be justifiable, legal and able to assist the Objectives of the Act.

The Secretary also added a section on Improvements to Right to Information. I submit that many of these improvements are drawn from or align with a number of the proposed solutions in the draft Discussion paper and therefore the public interest arguments against release of these related recommendations are vastly diminished or removed.

...

Department

- 15 The Department was not required to provide specific submissions in response to this external review as it had provided its reasoning in its decisions, relevant extracts of which are set out below.
- 16 As part of her initial decision, Ms Kelly reasoned:

In my assessment of the draft Discussion paper, I have considered the significant public interest in the RTI framework in Tasmania and the RTI Uplift Project, as reflected by questions in Parliament and media attention...

The draft Discussion Paper includes frank and fearless opinions and discussions about the current state of RTI processes within the State Service...

Chapter 11 of the draft Paper includes proposed solutions that are incomplete and that have not been comprehensively tested and explored, not approved at Departmental level, nor committed to by the government. Furthermore, the proposed solutions included in the draft Paper were drafted before the recent reports released by the Integrity Commission around RTI management and processes, and before the Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings Report, which makes

significant recommendations regarding the future Tasmanian Government RTI framework and processes.

For these reasons, in my view releasing these proposed solutions in chapter 11 of the draft Paper would hinder debate on a matter of public interest...

17 As part of her internal review decision, Ms Morgan-Wicks reasoned:

The entire Discussion paper, aside from purely factual information such as statistics, consists of a Department of Premier and Cabinet officer's opinions, advice and recommendations on what areas for improvement may exist in the Tasmanian State Service's right to information practice. The drafting officer reflects on statistics, survey results, and other jurisdictions' practice. I also agree with the decision-maker's analysis that it is clear from the Minutes and Agenda papers of the Steering Committee that the draft Discussion Paper was not intended for public release but was instead intended to be a comprehensive analysis of issues in practice and recommended solutions to assist the RTI Uplift Project Steering Committee.

The entire discussion paper is in draft, with no executive or government approval. The proposals within it are the views of the drafting officer and are not yet tested or considered. I agree with the original decision-maker's view that this goes towards showing that the information was internally deliberative.

Having considered the above, I find that the information is exempt under section 35 of the Act.

18 Ms Morgan-Wicks then considered the public interest test:

...
The most important factor for consideration in Schedule 1 of the Act is matter (a), the need for government information to be accessible. This aligns with the objects of the Act contained in section 3. The release of information in general helps achieve this need, but the release of the RTI Uplift Discussion Paper in particular will further this need as the information itself provides an analysis of information accessibility. This matter weighs heavily in favour of release of the information and is why I consider it appropriate and agree with decision [sic] to release the vast majority of the Discussion Paper.

I also note that the right to information framework is a matter of significant public interest and debate (b)... I consider that releasing the bulk of the Discussion Paper, which examines potential areas for improvement, will contribute to debate on this important matter of public interest.

I do not consider that the release of the proposed solutions will contribute to that debate any further. This is particularly so because the proposed solutions largely align with the recommendations already made by other bodies... Other recommendations within the Discussion Paper relate purely to internal processes used by agencies which make little to no difference to the timing or outcomes of right to information decisions. I accordingly consider that this information would provide little benefit to debate on this matter.

I have also considered whether the disclosure of the information would inform a person about the reasons for a decision (c) and whether the disclosure would provide the contextual information to aid in the understanding of government decisions (d). I again note that the paper remains a draft and has not been tested or considered, and there has not been any decisions made to action the solutions proposed. Accordingly, releasing the paper would not provide any useful contextual information on government's decisions or inform a person of why any decision has been made.

...

Analysis

- 19 Mr Snell focussed the internal review, as well as this external review application, on the Department's application of s35 to exempt Chapter 11 of the draft Discussion Paper, headed *Proposed Solutions*. Consequently, I shall confine my analysis to this area. Page numbers refer to those on the discussion paper itself, not the associated pdf.
- 20 For information to be exempt under s35 of the Act I must be satisfied that it consists 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.
- 21 When one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process relating to the official business of the Department.
- 22 The information is not exempt if it is:
 - 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, order or ruling; or
 - information that is older than 10 years.

- 23 As to the meaning of purely factual information, I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No.1)*¹ where the Administrative Appeals Tribunal (AAT) observed that the word purely in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms.
- 24 The meaning of the phrase *in the course of, or for the purpose of, the deliberative process* has also been considered by the AAT. in *Re Waterford and the Department of Treasury (No 2)*² it adopted the view that these are an agency's thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
- 25 Then, if I am satisfied that it is for a deliberative purpose related to official business, I must have regard to the public interest test in s33 of the Act.
- 26 The information in question is contained in Chapter 11 of a Document titled *Right to Information Uplift Project – Discussion Paper* and dated 9 August 2023. It is clearly labelled with the word *Draft* on the first page. The information exempted by the Department is in an area of text on pages 35 – 39 of the document and also in table form on pages 40 - 42. It consists of opinions or recommendations prepared by an officer of the Department, is not purely factual and is less than 10 years old. I am satisfied that it is *prima facie* exempt under s35(1)(a) of the Act.

Public interest test

- 27 As mentioned, exemptions under s35 are subject to the public interest test set out in s33 of the Act. It is therefore now necessary to assess whether, after taking into account all relevant matters, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt. In making this assessment I am required to have regard to, at least, the matters in Schedule 1 of the Act.
- 28 The information the Department has sought to exempt is all of the same broad type and the Department has undertaken a global public interest test assessment regarding the information in Chapter 11. For simplicity and clarity of understanding, I will adopt a similar approach.
- 29 Schedule 1 matter (a) – the general public need for government information to be accessible – was considered by the Department to be relevant and weigh heavily in favour of disclosure. I agree with this assessment and note that it also applies to the information in Chapter 11.
- 30 Schedule 1 matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – was considered by the Department to weigh against disclosure because the information would not *contribute to debate any further and would provide little benefit*. I disagree with this

¹ (1984) AATA 518 at [14]

² (1985) 5 ALD 588

assessment and consider the matter to weigh in favour of disclosure. The greater the amount of information which can be released into the public arena, the more debate can be informed and enlivened. In any event, the weight or quantity of benefit provided by information is not a matter provided for in (b).

- 31 Schedule 1 matter (c) – whether disclosure would inform a person about the reasons for a decision, and Schedule 1 Matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – were considered by the Department but determined to be not relevant. I agree with this assessment. Any government decisions made in relation to this Discussion Paper will be made on the basis of the final version, which has been released by the Department, and not on the basis of this draft. Ultimately, I do not find these two matters to be relevant considerations.
- 32 As part of the public interest test, I also take into account as a relevant matter the draft nature of the information in question. I note that much of the information is identical or closely reflects the final document, whilst other areas have undergone significant revision before publication. The exempted information as a whole is clearly contained in an unfinalised document, however the divergent treatment of the information between draft and finalisation makes it, in my opinion, inappropriate to impose a blanket determination.
- 33 As I outlined in my previous decision of *Rebecca White and Premier of Tasmania*,³ unless there are reasons to justify the release, it has been my practice to find that early working drafts of documents are usually exempt under s35 because it would be inappropriate for numerous slightly different drafts of a document to be released as a standard practice.
- 34 I consider that the inherent reasons for Parliament's inclusion of s35 in the Act, to allow for thinking processes to be explored and options discussed and tested prior to settling on a final direction, also weigh against the release of some of the information. The effectiveness of committees and projects such as the Uplift Project may be undermined if all initial and perhaps innovative ideas for policy direction, even if not taken up, were to be routinely disclosed. However, this must always be balanced with the need for transparency regarding government operations.
- 35 Another consideration is that some of the recommendations in the draft report will not be further considered, as they are now within the purview of the recommendations of the Commission of Inquiry. I consider that the release, in these circumstances, of internal deliberative information concerning a subject matter no longer relevant to the Uplift Project would not contribute to any public debate.

³ (April 2024) available at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>

- 36 The assessment and weighting of various public interest matters set out in Schedule 1 involves a consideration of competing factors when applied to the specific information in question. After careful consideration, on balance I am not satisfied that the Department has discharged its onus under s47(4) of the Act to demonstrate that the release of all the information in Chapter 11 is contrary to the public interest. This is particularly the case where the information is effectively already in the public domain, having been published in the final report.
- 37 I note that Chapter 11 is missing section 11.1, and the relevant information begins at section 11.2. The following information is the same or very similar to the final report and as such it cannot be considered to reflect early ‘thinking processes,’ and should therefore be released to Mr Snell:
- in Chapter 11.2 Resourcing, the first and fourth paragraphs;
 - in Chapter 11.3 Standard policy and processes, all paragraphs;
 - in Chapter 11.4 Culture, the first and second paragraphs;
 - in Chapter 11.5 Public perception, all paragraphs;
 - in Chapter 11.6 Community interface, the first sentence;
 - in Chapter 11.7 Delegated officers, the first three paragraphs;
 - in Chapter 11.8 Training, the first to the sixth paragraphs, the first sentence of the seventh paragraph, and the eighth paragraph;
 - in Chapter 11.9 External review, all paragraphs; and
 - in Chapter 11.10 Personal information protection, the first paragraph.
- 38 In the table beginning on page 40 headed *Table 7 – summary of proposed solutions to issues identified*, the information in the following topics is the same or very similar to the final report, and so for the above reasons is also to be released to Mr Snell:
- inconsistent process;
 - delegated officers;
 - training; and
 - public perception.
- 39 The remainder of the information is exempt under s35(1)(a) and is not required to be disclosed.

Preliminary Conclusion

- 40 For the above reasons, I determine that exemptions claimed pursuant to s35 are varied.

Response to the Preliminary Conclusion

- 41 As the above preliminary decision was adverse to the department, it was made available to it on 9 December 2024 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 42 On 3 January 2025, Mr Shane Gregory, Acting Secretary of the Department, provided a response, relevant parts of which are extracted below:

I accept the appropriateness of your finding that the information in the draft Discussion Paper which remained the same as in the final version should be released; however, I submit that you may consider clarifying in your decision this option, and resulting reasoning, was not available to the original decision maker, nor the Secretary of the Department of Premier and Cabinet as the internal reviewer at that time.

You note in paragraph 37 that some of the information should be released as it ‘is effectively already in the public domain, having been published in the final report’. At the time the original decision and the internal review decision were made, the final version was not finalised or in the public domain and remained the internal thinking process of the Department. I submit that it is worth mentioning this context existed when the previous decisions were made, but exists no longer.

You may also consider it appropriate to note the applicant was sent a copy of the final version as soon as it was available in recognition of the need for transparency regarding government operations.

- 43 I note and accept the Department’s comments. Circumstances may change with the passage of time, and information that may have been considered exempt at the time of a public authority’s determination can enter the public domain in other ways prior to external review. As the Department made no submissions concerning the substance of my decision, I have not altered my proposed findings.

Conclusion

- 44 Accordingly, for the reasons set out above, I determine that the exemptions claimed pursuant to s35 are varied.

Dated: 13 January 2025



Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 35 - Internal deliberative information

- (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.
- (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 (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 33 – Public interest test

- (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.

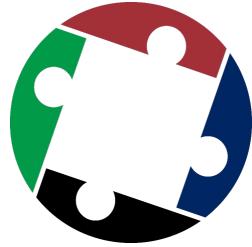
SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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: R2405-019

Names of Parties: Robert Hogan and University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s37, s38, s39

Background

- 1 In 2019 the University of Tasmania (the University) announced a decision to relocate its longstanding campus in Sandy Bay to central Hobart. This decision sparked a high level of public interest and debate.
- 2 Mr Robert Hogan (the Applicant) has a strong interest in the University and maintains a website and blog which are generally opposed to the move.
- 3 On 25 January 2024, Mr Hogan made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the University in the following terms:

I request copies of the Minutes of UTAS [University] Council meetings held in the period between 4 April 2022 and 23 February 2023.

Copies of the Minutes for both the prior and following period are already availalbe [sic].

I request that exemptions/redactions be minimised in line with recent decisions by the Ombudsman.

- 4 On 27 February 2024, Mr Simon Perraton, a delegate under the Act for the University, released a decision to Mr Hogan. Mr Perraton released 71 pages of information in whole or in part. Information not released was redacted pursuant to exemptions applied under ss35 (internal deliberative information), 36 (personal information), 37 (information relating to the business affairs of a third party), 38 (information relating to the business affairs of a public authority) and 39 (information provided in confidence) of the Act.
- 5 On 26 March 2024 (in a letter mistakenly dated 26 March 2023), Mr Hogan sought internal review. On 29 April 2024, Ms Juanita O'Keefe, another delegate under the Act for the University, released a decision which generally confirmed the original decision with some minor amendments.
- 6 On 23 May 2024, Mr Hogan made an application for external review which was accepted under s44 of the Act.

Issues for Determination

- 7 I must determine whether the information not released by the University is eligible for exemption under ss35, 36, 37, 38, 39 or any other relevant provision of the Act. As these sections are contained within Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33.
- 8 This means that, should I determine the requested information is *prima facie* exempt from disclosure, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to all relevant matters and those contained in Schedule 1 of the Act at a minimum.

Relevant legislation

- 9 Copies of ss35, 36, 37, 38 and 39 are included at Attachment 1.
- 10 Section 33 and Schedule 1 are also included at Attachment 1.

Submissions

Applicant

- 11 Accompanying his request for internal review, Mr Hogan made a number of submissions which challenged the University's initial decision. Relevant extracts of these submissions are set out below:

Mr Perraton has made a number of blanket statements ... relating to his application of s35, s36, s37, s38 and s39 of the Act, which indicate a predisposition to exempt certain types of material. These are followed by a number of statements under the sub-heading "Public Interest". While I would expect statements in the "Public Interest" section to indicate that the decision maker was in harmony with the Object of the Act, a number of statements in this section also indicate a predisposition towards exemption. As exemption goes against the presumption of disclosure in the Act, every claimed exemption should be weighed on its own merits against relevant public interest concerns, within the terms of Schedule 1 of the Act. There is no indication in ... Mr Perraton's decision letter that he undertook such 'weighing'.

...

Redactions made throughout the UTAS Council Minutes ... frequently involve large sections of text. The content of these sections is not described ... making it difficult to determine whether exemptions have been appropriately applied and the degree to which the public interest may be engaged.

In such cases I have had to make judgements based on headings and surrounding text, and applied my knowledge of the matters concerned.

It is clear that these frequent redactions of large sections of text must inevitably include factual material that is not sensitive in any way.

Mr Perraton has frequently misapplied s35 either by itself as a basis for exemption, or to ‘strengthen’ an exemption in combination with other sections of the Act. In particular I note that the majority of the Minutes has not been redacted while large sections of text, surely no different in their claimed ‘deliberative’ nature from the surrounding unredacted text, has been redacted... The practice of redacting such text extends to ‘updates’ provided to the UTAS Council and, even, to decisions of the UTAS Council, in clear contravention of the terms of s35.

Major redacted sections, where s35 is used as a ‘shield’, frequently relate to stakeholder or financial matters, where – if there was genuine sensitivity – other bases for exemption might have been expected to be available.

Mr Perraton’s redaction (exemption) of large sections of text under s35 must inevitably include factual information, which would – again – be a contravention of the terms of s35.

- 12 In his application to my office for external review, Mr Hogan challenged the exemptions applied by the University in similar terms. I have carefully considered these submissions but will not restate them.

University

- 13 The University was not required to provide submissions for this external review, beyond the reasoning in its decisions, relevant parts of which are extracted below.
- 14 When considering s35 of the Act in its original decision, the University held:

Records of the University Council include records of discussions on matters which are by their very nature deliberative, opinion based, advice and consultative. When these discussions are recorded they are clearly not records of a final decision. Such deliberations are imperative to the function of any council or board of governance. I consider that information with respect to the deliberations of the University Council are conditionally exempt from release pursuant to section 39 of the RTI Act. If the University Council was unable to deliberate on matters and consider recommendations from University employees, it would inhibit and harm the University Council’s ability to function.

15 Regarding s37, the University set out:

In order for the university to carry out its functions, the University trades, purchases products and equipment, purchases and leases real property, and procures services in commercial and competitive markets. Disclosure of details of commercial arrangements is not in the public interest because it is highly commercial in nature and may expose the third party to commercial disadvantage.

16 When considering the use of s38, the University determined:

... Releasing commercially valuable information such as commercial yields, details of financing arrangements, details of negotiating thresholds, and in some instances project budgets prior to procurement or negotiation, would result in market competitors such as large-scale property investors, landlords, service providers, and other higher education providers having information that could significantly weaken the university's ability to negotiate and to meet University Procurement Policy principles including value for money. Market operators would not ordinarily have access to this information for other purchasers and competitors in these markets. Failure to achieve value for money means University budgets are lessened which weakens the University's ability to meet key objectives including student experience and quality research with global impact.

It is my conclusion that the definition of 'competitive disadvantage is met in relation to both trade and commerce for procurement of equipment, property, services and other functions needed for the University to function, and also in relation to the University operating in the global and higher education market.

17 The University expanded upon this in the internal review decision, noting:

The information in the Council Minutes about such matters which has not been provided to you is information of a business, commercial or financial nature. It includes strategic business information about attracting students, student accommodation demand, financial information (including dollar figures) about investments, and strategically managing the University's financial position into the future whilst also managing market forces and headwinds.

... In each of those activities, the University is engaged in some degree of competition in a competitive market and the potential impact on the university as a participant or competitor in such markets is not diminished by the passage of time in relation to

some longer standing matters, particularly where matters have not been finalised. The information in question is not just factual or innocuous.

- 18 In its internal review decision, the University considered the following factors to weigh in favour of disclosure of information:

There is a general public need for University information to be accessible which is demonstrated by the amount of information in the Council minutes which has already been disclosed, and additional information disclosed by operation of my decision.

As an Australian resident or citizen there is a public interest in [the Applicant's] ability to be able to obtain the maximum amount of information under the RTI Act.

The University is a public educational institution which receives significant public funding and disclosure of some of the information could enhance scrutiny and accountability.

There is a portion of the Tasmanian community that is interested in the impacts of the University of Tasmania Southern Campus Transformation who might be interested in receiving some additional information (regardless of the amount of information which was disclosed to the applicant).

- 19 The University then listed the factors it considered to weigh against disclosure:

In light of the overwhelming majority of information already released, and the comparatively limited information withheld, it is unlikely that further disclosure would contribute to any matter of debate or public interest (noting this is not a reference to matters which the public might be interested in);

The exempt information would not inform the applicant or any other person about the reasons for any decisions taken by the Council which are of any public import – it would do no more than satisfy the applicant's curiosity about very limited matters in circumstances where an overwhelming amount of information has already been released;

The exempt information would not assist the applicant or any other person to better understand University decisions and would not provide any further contextual information to enable that to occur;

There is nothing in the exempt information which would inform the public about rules and practices of the University in dealing with the public;

The exempt information would not if disclosed enhance scrutiny of University decision-making processes and improve accountability;

Disclosure of the exempt information would not improve participation, particularly in relation to older information about matters that have passed, but which retain commercial or personal sensitivity;

In the context of information already provided, further disclosure would not enhance scrutiny of the University's administrative processes;

Given the statutory mandate for the University to engage in commercial activities, it should be able to do so on a level playing field subject to a fair and appropriate degree of public disclosure. In light of the amount of information already released, further disclosure would potentially hinder equity and fair treatment of individuals and corporations in their dealings with the University;

There is nothing in the exempt information which would promote or harm public health and/or safety;

There is noting in the exempt information which would promote or harm the administration of justice, procedural fairness or the enforcement of the law;

Disclosure could harm the economic development of the State such as by limiting competition and the ability of the University to attract students from other jurisdictions and the flow on commercial effect that would have to the State;

Further disclosure of exempt information would harm the interest of individuals whose personal information has been withheld or groups of individuals – there is not public interest or benefit, for example, of making a public spectacle of individuals who may have changed their names or gender – a matter which is no doubt of particular personal sensitivity to them;

Disclosure of estimates, forecasts, budgets and the like would prejudice the University's ability at the highest levels to constructively and frankly develop economic and financial policy;

Disclosure of information about matters which were never adopted would not inform the public of any decisions or improve accountability;

Disclosure of some staff related information would have a substantial adverse effect on the management or performance assessment by the University of its most senior staff;

To the extent that any of the information relates to matters of an enterprise bargaining nature, disclosure would have a substantial adverse effect on industrial relations of the University;

...disclosure of certain exempt information would harm the business and financial interests of the University and other persons or organisations with whom the University engages in business, commercial or financial negotiations and transactions;

Similarly ... some information is related to the business affairs of persons which would harm their competitive position if released;

Some of the commercial information about business affairs of other persons is not generally available to competitors of those businesses and in some instances are subject to express terms of confidentiality in the contractual arrangements with them.

Analysis

- 20 The University claimed information was exempt pursuant to ss35, 36, 37, 38 and 39 of the Act. I will assess whether information is exempt pursuant to each exemption in the following Analysis.
- 21 The University supplied my office with a PDF document containing 70 pages of unredacted information relevant to this review, as well as a partially redacted PDF document containing 71 pages of information released to Mr Hogan. Unfortunately, the latter PDF contained no indication of which sections of the Act were relied on to exempt information. The University also provided a Schedule of Documents which identified the sections relied on, though not by page number but by reference to the date and chapter number of each set of Council minutes. The labelling on this Schedule was sometimes in error, making it difficult to determine which piece of information is being referred to. However, for the purpose of my assessment, I will use the University's internal review Schedule when referencing the relevant exemptions.
- 22 I encourage the University to make a greater effort to ensure that it is clear which section of the Act is being applied to each specific exemption, as this is of major benefit to applicants and reviewers.

