



**TASMANIAN OMBUDSMAN**  
**DECISION**

**Right to Information Act Review**

**Case Reference:** O1610-034

**Names of Parties:** A and Tasmania Police

**Provisions considered:** s33, s36, Schedule 1

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**Background**

- 1 On 31 May 2016, the Applicant submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Tasmania Police.
- 2 This application for assessed disclosure is the result of an application the Applicant made to Tasmania Police for the posthumous awarding of the National Police Service Medal to their late [parent] (the testator). The Applicant is the natural child of the testator from a separate relationship.
- 3 The testator's [surviving spouse] was notified of the application and encouraged to submit an application of [their] own. As senior next of kin, the medal would likely be given to [them].
- 4 This led the Applicant, who is estranged from the [surviving spouse], to request a copy of the information supplied in support of [their] application.
- 5 Specifically, the Applicant requested:
  - ...*a copy of any and all information [the surviving spouse] has supplied to support [their] application including the reason for doing so. And a copy of my [parent's] Will [sic].*
- 6 The original application for assessed disclosure was accepted by Tasmania Police on 10 June 2016 after the minimum requirements of an application had been met. Tasmania Police waived the prescribed fee under s16(2)(a).
- 7 On 17 June 2016, a delegated officer released a decision to the Applicant. In this decision, Tasmania Police exempted the information requested under s36 – *personal information of a person*.
- 8 On 30 June 2016, the Applicant requested an internal review of this decision under s43 of the Act. The Applicant narrowed the scope of the internal review to only require consideration of the will of their late parent's will.
- 9 On 6 July 2016, a separate delegated officer authorised to conduct an internal review released the internal review decision to the Applicant. This decision, like the original decision, exempted the will under s36.

10 On 28 July 2016, the Applicant lodged a request with this office to externally review the decision of Tasmania Police to exempt the will.

### **Issues for Determination**

11 Tasmania Police has relied on s36 to exempt the will and the personal information of other people.

12 I must determine whether an exemption under s36 applies here, and if so, whether the information is exempt after taking into account the public interest test under s33.

### **Relevant legislation**

13 Section 33 provides:

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

(2) *The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.*

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

14 Section 36 provides:

(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.

Where :

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

- (a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and
- (b) who is alive, or has not been dead for more than 25 years;

## **Submissions and Evidence**

- 15 The Applicant claims they have a right as the natural child of their late parent to have access to the will. The Applicant claims they were told, by their other parent and their lawyers, that there was no will at the time of the parent's death.
- 16 Specifically, the applicant submitted:
- *It is in the public interest that I should have access to the will as my [parent's] child. I should not have been prevented from having claim on my [parent's] estate 20 years ago by pretending there was no will, nor should I now that an unverified will has been fraudulently produced. It is in the public interest that minors [sic] rights are protected. I was 4 when my [parent] died and as above lawyers said there was no will hence I had no interest in the estate as there was no estate.*
- 17 In the Applicant's request for internal review, they further submitted:
- *I have been told it is a will [my parent] made and I assume [they] signed which indicates that ownership is [theirs] and therefore that there is no breach of privacy involved regarding my application to obtain the will. Particularly regarding the fact that I am [their] next of kin and at no point has the will been provided to me, nor has it been verified or probated.*
  - *Since my [parent's] death this will has been non-existent despite legal request it be produced. Now it is being used to deny my application for a medal on my [parent's] behalf as such I believe I am entitled to a copy of the will.*
- 18 Tasmania Police submitted:
- *With regard to the material that is responsive to your application, I have formed the view that the information is exempt information under section 36(1) of the Right to Information Act 2009 and it is withheld in full as it contains personal information of another.*
  - *Ordinarily, this office may consult with a third party pursuant to section 36(2) of the Act if his or her personal information is sought as part of a right to information application. In this instance however you have instructed that not be done.*
- 19 The following documentary evidence is before me:
- the original application by applicant dated 31 May 2016
  - the original decision by a delegated officer under the Act, dated 17 June 2016
  - the request for internal review from the Applicant dated 30 June 2016
  - the internal review decision by a separate delegated officer authorised to conduct an internal review, dated 6 July 2016
  - a full unredacted copy of the information found to be within scope of the original request including:

- a copy of [the testator's] will
- the birth certificate of the Applicant

## **Analysis**

- 20 It is important to note that my role in this external review is to determine the applicability of any exemptions under the Act and consider, if appropriate, the public interest test.
- 21 I will not comment on the validity or otherwise of the will as raised by the Applicant, nor will I comment on the processing of the National Police Medal application process originally at the heart of the application for assessed disclosure.
- 22 As the internal review as refined only sought the will of the Applicant's late [parent], I will only consider this document.

## *Section 36*

- 23 Tasmania Police has relied on s36 to exempt the will of [the testator] claiming it contains personal information of another person other than the person making an application under s13.
- 24 I am satisfied the will contains [the surviving spouse's] personal information and s36(1) applies.
- 25 The information also contains the personal information of [the testator]. Under the Act, the right to have personal information protected exists for a person up to 25 years after their death. [The testator] died approximately 21 years ago.
- 26 Section 36(2) provides that, if an application is made for information and the information was provided to a public authority by a third party, the public authority, if practicable and before deciding whether to release the information, may give written notice to that person and seek that person's view as to whether the information should be provided.
- 27 Tasmania Police contacted the Applicant and requested permission to conduct a review on the basis it had determined [the surviving spouse] was named in the will and may be reasonably concerned about the information being released.
- 28 Given the estranged relationship of the Applicant and [the surviving spouse], the Applicant requested that no consultation be conducted to keep [their] actions in regards to the application for assessed disclosure unknown.
- 29 As a result, Tasmania Police made the decision to exempt the information under s36(1).
- 30 In general terms, the process undertaken by Tasmania Police to this point had been fair and appropriate and in accord with the Act.

31 However, the *Wills Act 2008* at s63(1)(b) provides:

**63. Persons entitled to see will**

(1) Any person having the possession or control of a will (including a revoked will) or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:

- (a) ...
- (b) the surviving spouse, any parent or guardian and any issue of the testator;
- (c) ...
- (d) ...
- (e) ...
- (f) ...

32 It would seem that there is an inconsistency between the Act and the Wills Act: section 36(1) provides information is exempt information if its disclosure would include the information of a person other than the Applicant, while the Wills Act makes the Applicant entitled to the will as the natural [child] of the testator.

33 The issue of competing Acts has arisen in numerous cases. Courts have been pressed with the argument that a later statute has repealed an earlier statue not by express words, but implication. This was discussed by Barton J in *Goodwin v Philips* (1908) 7 CLR 1 at 10, where His Honour adopted the following statement from *Hardcastle on Statutory Law*:

- *The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, i.e., the repeal must, if not express, flow from necessary implication.*

34 Thus, if the words in two enactments can be reasonably interpreted in a way to avoid inconsistency, then this approach should be adopted.

35 In *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 Fullagar J sounded the salutary warning that here is a strong presumption that the legislature does not intend to contradict itself but in fact intends both Acts to operate within their given spheres.

36 More recently, Gaudron J in *Saraswati v R* (1991) 100 ALR 193 at 204 held:

- *It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.*

- 37 Given it can be reasonably assumed that the State would not wish to contradict itself and therefore deliberately create an inconsistency, every attempt should be made to reconcile the competing statutes.
- 38 Section 36(1) applies to exempt the information in the will, however, this section is in Division 2 of Part 3 and does require the application of public interest test. Any inconsistency is corrected when considering the public interest as it cannot be against the public interest (and therefore exempt the information) if that would be inconsistent with another law (the Wills Act).
- 39 Section 36 also provides that a consultation should be undertaken if *the public authority reasonably believes it would be of concern to a third party and before deciding whether the disclosure of information under this Act should occur*. This allows for a decision to be made after weighing up the evidence on consultation or otherwise, as to whether or not the information should be released.
- 40 The Applicant is the natural [child] of the [testator] and is legally entitled to view [their parent's] will under s63(1)(b) of the Wills Act.
- 41 When determining the “reasonable concern” of a third party, reasonableness must be considered in terms of broadly reasonable, not necessarily specifically reasonable to any individual involved within the unique circumstances of a particular matter.
- 42 As the Wills Act compels a copy of the will to be released to the Applicant, there are no reasonable grounds for withholding it. That is not to say a third party may not have personal concern, however, this is a different matter to “reasonable concern”. I am satisfied that any action in defiance of a law could not be considered reasonable.
- 43 As a matter of procedural fairness, my office did consult with [the surviving spouse] directly and explained s63(1)(b) of the Wills Act and invited a submission from [them] as to why [they] might reasonably believe a copy should not be released. I found no compelling evidence in the ensuing submission that would suggest the will should not be released.
- 44 I am satisfied that s36(1) applies as the information is personal information. Section 36 is subject to the public interest test. Given the Wills Act compels release of the will to the Applicant, there is no public interest consideration against the will’s release, only in favour of it.

### **Preliminary Decision Submissions**

- 45 A preliminary decision was sent to Tasmania Police on 22 March 2017.
- 46 The preliminary decision was considered to be adverse to Tasmania Police’s original and internal review decision. Accordingly, Tasmania Police were invited to make further submission.
- 47 On 23 March 2017, Tasmania Police confirmed they would not make a further submission and on receipt of this final decision would release a copy of the will to [the Applicant].

**Decision**

- 48 I determine a full copy of the will is to be released to the Applicant. This decision is made under s48(1)(a).
- 49 Under s47(1)(p), I direct that this decision be implemented within 20 working days.

**Dated:** 23 March 2017

**Richard Connock**  
**OMBUDSMAN**



## TASMANIAN OMBUDSMAN

## DECISION

**Right to Information Act 2009 Review**

**Case Reference: O1411-123**

**Parties:** The Hon. Bryan Green MP<sup>1</sup> and Department of Treasury and Finance

**Provisions considered:** s27, s33, s35, s36 and Schedule 1

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### Background

- 1 An application for assessed disclosure under the *Right to Information Act 2009* (the Act) was lodged on 2 September 2014 by The Hon. Bryan Green MP, the former leader of the Tasmanian Labor Party (the Applicant), to the Department of Treasury and Finance (the Department).
- 2 The application sought:  
*A copy of all information including correspondence, treasury briefings and advice, any reports and emails relating to the decision made by Treasury and/or the Treasurer to revert to using the GST projects [sic] in the Australian Government budget as the basis for its estimates of GST receipts.*
- 3 The Department made its original decision on 30 September 2014 and identified eight records within scope of the request, which included several internal documents and a series of comprehensive spreadsheets.
- 4 An internal memo to the Secretary of the Department was said to be partially exempt under s35 (internal deliberative information) and a Minute to the Minister was said to be fully exempt under s27 (internal briefing information of a Minister).
- 5 Five financial spreadsheets were fully exempted under s35 (internal deliberative information).
- 6 One document was identified as publicly available on the Department's website.
- 7 The Applicant lodged a request for internal review under s43 with the Department on 7 October 2014. This was five working days from the date of the original decision.
- 8 The Department released its internal review decision to the applicant on 31 October 2014. This was 17 working days from the date of application for internal review.

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<sup>1</sup> Note: Mr Green has since retired from this position

- 9 The decision was upheld in full and was made by a separate delegated officer to the original decision maker, which satisfies s43(4)(b).
- 10 The Applicant applied for external review to me on 14 November 2014. This was 10 working days from the date of the internal review decision.

### **Issues for Determination**

- 11 The Applicant is seeking a review of the decision to rely on ss27 and 35.
- 12 The Applicant claims the exempt material has not been fully considered under the public interest test requirement that accompanies s35 (internal deliberative information).
- 13 Specifically he submitted:

*I am seeking an external review on the grounds that the methodology the Department of Treasury and Finance used in preparation for the [then] August State Budget in estimating the GST projection to be received from the Commonwealth across the Forward estimates are [sic] indeed very much in the public interest...*

- 14 The Department maintains the information is exempt information and the release of the draft finance projections is not in the public interest.
- 15 I must determine whether the information claimed by the Department under section 27 meets the requirements of that section and determine if s35 applies to the remaining purportedly exempt information. This will include consideration of the public interest test matters contained in Schedule 1.

### **Relevant legislation**

- 16 Section 27 of the Act provides:
  - (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) *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 any 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.*
- 17 Section 33 provides:
- (1) *In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.*
  - (2) *The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.*
  - (3) *The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.*
- 18 Section 35 provides:
- (1) *Information is exempt information if it consists of –*
    - (a) *an opinion, advice or recommendation prepared by an officer of a public authority; or*
    - (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.*
- 19 Section 36 provides:
- (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.

### **Submissions and Evidence**

- 20 The following relevant documentary evidence is before me:
- the application for assessed disclosure dated 2 September 2014;
  - the original decision of delegated officer Ms Jo Kitto dated 30 September 2014;
  - the application for internal review dated 7 October 2014;
  - the decision on internal review of delegated officer Ms Jo Spencer dated 31 October 2014;
  - two submissions from the Applicant dated 14 November 2014; 23 September 2016;
  - a submission from the Department dated 22 September 2016; and
  - the full un-redacted information falling within the scope of the original application
- 21 The information at issue consists of:
- Item 1 – Memo to Tony Ferrall – Revised GST Estimates;
  - Item 2 – Excel workbook – GST Model (changes to quarantined Commonwealth payments);
  - Item 3 – Excel workbook – Summary of each category from the draft Commonwealth Grants Commission report;
  - Item 4 – Excel workbook – Estimating the impact of 2015 methodology Review on Relativities (after draft CGC Report);
  - Item 5 – Excel workbook – GST Revenue and relativity estimates for the 2014-15 Budget;
  - Item 6 – Excel workbook - \$ per capita impact of CGC assessments; and
  - Item 7 – Minute to Treasurer – CGC 2015 Review Draft Report.

- 22 The Applicant submits that the Department has not properly addressed parts of s27, namely whether the information contains purely factual information. Similarly, the Applicant submits the use of s27 for Item 7 has not given due regard to whether the document was created for the purpose of briefing a Minister as required by s27(3).
- 23 The Applicant also submits in relation to Items 2 to 6 that the public interest considerations favouring disclosure have not been given due weight. While some matters in Schedule 1 have been considered, the Applicant suggests there is sufficient additional context that supports the release of information as a matter of public interest. The Applicant maintains there is a precedent set by previous governments releasing the GST estimates and modelling on the basis that:
- ... GST estimates and modellings are central and critical to the Tasmanian State Budget and pivotal to the general public's comprehension of how taxpayer funds are distributed.*
- 24 In the Department's submission, having considered the matter further, it changed the exemption relied upon from s27 to s35(1) for Item 1. It acknowledged the information had not been prepared for the purpose of briefing a Minister but rather had been:
- ... prepared by a public authority officer of Treasury to provide internal deliberations on GST estimates for the 2014-15 State Budget and to seek my approval of the estimates.*
- 25 This review will consider if s35 can be relied upon to exempt Item 1 and whether s27 is most relevant or not. I will also determine if Item 7 can be the subject of exemption under s27 as claimed by the Department.
- 26 The Department submits that Items 2 to 6 were created as forecasts, used to assist in the development of the 2014-15 State Budget. The Department maintains these forecasts are deliberative, not factual, and were not subsequently adopted or made public. As such, the Department continues to rely on s35 to exempt this information.
- 27 Item 7 was also addressed in the Department's submission. It maintains the information was solely generated to brief the Treasurer in his official duties. Specifically, the Treasurer has official duties under the *Financial Management and Audit Act 1990*, including the creation of the annual Budget Papers and the relevant Consolidated Fund Appropriation Bill for that year.

## **Analysis**

### **Section 27**

- 28 The information in the Minute contains tables of estimates, scenarios, and projections on possible ways forward to manage the State's finances. This was pre-emptive work by the Department before the Commonwealth released its report, its purpose to advise the Minister.

- 29 I am satisfied the Department prepared the Minute to the Treasurer at Item 7 and it does contain opinion, advice or a recommendation by an officer of a public authority such that s27(1)(a) is satisfied.
- 30 I am also satisfied the information is connected to the Minister's official duty to manage the State's finances under the Financial Management and Audit Act. It is reasonable for the Department to prepare a series of possibilities, projections, and analyses of likely ways forward for the Government to take – thus, s27(1) is satisfied overall.
- 31 The Applicant submitted that purely factual information had been made exempt in Item 7 contrary to s27(4).
- 32 As to the meaning of 'purely factual information', in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>2</sup>, the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore, the material must be "factual" in fairly unambiguous terms. To be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes<sup>3</sup>.
- 33 This means that for 'factual information' to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process so as to form part of it.
- 34 Thus, even though a document's contents are primarily factual, this does not of itself mean that the document falls outside the deliberative processes exemption.
- 35 After examination of the document, I am satisfied the material in Item 7 does contain some factual information, however, I am not satisfied that it contains purely factual information. I am of the view that the release of this factual information would identify opinion, advice, recommendation, consultation or deliberation and should remain exempt.

### **Section 35**

- 36 There are two parts of Item 1 that have been redacted pursuant to s35: first, the information in the header; and the second being the body of the document (which contains a second paragraph, a table, and a sentence just after the table).
- 37 I will consider each part separately.
- 38 The header redactions are to do with the identity of the person to whom the Internal Memorandum was addressed, whose possession it had been through, and who it was from.
- 39 In order for s35 to apply, I must be satisfied that the information redacted in the header consists of opinion, advice, or recommendation prepared by an officer of a public authority officer for the purposes of briefing a public

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<sup>2</sup> (1984) 6 ALN N347 at N349

<sup>3</sup> See *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

authority or Minister in their official business and relevantly, does not contain purely factual information.

- 40 This information does appear to be purely factual when taking into consideration the analysis in paragraphs 32 to 34 above.
- 41 The names of the staff members who were involved in the preparation and clearance of this document is purely factual information and I am satisfied that s35 does not apply to it. Section 36, however, might. I address this separately below.
- 42 The remaining redactions in the second part consist of a table with estimated forecasts on GST revenue and some explanatory information.
- 43 To exempt information using this section, I have to be satisfied the material at issue was prepared by an officer of a public authority and that it contains opinion, advice or a recommendation, and is not purely factual information.
- 44 The information is speculative and is specifically referred to as 'estimates' and 'forecasts'. Given this information was ultimately not adopted by Government, it strengthens the Department's claim the information is deliberative.
- 45 By its very nature, this material is hypothetical; it estimated forecasts that hypothesise several possible options pending a public announcement that was then yet to be made by the Australian Government. The Department has established it consists of deliberative information prepared by an officer of a public authority and it contains opinion, advice or a recommendation.
- 46 I am satisfied this information is not purely factual.
- 47 Items 2 to 6 similarly contain economic projections, estimates, and forecasts. The nature of the information in these spreadsheets is no different in effect to that of Item 1 and in context is deliberative in nature.
- 48 I am satisfied the information is not purely factual as submitted by the Department. The information was developed as educated projections based on old data.
- 49 I determine the header information in Item 1 is not eligible for exemption under s35. I further determine the remaining information in Item 1, and Items 2 to 6, however, is exempt under s35(1)(a).

### **Section 36**

- 50 As noted in paragraph 41 above, I have determined that the names of staff members in the header of Item 1 is not exempt information under s35, however, the application of s36 (personal information of a person) needs also to be considered.
- 51 The relevant provisions are those contained in s36(1), which refer to *the personal information of a person other than the person making an application under section 13..*

- 52 The names of those staff members is personal information in accordance with the terms of s36(1), however, the public interest test must be considered before the exemption can apply.
- 53 It is open to conclude that the release of the names of officers who prepare official information could lead to better accountability, and there is little in the way of ‘harm’ if the names are released. Especially as the staff members are performing their official duties and carrying out the functions they were employed to do.
- 54 When considering this against the names of staff already being information in the public domain via the Government Directory, there is little claim the information should remain exempt.
- 55 I determine the names of the staff in the header of Item 1 are not exempt under s36(1) and should be released.

## **Section 41**

- 56 While the Department has not considered other exemptions, the evidence suggests there is potential for s41(2) to apply. It provides:

*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.*

- 57 I will not consider this section further as I am convinced section 35 reasonably applies to the redacted information.

## **Public Interest Test**

- 58 As I am satisfied s 35 applies, I must now consider section 33 of the Act – the public interest test. A copy of the Schedule 1 is attached.
- 59 Of the Schedule 1 matters, I find (a), (b), (c), (f), (k), and (n) to be relevant.
- 60 I acknowledge there is a strong public interest in taxpayers having an understanding of and an involvement in democratic processes, which influence the use of their taxes, consistent with matters (a) and (b).
- 61 The Applicant maintains in his submission that (c) is relevant in supporting the release of the information. While the information in Item 1 is an exploration of issues and offers hypotheses to the Treasurer, ultimately, this material does not form the basis for a decision, and therefore, (c) and (f) would not apply.
- 62 Ultimately, any actual decision on this subject will be made by the Treasurer through the Cabinet leading to the development of the Budget Papers. This is a publicly accessible and heavily debated process in the Parliament. As such, I am not convinced this deliberative material amounts to a ‘decision’ and therefore (c) would not support release.

- 63 In terms of the factors above, in my view, disclosure would prejudice both the Department's and the government of the day's ability to constructively and frankly develop economic and financial policy satisfying (n).
- 64 The release of information that was never adopted and is highly speculative based on educated guesses would not inform the public of any decisions or improve accountability.
- 65 I find there would be little public interest in the release of hypotheses relating to economic and financial modelling, especially considering the final decisions and deliberations are ultimately released and publicly debated in the Tasmanian Parliament through the budget process.

### **Preliminary Decision**

- 66 I find the information contained in the header of Item 1 should be released to the applicant while the remaining information, and that in Items 2 to 6, should remain exempt under section 35 and it would, on balance, be contrary to the public interest to release it. I also maintain the Department's decision to exempt fully Item 7 under section 27.

### **Submission to Preliminary Decision**

- 67 In response to my preliminary decision, the Department made a submission that the staff names in the header of Item 1 should not be released. It claimed that:

*Broadly, disclosing the names of employees, even when performing their official duties does not automatically promote the public interest.*

- 68 Further, the Department went on to submit:

*... it is not reasonable to assume that those employees would expect their name and details would be made available to the public. Further, the fact their names are part of the [public] government directory should be irrelevant for the purposes of whether it is reasonable to disclose their personal information specially in the context of an application from the Hon. Bryan green MP, the subject matter of the memorandum involving significant political issues, and media interest and the likely concern this may cause those employees.*
- 69 I do not accept the Department's premise that the staff names should remain private. The information is broadly already publicly available. The staff are of senior level within the Department and a reasonable person would expect some level of publicity related to their role and their identity.
- 70 The names of staff members and their salaries has been categorised as relatively routine staffing matters, and comparatively innocuous employment information by the Queensland Information Commissioner when declining to exempt it.<sup>4</sup> (The Commissioner also had regard to the fact that much of the information already appeared in the public domain.) I see nothing in the current

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<sup>4</sup> Deputy Premier and Minister for State Development, Infrastructure and Planning, and the Premier [2014] QICmr 41

circumstances, on an objective analysis, that would convince me that I ought to find the same sort of information exempt here.

- 71 Similarly, I do not expect that these senior staff would attempt to have their identities suppressed should they assist the Treasurer during budget estimates. This is a common occurrence across the state service.

**Decision**

- 72 I find the information contained in the header of Item 1 should be released to the applicant while the remaining information, and that of Items 2 to 6, should remain exempt under section 35 and are, on balance, contrary to the public interest to release. I also maintain the Department's decision to exempt fully Item 7 under section 27.

**Dated:** 6 July 2017



Richard Connock  
OMBUDSMAN

## **Attachment**

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

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

- (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
  - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
  - (g) whether the disclosure would enhance scrutiny of government administrative processes;
  - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
  - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
  - (k) whether the disclosure would promote or harm the economic development of the State;
  - (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.





## TASMANIAN OMBUDSMAN

### Right to Information Act Review

#### Names of Parties

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

#### Reasons for decision

Provisions considered: ss43, 44 and 45

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#### Introduction

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

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

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

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

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

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

#### Relevant legislation

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

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

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

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

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

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

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

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

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

## **Submissions**

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

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

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

## **Analysis**

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

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

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

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

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

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

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

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

**Dated:** 27 April 2016

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

**Richard Connock**  
**OMBUDSMAN**



## TASMANIAN OMBUDSMAN

## DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1408-082

**Names of Parties:** Mr David Shelley of Page Seager Lawyers, on behalf of Huon Aquaculture Group Pty Ltd & Department of Primary Industries, Parks, Water and Environment

**Provisions considered:** s33, s37, s39, s42 and Schedules 1 & 2

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### Background

1. On 7 November 2013 an application for assessed disclosure under the *Right to Information Act 2009* (the Act) dated 1 November 2013 was received by the Department of Primary Industries, Parks, Water and Environment (the Department or DPIPWE) from a Mr Mark Ryan on behalf of Tassal Operations Pty Ltd (Tassal).
2. On 4 December 2013, by agreement, the scope of Tassal's application was narrowed to:

*Information relating to HAC and correspondence between Peter (James) Bender, Robin Fahey and David Cahill (all Huon) and any Minister, Ministerial staff or employee of DPIPWE regarding:*

- *Any investigations concerning seal, dolphin or bird interactions with HAC;*
  - *Any applications for taking, deterring, relocating and or destroying wildlife by HAC;*
  - *Any reported incidents of wildlife interactions with HAC marine farms, land bases, freshwater farming facilities (hatcheries or vessels of HAC);*
  - *Any reported incidents by a third party of suspected wildlife interactions with HAC operations and/or vessels or subcontractors of any of them;*
  - *Any investigation relating to the harming of wildlife by HAC;*
  - *Any compliance issues relating to wildlife interactions by HAC including under the Wildlife (General) Regulations 2010; and*
  - *A copy of the information supplied to the ABC under its RTI*
3. The ABC information was released to Tassal as an active disclosure on 23 December 2013 so is not within the scope of this review.

4. On 2 January 2014 the Department gave a notice to Mr Peter Bender, CEO of Huon Aquaculture Group Pty Ltd (Huon or HAC) under s37(2) of the Act, having come to the view that disclosure of the attached 267 pages of information may be reasonably expected to be of substantial concern to Huon. The Department did not state how many pages had been collated in total as of relevance.
5. A Department file note of 3 February 2014 records an email from the Corporate Affairs Manager of Huon advising that day that it did not object to the release of the 267 pages, subject to de-identification of all operational staff except two persons.
6. On 31 March 2014 the Department sent to Mr Peter Bender, CEO of Huon, a *right to information notice of decision* as required by s37(3) of the Act. Huon was advised that there were now 585 pages collated and of these, 128 were to be disclosed in full, 118 were to be exempt in full, and 339 exempt in part. This meant that 448 pages would be disclosed in part or in full.
7. Huon, through its solicitor, Mr David Shelley of Page Seager Lawyers, sought an internal review of this decision on 11 April 2014.
8. On 16 July 2014 Ms Michele Moseley, Deputy Secretary of the Department, made the internal review decision. Of a now identified 591 pages, there were 319 pages identified for release in part or in full and these were attached to the decision. Personal information had been redacted as per Huon's request.
9. On 13 August 2014 Mr David Shelley of Page Seager Lawyers sought external review on behalf of Huon.
10. By letter dated 20 June 2016 Tassal advised that it was content for its identity as the body making the application for assessed disclosure to be disclosed to Huon in regards this review.