Section 35 – Internal deliberative information

- 23 For information to be exempt under this section, I must be satisfied that it consists of:
 - an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities s35(1)(b)); or

- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 24 When one of these requirements is met, I must be further satisfied the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes relating to the official business of a public authority, a Minister or the Government.
- 25 The exemption does not apply to the following:
- purely factual information (s35(2)); or
 - a final decision, order or ruling given in the exercise of an adjudicative function (s35(3)(a)); or
 - a reason which explains such a decision, order or ruling (s35(3)(b)); or
 - information which is older than 10 years (s35(4)).
- 26 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*¹ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.
- 27 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*,² refers to the decision in *Re Waterford* and concludes that, regarding factual information, *it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*
- 28 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)*³ 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 course of action.’
- 29 The University’s schedule indicates that it has applied s35 to exempt information in University Council Minutes documents dated 27 April 2022, 29 June 2022, 31 August 2022, 18 October 2022 and 8 December 2022.
- 30 I have reviewed the information claimed be exempt and am satisfied that it consists of records of discussions between members of the University Council and other employees of the University as part of deliberative processes of the University. I am satisfied that it consists of opinion, advice or recommendations from officers of public authorities or deliberations between such officers, and is *prima facie* exempt pursuant to s35(1)(a) and/or (b).

¹ [1984] AATA 518 at [14].

² LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

³ [1984] AATA 67 at [58].

Section 33 – Public interest test

- 31 I now turn to my assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. This requires the consideration of the factors in Schedule 1 of the Act and any other information relevant to my decision.
- 32 I consider Schedule 1 matter (a) – the general need for government information to be accessible – is always relevant and generally weighs in favour of disclosure.
- 33 Schedule 1 matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – is also relevant. There is no question that the University's planned move is a matter of significant public interest, generating substantial media and community debate as well as being the subject of an elector poll at the time of the 2022 local government elections. I note the University's contention it is unlikely further disclosure would contribute to any matter of debate, however I do not accept that there may be a limit to public debate beyond which disclosure of information is superfluous. I consider this matter weighs in favour of disclosure.
- 34 Schedule 1 matters (c) – whether the disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – were identified by the University as weighing against disclosure. This was partly because it contended that disclosure would do no more than satisfy the applicant's curiosity about very limited matters in circumstances where an overwhelming amount of information has already been released. I do not agree with this position. Any curiosity of the applicant does not undermine his statutory right to information provided in s7 of the Act. I also cannot accept that the release of discussions within the University Council immediately prior to decisions would not add to public understanding of the reasoning behind such decisions. Overall, I consider these matters weigh in favour of disclosure.
- 35 Schedule 1 matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – was identified by the University as weighing against disclosure. Again, I do not agree with this submission. Understanding the matters considered by the Council leading to a decision would allow informed scrutiny of decision-making processes which can only improve the accountability of the University to the community. This aligns with the University's own acknowledgement in its internal review decision that *the University is a public educational institution which receives significant public funding and disclosure of some of the information could enhance scrutiny and accountability.*
- 36 The University further submitted that disclosure of information about matters which were never adopted would not inform the public of any decisions or improve accountability. I again disagree and consider that any information

relating to the decision-making process has the potential to enhance public understanding of why a course of action was, or was not, adopted. On balance, I consider matter (f) weighs in favour of disclosure.

- 37 I consider that Schedule 1 matters (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – and (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – are relevant. In order to ensure its future success, the University requires competent people to step forward and serve on its governing body. It is to be expected the Council will explore and consider different opinions and priorities, but if records of early stages of robust debate concerning ideas of individual members on controversial issues were routinely released, qualified people might be inhibited from contributing to the Council. This matter has been mitigated because although those present at meetings are identified, discussions are generally presented as occurring within the Council as a collective. Matters (m) and (n) therefore weigh against disclosure but only slightly.
- 38 As part of my public interest assessment, I also consider the inherent reasons for Parliament's inclusion of the s35 exemption to allow for early thinking processes to be explored and options tested prior to settling on a final direction for the University. I consider that this weighs against the release of some information. The effectiveness of the University Council may be undermined if all early proposals for the future of the University, even if later abandoned, were released. This must always be balanced with the need for transparency regarding the operations of public authorities.
- 39 The assessment and weighting of the various public interest factors set out in Schedule 1 involves a consideration of competing factors, always taking into account the object of the Act and that *discretions be exercised so as to facilitate and promote, promptly and at the lowest cost, the provision of the maximum amount of official information.*
- 40 The majority of the information to which the University has applied s35 is not 'early thinking' but a discussion immediately prior to a resolution. On balance, I give greater weight to matters (a), (b), (c), (d) and (f), and do not believe the University has discharged its onus under s47(4) to demonstrate that the release of much of the information is contrary to the public interest.
- 41 I also note the information is now approaching three years old and any decisions recorded in the Minutes would have already been implemented. In addition, some information claimed to be exempt is already in the public

domain through media releases issued by the University⁴ and so it could not be contrary to the public interest to disclose it in the University Council Minutes.

- 42 My determination is subject to the limited exceptions discussed below and any further determinations I make under ss36, 37, 38 or 39.

Minutes dated 27 April 2022

- 43 In section 4.2 of the 27 April 2022 minutes document, the first paragraph and associated dot points are exempt under s35(1)(a) and are not required to be released. The second paragraph beginning *Members noted...* is not exempt and should be released to Mr Hogan, subject to my assessment under s38.

Minutes dated 29 June 2022

- 44 In section 3.1 of the 29 June 2022 minutes document, the final sentence of the second redacted paragraph is an opinion and I am satisfied that it is exempt under s35(1)(a). It is not required to be released to Mr Hogan.
- 45 In section 6.5, the relevant information reflects an internal deliberative discussion surrounding the University's Risk Profile. I am satisfied it is exempt under s35(1)(b) and so is not required to be released to Mr Hogan.

Minutes dated 31 August 2022

- 46 In section 1.1 of the 31 August 2022 minutes document, the first paragraph merely refers to Council members noting a position regarding the 2022 City of Hobart elector poll. I am not satisfied that it would be contrary to the public interest to release it.
- 47 The second paragraph was assessed by the University as exempt under s36, however I consider it to be more appropriately assessed under s35 as it refers to a discussion regarding University procedures and learning models. With the exception of the first two sentences, I am satisfied this paragraph is exempt under s35(1)(b) and is not required to be released.
- 48 In section 3.4, the exemptions did not appear to be addressed by the University, however I note a repeated and apparently irrelevant reference to Section 3.2 on the Schedule which is likely to contain the University's position in relation to this section. I am satisfied that all except the first paragraph is exempt. This paragraph will be further assessed under s38.
- 49 In section 4.2, I am satisfied the information in the second paragraph which has not been released is exempt under s35(1)(b). The information which has not been released in Resolution 31-08-2022_UC_10982-11456 is also exempt.

⁴ University of Tasmania media releases dated 1 July 2022 and 3 March 2023, *4.6 percent pay rise for University of Tasmania staff* and *International study centre for Melbourne CBD*, available at www.utas.edu.au/about/news-and-stories/articles/2022/4.6-percent-pay-rise-for-university-of-tasmania-staff and www.utas.edu.au/about/news-and-stories/articles/2023/international-study-centre-for-melbourne-cbd, accessed on 19 May 2025.

Minutes dated 18 October 2022

- 50 In section 3.1 of the 18 October 2022 minutes document, the third paragraph under the heading *Elector Poll and Council Election* is exempt under s35(1)(b) and not required to be disclosed to Mr Hogan. The remainder of this section is not exempt under s35 but will be further assessed under s38.

Section 36 – personal information of person

- 51 For information to be exempt under this section, I must be satisfied that its release would involve the disclosure of the personal information of a person other than the person making the application under s13.

- 52 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.

- 53 The University identified information in this category in the Council minutes which are subject to this review, including names and grades of students and employment details of University staff. I am satisfied that all the information identified is personal information and is *prima facie* exempt under s36.

Section 33 – Public interest test

- 54 Section 36 is also subject to the public interest test contained in s33. I note that, in relation to some information, the University has indicated on its schedule of documents that there is *no public interest in release*. However, the public interest test requires me to determine whether the release of the information would be contrary to the public interest. To do this, I must again consider all relevant matters and as a minimum those in Schedule 1 of the Act.

- 55 I agree that the release of names of students or graduates who have changed their name or gender, and information relating to graduates of Shanghai Ocean University (where not already on the public record), has the potential to cause harm to those persons (Schedule 1 matter (m)) and there are no other matters which outweigh this concern. This information is exempt under s36 and is not required to be disclosed to Mr Hogan.

- 56 I also accept the University's submission disclosure of some staff related information would have a substantial adverse effect on the management or performance assessment of the University's staff (Schedule 1 matter (p)). The relevant information is a performance review of the Vice Chancellor. While there are matters which weigh in favour of release (Schedule 1 matters (a) and (b)), due to legitimate scrutiny of the performance of senior executives, I am satisfied that these are outweighed by the need for confidentiality to manage staff performance effectively. Accordingly, the information in the first redacted paragraph under section 1.1 in the 27 April 2022 minute document, along with

the final sentence in the second redacted paragraph, is exempt under s36 and not required to be released. The remainder of the second paragraph is not exempt, as this relates to employment arrangements which are already on the public record.

57 Accordingly, the information not disclosed in the following sections of the relevant minutes documents is exempt under s36 and is not required to be released:

- 27 April 2022 – section 1.1 (first redacted paragraph and final sentence of the second redacted paragraph only), section 8.1;
- 12 May 2022 – Resolution 12-05-2022_UC_18942-11098;
- 29 June 2022 – section 4.4;
- 31 August 2022 – section 5.3;
- 18 October 2022 – Resolutions 18-10-2022_UC_17439-11613 and 18-10-2022_UC_17439-11614; and
- 8 December 2022 – section 6.1.

58 The remainder of the information is not exempt under s36 and is to be released to Mr Hogan.

Section 37 – Information relating to business affairs of third party

59 For information to be exempt under this section, I must be satisfied that its release would disclose information related to business affairs acquired by the University from a third party and that:

- (a) *the information relates to trade secrets; or*
- (b) *the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*

60 In relation to 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*⁵ 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...

61 The court further held that:

⁵ [2010] TASSC 39.

55. In my view, what the provisions refer to as a competitive disadvantage is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason or circumstance. A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition.

- 62 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*.
- 63 The University applied s37 on 12 occasions to exempt information in the Council minutes. I am not satisfied the following entries reveal any information relating to business affairs which would expose any third party to a competitive disadvantage. They are not exempt under s37 and should be released to Mr Hogan, subject to any assessment under s38:
- 4 April 2022 – Resolution 04-04-2022_IC_18860-10949;
 - 18 October 2022 – Resolution 18-10-2022_UC_15481-11635; and
 - 8 December 2022 – page 1 (first redaction).
- 64 The University also indicated on the Schedule that information had been exempted pursuant to both ss37 and 38 in section 3.5 in the 8 December 2022 minutes document (second redaction), a redaction which does not appear to exist. However, I have assumed the University intended to refer to the second redaction of information in section 3.6 of the minutes document.
- 65 I am satisfied the remainder of the relevant information identified by the University is *prima facie* exempt under s37.

Section 33 – Public interest test

- 66 Exemptions under s37 are subject to the public interest test set out in s33 of the Act in order to determine if disclosure of the information would be contrary to the public interest.
- 67 I agree with the University's submission that Schedule 1 matter (a) – the general public need for government information to be accessible is relevant, along with matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation, as *the University is a public educational institution which receives significant public funding*.
- 68 I further agree that matters (s), (w) and (x), which relate to whether the disclosure would harm the business or financial interests of a third party, cause competitive disadvantage or reveal information not normally available to their competitors, are relevant.

- 69 I consider that the risk of competitive disadvantage can be satisfactorily mitigated in the following information which the University claimed to be exempt by selective redaction. Accordingly, I determine that the name of the third party organisations, where they occur in the following documents, are exempt under s37:
- 18 October 2022 – section 5.2, including Resolution 18-10-2022_UC_15481-11633; and
 - 8 December 2022 – section 3.6 (second redaction).
- 70 The remaining information which the University sought to exempt under s37 refers to commercial partnerships which have wide public exposure,⁶ or which were for a finite and now concluded period. I am not satisfied that its release at this point in time would be contrary to the public interest. This information is not exempt under s37 and should be released to Mr Hogan.

Section 38 – Information relating to business affairs of public authority

- 71 The University has applied s38(a)(ii) on 31 occasions to exempt some information contained in Council Minutes.
- 72 Section 38(a)(ii) provides that information is exempt information if it is:
- In the case of public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosure under this Act, be likely to expose the public authority to competitive disadvantage;...*
- 73 As has been set out in the previous decision of my office in *Alexandra Humphries and University of Tasmania*,⁷ given ss6 and 7 of the *University of Tasmania Act 1992*, I am satisfied the University is a public authority which can engage in trade and commerce. The fact that its functions relate to education and learning do not preclude it from undertaking commercial activities to achieve its objectives.
- 74 The interpretation of the term competitive disadvantage in s38 of the Act is the same as in s37, which is discussed above.
- 75 Turning now to the exemptions applied by the University, I do not consider the following information is of a nature such that disclosure would expose the University to any competitive disadvantage and it is to be released to Mr Hogan:
- 4 April 2022, Resolution 04-04-2022_UC_18860-10947.
- 76 I am satisfied the remainder of the information to which the University has applied exemptions under s38 are *prima facie* exempt under this section, as it

⁶ University of Tasmania media release dated 3 March 2023, *International study centre for Melbourne CBD*, available at www.utas.edu.au/about/news-and-stories/articles/2023/international-study-centre-for-melbourne-cbd, accessed on 20 May 2025.

⁷ (24 February 2022) at [24-26], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

does relate to the commercial activities undertaken by the University which could cause competitive disadvantage if disclosed.

Section 33 – Public interest test

- 77 As noted, s38 is subject to the public interest test and so I must now determine whether disclosure of the information found to be *prima facie* exempt under s38 would be contrary to the public interest.
- 78 I again agree with the University's submission to the effect that disclosure of the information could enhance scrutiny and accountability of an organisation which receives significant public funding (Schedule 1 matters (a), (b), (f) and (g)).
- 79 I also consider Schedule 1, matter (s) – whether the disclosure would harm the business or financial interests of the University, to be particularly relevant and weigh against the disclosure of some commercial information.
- 80 I also note that some commercial activities were for a 12 month period and have now ceased and also, that another commercial partnership has received public exposure due to public announcements by both the University and the partner. Other information is general in nature and does not reveal specific or projected impacts upon the business activities of the University.
- 81 On balance, I am satisfied any competitive disadvantage to the University can be adequately mitigated by redacting the name of any partner organisation, along with dollar figures and percentages values, in the following:
- 4 April 2022 – Resolution 04-04-2022_UC_18860-10949;
 - 27 April 2022 – Section 4.2 (second paragraph);
 - 18 October 2022 – Section 3.3 (except for the percentage value in the first redaction);
 - 18 October 2022 – section 5.1 (except for the contractor name);
 - 18 October 2022 – Resolution 18-10-2022_UC_10521-11630;
 - 18 October 2022 – Section 5.2, including Resolution 18-10-2022_UC_15481-11633; and
 - 8 December 2022 – Section 3.6.
- 82 Of the remaining information to which the University has applied s38, the following is exempt and is not required to be released:
- 27 April 2022 – Resolution 27-04-2022_UC_18746-10971;
 - 6 June 2022 – Section 2.1;
 - 6 June 2022 – Resolution 06-06-2022_UC_11020-11214;
 - 29 June 2022 – Sections 5.1 and 6.5; and

- 31 August 2022 – Section 4.1, the final sentence of the second paragraph.
- 83 The remainder of the relevant information is not exempt and is to be released to Mr Hogan.
- Section 39 – Information obtained in confidence**
- 84 For information to be exempt under s39(1), I must be satisfied that its disclosure 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.
- 85 Section 37(2) sets out that this 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.
- 86 In his initial decision, Mr Perraton reasoned:

I consider that information with respect to the deliberations of the University Council are conditionally exempt from release pursuant to section 39 of the RTI Act.

- 87 This approach was not pursued by Ms O'Keefe on internal review. This is correct, as such deliberations are not information provided in confidence to the University but its own internal thinking process.
- 88 Ms O'Keefe confirmed the University's reliance on s39 on four occasions to exempt information in the University Council Minutes.

Minutes dated 18 October 2022

- 89 In the schedule, the University identified s39 was applied to the second and third redactions in section 3.1, section 5.1 and Resolution 18-10-2022_UC_10521-11629 of the 18 October 2022 meeting minutes. I have not identified any information in that section which was communicated in confidence to the University. In the absence of any reasoning in either decision or the Schedule regarding the application of s39 to this information, I determine that the University has not discharged its onus under s47(4) of the Act and this information is not exempt under s39.

Preliminary Conclusion

90 For the reasons set out above, I determine that:

- exemptions claimed pursuant to ss35, 36, 37 and 38 are varied; and
- exemptions claimed pursuant to s39 are set aside.

Response to the Preliminary Conclusion

91 As the above preliminary decision was adverse to the University, on 8 August 2025 it was made available to it pursuant to s48(1)(a) of the Act to seek its input before finalisation.

92 On 8 September 2025, Ms Karina Groenewoud, Director Governance and Compliance at the University responded. She accepted the proposed findings in the preliminary decision, except in relation to the release of a small amount of information under s36, about which she made some submissions.

93 I have carefully considered these submissions and agree that, in the specific and unusual circumstances provided, it is appropriate to exempt a small amount of personal information. I am satisfied that the release of this information could cause harm to the interests of the relevant person. This exemption has been incorporated into my decision.

94 On 9 September 2025, the preliminary decision was made available to Mr Hogan to seek his input prior to finalisation, in accordance with s48(1)(b) of the Act.

95 On 15 September 2025, Mr Hogan responded and made a number of observations and comments which I have carefully considered, however advised (emphasis original):

In the public interest, I believe that it is important that UTAS provide me with the additional material determined not to warrant exemption in the draft decision as soon as possible. I therefore do not seek modifications to decisions made on individual exemptions, and/or changes to the text, in the draft decision.

Conclusion

96 Accordingly, and for the reasons set out above, I determine:

- exemptions claimed pursuant to ss35, 36, 37 and 38 are varied; and
- exemptions claimed pursuant to s39 are set aside.

97 I apologise to the parties for the delay in finalising this review.

Dated: 19 September 2025

A handwritten signature in blue ink, appearing to read "ML", is placed over a small rectangular box.

Megan Leary
ACTING OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 35 - Internal deliberative information

- (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.
- (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 (1) 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 person

- (1) 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; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 37 - Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

- (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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
 - (d) notify the third party that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43 , 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; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 38 - Information relating to business affairs of public authority

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

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

- (iii) 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 –
 - (i) 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.

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.

Section 33 - Public interest test

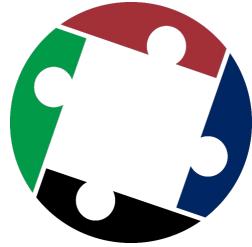
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding 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.

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: R2405-019

Names of Parties: Robert Hogan and University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s37, s38, s39

Background

- 1 In 2019 the University of Tasmania (the University) announced a decision to relocate its longstanding campus in Sandy Bay to central Hobart. This decision sparked a high level of public interest and debate.
- 2 Mr Robert Hogan (the Applicant) has a strong interest in the University and maintains a website and blog which are generally opposed to the move.
- 3 On 25 January 2024, Mr Hogan made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the University in the following terms:

I request copies of the Minutes of UTAS [University] Council meetings held in the period between 4 April 2022 and 23 February 2023.

Copies of the Minutes for both the prior and following period are already availalbe [sic].

I request that exemptions/redactions be minimised in line with recent decisions by the Ombudsman.

- 4 On 27 February 2024, Mr Simon Perraton, a delegate under the Act for the University, released a decision to Mr Hogan. Mr Perraton released 71 pages of information in whole or in part. Information not released was redacted pursuant to exemptions applied under ss35 (internal deliberative information), 36 (personal information), 37 (information relating to the business affairs of a third party), 38 (information relating to the business affairs of a public authority) and 39 (information provided in confidence) of the Act.
- 5 On 26 March 2024 (in a letter mistakenly dated 26 March 2023), Mr Hogan sought internal review. On 29 April 2024, Ms Juanita O'Keefe, another delegate under the Act for the University, released a decision which generally confirmed the original decision with some minor amendments.
- 6 On 23 May 2024, Mr Hogan made an application for external review which was accepted under s44 of the Act.

Issues for Determination

- 7 I must determine whether the information not released by the University is eligible for exemption under ss35, 36, 37, 38, 39 or any other relevant provision of the Act. As these sections are contained within Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33.
- 8 This means that, should I determine the requested information is *prima facie* exempt from disclosure, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to all relevant matters and those contained in Schedule 1 of the Act at a minimum.

Relevant legislation

- 9 Copies of ss35, 36, 37, 38 and 39 are included at Attachment 1.
- 10 Section 33 and Schedule 1 are also included at Attachment 1.

Submissions

Applicant

- 11 Accompanying his request for internal review, Mr Hogan made a number of submissions which challenged the University's initial decision. Relevant extracts of these submissions are set out below:

Mr Perraton has made a number of blanket statements ... relating to his application of s35, s36, s37, s38 and s39 of the Act, which indicate a predisposition to exempt certain types of material. These are followed by a number of statements under the sub-heading "Public Interest". While I would expect statements in the "Public Interest" section to indicate that the decision maker was in harmony with the Object of the Act, a number of statements in this section also indicate a predisposition towards exemption. As exemption goes against the presumption of disclosure in the Act, every claimed exemption should be weighed on its own merits against relevant public interest concerns, within the terms of Schedule 1 of the Act. There is no indication in ... Mr Perraton's decision letter that he undertook such 'weighing'.

...

Redactions made throughout the UTAS Council Minutes ... frequently involve large sections of text. The content of these sections is not described ... making it difficult to determine whether exemptions have been appropriately applied and the degree to which the public interest may be engaged.

In such cases I have had to make judgements based on headings and surrounding text, and applied my knowledge of the matters concerned.

It is clear that these frequent redactions of large sections of text must inevitably include factual material that is not sensitive in any way.

Mr Perraton has frequently misapplied s35 either by itself as a basis for exemption, or to ‘strengthen’ an exemption in combination with other sections of the Act. In particular I note that the majority of the Minutes has not been redacted while large sections of text, surely no different in their claimed ‘deliberative’ nature from the surrounding unredacted text, has been redacted... The practice of redacting such text extends to ‘updates’ provided to the UTAS Council and, even, to decisions of the UTAS Council, in clear contravention of the terms of s35.

Major redacted sections, where s35 is used as a ‘shield’, frequently relate to stakeholder or financial matters, where – if there was genuine sensitivity – other bases for exemption might have been expected to be available.

Mr Perraton’s redaction (exemption) of large sections of text under s35 must inevitably include factual information, which would – again – be a contravention of the terms of s35.

- 12 In his application to my office for external review, Mr Hogan challenged the exemptions applied by the University in similar terms. I have carefully considered these submissions but will not restate them.

University

- 13 The University was not required to provide submissions for this external review, beyond the reasoning in its decisions, relevant parts of which are extracted below.
- 14 When considering s35 of the Act in its original decision, the University held:

Records of the University Council include records of discussions on matters which are by their very nature deliberative, opinion based, advice and consultative. When these discussions are recorded they are clearly not records of a final decision. Such deliberations are imperative to the function of any council or board of governance. I consider that information with respect to the deliberations of the University Council are conditionally exempt from release pursuant to section 39 of the RTI Act. If the University Council was unable to deliberate on matters and consider recommendations from University employees, it would inhibit and harm the University Council’s ability to function.

15 Regarding s37, the University set out:

In order for the university to carry out its functions, the University trades, purchases products and equipment, purchases and leases real property, and procures services in commercial and competitive markets. Disclosure of details of commercial arrangements is not in the public interest because it is highly commercial in nature and may expose the third party to commercial disadvantage.

16 When considering the use of s38, the University determined:

... Releasing commercially valuable information such as commercial yields, details of financing arrangements, details of negotiating thresholds, and in some instances project budgets prior to procurement or negotiation, would result in market competitors such as large-scale property investors, landlords, service providers, and other higher education providers having information that could significantly weaken the university's ability to negotiate and to meet University Procurement Policy principles including value for money. Market operators would not ordinarily have access to this information for other purchasers and competitors in these markets. Failure to achieve value for money means University budgets are lessened which weakens the University's ability to meet key objectives including student experience and quality research with global impact.

It is my conclusion that the definition of 'competitive disadvantage is met in relation to both trade and commerce for procurement of equipment, property, services and other functions needed for the University to function, and also in relation to the University operating in the global and higher education market.

17 The University expanded upon this in the internal review decision, noting:

The information in the Council Minutes about such matters which has not been provided to you is information of a business, commercial or financial nature. It includes strategic business information about attracting students, student accommodation demand, financial information (including dollar figures) about investments, and strategically managing the University's financial position into the future whilst also managing market forces and headwinds.

... In each of those activities, the University is engaged in some degree of competition in a competitive market and the potential impact on the university as a participant or competitor in such markets is not diminished by the passage of time in relation to

some longer standing matters, particularly where matters have not been finalised. The information in question is not just factual or innocuous.

- 18 In its internal review decision, the University considered the following factors to weigh in favour of disclosure of information:

There is a general public need for University information to be accessible which is demonstrated by the amount of information in the Council minutes which has already been disclosed, and additional information disclosed by operation of my decision.

As an Australian resident or citizen there is a public interest in [the Applicant's] ability to be able to obtain the maximum amount of information under the RTI Act.

The University is a public educational institution which receives significant public funding and disclosure of some of the information could enhance scrutiny and accountability.

There is a portion of the Tasmanian community that is interested in the impacts of the University of Tasmania Southern Campus Transformation who might be interested in receiving some additional information (regardless of the amount of information which was disclosed to the applicant).

- 19 The University then listed the factors it considered to weigh against disclosure:

In light of the overwhelming majority of information already released, and the comparatively limited information withheld, it is unlikely that further disclosure would contribute to any matter of debate or public interest (noting this is not a reference to matters which the public might be interested in);

The exempt information would not inform the applicant or any other person about the reasons for any decisions taken by the Council which are of any public import – it would do no more than satisfy the applicant's curiosity about very limited matters in circumstances where an overwhelming amount of information has already been released;

The exempt information would not assist the applicant or any other person to better understand University decisions and would not provide any further contextual information to enable that to occur;

There is nothing in the exempt information which would inform the public about rules and practices of the University in dealing with the public;

The exempt information would not if disclosed enhance scrutiny of University decision-making processes and improve accountability;

Disclosure of the exempt information would not improve participation, particularly in relation to older information about matters that have passed, but which retain commercial or personal sensitivity;

In the context of information already provided, further disclosure would not enhance scrutiny of the University's administrative processes;

Given the statutory mandate for the University to engage in commercial activities, it should be able to do so on a level playing field subject to a fair and appropriate degree of public disclosure. In light of the amount of information already released, further disclosure would potentially hinder equity and fair treatment of individuals and corporations in their dealings with the University;

There is nothing in the exempt information which would promote or harm public health and/or safety;

There is noting in the exempt information which would promote or harm the administration of justice, procedural fairness or the enforcement of the law;

Disclosure could harm the economic development of the State such as by limiting competition and the ability of the University to attract students from other jurisdictions and the flow on commercial effect that would have to the State;

Further disclosure of exempt information would harm the interest of individuals whose personal information has been withheld or groups of individuals – there is not public interest or benefit, for example, of making a public spectacle of individuals who may have changed their names or gender – a matter which is no doubt of particular personal sensitivity to them;

Disclosure of estimates, forecasts, budgets and the like would prejudice the University's ability at the highest levels to constructively and frankly develop economic and financial policy;

Disclosure of information about matters which were never adopted would not inform the public of any decisions or improve accountability;

Disclosure of some staff related information would have a substantial adverse effect on the management or performance assessment by the University of its most senior staff;

To the extent that any of the information relates to matters of an enterprise bargaining nature, disclosure would have a substantial adverse effect on industrial relations of the University;

...disclosure of certain exempt information would harm the business and financial interests of the University and other persons or organisations with whom the University engages in business, commercial or financial negotiations and transactions;

Similarly ... some information is related to the business affairs of persons which would harm their competitive position if released;

Some of the commercial information about business affairs of other persons is not generally available to competitors of those businesses and in some instances are subject to express terms of confidentiality in the contractual arrangements with them.

Analysis

- 20 The University claimed information was exempt pursuant to ss35, 36, 37, 38 and 39 of the Act. I will assess whether information is exempt pursuant to each exemption in the following Analysis.
- 21 The University supplied my office with a PDF document containing 70 pages of unredacted information relevant to this review, as well as a partially redacted PDF document containing 71 pages of information released to Mr Hogan. Unfortunately, the latter PDF contained no indication of which sections of the Act were relied on to exempt information. The University also provided a Schedule of Documents which identified the sections relied on, though not by page number but by reference to the date and chapter number of each set of Council minutes. The labelling on this Schedule was sometimes in error, making it difficult to determine which piece of information is being referred to. However, for the purpose of my assessment, I will use the University's internal review Schedule when referencing the relevant exemptions.
- 22 I encourage the University to make a greater effort to ensure that it is clear which section of the Act is being applied to each specific exemption, as this is of major benefit to applicants and reviewers.

Section 35 – Internal deliberative information

- 23 For information to be exempt under this section, I must be satisfied that it consists of:
 - an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(a)); or
 - a record of consultations or deliberations between officers of public authorities s35(1)(b)); or

- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 24 When one of these requirements is met, I must be further satisfied the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes relating to the official business of a public authority, a Minister or the Government.
- 25 The exemption does not apply to the following:
- purely factual information (s35(2)); or
 - a final decision, order or ruling given in the exercise of an adjudicative function (s35(3)(a)); or
 - a reason which explains such a decision, order or ruling (s35(3)(b)); or
 - information which is older than 10 years (s35(4)).
- 26 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)*¹ where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.
- 27 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*,² refers to the decision in *Re Waterford* and concludes that, regarding factual information, *it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*
- 28 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)*³ 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 course of action.’
- 29 The University’s schedule indicates that it has applied s35 to exempt information in University Council Minutes documents dated 27 April 2022, 29 June 2022, 31 August 2022, 18 October 2022 and 8 December 2022.
- 30 I have reviewed the information claimed be exempt and am satisfied that it consists of records of discussions between members of the University Council and other employees of the University as part of deliberative processes of the University. I am satisfied that it consists of opinion, advice or recommendations from officers of public authorities or deliberations between such officers, and is *prima facie* exempt pursuant to s35(1)(a) and/or (b).

¹ [1984] AATA 518 at [14].

² LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

³ [1984] AATA 67 at [58].

Section 33 – Public interest test

- 31 I now turn to my assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. This requires the consideration of the factors in Schedule 1 of the Act and any other information relevant to my decision.
- 32 I consider Schedule 1 matter (a) – the general need for government information to be accessible – is always relevant and generally weighs in favour of disclosure.
- 33 Schedule 1 matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – is also relevant. There is no question that the University's planned move is a matter of significant public interest, generating substantial media and community debate as well as being the subject of an elector poll at the time of the 2022 local government elections. I note the University's contention it is unlikely further disclosure would contribute to any matter of debate, however I do not accept that there may be a limit to public debate beyond which disclosure of information is superfluous. I consider this matter weighs in favour of disclosure.
- 34 Schedule 1 matters (c) – whether the disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – were identified by the University as weighing against disclosure. This was partly because it contended that disclosure would do no more than satisfy the applicant's curiosity about very limited matters in circumstances where an overwhelming amount of information has already been released. I do not agree with this position. Any curiosity of the applicant does not undermine his statutory right to information provided in s7 of the Act. I also cannot accept that the release of discussions within the University Council immediately prior to decisions would not add to public understanding of the reasoning behind such decisions. Overall, I consider these matters weigh in favour of disclosure.
- 35 Schedule 1 matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – was identified by the University as weighing against disclosure. Again, I do not agree with this submission. Understanding the matters considered by the Council leading to a decision would allow informed scrutiny of decision-making processes which can only improve the accountability of the University to the community. This aligns with the University's own acknowledgement in its internal review decision that *the University is a public educational institution which receives significant public funding and disclosure of some of the information could enhance scrutiny and accountability.*
- 36 The University further submitted that disclosure of information about matters which were never adopted would not inform the public of any decisions or improve accountability. I again disagree and consider that any information

relating to the decision-making process has the potential to enhance public understanding of why a course of action was, or was not, adopted. On balance, I consider matter (f) weighs in favour of disclosure.

- 37 I consider that Schedule 1 matters (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – and (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – are relevant. In order to ensure its future success, the University requires competent people to step forward and serve on its governing body. It is to be expected the Council will explore and consider different opinions and priorities, but if records of early stages of robust debate concerning ideas of individual members on controversial issues were routinely released, qualified people might be inhibited from contributing to the Council. This matter has been mitigated because although those present at meetings are identified, discussions are generally presented as occurring within the Council as a collective. Matters (m) and (n) therefore weigh against disclosure but only slightly.
- 38 As part of my public interest assessment, I also consider the inherent reasons for Parliament's inclusion of the s35 exemption to allow for early thinking processes to be explored and options tested prior to settling on a final direction for the University. I consider that this weighs against the release of some information. The effectiveness of the University Council may be undermined if all early proposals for the future of the University, even if later abandoned, were released. This must always be balanced with the need for transparency regarding the operations of public authorities.
- 39 The assessment and weighting of the various public interest factors set out in Schedule 1 involves a consideration of competing factors, always taking into account the object of the Act and that *discretions be exercised so as to facilitate and promote, promptly and at the lowest cost, the provision of the maximum amount of official information.*
- 40 The majority of the information to which the University has applied s35 is not 'early thinking' but a discussion immediately prior to a resolution. On balance, I give greater weight to matters (a), (b), (c), (d) and (f), and do not believe the University has discharged its onus under s47(4) to demonstrate that the release of much of the information is contrary to the public interest.
- 41 I also note the information is now approaching three years old and any decisions recorded in the Minutes would have already been implemented. In addition, some information claimed to be exempt is already in the public

domain through media releases issued by the University⁴ and so it could not be contrary to the public interest to disclose it in the University Council Minutes.

- 42 My determination is subject to the limited exceptions discussed below and any further determinations I make under ss36, 37, 38 or 39.

Minutes dated 27 April 2022

- 43 In section 4.2 of the 27 April 2022 minutes document, the first paragraph and associated dot points are exempt under s35(1)(a) and are not required to be released. The second paragraph beginning *Members noted...* is not exempt and should be released to Mr Hogan, subject to my assessment under s38.

Minutes dated 29 June 2022

- 44 In section 3.1 of the 29 June 2022 minutes document, the final sentence of the second redacted paragraph is an opinion and I am satisfied that it is exempt under s35(1)(a). It is not required to be released to Mr Hogan.
- 45 In section 6.5, the relevant information reflects an internal deliberative discussion surrounding the University's Risk Profile. I am satisfied it is exempt under s35(1)(b) and so is not required to be released to Mr Hogan.

Minutes dated 31 August 2022

- 46 In section 1.1 of the 31 August 2022 minutes document, the first paragraph merely refers to Council members noting a position regarding the 2022 City of Hobart elector poll. I am not satisfied that it would be contrary to the public interest to release it.
- 47 The second paragraph was assessed by the University as exempt under s36, however I consider it to be more appropriately assessed under s35 as it refers to a discussion regarding University procedures and learning models. With the exception of the first two sentences, I am satisfied this paragraph is exempt under s35(1)(b) and is not required to be released.
- 48 In section 3.4, the exemptions did not appear to be addressed by the University, however I note a repeated and apparently irrelevant reference to Section 3.2 on the Schedule which is likely to contain the University's position in relation to this section. I am satisfied that all except the first paragraph is exempt. This paragraph will be further assessed under s38.
- 49 In section 4.2, I am satisfied the information in the second paragraph which has not been released is exempt under s35(1)(b). The information which has not been released in Resolution 31-08-2022_UC_10982-11456 is also exempt.

⁴ University of Tasmania media releases dated 1 July 2022 and 3 March 2023, *4.6 percent pay rise for University of Tasmania staff* and *International study centre for Melbourne CBD*, available at www.utas.edu.au/about/news-and-stories/articles/2022/4.6-percent-pay-rise-for-university-of-tasmania-staff and www.utas.edu.au/about/news-and-stories/articles/2023/international-study-centre-for-melbourne-cbd, accessed on 19 May 2025.

Minutes dated 18 October 2022

- 50 In section 3.1 of the 18 October 2022 minutes document, the third paragraph under the heading *Elector Poll and Council Election* is exempt under s35(1)(b) and not required to be disclosed to Mr Hogan. The remainder of this section is not exempt under s35 but will be further assessed under s38.

Section 36 – personal information of person

- 51 For information to be exempt under this section, I must be satisfied that its release would involve the disclosure of the personal information of a person other than the person making the application under s13.

- 52 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.

- 53 The University identified information in this category in the Council minutes which are subject to this review, including names and grades of students and employment details of University staff. I am satisfied that all the information identified is personal information and is *prima facie* exempt under s36.

Section 33 – Public interest test

- 54 Section 36 is also subject to the public interest test contained in s33. I note that, in relation to some information, the University has indicated on its schedule of documents that there is *no public interest in release*. However, the public interest test requires me to determine whether the release of the information would be contrary to the public interest. To do this, I must again consider all relevant matters and as a minimum those in Schedule 1 of the Act.

- 55 I agree that the release of names of students or graduates who have changed their name or gender, and information relating to graduates of Shanghai Ocean University (where not already on the public record), has the potential to cause harm to those persons (Schedule 1 matter (m)) and there are no other matters which outweigh this concern. This information is exempt under s36 and is not required to be disclosed to Mr Hogan.

- 56 I also accept the University's submission disclosure of some staff related information would have a substantial adverse effect on the management or performance assessment of the University's staff (Schedule 1 matter (p)). The relevant information is a performance review of the Vice Chancellor. While there are matters which weigh in favour of release (Schedule 1 matters (a) and (b)), due to legitimate scrutiny of the performance of senior executives, I am satisfied that these are outweighed by the need for confidentiality to manage staff performance effectively. Accordingly, the information in the first redacted paragraph under section 1.1 in the 27 April 2022 minute document, along with

the final sentence in the second redacted paragraph, is exempt under s36 and not required to be released. The remainder of the second paragraph is not exempt, as this relates to employment arrangements which are already on the public record.

57 Accordingly, the information not disclosed in the following sections of the relevant minutes documents is exempt under s36 and is not required to be released:

- 27 April 2022 – section 1.1 (first redacted paragraph and final sentence of the second redacted paragraph only), section 8.1;
- 12 May 2022 – Resolution 12-05-2022_UC_18942-11098;
- 29 June 2022 – section 4.4;
- 31 August 2022 – section 5.3;
- 18 October 2022 – Resolutions 18-10-2022_UC_17439-11613 and 18-10-2022_UC_17439-11614; and
- 8 December 2022 – section 6.1.

58 The remainder of the information is not exempt under s36 and is to be released to Mr Hogan.

Section 37 – Information relating to business affairs of third party

59 For information to be exempt under this section, I must be satisfied that its release would disclose information related to business affairs acquired by the University from a third party and that:

- (a) *the information relates to trade secrets; or*
- (b) *the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*

60 In relation to 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*⁵ 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...

61 The court further held that:

⁵ [2010] TASSC 39.

55. In my view, what the provisions refer to as a competitive disadvantage is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason or circumstance. A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition.

- 62 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*.
- 63 The University applied s37 on 12 occasions to exempt information in the Council minutes. I am not satisfied the following entries reveal any information relating to business affairs which would expose any third party to a competitive disadvantage. They are not exempt under s37 and should be released to Mr Hogan, subject to any assessment under s38:
- 4 April 2022 – Resolution 04-04-2022_IC_18860-10949;
 - 18 October 2022 – Resolution 18-10-2022_UC_15481-11635; and
 - 8 December 2022 – page 1 (first redaction).
- 64 The University also indicated on the Schedule that information had been exempted pursuant to both ss37 and 38 in section 3.5 in the 8 December 2022 minutes document (second redaction), a redaction which does not appear to exist. However, I have assumed the University intended to refer to the second redaction of information in section 3.6 of the minutes document.
- 65 I am satisfied the remainder of the relevant information identified by the University is *prima facie* exempt under s37.

Section 33 – Public interest test

- 66 Exemptions under s37 are subject to the public interest test set out in s33 of the Act in order to determine if disclosure of the information would be contrary to the public interest.
- 67 I agree with the University's submission that Schedule 1 matter (a) – the general public need for government information to be accessible is relevant, along with matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation, as *the University is a public educational institution which receives significant public funding*.
- 68 I further agree that matters (s), (w) and (x), which relate to whether the disclosure would harm the business or financial interests of a third party, cause competitive disadvantage or reveal information not normally available to their competitors, are relevant.

- 69 I consider that the risk of competitive disadvantage can be satisfactorily mitigated in the following information which the University claimed to be exempt by selective redaction. Accordingly, I determine that the name of the third party organisations, where they occur in the following documents, are exempt under s37:
- 18 October 2022 – section 5.2, including Resolution 18-10-2022_UC_15481-11633; and
 - 8 December 2022 – section 3.6 (second redaction).

- 70 The remaining information which the University sought to exempt under s37 refers to commercial partnerships which have wide public exposure,⁶ or which were for a finite and now concluded period. I am not satisfied that its release at this point in time would be contrary to the public interest. This information is not exempt under s37 and should be released to Mr Hogan.

Section 38 – Information relating to business affairs of public authority

- 71 The University has applied s38(a)(ii) on 31 occasions to exempt some information contained in Council Minutes.
- 72 Section 38(a)(ii) provides that information is exempt information if it is:

In the case of public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosure under this Act, be likely to expose the public authority to competitive disadvantage;...

- 73 As has been set out in the previous decision of my office in *Alexandra Humphries and University of Tasmania*,⁷ given ss6 and 7 of the *University of Tasmania Act 1992*, I am satisfied the University is a public authority which can engage in trade and commerce. The fact that its functions relate to education and learning do not preclude it from undertaking commercial activities to achieve its objectives.
- 74 The interpretation of the term competitive disadvantage in s38 of the Act is the same as in s37, which is discussed above.
- 75 Turning now to the exemptions applied by the University, I do not consider the following information is of a nature such that disclosure would expose the University to any competitive disadvantage and it is to be released to Mr Hogan:
- 4 April 2022, Resolution 04-04-2022_UC_18860-10947.
- 76 I am satisfied the remainder of the information to which the University has applied exemptions under s38 are *prima facie* exempt under this section, as it

⁶ University of Tasmania media release dated 3 March 2023, *International study centre for Melbourne CBD*, available at www.utas.edu.au/about/news-and-stories/articles/2023/international-study-centre-for-melbourne-cbd, accessed on 20 May 2025.

⁷ (24 February 2022) at [24-26], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

does relate to the commercial activities undertaken by the University which could cause competitive disadvantage if disclosed.