### **Issues for Determination**

11. The starting point in all my reviews is s7 of the Act: a person has a legally enforceable right to information in the possession of a public authority unless it is exempt, and this includes information acquired from third parties.
12. This is a review of a decision in respect of a third party, or an 'external party', being the term used in s44 of the Act in regards who may seek external review, arising during the finalising of a decision on an application for assessed disclosure by Tassal. Until this review is finalised, the original application for assessed disclosure cannot be determined.
13. My approach in this matter will be to examine the 319 pages sent to Huon with the internal review decision, being the information identified for release in part or in full, and to determine whether this information is exempt under the Act as claimed by Huon. In doing so, I will use as a guide the Decision Table attached to

the internal review decision, as this sets out the exemption section relied on for non-disclosure, either in part or in full.

14. The concern of the external party is with the information which the Department intends to disclose to the applicant. It is not concerned with the information the Department has already determined not to disclose. That may be an issue when the application for assessed disclosure is finalised but it is not at issue at this time.
15. Hence I will not be reviewing any information the Department has already determined it will not be disclosing under s27, 30 and 35, as well as personal information already redacted under s36.
16. The remaining grounds claimed for exemption by Huon rely on the application of s37, s39 and s42 of the Act. Under s47(5), the onus is on Huon to satisfy me that these grounds are made out.
17. If I am satisfied that these exemption provisions are met, as they are found in Division 2, Part 3 of the Act I then have to determine whether it is contrary to the public interest to disclose that information under s33 of the Act, after taking into account the matters set out in Schedule 1. The onus is again upon Huon to satisfy me that the information in question should not be disclosed by virtue of being contrary to the public interest.

### **Relevant legislation**

18. Section 33 states:

- (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.*

19. Schedules 1 and 2 are attached to this decision in regards the assessment of the public interest.

20. Section 37(1) and (2) of the Act state:

- (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.

21. Section 39 of the Act states:

(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.

22. Section 42 of the Act states:

*Information is exempt information if its disclosure would be likely to –*

- (a) threaten the survival of a rare or endangered species of flora or fauna; or
- (b) prejudice any measures being taken, or proposed to be taken, for the management or protection of a rare or endangered species of flora or fauna; or
- (c) have an adverse effect on a site or area of scientific, cultural or historical significance; or
- (d) prejudice any measures being taken, or proposed to be taken, for the management or protection of a site or area of scientific, cultural or historical significance provided such measures would not themselves have any of the effects referred to in paragraph (a), (b) or (c).

23. I also refer to s47(5) of the Act which sets out the onus of proof in this review:

(5) 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. [emphasis added]

### **Evidence and submissions before me**

24. I have before me the redacted and unredacted 319 pages of information the Department intended to disclose. Relevantly, I also have:

- The Department's s37(2) letter to Huon dated 2 January 2014
- Huon's email response dated 3 February 2014
- The Department's decision dated 31 March 2014, with attached Decision Table
- Huon's request for internal review dated 11 April 2014, and a follow up letter of 24 April 2014
- The Department's internal review decision dated 16 July 2014, with attached Decision Table
- Huon's application for external review dated 13 August 2014
- Ombudsman letter to Huon dated 8 September 2014 requesting further information as to its claims under s37 and the public interest
- Huon's response dated 28 November 2014

- Ombudsman letter dated 19 April 2016 to Tassal
  - Tassal's letter of 20 June 2016 in response
25. I refer briefly to the contents of the internal review Decision Table, which as noted earlier, I am using as a guide in undertaking this review. This sets out by line the relevant pages in question, a brief description of the information within, the date of the document, if clear, and the Department's decision on whether to exempt the information and the exemption section referred to.
26. Turning to the information intended to be disclosed, I note that where a document was intended to be exempt in full or in part, the deleted information was marked with a red lined box. Some text on some pages is printed in red but I have taken the view that this was not information intended to be redacted.

*Huon's submissions*

27. Huon first expressed its concern with the significant amount of new information attached to the original decision which it had not been consulted on.
28. Huon then objected to the release of much of the information, referring to s36, s37, s39 and s42 of the Act.
29. As to s36, it noted that the names of operational employees had been deleted at its request but stated it maintained its position on this on internal review.
30. As to s37, it appeared from its lawyer's submission that Huon was claiming this exemption in relation to *all* the information identified in the Decision Table. However after I wrote to Huon, asking it to identify the relevant documents it claimed were exempt under s37, it responded as follows:

*For the purposes of these further submissions, the information has been divided into the following categories.*

- (a) Photos of dead seals;
- (b) Information regarding marine livestock pens; and
- (c) Data regarding bird netting project.

...

**2.1 Photos**

- (a) This information forms pages 135, 137, 141, 146, 159, 161, 168, 169, 172, 179, 183, 184, 188, 190, 192, 193, 194, 196, 199, 204, 205, 238, 251, 252, and 253 of the Decision Table

...

**2.2 Information regarding marine livestock pens**

- (a) This information forms part of pages 1, 6, 12, 13, and 176 of the Decision Table.

...

*2.3 Data regarding bird netting trials*

*(a) This information forms pages 16, 17, 293, 329, 384, 385, and 388 of the Decision Table.*

31. Huon submitted that the information directly relates to its operational business practices, including research and development initiatives and trial outcomes, which contribute to it being an industry leader regarding practical innovations, design of farming areas, and wildlife management procedures.
32. It stated that if the information was disclosed, it would result in it suffering a competitive disadvantage, in that it would allow Huon's competitors to gain an advantage in the market place over it.
33. It was claimed that in an already difficult period for the Tasmanian economy, even a small shift away by customers could result in significant detrimental impacts on Huon's business, particularly where it is already competing in both Tasmanian and international markets.
34. It stated that reputation is key to Huon being competitive and its reputation as an industry leader, premium producer and the 'premiere' privately-owned Australian company has taken years to establish. It was stated that this good reputation is a major contributor to its success, and is particularly important to Huon's marketing of the "Huon Method" as its point of difference.
35. Huon claimed that its good reputation would be instantly damaged by release of the information, particularly given the graphic nature of the dead seal autopsy photographs and the information concerning the management of wildlife.
36. It noted that the information relates to a sensitive subject matter and that, industry-wide, there are issues with management of protected wildlife, and in particular seals.
37. If disclosed, it was claimed that customers and members of the public may unfairly associate these industry-wide issues with Huon specifically and this would be particularly damaging to Huon's competitive position.
38. Huon went on to submit that customers and the public at large are more conscious of conservation matters generally, and more concerned with ethical and sustainable methods of sourcing foods, and as such, release of the information would likely lead to loss of customer confidence in Huon and would result in a commercial advantage to Huon's competitors, as customers would take their business elsewhere.
39. Further, it was stated that Huon already makes information about its aquaculture processes, the environment, sustainability and innovation on its website. It referred to its 'sustainability dashboard'<sup>1</sup> in particular and claimed that it contains information regarding salmonid health, sustainable management, net cleaning, growing conditions, research and development, feed levels, clean-up locations, as

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<sup>1</sup> See <http://dashboard.huonaqua.com.au/>

well as statistical information specifically regarding seal interactions; the latter being updated monthly.

40. Huon submitted that its website and dashboard have been specifically designed to help the public better understand its business and to provide the public with accurate and current information about the way it farms and manages its fish and manages its impact on the environment.
41. It stated that any additional information *over and above* what it already actively discloses would be commercially sensitive information and would negatively impact on its competitive position if disclosed.
42. Huon also stated that there is a considerable amount of information publicly available regarding wildlife management in the fisheries and aquaculture context. It referred to the Department's own website, and the Commonwealth Department of Agriculture, Fisheries and Forestry's website. It noted that the latter also contains information about the *National Strategy to Address Interactions between Humans and Seals for Fisheries, Aquaculture and Tourism*.
43. Huon submitted that given the amount of information already in the public domain, the need to disclose further information regarding its business affairs is reduced.
44. Huon also submitted that the timing of the proposed release (in late 2014) would also likely result in significant competitive disadvantage to it, giving details as to why it considered this was the case.
45. As to s39, Huon stated that this applies to the *Statutory Declarations* and 'email correspondence' in the Decision Table.
46. It stated that part of the information proposed for release contains confidential information, in that where statements were made as part of an investigation of an incident, the information was provided by Huon to the Department in circumstances where it was intended that those communications would be confidential.
47. Further, it claimed that where email communications from Huon to the Department contain disclaimers to the effect that the email is a confidential communication for the intended recipient only, it is clear that this information was communicated in confidence to the Department as the relevant public authority.
48. Huon stated that release of this information would be reasonably likely to impair the ability of the Department to obtain similar information in the future, as it has the potential to damage the positive working relationship Huon has developed with the Department.
49. It was suggested that if disclosure did occur, rather than continuing to enjoy a 'frank and informal relationship' with the Department, Huon may need to

consider future responses on a more formal basis and limit its disclosures to only those which are legally required.

50. Huon also made a submission in regards the application of s42(b) – *Information is exempt information if its disclosure would be likely to – ... (b) prejudice any measures being taken, or proposed to be taken, for the management or protection of a rare or endangered species of flora or fauna.*
51. This was asserted to apply to the *Incident Reports, Notifications of Application for the Humane Destruction of Seal forms, Dead Seal Report Forms, Permits to Take Specially Protected Wildlife and Marine Occurrence forms*, as referred to in the Decision Table.
52. It was stated that Australian fur seals are protected, and New Zealand fur seals are listed as rare in Tasmania's threatened species legislation and the release of the information would prejudice the lawful measures being taken by it to manage protected and rare wildlife.
53. This is because significant public criticism regarding Huon's reliance on these processes would be likely if disclosure occurred. Disclosure of the information would negatively impact on Huon's ability to continue to implement these processes as part of managing its business, even though the processes are legal and Huon is acting in a compliant manner.
54. Huon also suggested that blank versions of the application and notification forms could be released to satisfy the public's need to have an understanding of the relevant government processes without needing to release information relating to it.
55. As to the public interest assessment in regards disclosure, Huon originally stated that, after considering the matters at (a), (b), (f), (g), (i), (j), (l), (m) (n), (s), (v), (w), (x) and (y) of Schedule 1, it was clear that the detriment to Huon outweighed any public interest factors in favour of disclosure and thus disclosure would be contrary to the public interest under s33.
56. I note that in making its submission to me in regards s37 specifically, Huon made public interest submissions on (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (l), (m), (n), (s), (v), (w) and (y). Curiously, matter (x) – *information available to competitors* - was not addressed on this occasion.
57. Huon also requested to be provided a copy of the Ombudsman's draft decision under s48(1)(b) of the Act.

*The Department's submissions*

58. I first note that in the internal review decision the Department expressly addressed the information it considered subject to exemption under s27, s30 and s35 and which it had no intention of disclosing. As discussed earlier, this information is therefore not subject to external review and it was not necessary for the Department to have addressed this on internal review.

59. As to s36 personal information, the Department accepted Huon's arguments that the names of operational employees were exempt under this section and that it would be contrary to the public interest to disclose the personal information of Huon employees. Again, as the Department has no intention of disclosing this information, this information is not subject to external review.
60. The Department's internal review decision set out its views in response to Huon's claims in regards s37, s39 and s42 and the public interest.
61. As to its assessment of s37, the Department considered that Huon had 'articulated a plausible mechanism' through which disclosure could competitively disadvantage it, by harming its reputation with retailers and consumers, thus affecting its market share.
62. Turning to the public interest arguments regarding disclosure, the Department considered that (a), (b), (c), (d), (f), (g), (m) (n), (s), (v) and (w) of Schedule 1 were relevant where (a), (b), (c), (d), (f) and (g) weighed in favour of disclosure whilst (m) (n), (s), (v) and (w) weighed against it.
63. In assessing the public interest, the Department categorised the documents as follows:
- Forms, *Statutory Declarations* and other signed statements relating to applications for the humane destruction of seals;
  - HAC *Dead Seal Report Forms* and other reports of incidents involving interactions with wildlife (including emails and photographs, where applicable);
  - Information concerning permits to take specially protected wildlife, including DPIPWE internal memoranda and minutes to the Secretary;
  - Information relating to law enforcement investigations; and
  - Other DPIPWE documents.
64. The Department noted that, except for some Huon emails provided voluntarily to it, the information concerning applications for the humane destruction of seals and incidents involving interactions with wildlife appear to have been submitted to the Department in compliance with the protocols set out in the *Seal Management Framework 2012* or earlier protocols approved by the Minister for Environment, Parks and Heritage.
65. It stated that matters (n) and (v) do not apply to this information and matter (m) is less relevant, provided that the personal information of Huon employees is not disclosed as intended.
66. The Department was further of the view that there is a strong public interest in disclosure of this information because of its key role in enhancing the administrative and decision-making processes relating to the relocation and destruction of seals, and its value in understanding the impacts of marine farming operations on wildlife generally.

67. It noted that Huon has suggested that the general public could obtain an understanding of the government's administrative and decision-making processes from *blank* versions of the documents without specific details relating to Huon's business being released. It also acknowledged that Huon publishes some information and statistics regarding seal interactions on its website.
68. However, the Department was of the view that this limited information cannot satisfy the legitimate public interest in understanding how the government's administrative and decision-making processes work *in practice*, and specifically, the circumstances surrounding the death or destruction of individual seals, or impacts on other wildlife.
69. The Department took the view that whilst it was possible that disclosure of this information, if subsequently made public, could harm the competitive position of Huon, the public interest in disclosure of the information was stronger and hence the information was not exempt from disclosure under the public interest test.
70. The Department accepted that where Huon's emails were provided *voluntarily* there was little obvious public interest in disclosure of the information they contain, as it is possible that disclosure of the emails could prejudice its ability to obtain similar information in the future. As such it would be contrary to the public interest to disclose this information.
71. However, the Department considered that the remaining information relevant to the application was not *acquired* from Huon, and hence could not satisfy s37(1).
72. As to s39 and information communicated in confidence, the Department stated that the information at issue was 50 pages of *Statutory Declarations* (under two groups) and numerous emails sent by Huon employees to the Department.
73. In regards the first group of *Statutory Declarations*, the Department recorded that one of the investigation officers had confirmed that these were obtained *voluntarily* on the understanding that the individuals who provided them would be prepared to appear in court as witnesses should the investigation lead to a prosecution, but that the statements would otherwise remain confidential.
74. After having regard to Schedule 1 of the Act, the Department was confident that disclosure of these *Statutory Declarations* would be likely to result in harassment or discrimination against the individuals who provided them, thereby deterring other individuals from providing similar statements to the Department in the future and that they should not be disclosed.
75. In contrast to the first group, it was noted that the *Statutory Declarations* in the second group were submitted to the Department in compliance with the *Humane Destruction Management* option under the *Minimum Requirements 2012a* forming part of the *Seal Management Framework 2012* approved by the Minister for Environment, Parks and Heritage, or an earlier such protocol.

76. The Framework and protocols set out, amongst other things, the conditions that must be met before the Secretary of the Department will consider granting a permit to 'take' specially protected wildlife in accordance with r24 of the *Wildlife (General) Regulations 2010*.
77. Specifically, the Department considered that these *Statutory Declarations* were provided to the Department under the requirement for the Secretary to be satisfied in accordance with regulation 24(b), and that they were acquired by the Department from Huon, related to Huon's business, and were provided to the Department pursuant to a requirement of the *Wildlife (General) Regulations 2010*. As such, they satisfied the requirements of section 39(2) of the Act and could not therefore be exempt under section 39.
78. Turning to the Huon emails, several of these were from its employees to the Department and included the following generic disclaimer:
- The information contained in this email is for the named recipient(s) only. It may contain privileged and confidential information and, if you are not an intended recipient, you must not copy, distribute or take any action in reliance on it.*
79. The Department considered that the disclaimer merely serves to alert the recipient of the email as to the possibility that the email contains confidential information, but does not confirm or even suggest the presence or absence of confidential information.
80. The Department found no reason to doubt the assertion that the emails were provided in a candid manner and in good faith, and solely for the benefit of the intended recipients. However, Wildlife Management Branch confirmed that there was no mutual understanding between the parties that the emails were communicated in confidence, and was of the view that none of the emails were inherently confidential in nature.
81. Hence it was found that none of the emails qualified for exemption under section 39 of the Act and could be disclosed.
82. As to Huon's claims in regard to s42 of the Act, the delegate stated that only the New Zealand fur seal (*Arctocephalus forsteri*) and the White-bellied Sea-Eagle (*Haliaeetus leucogaster*) were listed as rare or endangered species under the *Tasmanian Threatened Species Protection Act 1995*. Hence, only information concerning measures being taken for the management or protection of these two species was potentially relevant to this exemption provision.
83. The Department acknowledged it was possible that disclosure of the information, if it were to become public knowledge, could result in some adverse publicity for Huon, and/or pressure on the salmonid industry or the regulator to modify the measures used to manage seal interactions.
84. However, the Department concluded that disclosure of the information would not prevent Huon from exercising its lawful right to continue using the same

measures, and it was also not certain that the applicant would make any of the information publicly available.

85. Hence the Department considered that none of the information qualified as exempt under section 42 of the Act.

### **Analysis**

86. Prior to considering the claimed exemptions, I wish to make a few preliminary observations on process.
87. Huon was aggrieved when the Department made its original decision to disclose in part or full 448 pages out of 585 pages when it had only been consulted on 267 pages. On internal review the number of collated pages was increased to 591 but the number to be disclosed in part or full was reduced to 319.
88. In this regard I note that under the Act the Department does not have to provide every piece of information it is thinking of disclosing to the third party in order to obtain their view.
89. Section 37(2)(e) requires that, once the Department has determined that the identified information would be likely to expose the third party to substantial harm to its competitive position, it state to the third party *the nature of the information applied for*. It is not formally required to provide the actual information in question to the third party.
90. However, I consider the Department has a discretion to do so and that in some cases it may be appropriate to provide a copy of the actual information if this best makes clear the *nature of the information*.
91. In this case, clearly Huon did not think it had been fully informed of the nature of the 448 pages to be disclosed in part or full after having received only 267 pages with the consultation notice.
92. My observation is that the Department did attempt to set out the nature of the information in its consultation notice. It set out the type of information it had acquired from Huon under three headings. It may also have been of benefit to have set out the actual terms of the application for assessed disclosure, as this may have provided some additional context, and to have identified at that time how many pages had been collated, so that Huon was not taken by surprise when this information emerged in the original decision.
93. My final observation is that if the Department has determined to go down the route of providing all relevant information to the third party for comment, it should take extreme care to ensure that *all* relevant information is provided.

### **Section 37 claims- competitive disadvantage**

94. Under s37 I am assessing the circumstances relating to competitive disadvantage and disclosure at the time of my decision, not at the time the information was acquired by the Department from Huon.
95. Generally, in the words of s37(1), I am satisfied that much of the information before me, if disclosed, would reveal information relating to business affairs acquired by the Department from an organisation other than the applicant, namely Huon.
96. However, the wording of s37(1) also requires that I must be satisfied that the information either relates to trade secrets, or that disclosure of the information acquired from a third party would be likely to expose that particular third party, Huon, to competitive disadvantage.
97. There is no claim before me that the information in question relates to trade secrets as such, and I find accordingly.
98. On the question of likely competitive disadvantage, in considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman [2010] TASSC 39*, held that:
  52. *For the information to be exempt its disclosure needs to be likely to expose the undertaking or agency not to any disadvantage, but a disadvantage which relates to or is characterised by competition. The requirements in ss31 and 32 of the Act that the disadvantage relate to competition may have the preservation of the competitive process as a broad ultimate goal, but primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in the market....*
  59. *...The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage...*
99. At paragraph 41 the Court interpreted the meaning of "likely" to be 'a real or not remote chance or possibility, rather than more probable than not'.
100. I now turn to the information which Huon claims to be exempt under s37.

**Photos –**

*pages 135, 137, 141, 146, 159, 161, 168, 169, 172, 179, 183, 184, 188, 190, 192, 193, 194, 196, 199, 204, 205, 238, 251, 252, and 253*

101. I have examined these pages and they are not all photos as claimed. Page 135 is not a photo, but I will accept that Huon is referring to the nearby page 133, and page 159 is not a photo, but I will accept it is referring to the nearby page 156. However, as to page 199, there is no such page in the information to be

disclosed and no nearby photo so I disregard this claim. Thus the relevant photos are:

*pages 133, 137, 141, 146, 156, 161, 168, 169, 172, 179, 183, 184, 188, 192, 193, 194, 196, 199, 204, 205, 238, 251, 252, and 253*

102. I accept that these photos of dead seals are, on the whole, not pleasant viewing, and that viewing may well cause distress, upset and potentially an adverse reaction by Tasmanian, Australian and overseas consumers and possibly also by shareholders of Huon, given it is now a publicly listed company<sup>2</sup>.
103. I can also accept that these photos may well be made available to the media or other organisations, where they are likely to be widely publicised.
104. From the evidence before me, I can also accept that Huon is not alone as a salmonid producer in being responsible for the death of wildlife. The evidence on Tassal's sustainability dashboard shows this<sup>3</sup>. However, Huon would be unable to point to similar photos on, say, Tassal's website, as there are none.
105. Thus, there is a real chance that Huon consumers may then purchase fish from other Tasmanian producers in protest, or shareholders may sell their stock, thus affecting Huon's share price and its market capitalisation value.
106. Even if dead seal photos taken by other local producers were available on their websites, this may not reduce the competitive disadvantage faced by Huon from disclosure. Consumers may then purchase fish produced outside of Tasmania in protest, to Huon's (and the others') disadvantage or again its shareholders may invest elsewhere.
107. In light of the above considerations I am satisfied that the release of these photos of dead seals may be likely to expose Huon to competitive disadvantage and that this information meets the requirements of s37(1) of the Act.

*Marine livestock pen information -*  
*pages 1, 6, 12, 13, and 176*

108. This appears to be a combination of information about pen and related designs within emails and in photos or drawings.
109. Huon claims that this information, if disclosed, would give competitors information about the design of pens which they may either use or build upon, without having to spend time/resources in development as it has done.
110. In considering this generic claim, I examined what type of pen information Huon now provides on its website. I refer to their webpage titled 'revolutionary new pen design'<sup>4</sup>, which it states it was rolling out in 2015. Notably, it includes graphics of their new net design.

<sup>2</sup> See <https://www.huonaqua.com.au/huon-aquaculture-public-offer-now-open/>

<sup>3</sup> See <http://www.tassal.com.au/sustainability/asc-dashboard/>

<sup>4</sup> See <https://www.huonaqua.com.au/about/farm/new-pens/>

I11. It is difficult for me to be satisfied, on the limited evidence before me, how disclosure is likely to expose Huon to competitive disadvantage as claimed when it is prepared to graphically disclose its new pen design on its website.

I12. Thus I am not satisfied that the above information meets the requirements of s37(1) of the Act.

*Data regarding bird netting trials-  
pages 16, 17, 293, 329, 384, 385, and 388*

I13. I am not satisfied that page 329 relates to bird netting trials and I note it is part of a three page memorandum. Huon may be referring to part of page 331 but this merely sets out elements of the required exclusion netting standards so I disregard this also. I am satisfied that the remaining pages relate to bird netting trials.

I14. Huon again claims that the disclosure of this information would give competitors information which they may either use or build upon without having to spend the time and resources in developing as it has done.

I15. On the evidence before me, I am not satisfied that any of this information is of such a nature that it is likely to expose Huon to competitive disadvantage as claimed. The information is primarily about the number and type of wildlife being killed using a certain type of netting and is not so much about the design of the netting itself. Bird mortality is also now the type of information which Huon (and others) disclose on their own websites<sup>5</sup>.

I16. Thus I am not satisfied that any of these pages meet the requirements of s37(1) of the Act.

### ***Section 39 claims - information communicated in confidence***

I17. For information to be exempt under s39 I first need to be satisfied that the information was communicated in confidence to the Department.

I18. The confidential communication of information can be actual or implied<sup>6</sup> and is fact sensitive<sup>7</sup>. I consider the intentions of the person providing the information, to what extent that information has been otherwise circulated and the likely consequences of disclosure to be of significance here.

I19. Here there was no formal offer of confidentiality by the Department in regards the information to be disclosed. However, this is not essential in establishing whether information was communicated in confidence. The factual circumstances must be examined to assess whether there is an implied offer of confidentiality. I refer to the Victorian Administrative Appeals Tribunal (AAT) case of *Re Thwaites*

<sup>5</sup> See <https://www.huonaqua.com.au/sustainability/wildlife/birds/>, and also see Tassal's website at <http://www.tassal.com.au/sustainability/asc-dashboard/>

<sup>6</sup> *Re B and Brisbane North Regional Health Authority* 1 QAR 279

<sup>7</sup> *Ryder and Booth* (1985) VR 869

*and Department of Health and Community Services (1995) 8 VAR 361* where it was stated that:

*No formal confidentiality agreement is required to establish that information was communicated in confidence nor is it necessary to establish a ‘meeting of minds’...it is unnecessary even to establish an ‘agreement’ by word of mouth. The understanding and the circumstances surrounding the communication or the very nature of the information may be sufficient in themselves.*

120. Conversely, in regards the submission by Huon that the disclaimer on its emails stating that the information contained within is confidential is sufficient, I do not consider this to be the proper test either.
121. The then Victorian Administrative Appeals Tribunal<sup>8</sup> has found that merely marking a document as ‘commercial-in-confidence’ may not be sufficient as the material may lack ‘the intrinsic quality of confidentiality’. However it is a consideration which must be given some weight.
122. In addition, just because information has been found to have been communicated in confidence does not mean that the requirements of s39 are met. The section further requires that the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future: s39(1)(b).
123. I note that there is a similar provision in the Victorian *Freedom of Information Act 1982* at s35. In interpreting this provision, it has been held that what is required is some positive demonstration that the information’s disclosure will adversely affect the respondent’s future ability to obtain similar information from persons in general, rather than specifically from the person who confided it.<sup>9</sup>.
124. ‘Similar information’ needs to be assessed with regard to the nature of the specific contents of each document<sup>10</sup>. It requires a degree of impairment in ability going beyond that which is merely ‘trifling’ and to be one which is more probable than not<sup>11</sup>.
125. A relevant consideration here is whether the information was provided voluntarily. This was the basis on which the Department determined not to disclose the first group of *Statutory Declarations*, these having been provided voluntarily in the course of law enforcement investigations conducted by officers of the Wildlife Management Branch.
126. The group of *Statutory Declarations* under consideration here were obtained by Department investigators in compliance with the Humane Destruction

<sup>8</sup> *Re Mildenhall and VicRoads* (1996) 9 VAR 362

<sup>9</sup> *Re Landsberger and Victoria Police* (1989) 3 VAR 100 at 102

<sup>10</sup> *Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined)* (1992) 5 VAR 542

<sup>11</sup> *Gunawan v Department of Education* [1999] VCAT 665

Management protocols under the *Seal Management Framework 2012* approved by the Minister for Environment, Parks and Heritage, or an earlier such protocol<sup>12</sup>.