Section 33 – Public interest test

- 77 As noted, s38 is subject to the public interest test and so I must now determine whether disclosure of the information found to be *prima facie* exempt under s38 would be contrary to the public interest.
- 78 I again agree with the University's submission to the effect that disclosure of the information could enhance scrutiny and accountability of an organisation which receives significant public funding (Schedule 1 matters (a), (b), (f) and (g)).
- 79 I also consider Schedule 1, matter (s) – whether the disclosure would harm the business or financial interests of the University, to be particularly relevant and weigh against the disclosure of some commercial information.
- 80 I also note that some commercial activities were for a 12 month period and have now ceased and also, that another commercial partnership has received public exposure due to public announcements by both the University and the partner. Other information is general in nature and does not reveal specific or projected impacts upon the business activities of the University.
- 81 On balance, I am satisfied any competitive disadvantage to the University can be adequately mitigated by redacting the name of any partner organisation, along with dollar figures and percentages values, in the following:
- 4 April 2022 – Resolution 04-04-2022_UC_18860-10949;
 - 27 April 2022 – Section 4.2 (second paragraph);
 - 18 October 2022 – Section 3.3 (except for the percentage value in the first redaction);
 - 18 October 2022 – section 5.1 (except for the contractor name);
 - 18 October 2022 – Resolution 18-10-2022_UC_10521-11630;
 - 18 October 2022 – Section 5.2, including Resolution 18-10-2022_UC_15481-11633; and
 - 8 December 2022 – Section 3.6.
- 82 Of the remaining information to which the University has applied s38, the following is exempt and is not required to be released:
- 27 April 2022 – Resolution 27-04-2022_UC_18746-10971;
 - 6 June 2022 – Section 2.1;
 - 6 June 2022 – Resolution 06-06-2022_UC_11020-11214;
 - 29 June 2022 – Sections 5.1 and 6.5; and

- 31 August 2022 – Section 4.1, the final sentence of the second paragraph.
- 83 The remainder of the relevant information is not exempt and is to be released to Mr Hogan.
- Section 39 – Information obtained in confidence**
- 84 For information to be exempt under s39(1), I must be satisfied that its disclosure 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.
- 85 Section 37(2) sets out that this 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.
- 86 In his initial decision, Mr Perraton reasoned:

I consider that information with respect to the deliberations of the University Council are conditionally exempt from release pursuant to section 39 of the RTI Act.

- 87 This approach was not pursued by Ms O'Keefe on internal review. This is correct, as such deliberations are not information provided in confidence to the University but its own internal thinking process.
- 88 Ms O'Keefe confirmed the University's reliance on s39 on four occasions to exempt information in the University Council Minutes.

Minutes dated 18 October 2022

- 89 In the schedule, the University identified s39 was applied to the second and third redactions in section 3.1, section 5.1 and Resolution 18-10-2022_UC_10521-11629 of the 18 October 2022 meeting minutes. I have not identified any information in that section which was communicated in confidence to the University. In the absence of any reasoning in either decision or the Schedule regarding the application of s39 to this information, I determine that the University has not discharged its onus under s47(4) of the Act and this information is not exempt under s39.

Preliminary Conclusion

90 For the reasons set out above, I determine that:

- exemptions claimed pursuant to ss35, 36, 37 and 38 are varied; and
- exemptions claimed pursuant to s39 are set aside.

Response to the Preliminary Conclusion

91 As the above preliminary decision was adverse to the University, on 8 August 2025 it was made available to it pursuant to s48(1)(a) of the Act to seek its input before finalisation.

92 On 8 September 2025, Ms Karina Groenewoud, Director Governance and Compliance at the University responded. She accepted the proposed findings in the preliminary decision, except in relation to the release of a small amount of information under s36, about which she made some submissions.

93 I have carefully considered these submissions and agree that, in the specific and unusual circumstances provided, it is appropriate to exempt a small amount of personal information. I am satisfied that the release of this information could cause harm to the interests of the relevant person. This exemption has been incorporated into my decision.

94 On 9 September 2025, the preliminary decision was made available to Mr Hogan to seek his input prior to finalisation, in accordance with s48(1)(b) of the Act.

95 On 15 September 2025, Mr Hogan responded and made a number of observations and comments which I have carefully considered, however advised (emphasis original):

In the public interest, I believe that it is important that UTAS provide me with the additional material determined not to warrant exemption in the draft decision as soon as possible. I therefore do not seek modifications to decisions made on individual exemptions, and/or changes to the text, in the draft decision.

Conclusion

96 Accordingly, and for the reasons set out above, I determine:

- exemptions claimed pursuant to ss35, 36, 37 and 38 are varied; and
- exemptions claimed pursuant to s39 are set aside.

97 I apologise to the parties for the delay in finalising this review.

Dated: 19 September 2025

A handwritten signature in blue ink, appearing to read "ML", is placed over a small rectangular box.

Megan Leary
ACTING OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 35 - Internal deliberative information

- (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.
- (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 (1) 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 person

- (1) 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 workdays the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 37 - Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

- (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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
 - (d) notify the third party that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43 , 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; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 38 - Information relating to business affairs of public authority

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

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

- (iii) 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 –
 - (i) 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.

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.

Section 33 - Public interest test

- (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.

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: R2301-003

Names of Parties: Selby Cooper and Department of Health

Reasons for decision: s48(3)

Provisions considered: s31, s35, s36, s45

Background

- 1 Throughout the COVID-19 pandemic, the Tasmanian Government issued a number of public health directions which were aimed at slowing the spread of COVID-19 in the Tasmanian community. Mr Selby Cooper is a Tasmanian citizen who is concerned by the impact that these public health directions had on the hospitality industry.
- 2 On 10 November 2022, Mr Cooper submitted an assessed disclosure application under the *Right to Information Act 2009* (the Act) to the Department of State Growth. This application was transferred to the Department of Health on 14 November 2022, which then processed the request.
- 3 Mr Cooper's application contained the following requests for information:
 1. *Any information including advice received in developing the Public Health Direction- Additional Requirements for Certain Venues, which commenced on the 6th of December 2021. This specifically includes:*
 - *Modelling basis, data, information, literature review and any related writeups and statutory declarations of qualified individuals certifying said information or similar - relating to the reduction in COVID case numbers and deaths as referenced in the premier's response to me. REF MIN22/456. [item 1]*
 - *Any information relating to the direction being introduced as a means to "encourage vaccination rates in the 20–30-year-old age group, due to it lagging behind", or similar as mentioned by the*

secretary during my phone call to the department on the 16th of February 2021. [item 2]

- *Any communications or information relating to the legality of the declaration either sought internally or externally. [item 3]*
 - *Any communications, including meeting minutes to relating to the enforcement of the declaration including with the state police, federal police or any representatives hither to. [item 4]*
 - *Any information relating to the knowledge of or estimation of people who will be unable to continue employment or patronage at effected businesses. [item 5]*
 - *Any information relating to the knowledge of or estimation of financial fallout of businesses whom will be unable to continue operation, or have a reduced capability due to the declaration. [item 6]*
2. *Any Information relating to the ongoing evaluation of the public health direction. including number of and nature of any complaints received either from internal or external sources. [item 7]*
 3. *Any information relating to the evaluation of the declaration once implemented. [item 8]*
 4. *Any information relating to cases of Covid spread within venues with limited access for unvaccinated individuals as imposed by the public health direction – additional requirements during the enactment of the aforementioned declaration. [item 9]*
- 4 On 9 January 2023, a Senior Legal Officer and delegate under the Act for the Department issued a decision to Mr Cooper. Mr Cooper was not satisfied by that decision, and, on 17 March 2024, Ms Megan Hutton, General Manager Legal Services, and a delegated officer of the Department under the Act, issued an internal review decision to Mr Cooper which largely affirmed the original decision.
- 5 Mr Cooper was not satisfied with the internal review decision issued to him and, on 31 March 2023, he sought external review. This application was accepted pursuant to s44 of the Act as Mr Cooper was in receipt of an internal review decision, and his application for external review was made within 20 working days of receiving that decision.

- 6 Upon reviewing the original and internal review decisions issued to Mr Cooper, my office raised concerns with the Department in correspondence of 29 August and 13 September 2024 and requested that the Department address issues identified with its decisions. These issues related to its use of s12(1)(c)(i) to refuse parts of the request claiming the information was otherwise available, issues with reasoning and questions regarding the search for responsive information undertaken. On 18 September 2025, Mr Joshua Toselli of the Department wrote to my office offering to make a fresh decision on Mr Cooper's assessed disclosure application. This was considered the most expedient way to address the issues, given the staff who worked on the file originally had left the Department.
- 7 Mr Cooper was issued with a fresh decision on 1 November 2024 (the first fresh decision), which identified 95 pages of relevant information, consisting of draft public health orders, internal officer meeting notes, internal email correspondence between public officers, a Minute issued to the Director of Public Health and email correspondence between the Department and the Office of Parliamentary Counsel.
- 8 The Department held that:
 - the draft public orders were exempt from disclosure pursuant to s31 in full, as information subject to legal professional privilege;
 - the internal officer meeting notes and email correspondence was partially exempt pursuant to s35 (as internal deliberative information) and s36 (as personal information);
 - the Minute to the Director of Public Health was partially exempt from disclosure pursuant to s36; and
 - the email correspondence between the Department and the Office of the Parliamentary Counsel was partially exempt pursuant to ss31 and 36.
- 9 Mr Cooper was not satisfied by the Department's fresh decision and submitted an application for external review to my office. Mr Cooper was not satisfied by the redactions applied to the information that he was provided, and also queried whether all information responsive to his request had been located.
- 10 On 18 February 2025, my office wrote to the Department to ask that it provide a search record documenting the steps it took to identify information responsive to Mr Cooper's application.
- 11 On 5 March 2025, Ms Jenny Kaldor of the Department advised my office that the Department had identified additional information responsive to Mr Cooper's assessed disclosure request when compiling the search record. My office advised the Department that it was required to assess this information under the Act and issue a decision to Mr Cooper.

- 12 On 14 March 2025, the Department wrote to my office to provide the requested search record. The Department also provided the decision it issued to Mr Cooper regarding the additional information (the second fresh decision), and a copy of the partially redacted information it provided to Mr Cooper when issuing this decision.
- 13 The additional information subject to the second fresh decision consisted of 19 pages of emails and letters containing the Solicitor-General's legal advice and a briefing to the Premier. Partial exemptions had been applied to this information pursuant to ss31 and 36.
- 14 On 1 April 2025, Mr Cooper wrote to my office to advise that he wished to have the second fresh decision also form part of this external review.

Issues for Determination

- 15 I must first determine whether information responsive to Mr Cooper's application that was not released is eligible for exemption under ss31, 35 or 36 of the Act. I must also determine whether the Department's search for information was sufficient pursuant to s45(1)(e) of the Act.
- 16 As ss35, and 36 are contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under either section, I am then required to determine whether it would be contrary to the public interest to release it, having regard to all relevant matters, but at least those contained in Schedule 1.

Relevant legislation

- 17 Copies of ss31, 35, 36 and 45 are attached at Attachment 1.
- 18 Copies of s33 and Schedule 1 are also attached.

Submissions

Mr Cooper

- 19 In responding to the first and second fresh decisions issued by the Department, Mr Cooper said that he found it *completely ridiculous that information they previously stated existed with quoted page numbers in earlier correspondence somehow does not exist anymore*. Mr Cooper also noted that he was not satisfied by the exemptions applied by the Department.
- 20 In response to the initial internal review decision issued to him, Mr Cooper made the following submissions to my office about the Department's application of s12:

In relation to Request 2, 7, 8 and 9 the decision in accordance with section 12(3)(c)(i) of the Act. The reasoning for the different interpretation is that the

evaluation and assessment at the time of the commencement of the public health direction relied on publicly available mathematical, scientific and epidemiological data. Where is this information? it is not currently publicly available, none of the supplied links have any information relevant to any of these. I am well aware of all information published by the department and as such in my initial consultation with the department for the RTI process made it clear that I was looking I the modelling done explicitly toward the vaccination entry declaration and the evidentiary basis for these or at the very least a signed declaration of a qualified individuals. The links provided have all also been updated since the time of the direction and have no ability to be rolled back to the relevant time period. It is in my belief that this information is not publicly available.

The reviewer goes on to express “The information that was relied on to assess the spread of the disease was the R number being a mathematical calculation as a way of rating the ability of COVID-19 or any other disease to spread. R is the number of people that one infected person will, on average, pass on a virus to.”. Where did the reviewer get this information? At no point has any information been released relating to the department’s calculation of the R number or reduced R number calculation with the health direction in place.

“Any Information relating to the ongoing evaluation of the public health direction. including number of and nature of any complaints received either from internal or external sources.” [Request 7] This information is clearly not already publicly available and I find it a gross misuse of the Act that the department has attempted to not disclose this information by using Section 12. I also note that the initial response indicated that this information did indeed exist on the departments computer system. To myself it feels as if the department is misusing the unreviewable nature of Section 12 to avoid supplying any information and avoid being accountable to the applicant and the ombudsman. This is the basis for my complaint, that I would like to see rectified by the department.

The Department

- 21 The Department's position in relation to this external review is best reflected by what was held in each of its fresh decisions. As such, I will set out its reasoning as follows.

The first fresh decision

- 22 Regarding information contained within the draft public orders and correspondence between the Department and Office of the Parliamentary Counsel which was identified as exempt pursuant to s31 of the Act, the Department's fresh decision contained the following:

The information consists of draft directions under section 16 of the Public Health Act 1997, and communications between the Chief Parliamentary Counsel and the public authority involving advice on legislative instruments, such as the public health directions, during the Covid-19 pandemic. These emails and draft legislative instruments were communicated for the purpose of giving advice to the public authority from the Chief Parliamentary Counsel on the Public Health Act and directions under it. The privileged nature of these communications and the drafts is made clearer by the in-confidence character, the deliberative and assessing tone, and the inclusion of draft or version watermarks.

I am satisfied that this information was communicated for the purpose of legal officers of the Crown giving legal advice to the public authority and it is therefore privileged.

- 23 The Department's first fresh decision set out that it considered information within the following to be *prima facie* exempt from disclosure pursuant to s35 of the Act:

Minutes to the Director of Public Health providing advice as to the directions under section 16 of the Public Health Act 1997, emails between officers of the public authority, and informal meeting notes of meetings between the Director of Public Health and senior officers of the Emergency Control Centre and State Command Centre.

- 24 The Department's first fresh decision held at that it did not consider it to be contrary to the public interest to release a relevant Minute to the Director of Public Health:

The Minute provides context on the decision to implement certain vaccination requirements in Tasmania for certain activities during the Covid-19 pandemic, which is a matter of general public interest. Given this, I believe that (a), (b), (c), (d), (e), (f), (g), and (h) weigh in favour of disclosure.

The Minute provides information on how a conclusion was reached and the rationale behind it. It allows the public to inform them of the practices of government decision making and scrutinise it.

- 25 However, it did find that it would be contrary to the public interest for informal meeting notes of meetings between the Director of Public Health and senior officers of the Emergency Control Centre and State Command Centre, and internal email correspondence between public officers, to be released. The Department's first fresh decision provided the following public interest test assessment to support that conclusion:

I do not consider the officer-to-officer communications of the same intent or purpose as the Minutes to the Director of Public Health. These discussions are informal communications for the purposes of deliberating courses of actions in reaching a final recommendation, which is recorded in the Minutes and final instruments under the Public Health Act.

I consider that (a) and (c) weigh in favour of disclosure. Information should generally be available to the public. However, I consider that this information does not reach the same threshold as the formal and finalised Minutes. I find that the officer-to-officer level communications do not contribute in the same way to understanding government decisions (d and f). Officers should be able to undertake robust discussions on potential courses of action and these discussions are not always representative of the final outcome.

- 26 The first fresh decision also contained the following table which made explicit the Schedule 1 matters it considered in coming to its conclusion:

Schedule 1(1)(a)	the general public need for government information to be accessible;
Schedule 1(1)(b)	whether the disclosure would contribute to or hinder debate on a matter of public interest;
Schedule 1(1)(c)	whether the disclosure would inform a person about the reasons for a decision;
Schedule 1(1)(d)	whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
Schedule 1(1)(e)	whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
Schedule 1(1)(f)	whether the disclosure would enhance scrutiny of

	government decision-making processes and thereby improve accountability and participation;
Schedule 1(1)(g)	whether the disclosure would enhance scrutiny of government administrative processes;
Schedule 1(1)(h)	whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
Schedule 1(1)(i)	whether the disclosure would promote or harm public health or safety or both public health and safety;

- 27 Regarding exemptions applied pursuant to s36, the first fresh decision set out (footnote omitted):

. . . I also recognise that names of public officers performing their regular duties are not usually exempt under s36, unless there are exceptional circumstances. Conversely, the Department of Health is a public authority that for business and security reasons does not display personal employee contact details in the public view function of the directory. The public authority should be entitled to having direct contact from the public via the appropriately established channels. For this reason I am satisfied the direct contact information of officers and other parties is personal information and exempt information.

. . . So, the public interest test requires a balancing of the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of government and its agencies on the other.

The (a), (m), and (q) matters of Schedule 1 have been applied in relation to the Public Interest Test as required by s33 to the personal information of the information custodian.

I accept that the disclosure of the information reflects public interest with the community having an understanding of and an involvement in the democratic processes. I am satisfied the information held by the public authority should be accessible (a).

However, as to matter (m), I consider disclosure would harm the interests of third parties by the mere fact that disclosure of the information could create apprehension in

the mind of the person concerned is enough to render disclosure unreasonable.

I consider that for (q), disclosure would have an adverse effect on the industrial relations of the public authority. Industrial relations covers the operation of the public authority. The public authority maintains specific channels for the public at large to make contact. The disclosing of names and other details would enable members of the public to contact individual public authority officers directly outside the public authority's preferred contact points.

In my view, it is contrary to the public interest to disclose the direct contact information relating to third parties.

The second fresh decision

- 28 Regarding the letters and emails containing the Solicitor-General's legal advice, the second fresh decision held:

The information exempted under section 31 contains advice from the Solicitor-General to the public authority, and requests to the Solicitor-General for formal advice. The requests contain the substance of the request and the discussion of the law. The Solicitor-General's advice is binding on the Government and is flagged as legally privileged, and not for dissemination without the written authority of the Attorney General. I am satisfied that the body of this advice and the requests are for the purpose of seeking and receiving formal legal advice and is exempt from disclosure.

- 29 As for information identified as exempt pursuant to s36, the second fresh decision contained the following:

Section 36 (Personal Information) is an exemption that is subject to the public interest test. Therefore, I have applied the public interest test to exempted information that has been deemed to be personal information.

- The Act recognises that certain information is personal information that should not be disclosed via the operation of the Act. This information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature. It is information that would allow for another to reasonably identify them. Information that is publicly available and well known should be given appropriate consideration when determining whether personal information is exempt. Furthermore, names of state service employees acting in*

the course of their duties are not normally considered exempt unless there are specific or unusual circumstances. The Tasmanian Ombudsman has accepted that the release of direct contact details of state servants is not in the public interest, and the public authority should be entitled to maintain established points of contact with the public.

- *I have considered Schedule 1 of the Act and conclude the following:*

- o While (a) generally favours the release of information held by the public authority, it does not overcome the other relevant clauses of schedule 1 such as (m), (q), and (p). The Ombudsman has determined that the release of direct contact information of staff, such as their personal mobile numbers, is not in the public interest. This release would cause enough concern and distress to those staff to warrant the exemption because those details are not ordinarily released to the public, and their personal contact information should be afforded a level of privacy. The public authority has appropriate contact methods open to the public and is entitled to ask that members of the public use those contact points instead of directly contacting staff.*

Analysis

Preliminary Matter 1 – the Department’s initial decisions

- 30 As indicated in the Background section, my office raised concerns regarding the Department’s initial original and internal review decisions on Mr Cooper’s assessed disclosure application. Resolving these concerns led to considerable delay in finalising this external review, as fresh decisions were required to be made by the Department to rectify the issues arising in the initial original and internal review decisions.
- 31 First, the Department’s internal review decision failed to assess item 1 of Mr Cooper’s application.
- 32 Second, the Department’s initial original decision incorrectly relied upon s10 and s12(3)(c)(i) of the Act. Though on internal review the Department no longer relied on s10, it maintained its incorrect use of s12(3)(c)(i) of the Act to refuse aspects of Mr Cooper’s application for requesting information that was otherwise publicly available. The Department provided the applicant with links to websites to justify its use of s12(3)(c)(i), however it was not apparent how these links contained

specific information responsive to any part of Mr Cooper's application. The Department also did not provide Mr Cooper with an appropriate explanation as to the location of this information which it claimed was otherwise available.

- 33 Section 12(3)(c)(i) of the Act should only be relied upon to refuse applications, or individual aspects of applications, where specific information responsive to those applications or individual requests is, in fact, otherwise available to the applicant.
- 34 As mentioned, my office made enquiries with the Department to attempt to resolve these issues, and it did agree to issue a fresh decision to rectify these concerns. While this is commendable, I urge the Department to adhere more closely to the requirements of the Act and to engage with the applicant during any internal review to prevent the occurrence of such issues, and resulting delays, in future.

Preliminary Matter 2 – online searches of the applicant by the Department's delegates

- 35 I also find it necessary to raise my concerns about the Department's delegates conducting their own online research to ascertain whether Mr Cooper was a member of a public interest advocacy group, for the purpose of determining whether to waive the fee on his assessed disclosure application.
- 36 The Department's internal review decision held that the Department's delegate undertook her own online research to conclude that Mr Cooper was not a member of a public interest advocacy group: *Further, on my own internet search, I was unable to identify if the applicant is a member of a public interest advocacy group.* The Department's delegate did not provide Mr Cooper an opportunity to respond to this finding.
- 37 As I set out in my recent external review decision of *Stephen Crothers and Department of Health*, drawing conclusions based on material that is found online and is external to the actual application deprives an applicant of procedural fairness if they are unable to respond to conclusions that are drawn from that material.¹ Further, the practice of conducting online research to collate information about applicants is not ideal for ensuring accuracy in decision making, given there can be a lack of veracity in internet search results.
- 38 I have asked that the Department's delegates cease conducting their own online searches of applicants to assist in their decision making or, if they do, that they exercise far greater caution in relying on the results of such research. Should a delegate require further information about an applicant to determine whether to waive an application fee, best practice

¹ *Stephen Crothers and Department of Health* (19 April 2024) at [36], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

is to ask the applicant themselves for that information or provide an opportunity for the applicant to respond before relying on information found in internet searches. I will be monitoring this in the future.

Section 31 – Legal Professional Privilege

- 39 Information is exempt from disclosure under s31 of the Act:

. . . if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.

- 40 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.² Legal professional privilege can be characterised as either advice privilege or litigation privilege.
- 41 Advice privilege attaches to confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice.³ Legal professional privilege will only apply to communications where they are made for the dominant purpose of the legal advisor providing legal advice. Advice privilege has been codified in Section 19 of the Evidence Act 2001 (Tas).⁴

Draft Public Health Orders and Email Correspondence between officers at the Department of Health and of the Office of Parliamentary Counsel

- 42 The Department has claimed s31 of the Act is applicable to exempt all of the information contained in 11 emails sent between officers of the Department and of the Office of Parliamentary Counsel. These emails attach or contain 15 draft public health orders regarding the COVID-19 pandemic.
- 43 Upon reviewing this information, I am satisfied that the Department was entitled to rely on s31 of the Act to exempt from disclosure the 15 draft public health orders and information contained in these 11 emails. I am satisfied that the communication was for the dominant purpose of giving or obtaining legal advice.
- 44 This information is exempt under s31 and the Department is not required to provide it to Mr Cooper.

Emails and letters containing Solicitor-General's legal advice

- 45 The Department has claimed s31 of the Act applies to exempt three letters and three emails passing between the Office of the Solicitor-General and the Department. These emails and letters seek, or provide, legal advice.

² AWB LTD v Cole and Another (No 5) (2006) 234 ALR 651, 662 at [44].

³ AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) [2006] FCA 1234 18 September 2006 at [41].

⁴ Evidence Act 2001 (Tas) pt10 div1.

46 I am satisfied that the Department was entitled to use s31 to exempt all of this information, as it consists of information that would be privileged from production in legal proceedings on the ground of legal professional privilege. The Department is not required to provide this information to Mr Cooper.

Information in internal emails identified as exempt from disclosure pursuant to s35

47 The Department's first fresh decision held that information in the following emails was exempt from disclosure pursuant to s35 of the Act, as internal deliberative information:

- an email from Ms Marina Brkic to Mr Calum McKinnon on 14 December 2021 at 8:46am;
- an email from Ms Hutton to Mr Mark Veitch, Mr Graham Scott, and Ms Julia Mansour on 7 December 2021 at 1:03pm;
- an email from Ms Jacobs to Ms Hutton on 13 December 2021 at 13 December 2021 at 3:27pm;
- an email from Mr McKinnon to Ms Sarah Jacobs and Ms Hutton on 13 December 2021 at 3:33pm; and
- an email from Ms Jacobs to Ms Hutton on 10 December 2021 at 3:30pm.

48 Upon reviewing this information, however, I consider that it is more appropriate to assess this information under s31 of the Act, as it consists of information communicated between general staff of the Department and its in-house counsel. This information is made up of communications that were made for the dominant purpose of giving or obtaining legal advice. This information therefore consists of information that would be privileged from production in legal proceedings on the ground of legal professional privilege and therefore is eligible for exemption pursuant to s31 of the Act. The Department is under no obligation to provide this information to Mr Cooper.

49 As I have found this information exempt under s31, it is not necessary for me to assess whether it could also be eligible for exemption under s35.

Section 35 – Internal Deliberative Information

50 For information to be exempt under s35 of the Act I must be satisfied that it consists of:

- an opinion, advice or recommendation prepared by an officer of a public authority (s35(1)(1));
- a record of consultations or deliberations between officers of public authorities (s35(1)(b)); or

- a record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).
- 51 When the requirements of one of those subsections is met, I must also then be satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process relating to the official business of the Department (s35(1)).
- 52 The information is not exempt if it is:
- purely factual information (s35(2));
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling (s35(3)); or
 - information that is older than 10 years (s35(4)).
- 53 As to the meaning of purely factual information, I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No.1)* where the Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms.⁵
- 54 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative process’ has also been considered by the AAT. in *Re Waterford and the Department of Treasury (No 2)* it adopted the view that these are an agency’s ‘thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action’.⁶
- 55 Then, if I am satisfied that information is *prima facie* exempt under s35, I must have regard to the public interest test in s33 and the factors in Schedule 1 of the Act to determine whether it would be contrary to the public interest to release it.
- 56 The Department relies on the s35 exemption to not release *meeting notes of meetings between the Director of Public Health and senior officers of the Emergency Control Centre and State Command Centre* relating to three separate meetings held on 24 November, 1 December, and 8 December 2021. Though the Department did not specify whether it claimed s35(1)(a), (b), or (c) applies to this information, the content relates to consultations and deliberations between officers of public authorities and I consider s35(1)(b) is most relevant.
- 57 The information considered exempt by the Department consists of records of discussions and deliberations between Department officials about various COVID-19 related issues, and how the Department should

⁵ *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14].

⁶ *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588 at [58].

respond to these issues. The information reveals that topics of conversation included, among other things, vaccinations, public health orders, face masks, testing, workplans, and Tasmanian border control. The information claimed to be exempt in these meeting notes is not purely factual and is not more than ten years old. As such, I am satisfied that information the Department has not disclosed to Mr Cooper is *prima facie* exempt from disclosure pursuant to s35(1)(b) of the Act, as it is a record of consultations or deliberations between officers of the Department as part of a deliberative process.

Section 33 – Public Interest Test

- 58 I agree with the Department that Schedule 1, matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 59 I also agree with the Department that matter (c) – whether disclosure would inform a person about the reasons for a decision – is relevant and weighs in favour of disclosure. The disclosure of information contained in the meeting notes would reveal information detailing how the Department made various decisions about how to respond to the COVID-19 pandemic. However, I accept that, as the Department sets out, the extent to which this information could inform the public about decision making is limited by its informal and preliminary deliberative character. As such I find that Schedule 1 matter (c) only weighs slightly in favour of disclosure.
- 60 I recognise that the Tasmanian Government's response to the COVID-19 pandemic was, and to some extent remains, a politically charged issue and that it is reasonable for some early discussions not to be disclosed to the public. However, I find that the sensitivity attached to the internal deliberative information identified as exempt under s35 of the Act has been diminished somewhat by the passage of time. As such, I am less inclined to find that it would be contrary to the public interest to release this information now, than I may have found during, or closely following, the time during which Tasmania was greatly impacted by the COVID-19 pandemic.
- 61 In summary, after balancing all relevant matters, I am satisfied that it would not be contrary to the public interest to release most of the information I have identified as *prima facie* exempt pursuant to s35(1)(b) of the Act. This information is not exempt and should be released to Mr Cooper.
- 62 However, I note that my finding here does not extend to all the information contained in the 2nd, 3rd, 4th, and 5th dot points contained under the 4th dot point in the meeting note for the meeting held on 1 December 2024. Upon reviewing this information, I can see that it is of a quite sensitive nature and its release would be of concern to the

individual it relates to. As such, I find that schedule 1 matters (h) – *whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government*, and (m) – *whether the disclosure would promote or harm the interests of an individual or group of individuals*, to the key schedule 1 matters that are relevant and weigh against disclosure.

63 My finding here also does not extend to:

- the names contained in paragraphs 3, 4 and 5 of the 24 November 2021 meeting note, and the fourth dot point of the 1 December 2021 meeting note;
- The 14th to 19th word of the 1st dot point under point 3 of the meeting note for the meeting dated 24 November 2021;
- The 8th word of the 4th dot point under point 3 of the meeting note for the meeting dated 24 November 2021; and
- The 2nd word of the 4th point in the meeting note for the meeting dated 24 November 2021.

I will assess whether this information is eligible for exemption under s36 of the Act in the next part of my decision.

Section 36 – Personal information of person other than the applicant

64 For information to be exempt under s36 of the Act, it must reveal the personal information of a person other than the applicant. Section 5(1) of the Act defines personal information 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.

65 The Department has applied s36 of the Act to exempt from disclosure information revealing the contact details of public officers, including:

- direct email addresses;
- direct mobile phone contact numbers;
- generic work email inbox addresses;
- work physical addresses;
- work postal addresses;
- work pattern information of public officers; and
- work phone numbers.

- 66 I am satisfied that this information is *prima facie* exempt under s36 as it is information from which the identities of public servants would be reasonably ascertainable.
- 67 I will also assess the personal information in the meeting notes which I found not to be exempt under s35. This is comprised of names of public authority staff and members of the public, which is personal information and is *prima facie* exempt under s36.

Contact information

- 68 As I have done in previous decisions, in determining whether this information is exempt pursuant to s36 of the Act, I find it necessary to distinguish between contact details which allow public officers to be contacted by the public directly, and information that allows public officers to be contacted through channels determined by the public authority, including through generic email inboxes and workplace phone numbers.
- 69 Unlike generic email inboxes, workplace phone numbers, and work postal addresses, there is potential for harm with the release of an employee's direct email or mobile phone number as they may become exposed to harassment as a result of this information being released. Further, it is valid for public authorities to limit the release of direct contact numbers and emails of staff to ensure public enquiries are able to be directed through appropriate channels.
- 70 It is also permissible to restrict details shared internally – such as a physical office location which is not public facing or exact work patterns – from external release if these would be removed when communicating with the general public.
- 71 Accordingly, I am satisfied that it would be contrary to the public interest to release information revealing the direct email addresses, mobile phone contact numbers, physical office addresses and work pattern information of public officers which the Department has sought to exempt. This information is exempt under s36 and is not required to be made available to Mr Cooper.
- 72 My finding in this regard does not extend to information revealing generic email inbox addresses, the Department's general office phone numbers, or the Department General Post Office Box address. This information is clearly not exempt and should be made available to Mr Cooper.

Names contained in internal meeting notes

- 73 As outlined earlier, I decided that it would not be contrary to the public interest to release three internal meeting notes the Department's fresh decision identified as exempt pursuant to s35 of the Act.

- 74 Contained in these meeting notes are references to various first names of staff of the Department. As I have noted previously, it is standard Australian practice that the personal information of officers of public authorities which relate to the performance of their regular duties, including names, should be released, unless specific and unusual circumstances apply to justify non-disclosure. I am not satisfied that specific or unusual circumstances apply in this instance. As such, this information should be released.
- 75 Also contained in these documents are references to three other members of the public that were the subject of discussions at these meetings. It is not apparent to me how the release of this information would add value to these meeting notes, and I recognise that its release would infringe upon the privacy of these individuals. Accordingly, I find that it would be contrary to the public interest to reveal the names of these third parties who are not officers of public authorities. I also find that it would contrary to the public interest to release other information contained within these internal meeting notes that would leave the identity of people other than the applicant reasonably ascertainable and be of little to no value for the applicant. This information consists of:
- the 14th to 19th word of the 1st dot point under point 3 of the meeting note for the meeting dated 24 November 2021;
 - the 8th word of the 4th dot point under point 3 of the meeting note for the meeting dated 24 November 2021; and
 - the 2nd word of the 4th point in the meeting note for the meeting dated 24 November 2021.
- 76 Accordingly, I find that:
- the names contained in paragraphs 3, 4 and 5 of the 24 November 2021 meeting note, and the fourth dot point of the 1 December 2021 meeting note;
 - The 14th to 19th word of the 1st dot point under point 3 of the meeting note for the meeting dated 24 November 2021;
 - The 8th word of the 4th dot point under point 3 of the meeting note for the meeting dated 24 November 2021; and
 - The 2nd word of the 4th point in the meeting note for the meeting dated 24 November 2021

is information that is exempt from disclosure pursuant to s36, and is not required to be released to Mr Cooper.

Section 45(1)(e) – Sufficiency of search

- 77 As I have mentioned, the Department provided my office with a search record documenting the steps that it took in searching for information

responsive to Mr Cooper's assessed disclosure application. The search record details:

- the date on which the Department executed searches for relevant information;
- the nature and scope of those searches;
- the time it took to conduct those searches;
- comments and reasons for why information might not have been located;
- the outcome of those searches; and
- who conducted those searches.

- 78 Section 5 of my *Guideline in Relation to Searching and Locating Information*⁷ (Search Guideline) advises delegates on what is expected of public authorities when searching for information.
- 79 The information contained within the search record reveals that the Department made an appropriate attempt to locate information responsive to Mr Cooper's application in accordance with my Search Guideline. From the search record provided, it is apparent that multiple staff from the Department have spent, in total, eight hours searching for information responsive to Mr Cooper's assessed disclosure application. Staff have conducted those searches by searching key search terms contained within Mr Cooper's request across various information management systems, reviewing internal newsletters, and by conducting online searches for information relevant to Mr Cooper's application.
- 80 Accordingly, I am satisfied that the Department's search for information was sufficient.

Preliminary Conclusion

- 81 For the reasons set out above, I determine that:

- exemptions claimed pursuant to s31 are affirmed;
- exemptions claimed pursuant to s35 are set aside;
- exemptions claimed pursuant to s36 are varied; and
- the Department's search for information was sufficient.

⁷ Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications

Response to the Preliminary Conclusion

- 82 As the above preliminary decision was adverse to the Department, it was made available to it on 15 April 2025 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 83 On 13 May 2025, Mr Toselli provided the Department's response to my preliminary decision as follows:

The Department makes the following submission.

At paragraphs 72-76, the Ombudsman finds that the names of persons not employed by the Tasmanian State Service to be exempt under section 36. The Department agrees with this position however submits that the contents of the paragraphs involving those individuals is also exempt under section 35, section 36, and potentially section 39.

Those paragraphs are indeed deliberative in nature, as you have accepted at paragraph 57. The information discusses individuals that are well known to the Department or sections of the public, and to disclose these paragraphs would make the identity of these persons reasonably ascertainable and disclose the Department's internal deliberations of those individual's circumstances. Furthermore, those individuals have ongoing complaints with the Department or have sought assistance from the Department in relation to their personal health circumstances. To disclose this information would negatively impact this complaint process and the confidence in the Department's ability to maintain the confidentiality of members of the public who seek clarification or assistance to understand public health policy and how it relates to their personal health.

The argument that it is in the public interest to disclose these paragraphs because of the time elapsed since the COVID-19 public health emergency should also be defeated by the fact that some of these individuals still interact with the Department regarding these issues. Disclosing this information affects the privacy of those individuals and may impact the public's confidence to disclose information to the Department when we are trying to assist them (section 39). As such, we believe that the considerations under Schedule 1(h) and (m) would outweigh the considerations in favour of disclosure in those specific circumstances.

As a further argument against disclosure, it is the nature of an emergency response to rely on the goodwill of the public. To release this information to the applicant does not achieve this aim. The information contained in these paragraphs are not responsive to the applicant's requests as they are specific to other individual's circumstances and not the State's emergency response to COVID-19.

As such we request redaction of the notes at:

- *Meeting date 24/11/2021, entirety of point "3", "4", "5"; and*
- *Meeting date 01/12/2021, entirety of the 4th dot point.*

Further Analysis

- 84 Having reviewed the Department's submissions, I am persuaded that there is additional information that should be exempt under s36 of the Act. This information is contained in:
- the fourteenth to the nineteenth word of the first dot point under point three of the notes of the meeting dated 24 November 2021; and
 - the eighth word of the fourth dot point under point three of the notes of the meeting dated 24 November 2021.
- 85 This information is exempt for the same reasons as set out at paragraphs 75 and 76 of this decision.
- 86 I am also persuaded that it would be contrary to the public interest to release some further information I identified as *prima facie* exempt from disclosure pursuant to s35. This information is contained in the notes for the meeting held on 1 December 2024, and I find it exempt for the same reasons as are set out at paragraph 62 of this decision.
- 87 I am not persuaded that any further information contained in the dot points of the meeting notes identified in the Department's submissions is exempt under ss35, 36 or 39. I do not consider that the remaining information identifies any person or is of a level of sensitivity which makes its release contrary to the public interest. Accordingly, my decision in relation to the remainder of this information remains unchanged.

Conclusion

- 88 For the reasons given above, I determine that:

- exemptions claimed pursuant to s31 are affirmed;
- exemptions claimed pursuant to s35 are set aside;

- exemptions claimed pursuant to s36 are varied; and
- the Department's search for information was sufficient.

89 I apologise to the parties for the considerable delay in finalising this external review.

Dated: 16 May 2025

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

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

(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.

(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 (1) 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 Person

(1) 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 –
 - and
 - (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;
 - (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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

45. Other applications for review

(1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –

- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
- (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or

- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3), has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

(2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –

- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
- (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

33. Public interest test

- (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.

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.



Right to Information Act Review

Case Reference: R2403-005

Names of Parties: Selby Cooper and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s30, s36, s37

Background

- 1 On 31 October 2023, Mr Selby Cooper (the Applicant) submitted an application for assessed disclosure and paid the applicable fee under the Right to Information Act 2009 (the Act) to the Department of State Growth (the Department).
- 2 The request was as follows (verbatim):

Can the department please provide for each location the mobile speed cameras have been operated:

- *The precise location including the viewing area of the camera.*
- *Crash history considered for that precise location*
- *Infrastructure considerations at that precise location*
- *Any/All information relating to speeding levels at that precise location.*
- *Permits/ notices needed to deploy to each location.*

Additionally, The mobile speed cameras record public citizens and are subject to privacy and data security expectations. Can you provide, The latest version of source code for any system running in or analysing data / images from the cameras. Hardware breakdown of the cameras including any 3rd party systems that have access/transmit image or registration/ driver information.

An overview of where information is sent from the cameras, e.g. API [Application Programming Interface] call systems, and whether data captured by the cameras are used for data/AI/image

recognition training, saved in any location, if so provide images that pertain to this.

Please also provide full details of any components of camera hardware or software that have access to the internet.

- 3 On 22 January 2024, Ms Gabi Harvey, a delegate under the Act for the Department, issued a decision. Ms Harvey, after consulting with Sensys Gatso Australia (a company contracted to provide traffic offence detection services) pursuant to s36(2) and s37(2) of the Act, decided to release some of the information responsive to Mr Cooper's request and found the remainder to be exempt under the following sections of the Act:
 - section 30 – Information relating to the enforcement of the law;
 - section 36 - Personal information of a person; and
 - section 37 – Information relating to the business affairs of a third party.
- 4 Mr Cooper applied for internal review of the Department's decision on 31 January 2024. On 28 February 2024, Ms Tiahna Tomac, another delegate of the Department under the Act, issued an internal review decision which affirmed the initial decision in full.
- 5 On 19 March 2024, Mr Cooper applied to this office for external review of the decision. His application was accepted under s44 of the Act, on the basis he was in receipt of an internal review decision and his application for external review was made within 20 working days of receipt of that decision.

Issues for Determination

- 6 I must determine whether the information not released by the Department is eligible for exemption under ss30, 36, 37 or any other relevant section of the Act.
- 7 As ss36 and 37 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, if I determine that information is *prima facie* exempt under these 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 1.

Relevant legislation

- 8 Copies of ss30, 36 and 37 are at Attachment 1.
- 9 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 10 After receiving Ms Harvey's original decision, Mr Cooper emailed Ombudsman Tasmania on 25 January 2024 the following (verbatim):

I have submitted an RFI to the department of state growth concerning mobile speed cameras. Unfortunately a lot of the information regarding the cameras I sought particularly relating to reasonable expectations of privacy were exempt. Under either section 30 or commercially sensitive information.

I would like them to undertake an internal review of the information. I dont believe that releasing information about how the cameras process, store and transmit information could lead to not being able to enforce the law.

- 11 In support of his request for internal review, the applicant made the following submissions:

I also implore you to re-engage with sensys gatso to obtain all information that was requested.

Please undertake an internal review. Here are some of my thoughts I would like you to consider when undertaking the review.

Firstly, It is hard understand how the information is sufficiently detailed to present a security risk, and could be used to deconstruct the ATOEP [Automated Traffic Offence Enforcement Program] to identify potential areas of vulnerability, or attack points in the system. Which law are you using section 30 to protect? It was not specifically stated in the response.

In my understanding these systems are not deployed, operated or retrieved by police officers and I believe as such section 30 does not apply. Only the process of obtaining the information from sensys gatso once already captured could be considered part of official police business unless contracts exist [sic] or authorised officers exist that have not been disclosed.

How can the public have confidence in these machines ability to capture information if the department refuses to release any detail of their operation.

As for location information, a weak argument is presented. These sensors were deployed in the past at these locations. Any secrecy of redeployment in these locations is void as the public is already aware of such locations. I did not ask for a future deployment program or associated dates.

The sensors are also deployed in public spaces by non-authorised officers. As such are of interest to the public.

In regard to public interest tests on section 36 and 37, i must ask you to reconsider the following:

"Sensys Gatso has also indicated that Document 3 was prepared specifically for the Department as part of the ATOEP contract, with the intention that it would be used only by its intended audience, being Tasmanian Government personnel involved in the ATOEP. "The act very clearly states that information collected and held by the government is for the people. I find this to be very weak justification for not releasing said information.

Department's submissions

- 12 The Department was not required to provide any submissions in response to this external review, beyond the reasoning of its decisions. Extracts of these decisions are set out below.
- 13 In the original decision dated 22 January 2024, Ms Harvey noted:

In relation to your request for source code information, I note that the Department does not have in its possession source code or specific hardware componentry used to transmit/access the internet for exact details of API call systems. I therefore provide you with a 'nil return' with respect to this part of your request.

- 14 Regarding s30 – enforcement of the law, Ms Harvey set out that:

5. The information in issue is a system overview of the Automated Traffic Offence Enforcement Program ('ATOEP') prepared by Sensys Gatso for the Department (Document 3), as well as specific location data of mobile speed cameras (Document 5).

6. The information contained in Document 3 demonstrates the operational characteristics and complex design layout of the ATOEP. It also shows how the ATOEP, the Department and other government stakeholders (for example, Tasmania Police) interact within the traffic offence and enforcement framework.

7. In addition, Document 3 contains a high level of detail in the areas of software use, systems interfaces, technical integration, data management, data transfer protocols, and access management arrangement; [sic] all of which are critical to the ATOEP systems operation. For example, it details areas such as:

- Details of the managed services provided by Sensys Gatso.*

- Key personnel and responsibilities (both within Sensys Gatso and government).
- Network infrastructure and Sensys Gatso Australia back office diagrams showing software systems, databases, and interfaces.
- User permissions.
- End to end data flows.

8. In my view, this aggregated information is sufficiently detailed to present a security risk, and could be used to deconstruct the ATOEP to identify potential areas of vulnerability, or attack points in the system.

...

10. The information in Document 5 relevant to this exemption is the specific descriptions of each approved mobile speed camera location.