127. In considering these *Statutory Declarations*, I turn to the requirements of s39(2). I am first satisfied that these were acquired by the Department from a business undertaking, Huon, and they relate to matters of a business or commercial nature. Thus s39(2)(a) and (b) are satisfied.
128. As to s39(2)(c) and whether they were provided to the Department pursuant to the requirement of a law, I note r24 of the *Wildlife (General) Regulations 2010* which the Department has relied on. This states:
  24. *Permit for taking specially protected, protected or partly protected wildlife in special cases*
    - (1) *A permit under this regulation authorises the person named in the permit or a person acting under the Secretary's direction to take, have possession of, buy or sell or otherwise dispose of such form of partly protected, protected or specially protected wildlife, or the products of such wildlife, as are specified in the permit.*
    - (2) *The permit may only be issued if the Secretary is satisfied that it is necessary or desirable to do so.*
129. I am satisfied that these *Statutory Declarations* were provided by Huon to the Department so as to satisfy the Secretary of the Department that it was necessary or desirable to issue a permit for the seals in question to be 'taken' or 'otherwise disposed of' as per r24.
130. Whilst there is nothing in the above regulations stating that a *Statutory Declaration* is required when applying for a permit (see r20) I am satisfied that this is a lawful requirement as per the protocols set out above.
131. Thus s39(2)(c) is satisfied and as the requirements of s39(2) as a whole are satisfied, such that these *Statutory Declarations* are not exempt under s39(1).
132. Even if I am wrong and these *Statutory Declarations* were not technically required by law, such that the requirements of s39(2)(c) are not met, I would in any event not be satisfied that s39(1)(b) is met.
133. The evidence before me does not satisfy me that disclosure of these *Statutory Declarations* would stop salmonid producers from providing similar evidence in the future, where the Department deems it necessary as a matter of proof. As good corporate citizens I am satisfied that Tasmanian salmonid producers would wish to continue to comply with the relevant seal protocols in the future regardless of disclosure.

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<sup>12</sup> These documents can be found on the Department's website at:  
<http://dipwe.tas.gov.au/Documents/Appendix%20B%20EIS%20Draft%20Amendment%205.pdf>

- I34. Thus disclosure would not be reasonably likely to impair the ability of the Department to obtain similar information in the future as required by s39(1)(b).
- I35. Huon also claimed that the information titled 'email correspondence' in the Decision Table should also be exempt under s39.
- I36. From an examination of the information, the 'email correspondence' with Huon has generally been redacted in full and hence was not intended for disclosure. Of the remaining 'email correspondence' to be disclosed in part, the information acquired from Huon has generally already been redacted.
- I37. Also, part of what remains unredacted on some 'email correspondence' pages is information of the Department, not information communicated in confidence by Huon.
- I38. That is, page 384 is email correspondence between Departmental officers concerning deaths from a netting trial (referred to earlier under s37). The information on page 384 came from an audit inspection of the netting project as conducted by the Department. I am not satisfied that this information was communicated by Huon, as the information was gathered by the Department officers. Thus this page is not exempt under s39(1).
- I39. By contrast, in regards the top part of page 385 (this email contains both information acquired from Huon, and repeats the information from the page 384 email) and the information at paragraph 3 on page 388, I accept that this has been communicated in confidence and voluntarily reported under a trial.
- I40. However, I am not satisfied that disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in the future. This is because, as noted earlier, it is common practice now for producers such as Huon and Tassal to disclose bird deaths on their sustainability dashboards<sup>13</sup>.
- I41. Hence I am not satisfied that similar information of this nature would not be voluntarily provided to the Department in the future where a producer discloses such information on its website.
- I42. As to pages 579-581, this correspondence from Huon concerns an attack on a Huon diver by a seal. On the evidence before me I can see no basis for finding that this information was communicated in confidence under s39, despite the confidentiality disclaimer on page 581, nor why disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in the future.
- I43. As to page 587, this is merely a microchip number and it is not clear that this is part of any 'email correspondence'. I can see no basis for finding that this information was communicated in confidence under s39 and again, why disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in the future.

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<sup>13</sup> See earlier at footnote 5.

**Section 42(b) claims – disclosure likely to prejudice any measures being taken, or proposed to be taken, for the management or protection of a rare or endangered species of flora or fauna**

144. Huon claims that this exemption should apply to the *Incident Reports, Notifications of Application for the Humane Destruction of Seal Forms, Dead Seal Report Forms, Permits to Take Specially Protected Wildlife and Marine Occurrence Forms* referred to in the Decision Table.
145. Huon claims that release of the above information would prejudice lawful measures it is taking to manage protected and rare wildlife, as significant public criticism regarding its reliance on these processes is likely should disclosure occur.
146. It also claims that disclosure of the information would negatively impact on its ability to continue to implement these processes as part of managing its business, even though the processes are legal and it is acting in a compliant manner.
147. The Department was of the view that of the birds, dolphins and seals referred to in the above information only the New Zealand fur seal and the White Bellied Sea-eagle would be considered rare or endangered under the law. I accept that only information concerning measures being taken for the management or protection of these species is potentially relevant to this exemption.
148. I have noted a number of references to New Zealand fur seals in the forms before me and they appear to be treated the same as Australian fur seals in terms of seeking permits for humane destruction. I also found references to sea eagles in *Incident Reports* but it is not clear whether this is the White Bellied Sea-Eagle specifically.
149. In any event, I do not believe that Huon has made out its case here. As Huon claims, its current processes are legal and it is ‘compliant’, and the Department does not dispute this. On the evidence before me I am satisfied that Huon, as a good corporate citizen, will continue to meet any obligations it has in the future in regards to rare or endangered species, regardless of any disclosure, just as I am satisfied that it will do so in regards to protected wildlife generally.
150. I am not satisfied that any ‘measures’ Huon might take in the future, or proposes to be taken, for the management or protection of a rare or endangered species of fauna, would be prejudiced by any disclosure.
151. I am thus not satisfied that the requirements of s42 are met. Hence the claimed information is not exempt under this provision.

**Section 33- the public interest test**

152. The information subject to the public interest test is as follows:

- *Photos (s37) - pages 133, 137, 141, 146, 156, 161, 168, 169, 172, 179, 183, 184, 188, 190, 192, 193, 194, 196, 204, 205, 238, 251, 252, and 253*

153. In a nutshell, my task is to balance any potential economic harm to Huon arising from disclosure against the significant public or community interest in salmonid farming in Tasmania, and in particular, its effect on the environment.
154. Of interest, I note that it has been Huon's actions of recent times which have served to further raise the public's interest in this issue. In particular, I refer to their disclosures to, and participation in, an ABC 4 Corners program in 2016 and its recent litigation on biomass limits for Macquarie Harbor<sup>14</sup>.
155. However, it is important to distinguish between issues of interest to the public and 'the public interest'.
156. Australian courts and tribunals have drawn a distinction between the public interest in disclosure and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest<sup>15</sup>.
157. What I must do under the Act is to consider all relevant matters, including those matters set out in Schedule 1, and disregarding those matters set out in Schedule 2, in coming to a conclusion as to whether or not it is contrary to the public interest for information to be disclosed.
158. Huon submits that any additional information over and above what it already actively discloses on its website and on its 'sustainability dashboard' would be commercially sensitive information and would negatively impact on its competitive position if disclosed. In effect, it is arguing that 'the public interest' should be satisfied by what it chooses to disclose on its dashboard in relation to the environment and what is available on other government websites.
159. I have examined its dashboard and related website pages and particularly the 'wildlife interactions' pages. I accept that Huon has gone to considerable lengths to develop this feature in order to provide a significant degree of transparency and is open about declaring mortalities and live removals of seals going back a number of years, and detailing how these events have happened. It also records the species and cause of deaths of birds, so far only for three of its leases in South-east Tasmania in 2016/17.
160. As expected, and for good reason, I note that there are no photos of any dead wildlife.
161. I have accepted, in the context of s37, that disclosure of the photos would be likely to expose Huon to economic loss by way of creating a competitive disadvantage by advantaging other producers who are not so vividly associated with seal deaths.

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<sup>14</sup> See <https://www.huonaqua.com.au/news/>

<sup>15</sup> *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 2) (1991)* 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment (1985)* 9 ALD 113

162. As to the actual likelihood of competitive disadvantage, I consider that disclosure of the photos *would* cause serious economic harm to Huon, through both consumer and shareholder response. As noted earlier, many of these photos are graphic and are very likely to cause an emotive response which on its own, or manipulated or misrepresented by others, would lead to Huon's detriment and give an advantage to others.
163. It could be argued that in taking such a view I am giving weight to criteria listed in Schedule 2, which are *irrelevant* to an assessment of the public interest, namely:
- (b) *that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;*
  - (d) *that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.*
164. In giving weight to an emotive response to photos of dead seals, my assessment of the effect of disclosure on one level does involve a consideration of whether the public may be 'confused' or 'not readily understand' the information, or consideration of whether the applicant may misinterpret the information, whether because of the actions of others in misusing and misrepresenting this information or not.
165. However, Schedule 2 is focused on these not being reasons in themselves for information not being disclosed. Here, these matters are relevant considerations in the context of assessing the *end-result* of disclosure in relation to a third party, being financial detriment to Huon. This is a relevant consideration under Schedule 1, and in particular, under (s) and (w).
166. These photos have been provided by Huon as supporting evidence to the relevant forms lodged with the Department under established protocols. It is not evident, nor does the Department claim, that in so doing there has been any unlawful action by Huon.
167. Given that the relevant de-identified forms and *Statutory Declarations* from Huon are to be disclosed, which set out the exact circumstances surrounding the seals the subject of the photos, I consider that their disclosure would not further materially contribute to debate on this matter of public interest: (b). Neither would it assist in further understanding government administrative processes or decision-making: (f) and (g).
168. By contrast, I am satisfied that disclosure *would* affect the business or financial interests of Huon and would cause harm to its competitive position: (s) and (w).
169. On balance, it would be contrary to the public interest to release any of these photos. Even if I am wrong and disclosure did in some way add to the public interest debate, I consider that the harm to Huon would still outweigh any public benefit, such that it would still be contrary to the public interest to disclose the photos.

## **Preliminary Conclusion**

170. Of the 319 pages of information in question, I find that the following information is exempt under s37 of the Act and is not to be disclosed, as it is contrary to the public interest to do so:

- Photos - pages 133, 137, 141, 146, 156, 161, 168, 169, 172, 179, 183, 184, 188, 190, 192, 193, 194, 196, 204, 205, 238, 251, 252, and 253

171. The remaining pages of information may be disclosed.

172. In releasing the information, the name of the Huon employee on the *Statutory Declaration* at page 304 should be deleted, as this would have been intended by the Department. Similarly, the name of the Huon employee on page 96 and 97 under 'Capture Record' should be deleted. The Department should closely examine each page of information to ensure personal information is not being disclosed counter to its intentions.

## **Submission to Preliminary Conclusion**

173. The Department advised me on 12 July 2017 that it had no further submission to make in relation to the preliminary decision.

## **Conclusion**

174. I therefore direct the Department to release the information referred to in paragraph 171 above, redacted in accordance with paragraph 172, by close of business on 17 August 2017.

**Dated:** 20 July 2017



**Richard Connock**  
**Ombudsman**

## **Attachment**

### **Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest**

### **Sections 30(3) and 33(2)**

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
  - (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
  - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
  - (g) whether the disclosure would enhance scrutiny of government administrative processes;
  - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
  - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
  - (k) whether the disclosure would promote or harm the economic development of the State;
  - (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 2009 - SCHEDULE 2**

### **- Matters Irrelevant to Assessment of Public Interest**

### **SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest**

Sections 30(4) and 33(3)

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

- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
- (b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
- (c) that disclosure would cause a loss of confidence in the government;
- (d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.



## TASMANIAN OMBUDSMAN

### DECISION

**Right to Information Act 2009 Review**

**Case Reference: 01502-105**

**Names of Parties:** Laura Kelly, on behalf of Environment Tasmania & the Environment Protection Agency

**Provisions considered:** s22(4), s33, s37, s39 and Schedule 1

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#### Background

1. On 25 September 2014 an application for assessed disclosure was lodged with the Department of Primary Industries, Parks, Water and Environment (the Department) by Ms Rebecca Hubbard, Marine Coordinator, on behalf of Environment Tasmania (ET or 'the applicant'). This application covered information in the possession of the Environment Protection Agency (EPA) relating to the operations of the Lonnavale Hatchery on the Russell River, owned by Huon Aquaculture (Huon).
2. The application sought:
  - Site Environmental Management Plan – Lonnavale Hatchery (AQMO130.1)
  - Risk Assessment – Lonnavale (AQMO010.2)
  - The relevant Government-provided Licence (and all regulatory requirements) specific to operating the Lonnavale Hatchery
  - Scientific Report: Davies, PE (2009) Nutrient and Algal levels in the Russell River and their relationship to discharges from the Huon Aquaculture Company (HAC) farm facility [Report to Huon Aquaculture Company]. Project Report. Freshwater Systems, Hobart.
  - Any water quality or river health monitoring reports related to the Lonnavale Hatchery for the period of 2012-2014
  - Any correspondence (including letters, emails and notices) between officers of EPA, DPIPWE or Inland Fisheries Service and Huon Aquaculture (including Huon Aquaculture Company Ltd and Huon Aquaculture Group Limited) related to monitoring of the Russel (sic) River

We also request any details of compliance or enforcement action taken in respect of the Lonnavale Hatchery between 2009 and 2014. This could include warning letters, infringement notices, notices to comply, licence suspensions, permit variations, fines or prosecution activities.

3. There was some negotiation on scope around 4-5 November 2014 in that ET agreed that names, contact details and any other personal information were accepted as outside the scope of the application.
4. On 28 November 2014 the Department made its decision. It identified 212 pages of information, excluding duplicates and out of scope information. A schedule was attached to the Department's decision and is referred to in this decision as the 'Decision Table'.
5. The decision was that some of the information on 17 pages, and all of the information on 136 pages, was exempt information. Some information was released with the decision and some was withheld subject to the third party's decision regarding external review. The Department relied on s39 of the Act (*information obtained in confidence*) for all the exemptions and made an assessment of the public interest under s33, although it noted that much of the information would be exempt under s37 (*information relating to business affairs of third party*), and hence the need for third party consultation.
6. There was what was titled a subsequent 'Right to Information decision' on 16 December 2014. This was actually the release of the information identified as subject to third party appeal rights in the decision letter. This noted that all the material the third party was consulted on was exempt except for the correspondence on pages 46-49, which was released partially redacted.
7. An application for internal review was made on 17 December 2014 and an internal review decision was made on 29 January 2015. The review delegate affirmed the original decision to exempt some of the information on 17 pages and all the information on 136 pages.
8. The application for external review was lodged with this office on 18 February 2015.
9. Since that time Ms Hubbard has been replaced in her position at ET by Ms Laura Kelly.

### **Issues for Determination**

10. The starting point in all my reviews is s7 of the Act: a person has a legally enforceable right to information in the possession of a public authority unless it is exempt.
11. The Department has relied on s39(1)(b) to claim exemptions for the information because it is asserted that the information was communicated in confidence and that its disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in the future. It has also claimed that s37 applies to this information.
12. Both s37 and s39 are found in Part 3, Division 2 of the Act. Disclosure of information found to be exempt under Division 2, unlike Division 1, is subject to the public interest test.

13. In undertaking my review, I must determine whether the above grounds of exemption apply to the information before me. If either exemption ground applies, I must then determine whether that information is to remain exempt after taking into account the public interest test at s33.

14. The applicant has stated that it is not seeking any personal information. Thus any personal information under s36 is outside of the scope of the application for assessed disclosure and hence not part of this review.

## **Relevant legislation**

15. Section 22 relevantly states:

22. Reasons to be given

(1) *If, in relation to an application for information made to a public authority or Minister, the public authority or Minister decides –*

*(a) that the applicant is not entitled to the information because it is exempt information; or*

...

*the public authority or Minister must give the applicant written notice of the decision.*

...

(4) *A public authority or Minister may, in a notice given under subsection (1), state the decision in terms which neither confirm nor deny the existence of any information which on a ground specified in Division 1 of Part 3 would be exempt information.*

16. Section 33 states:

(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.*

17. Schedules 1 and 2 as referred to in s33 are attached to this decision.

18. Section 37 states:

(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.*

*...*

**19. Section 39 states:**

- (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.

20. I also note that under s47(4) of the Act, the onus is on the Department to satisfy me that the information that is claimed to be exempt should not be disclosed:

*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.*

### **Evidence and submissions**

21. I have the full unredacted 212 pages of information before me. I also have:

- the application for assessed disclosure, dated 25 September 2014
- the Department's third party consultation letter to Huon under s37(2), dated 29 October 2014
- Huon's response to the Department, dated 19 November 2014
- the initial decision on the application for assessed disclosure by a delegated officer dated 28 November 2014 with attached Decision Table
- the initial decision under s37(3) - third party consultation with Huon - by a delegated officer dated 28 November 2014
- follow up 'decision' by the above delegated officer, dated 16 December 2014 (as Huon did not seek external review)
- the application for internal review, dated 17 December 2014
- the decision on internal review by a different delegated officer, dated 29 January 2015
- the application for external review received on 18 February 2015, and attached submission
- My letter to the Department dated 22 April 2016 asking for information concerning Environmental Protection Notices (EPNs)

- Department response dated 12 May 2016 concerning EPNs
  - My letter to the Department dated 22 March 2017 querying whether a full search for information has occurred
  - letter from the Department dated 5 April 2017 advising that a full search had occurred
  - other material received from the parties during the review process
22. I refer briefly to the contents of the original decision's Decision Table, which is the document I am working from in this review as no new table was prepared for the internal review decision. This sets out by line item the relevant pages in question, a brief description of the information, the date of the document (if clear), the Department's decision on whether it is exempt under s39 or should be released, and also whether the information was subject to third party review under s37, indicating which pages were sent to Huon for consultation.
23. The Department's view, as expressed in the original decision, was that there were two main categories of information – email correspondence provided on a regular basis over the years by Huon relating to scientific data, and information provided on a one-off basis.
24. In regards its application of s39(1)(b), the Department noted that the expectation of confidentiality was explicitly stated by Huon for pages 113 to 156 and pages 161 to 170 and that it was self-evident that the EPA accepted this expectation. A further email, pages 37-45, was subject to an explicit assurance that it would be treated as commercial-in-confidence (see pages 37 and 42).
25. The Department considered that, whilst the evidence was 'less explicit' in relation to the more routine correspondence, it considered it was commercial in confidence, and also noted an instance where an officer recorded that the data would remain the property of Huon as it was not collected under an EPN (see page 184)<sup>1</sup>.
26. The original delegate noted that Huon had been consulted on much of the exempt information because it 'raised the possibility' of exemption under s37. However, beyond this general statement, the delegate did not ever specify to which particular pieces of information s37(1) would have applied, as it did with s39(1), such that the s37 consultation indicated in the Decision Table was warranted.

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<sup>1</sup> As per Ombudsman and Department correspondence concerning EPNs in April/May 2016, the Department confirmed that the first EPN, being EPN 7677/1, which concerns the Lonnavale Hatchery, was issued on 26 September 2014. This was amended on 17 December 2014 to add a flow measuring method to the monitoring requirements of condition M3. Further, on 20 January 2015, EPN 7677/2 was issued to update EPN 7677/1, following a compliance review and to add certain conditions about flow through, and that EPN was amended later that year

27. The Department actually provided 85 pages to Huon that it considered came under s37(2) - disclosure of information which may be reasonably expected to be of substantial concern to the third party.
28. In its response, Huon referred to the individual pages proposed for release, stating why they should be exempt under s37 and the public interest test. Ultimately, only a few of the 85 pages, being pages 46-49 (with redactions), were disclosed to the applicant despite Huon's view that they should not be disclosed. I will discuss Huon's response in more detail later.
29. In the decision sent to the applicant the delegate relayed Huon's view that it considered the provision of the information had been voluntary and in confidence, and stressed the importance of trust in their relationship.
30. As to the public interest test, the delegate acknowledged that disclosure would contribute to debate on a matter of public interest and provide contextual information to aid in the understanding of the EPA's EPN process. However, given that the information was commercially sensitive and was voluntarily provided, the Department accepted Huon's position that disclosure would harm its competitive position.
31. The Department concluded that disclosure would also limit its ability to obtain similar information in the future, in that the EPA relies to a significant degree on the willingness of companies it regulates to provide information voluntarily, and this is often sensitive information. Accordingly, it was not in the public interest to release the information identified as exempt under s39 of the Act.
32. On review, the new delegate referred extensively to the original decision and agreed with the original delegate that all relevant information satisfied the requirements of s39(1)(b).
33. It was argued that whilst the EPA may have the statutory powers to acquire similar information, the fact that it has chosen to do so by co-operative measures is evidence that voluntary compliance is the preferred regulatory method.
34. The delegate stated that 'imposing the provision of information via statutory provisions' would require amendments and modifications to existing licences and potentially extend timeframes for compliance. Further, other baseline data is obtained routinely outside of the regulatory regime.
35. The review delegate was of the view that marine farming in general is of particular interest to a number of organisations and that transparency is important, and in this regard noted that Huon does publish business operations and sustainability information on its website, other than information which is commercially sensitive.
36. However, the conclusion reached was that it was imperative that in the future the EPA continue to receive up-to-date and comprehensive information given voluntarily to enable appropriate and effective response measures, and that,

overall, it is contrary to the public interest for this relationship to be compromised by disclosure of commercially sensitive proprietary information.

37. ET submitted the following grounds for external review:

*Application of s39(1)(b)*

9. The Department has erred in its application of s39(1)(b). The Department has construed this provision such that the Department determines its “preferred” method to obtain information. That preferred method is then used as the approach which is tested in relation to the “ability... to obtain”. The Review Decision infers (without adequate evidence, in our view) that “voluntary compliance” is the preferred method. This construction of s39(1)(b) is not what the plain language of the legislation requires. The Department is reading into the Act a discretion which does not exist.

10. Section 39(1)(b) of the Act refers to the “ability” of the public authority to obtain similar information. The Macquarie Dictionary defines “ability” as “power or capacity to do or act in any relation”. To properly construe this, it is necessary to consider the nature of the information requested and which is found to fall within the request. Neither the First nor the Review Decision adequately does this. The information, scientific data and reports requested are plainly within the range of documents that the Department could compel Huon Aquaculture to provide. The powers were set out in the Review Request (see page 3). In addition to the powers under the Marine Farming Planning Act 1995, the Living Marine Resources Management Act 1995 and within s43 of the Environmental Management and Pollution Control Act 1994 (EMPCA), Department officers have extensive powers to obtain information of the kind set out in the request under s92 of EMPCA.

11. There is no sensible basis to argue that an aquaculture company’s level of comfort in providing information impacts on the Department’s ability to obtain information pursuant to its statutory power.

12. Given the clear and expansive power of the Department to obtain information, s39(1)(b) does not operate to exempt the information sought in the RTI Request.

13. We also refer to the discussion in the Review Request of the decision of Cannon and Australian Quality Egg Farms Ltd (1994) QAR 491.

*Public Interest*

14. It is not necessary to apply the public interest test given s39(1)(b) does not operate to exempt the information. However, in the event this is not accepted, ET believes it is not contrary to the public interest for the information to be disclosed. Accordingly, disclosure must occur.

15. The Review Decision relies almost exclusively on the argument that disclosure would impair the ability of the Department to obtain similar information in the future. This is a re-run of the s39(1)(b) argument and we repeat what is said above in relation to that.

16. The Review Decision agrees with the First Decision in relation to Sch 1(s), (v) and (w) without further consideration. ET suggests that the First Decision's discussion of Sch 1 (s) and (w) incorrectly proceeds on the basis that it is the company's attitude and belief which is determinative. Plainly this is not the case. An objective judgment needs to be made as to whether harm will be caused.

The assertion that to "disregard confidentiality principles...will cause harm" is not supported in any way by reference to evidence or further argument. The same can be said of the assertion in the Review Decision in relation to competitors gaining an advantage from release of the information (see page 4 paragraph 3).

17. We repeat the comments made in the Review Request in relation to Sch 1(a), (b), (d), (f), (i) and (l). We note the Review Decision does not challenge the contentions in relation to Sch 1(a), (b), (c) contained in the Review Request.

18. The Review Decision takes issue with the application of Sch 1(i) and (l) on the basis that the information was provided to the regulator responsible for environmental management and pollution control. It is not articulated why this is relevant. There is no other basis expressed as to why the "threshold" is not met. Both Sch 1(i) and (l) juxtapose "promote" and "harm" in their wording.

Plainly, the consideration is whether disclosure is more likely to "promote" or more likely to "harm", in one case public health and safety, in the other, the environment. There is no explanation why disclosure would "harm". We suggest there can be no sensible basis to claim this.

Accordingly, correctly applied, Sch 1(i) and (l) support disclosure.

#### Failing to provide specific response

19. The RTI Request specifically asked for 3 documents, a Site Environmental Management Plan, a Risk Assessment and a scientific report. The First Decision and Review Decision do not respond specifically in relation to these documents. Presumably the Department has not located them in the search, however this is not clear.

20. In order to properly respond to a refusal to release documents, it is important that the applicant understands the basis on which documents are not disclosed, including whether no such document exists in the Department's records.

*21. The Department should specifically respond as to whether documents are held by the Department or not. We refer to section 8.4 of the Ombudsman's Manual and suggest in a matter such as this there is no sensible basis not to advise ET whether these documents are held by the Department.*

38. I turn now to Huon's submissions in regards s37, which have been provided to me by the Department.

39. Huon objected to the release of all the information sent to it by the Department in accordance with s37(2). It stated that it operates in both the local, national and international aquaculture markets and is widely acknowledged as an industry leader in all key aspects of salmon production, as a result of its focused farm management and use of technology. If the requested information was disclosed, it claimed this would allow its competitors to gain an advantage in the marketplace over Huon that they otherwise would not have.

40. Huon broke up the 85 pages of information into four categories:

- *Data* - pages 2, 8, 9, 19, 20, 22, 23-29, 33, 34, 38, 39, 40, 44, 45, 47, 51, 52, 56, 58, 60, 61, 64, and 65\*
- *Correspondence with the EPA* - pages 1, 3-7, 10-13, 21, 30-32, 35-37, 41-43, 46, 48-50, 53-55, 57, 59, 62, 63, 65, 67 and 68
- *Correspondence with a third party*- pages 10-21\*
- *Environmental Effects Report of 2006/2007*- pages 69-85

*\* page 65 is not data but page 66 is - I will accept that Huon is referring to this page*

*\* page 21 is correspondence with EPA - third party information ends at page 20*

41. Regrettably, the numbering system on the information provided to Huon did not match that used in the Decision Table. Huon's page number response has been converted later in this decision to match the Table for the sake of clarity.

42. In relation to the data, Huon submitted:

*The information relates to matters which are of key importance to Huon's business, such as hatchery water flows, oxygen levels, ammonia levels and waste information. It is commercial information as it reveals details regarding optimum growing conditions for Huon's product. It is also clearly technical information that Huon has expended staff time, technical skill, and resources (including use of specialised equipment) to obtain. We are not informed of the terms of the applicant's request or intended use of the information. However, there is a real risk the release of the information would result in a commercial disadvantage to Huon, as the applicant would*

*benefit from our investment in obtaining the data without having to pay the associated costs of obtaining such data.*

*There is also potential for the relevant data to be reported wrongly, inaccurately, or out of context which would result in damage to Huon's good reputation as an industry leader. For example, some water samples have indicated a spike in measurements as the result of complications in the testing processes (including difficulties in obtaining samples as a result of rainfall and technical officer availability) as opposed to any inherent environmental issues regarding water quality.*

43. In relation to the correspondence with the EPA, Huon stated:

*Where Huon provided correspondence to the EPA Division, the information was provided on the basis that it was commercially sensitive information. This is indicated by the email disclaimer attached to each email to the EPA Division from Huon's officers, and expressly stated in the information at page 59. Huon's expectation was that this information would be treated as confidential by the EPA Division. Release of Huon's commercially sensitive information would clearly result in harm to Huon's competitive position.*

44. Huon also noted that the information contains additional information which relates to operations other than the Lonnavale Hatchery and which should be redacted.