11. I am satisfied that the effectiveness of this method of detecting speed limit breaches would be prejudiced by the disclosure of specific locations, particularly as these locations are routinely revisited. Location is especially relevant to the effectiveness of a mobile speed camera in detecting speed limit breaches, as mobility is its key feature which separates it from a standard fixed camera.

12. I also note that there have been recent increases in reported camera operator abuse and intimidation by members of the public while conducting enforcement sessions. I therefore consider that disclosure carries the additional risk to camera operators performing their duties in the future. The identified sites were chosen using a merit-based assessment process. Accordingly, being required to change the sites to avoid abuse of operators is likely to influence the effectiveness of this method of detecting breaches of the law.

13. I have therefore made the decision to not disclose the columns providing the exact locations, however, road name, suburb, and municipality are being released.

15 Regarding s36 – personal information, Ms Harvey set out:

18. The personal information consists of the name and signature of two departmental employees, as well as the names of employees of external third parties, Sensys Gatso and Abley.

...

20. Section 36 also provides that if an application for third party personal information is made and the public authority decides

that disclosure of the information may reasonably be expected to be of concern to the third party, it is to, if practicable, and before deciding whether disclosure should occur, seek the views of the third party concerned.

21. I undertook consultation as required by the Act where I considered it would reasonably be expected to be of concern to that third party, and have taken the outcome of that consultation into consideration when making my decision

16 After considering the public interest test, Ms Harvey concluded:

35. Staff raised concerns about the release of their signatures. This was on the basis that release poses a risk to them and the Department, due to the potential for signatures to be copied and illegally used without their knowledge or consent. I consider the staff concerns about the release of their signatures to be reasonable, and that release of signatures in electronic format creates a genuine risk of misuse.

36. I also consider releasing this information to be contrary to the public interest on the basis that the potential for misuse of the information could undermine the integrity of the information. The Commissioner for Transport is a statutory position and holds significant powers and functions with respect to making decisions under relevant transport legislation. In this context, the signature of the delegate of the Commissioner demonstrates the authority to grant an exemption to the Road Rules 2019. As such, the signature of the Commissioner or his delegate carries significant weight. The consequences for misuse of the individual's signature in this context is therefore serious and could lead to production of fraudulent documentation.

...

39. Third party consultation was undertaken with the Sensys Gatso staff identified in the documents. The result of this consultation was that all of the staff expressed concern over the release of their personal information. They noted that privacy is particularly important to their staff given the nature of their business, and identifying them to the general public may introduce a potential threat to them personally.

40. I am of the view that Sensys Gatso's employee's concerns about the release of their personal information are reasonable, and that the release of their information has potential to harm the interests of the affected individuals by exposing them to unjustified public attention (Item (m), Schedule 1). As noted above, this is not merely a hypothetical concern. There has

been a recorded increase in abuse and intimidation by members of the public against camera operators in recent times.

41. I have also considered that there is no contextual benefit (Item (d), Schedule 1) or greater understanding that could be gained from the release of this information into the public domain. I have therefore concluded that the release of this information, against the individuals' express wishes, is contrary to the public interest.

- 17 Regarding s37 – information relating to the business affairs of a third party, Ms Harvey set out:

23. The information relating to this exemption is a system overview of the ATOEP prepared by Sensys Gatso for the Department (Document 3). The information includes technical designs and operational information that are proprietary and would likely cause commercial competitive disadvantage to Sensys Gatso Australia if released

24. Section 37 also provides that if an application for third party business information is made and the public authority decides that disclosure of the information may reasonably be expected to be of concern to the third party, it is to, before deciding whether disclosure should occur, seek the views of the third party concerned.

25. I have undertaken the required consultation under the Act and have taken the outcome of that consultation into consideration when making my decision.

- 18 After considering the public interest test, Ms Harvey concluded:

42. Results of the consultation with the third party indicated that the information in issue is technical designs and operational information which are proprietary to Sensys Gatso. Sensys Gatso has indicated that, if released, this information would cause it a commercial competitive disadvantage.

43. Sensys Gatso has also indicated that Document 3 was prepared specifically for the Department as part of the ATOEP contract, with the intention that it would be used only by its intended audience, being Tasmanian Government personnel involved in the ATOEP. I further note that the sector Sensys Gatso operates within is highly technical and specialised, making it more likely that proprietary information like that contained in Document 3 is not available to its competitors, and if made so, would have a detrimental effect on its competitive position.

45. I am also of the view that the release of third-party business information, against their express wishes, would be a breach of trust that would significantly impair the Department's relationship with Sensys Gatso. I consider that such conduct would be very likely to impair not just the Department's relationship with that third party, but the Department's reputation more generally, thereby diminishing its capacity to engage effectively with other third parties. I also consider that such conduct could impair the reputation of the Crown more broadly, affecting the capacity of other public authorities to obtain critical commercial information from third parties, or enter into cooperative arrangements of benefit to the State (Item (n), Schedule 1).

46. In addition, I do not consider it to be appropriate for third parties to have their commercial position put in jeopardy simply by virtue of their engagement with government.

- 19 In her internal review decision dated 28 February 2024, Ms Tomac determined:

I note that in your application for internal review, you have requested the Department re-engage with a third party, Sensys Gatso, to obtain information requested in your original application. A person's right to be provided with information pursuant to the Act is only in respect of information that is in the possession of a public authority. As such, if the Department does not already hold the information relevant to the scope of the application at the time the application is received, it is not required to seek the information.

...

Having concluded my review, I have made the decision to uphold the original decision in full.

Analysis

- 20 The Department seeks to exempt information in three of the five documents found to be responsive to Mr Cooper's application. It provided an *RTI Summary of Search Documents* table as part of its original decision, which allocates reference numbers to each document. The information was provided in a bundle of documents of 108 pages in length. For ease of reference, I will use the Department's document and page numbering system to refer to the information in my Analysis.

Section 30 – Information relevant to the enforcement of the law

- 21 Section s30(1) of the Act provides for the exemption of information relating to enforcement of the law. The Department has claimed

information is exempt under s30(1)(c). In order to find that information is exempt under this 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; and
 - that disclosure would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.
- 22 Disclosure of relevant methods or procedures would be reasonably likely to prejudice their effectiveness if, on reasonable grounds, it is found that there is a real risk of such prejudice.¹ There must be a real risk of prejudice; more than a mere possibility.²
- 23 Therefore, even if I am satisfied that the release of information would disclose relevant methods or procedures, unless I am also satisfied that its disclosure would have a real risk of prejudicing the effectiveness of those methods or procedures, the information is not exempt.

Document 3

- 24 The Department relied on s30(1)(c) to exempt pages 2 - 33 of Document 3, a system overview of the Automated Traffic Offence Enforcement Program (ATOEP) prepared by Sensys Gatso Australia (Sensys Gatso). The Tasmanian government has a contract with Sensys Gatso to provide traffic enforcement services, including the ATEOP.
- 25 Parts of Document 3 contain information which sets out the operational characteristics and the design layout of the ATOEP. The information provides details on the software used, the ATOEP system interfaces, data management, access management arrangements and data transfer protocols. Document 3 also shows how the ATOEP system and government stakeholders such as Tasmania Police and the Department interact.
- 26 Prejudice to the effectiveness of law enforcement methods and procedures is more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine, methods or procedures.³
- 27 The internal design structure and operational characteristics of the ATOEP are not routinely available to the public. I consider that the release of sections of Document 3 would disclose methods and procedures for preventing, detecting and investigating breaches of the

¹ Re Timothy Edward Anderson and Australian Federal Police [1986] AATA 79, [38] (Anderson and AFP).

² Re Timothy Edward Anderson and Department of Special Minister of State (No 2) [1986] AATA 81, [66]- [68].

³ Re Timothy Edward Anderson and Australian Federal Police [1986] AATA 79, [38] (Anderson and AFP)

law regarding traffic offences. I also consider that the disclosure of sections of Document 3 would be reasonably likely to prejudice the effectiveness of ATOEP law enforcement methods, due to the release of details which are not otherwise available to the public and may lead to vulnerabilities in the system or enable people to evade detection.

- 28 The risk of cyber-attacks in contemporary society is ever present, especially in law enforcement and to databases that contain large volumes of personal data. Disclosing sections of Document 3 could enable law enforcement action to be countered or interfered with by way of hacking or the development of technological means to evade detection of offences. The disclosure of these sections of Document 3 would be reasonably likely to prejudice the effectiveness of the ATOEP.
- 29 Consequently, I determine that the following sections of Document 3 are exempt from release under s30(1)(c):
 - page 11 – 3.4 Operator Safety. The final heading and paragraph under this heading;
 - page 12 – 3.5 Scheduling and Session Operations. The two tables under this heading, and dot point five of the list that follows;
 - page 13 – the two tables;
 - page 14 – 3.6 CCTV and Security Systems. All information below the heading;
 - page 15 – 3.7 Vehicle Housing Units. All information below the heading (except the vehicle picture);
 - page 16 – 3.8 Type A Trailer Housing Units. All information below the heading (except the vehicle picture);
 - page 17 – 3.9 Type B Trailer Housing Units. All information below the heading (except the vehicle picture);
 - page 18 – 3.10 Speed Enforcement Camera. The graphic below first paragraph. 3.10.1 T-Series with RT4. All information below the heading and the picture;
 - page 19 – all information below the headings;
 - page 20 – 3.11. The graphic below the first paragraph. 3.11.1 Information below the heading except for the words *The DDS generates three offence types: Seatbelt (driver), seatbelt (passenger), and mobile phone. Incident data generated by the DDS includes:*
 - pages 21-22 – the screenshots;
 - page 24 – the screenshot under 4.3;
 - page 25 – the diagram;

- page 27 – the two diagrams and the paragraph below the 5.2. VPN heading;
 - page 28 – the screenshot;
 - pages 29-30 – 5.5 User Permissions and Software Access Overview. All information after the heading and first sentence;
 - page 30 – the screenshots;
 - page 31 – the diagram; and
 - page 33 – all information.
- 30 The remaining information in Document 3 is not exempt and should be released to Mr Cooper, subject to my consideration of ss36 and 37 below.

Document 5

- 31 Document 5 is a table containing data about the past locations of mobile traffic offence detection equipment in Tasmania. The Department released some fields but claimed that the location description, latitudinal and longitudinal coordinates and Google Maps link columns were exempt under s30(1)(c). This was on the basis that it is common for mobile traffic offence detection equipment to be placed in the same locations for future enforcement activities, which could reduce the effectiveness of prevention of road safety offences and increase the chance of interference with equipment.
- 32 Document 5 does not contain past or future dates or times that this equipment has been used, or will be used, in the listed locations. If and/or when these sites may be used again would remain unknown to members of the public and I consider that this decreases the likelihood of prejudice to the effectiveness of that method of detecting breaches of the law.
- 33 The Department commissioned transportation consultants Abley to create the State of Tasmania Speed Camera Program, Site Selection and Prioritisation Method report. This was released in full to Mr Cooper as Document 2 and contained the following:

Recent studies from Australia and beyond have shown that corridor speed cameras are an effective tool in managing speed and reducing Fatal and Serious Injury (FSI) crashes across the network.

...

It was assumed that if a camera was to be installed to reduce the number of FSI crashes then the camera is best installed on the segment with the highest crash density.

- 34 Accordingly, there is a policy of placing Tasmanian speed cameras in locations to deter the public from committing traffic offences in key problem areas thereby aiming to reduce the number of serious crashes across the network. I consider that the public being aware that mobile speed cameras have operated in those locations could reduce the commission of offences in these areas of concern and may actually reduce the likelihood of such crashes.
- 35 The Department raised the potential increased risk of abuse and intimidation of Tasmanian speed camera operators while conducting enforcement sessions and interference with cameras, in determining that this information should be exempt in Document 5. It set out that such conduct has occurred previously and is likely to recur. As set out above, however, the release of location descriptions would not inform the public of what locations may be reused, and the proposed dates and times of future mobile speed camera operations at those sites. Therefore, I do not consider that the potential risk to mobile speed camera operators and equipment would be likely to increase significantly from present levels were this information to be released.
- 36 The disclosure of the location description of previous mobile speed cameras may disclose a method or procedure used in matters relating to past breaches of the law, however the fact that these locations may at some undisclosed time and date in the future be used again as mobile speed camera locations is unlikely to prejudice the effectiveness of that method.
- 37 On balance, I am not satisfied that the location description column in Document 5 is exempt under s30(1)(c). This data should be released to Mr Cooper.
- 38 Accordingly, I am satisfied that the GPS Latitude, GPS Longitude and Google Maps Link columns in Document 5 are exempt under s30(1)(c) and should not be released to Mr Cooper.

Section 36 – Personal Information of person.

- 39 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than Mr Cooper. Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 40 The s36 exemption was applied to the signature of two Departmental employees, as well as the names of four employees of the third party company, Sensys Gatso. It is clear that the information falls within the definition of personal information in s5 of the Act and there is no suggestion that the persons concerned have been dead for more than

25 years. I consider the information is prima facie exempt under s36 of the Act.

Public interest test

- 41 That the information may be found to be personal information and prima facie exempt does not preclude it from release if doing so would not be contrary to the public interest. Accordingly, I must consider the matters in Schedule 1 of the Act and any other relevant consideration to determine whether this information should be released.

Public officers and employees

- 42 It has been my consistent position, as well as standard Australian practice, that the personal information of public officers which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether a public officer is a current or former employee is irrelevant to the assessment under s36 of the Act
- 43 I considered the release of the signatures of delegates in my previous decision of *Bell and Department of State Growth*⁴, in which similar arguments were advanced to that of the Department here:

I acknowledge, and share to some extent, the Department's concern regarding the potential for misuse [of signatures] but also note that the potential is always present, in every document signed in every circumstance. I agree that a signature is used to confirm the acceptance of obligations, such as signing a contract, and as such it is an important component of any document. The use of a signature demonstrates, in a manner that a name alone cannot, that a document has been properly executed by those with authority to do so, which is a significant matter of public interest.

I have considered the Department's submission in conjunction with Schedule 1 of the Act and consider the following matters to be most pertinent:

- *matter (a) – the general need for government information to be accessible – weighs in favour of disclosure;*
- *matter (g) – whether the disclosure would enhance the scrutiny of government administrative processes – weighs in favour of disclosure, to determine for example if documents are signed by the named person or a proxy;*

⁴ *Anthony Scott Bell and Department of State Growth* (August 2024) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- *matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – weighs against disclosure for the reasons advanced by the Department.*
- 44 On balance, I am not satisfied that the relevant signatures are exempt under s36 or that their release would be contrary to the public interest. The signatures of the two Departmental officers should be released to Mr Cooper.
- External professionals*
- 45 The Department has applied s36 to exempt to the names of four Sensys Gatso non-executive employees who authored, reviewed and issued the information contained in Document 3.
- 46 Pursuant to the requirements in s36(2) of the Act, Ms Harvey undertook third party consultation with the Sensys Gatso staff identified in Document 3, all of whom expressed concern about the release of their personal information. The employees said that, given their field of employment, identifying them to the public may increase potential threats to their personal safety.
- 47 The Department has noted the recent increases in reported camera operator abuse and intimidation by members of the public while conducting enforcement sessions.
- 48 I consider that matter (a) *the general public need for government information to be accessible* is relevant but not a significant consideration here, as this is a small amount of third party information.
- 49 I also consider that matter (d) *whether the disclosure would provide the contextual information to aid in the understanding of government decisions* is relevant but, again, does not weigh significantly in favour of disclosure as this information would not provide such context or understanding.
- 50 I am most persuaded by matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals*, as I consider that there is a genuine risk of harm attendant on the release of the names of these individuals.
- 51 Accordingly, I am satisfied that the names for the four employees are exempt under s36 of the Act and are not required to be released to Mr Cooper.

Section 37 – Information relating to business affairs of third party

- 52 Section 37(1) of the Act provides that information relating to the business affairs of a third party acquired by a public authority or Minister is eligible for exemption from disclosure if it is:
- a trade secret of a public authority; or*

b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

- 53 The meaning of competitive disadvantage was considered by the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman*:⁵

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.⁶

...

The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage.⁷

- 54 The Court interpreted the meaning of ‘likely’ to be a *real or not remote chance or possibility, rather than more probable than not*.⁸
- 55 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*⁹, it was held the Ombudsman is not subject to the supervisory jurisdiction of the courts. I have since considered and taken legal advice on the position in Tasmania. I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to section 33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Supreme Court of Tasmania.
- 56 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases competitive disadvantage and likely to expose, all of which are instructive and with which I agree.
- 57 The Department withheld pages 2-33 of Document 3, a system overview of the ATOEP prepared by Sensys Gatso, on the basis that it was exempt under ss37(1)(b). Ms Harvey decided that [t]he information includes technical designs and operational information that are

⁵ [2010] TASSC 39

⁶ See Note 5, per Porter J at [52]

⁷ See Note 5, per Porter J at [59]

⁸ See Note 5, per Porter J at [41], applying *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 31, per Deane J at 346; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 per Heerey J at [91]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 [750]

⁹ [2017] NSWCA 275 (24 October 2017).

proprietary and would likely cause commercial competitive disadvantage to Sensys Gatso Australia if released. This was based on a submission from Sensys Gatso in consultation undertaken under s37(2) to obtain its view regarding the release of this information.

- 58 Document 3 on page 11 contains the following indication of content excluded from that document:

1.2 Exclusions:

This document excludes:

- *Detailed technical and functional specifications of equipment, systems, and networks.*
- *Physical and electronic security devices, standards, and procedures.*

- 59 As Sensys Gatso has clearly excluded *technical and functional specifications*, I am not persuaded that the report could be eligible for exemption on the basis that it includes such material and that this could cause competitive disadvantage. The Department has not discharged its onus under s47(4) to show why this would be the case, or why it accepted Sensys Gatso's submission. Accordingly, I find that no information is exempt under s37(1)(b).

- 60 The information should be made available to Mr Cooper.

Preliminary Conclusion

- 61 For reasons set out above, I determine that:

- exemptions claimed by the Department pursuant to ss30(1)(c) and 36 are varied; and
- exemptions claimed by the Department pursuant to s37(1)(b) are not made out.

Submissions to the Preliminary Conclusion

- 62 As the above preliminary decision was adverse to the Department, it was made available to it on 2 May 2025 under s48(1)(a) of the Act to seek its input prior to finalising the decision.
- 63 The Department provided my preliminary decision to Sensys Gatso, to enable it to provide submissions in relation to concerns regarding the competitive disadvantage it might be exposed to under s37. It provided these submissions on 19 May 2025.
- 64 On 28 May 2025, my office also received submissions from the Secretary of the Department, Mr Craig Limkin.

Department

- 65 The Department accepted my proposed determination in relation to Document 5, column titled “Location Description” and indicated that it had already released this additional information to the applicant.
- 66 The Department submitted in relation to s30(1) of the Act:

I have considered the preliminary reasons and have consulted with the department’s Chief Information Officer in relation to the potential cybersecurity risks that release of the proposed information would present to the Department. Accordingly, I consider the following information should continue to be withheld under s 30:

- *Document 3:*
 - *page 24 – 4 Adjudication System, the diagram on the top left of the page; and*
 - *page 29 – 5.4 Pre-Verification (Speed Offences), the diagram under the paragraphs.*

The department’s Chief Information Officer has raised the following specific concerns with me:

- a) *page 24 – the diagram under 4 Adjudication System shows interfaces, data import and management pathways tailored to suit the requirements set by the Tasmanian Government. Explicit knowledge of this would allow third party target areas for cyber intrusion; and*
- b) *page 29 – the diagram under 5.4 Pre-Verification (Speed Offences) likewise shows the functional interfaces, data import and management pathways used in the screening of potential infringements. This also exists outside of the department’s secure environment and knowledge of it would allow third party target areas for cyber intrusion.*

Conclusion

On the above bases, release of this information would have a real risk of prejudicing the effectiveness of the relevant methods and procedures and should be withheld under s 30.

- 67 The Department further argued, in relation to s36 of the Act that:

I respectfully submit that while this may be a longstanding position of your office, the risk of misuse of personal information (including signatures) in a digital society is far more present now than even in the recent past. From a review of recent decisions by the Office of the Australian Information Commissioner (OAIC) it also does not appear to still be the standard Australian

practice to take such a wholesale approach to release of public officer names, except for where there are specific or unusual circumstances. For example, in a decision directly relevant to the issue at hand – release of staff signatures – the OAIC found that disclosure of signatures of even SES level officers was of minimal public interest given that, in that case, the unredacted parts of the documents included the name and role of the staff members and the fact that they signed the minutes of the meetings.¹⁰

I further submit that there are specific circumstances in this instance justifying exemption. There is an elevated risk in this space due to ongoing public campaigns (for example, active social media campaigns) that seek to target, harm, and intimidate individuals associated with the ATOEP. I therefore submit that exempting this information reflects contemporary Australian practice, as the OAIC recently found that signatures were not to be disclosed in a similar factual scenario, where a public officer held concerns with release due to the contentious nature of their work.¹¹

...

I have sought input from the Department's Chief Information Officer on this point. From a cybersecurity perspective, it is strongly advised that these signature blocks should not be released. These forms of electronic identifiers, particularly where they are linked to specific names and roles, can be easily copied, and then used maliciously by a third-party. There are numerous examples of this happening maliciously. There is also ample evidence that the increased use of technology to 'scrape' publicly accessible data poses significant cybersecurity risks for both the Department and identified individuals.¹² The risk is increased when identifying information is released in a combined format (for example, name, signature and title in this instance). While these can be sourced elsewhere, each additional release adds to the risk, and it is not acceptable contemporary cybersecurity practice to release this information deliberately, and in a combined format. The omnipresent

¹⁰ 'AEH' and the Department of Veterans' Affairs (No. 2) (Freedom of information) [2023] AICmr 75 (28 August 2023) ['AEH' and the Department of Veterans' Affairs \(No. 2\) \(Freedom of information\) \[2023\] AICmr 75 \(28 August 2023\)](#) at [59]

¹¹ 'AUT' and Department of Home Affairs (No. 2) (Freedom of information) [2025] AICmr 57 (31 March 2025) https://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2025/57.html?context=1;query=signatures;mask_path=au/cases/cth/AICmr

¹² Office of the Australian Information Commissioner, joint statement on data scraping <www.oaic.gov.au/newsroom/global-expectations-of-social-media-platforms-and-other-sites-to-safeguard-against-unlawful-data-scraping>.

potential for misuse is not a justification for demanding practices that increase the risk of that misuse actually occurring without significant countervailing benefit to the public interest.

Sensys Gatso

68 Sensys Gatso made submissions which maintained its preference for the entirety of Document 3 to be found to be exempt under s37. However, in the alternative, it provided an annotated copy of Document 3 setting out specific redactions it requested for the following reasons:

1. *Part of the redacted information provides visibility to the technical and operational solution from which a malevolent actor could subsequently exploit. This exploitation could be in the form of attempted security breach or potential interventions to the enforcement operations. This includes technical flow charts, schematics, the addresses of SGA [Sensys Gatso Australia] operations in Tasmania and even the SGA stored file location identifiers.*
2. *The redacted information can be used to construct a profile of the SGA commercial in confidence solution it is delivering to the State of Tasmania. This profile would place SGA at a disadvantage for existing and future contract engagement in Tasmania (and the rest of Australia).*
3. *The intended audience of this document is nominated in section 1.3 of the document as SGA, SGG, DSG, Tasmania Police and other Tasmanian Government personnel involved in the ATOEP only.*
4. *This document is marked as Sensys Gatso Confidential and needs to be treated accordingly, on a need-to-know basis. Exposing this information could be considered as a breach of the Tasmanian Government's obligations as part of the ATOEP operations.*

Further Analysis

- 69 In relation to s30, I am persuaded that the limited additional information requested by the Department to be exempt would disclose relevant law enforcement methods and would create a real risk of prejudicing their effectiveness.
- 70 For the same reasons as I set out at paragraphs 24 to 28 of this decision, the following additional information in Document 3 is exempt under s30 of the Act:
- page 24 – 4 Adjudication System, the diagram on the top left of the page; and

- page 29 – 5.4 Pre-Verification (Speed Offences), the diagram in this section.
- 71 In relation to s36, I have carefully considered the Department's submissions regarding the signatures of staff members associated with the ATOEP in Document 1. I have also reviewed recent decisions by the Office of the Australian Information Commissioner, particularly '*AEH and the Department of Veterans' Affairs (No. 2) (Freedom of information)* [2023]¹³', which addressed concerns about disclosing staff signatures due to the contentious and emotionally charged nature of their work. In that case, both the staff and the Department raised concerns that disclosure could expose staff to targeted harassment.
- 72 In '*AEH*' the Australian information Commissioner considered whether the staff names and signatures were publicly known or linked to the subject matter. The Commissioner found that the individuals were only likely to be recognised in connection with the documents by a limited group within the Department, not the broader public.¹⁴
- 73 I am persuaded in this case that similar concerns apply. I accept the contentious nature of work the Department undertakes regarding the ATOEP and that safety risks are heightened due to this. I acknowledge the fact that the staff members names and position titles are visible in the unredacted parts of the documents, making the additional information provided by the release of signatures minimal. Furthermore, the presence of the redaction over the signature block indicates the document has been signed by the relevant public officers, even if the signature itself is not provided.
- 74 Accordingly, I have reconsidered the public interest test regarding signatures and attach greater weight to matter (m) regarding the harm to the interests the two relevant staff in Document 1. I find that disclosing their signatures would be contrary to the public interest and they are exempt under s36.
- 75 In relation to s37, I have carefully considered the submissions from Sensys Gatso, particularly focusing on its second point that the redacted information could be used to create a commercial profile of the ATOEP model designed and delivered to the State of Tasmania.
- 76 The information in Document 3, which Sensys Gatso has claimed is exempt under s37, contains the names of software systems and the network infrastructure it uses in its Tasmanian ATOEP business. Sensys Gatso operates in a highly technical and specialised field and I accept that these software programs and their interaction with the hardware used by Sensys Gatso are not publicly available. Accordingly, I accept

¹³ '*AEH and the Department of Veterans' Affairs (No. 2) (Freedom of information)* [2023]

AICmr 75 (28 August 2023)

¹⁴ See Note 13 at [27]

that disclosure could expose Sensys Gatso to competitive disadvantage in future commercial dealing with the State of Tasmania and other governments. This information is *prima facie* exempt under s37(1)(b).

- 77 Similarly, I consider that the release of the addresses of the Sensys Gatso Tasmania offices could expose the company to competitive disadvantage, due to the reduced ability to secure its premises. Sensys Gatso has removed its Tasmanian addresses from the public domain following a recent increase in reported camera operator abuse and arson attacks on its mobile speed camera infrastructure. The real risk of damage to its places of business could render it unable to provide contracted services.
- 78 I am satisfied that there is a real possibility and not a remote chance of competitive disadvantage to Sensys Gatso in relation to the release of its address and this information is also *prima facie* exempt under s37(1)(b).

Public interest test

- 79 I now turn my attention to assessing the public interest test under s33 and determining whether, after taking to account all relevant matters and at least those in Schedule 1, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt.
- 80 Matter (a) – the general public need for government information to be accessible – was not identified by the Department or Sensys Gatso as relevant. I find matter (a) relevant and weighs in favour of disclosure, as it is in line with the object of the Act as set out in s3 and so will always be a relevant matter to be considered.
- 81 Matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – was identified by the Department as weighing against disclosure, as was matter (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. I agree these matters weigh against disclosure as the sector that Sensys Gatso operates within is specialised, technical and subject to security concerns due to its contentious nature.
- 82 Matter (x) – whether the information is information related to the business affairs of a person which is generally available to the competitors of that person – was identified the Department as weighing against disclosure. The internal software design structure and operational characteristics of the ATOEP are not routinely available to the public or Sensys Gatso's competitors, and I agree that this matter weighs against disclosure.
- 83 The public interest test requires a consideration of competing factors, as not all of those factors have equal weight when applied to the issue in

question. The caveat provided, that detailed technical and functional specifications were excluded from Document 3 remains a relevant consideration in relation to the sensitivity of the document and any potential for competitive disadvantage.

- 84 I have not accepted all the redactions to Document 3 that Sensys Gatso has proposed. While I am satisfied that this information would not otherwise be available to its competitors, any likely competitive disadvantage regarding certain innocuous or non-technical information would not be of any significance. Other information relating primarily to the Department's systems or integrity safeguards would also not be contrary to the public interest to disclose.
- 85 Overall, after considering all relevant matters, I determine that the disclosure of some of the information in Document 3 would be contrary to the public interest. This information is exempt under s37(1)(b). The remainder of Document 3, if I have not previously found it to be exempt, should be released to Mr Cooper.
- 86 Accordingly, the following additional information in Document 3 is exempt under s37 of the Act:
 - page 2 and throughout – all references to the addresses of Sensys Gatso's Tasmanian offices;
 - page 3 and throughout – the information in the Document Control table beside Location; and the term and definition following CCTV in the *Terms and Abbreviations* table;
 - page 4 and throughout – all references to the data in *Doc No* column of the Referenced Documents table (except "DA 2351" and "DA 2442"), and all data in *Location* column (except for the word "External");
 - page 5 and throughout – Table of Contents – all references to the terms in the first and fifth words after 3.5.1, third word after 3.11 and the fourth word after 3.12.4;
 - page 6 and throughout – Table of Contents – all references to the terms in the fourth word in 4.2 and the third word in 4.3;
 - page 8 – all text in the graphic under the heading 2. *ATOEP System Introduction*;
 - page 21 – the first sentence following the heading 3.12.2 (except for the words "CCAT is used to");
 - page 24 –the text in brackets in the first paragraph of text beside the graphic;
 - page 25 – the second sentence of the second paragraph of text under the heading 4.5 *Distracted Driver Data Handling* (except for the first four words and final word), and the third paragraph (except for the first seven words and final eight words);

- page 27 – the second sentence of the first paragraph of text under the heading 5.3 (except for the final five words);
- page 28 – the final seven words of the third sentence under the heading 5.3.1 *Session and Site Databases*;
- page 29 – the graphic under the heading 5.4 *Pre-Verification (Speed Offences)*; and
- page 31 – the eleventh to the fifteenth words in the second sentence of the examples column of the “Site Details” row of the table under the heading 5.6.2.

Conclusion

87 In accordance with the reasons set out above, I determine that:

- exemptions claimed pursuant to s36 are affirmed; and
- exemptions claimed pursuant to ss30 and 37 are varied.

88 I apologise to the parties for the delay in finalising this decision.

Dated: 24 June 2025 (re-issued to make minor corrections pursuant to s48(2) of the Act on 27 June 2025 and 4 July 2025)



Richard Connock
OMBUDSMAN

Attachment 1
Relevant Legislation

Section 30 Information relating to enforcement of the law

(1) 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 (1) 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 1 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 36 Personal information of a person

- (1) 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; or

- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 37 - Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (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 substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
 - (d) notify the third party that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information applied for; and
 - (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
 - (c) inform the third party of –
 - (i) its 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 third party under subsection (3) –
 - (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43, 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 working days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

- (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.

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.



Right to Information Act Review

Case Reference: R2312-017, R2312-018, R2312-019

Names of Parties: W, X, Y and City of Launceston

Reasons for decision: s48(3)

Provisions considered: s36 and s37

Background

- 1 The Building Better Regions Fund was a federal grant program that provided funding for infrastructure projects and community development throughout regional Australia. On 19 December 2019, the State Coordinator General's office applied to the Federal Government for funding through the Building Better Regions Fund grant program on behalf of the City of Launceston (Council).
- 2 On 11 October 2023, the primary applicant in this matter applied for assessed disclosure under the *Right to Information Act 2009* (the Act) to Council. As part of this application, the primary applicant requested Council's application for \$10 million through the Building Better Regions Fund grant program (the BBRF application).
- 3 On 6 December 2023, Council's Acting Chief Executive Officer, Mr Shane Eberhardt, issued a decision to the primary applicant to release the BBRF application in full (with the exception of the redaction of one telephone number on page 20).
- 4 On 20 December 2023, W, X, and Y (the applicants in this matter) applied for the external review of Mr Eberhardt's decision to release the substantial majority of the BBRF application to the primary applicant.
- 5 This application for external review was accepted pursuant to s45(2)(a) of the Act on the basis that W, X and Y were persons who were required to be consulted under s37(2) but Council had not formally undertaken this consultation.
- 6 My office requested that Council consult with the applicants in accordance with s 37(2) of the Act, as it had failed to do so prior to issuing its 6 December 2023 decision, and to advise whether this changed its decision.

- 7 After consulting with the applicants as requested, Council issued a fresh decision to each of them on 15 March 2024. This affirmed its 6 December 2023 decision to release the substantial majority of the BBRF application to the primary applicant.
- 8 I note that Ombudsman Tasmania has received two further applications for external review from other parties objecting to the release of the BBRF application. This decision will consider whether the BBRF document should be released with reference to submissions made by W, X and Y only. Decisions on the other two applications will be issued simultaneously, however, to ensure consistency.
- 9 These three applications are being handled jointly, as the parties are all connected and made identical applications for review at the same time.

Issues for Determination

- 10 I must first determine whether the information proposed to be released by Council is eligible for exemption under ss36 or 37, or any other relevant section of the Act.
- 11 As ss36 and 37 are contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under either ss36 or 37, 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 1.

Relevant legislation

- 12 Copies of ss36 and 37 are at Attachment A.
- 13 Copies of s33 and Schedule 1 are also attached.

Submissions

The Applicants

- 14 W, X, and Y made the following brief submissions supporting their position that the BBRF application should not be made available to the primary applicant:

We request a review based on the following reasons:

We weren't given prior notice

The information identifies the three of us personally

The information if released may expose [business name] to competitive disadvantage.

Council

- 15 Council did not provide substantive submissions relevant to this external review, however in its 15 March 2024 decision it did provide:

Having considered the abovementioned submissions against my decision of 6 December 2023 and the provisions of the Act, I am not persuaded that the information is exempt from release.

Accordingly, I affirm my decision that the BBRF Application is not exempt from release and is to be released to the [primary] applicant in full [other than the phone number contained on page 20 of the BBRF application].

Analysis

Section 36 – Personal Information of a Person

- 16 For information to be exempt under s36 of the Act, it must reveal the personal information of a person other than the applicant. Section 5(1) of the Act defines personal information 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;*
- 17 The applicants submit that the BBRF application *identifies the three of us personally*. Upon reviewing the BBRF, I cannot find any explicit references to any of W, X or Y. Accordingly, it appears this submission is based upon references to the previously undisclosed site for the project detailed in the BBRF application, which the applicants either own, or manage businesses which operate from it (the previously undisclosed site). The inference being that the release of information revealing this site will identify the applicants.
- 18 For information to be *prima facie* exempt from disclosure under s36 of the Act, it must be information that is about an individual. Such information is not required to include a person's name but must be about a person. It is a subtle distinction, however information that might make someone's identity reasonably ascertainable should not be conflated with information that is about an individual. References to some previously undisclosed sites for the project detailed within the BBRF application might make the identity of the W, X and Y reasonably ascertainable, however, this does not make the information about an individual. Accordingly, it is not information which aligns with the first part of the definition contained in s5(1). As such, I find that references to the previously undisclosed sites are not exempt from disclosure pursuant to s36 of the Act.
- 19 If I were to find otherwise, the identities of an extremely broad range of people, including business owners, their staff, and their customers, could be deemed reasonably ascertainable by the release of information identifying a business or a premises. It would frustrate the purpose of the Act, and its intention to *facilitate and promote, promptly and at the lowest*

reasonable cost, the provision of the maximum amount of official information, if I were to consider business information which is not about any individual as potentially exempt under s36 of the Act.

- 20 However, I will now consider whether information revealing undisclosed sites for the project detailed within the BBRF application are exempt from disclosure pursuant to s37 of the Act.

Section 37 – Information Relating to the Business Affairs of a Third Party

- 21 Information may be exempt from disclosure under s37(1) of the Act if *its disclosure under this Act would disclose information related to the business affairs acquired by a public authority or Minister from a person or organisation other than the person making the application under section 13 (the “third party”) and –*

- (a) *the information relates to trade secrets; or*
- (b) *the disclosure of the information under the Act would be likely to expose the third party to competitive disadvantage.*

- 22 The information subject to this external review does not contain trade secrets, and so I will only consider whether s37(1)(b) of the Act applies to information contained in the BBRF application.

- 23 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman [2010] TASSC 39*, Porter J held at [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.

- 24 At [59] Porter J added:

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

- 25 At [41] the Court interpreted the meaning of 'likely' to be a real or not remote chance or possibility, rather than more probable than not.

- 26 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour* it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales.¹ I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the

¹ [2017] NSWCA 275 (24 October 2017).

NSW Supreme Court applies in this jurisdiction due to s33 of the Ombudsman Act 1978, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

- 27 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 28 I am satisfied that references to the previously undisclosed sites relate to the applicant’s business affairs, as they relate to private businesses seeking funding from government.
- 29 On numerous occasions the BBRF application details an intention to refurbish the previously undisclosed site. These details are located in the following parts of the BBRF application:
 - the second sentence in the paragraph under the heading ‘Project Title and Description’ on page 3;
 - the third complete paragraph under the heading ‘Detailed project description and Key activities’ on page 4;
 - the seventh and eighth paragraphs under the heading ‘Project outputs’ on page 6;
 - the fourth sentence of the first paragraph under the heading ‘Project management’ on page 7;
 - the third, fourth and fifth sentences of the fourth paragraph under the heading ‘Project management’ on page 7;
 - the second, fifth and sixth boxes on page 8;
 - the third box on page 9;
 - the address listed under the heading ‘Project site 2’ on page 10;
 - the two words under the heading ‘Project site name’ in the second box under the heading ‘Project geolocation’ on page 10;
 - the latitudinal and longitudinal figures in the second box under the heading ‘Project geolocation’ on pages 10 and 11;
 - the first 3 boxes on page 14;
 - the eighth sentence of the first paragraph under the heading ‘Economic benefits of your project for the region’ on Page 15;
 - the fourth last sentence of the third paragraph under the heading ‘Economic benefits of your project’ on page 15;
 - the fourth line and second last line under the heading ‘Evidence to support claims’ on page 16;

- the second and fourth sentences of the second paragraph under the heading ‘Social benefits of your project for the region’ on page 16;
 - the last 2 sentences of the last paragraph under the heading ‘Social benefits of your project for the region’ on page 16;
 - the third sentence of the first paragraph under the heading ‘Capacity, capability and resources to deliver the project’ on page 17;
 - the second, fifth and seventh sentence of the second paragraph under the heading ‘Capacity, capability and resources to deliver the project’ on page 17;
 - the first, second and third sentences in the second paragraph under the heading ‘Impact of funding on your project’ on page 18; and
 - the fifth and ninth line under the heading ‘Project employment evidence’ on pages 19 and 20.
- 30 I accept that discussion of the possible refurbishment of the previously undisclosed site would cast doubt over the future operations of the business currently operating from it. Depending on prior communication of how these changes would impact them, there may also be concern or anxiety caused to this business’s employees and its clients.
- 31 However, for s37 of the Act to apply to exempt information from disclosure, I must be satisfied that the disadvantage that this business would be likely to suffer is one characterised by competition. An example of a situation where s37 of the Act might apply, would be to prevent the release of information that reveals a successful tender application, because if a competitor was in possession of such information, they may then be able to mimic strategy or tailor its own application accordingly.
- 32 I am not satisfied that the release of any of the information contained in the BBRF application would be likely to cause this business a disadvantage characterised by competition, such as the one described above. Changes to a business’s premises or functions do not necessarily cause competitive disadvantage, and this business has decided to alter the operation of their businesses with the assistance of government grant money. Without further detail about why the release of this information would actually cause a disadvantage characterised by competition, rather than disrupting a planned internal communication strategy, I do not consider information contained in the BBRF application to be exempt from disclosure pursuant to s37 of the Act.
- 33 Section 47(5) of the Act provides:

Where an external party seeks review of a decision by a public authority or Minister to disclose personal or business

information of that external party, the external party has the onus to show that there are grounds that the information should not be disclosed and it is open to the Ombudsman to overturn a decision if that onus is not discharged.

- 34 I am not satisfied that the applicants for external review have discharged that onus.

Preliminary Conclusion

- 35 Accordingly, for the reasons set out above, I determine that information in question is not exempt from disclosure pursuant to ss36 or 37 of the Act.

Submissions to the Preliminary Conclusion

- 36 As the above preliminary decision was adverse to W, X and Y, it was made available to them on 29 November 2024 under s48(1)(b) of the Act to seek their input prior to finalisation. No submissions were received by W, X or Y.
- 37 However, as mentioned earlier in this decision, Ombudsman Tasmania received two further applications for external review from other parties objecting to the release of information contained within BBRF application.
- 38 One of those applications for external review was made by Mr Chris Billing. On 10 January 2024 Mr Billing's legal representatives provided my office with a marked-up version of the BBRF application identifying 26 specific pieces of information which Mr Billing contended were exempt from disclosure pursuant to s37(1)(b) of the Act. Upon reviewing this information, I could see that it identified information of the same category that W, X and Y were objecting to the release of, namely information revealing the buildings that W, X and Y own and the businesses that they manage.
- 39 Despite my reservations about whether W, X, or Y have discharged their onus to establish why any information contained within the BBRF application should be considered exempt from disclosure under the Act, it is vital that a consistent approach is taken in relation to this information being considered in five concurrent external reviews.
- 40 Accordingly, I will restate my reasoning from my decision in Chris Billing and City of Launceston of 20 January 2025 and make identical findings as follows:

*Having reviewed the submissions and proposed exemptions [from Mr Billing], I can see that the release of this information would reveal an unannounced site for the proposed project detailed within the BBRF application. The release of this information has the potential to impact ongoing negotiations regarding that site. Due to this, I am satisfied that this information identified by Mr Billing is *prima facie* exempt pursuant to s37(1)(b) of the Act. This is because the*

information, if released, would be likely to cause Mr Billing a competitive disadvantage.

Public interest test

*For the purposes of this public interest assessment, I find it helpful to characterise the information identified as *prima facie* exempt pursuant to s37(1)(b) of the Act, as information revealing a previously undisclosed site for the project detailed within the BBRF application.*

I find that matter (a) - the general public need for government information to be accessible – is relevant and I weigh this matter in favour of disclosure.

I find that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. The project detailed within the BBRF application has been reported in Tasmanian media outlets previously and funding arrangements for this project are a matter of public interest. I am satisfied that the release of information revealing a potential site for the project would contribute to public debate about this matter.

I also find that matters (c) – whether disclosure would inform a person about the reasons for a decision, (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – and (f) – whether disclosure would enhance scrutiny of government decision-making processes – are relevant and weigh in favour of disclosure. The release of this information would inform the public about a project that has attracted government investment. However, the relevant information does not reveal information that explicitly explains why the Council was successful in attracting this investment over other projects, and so I only weigh these factors marginally in favour of disclosure.

However, I also find that Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. As I have discussed, the release of information revealing a potential site for the project detailed within the BBRF application would likely impact negotiations and the interests of individuals, and has the potential to harm these interests. Accordingly, I find that this matter weighs against disclosure.

I also find that matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – to be relevant and to weigh against disclosure. Should the release of information revealing

a potential site for the project detailed within the BBRF application impact upon negotiations Mr Billing is a party to, it would likely impact upon the likelihood of this project proceeding, and this could harm Council's interests.

Overall, it is a difficult balance to strike, however after considering the applicant's submissions in response to my preliminary decision, I am satisfied that it would be contrary to the public interest to release information revealing this unannounced site. I consider that the information marked up by Mr Billing was confined to the minimum necessary to remove reference to this site and is proportionate. Accordingly, the information annotated in the version of the BBRF provided by Mr Billing is exempt from disclosure pursuant to s37(1)(b).

Conclusion

- 41 For the reasons set out above, I determine that information is exempt pursuant to s37.
- 42 The remainder of the information is not exempt and should be released to the original applicant.