45. As to the correspondence with a third party information, Huon stated that certain information was provided to this third party in the interests of maintaining a good relationship. It added that this is clearly marked 'Private and Confidential' and it was Huon's intention that the document would remain confidential and would not be made publicly available.

46. It stated that, given the basis for disclosing the information to the third party, release of such confidential information would clearly result in harm to Huon's competitive position.

47. As to the 2006/7 report, Huon noted it is marked 'confidential' and directly relates to Huon's operational business practices. It contains commercially sensitive information.

48. Huon claimed that if the requested information is disclosed it would allow Huon's competitors to gain an advantage in the marketplace over it that they otherwise would not have, as it would reveal information regarding Huon's particular operational methods of farming.

49. As to the public interest test, Huon referred to clauses (a), (b), (h) (j), (m), (n), (s), (v) and (w) of Schedule 1 in coming to the view that the significant commercial disadvantage to Huon should outweigh any general public interest factors in favour of disclosing the information, such that the information should not be disclosed.

## **Analysis**

### **General**

50. It is appropriate to first address the applicant's issue, raised on external review, concerning the Department's failure to advise whether certain information it seeks is held by it.
51. It may be that the Department considered that it was obliged under s22(4) to neither confirm nor deny the existence of any exempt information and that, in identifying or discussing any particular requested information, it would be confirming its existence or not.
52. However, I note that the requirement in s22(4) only applies to exemptions established under Part 3, Division 1 whereas the exemption grounds claimed here are both under Division 2. Generally<sup>2</sup>, if information is exempt under Division 2, the Department should confirm or deny whether the information sought is held by it.
53. In the circumstances of this application for review I consider it is appropriate to advise the applicant that the Department does not have in its possession the following:
  - *The Site Environmental Management Plan - Lonnavaale Hatchery (AQMO130.1)*
  - *The Risk Assessment - Lonnavaale (AQMO010.2)*
  - *details of any compliance or enforcement action taken in respect of Lonnavaale Hatchery between 2009 and 2014*
54. The Department does hold a water quality or river health monitoring report it commissioned relating to the Lonnavaale Hatchery for the period 2012-14 and this was disclosed to the applicant at pages 27-31. An earlier report from 2010 was also disclosed, although outside scope. This report information is to be distinguished from river data provided with email correspondence from Huon.
55. I also advise the Department does have in its possession the requested 2009 Davies Report<sup>3</sup>: see pages 114-156. I note that a 2015 update to this report by the author was commissioned by Huon and has since been made publicly available on its website<sup>4</sup>.

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<sup>2</sup> Where exempt information is personal information (s36), care should be taken as confirming or denying whether information is held may incidentally lead to the disclosure of personal information

<sup>3</sup> '2009 Davies Report' refers to the request for : Scientific Report: Davies, PE (2009) Nutrient and Algal levels in the Russell River and their relationship to discharges from the Huon Aquaculture Company (HAC) farm facility [Report to Huon Aquaculture Company]. Project Report Freshwater Systems, Hobart

<sup>4</sup> See <https://www.huonaqua.com.au/wp-content/uploads/2015/09/Water-quality-and-benthic-algal-study-of-the-Russell-River-P-Davies-2015.pdf>

56. I now return to the issue of scope, and whether all the information before me is actually the subject of the application for assessed disclosure, taking into account the time period the application covers.
57. I note that the Department found that pages 1-2 were outside the scope of the application for assessed disclosure and were disclosed in accordance with s12(1), being created one day after 2 October 2014, which it found to be the date of acceptance of the application.
58. Technically, if outside scope and disclosed, this information must have been disclosed in accordance with s12(2)(c) as an *active disclosure* and this would mean the application, and this review, can be properly refused in this regard.
59. However, in order to come to a view as to whether the Department was correct in stating this was information outside scope, I must determine the relevant end-date of the time period covered by the application for assessed disclosure.
60. This is to be distinguished from the date the application was formally ‘accepted’ by the Department, for the purposes of the commencement of the timeframes to be met under the Act.
61. In many cases, the applicant will state the end-date in their application. However, in this case the application states ‘...to 2014’ and does not state any particular end date in 2014.
62. The end-date of any application is something that is to be found in the mind of the applicant. Thus there is an argument that, if unstated or not clarified by the Department at the time, it could be any date in 2014 up until the date of the actual application, or at the latest, up until the date the application was received by the Department, noting that the application letter dated 25 September 2014 was date-stamped as received by it on 2 October 2014.
63. I find on the evidence before me that the end date here is the date the application letter was *dated*, rather than the date it was *received* by the Department. If not that date, I would have expected the applicant to have clearly stated in the application letter that it was intended that it be a future date, such as the date of receipt.
64. I therefore find that 25 September 2014 is the relevant end-date of the scope of the application for assessed disclosure. Any documents created after this date would not be within scope.
65. Thus it is correct that pages 1-2 are outside the scope of the application, and hence this review, as they were created *after* the relevant end-date of the application for assessed disclosure.
66. Examining the Decision Table, it also shows a ‘decision’ in relation to information dated 26 September 2014 (pages 3-5 and 6-26) as being ‘released’. Given my finding as to the relevant end-date, I am of the view that all of pages 1-26 must be

seen as having been released as active disclosures as per s12(2)(c), as all this information is outside the time period covered by this application.

### **Section 37 or section 39?**

67. Returning to the remaining undisclosed information, the question arises as to whether s37 or s39 is the appropriate exemption ground.
68. I take the view that in cases of this type it is best practice for the delegate to assess each piece of information against both sections.
69. If this is done then I can be more easily satisfied on review that the third party has been informed of the *nature* of all of the information applied for, as per s37(2)(e).
70. For example, if I take the view that some of the information is not exempt under s39 as claimed but that it may be exempt under s37(1), where that information has not been identified to the third party for consideration, I may be in the position of assessing disclosure without the third party having had the opportunity to comment on the effect of disclosure of this information, as s37(2) is meant to afford it.
71. Thus the Department should not be making general statements that all information meets s37. It should be specifically making a finding of such in relation to each piece of information.
72. I note that the Department does not have to provide every piece of information it is thinking of disclosing to the third party in order to obtain the view of the third party. Section 37(2)(e) states that the Department is merely required to state the *nature* of the information applied for and is not formally required to provide the actual information in question to the third party.
73. However, I consider the Department has a discretion in this regard and that in some cases it may be appropriate to provide a copy of the actual information if this best makes clear the *nature* of the information.
74. Turning to the facts of this case, from the Decision Table the relevant information the Department did not provide to Huon under s37(2) was the information it claimed was exempt under s39 at pages 37-44, 92-104, 112, 113-156, and 161-170 (I note however that pages 92-95 were in fact provided to Huon).
75. I consider however that Huon was generally advised of the nature of all the above information, being data and email correspondence, except for pages 113-156, which as I have stated is the *2009 Davies Report* (and covering letter) and pages 161-170 (excerpts of *2009 Davies report* and covering email). I do not believe it was clear to Huon that the report information may be disclosed. I will consider whether this is significant later in this decision.

76. Returning to the remaining information, as noted, the Department broke down the information into two main categories: regular scientific reporting information; and 'one-off' provision of information.

77. This breakdown would be of little meaning to the applicant, as it is to me. Huon's breakdown of the information is a sensible approach to reviewing the information and I will proceed on that basis, being:

- *Data*
- *Correspondence with the EPA*
- *Correspondence with a third party*
- *Environmental Reports*

78. I will commence by considering s39.

### ***Section 39 claims - information communicated in confidence***

#### *General consideration*

79. I turn directly to the issue of whether 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).

80. The Department has stated that the EPA's preferred approach to its regulatory function is one of co-operation and voluntary compliance in the first instance, but it acknowledged that the EPA does have comprehensive powers under the *Environmental Management and Pollution Control Act 1994* (the EMPC Act), and other Acts, to fall back on if information is not forthcoming.

81. I note that this approach forms the basis of the *EPA Division Compliance Policy*, available on its website<sup>5</sup>.

82. Following from this approach, the Department's position on s39 appears to be that any information provided voluntarily to the EPA would meet the requirements of s39(1)(b) and that it is only after an EPN has been issued by the EPA that it can be successfully argued that any such information has been provided pursuant to its legal powers, and it is only in such circumstances that the EPA's ability to obtain similar information in the future would *not* be affected.

83. In this matter, I note that the first EPN for the Lonnavale Hatchery only came into effect on 24 September 2014, the day before the end-date of the period covered by this application.

84. By contrast, ET is of the view that voluntary compliance processes cannot and should not be used as an argument for exemption under s39(1)(b), given the broad statutory powers the EPA has to obtain information.

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<sup>5</sup> See <http://epa.tas.gov.au/regulation-site/Pages/Document.aspx?docid=1374>

85. ET is not arguing that all information provided voluntarily to the EPA cannot be exempt under s39(1)(b). Rather, it is arguing that the EPA's *ability* to obtain similar information in the future is not impaired where the provision of such information can ultimately be required by law.

86. The issue thus becomes what is meant by 'similar information' here.

87. I note that there is a similar provision in the Victorian *Freedom of Information Act 1982* at s35. In interpreting the meaning of 'similar information' under that Act, the then Administrative Appeals Tribunal of Victoria found that what is required is some positive demonstration that the information's disclosure will adversely affect the respondent's future ability to obtain similar information from persons in general, rather than specifically from the person who confided it, and that this needs to be assessed with regard to the nature of the specific contents of each document under consideration<sup>6</sup>.

88. It has also been found by the Victorian Supreme Court that the degree of impairment required must go beyond that which is merely a trifling or minimal impairment<sup>7</sup>.

89. In this situation, 'similar information' could, on the one hand, be relevant information about the health of the environment which, if necessary, could be obtained by law if not voluntarily provided. Alternatively, it could be relevant information about the health of the environment which is merely provided voluntarily.

90. Turning to the powers of the EPA, the Director has very broad powers to obtain information which he 'reasonably considers necessary in the interests of the environment' (s43)<sup>8</sup>. Similarly, authorized officers have a multitude of powers, including the power to obtain documents, where it 'is reasonably required in connection with the administration or enforcement of the EMPC Act' (s92(1)(e) and (f)<sup>9</sup>.

91. I consider that 'similar information', where the information is coming from a potential polluter, must be the former and not the latter.

92. The EPA's objective is to protect the health of the environment. Thus, the only information which it might rightly wish to obtain from a potential polluter is information which goes towards its objective. If, as is the case here, the EPA has broad powers to compel the provision of such information from such persons or bodies, then this must be the 'similar information' of relevance here.

93. By contrast, information provided voluntarily and relevant to the EPA's objectives may meet the requirements of s39(1)(b) only where there is no legal basis for its provision. For example, a person complaining in confidence about

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<sup>6</sup> *Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined)* (1992) 5 VAR 542

<sup>7</sup> *Ryder v Booth* [1985] VR 869

<sup>8</sup> See [http://www.austlii.edu.au/au/legis/tas/consol\\_act/emapca1994484/s43.html](http://www.austlii.edu.au/au/legis/tas/consol_act/emapca1994484/s43.html)

<sup>9</sup> See [http://www.austlii.edu.au/au/legis/tas/consol\\_act/emapca1994484/s92.html](http://www.austlii.edu.au/au/legis/tas/consol_act/emapca1994484/s92.html)

damage to the environment is doing so voluntarily, and their complaint relates to the EPA's objectives. To disclose this information against their wishes would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information from other complainants in the future.

94. My specific finding here is that I am satisfied that the EPA has the power under the law to obtain similar information relating to the health of the Russell River from Huon, or indeed from other potential polluters who use natural resources, either through the Director where reasonably necessary in the interests of the environment (s43) or through authorized officers where it is reasonably required in connection with the administration or enforcement of the EMPC Act (s92(1)(e) and (f)).
95. Thus I am generally satisfied that any information provided directly by Huon to the EPA relating to the health of the Russell River does not satisfy the requirements of s39(1)(b) of the Act.
96. I understand the Department and the EPA's position in terms of taking a co-operative approach with enterprises, and the risk that an enterprise may either not undertake monitoring or will not let the EPA know the results of its monitoring if such information may be disclosed under the Act.
97. However, what the Department and the EPA are concerned about is the manner in which such information is obtained in the future, not the ability to obtain such information in the future.
98. Whilst sharing their concerns, I believe the wording of the Act is clear in its intent and impact here.
99. I will now go on to consider the specific information under the following headings.

#### *Data*

100. I am satisfied on the evidence before me that the data identified as relating to the health of the Russell River would be either information that the Director reasonably considers necessary to obtain in the interests of the environment (s43) or would be reasonably required by authorized officers in connection with the administration or enforcement of the EMPC Act (s92(1)(e) and (f)).
101. That is, as it is the type of data which the EPA would wish to acquire, and which it has the ability to obtain in the future by law, the information cannot satisfy the requirements of s39(1)(b) because the EPA has extensive powers to obtain relevant data should it not be provided voluntarily.
102. Thus the data referred to by Huon at pages 45, 51-52, 63-64, 66-73, 78-79, 83-85, 89-90, 92-95, 158, 172-173, 177, 179, 181-182, 185 and 188 does not satisfy the requirements of s39(1)(b). [This corresponds to the Huon numbering of Data - pages 2, 8, 9, 19, 20, 22, 23-29, 33, 34, 38, 39, 40, 44, 45, 47, 51, 52, 56, 58, 60, 61, 64, and 66.]

103. As noted earlier, the data/information at pages 37-44 and data at 96-104 was not sent to Huon under the s37(2) consultation.
104. On closer examination, the information at pages 36-44 is not information relating to the monitoring of the Russell River and thus is not within the scope of the application or this review. In regards the data at pages 96-104, I accept that Huon would not want this released for the same reasons as it gave earlier. I find also that this data does not satisfy the requirements of s39(1)(b) for the reasons given above.
105. To conclude, none of the data satisfies the requirements of s39(1)(b) and pages 36-44 are not within the scope of this review.

*Correspondence with the EPA*

106. I did have concerns that not all correspondence relating to the creation of the EPN had been identified by the Department, as there was no information indicating when the EPA came to a view that an EPN was warranted or when it had advised Huon of this, yet some of the information before me showed that Huon was well aware of the EPA's intentions.
107. The Secretary advised me that Huon and the EPA were periodically in conversation about the forthcoming EPN but this was not formally notified to Huon in writing. The Secretary noted that Huon had experience operating other activities that were regulated under EPNs and hence there was some understanding of this process and that it is not uncommon for informal negotiations regarding a forthcoming EPN to extend over many months.
108. Whilst the EPA's failure to record in writing its conversations with Huon appears at odds with good administrative practice, I will accept that all relevant correspondence is before me.
109. I first note that the correspondence at pages 37-38, 42-43, 113 and 161 was not provided to Huon for comment. Pages 36-44 have now been found to be outside of scope, but I accept that Huon would not want the remaining information disclosed either, for the reasons it gave earlier.
110. Second, I note that much of the information on pages 46-49 was disclosed to the applicant after the consultation, and what was deleted, apart from personal information, was claimed s39 information on page 46.
111. Third, I note that a number of the EPA correspondence pages marked as released in full in the Decision Table did not contain any information that was actually *acquired* from Huon, but these were sent to Huon as part of the s37 consultation and Huon objected to their release.
112. Fourth, I note that page 77 paragraph 2 is outside the scope of this review as it does not concern the health of the Russell River.

- I13. Following from the earlier general discussion, the issue under s39(1)(b) is whether the information under *Correspondence with the EPA* is information it could obtain under its general powers.
- I14. The information does vary in significance in terms of the details it contains about Huon's operations. However, I would have to find that all such information is being provided in connection with the data that the EPA is seeking from Huon in regards the health of the Russell River.
- I15. Returning to the powers of the EPA, s43 of the EMPC Act would permit the Director to seek such information from Huon, as would s92, as not only does it empower officers to obtain documents, officers are able to require a relevant person to answer questions- that is to provide oral information<sup>10</sup>.
- I16. Whilst it can be difficult to characterise an ongoing email conversation in these terms, I find that there is nothing in the information in question, whether it was requested by an officer or offered by Huon, which did not reasonably relate to the health of the Russell River.
- I17. On this basis, I find that the information contained in any of correspondence is information that the EPA would be able to seek orally from Huon under its broad legal powers under s43 and s92. In terms of 'similar information', this would also apply to *any* potential polluter.
- I18. Thus the correspondence referred to by Huon at pages 46-50, 65, 74-77, 80-82, 91, 157, 159-160, 171, 174-176, 178, 180, 183-184, 187, 189 and 190 does not satisfy the requirements of s39(1)(b). [This corresponds to the Huon numbering of *Correspondence with the EPA* - pages 3-7, 21, 30-32, 35-37, 41-43, 46, 48-50, 53-55, 57, 59, 62, 63, 65, 67 and 68.]
- I19. Similarly, I also find that the correspondence not sent to Huon, at pages 113 and 161, as identified earlier, does not satisfy the requirements of s39(1)(b).
- I20. I am of the view that the information at pages 54-57 (Huon pages 10-13) should be considered under the category that follows as it relates to a third party.

*Correspondence with a third party*

- I21. Unlike the above information, I am satisfied that disclosure of this information would be reasonably likely to impair the ability of the EPA to obtain similar information in the future.
- I22. However, on closer examination of the information at pages 54-64, I am not satisfied that this information is within the scope of the application for assessed disclosure.
- I23. That is, ET has requested any correspondence (including letters, emails and notices) between officers of EPA, the Department or the Inland Fisheries Service and Huon 'related to monitoring of the Russell River'.

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<sup>10</sup> See s92(1)(k)

- I24. This correspondence does not relate to the *monitoring* of the Russell River; rather, it relates to a complaint received by Huon. It is information that has been voluntarily provided to the EPA by Huon for information purposes only, to show that as a good corporate citizen it takes seriously any complaints about its possible effect on the Russell River.
- I25. Thus, I find that pages 54-64 are outside the scope of the application for assessed disclosure.

*Environmental Reports:*

*Environmental Effects Report of 2006/2007*

- I26. I find that the information contained in this report does not directly relate to the health of the Russell River, and as such, would not be information that the EPA would wish to obtain under its s43 and s92 powers under the EMPC Act.
- I27. Further, on closer examination, I am not satisfied that this report comes within the scope of the application for assessed disclosure either.
- I28. Whilst it relates to the Lonnavale Hatchery, it is neither a water quality or river health monitoring report, nor is it for the period 2012-14, as requested.
- I29. Thus, I find that pages 191-207 are outside the scope of the application for assessed disclosure.

*The 2009 Davies Report- full report (pages 114-156) and Report excerpts (pages 162-170)*

- I30. This report was identified in the application for assessed disclosure. As noted earlier, I consider it appropriate that ET be advised that the full report is in the possession of the EPA.
- I31. I also find that the excerpt of the report would come within the scope of the application for assessed disclosure as it was included in correspondence 'related to monitoring of the Russell River'.
- I32. As raised earlier, I note that none of this information was sent to, or identified to, Huon under the s37(2) consultation. However, it is clear from the covering letter that Huon did not want the full report disclosed, at least at the time it was provided to the EPA. I note that the full report was stated to be provided in confidence, specifically referring to s39 of the Act. There was no such statement in relation to the excerpts at pages 162-170.
- I33. For the reasons given above in relation to *Data and Correspondence with the EPA*, I find that as the information contained in both the full report and the excerpts of the report directly relate to the health of the Russell River, it is the type of information that the EPA would wish to acquire, and would have the ability to acquire, using its s43 and s92 powers under the EMPC Act. In terms of 'similar information', this would also apply to *any potential polluter*.

- I34. Thus neither the full *2009 Davies Report* at pages 114-156 nor the excerpt of the Report at pages 162-170 meets the requirements of s39(1)(b).

#### **Section 39 conclusion**

- I35. I am not satisfied that any of the above information meets the requirements of s39(1)(b) of the Act.
- I36. However, I find that the following information is outside the scope of the application for assessed disclosure and hence this review:
- pages 36-44
  - pages 54-64
  - page 77 paragraph 2
  - pages 191-207

#### **Section 37 claims - competitive disadvantage**

##### *General consideration*

- I37. Under s37 I am assessing the circumstances relating to competitive disadvantage at the time of my decision, being the time of any possible disclosure.
- I38. Generally, in the words of s37(1), I am satisfied that much of the information before me, if disclosed, would reveal information relating to business affairs acquired by the Department from an organisation other than the applicant, namely Huon.
- I39. However, s37(1) also requires that I must be satisfied that the information either relates to trade secrets, or that disclosure of the information acquired would be likely to expose that particular third party, Huon, to competitive disadvantage.
- I40. There is no claim before me that the information in question relates to trade secrets, and I find accordingly.
- I41. On the question of likely competitive disadvantage, in considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman [2010]* TASSC 39, held that:

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

59. ...The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage...
- I42. At paragraph 41 the Court interpreted the meaning of 'likely' to be 'a real or not remote chance or possibility, rather than more probable than not'.
- I43. I thus accept that the threshold for effect under this provision is not particularly high, given the Court's views on the meaning of 'likely'. The test the Court said did not apply, being more probable than not, connotes a 50/50 probability, whereas I can conceive that even if there is, say, a 10% chance of this occurring then this would be a 'real chance' and sufficient to satisfy this test<sup>11</sup>.
- I44. I return to the information under consideration and have incorporated the pages not sent to Huon by the Department for consultation under s37 into those identified by it.
- I45. In regards the information not sent, I am satisfied that Huon would already be aware of the *nature* of this information, given the information already provided under s37(2), and I will act on the presumption that, as with the other information, Huon would have opposed disclosure under s37 on the grounds of competitive disadvantage and because it was not in the public interest to disclose this information.
- I46. I have also deleted those pages identified by Huon which have already been released in full, or have been found to be outside scope, or where the only deletion is personal information, this also not being within the scope of the application:
- Data*
- Pages 45, 51-52, 66-73, 78-79, 83-85, 89-90, 92-95, 96-104, 158, 172-173, 177, 179, 181-182, 185 and 188
- I47. I am not satisfied on the evidence before me that this information, being data on the health of the Russell River, is of such a nature that it would reveal anything material about Huon's hatchery operations.
- I48. However, applying the test as stated in *Forestry Tasmania v Ombudsman*, and giving the Department and Huon the benefit of the doubt, based on their submissions I will accept that this information has the *potential* to be reported wrongly, inaccurately or out of context, making it a real possibility and not a remote chance that such information may damage its reputation, hence being to Huon's disadvantage and to its competitors' advantage.
- I49. Thus I am satisfied that s37(l) is met in relation to the above data.

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<sup>11</sup> 'Real chance' is an expression often considered in refugee law and 10% was a figure used by McHugh J in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989-90) 169 CLR 379

*Correspondence with EPA*

Pages 46, 50, 65, 74, 77 (paragraph 1), 80-82, 113, 157, 159, 171, 174, 176, 178, 180, 183, 187 and 190

150. Huon stated that this information was provided on the basis that it was commercially sensitive information, as indicated by the email disclaimer attached to each email, and as expressly stated in the information at page 180 (its page 59). It stated its expectation was that this information would be treated as confidential and that release of this commercially sensitive information would clearly result in harm to Huon's competitive position.
151. I have considered each piece of remaining correspondence. I am satisfied that the remaining information is either cursory, or does not contain any specific operational information or does not contain any specific information relating to the monitoring of the Russell River and hence is out of scope.
152. Thus I am not satisfied that disclosure of any of the above remaining information would be likely to expose Huon to competitive disadvantage in any way, reputational or otherwise.
153. I note that page 46 was released in part but the claimed 's39(1) exemption' information should also be released and that page 74 contains a paragraph of information outside scope - it not being about the hatchery's effect on the health of the Russell River - and hence it should not be disclosed.
154. I also note that many of the above pages to be disclosed contain personal information, which should be deleted before release as this is not within scope.
155. To be clear, no remaining EPA correspondence satisfies the requirements of s37.

*The 2009 Davies Report and Report excerpts*

156. Again, I am not satisfied on the evidence before me that this information, being a report on the health of the Russell River, is of such a nature that it would reveal anything material about Huon's hatchery operations.
157. However, as above, applying the test as stated in *Forestry Tasmania v Ombudsman*, and giving the Department and Huon the benefit of the doubt, based on their submissions I will accept that this information has the potential to be reported wrongly, inaccurately or out of context, making it a real possibility and not a remote chance that such information may damage their reputation, hence being to Huon's competitive disadvantage and to its competitors' advantage.
158. Thus I am satisfied that s37(1) is satisfied in relation to the above report at pages 114-156 and excerpts at pages 162-170.

**Section 33- The public interest test**

159. To summarise, the following information meets the requirements of s37 and is subject to the public interest test:

*Data*

- Pages 45, 51-52, 66-73, 78-79, 83-85, 89-90, 92-95, 96-104, 158, 172-173, 177, 179, 181-182, 185 and 188

*The 2009 Davies Report and Report excerpts*

- pages 114-156 and 162-170

*General consideration*

160. The interest of Huon is to protect its reputation and its financial and business interests, which are intertwined, and to protect information that it believes it has provided voluntarily and in confidence to the EPA, some specifically on the basis that it should not be disclosed.
161. The issue of interest to a number of individuals and bodies in Tasmania is the health of the Russell River, and whether the Lonnavale Hatchery is having an adverse effect on its health. Tied to this is an interest in knowing that the EPA is properly using its regulatory powers to protect the health of the river.
162. However, it is important to distinguish between issues of interest to the public and 'the public interest'.
163. Australian courts and tribunals have drawn a distinction between the public interest in disclosure and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest<sup>12</sup>.
164. What I must do under the Act when considering whether or not it is contrary to the public interest for information to be disclosed is to consider all relevant matters, including those matters set out in Schedule 1, and to disregard those matters set out in Schedule 2.

*Data*

165. I find that the data information is essential to the proper regulation of the health of the Russell River by the EPA.
166. I am satisfied that this information, if it had not been voluntarily provided by Huon, would have been acquired under the EPA's powers to obtain information, if its existence had been known. I am further satisfied that if Huon had not been collecting this data, then the EPA would have had to have obtained it itself.
167. I accept that, given the limited resources that the EPA has, it must determine an effective regulatory approach overall, and I put considerable weight on the EPA's established policy, prepared at the highest level by the Director and General Manager of the EPA, and its view that disclosure would undermine the co-

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<sup>12</sup> *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 2) (1991)* 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113

operative arrangement it has with Huon and others, which is in line with its stated policy.

168. There is a suggestion that because the testing is usually done by Huon and not independently that this is a reason for public disclosure, so bodies like ET can cast a critical eye over the data. Certainly, the meaning of the data itself would not be understood by the average member of the public, but bodies such as ET would be able to interpret this data, and so address the considerable interest held by the general public in the issues identified earlier.
169. However, there is no suggestion from the information before me that the data has been manipulated or distorted in any way by Huon. Indeed, the EPA did its own testing in September 2014 and this was released to the applicant at pages 1-2 and 27-31, where in the words of the EPA:

*The water quality sampling results showed values that are consistent with monitoring that is routinely conducted by Huon Aquaculture.<sup>13</sup>*

170. Similarly, the fact that the EPA has issued an EPN in relation to the hatchery is not evidence that there has already been serious environmental harm to the Russell River by Huon. As the above letter at page 1 goes on to state:

*The nutrients in the outfall are present at low concentrations that do not pose toxicity hazards. However, they are likely to be sufficient to increase algal biomass....*

...