Dated: 20 January 2025



Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

Section 36 – Personal Information of a Person

(1) 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
- (i) during 20 working days after the notification of the decision; or
- (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 37 - Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "**third party**") and –
- (a) the information relates to trade secrets; or
- (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (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 substantial concern to the third party –
- the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f) , decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party 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, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
- (i) its 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 third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43 , 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 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

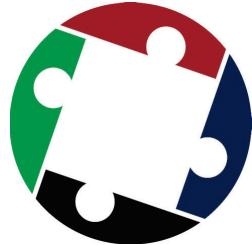
Section 33 – Public Interest Test

- (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.

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.

**Right to Information Act Review Case Reference:** R2412-012**Names of Parties:** Z and City of Launceston**Reasons for decision:** s48(3)**Provisions considered:** s36**Background**

- 1 Z (the Applicant) is a senior officer at City of Launceston (Council).
- 2 On 27 September 2024, Council received an application for assessed disclosure dated 20 September 2024 from a journalist (the Original Applicant) under the *Right to Information Act 2009* (the Act) seeking information in relation to correspondence sent and received through Z's email address at Council.
- 3 Specifically, the application sought:

I am seeking a copy of all emails [Z] sent and received to/from the email address [Z]@launceston.tas.gov.au between any/all staff at [Public Authority], Tasmania Police and, [Community Organisation].

I request all relevant emails between 19th September 2022 and 19 September 2024.

- 4 A search of records in the possession of Council identified information responsive to the request in the form of 277 emails and 106 attachments.
- 5 Council decided that disclosure of the information may reasonably be expected to be of concern to Z and so, in accordance with s36(2) of the Act, wrote to Z requesting they provide their view as to whether the information should be provided to the Original Applicant.
- 6 On 1 November 2024, Z emailed Council indicating that they did not consent to the release of any personal information to the Original Applicant.
- 7 On 21 November 2024, Council transferred part of the request to the Public Authority and those relevant 17 emails and seven attachments form no part of this external review.

- 8 On 26 November 2024, as a result of negotiations with the Original Applicant, Council confirmed the following information was not within the scope of the application:
 - personal information of individuals not directly related to the request; and
 - some information relating to the Community Organisation.
- 9 On 29 November 2024, Mr Sam Johnson, Chief Executive Officer of Council and its principal officer under the Act, made a decision on the application. He determined to release the majority of information to the Original Applicant in full. He applied some full or partial exemptions pursuant to ss31 (legal professional privilege) and 36 (personal information) of the Act. He proposed to release 38 emails and 12 attachments. Z was notified of this planned decision.
- 10 Z sought external review of the decision to release this information, as they considered it should be exempt pursuant to s36 of the Act. Their application was accepted pursuant to s45(1A)(a) of the Act.

Issues for Determination

- 11 I must determine whether the information Council is proposing to release is exempt under s36 or any other relevant section of the Act.
- 12 As 36 is within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s36, 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 1.

Relevant legislation

- 13 A copy of s36 is attached at Attachment 1.
- 14 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 15 In their application for external review dated 11 December 2024, Z submitted:

All of the emails sought by the [Original Applicant] ... were personal. That is, they had nothing whatever to do with any business of the Launceston City Council nor with my role/function... The emails did not contain any information within the meaning of the phrase in s3 of the Act – ‘information in the possession of a public authority’. That is, the information in the emails was not information ‘that relates to the official business of the authority’.

...

It is only ‘information in the possession of [the Launceston City Council]’ that can be the subject of an application; and such information, by reason of the definitional provision, is confined to information which ‘relates to the official business’ of the Council. Any information which does not relate to the official business of the Council is not information which can be the subject of an application under s13; and is not therefore information which can be released under the Act.

In addition, the emails contain personal information and they have not been collected by the Council for any of its purposes. The proper application of that which is set out in Schedule 1 to the Act (and bearing in mind the object of the Act as contained in s3) is such that there is no public interest in releasing to a journalist personal emails. This has nothing to do with good governance or anything else identified in s3.

I repeat that the emails are personal. I claim ownership of them. In any event they are confidential communications between me and others; and there is a duty on Council (and anyone else who comes into possession of them) to maintain that confidentiality. Breaching that confidence – by disclosing that information without lawful justification – exposes the wrongdoer to damages – including for mental distress and including aggravated damages.

By reason of the foregoing I contend that the decision of Mr Johnson is wrong and should be set to nought. The Ombudsman should exercise powers in s47(1)(k) to decide that the Council does not have any information which relates to its official business as sought by [Original Applicant]; or alternatively (if that is not accepted), that any such information is personal information which is not in the public interest to disclose...

Council

- 16 Council was not required to provide submissions in relation to this external review, as it had determined to release the relevant information. When it informed Z of this decision, it set out its view that:

The nature of the information to be provided is the content of a number of emails within the scope of the Application. In some cases, emails are to be provided in full. In other cases, emails are to be provided in a form where information determined to be exempt under section 36 of the Act or not within scope of the Application has been deleted.

Analysis

Preliminary issue

- 17 Before commencing my substantive analysis, I will address Z's submissions that this information could not be considered *in the possession* of Council as he does not consider that it relates to its official business.
- 18 Section 5(1) of the Act relevantly provides:

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

- 19 Section 5(3) expands on this definition:

... a public authority is taken to be in possession of information if the public authority is entitled to the information and it is not information in the possession of a Minister.
- 20 There is, in my view, no question that Council is entitled to, and therefore in possession of, emails sent or received through a Council email address. It holds this information and can easily retrieve it. Z also appears to accept this, the relevant point of contention is whether these emails relate to the official business of Council.
- 21 Council's determination that the emails which are the subject of this external review relate to the official business of the public authority, and must therefore be assessed under the Act, is not one which attracts an external review right. It is a preliminary assessment decision of the principal officer of a public authority, or their delegate, regarding whether information is in the public authority's possession. Similar to assessments of whether a fee waiver request should be granted or whether information is within the scope of a request, it is not a matter which I am empowered to review under Part 4 of the Act.
- 22 While s47(1)(k) sets out that I have the power when considering an application for review to *decide any matter in relation to the original application for assessed disclosure that could be decided by the public authority or Minister to whom the application was made*, it would be somewhat absurd if this led to me being able to decide matters which are not within my external review jurisdiction. I interpret this power as meaning that I can decide any matter which could have been decided by the public authority or Minister and which I have the power to review. If other concerns arise, my practice has been to deal with these matters as complaints under the *Ombudsman Act 1978* in relation to the relevant administrative action.
- 23 Accordingly, it is my view that the power identified by Z under s47(1)(k) is not available to me in these circumstances and Council's categorisation of this

information as relating to its official business is not a matter I am empowered to review in this decision.

- 24 Although I do not have jurisdiction to review Council's determination, it is appropriate for me to consider whether Council's decision is one which was reasonably available. I consider that Council's wide interpretation of what constitutes official business, particularly where a senior officer chooses to use their official email address and/or fails to remove their official signature block in personal communication, was a decision reasonably available to Council and is an interpretation which is open to it, consistent with s3(4)(b) of the Act.

Section 36 – Personal information of person

- 25 While Z's submissions focused on why this information should not even be considered in possession of Council, this was due to their concern that these were personal in nature. Accordingly, I consider that this is effectively a submission regarding the application of an exemption under s36 of the Act. For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

- 26 Section 5 of the Act defines personal information 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 who has not been dead for more than 25 years.*

- 27 Council identified information in this category in the emails and attachments which are subject to this review, including email addresses, telephone numbers, and personal communications between named persons who have clearly not been dead for more than 25 years. I am satisfied that all the emails and attachments not yet released to the Original Applicant are *prima facie* exempt under s36.

Public interest test

- 28 Section 36 is subject to the public interest test contained in s33. I note Z has submitted that *there is no public interest* in releasing the emails, however the public interest test actually requires me to determine whether the release of the emails would be contrary to the public interest. To do this I must consider all relevant matters and as a minimum those specified in Schedule 1 of the Act.
- 29 Council provided my office with redacted and unredacted copies of all the emails and attachments identified as being responsive to this request, as well as a Table of Documents which listed the matters in Schedule 1 which had

been considered by Council. For ease of reference, I will use Council's numbering from the Table of Documents in my assessment.

- 30 It is apparent that the information to be assessed is in two general categories:
- information connected to Z's duties as a public officer; and
 - information relating to the interests and activities of Z outside their position as a public officer.

Emails connected to Z's official duties

- 31 It has been my consistent position that the personal information of public officers performing their regular duties is not normally exempt under s36. It is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether an individual is a current or former public officer is irrelevant to the assessment under s36 of the Act.
- 32 The exception to this practice is direct and mobile phone numbers and direct emails of public officers, which I have consistently found eligible for exemption under s36 where these details are not routinely provided to the public. In this instance Council has not sought for this information relating to its staff to be exempt and it would, accordingly, only be relevant for Z's direct contact details and those of officers of other public authorities not routinely provided to the public. I am satisfied that there is potential for harm with the release of this information as it is valid for public authorities to limit the release of direct contact information to ensure public enquiries are able to be directed through appropriate channels.

Emails to or from Tasmania Police

- 33 The following documents relate to Z's duties as a public officer and are to be released to the Original Applicant (except for the direct contact details of a Tasmania Police Inspector in Documents 28 and 275 not usually provided to the public):
- Documents 26, 27, 28, 272, 273, 274 and 275; and
 - Attachment 26.

Emails to or from the Community Organisation

- 34 The following documents are connected to Z's duties as a public officer and, except for the details of persons outside Council and direct contact details not routinely provided to the public, are to be released to the Original Applicant:
- Documents 4, 24, 37, 93, 94, 99, 128, 137, 145, 187 and 205; and
 - Attachments 37, 99 and 128.

Personal emails sent from Z's official email address

- 35 Except for the emails discussed above, the remainder of the relevant information comprises relevant emails of a personal nature, which do not appear to have any connection with Z's official duties at Council. As I have found this information *prima facie* exempt under s36, I must now consider whether its release would be contrary to the public interest and consider the matters in Schedule 1 of the Act.
- 36 Schedule 1 matter (a) – the general need for government information to be accessible – is always relevant and weighs in favour of disclosure as it is essentially a restatement of the object of the Act.
- 37 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – has some relevance and weighs slightly in favour of disclosure. The actions of councils and their senior officers are subject to journalistic scrutiny and further detail may contribute to relevant debate. The innocuous and personal nature of the emails reduces the weight given to this matter, however.
- 38 Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. Much of the communication in the emails and attachments, whilst mundane and innocuous, is of a personal nature and has no connection to Z's official duties. There is a reasonable expectation of privacy regarding purely personal correspondence, however ill-advised Z's decision to use their official email address for extensive personal use may have been. Having examined the information, I am of the view that this matter weighs heavily against disclosure.
- 39 As part of the public interest test, I also take into account the nature of the information, much of which is personal and non-governmental in nature, which was not brought into existence in the performance of Z's duties as a public officer and which clearly has no connection with the functions of Council.
- 40 The assessment of matters relevant to the public interest test involves a consideration of a number of competing factors of differing importance applied to the individual circumstances of each piece of information. Whilst the decision by Z to use their official email address for personal matters is not best practice for public officers, I am of the view that it would be an overreach to make the information regarding personal and private matters which is contained in the majority of the documents subject to release under the right to information process.
- 41 Due to this, I am satisfied that, on balance, it would be contrary to the public interest to release the information I found to be *prima facie* exempt under s36. It is exempt under s36 and should not be released to the Original Applicant.

Preliminary Conclusion

42 In accordance with the reasons set out above, I determine that some information is exempt pursuant to s36.

Response to the Preliminary Conclusion

43 As the above preliminary decision was adverse to Council, it was made available to it on 2 April 2025 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.

44 On 2 April 2025, the preliminary decision was also made available to Z to seek their input prior to finalisation, under s48(1)(b) of the Act.

45 On 9 April 2025, Z emailed brief submissions to my office which did not concern the reasoning or substantive analysis of my preliminary decision but primarily related to whether a small number of emails should be characterised as having a personal quality. I have considered these submissions and, where appropriate, incorporated them into my decision. I did not alter the characterisation of the three relevant emails, however, as I considered that these related sufficiently to the official business of Council that it would not be contrary to the public interest for them to be released.

46 On 29 April 2025, Council advised that it would not be making any submissions.

Conclusion

47 Accordingly, for the reasons given above, I determine that some information is exempt pursuant to s36 of the Act.

Dated: 29 April 2025



**Richard Connock
OMBUDSMAN**

Attachment 1 – Relevant legislation

Section 36 - Personal information of person

(1) 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 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –

- (i) during 20 working days after the notification of the decision;
or
- (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 - Public interest test

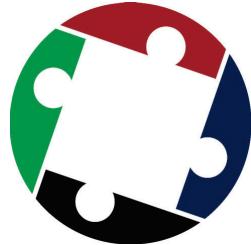
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding 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.

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: R2502-014

Names of Parties: Z and City of Launceston

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 Z (the applicant) is a senior officer at the City of Launceston (Council).
- 2 On 4 December 2024, Council received an application for assessed disclosure from a journalist (the original applicant) under the *Right to Information Act 2009* (the Act) seeking information in relation to correspondence sent from and received by Z's email address at Council.
- 3 The original applicant sought, after some negotiations as to the scope, all incoming and outgoing emails from the email account assigned to Z during the period from 1 April 2022 to 28 November 2024 to the following email addresses, which contained specific phrases:
 1. [Z]@launceston.tas.gov.au
 2. Michael.stretton@launceston.tas.gov.au
 3. shane.eberhardt@launceston.tas.gov.au
 4. liz.lynch@launceston.tas.gov.au
 5. sam.johnson@launceston.tas.gov.au
- 4 Council determined that the release of the information responsive to the application was reasonably expected to be of concern to Z, and so, in accordance with s36(2) of the Act, requested Z's views as to whether the information should be provided to the original applicant.
- 5 On 29 January 2025, Z made submissions to Council indicating their objections to the information being provided to the original applicant.
- 6 On 5 February 2025, Mr Sam Johnson, Chief Executive Officer of Council and its principal officer under the Act, issued a decision to the original applicant. He determined to release the majority of the information in full, and applied some exemptions pursuant to ss31 (legal professional privilege) and 36 (personal information) of the Act.

- 7 On the same day, Mr Johnson notified Z of this decision and the proposed release of documents, and further notified Z of their review rights in respect of the proposed release.
- 8 Z sought external review of the decision, arguing that it was either information not subject to assessed disclosure under the Act or was exempt pursuant to s36 of the Act. Their application was accepted pursuant to s45(1A) of the Act.

Issues for Determination

- 9 I must determine whether the information Council is proposing to release is exempt under s36 or any other relevant section of the Act.
- 10 As 36 is within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s36, 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 1.

Relevant legislation

- 11 I attach a copy of s36 to this decision at Attachment 1.
- 12 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 13 In their application for external review dated 17 February 2025, Z relevantly submitted:

The E-mails sought by the applicant, and identified in the noted annexure were personal. That is, they had nothing whatever to do with any business of the Launceston City Council nor with my role/function as a Councillor. The E-mails did not contain any information within the meaning of the phrase in s3 of the Act - 'information in the possession of a public authority'. That is, the information in the E-mails was not information 'that relates to the official business of the authority'

The [original applicant] made an application under s13 of the Act. S13(2) relevantly provides:

- (2) *A person who seeks –*
 - (a) *information in the possession of a public authority;*
 - (b)

must make a written application to the public authority or Minister for an assessed disclosure of the information.

It is only ‘information in the possession of [the Launceston City Council]’ that can be the subject of an application; and such information, by reason of the definitional provision, is confined to information which ‘relates to the official business’ of the Council’. Any information which does not relate to the official business of the Council is not information which can be the subject of an application under s13; and is not therefore information which can be released under the Act. ...

In addition, the E-mails contain very personal information and they have not been collected by the Council for any of its purposes. The proper application of that which is set out in Schedule 1 to the Act (and bearing in mind the object of the Act as contained in s3) is such that there is no public interest in releasing to a journalist personal E-mails. This has nothing to do with good governance or anything else identified in s3.

I repeat that the E-mails are personal. I claim ownership of them. In any event they are confidential communications between me and others; and there is a duty on Council (and anyone else who comes into possession of them) to maintain that confidentiality. Breaching that confidence - by disclosing that information without lawful justification - exposes the wrongdoer to damages - including for mental distress and including aggravated damages.

...
By reason of the foregoing I contend that the decision of Mr Johnson is wrong on many levels and should be set to nought. The Ombudsman should exercise powers in s47(1)(k) to decide that the Council does not have any information which relates to its official business as sought by the media in its ongoing attempt to cause me significant distress; or alternatively (if that is not accepted), that any such information is personal information which is not in the public interest to disclose; and the Ombudsman should exercise the power in s47(1)(p) to direct the Mr Johnson to inform the [original] applicant accordingly.

Council

- 14 Council was not required to provide submissions in relation to this external review, as it had determined to release the relevant information. When it informed Z of this decision, it set out its view that:

The nature of the information to be provided is the content of a number of emails within the scope of the Application. In some cases, emails are to be provided in full. In other cases, emails are to be provided in a form where information determined to be exempt under section 36 of the Act or not within the scope of the Application has been deleted.

Analysis

Preliminary issue

- 15 Z has made submissions that the relevant information cannot be considered *in the possession* of Council as they do not consider it relates to the official business of Council.
- 16 In my previous decision of *Z and City of Launceston*¹ (involving the same parties) at paragraphs 17-24, I considered this same issue.
- 17 I maintain my reasoning set out in that matter, namely that:

21 Council's determination that the emails which are the subject of this external review relate to the official business of the public authority, and must therefore be assessed under the Act, is not one which attracts an external review right. It is a preliminary assessment decision of the principal officer of a public authority, or their delegate, regarding whether information is in the public authority's possession. Similar to assessments of whether a fee waiver request should be granted or whether information is within the scope of a request, it is not a matter which I am empowered to review under Part 4 of the Act.

22 While s47(1)(k) sets out that I have the power when considering an application for review to decide any matter in relation to the original application for assessed disclosure that could be decided by the public authority or Minister to whom the application was made, it would be somewhat absurd if this led to me being able to decide matters which are not within my external review jurisdiction. I interpret this power as meaning that I can decide any matter which could have been decided by the public authority or Minister and which I have the

¹ *Z and City of Launceston* (April 2025), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

power to review. If other concerns arise, my practice has been to deal with these matters as complaints under the Ombudsman Act 1978 in relation to the relevant administrative action.

- 18 It remains my view that the power referred to by Z under s47(1)(k) is not available to me in these circumstances and Council's categorisation of the information as relating to its official business is not a matter I am able to review in this decision.
- 19 Further, unlike in my previous decision involving these parties which related in large part to private correspondence between Z and associates which was not connected to Council's official business, the relevant information relates to Z's employment and appears to be clearly connected to the official business of Council. That it relates primarily to Z's appointment and role rather than their regular duties does not make it unconnected with Council's official business, which includes employing and managing staff.

Section 36 – Personal information of a person

- 20 Z has also made submissions that the information Council proposes to release is personal information which would not be in the public interest to disclose.
- 21 Section 36 provides that information may be exempt from disclosure if it is the personal information of a person other than the (original) applicant.
- 22 Personal information is defined in s5 of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 23 I consider that all of the information proposed to be released is *prima facie* exempt under s36, as the identity of Z is clearly ascertainable from it.

Public interest test

- 24 Because s36 is contained within Part 3 of Division 2 of the Act and is subject to the public interest test in s33, I must consider, at least, the Schedule 1 factors to determine whether it would be contrary to the public interest to release the information.
- 25 Matter (a) *the general public need for government information to be accessible* is relevant and will always weigh in favour of disclosure.
- 26 Matter (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest* is also relevant and weighs in favour of disclosure. The actions of councils and their senior officers are often subject to media and public scrutiny. Such scrutiny is appropriate for community representatives, including senior council officials. The

provision of this information is likely to contribute to relevant debate about Z, and potentially Council more generally.

- 27 Matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* is relevant. The information relates to Z's employment and personal affairs. Much of the information is of a personal nature rather than relating to their regular duties, and there is a reasonable expectation of privacy in relation to the investigation of allegations and personal employment arrangements. Z has clearly indicated that disclosure of this material would harm their interests and I accept this. I am therefore of the view that this matter weighs significantly against disclosure regarding material not already released in public statements from Z and other Council officers.
- 28 On balance, I consider that it would be contrary to the public interest to release the following information and it is exempt under s36:
 - *Document 5* – the two sentences from after the words *Dear Colleagues*;
 - *Document 6* – the final three paragraphs;
 - *Document 13* – from after the words *May last year* until *I am letting*;
 - *Document 385* – the fourth paragraph of the email of 4 September 2023 at 10.30am; and
 - *Document 398* – the final substantive sentence.
- 29 I am not so satisfied regarding the remainder of the information, given the extent that it has already been released into the public domain and the importance of scrutiny and public debate regarding the management of public authorities. I agree with Council that this information is not exempt, and it should be released to the original applicant.

Preliminary conclusion

- 30 In accordance with the reasons set out above, I determine that some additional information is exempt pursuant to s36.

Submissions to the preliminary decision

- 31 Because the preliminary decision was adverse to Council, it was made available to it on 16 June 2025 pursuant to s48(1)(a) to seek its input before finalisation. It was also made available to Z pursuant to s48(1)(b) of the Act.
- 32 On 17 June 2025 my office received submissions from Z in relation to the preliminary decision.
- 33 On 18 June 2025, Council advised that it did not wish to make submissions in relation to the preliminary decision.

34 I have carefully considered Z's submissions, which requested rephrasing of two small sections of my decision to clarify employment arrangements and reflect concerns about the unauthorised disclosure of other information. In response, I have made some minor changes to the phrasing of my decision but my overall conclusions remain unchanged.

Conclusion

35 In accordance with the reasons set out above, I determine that some additional information is exempt pursuant to s36.

Dated: 20 June 2025

A handwritten signature in black ink, appearing to read "RC".

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 36 – Personal information of a person

- (1) 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; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

- (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.

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.