*... the increased algal biomass ... indicates that the water quality of the fish farm outfall is influencing river condition... The extent of this impact is not acceptable. An Environment Protection Notice which requires a staged reduction in nutrients discharged to the Russell River has been issued to Huon Aquaculture.<sup>14</sup>*

171. I note that the EPN states it was issued under s44 (1)(a) and (c), which provides:

*(1) Where the Director is satisfied that in relation to an environmentally relevant activity –*

*(a) serious or material environmental harm or environmental nuisance is being, or is likely to be, caused; or*

...

*(c) it is necessary to do so in order to give effect to a State Policy or an environment protection policy; or*

172. After examining the information as a whole, I am satisfied the EPN was issued because some harm is being caused which has the potential to cause serious or material environmental harm or environmental nuisance, rather than because of any view of the EPA that this had already occurred.

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<sup>13</sup> See page 1, paragraph 2

<sup>14</sup> See page 1, paragraph 2 and page 2, paragraph 2

173. In coming to a conclusion as to the public interest here, I acknowledge that this is a difficult balancing exercise, given that, if the data had been obtained through testing by the EPA in the first instance, it would most likely have been released, as occurred at pages 1-2, 27-31 and 105-111.
174. Further, I do not consider that the Department has demonstrated to my satisfaction that disclosure of the ‘scientific’ or other data information from Huon would *actually* harm Huon’s reputation or economic or related interests in any way, or *actually* lead to a competitive disadvantage.
175. However, even though the EPA’s ability to obtain similar information in the future, which is currently voluntarily provided, would not be impaired by disclosure, I am of the view that I should put considerable weight on the EPA’s risk management approach to compliance and its desire that similar information be provided voluntarily in the future, given there is no evidence to show that Huon is not performing its monitoring properly, and no evidence to show that it has caused serious or material environmental harm to the Russell River at any time.
176. Whilst I do not consider that disclosure of the information in question would significantly advance debate on this matter of public interest, I do consider it would undermine the EPA’s risk management approach and I conclude that it would be contrary to the public interest to disclose the above data.

*The 2009 Davies Report and Report excerpts*

177. As I stated earlier, the issue of interest to the public is the health of the Russell River, and whether the Lonnavale Hatchery is having an adverse effect on its health, and also whether the EPA is properly using its regulatory powers to protect the health of the river.
178. The *2009 Davies Report* (and hence the excerpts) are specifically about the health of the Russell River. As noted, at page 113, which is not exempt under either s37 or s39, Huon stated at the time that it was given to the EPA in August 2010 that it was provided voluntarily, and that in regards s33:

*until all relevant matters have been explored in an “objective scientific & transparent manner”, release of the enclosed report under RTI would be premature and not in the public interest.’*
179. As with the data, I put considerable weight on the EPA’s risk management approach to compliance and its desire that similar information be provided voluntarily in the future.
180. However, as noted earlier, in 2015 Huon commissioned an update to the 2009 report, and has made this available on its website for public downloading.
181. I am not in a position to determine what occurred, but on face value, there has been an update of the 2009 report which Huon has considered not commercially

disadvantageous to publicly release. Presumably, this report clarified favourably any previous concerns which the 2009 Report may have raised.

182. Given that the 2015 update report refers to the *2009 Davies Report*, I consider that it would greatly contribute to public debate on this issue of public interest to disclose it, so that the update report can be read and understood properly in the context of the earlier report.
183. Further, it would appear that there has been, since 2010, exploration of all relevant matters in an “objective scientific & transparent manner”, which led to first EPN being issued by the EPA in September 2014 and then a subsequent EPN and then the 2015 update report.
184. Given all the above, taking Huon at its word and noting its actions in publishing the latest report update, whilst it may have been arguable that disclosure of the 2009 Report was contrary to the public interest at the time it was provided in 2010, I am not presently satisfied that it is contrary to the public interest to disclose the 2009 report and excerpts now.
185. I have come to this view after finding that, as with the data above, the Department has not demonstrated to my satisfaction that disclosure of the ‘scientific’ or other information in these reports would *actually* harm Huon’s reputation or economic or related interests in any way, or *actually* lead to it facing a competitive disadvantage.
186. Thus I find under s33 that it is not contrary to the public interest for the *2009 Davies Report* and *Report excerpts* to be disclosed.

### **Draft decision**

187. As the draft of this decision was considered ‘adverse’ to the Department, s48(1)(a) of Act required me to seek input from the Department before finalisation.
188. Accordingly, I wrote to the Department on 10 May 2017 and I received a response from the Department on 8 June 2017. This included Huon’s response to the draft.
189. The Department had no formal submissions to make. Huon identified a page of data which had not been addressed in the draft and I have now corrected this.

### **Conclusion**

190. The following information is outside the scope of the application for assessed disclosure, and hence this review, and should not be disclosed:
  - Any personal information
  - pages 36-44
  - pages 54-64

- page 77, paragraph 2
- pages 191-207

191. The information which should not be disclosed is as follows:

*Exempt under s37 and contrary to the public interest:*

- Data - pages 45, 51-52, 66-73, 78-79, 83-85, 89-90, 92-95, 96-104, 158, 172-173, 177, 179, 181-182, 185 and 188

192. All other information should now be disclosed by the Department.

Dated: *9<sup>th</sup> June 2017*  


**Richard Connock  
OMBUDSMAN**

## **Attachment**

### **Right to Information Act 2009 - SCHEDULE I - Matters Relevant to Assessment of Public Interest**

Sections 30(3) and 33(2)

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

- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (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 2009 - SCHEDULE 2 - Matters**

### **Irrelevant to Assessment of Public Interest**

### Sections 30(4) and 33(3)

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

- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
  - (b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
  - (c) that disclosure would cause a loss of confidence in the government;
  - (d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.



## TASMANIAN OMBUDSMAN DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1511-046

**Names of Parties -** Mr Michael Atkin and Department of Primary Industries, Parks, Water and the Environment

**Provisions considered:** s33, s37, s39 and Schedule 1

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### Background

1. On 27 May 2015 Mr Michael Atkin, a reporter for the ABC (the applicant), applied to the Department of Primary Industries, Parks, Water and the Environment (the Department) under the *Right to Information Act 2009* (the Act) for an assessed disclosure of information.
2. The request was in the following terms:

*In attached email correspondence DPIPWE has confirmed that either Tassal or Huon Aquaculture had a fish mortality event greater than 0.25 per cent of fish per day for 3 consecutive days in Macquarie Harbour between 1 December 2014 and 28 February 2015 which was reported to the department ...*

*Please provide any emails, documents, letters, meeting minutes, briefing notes and other correspondence held by the Department in relation to the fish mortality event including but not limited to correspondence with the company, the volume of fish killed in the mortality event, how the mortality event was managed by the department including any involvement of the EPA and any investigation into the cause of the mortality event.*

3. It is not in dispute that the fish mortality event referred to above occurred in Macquarie Harbour between 1 December 2014 and 28 February 2015 and involved a private salmonid aquaculture enterprise (the enterprise).
4. Seven pages were identified to be within the scope of the application. A decision was made by the Department on 25 August 2015 to exempt all information. In a schedule it disclosed that pages 1 and 2 were emails from the enterprise, identified as Tassal, and that pages 3 and 4 were 'Fish Health Unit form' and 'Animal Health Laboratory report' respectively.
5. The applicant applied for internal review on the same day and the review decision was made on 19 October 2015. The review delegate correctly identified

the page 1 and 2 correspondence as an email from 'a company providing advice' to the Animal Biosecurity and Welfare Branch of Biosecurity Tasmania in relation to reporting on their fish mortality licensing condition and the Department's response to that email.

6. Reading the original decision and internal review decision together, it was apparent that the Department had disclosed to the applicant that it was Tassal that was reporting on the fish mortality licensing condition in the period in question.
7. The review varied the decision of the primary decision maker in that it also disclosed that the 'Animal Health Laboratory, Department' document was a Case Report prepared by it for the enterprise and which identified the species being tested as Atlantic Salmon and it also released some factual information from the report, as well as some information relating to the fish deaths which was found not to be contrary to the public interest.
8. The fish death information disclosed was commentary as follows:
  - *There are only mild and non-specific histological changes in these fish and do not indicate a cause of the elevated mortality; and*
  - *... isolation from a single fish indicates low level yersiniosis*
9. The applicant made an application for external review to this office on 2 November 2015. He seeks a review in relation to all the exempt information except personal information.

### **Issues for Determination**

10. As noted, the applicant advised that he is not seeking personal information of employees and has consented to this information being redacted by the Department where appropriate. Thus, all personal information of employees has been deleted and is not subject to review.
11. The Department relied on s37(1)(b) and s39(1)(b) of the Act to claim exemptions for the remaining information because of the effect of disclosure of this information on the enterprise.
12. Sections 37 and 39 are found in Part 2 of the Act and are therefore subject to the public interest test.
13. I must determine whether the above grounds for exemption apply here, and if so, whether the information is exempt after taking into account the s33 public interest test.

### **Evidence before me**

14. I have before me the relevant redacted and unredacted seven pages of information. This has been identified by the Department as follows:

- email from Tassal to Animal Biosecurity and Welfare Branch of Biosecurity Tasmania (pages 1-2)
- response to the Tassal email by Senior Veterinary Officer (Aquatic Health) (page 1)
- application form for a Fish Health Unit, Animal Health Laboratory Report (page 3)
- the subsequent Animal Health Laboratory Report (pages 4-7)

15. In addition I have before me:

- the application for assessed disclosure, dated 27 May 2015
- the initial decision on the application of Mr Mick Casey, Delegated RTI Officer, dated 25 August 2015
- the application for internal review, dated 25 August 2015
- the decision on internal review of Ms Marion March, Senior Policy Analyst – Legal, as delegate of the Department's Principal Officer, dated 19 October 2015
- the application for external review received on 2 November 2015, and attached letter
- a submission made by the Department on 3 May 2016, in response to a letter from me dated 22 March 2016
- the Secretary's response of 10 February 2017 to my draft decision of 14 December 2016, sent for comment or response, attaching Tassal's view on the draft decision
- the Department's response dated 7 March 2017 to my letter dated 16 February 2017 in regards whether a full search had been conducted
- other material received from the parties during the review process

16. In this matter I will address the submissions of the applicant and the Department, and also Tassal, and the relevant law, in the *Analysis* that follows.

## **Analysis**

### **Section 37**

17. In the internal review decision, the Department applied s37(1)(b) to all of pages 1, 2 and 3 (considering page 2 a duplicate of part of page 1), and to 'some' of the information on pages 4-7 (presumably being that information provided by the

enterprise) arguing that release of the information would expose the third party to competitive disadvantage.

18. I propose to only deal with pages 1 and 2 under s37(1)(b) and for pages 3-7 to be dealt with together under s39. I believe their separation in this way to be a more practical approach.

19. Section 37(1)(b) provides:

(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 -*

...

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

20. I am satisfied by the nature of the information contained in pages 1 and 2 that, if disclosed, it would reveal information related to business affairs acquired by the Department from an organisation other than the applicant, namely a third party aquaculture enterprise. This includes the content of the email of the Department in response to the enterprise's email.

21. I must also be satisfied that disclosure of the information would be likely to expose the third party to competitive disadvantage.

22. The Department's original decision stated:

*A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition. What the concept entails is something which puts one entity at a disadvantage in relation to a matter which affects its profit making capacity relative to its competitive rivals.*

*It is my view that the release of the information submitted under clause 2.2 would expose the third party to a competitive disadvantage even though it is a license condition to report incidents of disease or mortality.*

*The communication between DPIPWE and the third party, under the above listed clause 2.2 of the license conditions, only applies to the reporting of incidents. The clause does not capture the provision of reasons for the incidents or the pathology results. The information contained within the pathology report includes facts that are not in the public domain. The existence of this information is additional and not covered by any statutory or license condition.*

23. Consultation with Tassal in accordance with s37(2) took place as part of the internal review and its reasons for non-disclosure are recorded as follows:

- *The material contains information that, if disclosed, would place the third party at competitive disadvantage to comparable operations who either haven't released or been compelled to release identical information to the market*
- *Disclosure of the information would allow competitors access to growth rates, mortality rates, biomass and probable harvest tonnages which the third party views as trade secrets with the third party unable to possess equivalent information in respect to their competitors*
- *The material contains the personal information of employees that should not be disclosed for privacy reasons*

24. In regards the claim of competitive disadvantage, the applicant submitted in his letter of 2 November 2015:

*...No evidence has been supplied to support this assertion. Information collected by DPIPWE about the competitive disadvantage the company will be placed in, including a statement from the company involved should be provided.*

25. In the submission from the Department dated 3 May 2016 it was argued that:

*The third party operates in a growing and competitive market for farmed salmon as well as competing against wild-caught fish and other meats for market share. Consumer preferences for particular goods may well depend on quality, appearance and perceived health benefits, all of which have contributed to the successful and growing rates of production of farmed salmon in Tasmania. Consumer confidence could easily be undermined by unfounded concerns about the production environment, such as those expressed by the applicant in his applications for assessed disclosure and internal review.*

*It is not unreasonable to assume a change of competitive disadvantage if the information were distributed more widely to companies, the media and individuals who do not possess the same joint interest. The Tasmanian industry as a whole faces strong competition from international participants in the domestic and international market, including increased import volumes from low-cost companies. Disclosure of the information under the RTI Act could possibly place further pressure on the industry as it attempts to maintain and grow market share for sustainably farmed salmon.*

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

*52. For the information to be exempt its disclosure needs to be likely to expose the undertaking or agency not to any disadvantage, but a disadvantage which relates to or is characterised by competition. The requirements in ss31 and 32 of the Act that the disadvantage relate to competition may have the*

*preservation of the competitive process as a broad ultimate goal, but primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in the market....*

27. The Court further held that:

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

28. At paragraph 41 the Court interpreted the meaning of “likely” to be ‘a real or not remote chance or possibility, rather than more probable than not’.

29. In light of the submissions made by the Department, including the information from the third party, I am satisfied that the information contained in pages 1 and 2 is information related to the business affairs of a third party, the disclosure of which is likely to expose it to competitive disadvantage.

30. Even though, as the Department acknowledges, the email from the enterprise was provided to its two competitors at the time of writing, and even though the mortality event occurred some 18 months ago, I accept that the possibility of it having an effect is real and not remote, and hence such a disclosure would be likely to expose the third party to competitive disadvantage.

31. The Department has revealed from the laboratory report that there were no obvious signs of disease in the dead fish and no elevated cause of mortality and has suggested that to disclose any more information may damage the reputational standing and business of the enterprise for no public benefit.

32. Further, I also note that the information in the page 1-2 emails and from the Department indicates that it is a licence condition for the enterprise to report mortalities of 0.25% or above for three days or more and the enterprise, on reporting, having stated that this level of mortality had been sustained over two weeks, had failed to meet this licence condition.

33. The risk from disclosure, as I see it, is not likely to be from a national or overseas competitor taking direct advantage of this information per se. Rather, it lies in the fact that the information under consideration relates to just one competitor, and its potential effect on consumers.

34. If it is widely revealed that this particular enterprise is not complying with a licence condition, or has ‘diseased fish’, then this may be a factor which may allow for ‘market differentiation’, such that a consumer may prefer an alternative product, which it perceives, rightly or wrongly, to have been produced in compliance with licence conditions, or not to be ‘diseased’.

35. I am therefore satisfied that all information on pages 1 and 2 is exempt information in accordance with s37 of the Act, disclosure of which is subject to the public interest test.

## **Section 39**

36. I am considering the application of s39(1)(b) to pages 3-7, being the laboratory report prepared by the Department's Animal Health Laboratory (pages 4-7), which has been partially released to the applicant, and the completed Fish Health Unit application form requesting the provision of this report (page 3).

37. Section 39 provides:

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

(a) *the information would be exempt information if it were generated by a public authority or Minister; or*

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

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

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

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

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

38. For information to be exempt pursuant to s39 I first need to be satisfied that the information was communicated in confidence to the Department. The confidential communication of information can be actual or implied<sup>1</sup> and whether it was or not is fact sensitive<sup>2</sup>. Factors to consider when determining the question include: what the intentions of the person providing the information were; to what extent that information has been otherwise circulated; and the likely consequences of disclosure<sup>3</sup>.

39. One other factor that I have previously taken into account in similar matters and which is relevant here is whether the information has been provided voluntarily.

40. In the internal review, the Department emphasised that the information was given voluntarily and that there is a disclaimer at the end of the report which reads '*...the source of the information will remain confidential unless otherwise*

<sup>1</sup> *Re B and Brisbane North Regional Health Authority* 1 QAR 279

<sup>2</sup> *Ryder and Booth* (1985) VR 869

<sup>3</sup> Moira Paterson, *Freedom of Information and Privacy in Australia – 2<sup>nd</sup> Edition*, LexisNexis Butterworths, Australia, 2015

*required by law or regulatory policies...'. It concluded that a shared understanding of confidentiality may be implied here.*

41. In its 3 May 2016 submission the Department stated:

*An understanding of confidentiality can be implied by the fact that the third party is strongly opposed to the disclosure of the information and was not required to submit the fish samples for testing with the DPIPWE laboratory and could have had the samples tested privately—in which case DPIPWE may not have received the results.*

and

*I am of the view that disclosure of this information may reasonably give rise to the third party not using the services of the Animal Health Laboratory should the need arise in the future, and potentially not providing privately obtained results and analysis to the Agency in the absence of a specific licence condition to do so.*

*In this matter I consider that particular weight must be given to the ability of companies to report incidents and volunteer confidential information to government in a timely and comprehensive manner and have confidence that this information will not be made available by regulators to their competitors or released to the wider market. Such ability and confidence provides regulators with the best possible basis for decision making and enhances the ability of the agency to encourage and ensure compliance with regulatory obligations. In my view this outweighs the considerations discussed above in favour of disclosure.*

42. The onus is on the Department to satisfy me not that it is reasonably likely that its ability to obtain similar information from the *same enterprise* will be impaired, but that its ability to obtain information of the same nature *generally* is likely to be impaired. In this regard, it submits that the three main enterprises operating in Macquarie Harbour already share the sort of information at issue, given their joint interest in maintaining Tasmania's *clean and green* reputation. It further submits that in that context, release of the information by one enterprise against its express wishes would be of concern to them all in circumstances where the information was volunteered to the Department.

43. Further, I note the Department does not need to establish that disclosure would necessarily lead to it *not* being able to obtain the same information in the future, only that disclosure would be *reasonably likely* to impair its ability to do so.

44. I put considerable weight on the Department's submissions in this matter. I accept the argument that there is an implied understanding of confidentiality here, given the voluntary nature of the provision of the information, and, in the particular circumstances of this case, that alone is enough to satisfy me that disclosure of the exempt information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.

45. Section 39(2) allows for such information to be found to be not exempt in certain circumstances. It follows that because the above information was provided voluntarily it was not provided pursuant to a requirement of any law, as required by s39(2)(c). Hence the exclusion in s39(2) does not apply here.

46. I am therefore satisfied on the basis of the material before me that the remaining redacted information on pages 3 to 7 is exempt under s39, disclosure of which is subject to the public interest test.

### ***The Public Interest- s33***

#### *General discussion*

47. Section 33 states:

- (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.*

48. The applicant has submitted that the matter is of interest to the public and points to an email of 19 September 2014 to the Premier, the Hon. Will Hodgman MHA, from two of the salmon enterprises operating in Macquarie Harbour, which raised concerns about the health of the waterway. He submits:

*The measures considered and taken [by Government] should be transparent and released to the public because it relates to the health of a public waterway that three salmon companies are leasing from the Tasmanian government and specifically the Tasmanian people. Impacts on the health of the waterway impact the viability of other industries such as tourism and recreational fishing and the quality of life for Tasmanians.*

49. The information on pages 1 and 2, which I have found to be exempt pursuant to s37(1)(b), is information which the Department states, and I accept, contains information that is required to be provided by the enterprise under its operating licence conditions.

50. The Department submits, and I accept, that the licence conditions place no requirement on Macquarie Harbour licence holders to publish mortality data more broadly nor is the information generally made available. The enterprise merely has to report the deaths to the Department within the given timeframe.

51. However, as the Department also noted in the internal review:

*I accept that marine farming in general is of particular interest to a number of organisations and that transparency is an important aspect of the industry and how it is regulated. In my view disclosure of the information would provide some indication of how a specific incident was reported and dealt with, but not how the Tasmanian aquaculture industry is being regulated more generally.*

52. The Department also appears to submit, and Tassal does directly, that the public interest should be assessed at the time of the application for assessed disclosure and not now.
53. I consider that such a view fails to understand the process of external merits review. I am reviewing the decision of the Department, ‘standing in its shoes’, as the expression goes, and am undertaking a full merits review of the internal review decision.
54. The exemption provisions and the public interest test are couched in terms of the effect of disclosure. If I am freshly determining whether any information should be disclosed, I must come to a view on the effect of disclosure as at the time of my decision.
55. In this regard, I consider that, presently, interest in salmon farming and aquaculture generally, and in particular in Macquarie Harbour, is very high.
56. I refer to a recent ABC 4 Corners program on Macquarie Harbour<sup>4</sup> and a recent report of Environment Tasmania on salmon farmings. There have also been government commissioned reports<sup>5</sup> and a recent Commonwealth Senate Inquiry<sup>6</sup>. There has also been recent EPA action on biomass determinations for Macquarie Harbours<sup>7</sup>, which has led to litigation regarding the biomass limits<sup>8</sup>, both widely publicised.
57. It has been further submitted by Tassal that organisations such as ABC’s 4 Corners and Environment Tasmania do not necessarily represent ‘the public interest’ but vested interests.
58. I consider the interest in Tasmanian salmon farming, its possible expansion, and in aquaculture generally, to be high and widespread amongst the general public and this is reflected in the interest of the media and other organisations.

<sup>4</sup> See <http://www.abc.net.au/4corners/stories/2016/10/31/4564542.htm>

<sup>5</sup> See [http://www.et.org.au/cleaning\\_up\\_tasmanian\\_salmon](http://www.et.org.au/cleaning_up_tasmanian_salmon)

<sup>6</sup> See <http://dpipwe.tas.gov.au/Documents/Report%20Cawthon%20Review.pdf> and [http://frdc.com.au/research/Final\\_reports/2016-229-DLD.pdf](http://frdc.com.au/research/Final_reports/2016-229-DLD.pdf)

<sup>7</sup> This was an inquiry into the regulation of Tasmania’s aquaculture industry. See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Fin-Fish/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Fin-Fish/Report)

<sup>8</sup> The January 2017 letters to the three fish enterprises are available on the EPA website at <http://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour-management>

<sup>9</sup> See <https://www.huonaqua.com.au/huon-lodges-proceedings-federal-court-tasmanian-supreme-court/>

59. As the applicant succinctly puts it, the health of the waterway has an impact on the viability of other industries such as tourism and recreational fishing and the quality of life for all Tasmanians. I would add that this is of great interest to Australians as a whole, as the Senate Inquiry demonstrates.
60. However, it is important to distinguish between issues of interest to the public and 'the public interest'.
61. Australian courts and tribunals have drawn a distinction between the public interest in disclosure and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest<sup>10</sup>.
62. What I must do under the Act is to consider all relevant matters, including those matters set out in Schedule 1, and disregarding those matters set out in Schedule 2, in coming to a conclusion as to whether or not it is contrary to the public interest for information to be disclosed.
63. My conclusion in this matter is that it is not contrary to the public interest for it to be disclosed that an enterprise has failed to comply with a licence condition, and the Department's response to this. Further, this extends to knowing which of those enterprises granted licences from the Government was not complying with a term of its licence conditions.
64. However, I consider that the specific operational information on those pages to which this information relates should not be disclosed for reasons that will be discussed later.
65. Clearly, salmon deaths above a certain percentage of stock are significant. Although, as the Department states, the licence reporting requirement is merely a 'trigger point', the actual cause of death may represent a significant biohazard and it is for this reason that such deaths are to be promptly reported to the Animal Biosecurity and Welfare Branch of Biosecurity Tasmania. The extent of any risk will not be known until laboratory tests are concluded. Hence, time is of the essence in reporting.
66. The Department's view is that disclosure of the information, whilst providing some indication of how a specific incident was reported and dealt with, would not inform the public as to how the Tasmanian aquaculture industry is being regulated more generally.
67. The Department and Tassal further submitted in response to the draft decision as follows:

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<sup>10</sup> *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 2)* (1991) 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113

Department: ...After the [Attachment 2] email was sent DPIPWE worked with Tassal and other aquaculture operators to ensure they reported elevated mortalities promptly, and this is what is currently happening within the industry today. In this particular case, laboratory samples were received soon after the email, so the event was appropriately followed up. DPIPWE is satisfied the matter was appropriately investigated and took no further action other than working with the company vets to ensure prompt reporting.

and

Tassal: ...we submit [the Ombudsman] also considers the fact that following this correspondence DPIPWE resolved there was no breach of a licence condition. I am instructed that DPIPWE worked with Tassal to resolve all issues raised in relation to the elevated mortality rates and no breaches were identified. Tassal clarified that the elevated mortality rates were not caused by infectious disease, rather they related to underperforming fish due to grading issues and conditions of transport prior to being released into the pens. It would be misleading to release this email as it does not accurately identify the incident.

68. I can accept that the matter was resolved to the Department's satisfaction and this is now on the record.
69. On the evidence before me, I conclude that because the laboratory report showed nothing particularly adverse, the matter was considered resolved at that time. There is no documentary evidence before me to support the Secretary's and Tassal's suggestion that there was any further follow-up of the particular issue of reporting mortalities on time, and the absence of any Department information or records of this supports such a view.
70. However, the outcome does not mean that the matter is no longer of public interest. I consider it still to be in the public interest to know that the deaths were not reported by Tassal within the licence requirement timeframe, and to know what specific action was taken by the Department in this instance for the matter to be resolved.
71. That is, regardless of a satisfactory resolution here, and that licence condition compliance may have improved since that time, it is still in the public interest for this information to be disclosed, so as to inform the debate as to whether the Tasmanian salmon farming industry is being properly regulated, particularly in light of possible expansion around Tasmania.
72. However, I consider it is contrary to the public interest to disclose any further information from within the Animal Health Laboratory Report and the related application form (pages 3 to 7).
73. In coming to this view I put significant weight on the fact that the cause of death has been disclosed to the applicant. I note the following from the submission of the Department of 3 May 2016:

*In the particular instance at hand subsequent analysis of a sample of fish by the DPIPWE Animal Health Laboratory found no obvious signs of disease in the fish and no cause of the elevated mortality. This information was disclosed to the applicant on internal review.*

74. The applicant submitted in his letter of 2 November 2015 that the Department has released a document from the Animal Health Laboratory but that it has been 'redacted of all meaningful information and that it should be released in full'.
75. I do not agree. I consider the applicant has received 'meaningful information'. I have had the opportunity to review the application form and the full laboratory report. From this I am satisfied that the public interest would not be further advanced by any subsequent disclosure, when considering the harm to the enterprise that may be likely to occur by way of competitive disadvantage, and the Department's difficulty in obtaining information in the future, if information is released where it has been provided voluntarily.

*Addressing the Schedule 1 matters*

76. In coming to my conclusions as set out above, I have considered the public interest matters as set out in Schedule 1 of the Act. I have ultimately paid particular regard to (a), (b), (k), (l), (n), (s), (v), (w) and (x). Schedule 1 is attached to this decision as Attachment 1.
77. In favour of disclosure of the page 1-2 email information relating to licence obligations and a breach, I consider that there is a public need for this type of government-held information to be accessible (a), that disclosure will contribute to debate on a matter of public interest (b), and that disclosure will promote the environment and/or ecology of the State (l).
78. Significantly, disclosure of the relevant s37 page 1-2 email information would not prejudice the ability of the Department to obtain similar information in the future as there is a licence condition for the enterprise to report this type of information (n).
79. In terms of personal information (m), as noted earlier this will be redacted as the applicant consented to this in his review application.
80. As to whether the information in question is information related to the business affairs of a person which is generally available to the competitors of that person (x), I note the enterprise's email was also sent at the time to its direct local competitors, who would most likely be aware that there had been a breach of licence conditions. I acknowledge however that competitors outside of Macquarie Harbour would not have this information.
81. In the internal review decision, the Department balanced (a), (b) and (c) against (n), (s) and (v) in coming to its view on the public interest and disclosure.

82. The Department and Tassal have now further claimed that disclosure will lead to harm to individuals and to business and financial interests, adding (m) and (w), to the economic development of the State as a whole by undermining the industry (k), that the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff (p), and (u), that the information is wrong or inaccurate.
83. I have given weight to each of the above matters with the exception of (m), (p) and (u).
84. I have already addressed (m) above in terms of personal information. Tassal has used (m) in the context of financial effects and commercial disadvantage relating to disclosure. I do not consider it is necessary to give this meaning to (m) as this possible effect is already covered by (s) and (w).
85. In regards (u), the claim is that there was ultimately no breach of a licence condition, so the information is wrong or inaccurate. With respect, this claim is not itself accurate. From the evidence before me, I am satisfied that there was a breach of a licence condition, but that the Department was satisfied by the laboratory test results and took no further specific action on the breach.
86. I can see no relevance of (p) here despite the claims of Tassal. This in no way relates to the management or performance assessment by a public authority of the public authority's staff.
87. In my consideration of pages 1 and 2 under s37 I found that disclosure of the information would be *likely* to expose Tassal to competitive disadvantage because of its potential effect on consumers and because the information relates to just one competitor in the industry, possibly giving one of the others an advantage. I considered it a real possibility and not remote.
88. However, I am not satisfied, on the evidence before me, that the disclosure at this time of the licence obligation breach information at pages 1 and 2 would actually harm the business or its financial interests or its competitive position, (s) and (w), or would harm the economy of the State, (k).
89. There is little specific evidence or information before me to satisfy me of the Department's and Tassal's claims. As required under s47(4), where the Ombudsman is determining a matter brought by an applicant, the public authority concerned has the onus to show that the information should not be disclosed, and it is open to the Ombudsman, as in this case, to determine the outcome of a review on the basis that the onus has not been discharged.
90. Similarly, I am not satisfied that the disclosure of the specific operational information contained in pages 1-2 would actually harm the business or its financial interests or its competitive position, (s) and (w). However, even the risk of it so doing when weighed against other relevant Schedule 1 matters favouring disclosure, such as (a), (b) and (l), leads me to not be satisfied that the limited benefits of public disclosure outweigh the potential costs to the enterprise. Thus it would be contrary to the public interest to disclose this information.

91. I find that disclosure of the s39 information at pages 3-7 would not significantly contribute to debate on the matter (b), may prejudice the Department's ability to obtain additional information, such as independently commissioned reports, in the future (n), and that there is a risk of competitive disadvantage or of financial interests being affected by disclosure: (s) and (w). This is also 'extraneous or additional information' provided by the enterprise that was not required to be provided (v). Thus it would be contrary to the public interest to disclose this information.
92. These are the reasons for my conclusion that it is contrary to the public interest to disclose any further information from the Animal Health Laboratory Report or the related Fish Health Unit application form, but that it is not contrary to the public interest for the information relating to a breach of a licence condition on pages 1 and 2 to be disclosed.
93. Finally, I would like to address the applicant's submission that under the public interest this information should be released because the Department has set a 'precedent' by releasing similar information about a competing enterprise.
94. The Department submits that this was provided to the applicant by way of an active disclosure, and not in response to an application for assessed disclosure.
95. Section 12(l) makes it clear that the Act does not prevent, and is not intended to discourage a public authority from publishing or providing information (including exempt information). Active disclosure of information is voluntary and can be made at any time and, importantly, can involve information that might otherwise be subject to exemptions.
96. I am also advised the relevant enterprise had already voluntarily made the information publicly available.
97. The Department is entitled to, and indeed, encouraged to, actively release information even if it could be withheld, where it sees a benefit in doing so. The previous matter that the applicant relies upon involved a different enterprise, which as a third party took a different view in relation to the information and released the information in a different form.
98. On the evidence before me I am satisfied that on that occasion a decision was made to make an active disclosure. Hence, that decision cannot have a bearing on this decision. It is not a relevant consideration in determining the public interest here.

## Conclusion

99. I am satisfied that all information on pages 1 and 2 is exempt under s37. However I am satisfied that it is not contrary to the public interest to disclose the information which relates to a breach of one of the enterprise's licence conditions. The information on pages 1 and 2 should be partially released as per Attachment 2.

100. I am satisfied that all remaining undisclosed information on pages 3 to 7 is exempt under s39 and that it is contrary to the public interest to disclose the information. This information should not be released.

**Dated:** 20 April 2017



**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

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

- (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
  - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
  - (g) whether the disclosure would enhance scrutiny of government administrative processes;
  - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
  - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
  - (k) whether the disclosure would promote or harm the economic development of the State;
  - (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.



## TASMANIAN OMBUDSMAN

### DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1506-060

**Names of Parties:** Michael Atkin & Department of Primary Industries, Parks, Wildlife and the Environment

**Provisions considered:** s27, s33, s36, s37 and Schedule 1

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#### Background

1. Mr Atkin, a reporter for the ABC, made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Primary Industries, Parks, Wildlife and the Environment (DPIPWE or the Department) on 31 March 2015.
2. The application for assessed disclosure sought:
  - Any records held by the Department of Primary Industries, Parks, Water and Environment in relation to testing on Warwick Hastwell's Dover Bay mussels in relation to decreased productivity and the contraction of a pest or disease. Please include any letters, reports, emails, test results and meeting minutes including but not limited to the Chief Vet, a Departmental Vet and specialists from IMAS between December 2014 and present.
  - Any correspondence between the Department of Primary Industries, Parks, Water and Environment and Minister Rockliff including any letters, reports, emails, test results and meeting minutes in relation to Warwick Hastwell between December 2014 and present.
  - Any correspondence between the Department of Primary Industries, Parks, Water and Environment and the Marine Farm Planning Review Panel including any letters, reports, emails, test results and meeting minutes in relation to Warwick Hastwell between December 2014 and present.
  - Any correspondence between the Department of Primary Industries, Parks, Water and Environment and Tassal and its representatives in relation to Warwick Hastwell between December 2014 and present.

3. A decision was made by a delegate on 11 May 2015. The Department determined it held no information within the scope of points 3 and 4. In a schedule it identified 64 documents to be within scope of the application and of these, 4 pages were not released and 2 were released in part. The delegate relied on exemptions under s35 of the Act- *internal deliberative information*. The delegate also noted that the names and contact details of several individuals had been de-identified, as consulting with them would have delayed the decision.
4. The applicant subsequently requested an internal review and this was completed on 29 May 2015 and affirmed the original decision. However the new delegate noted that whilst the decision was based on s35, other exemption provisions would apply – s27 and s37. However she did not give any detail as to which particular pieces of information were exempt under these provisions and why.
5. The applicant's application for external review was received on 10 June 2015.

### **Issues for Determination**

6. The starting point in all my reviews is s7 of the Act: a person has a legally enforceable right to information in the possession of a public authority unless it is exempt.
7. The Department has generally relied on s35 to claim exemptions for all undisclosed information on the 6 documents because it is internal deliberative information.
8. From the schedule of documents attached to the original decision, the Department also made a decision to de-identify one piece of personal information in one document under s36 of the Act.
9. In undertaking my review, I must determine whether the above grounds of exemption apply, or whether any other ground, such as s27 or s37, would be more appropriately applied when considering the facts of this case.
10. If any exemption ground applies which is subject to the public interest test at s33, I must then determine whether it is contrary to the public interest for that information to be disclosed. In so doing, I must consider the matters raised in Schedule 1 of the Act.

### **Relevant legislation**

11. Section 27 states:

(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.*

*(2) 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.*

12. Section 33 states:

*(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.*

13. Schedule 1 of the Act is attached to this decision.

14. Section 36 relevantly states:

*(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.*

15. Section 37(1) states:

*(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

16. I also note that under s47(4) of the Act, the onus is on the Department to satisfy me that the information that is claimed to be exempt should not be disclosed:

(4) 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.

### **Evidence and submissions before me**

17. The Department has provided me with the 6 documents it considered exempt in part or in whole under s35 and the one document with the redaction under s36. In addition I have before me:

- the application for assessed disclosure, dated 31 March 2015
- the initial decision on the application by the delegated officer, dated 11 May 2015
- the application for internal review, dated 13 May 2015
- the decision on internal review of a different delegated officer, dated 29 May 2015
- the application for external review dated 5 June 2015, and attached letter
- a submission from Dr John Whittington, Department Secretary, dated 15 August 2016, in response to my letter of 19 July 2016
- other material received from the parties during the review process

18. The applicant submitted that the Department had failed to properly consider Schedule 1 in assessing the public interest. He referred to significant government funding for the fish farming industry and the significant economic harm to a third party, Mr Warwick Hastwell, of Dover Bay Mussels Pty Ltd. He also stated that the third party had given his consent to the release of his information.

19. The applicant also questioned the Department's use of the argument that 'frank and fearless advice' would not be forthcoming if disclosure occurred. He

described this argument as resting on the ‘tired and flawed Re: Howard arguments first developed in the infancy of FOI in Australia’.

20. He suggested that officers have a legal duty to provide ‘frank, honest, comprehensive, accurate and timely advice’ and there were no reasonable grounds for such an argument to justify the withholding of information under freedom of information laws.
21. He later advised that he wanted the decision to de-identify personal information on one document reviewed as he could see no reason for the redaction. He did not believe there was any reason to de-identify Warwick Hastwell or anyone representing Tassal and if this person was from within the Department or another party, he stated it would depend entirely on the context in which they were mentioned.
22. As stated earlier, the Departmental delegate noted in the internal review decision that, whilst the decision was based on s35, other exemptions would apply, being s27 and s37. As no reasons were provided, I raised this with the Department and the application of these provisions to the information subject to review was addressed squarely by the Secretary in his response dated 15 August 2016.
23. The Department also made submissions on the relevant public interest issues, and on the specific arguments as raised by the applicant.

### **Analysis**

24. The undisclosed information before me is described in the schedule to the Department’s original decision as follows:
  - Pages 2-3, 26 March 2015, DPIPWE email with summary of ‘in situ’ net cleaning literature attached (some information exempt)
  - Page 7, 25 March 2015, DPIPWE email re Veterinary Officer visit (outside scope)
  - Pages 38-41, 18 February 2015, Minute to Minister for Primary Industries and Water (exempt in full)
  - Page 56, 3 February 2015, UTAS email to DPIPWE re fouling samples (personal information, de-identified)
25. I will first consider the Department’s claim that the page 7 information is outside scope of the application for assessed disclosure. I find that this email is dated after the date the application for assessed disclosure was accepted, which was 31 March 2015. Thus I accept that it is outside the scope of this application.
26. Examining the remaining information chronologically, the information at pages 2 and 3, I am satisfied that this is specific operational information of one of the

three salmon enterprises operating in Macquarie Harbour. The exemption of greatest relevance in application is s37.

27. I am further satisfied that, in terms of s37(1), the information acquired by the Department from this third party regarding netting would have been provided voluntarily and is either information relating to trade secrets or information the disclosure of which would be likely to expose the third party to competitive disadvantage.
28. Thus I am satisfied that this information may be exempt under s37.
29. As to pages 38 to 41, I consider that s27 is of greatest relevance and should be applied here.
30. I am satisfied from examining this information that, under s27(1), it is opinion, advice or a recommendation prepared by an officer of the Department, for the purpose of providing a Minister with a briefing in connection with the official business of the Department and its relevant Minister, and it is in connection with the Minister's parliamentary duty.
31. Whether or not this information is exempt depends on whether any of the exclusions to s27(1), detailed at s27(2), (3) or (4), apply.
32. I am satisfied that this information is less than 10 years old from the date of creation. I am also satisfied that all information contained within this briefing was brought into existence for submission to a Minister for the purposes of a briefing. Thus the exclusions in s27(2) and (3) do not apply.
33. Section 27(4) provides that purely factual information is not included in s27(1). As to the meaning of 'purely factual information', I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>1</sup>, where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore 'the material must be 'factual' in fairly unambiguous terms. Further, to be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes<sup>2</sup>.
34. That is, for 'purely factual information' to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process so as to form part of it. As a result, even though a document's contents are in part factual, this does not necessarily mean that the document falls outside the ministerial briefing exemption.
35. Turning to the information before me, I am satisfied that the briefing note does contain some factual information which could potentially stand apart from the deliberative process the Minister must undertake.

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<sup>1</sup> (1984) 6 ALN N347 at N349

<sup>2</sup> See *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

36. However, I consider that the qualification to 'purely factual information' in s27(4), being - ...unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing - is considerably broad and that any 'factual information' here would be excluded from disclosure under the 'consultation' provision.
37. In passing, I note by comparison that under the s35 'internal deliberative information' exemption provision, s35(2) states only that 'purely factual information' is not exempt. It is not qualified in the way s27(4) is.
38. I also note in passing that nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information: s27(5). However, I accept that the Minister does not wish to disclose any part of this briefing note.
39. Turning to s36, and personal information, I have examined page 56 and the de-identification extends to deleting the name of the person this email was 'cc'd' to.
40. I am satisfied that s36 applies to this information. This is because releasing this information would involve the disclosure of the personal information of a person other than the person making an application under section 13. 'Personal information' is defined at s5 to mean any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion and who is alive, or has not been dead for more than 25 years.
41. However, I note that this name is the same as a person referred to in the body of the email already released in full to the applicant. I will return to this under my assessment of the public interest.
42. I now turn to the public interest under s33. This section requires disclosure of information exempt under Part 3 Division 2 of the Act unless it is found, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information. As noted earlier, the matters set out in Schedule 1 must be taken into consideration.
43. The only exempt information to which the public interest test applies is that on pages 2 and 3, and on page 56, as this information is exempt under s37 and s36 respectively. Exemptions under s27 are not subject to the public interest test.
44. The applicant has made a number of submissions in relation to the application of the public interest test, as has the Department. Not all is now of direct relevance.
45. The page 2 and 3 information in question is information acquired voluntarily by the Department from a third party, which I have found is either information relating to trade secrets or information the disclosure of which would be likely to expose the third party to competitive disadvantage.

46. The public interest test is a balancing exercise, and in this case, I consider there is some public interest in knowing this private enterprise's specific operational information but, when weighed against the likely competitive disadvantage it may suffer should this confidential information be disclosed, I consider it is contrary to the public interest to disclose it.
47. Thus after taking into account all relevant considerations the redacted information at pages 2 and 3 should not be disclosed.
48. As to the identity of the person copied in to UTAS's email at page 56, I consider there is little or no public benefit in knowing to whom a copy of this email was sent. However, this person has already been identified in the body of the email already released to the applicant and it is clear that it was copied to him so he would know what the writer was stating about *his* scientific results. Rightly or wrongly, his identity has already been disclosed to the applicant.
49. Whilst there is little or no public benefit in disclosure, I am satisfied there is no detriment, and in light of this I cannot be satisfied that it is actually *contrary* to the public interest to disclose this information, as required by s33. Thus it should be released.

### **Conclusion**

50. The undisclosed information at pages 38 to 41 is exempt under s27 of the Act and should remain undisclosed.
51. After considering the public interest test at s33 of the Act:
- The undisclosed information at pages 2 and 3 which is exempt under s37 of the Act should remain undisclosed
  - The undisclosed information at page 56 which is exempt under s36 of the Act should be released
52. As required by s48(1)(a) of the Act, I sought the Department's input on this decision as it may be considered adverse in part. The Department has advised it will not be making any formal response.
53. Under s47(1)(p) of the Act, I direct that the release of information as set out above be implemented by the Department within a period of 5 working days from the date of receipt of this decision.

Dated: 1 March 2017



**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest**

**Sections 30(3) and 33(2)**

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

- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (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:** O1704-073

**Names of Parties:** Mr Simeon Thomas-Wilson and City of Hobart

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

**Provisions considered:** s31

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**Background**

- 1 On 20 February 2017, Mr Simeon Thomas-Wilson submitted an application for assessed disclosure to the City of Hobart seeking information pertaining to a discussion in closed council about the Hobart City Council Facebook parody page. Specifically, he sought:

*Item 7 of the Hobart City Council's closed council meeting on 6 February 2017.*
- 2 The information is contained in a memorandum from Council's General Manager, Nick Heath, submitted as Item 7 of a Supplementary Agenda in relation to the closed portion of the 6 February 2017 council meeting.
- 3 The memorandum discusses a private Facebook page that uses satire to *parody* the actions of Council and appears to contain general and legal advice on the issue. While the information claimed as exempt under s31 is not a communication from a lawyer to a client, it is claimed it is a summary of advice received by Council from its legal representatives, Shaun McElwaine and Associates.
- 4 On 21 March 2017, Ms Heather Salisbury, Council's then Acting General Manager and therefore its principal officer, released a decision to the applicant with one exemption claimed under s31; that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.
- 5 On 12 April 2017, the applicant submitted a request for external review of this decision with my office, asserting that the information would not be privileged from production in legal proceedings.

**Issues for Determination**

- 6 I must determine if the information claimed exempt by Council attracts legal professional privilege for the purposes of s31 of the Act.

## **Relevant legislation**

- 7 Section 31 provides:

*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.*

## **Submissions**

- 8 The applicant asserts that the paragraph claimed by Council to be exempt does not sufficiently meet the requirements of s31:

*I believe the information received in my assessed disclosure that has been redacted does not need to be redacted, as it would not be privileged from production in legal proceedings on the ground of legal professional privilege.*

- 9 Council continues to maintain the information is subject to legal professional privilege. It submits:

*The portion of the material provided which has been redacted is exempt on the basis 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.*

*In our view it is clear that the paragraph of the report that was redacted in providing it to Mr Thomas-Wilson is protected by legal professional privilege...*

## **Analysis**

- 10 I have received a full copy of the memorandum and considered the information Council claims to be exempt.
- 11 Simply put, legal professional privilege attaches to communications between a lawyer and their client made for the purposes of providing legal advice, or advice in connection with litigation.
- 12 As is plain, the memorandum containing the information claimed as exempt was prepared by Council's General Manager rather than any lawyer acting for Council. It does though, paraphrase legal advice Council had received from its lawyers.
- 13 Legal professional privilege does not attach to a document as such, but rather to the communication recorded within it<sup>1</sup>. That means that:

*... it attaches also to summaries, notes and copies of documents made by the client or the lawyer of communications which are themselves privileged ...<sup>2</sup>.*

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<sup>1</sup> *Australian Federal Police v Propend Finance* (1997) 188 CLR501; 141 ALR 545

<sup>2</sup> *Trade Practices Commission v Sterling* (1978) 36 FLR 244; *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514

- 14 While the information is contained in a memorandum from the General Manager, it is a summary of legal advice received and is therefore itself privileged.

**Preliminary Decision**

- 15 I determine the information claimed to be exempt by Council is exempt under s31 and should not be released to the applicant.

**Submissions to Preliminary Decision**

- 16 Neither party made a submission to my preliminary decision.

**Conclusion**

- 17 I confirm my preliminary decision and determine the information claimed to be exempt by Council is exempt under s31 and should not be released to the applicant.

**Dated:** 5 October 2017



**Richard Connock**  
**OMBUDSMAN**

**OMBUDSMAN TASMANIA**  
**DECISION**



**Right to Information Act 2009 Review**

**Case Reference: O1610-067**

**Names of Parties:** Patrick Billings & Department of Health and Human Services

**Provision considered:** s18, s30

- 
1. This decision is issued in accordance with the powers of the Ombudsman under s47 of the *Right to Information Act 2009* (the Act).

**Background**

2. On 17 August 2016 Mr Billings (the applicant) sought from the Department of Health and Human Services (the Department) the following information through an application for assessed disclosure:
  - “*The footage/CCTV referred to by Human Services Minister Jacquie Petrusma in parliament on 16/8/16 capturing the conduct of Ashley Youth Detention staff that has prompted the Minister to seek external expert advice*”
  - “*The time period referenced by the Minister in parliament namely a period of approximately 48 hours covering July 14 and 15, 2016*”
3. On 1 September 2016 the Department made a decision, determining that the information requested was fully exempt under s30(1)(a)(i) of the Act.
4. The applicant sought an internal review and on 3 October 2016 the Department affirmed the decision under review on the same basis.
5. The applicant sought a review with the Ombudsman on 10 October 2016. He later requested expedition of this matter, giving grounds, and after due consideration, this was granted.

**Issues for Determination**

6. The Department relied on s30(1)(a)(i) of the Act to claim exemptions for the information because its disclosure under this Act would, or would be reasonably likely to, prejudice the investigation of a breach or possible breach of the law.
7. Section 30 is found in Part I of the Act and is not subject to the public interest test. It is set out in full as an attachment to this decision.

## **Submissions and evidence**

8. I have before me the CCTV footage in question.
9. The original decision and internal review decision were brief. Mr Bruce Paterson, Executive Manager, Legislative Review and Legal Support, of the Department has now set out more fully in his letter of 11 November 2016 the reasons for the decision. He states in part:

*Prior to making the decision on the application for assessed disclosure, Departmental officers sought advice from Tasmania Police and Crown Law. This included written advice to me from Crown Counsel. Input from the Commissioner for Children and Young People was also received - given the Commissioner's function as an advocate for vulnerable youth justice detainees. As stated in the internal review decision, I then determined that disclosure was exempt from disclosure under s.30 of the Right to Information Act 2009 on the basis that it may prejudice the investigation of a breach or possible breach of the law.*

*I would like to expand on the context and reasons for the decision, including reference to parallel cases previously considered by the Ombudsman below. I accepted advice that the publication or reproduction of the CCTV footage, in the context of a police investigation being on-foot, could constitute a contempt of court in the event that, in due course, charges are laid against a person depicted in the footage. Therefore, the footage was exempt from s.30(l)(a), particularly sub-paras (i) and (ii) and paragraph (f). There was, therefore, no need to consider sections 33 and 36 of the RTI Act in terms of public interest or personal information. However, if in future there is a decision that charges are not to be laid, any future RTI application for the same material would, of course, be subject to a detailed consideration of whether other exemptions apply. Without wishing to speculate in detail on the nature of considerations that might apply in future, I note that the Minister has identified to the public that there has been conduct of concern which is being investigated, so that any necessary action can be taken, while preserving the privacy of the detainees involved and natural justice for the staff member against which allegations have been made. I also note that the previous positions that the Department has taken in respect of RTI applications for evidentiary and other material that forms part of misconduct and performance management processes may be relevant. For example, these matters require a balance between matters of interest to the public and something of serious concern to the public (eg. the issue raised in the Ombudsman's reasons for decision in K and the Department of Infrastructure, Energy and Resources).*

*I am of the view it is a standard and commonly understood principle that there is a high level of confidentiality with material that forms part of a police investigation, unless the police themselves decide that some disclosure of evidence is necessary in the interests of justice (eg. disclosure of CCTV footage where the identity of an alleged offender is unknown).*

10. I note that the last paragraph was in response to the applicant's assertion on seeking internal review that Tasmania Police routinely release CCTV footage of alleged crimes and this does not have the effect of prejudicing their investigations into possible breaches of the law.

### **Analysis**

11. I have examined the footage in question.

12. I am satisfied that the matter, including the CCTV footage, has been referred to Tasmania Police and that criminal investigations are ongoing, after which charges may or may not be laid.

13. I am also satisfied that, if the persons in the CCTV are able to be identified upon the footage being publicly released, then it becomes reasonably likely in the circumstances of this particular case that potential witnesses or potential offenders may be approached by other persons, who may attempt to influence their words and actions, possibly before they are interviewed by police, or statements taken, or charges laid.

14. I am therefore satisfied on the basis of these findings that the CCTV footage as a whole is exempt information as its disclosure under this Act would, or would be reasonably likely to, prejudice the investigation of a breach or possible breach of the law: s30(1)(a)(i).

15. I note that s30(1)(f) states that information is also exempt if disclosure would, or 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. This in my view has an even broader reach than s30(1)(a), as it includes 'delaying or hindering' as well as 'prejudicing' current police investigations. Hence this exemption provision is also satisfied.

16. In addition, I am also satisfied that the identification of these persons, especially where many are youths, and in circumstances where criminal charges are ultimately *not* laid, could also be reasonably likely to endanger the emotional or psychological safety of these persons, or increase the likelihood of public harassment of these persons: s30(1)(d).

17. For completeness, I note that s30(2) provides that the public interest test may apply to the release of information considered exempt under s30(1) in a limited number of circumstances.

18. I do not believe it is necessary for me to go into each of the six circumstances in this particular case as there is nothing before me to suggest that any of the six would apply here.

19. Whilst not raised by the Department there are additional considerations where youths are involved. I refer to s31 of the *Youth Justice Act 1997*, also attached to this decision, which states in part:

(1) A person must not publish any information in respect of any proceedings that are to be, are being or have been taken in the Court if the information identifies, or may lead to the identification of, a youth who is the subject of or a witness in the proceedings except where—

- (a) permission to publish the identity or information has been granted under subsection (2); and
- (b) the identity or information is published in accordance with any conditions specified in respect of the permission.

*Penalty:*

*Fine not exceeding 100 penalty units or a term of imprisonment not exceeding 2 years, or both.*

20. Given the footage involves both adults and youths, it is possible that a youth could potentially either be charged as a result of the footage, or be a witness in relation to a criminal charge laid against a youth.

21. This section makes it clear that, without proper permission, to publish any information in Magistrates Court (Youth Justice Division) proceedings yet to be taken which identifies, or may identify a youth, may be a serious offence under the Act.

22. Clearly, the releasing of this CCTV footage at this time, and possibly at any time, may also be likely to lead to an offence being committed under the *Youth Justice Act 1997*. Even if not an offence at this time, its release would not be in the spirit of the Act.

23. Based on the above, I am also satisfied that s30(1)(a)(ii) applies here, as disclosure would also be reasonably likely to prejudice the enforcement or proper administration of this law in this particular instance.

## **Conclusion**

24. I am satisfied that s30 of the Act applies here, as disclosure of the CCTV footage under this Act would, or would be reasonably likely to:

- prejudice the investigation of a breach or possible breach of the law: (1)(a)(i)
- prejudice the enforcement or proper administration of the law in a particular instance: (1)(a)(ii)
- endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person: (1)(d)

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

25. I issued a draft decision to this effect on 9 December 2016, sending this to both the applicant and the Department in accordance with s48(1)(b) of the Act for comment or submissions.

26. On 12 December 2016 Mr Cain of the Department advised that it had no further submissions to make.

27. The applicant provided a written submission on 23 December 2016. He first discussed the claim of contempt raised by the Department in regards s30(1)(a) and argued that it would not apply in this case as no charges have been laid, and even if they had, it may still be appropriate to disclose the CCTV footage in the circumstances of this case.

28. I agree with the applicant's analysis that the law of contempt does not begin to operate until charges have been laid. This is why I have not used possible contempt as the basis for my decision.

29. Rather, I have considered a number of factors in coming to my conclusion that the CCTV footage should not be released, including factors relating to my finding that many of those in the footage are youths.

30. The applicant also submits that the CCTV footage could be released in a de-identified fashion in accordance with s18 and this would remedy my concerns about identification under s30(1)(a)(i) and harm or harassment under s30(1)(d).

31. He refers to s18(3)of the Act to support his argument, which states:

(3) If –

*(a) information requested under this Act is included with other information; and*

*(b) the information requested can be extracted from that other information by the use of a computer or other equipment usually available to the public authority or Minister –*

*the information is to be extracted accordingly.*

32. I am not satisfied that this provision would apply here. Whilst what the applicant requests may be 'included within other information' as this provision requires under s18(3)(a), I am not satisfied that the information requested can be 'extracted' in terms of s18(3)(b).

33. I am satisfied that, whilst it may be possible to release the CCTV footage in a pixelated or blurred fashion, the parts of it containing activity would have to be severely pixelated or blurred so as to not identify the participants and that would render any footage meaningless, such that it would not be information in terms

of the scope of the request, being information 'capturing the conduct' of Ashley Youth Detention Centre staff.

34. Accordingly, the CCTV footage in issue should not be released.

**Dated:** 23 December 2016



Richard Connock  
**OMBUDSMAN**

## **RIGHT TO INFORMATION ACT 2009 - SECT 30**

### **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

## **YOUTH JUSTICE ACT 1997 - SECT 31**

### *31. Restrictions on reporting proceedings*

(1) A person must not publish any information in respect of any proceedings that are to be, are being or have been taken in the Court if the information identifies, or may lead to the identification of, a youth who is the subject of or a witness in the proceedings except where—

- (a) permission to publish the identity or information has been granted under subsection (2); and
- (b) the identity or information is published in accordance with any conditions specified in respect of the permission.

**Penalty:**

Fine not exceeding 100 penalty units or a term of imprisonment not exceeding 2 years, or both.

(2) The Court may grant a person permission to publish an identity or information subject to any conditions specified by the Court.

(3) A person must not publish in any way any information in respect of the proceedings of the Court if the Court prohibits publication of the information.

**Penalty:**

Fine not exceeding 100 penalty units or a term of imprisonment not exceeding 2 years, or both.

(4) Subsections (1) and (3) do not apply to the provision of information to —

- (a) the youth or his or her legal representative; and
- (b) a guardian of the youth; and
- (c) a victim of the offence; and
- (d) a police officer, or a person or a member of an authority responsible for the enforcement of laws in this State, in the course of his or her official functions; and
- (e) a member of the Australian Federal Police, a member of the police force of another State or a Territory or a person or a member of any other authority responsible for the enforcement of laws of the Commonwealth, any other State or a Territory in the course of his or her official functions; and
- (f) a person employed or engaged in the administration of this Act in the course of his or her official functions; and

- (g) a person employed or engaged in the administration of the Act against which the offence was committed in the course of his or her official functions; and
- (h) a person undertaking research that does not involve the identification of the youth, the victim or any person involved in the proceedings (otherwise than in a professional capacity as a police officer or a person employed or engaged in the administration of this Act) who has not consented, in writing, to the publication of the report if the research has been approved by the Commissioner of Police or the Secretary; and
- (i) a person undertaking research that involves the identification of the youth, the victim or any other person referred to in paragraph (h) if –
  - (i) all persons to be identified have consented, in writing, to their identity being provided to the researcher; and
  - (ii) the research has been approved by the Commissioner of Police or the Secretary; and
- (j) a prescribed person or a person in prescribed circumstances or for a prescribed purpose.

(5) Subsection (1) does not apply to the provision of information in relation to a youth if the youth, or the youth's guardian, consents in writing to the provision of the information for the purpose of the rehabilitation of the youth or a related purpose.

(6) Subsections (1) and (3) do not apply to the provision of information in relation to a youth –

- (a) between an information-sharing entity and a Government Agency for the purpose of the rehabilitation of the youth or a related purpose; or
- (b) between an information-sharing entity and the Commissioner for Children and Young People, or between a Government Agency and the Commissioner for Children and Young People.



## OMBUDSMAN TASMANIA

### DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1511-169

**Parties:** Patrick Billings & the Department of Health and Human Services

**Provisions considered:** s33, s35, Schedule 1

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#### Background

1. An application for assessed disclosure under the *Right to Information Act 2009* (the Act) was lodged on 28 July 2015 by Mr Patrick Billings, a reporter with *The Mercury* newspaper (the applicant), to Ambulance Tasmania, being part of the Department of Health and Human Services (the Department).
2. The application for assessed disclosure sought:
  - *The operational and technical reviews into the July 5 [2015] power failure at Ambulance Tasmania's State Communications Centre*
  - *Any briefing notes from Ambulance Tasmania or DHHS regarding the power failure*
3. The Department made a decision on 28 August 2015 and identified 27 pages to be within the scope of the application, including a *Technical Review*, an *Operational Review* and two pages of information referred to as *Dot Points for Minister*.
4. The *Technical Review*, noted as a preliminary review, was released in full, but the Department relied on s27 (internal briefing information of a Minister) to exempt the *Dot Points for Minister*.
5. The Department released the cover page of the *Operational Review* and pages 1-5 (*Background, Terms of Reference, Review Team and Methodology*), page 9 (*Timeline of Events*) and pages 17 and 18 (*Key Recommendations and Quick Wins*) but the remainder was found exempt under s35(1)(b) of the Act (internal deliberative information) and s39(1)(b) (information obtained in confidence).
6. The applicant applied for internal review on 9 September 2015 and a decision was made on 28 October 2015. The internal review relied on s35 alone and came to the same decision as in the original decision.
7. The applicant applied for external review on 25 November 2015.

## **Issues for Determination**

8. During the review process the applicant confirmed that he disputed the exemptions in relation to the *Operational Review* only, and the scope of this review is therefore confined to a consideration of the information contained on pages 6-8, and 10-16 and 19 of the *Operational Review*.
9. The Department has determined that this information is exempt under s35 and that, in terms of the public interest test at s33, it is contrary to the public interest to disclose the information.
10. I must determine whether this information is exempt under s35 as claimed, and if so, how the public interest test applies in the circumstances of this case.

## **Relevant legislation**

11. Section 33 states:

- (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.*

12. Section 35 of the Act states:

- (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.

### **Submissions and evidence**

13. The following relevant documentary evidence is before me:

- the application for assessed disclosure dated 28 July 2015
- the original decision of Mr Mike Cain, Delegated RTI Officer dated 28 August 2015
- the application for internal review dated 9 September 2015
- the decision on internal review of Mr Michael Pervan, Secretary of the Department, dated 28 October 2015
- the application for external review received on 26 November 2015
- submissions from the applicant dated 23 February 2016
- the full *Operational Review*

14. The *Operational Review's Table of Contents* was included with the information released to the applicant. He is therefore broadly aware of the general focus of the claimed to be exempt information. Those parts of the *Operational Review* which were found to be exempt are as follows:

- 5. Response to Terms of Reference (5.1 to 5.8) – pages 6-8
- 7. Review of Roles and Responsibilities – page 10
- 8. Review of Training and Professional Development – page 11
- 9. Review of Contingency Plan- page 12
- 10. Review of Documentation – page 12
- 11. Executive Oversight – pages 12-13
- 12. Preliminary Findings – pages 14-16

- 15. Staff Recognition- page 19
15. The applicant made two submissions on 23 February 2016. He submitted that the considerations contained in paragraphs (b), (c), (f,) and (g) of Schedule 1 favour the release of the information and should have been given greater weight by the Department. He submitted the subject matter is of serious concern or benefit to the public and that the *Operational Review* is not marked as confidential. He also cited the Ombudsman's Manual to support a view that *disclosure should occur if [I] come to the conclusion that the issue is evenly balanced.*
16. He further stated:
- The Internal Review which rejected my application relies heavily on the idea that release of the information would disclose personal information. The argument is made that this in turn would prejudice Ambulance Tasmania's ability to obtain similar information in the future. However the Operational Review appears to contain information where this wouldn't apply including a review of the contingency plan and a review of documentation.*
17. The Department was given the opportunity to make submissions in relation to this review but declined to do so.
- Analysis:**
- Section 35**
18. I have had the opportunity to examine the full *Operational Review*, noting the information the Department claims an exemption for.
19. In terms of s35, I am satisfied that, generally, the *Operational Review* is an internal deliberative document.
20. The review was undertaken as a result of a power failure at Ambulance Tasmania on 5 July 2015. The *Terms of Reference* make it clear that the purpose of the *Operational Review* was for it to receive an independent review and to make recommendations to the Chief Executive Officer of Ambulance Tasmania to consider as the basis for service improvement.
21. In the words of s35, the *Operational Review* consists of 'opinions, advice or recommendations', as well as facts, undertaken in part by officers of State public authorities (Tasmania Police, Ambulance Tasmania) and which was prepared in the course of, or for the purpose of, the deliberative processes relating to the official business of Ambulance Tasmania and the Department.
22. Thus I am satisfied that s35(1) is met in relation to the review as a whole.
23. As I noted above, the information in the *Operational Review* does include 'facts'. Section 35(2) states that information exempt under s35(1) does not include purely factual information.

24. As to the meaning of 'purely factual information', in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>1</sup>, the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore 'the material must be "factual" in fairly unambiguous terms. To be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes<sup>2</sup>.
25. This means that for 'factual information' to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process so as to form part of it.
26. Thus, even though a document's contents are primarily factual this does not of itself mean that the document falls *outside* the deliberative processes exemption.
27. In this case, I am satisfied that the Cover and pages 1 to 4 (*Background, Terms of Reference, Review Team*), and page 9 (*Timeline of events*) may be considered purely factual information which stands alone and is not exempt by virtue of s35(2). Page 5 (*Methodology*) however is exempt as it crosses over into the deliberative process and is not purely factual.
28. Similarly, beyond page 5, I consider that whilst there are certain facts recorded, I do not believe they can be separated from the review's deliberative processes.
29. I wish to specifically refer to 12. *Preliminary Findings*. This is in my view shorthand for 'preliminary findings of fact'. Thus, it could be argued that this is factual information which should not be exempt. However, I consider that whilst this is what the review authors consider to be fact, based on their enquiries, it is inextricably bound up with their deliberative processes. Thus it should remain exempt.
30. I am satisfied that s35(3) does not apply here, because as the title suggests, it is a review, and is merely a set of recommendations, advice and opinions for consideration by those who have the authority to make decisions rather than a decision or reasons that explain a decision.
31. I am also satisfied that s35(4) does not apply here as the information is not 10 years of age.
32. To summarise, I am satisfied that the Cover and pages 1 to 4 (*Background, Terms of Reference, Review Team*) and page 9 (*Timeline of Events*) of the *Operational Review* are not exempt under s35.
33. I note that the Department has actively disclosed all of these pages, and more, these being available at the Disclosure Log on their website<sup>3</sup>.

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<sup>1</sup> (1984) 6 ALN N347 at N349

<sup>2</sup> See *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

<sup>3</sup> [http://www.dhhs.tas.gov.au/about\\_the\\_department/your\\_rights/rti/right\\_to\\_information\\_disclosure\\_log](http://www.dhhs.tas.gov.au/about_the_department/your_rights/rti/right_to_information_disclosure_log) - see RTI201516-011 and RTI201516-010

## **Section 33- the public interest**

34. As I am satisfied that s35 applies, I must now consider s33 of the Act.
35. In determining the public interest under s33 I must take into account all relevant considerations as well as the matters contained in Schedule 1 of the Act. Schedule 2 contains matters that are irrelevant to the determination.
36. Relevant considerations contained in Schedule 1 are:
- (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*
  - (n) *whether the disclosure would prejudice the ability to obtain similar information in the future*
37. Both the Department and the applicant have referred to the decision of my predecessor in K and the Department of Infrastructure, Energy and Resources (2011)<sup>4</sup> which stated:
31. *Also important is the understanding that the public interest pertains to something which is of serious concern or benefit to the public or a substantial section of it; British Steel Corporation v Granada Television [1981] AC 1096; Sinclair v Mining Warden of Maryborough (1975) 132 CLR 473.*
38. I am satisfied that the reliability of Ambulance Tasmania's '000' service, as an essential public service, is of the utmost concern to the public as a whole. I consider that the disclosure of any information as to how this event occurred, how such a crisis was handled, and how a reoccurrence may be prevented would significantly contribute to meeting the high public interest in this issue.
39. As noted earlier the Department has quite rightly, in view of the high public interest here, actively released information under s12<sup>5</sup>. Information released in

<sup>4</sup> [http://www.ombudsman.tas.gov.au/right\\_to\\_information/reasons\\_for\\_decision\\_2011\\_a](http://www.ombudsman.tas.gov.au/right_to_information/reasons_for_decision_2011_a)

<sup>5</sup> [http://www.dhhs.tas.gov.au/about\\_the\\_department/your\\_rights/rti/right\\_to\\_information\\_disclosure\\_l\\_og](http://www.dhhs.tas.gov.au/about_the_department/your_rights/rti/right_to_information_disclosure_l_og) - see RTI201516-011 and RTI201516-010

addition to that noted above was page 5 (*Methodology*) and pages 17 and 18 (*Key Recommendations and Quick Wins*).

40. The Department asserted in its internal review, in light of the above disclosure, that:

*Staff participated in the operational review on the understanding that the purpose of the review was not to blame any faults on staff who worked in difficult circumstances while responding to the incident, but to strengthen AT's systems and operational response.*

*The public interest in what changes were necessary in response to the incident has therefore been reasonably met [by the disclosure], without impairing the ability of the Department to conduct similar operational reviews in future.*

41. Further, in its original decision the Department stated:

*The information was provided by staff with the express and direct understanding the information provided was going to be confidential. Staff were deliberately encouraged to be fully frank and honest with their thoughts and opinions.*

*Whilst some staff have been given the opportunity to provide advice on the power failure and subsequent processes taken, other staff have been implied [sic] that have not had the opportunity to provide their advice to support or counter the other advice provided. As each staff member's advice was kept completely confidential, each staff member will be denied natural justice in having all the information available to them to respond. This would not be in support of the wellbeing of staff or good practice in investigating situations like this or for similar situations that may arise in the future. At least one employee has already confirmed they would not have provided the information [if] they believed it would not have been kept confidential.*

42. I place considerable weight on this argument in light of the active disclosure which has already occurred.
43. I consider it reasonably likely that further disclosure would prejudice Ambulance Tasmania's ability to obtain similar information in the future from employees whilst not being likely to significantly advance the public interest in the particular circumstances of this case.
44. Further, I consider it worthwhile to keep in mind that the '000' service is an essential service, and that nowadays there are additional security concerns when considering disclosure relating to essential services, which may make it more likely that disclosure in this case is contrary to the public interest.
45. That is, it may not be wise to reveal too much about the actual procedures involved in the delivery of services such as '000' lest that information be misused or exploited.

46. This argument was not raised by the Department, and is not a matter specifically stated under Schedule 1, but nevertheless I consider it to be a legitimate public interest consideration, to be balanced against the public's right to know.
47. In this regard, I note that the preliminary *Technical Review* has already been released in full. It is arguable that a technical report may have even greater security implications and perhaps closer consideration should have been given to the release of this document in full, especially where it was a preliminary review, and so was unlikely to advance the public interest in that it did not actually determine the cause of the power outage.
48. I emphasise also in terms of the above Schedule 1 considerations that I am not looking at a government 'decision' [(c),(d) and (f)], and may not be looking at *all* of the evidence that may be assessed in coming to a decision down the track. This review, like most others, is an exploration of the issues, but any ultimate 'decision' is in the hands of others, being the CEO of Ambulance Tasmania in this case.
49. I also note the applicant's submission that the document was not marked *confidential* and that weight should have been placed on the fact that disclosure would enhance scrutiny of government administrative processes, the implication being that this should lead to disclosure.
50. These are considerations when assessing public interest, but after considering all relevant factors here, I believe that on balance it is contrary to the public interest to disclose any of the remaining information subject to the s35 exemption.

### **Conclusion**

51. Under s48(1)(b) of the Act I gave both parties a copy of my draft decision for comment. Neither party responded by the due date.
52. I am satisfied that the remaining redacted information in the *Operational Review* is exempt under s35 and that, after taking into account all relevant matters in accordance with s33, it is contrary to the public interest to disclose this information.

Dated: 22 February 2017



**Richard Connock**  
**OMBUDSMAN**



## TASMANIAN OMBUDSMAN

### DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1702-151

**Names of Parties:** Richard Baines (ABC) & Department of Health and Human Services

**Provisions considered:** s27, s35, s36, s37 s39, Schedule 1

**Other Acts considered:**

*Children, Young Persons and their Families Act 1997; s7, s16, 103, 111A*

*Acts Interpretation Act 1931; s8A*

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#### Background

1. By application for assessed disclosure under the *Right to Information Act 2009* (the Act) dated 11 January 2017, Richard Baines (a journalist with the ABC and hereafter 'the applicant'), sought from the Department of Health and Human Services (the Department) for the period 1 January 2015 to 1 January 2017 the following information:
  - A breakdown of payments made to the for-profit residential care provider Safe Pathways in the timeframe specified. Please include each individual payment made to Safe Pathways as well as the total paid.
  - All information included [sic] but not limited to emails, briefing notes and reports exchanged between the Department of Health & Human Services and the Human Services Minister, Jacquie Petrusma relating to Safe Pathways.
  - All information included [sic] not limited to emails, briefing notes and reports exchanged between the Department of Health and Human Services and the Human Services Minister Jacquie Petrusma [sic] relating to a media strategy for dealing with stories and requests relating to Safe Pathways.
2. The applicant lodged an application for external review on 20 February 2017 on the basis that the due date for the decision had passed and no decision had been received.
3. On 28 February 2017 I found there was jurisdiction to conduct a review under s45(1)(f) and advised the Department of this, asking for submissions prior to the possible issuing of a Direction to make a decision under s47(1)(e) of the Act.

4. On 8 March 2017 the Department made its decision and this was provided to the applicant. There were 74 pages identified as being within the scope of the application and the Department stated that only 3 pages were disclosed in full and 3 pages in part, the remainder being exempt. The grounds for exemption were s27, s35, s36, s37 and s39 of the Act.
5. Section 16, s103 and s111A of the *Children, Young Persons and their Families Act* 1997 (the CYPTF Act) were also applied as stand-alone grounds for non-disclosure.
6. On 10 March 2017 the applicant and the Department were advised that I had accepted the applicant's request that I continue with his s45 review as per s46(2) of the Act.
7. The applicant sought to have his review given priority and on 14 March 2017 the applicant and the Department were advised that the application for priority had been granted and that this review was to be expedited.
8. On 24 March 2017 I received the mostly unredacted information from the Department. There was some delay in providing this as the Department sought advice on whether s16, s103 or s111A of the CYPTF Act prevented the disclosure of any information to me. Some information was ultimately redacted under s16.

### **Issues for Determination**

9. The starting point in all my reviews is s7 of the Act: a person has a legally enforceable right to information in the possession of a public authority unless it is exempt.
10. Also of relevance here is s8: that if a private organisation is funded by or performs a role of a public authority, a person is entitled to the information related to that performance, or the progress of work, or the evaluation of work, or the expenditure of public moneys held by the public authority, unless the information is exempt information.
11. The Department has relied on s27, s35, s36, s37 and s39 of the Act in claiming exemptions from disclosure. These sections are set out below.
12. Section 27 is found in Division 1 of Part 3 of the Act and any exemptions established under this provision are not subject to the public interest test.
13. Sections 35, 36, 37 and 39 are found in Division 2 of Part 3 of the Act. Information found to be exempt under Part 2 is subject to the public interest test.
14. In undertaking my review, I must determine whether the above grounds of exemption apply to any of the 74 pages of information and where appropriate,

whether that information is to remain exempt after taking into account the public interest test at s33.

15. I will also need to consider whether s16, s103 or s111A of the CYPTF Act prevent disclosure of any information to the applicant.
16. The applicant has advised that he is not seeking the names of any young persons identified in this information. Thus this personal information is outside of the scope of the application for assessed disclosure and hence not part of this review. However, other personal information of young persons beyond names and the personal information of others remains to be considered.
17. Under s47(4) of the Act the Department has the onus to satisfy me that any claimed grounds for exemption are made out.

### **Relevant legislation**

18. Section 27 of the Act provides:

*(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.*

19. Section 33 provides:

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

20. Schedules 1 and 2 are Attachment 1 to this decision.

21. Section 35 provides:

- (1) *Information is exempt information if it consists of –*
  - (a) *an opinion, advice or recommendation prepared by an officer of a public authority; or*
  - (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.*

22. Section 36(1) provides:

- (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.*

where under s5:

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

- (a) *whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
- (b) *who is alive, or has not been dead for more than 25 years;*

23. Section 37 provides:

(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.*

*...*

24. Section 39 provides:

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

*(a) the information would be exempt information if it were generated by a public authority or Minister; or*

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

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

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

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

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

25. I also refer to s47(4) of the Act, which provides that the onus is on the Department to satisfy me that the information that is claimed to be exempt should not be disclosed:

*(4) 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.*

26. The relevant parts of s16, s103 and s111A of the CYPTF Act are Attachment 2 to this decision.

### **Submissions and evidence**

27. In coming to my decision I have considered the following evidence:

- The unredacted 74 pages of information
- Application for assessed disclosure dated 11 January 2017
- Decision record of the Department dated 8 March 2017
- Departmental Secretary's letter to me dated 24 March 2017
- Other correspondence between the applicant, the Department and my office

28. The applicant submitted that his application for assessed disclosure is concerned with whether Tasmania's most vulnerable children are being properly cared for. His submission was as follows:

- *Allegations were first raised on ABC TV's Four Corners program and then in a series of stories by the ABC in Tasmania. These stories led to the removal of children from the care of Safe Pathways, a government review of the for-profit-residential care provider and prompted the Tasmanian Government to sever ties with the organisation.*
- *Specifically, Safe Pathways is accused of neglecting some of Tasmania's most vulnerable children while being paid what's likely to be millions of dollars in taxpayer funds.*
- *The public has a right to know how much of their money was spent on this organisation.*
- *This is not an onerous request for DHHS and the argument about a competitive disadvantage is more than a shade overstated when Safe Pathways was the only for-profit provider in the residential care space.*
- *Recently the Children's Commissioner Mark Morrissey released a report that found Tasmania is a "less than ideal" parent in some cases. My request goes to that very point – what are the structures in place.*
- *The fact that virtually no documents were released appears to be a clear attempt to block the release of important information seemingly for political purposes.*

29. In its decision the Department stated that it located 74 pages of information and decided to release 6 pages, being 3 pages in full and 3 pages in part. However, attached to the decision were pages 45 and 61 in full and pages 46 and 60 in part, which totalled 4 pages only.

30. The Department's reasons for not disclosing the remaining information were set out in its decision and the Schedule attached to it. The following descriptions of the information were used in the Schedule:

- *Funding under Special Care Package Contracts*  
pages 1-4
- *email chain between Department and Ministerial officers about (the operation of) Safe Pathways*  
pages 5-6, 7, 25, 30-37, 38, 39-40, 41-42, 62-66, 67-70 and 71-72

- *Draft briefing to Minister on Safe Pathways*  
Pages 8-10
- *Notification from an individual*  
Pages 11-12
- *Dot points to Minister on Safe Pathways*  
Pages 13-14
- *Briefing to Minister on Safe Pathways*  
Pages 15-17, 21-22, 23-24 and 26-29
- *email chain between Department and Ministerial officers and a constituent about Safe Pathways*  
Pages 18-20
- *Letter from Minister to a party that had expressed concern about the welfare of a minor*  
Pages 43-44
- *Terms of Reference for the review of the practices of Safe Pathways*  
Pages 45-46
- *Issues Briefing to Minister on Safe Pathways*  
Pages 47-51
- *Email chain including attached letters between the Department and Ministerial Officers about responding to correspondence from the Commissioner for Children and Young People*  
Pages 52-58
- *Email chain between Department and Ministerial Officers about responding to an email from the applicant*  
Pages 59-61
- *Email chain between Department and Ministerial Officers about draft update on Safe Pathways review*  
Pages 73-74

31. The sections of the Act claimed to apply by the Department will be referred to in Analysis below, page by page.
32. As noted earlier, there were a number of pages where the Department did not refer to the Act as the basis for non-disclosure; rather, it referred solely to the

CYPTF Act. I will consider those pages under the most likely exemption grounds as follows:

- Pages 5-6 s36
- Pages 11-12 s36, s39
- Pages 18-20 s36
- Page 25 s35

## Analysis

### Section 27

*Claimed exemptions: pages 8-10, 13-14, 15-17, 21-22, 23-24, 26-29 and 47-51*

33. After examining each page, I am satisfied it is all opinion, advice or a recommendation prepared by an officer of a public authority, being the Department. Thus it satisfies the requirements of s27(1)(a).
34. I am also satisfied that this information has been prepared in the course of, or for the purpose of, providing the Minister for Human Services with a briefing in connection with the official business of the Department and the Minister, and is also in connection with the Minister's parliamentary duty. Thus this information meets the requirements of s27(1) as a whole.
35. I am satisfied that, as the remaining information is not more than 10 years old, the requirements of s27(2) are not met. In terms of s27(3), I am satisfied that the information was brought into existence for submission to a Minister for the purposes of a briefing to that Minister and hence the requirements of s27(3) are not met. Thus neither provision prevents s27(1) from applying here.
36. Section 27(4) provides that purely factual information is not exempt under s27(1). As to the meaning of 'purely factual information', I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>1</sup>, where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely' and that 'the material must be 'factual' in fairly unambiguous terms'.
37. Further, for 'purely factual information' not to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process so as to form part of it<sup>2</sup>. This means that even though a document's contents may be in part factual, this 'intertwining' may lead to the document as a whole being covered by the ministerial briefing exemption.
38. In terms of s27(4) I am satisfied that there is a significant amount of factual information in these briefings concerning young persons but I take the view that this is inextricably linked to the other information, such that its disclosure would

<sup>1</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14

<sup>2</sup> *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

39. However, there is some information concerning Safe Pathways at pages 13, 23, 26 and 47 which I find is not inextricably linked to other information, such that its disclosure would not reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

40. The remainder of the information remains exempt under s27(1). As most of these briefings contain personal information about young people, they would be exempt under s36 also.

41. I am satisfied that the following information meets the requirements of s27(1):

- In full: pages 8-10, 14, 15-17, 21-22, 24, 27-29 and 48-51
- In part: pages 13, 23, 26 and 47

### **Section 35**

*Claimed exemptions: pages 7, 30-37, 38, 39-40, 41-42, 52-58, 59-61 and 73-74 (plus 25)*

42. The Department has claimed that s35 applies in relation to this *email chain* information.

43. This exemption ground is designed to protect the 'integrity and viability of the decision-making process'<sup>3</sup> and to 'encourage the free exchange of ideas during the process of deliberation and policy-making'<sup>4</sup>.

44. Similar to the wording of s27, the information exempted by s35(1)(a), (b) and (c) must be 'an opinion, advice or recommendation...', or a 'record of consultations or deliberations...'. However, for the purposes of s35(1) it must have been created 'in the course of, or for the purpose of, the deliberative processes related to the official business of a Department or Minister.'

45. As with s27 exemptions, a s35(1) exemption does not automatically apply to all information created by a Department or Minister. It must be tested to see whether it is in fact an opinion, advice or recommendation, or a record of consultations or deliberations.

46. Closely tied to this consideration is the exclusion under s35(2): that purely factual information is not exempt under s35(1).

47. As to the meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes...', this has been considered by the AAT, which in *Re*

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<sup>3</sup> *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112, cited with approval in *Latham v Director-General, Department of Community Services* [2000] NSWADT 58

<sup>4</sup> *Re Coleman and Director-General, Local Government Department, Pentland* (1985) 1 VAR 9

*Waterford and Department of Treasury (No 2)*<sup>5</sup> 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'.

48. The context of the information in question is important. The ABC and other complainants have made serious allegations against Safe Pathways and the Minister has needed to address these allegations both publicly and in parliament, and to appropriately respond to those complainants.
49. Much of the above information consists of advisers to the Minister seeking information from the responsible officers in the Department, then those officers seeking information from others if necessary, and then providing information as requested, so that the Minister could consider a course of action.
50. This information would have informed the Minister's actions in addressing parliament on this issue, and particularly that information given on 15 November 2016<sup>6</sup>. It would also have informed her actions in releasing any media statements on the issue. It would also have informed her actions in responding to the complaints and allegations she has received on the issue. It would also have informed her decision to set up a review of Safe Pathways.
51. Thus I accept that almost all of the above information would fit within the internal deliberative information requirements at s35(1)(a), (b) and (c).
52. However, information which stands without there being any apparent deliberation or ultimately, a decision to be made or course of action to be adopted, is not sufficient to meet the requirements of s35(1).
53. I will describe this as 'mere information' hereafter to distinguish it from internal deliberative information which would meet the requirements of s35(1).
54. The question arises whether 'mere information' is just another term for factual information in terms of s35(2). In my view it is not, as both mere and actual deliberative information may include factual information. Thus this is a separate consideration and I refer to my discussion of this under s27.
55. In order to consider the information as set out in the decision and Schedule, I consider it appropriate to re-classify much of it, as I do not believe that the Department's approach to classifying it has been adequate.
56. That is, some of the information has been inappropriately grouped together by the Department, given the range it covers. In light of this, it may also be that certain information should be more appropriately considered under another exemption provision.
57. The following is my breakdown and consideration of the information classified by the Department as *email chain* and which is claimed to be exempt under s35. Where I state I am satisfied that s35(1) is met, this means that I am satisfied that

<sup>5</sup> Re Waterford and Department of Treasury (No 2) (1985) 5 ALD 588

<sup>6</sup> See <http://www.parliament.tas.gov.au/ParliamentSearch/search>

it is the type of information as specified under s35(1)(a), (b) or (c) as having been created in the course of, or for the purpose of, the deliberative processes related to the official business of the Department or the Minister. I am also considering page 25 here although not raised by the Department:

- I. Page 7: I am satisfied that this information should be considered together with pages 5 and 6, as it concerns a particular young person, and is more appropriately considered for exemption under s36
- II. Page 25: I am satisfied that this information is internal deliberative information and does satisfy the requirements of s35(1). It is information leading to a course of action by the Minister
- III. Pages 30-37:
  - a) I am satisfied that the information at pages 30-34 is internal deliberative information and does satisfy the requirements of s35(1). It is information leading to a course of action by the Minister
  - b) There is an internal briefing at pages 31-32, which is personal information concerning a young person, which may also be considered exempt under s36, and parts of page 32 are concerning other care providers which is outside the scope of the application and hence this review
  - c) However, parts of the information at pages 31-32 may be disclosed as factual information as it stands alone as such
  - d) Pages 35-37 appear to be either a draft speech or speaking notes intended for parliament. I consider this is internal deliberative information and does satisfy the requirements of s35(1)
  - e) However, the information on page 37 may be disclosed as factual information as it stands alone as such
- IV. Page 38: The first part of this page is outside scope as it concerns other care providers. As to the remainder, I consider this to be internal deliberative information which does satisfy the requirements of s35(1). However, part of the information at page 38 may be disclosed as factual information as it stands alone as such
- V. Pages 39-40: I am satisfied that parts of these pages contain internal deliberative information which meets the requirements of s35(1). I also note there is personal information at the bottom of page 40 which would be exempt under s36. However, parts of the information at pages 39-40 may be disclosed as factual information as it stands alone as such
- VI. Page 41-42: this is email information as to Safe Pathways' funding and another email. I am satisfied that these emails are internal deliberative information which meet the requirements of s35(1). However I am also

satisfied that part of page 41 is factual information as it stands alone as such

VII. Page 52-58: This information is email correspondence in the context of a letter from the Commissioner for Children and Young People, Tasmania (CCYP) and so differs from the other *email chain* information

- a) Pages 52-53: concern the correspondence that follows at pages 54-58. I am satisfied that this is internal deliberative information and meets the requirements of s35(1)
- b) Pages 54-56: is the letter from the CCYP to the Minister. I am not satisfied that this is *internal* deliberative information and hence this does not meet the requirements of s35(1). I will however consider this under s39(1). I note that it does not contain any personal information concerning young persons
- c) Pages 57-58: this is the Departmental Secretary's *signed* response to the CCYP. As a *final* document I am not satisfied that this is internal deliberative information. Thus it does not meet the requirements of s35(1). I note that it does not contain any personal information concerning young persons

VIII. Pages 59-61: I note page 60 (bottom part) and page 61 have already been disclosed to the applicant

- a) page 59-60 (top part): I am satisfied that these emails are internal deliberative information and thus meet the requirements of s35(1). There is also information on this page about a young person which would meet the requirements of s36

IX. Pages 73-74: this information is the Minister's press release or media statement and also a Departmental officer's email comment on this.

- a) I consider the email comment mere information and hence I am not satisfied that this information meets the requirements of s35(1)
- b) I am not satisfied that this was a *draft* press release or statement as claimed in the Schedule as there is evidence before me that this was the final media release and was published<sup>7</sup>. As a *final* document it is not internal deliberative information and thus does not meet the requirements of s35(1)

58. I am satisfied that the following information meets the requirements of s35(1):

- In full: pages: 25, 30, 33, 34-36, 42, 52-53, 59
- In part: pages: 31-32, 38, 39-40, 41, 60

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<sup>7</sup> See <http://www.tas.liberal.org.au/news/update-safe-pathways-review>

## **Section 36**

*Claimed exemptions: pages 45-46 (plus 5-7, 11-12, 18-20, 31-32 and 40)*

59. Section 36(1) 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 under s13.
60. ‘Personal information’ is defined at s5 in the Act to be any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion; and who is alive, or has not been dead for more than 25 years.
61. Personal information can extend to something as basic as a person’s name, although the definition does require that it must reveal something *about* that individual<sup>8</sup>.
62. Conversely, merely deleting a person’s name from information may not be sufficient to de-identify it, as their identity may be reasonably ascertainable from the remaining information. In such circumstances, what remains would still be personal information.
63. As noted earlier, the applicant has indicated to me that he is not seeking the names of children/young people in care and these are therefore outside the scope of this review.
64. However, other personal information of the young persons which may identify them, or the personal information relating to Department officers, Ministerial advisers, or any other person is not outside the scope of this review.
65. I will not be considering the personal information of the CCYP, or of Department officers or Ministerial advisers here because, even though there is personal information about them, I would ultimately consider that it is not contrary to the public interest for this to be disclosed. I will address this in more detail later in the decision.
66. Examining the information claimed to be exempt under s36, being pages 45-46, and also the other information which should be considered under s36:
  - I. Pages 5-7: All information concerns the personal information of a young person, and as such I am satisfied it should be exempt under s36(1) as their identity is reasonably ascertainable from the information
  - II. Pages 11-12:
    - a) this information is a letter from a source whose personal details have been deleted by the Department on the basis that disclosure of their details to anyone is prohibited under s16 of the CYPTF Act, and that disclosure of the remainder is not permitted under s103(1) of that Act

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<sup>8</sup> *Re Veale and Town of Bassendean [1994] WAI Cmr 4*

- b) Putting whether s16 applies to one side, I note that this letter raises systemic issues about Safe Pathways and specific issues about a young unnamed person
  - c) I consider that the systemic information does not meet the requirements of s36(1) as I am not satisfied that the information discloses information about an individual whose identity is apparent or is reasonably ascertainable. The remaining information does meet the requirements of s36(1)
  - d) It is appropriate to consider the parts of pages 11-12 which do not satisfy s36 under the s39 considerations
- III. Pages 18-20: this is an expression of concern to the Minister about young persons in Safe Pathway's care. I am satisfied that all of this information meets the requirements of s36(1), as the identity of the complainant and the young persons is reasonably ascertainable from the information
- IV. Pages 31-32:
- a) I am satisfied that parts of the information on pages 31-32 are exempt under s36(1) as they relate to a young person. However, other parts relate to issues about Safe Pathways generally and are not exempt
  - b) As noted earlier, part of page 32 should not be disclosed as it is outside the scope of the application and hence this review
- V. Page 40: I am satisfied that the bottom line is exempt under s36(1) as it relates to an identified young person
- VI. Pages 45-46: Page 45 has been disclosed in full. Page 46 has had young persons' names redacted but the remainder was disclosed. I am satisfied that redaction of those names was sufficient to ensure that the information did not in any way disclose information about an individual whose identity is apparent or is reasonably ascertainable
67. I make the following observation in respect of pages 60 (bottom email)-61. As noted, this information has already been disclosed to the applicant, presumably because it was his email.
68. I am concerned that the Department has disclosed the small town the girl was taken to in this information. Together with other information in the applicant's email (eg age, time young person was taken on by Safe Pathways, that she lived with a staff member in their home) I am satisfied that the identity of the young person is reasonably ascertainable in that small town, and perhaps beyond, and hence is personal information to which s36(1) applies.
69. I consider that just because personal information about a young person was provided by the applicant to the Department does not mean that it can then be disclosed in full to him. The Department does not appear to have turned its mind to whether s36 would apply here. I also note that the application could have

been refused in this regard as under s12(3)(c) this particular information is ‘otherwise available’ to the applicant.

70. I note with concern that this information has been disclosed on the Department’s Disclosure Log<sup>9</sup>, so it is now widely available. In light of my finding, the Department should promptly remove any young person identifying information from its Disclosure Log.

71. I am satisfied that the following information meets the requirements of s36(1):

- In full: pages 5-7, 18-20
- In part: pages 11-12, 31-32, 40, 46 and 60-61

### **Section 37**

*Claimed exemptions: pages 1-4 and 41-42*

72. Page 1 is a summary of payments to Safe Pathways. Pages 2-4 are a breakdown of these payments. Pages 41-42 are payments in the relevant financial years. I have found pages 41-42 exempt under s35 but also that there is purely factual information which may be disclosed on page 41.

73. From documentary evidence provided by the applicant I am satisfied that there was a Departmental s37(2) consultation with Safe Pathways in relation to the above information in January 2017.

74. Section 37(1) states that information is only ‘exempt information’ if its disclosure under the 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 the application for assessed disclosure.

75. I am not satisfied that the information, if disclosed, would reveal information relating to business affairs *acquired* by the Department from Safe Pathways.

76. I have emphasised ‘acquired’ because, from the evidence before me, the relevant information on pages 1-4 and page 41 is from the Department’s own records. That is, it is the Department’s own record of how much it has paid to Safe Pathways, either in summary, or by line-item, not information acquired from Safe Pathways, such as for example, invoices. Thus s37(1) cannot apply to the above information.

77. However, as the *Narrative* and *Client* columns in pages 2-3 and some information at page 4 contains young persons’ information, this is exempt as personal information under s36(1).

78. Thus I am not satisfied that any of the information claimed to be exempt meets the requirements of s37(1).

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<sup>9</sup> See [http://www.dhhs.tas.gov.au/\\_data/assets/pdf\\_file/0018/244107/RTI201617-077.pdf](http://www.dhhs.tas.gov.au/_data/assets/pdf_file/0018/244107/RTI201617-077.pdf)

## **Section 39**

*Claimed exemptions: pages 43-44, 62-66, 67-70 and 71-72 (plus pages 11-12 and 54-56)*

79. For information to be exempt under s39 I first need to be satisfied that it was communicated in confidence to the Department.
80. The confidential communication of information can be actual or implied<sup>10</sup> and whether it was or not is fact sensitive<sup>11</sup>. Factors to consider when determining the question include: what the intentions of the person providing the information were; to what extent that information has been otherwise circulated; and the likely consequences of disclosure<sup>12</sup>.
81. I also have to be satisfied that disclosure of the above information would be reasonably likely to impair the ability of the Department to obtain similar information in the future: s39(1)(b).
82. I note that there is a similar provision in the Victorian *Freedom of Information Act 1982* at s35. In interpreting the meaning of 'similar information' under that Act, the then Administrative Appeals Tribunal of Victoria found that what is required is some positive demonstration that the information's disclosure will adversely affect the respondent's future ability to obtain similar information from persons in general, rather than specifically from the person who confided it, and that this needs to be assessed with regard to the nature of the specific contents of each document under consideration<sup>13</sup>.
83. It has also been found by the Victorian Supreme Court that the degree of impairment required must go beyond that which is merely a trifling or minimal impairment<sup>14</sup>.
84. Another factor that I have previously taken into account in similar matters and which is relevant here is whether the information has been provided voluntarily.
85. Examining the claimed exemptions and the information which I consider should be assessed under this provision:
  - I. Pages 11-12
    - a) As noted earlier, this information is a letter to the Minister from an unknown source, their personal details having been deleted by the Department on the basis of s16 of the CYPTF Act
    - b) I have already found the personal information about a young person in this letter to be exempt under s36(1)

<sup>10</sup> *RE B and Brisbane North Regional Health Authority* | QAR 279 at paragraph 152

<sup>11</sup> *Ryder and Booth* (1985) VR 869

<sup>12</sup> See Moira Paterson, *Freedom of Information and Privacy in Australia – 2<sup>nd</sup> Edition*, LexisNexis Butterworths, Australia, 2015

<sup>13</sup> *Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined)* (1992) 5 VAR 542

<sup>14</sup> *Ryder v Booth* [1985] VR 869

- c) I am of the view that it is appropriate and necessary to disclose that this information is from a parliamentarian's office and that this disclosure is not a breach of s16 of the CYPTF Act
- d) This information is relevant to both whether the information was communicated in confidence and whether disclosure of the remaining information would be reasonably likely to impair the ability of the Department or Minister to obtain 'similar information' in the future under s39(1)(b)
- e) I am first not satisfied that this information was communicated in confidence. No claim of confidentiality was made by the parliamentarian in relation to all or part of the letter's contents, as I would expect if this was intended
- f) Even if I am wrong, s39(1)(b) would not be met as I am not satisfied that disclosure of the remaining information would be reasonably likely to impair the ability of the Department or Minister to obtain similar information in the future because a parliamentarian would see it as their duty to follow up on these kinds of complaints or concerns of constituents once brought to their attention
- g) Thus the remaining information is not exempt under s39(1)
- h) I acknowledge that disclosure of the remaining information may be prejudicial to Safe Pathways, given the review has not been finalised, but I am not satisfied that there is any basis for exemption of this information under the Act

II. Pages 43-44:

- a) This is a letter *from* the Minister to the writer of the letter to the Minister at pages 11-12. No personal information is disclosed about any young person. Consistent with pages 11-12, under s16 of the CYPTF Act, the name of the recipient has been deleted
- b) Whilst this is not information communicated to a Department or Minister, it does refer to some of the information communicated to the Minister at pages 11-12
- c) In any event, I am not satisfied that there is anything in pages 43-44 which, if disclosed, would be reasonably likely to impair the ability of the Department or Minister to obtain similar information in the future, again because a parliamentarian would see it as their duty to follow up on these kinds of complaints or concerns of constituents once brought to their attention
- d) Thus the information is not exempt under s39(1)

III. Pages 54-56:

- a) This information is an expression of concern from the CCYP to the Minister
- b) On the evidence before me I am not satisfied that this letter was communicated in confidence to the Minister. This is not stated anywhere on the letter as I would expect if this was intended. Further, the CCYP is performing his legislative duties under the *Commissioner for Children and Young Persons Act 2016* in writing to the Minister with his concerns
- c) Even if I am wrong and this was communicated in confidence, I am not satisfied on the evidence before me that disclosure would be reasonably likely to impair the ability of the Minister or the Department to obtain similar information in the future under s39(1)(c), where a person expressing their concerns is legislatively obliged to do so
- d) Thus the information is not exempt under s39(1)
- e) I acknowledge that disclosure of some of the information may be prejudicial to the review of Safe Pathways, given the review has not been finalised, but I am not satisfied that there is any basis for exemption of this information under the Act

IV. Pages 62-66, 67-70 and 71-72:

- a) This information contains allegations from persons concerned about the welfare and the level of care provided to young persons by Safe Pathways
- b) Even though not stated to be communicated in confidence, in the circumstances I am satisfied from the nature of the information provided that there was an expectation of confidence when the information was provided to the Department
- c) Further, I am satisfied that to disclose this information would be reasonably likely to impair the ability of the Department or Minister to obtain similar information in the future, being voluntarily provided by persons concerned about the welfare of children generally, and the level of care provided by providers such as Safe Pathways
- d) This is because I am satisfied that persons with relevant information would be unlikely to raise their concerns about the welfare of young persons in the future if it became known that their identity might be publicly disclosed
- e) Thus the information is exempt under s39(1)

86. I am satisfied that the following information meets the requirements of s39(1):

- In full: pages 62-66, 67-70, 71-72

### ***The public interest: s33***

87. As the Department's Right to Information Act delegate has correctly stated, it is important to distinguish between issues of interest to the public and 'the public interest'.
88. Australian courts and tribunals have over time drawn a distinction between 'the public interest' in disclosure and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest<sup>15</sup>.
89. What I must do under the Act is to consider all relevant matters, including those matters set out in Schedule 1, and to disregard those matters set out in Schedule 2, in coming to a conclusion as to whether or not it is contrary to the public interest for information to be disclosed.
90. In considering the public interest it is appropriate for me to again refer to the statement of principle at s8 of the Act: that if a private organisation is funded by or performs a role of a public authority, a person is entitled to the information related to that performance, or the progress of work, or the evaluation of work, or the expenditure of public moneys held by the public authority, unless the information is exempt information.
91. Safe Pathways is a private organisation funded by, or performing a role of, the Department and hence there is an expectation that information relating to expenditure to that organisation or its performance should be disclosed, unless exempt.
92. This principle clarifies that, as the Department is spending the public's monies via third parties, there is a strong interest in the public knowing how this money is being spent, and whether it is being spent in the best interests of the public.
93. Given the information also concerns vulnerable young people and their safety and well-being in out-of-home care, there is a strong interest in the public knowing that this care is being delivered to the highest possible standard, providing value for money.
94. Indeed, the Tasmanian CCYP has recently issued a report on care arrangements (January 2017)<sup>16</sup>: He lists three themes in his recommendations, one of which is particularly relevant to the assessment of the public interest here, namely:
  - *the need for increased accountability and standards*
95. I also note that investigations into Safe Pathways are yet to be finalised, so it is important that any disclosure not prejudice that enquiry. The last public update

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<sup>15</sup> *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 2) (1991)* 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113

<sup>16</sup> See <http://www.childcomm.tas.gov.au/wp-content/uploads/2017/01/Media-Release-Children-in-Out-of-Home-Care-in-Tasmania-Report-31.01.17.pdf>

from the Minister for Human Services on the issue was on 16 March 2017 when she advised that investigation into Safe Pathways is ongoing<sup>17</sup>.

96. Turning to the information in question:

*Internal deliberative information*

97. The public interest test in relation to the deliberative information exemption has been interpreted as requiring 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<sup>18</sup>.
98. Whilst in terms of Schedule 1, I can accept that disclosure of this information may contribute to debate on a matter of public interest (b), I do not think that it would add greatly. Nor do I consider this information would add much in terms of whether the disclosure would inform a person about the reasons for a decision (c), or that the disclosure would provide the contextual information to aid in the understanding of government decisions (d), or would inform the public about the rules and practices of government in dealing with the public (e), or would enhance scrutiny of government decision-making processes and thereby improve accountability and participation (f) or would enhance scrutiny of government administrative processes (g).
99. By contrast, I have serious concerns that disclosing any information relating to Safe Pathways prior to any review being completed would be unfair, and may harm its business or financial interests (s) and its competitive position (x).
100. I also think it is a relevant consideration that I have decided that much of the information which may contribute to the public interest debate can be disclosed as purely factual information.
101. Thus I am satisfied it is contrary to the public interest to disclose all this information at this time.
- Personal information about young people*
102. The applicant has indicated that he is content for the names of children/young people to be excluded from the information he has requested and subsequently from this review.
103. However, the information I have found exempt goes beyond names and extends to other information which may lead to their identity being reasonably ascertained.
104. Given the information relates to young people in care, extra care must be taken to ensure their personal information is protected. Whilst it may be of interest to some persons and may even contribute to public debate in some ways, balancing

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<sup>17</sup> See [http://www.premier.tas.gov.au/releases/safe\\_pathways](http://www.premier.tas.gov.au/releases/safe_pathways). Also see the earlier media statement- [http://www.premier.tas.gov.au/releases/safe\\_pathways\\_review](http://www.premier.tas.gov.au/releases/safe_pathways_review)

<sup>18</sup> *Harris v Australian Broadcasting Corporation* (1983) 5 ALD 545

the relevant considerations under Schedule 1, I consider that protecting the personal information of young people to be of the utmost concern. Such a view is reflected in the stringent laws against disclosure of personal information and maintenance of confidentiality in the CYPTF Act.

105. I am therefore satisfied that it is contrary to the public interest to disclose this personal information. All information about young persons exempt under s36 must therefore not be disclosed.

*Information obtained in confidence*

106. This information is exempt because the information was communicated in confidence and the disclosure of the information would be reasonably likely to impair the ability of the Department or the Minister to obtain similar information in the future.
107. I note that much of the information also contains personal information about young persons and other persons so is exempt under s36 and must not be disclosed because it would be contrary to the public interest.
108. Given the information relates to allegations and concerns about young people in care, again extra care must be exercised to ensure their personal information is protected and also, that those persons raising such concerns are not deterred in any way from doing so in the future.
109. Again, whilst it may be of interest to some persons in the community to know the nature of the concerns, and acknowledging that it may even contribute to public debate in some ways to know the nature of the concerns or the allegations, balancing the relevant considerations under Schedule 1, I consider that protecting the personal information of young people, and those people who raise these serious concerns, must outweigh any interest from the public.
110. In addition, as the review into Safe Pathways has not yet been completed, the disclosure of any such information at this point would be unfair and may well be prejudicial to the rights and interests of Safe Pathways, which as noted above is a relevant matter under Schedule 1.
111. Thus I am satisfied that it is contrary to the public interest to disclose the information at pages 62-66, 67-70 and 71-72.

*Personal information about CCYP*

112. The CCYP has written to the Minister because under the relevant Act his functions include advocating for all children and young people in Tasmania.
113. As a statutory public figure performing his legislative duties I am satisfied that it is not contrary to the public interest for personal information about the CCYP to be released.

*Personal information about Department and Ministerial employees*

114. The remaining information which may be disclosed contains personal information as above. The applicant did not wish to exclude such persons from the scope of his application for assessed disclosure.
115. Whilst this information would be exempt under s36 I am satisfied that it is not contrary to the public interest to disclose the names and related information of government employees who are acting in the course of their duties, who are already publicly identifiable as being employed in that area<sup>19</sup> and who, on the evidence before me, are not placed at any personal risk by disclosure.

*Non-disclosure claims under the CYPTF Act*

116. For completeness, I first refer to those pages of information in the decision Schedule which do not refer to a section of the Act for non-disclosure. The Department has claimed that this information cannot be disclosed because:
- the identity of notifiers must not be disclosed and the *Right to Information Act 2009* does not apply to this information (s16, CYPTF Act); or
  - information provided to the Secretary or a Community-Based Intake Service by an information-sharing entity must not be provided under the *Right to Information Act 2009* (s11A, CYPTF Act); or
  - that personal information relating to a child (and others) must not be disclosed (s103(1)(a), CYPTF Act)

117. The Department's specific claims are as follows:

- pages 5-6: s16, s103(1)(a). I have found pages 5-7 to be exempt in full under s36 and contrary to the public interest to disclose
  - pages 11-12: s16, s103(1)(a). I have found these pages to be exempt in part under s36 and contrary to the public interest to disclose
  - pages 18-20: s16, s103(1)(a). I have found these pages to be exempt in full under s36 and contrary to the public interest to disclose
  - page 25: s103(1)(a), s11A. I have found this page to be exempt in full under s35 and contrary to the public interest to disclose
118. The only information which may therefore be of concern to the Department, as not being fully redacted, is pages 11-12. However, I am satisfied that the information determined to be exempt under the Act addresses any disclosure concerns around the duty not to divulge any personal information relating to a child under s103(1)(a) of the CYPTF Act.

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<sup>19</sup> See <http://www.directory.tas.gov.au/cgi/access.pl>

I19. As noted earlier I am also not necessarily satisfied that s16(7) of the CYPTF Act applies to this information such that the personal details of the complainant should not be disclosed.

I20. Section 16(7) provides:

*(7) The Right to Information Act 2009 does not apply to the identity of a notifier or any information contained in or relating to a risk notification that may lead to the identification of the notifier.*

I21. This raises the question of who is a 'notifier'. Section 16(1) provides that notifier means a person who provides the Secretary or a Community-Based Intake Service with a risk notification.

I22. As to the meaning of 'risk notification', this is defined in s3 to be:

- (a) *information voluntarily provided to the Secretary or a Community-Based Intake Service under section 13(2), or any similar voluntary notification to the Secretary or a Community-Based Intake Service; or*
- (b) *information provided to the Secretary or a Community-Based Intake Service under section 14(2); or*
- (c) *a report provided to the Secretary under section 18(3) or (5);*

I23. I have examined the provisions referred to in s3 in relation to who may be providing risk notification information.

I24. I have concerns as to whether the parliamentarian who has provided the information at pages 11-12 could be considered to be a notifier, and hence whether the deletions at pages 11-12 and page 43 were a valid exercise of s16.

I25. As noted above, 'notifier' means a person who advises the Secretary or a Community-Based Intake Service with a risk notification, *not* the Minister.

I26. Under s13(1), the Minister may have an obligation to notify the Secretary or a Community-Based Intake Service, if she, as an adult, knows, or believes or suspects on reasonable grounds, that a child is suffering, has suffered or is likely to suffer abuse or neglect.

I27. Whether such action was required was for the Minister to decide, but my conclusion in relation to the above information is that under s16 the parliamentarian cannot be found to be a notifier, and hence the relevant information on pages 11-12 and 43 should not have been deleted from the unredacted information provided to me.

I28. As to the information I consider can be disclosed, the Department has also made claims that s16, s103 and s111A variously apply as follows:

- Pages 1 and 2-4: s103, s111A
- Pages 31-32 and 37: s103
- Pages 39-40: s111A

- Pages 43-44: s16, s103
- Pages 60-61: s103

129. I consider that the Department has made generic and undetailed claims that these provisions apply, and in any event, even if they did apply, it would only be to personal information which I have found to be exempt and contrary to the public interest to disclose.
130. Thus I am not satisfied on the evidence before me that these provisions would prevent disclosure.

### **Department input on draft decision**

131. On 12 May 2017, I provided a copy of this draft decision to the Department as I was obliged to do so under s48(1)(a) of the Act, as the draft was considered 'adverse'.
132. The Secretary provided the Department's input to the draft decision on 13 June 2017.
133. The Department's submission is only concerned with the information I consider should be released to the applicant. In summary, the Department stands by the view of the delegate in regards some information but in relation to other information now submits that other exemption provisions in the Act would apply. It also expanded the information it considered the Act did not apply to at all, by virtue of s16 and s111A of the CYPTF Act.
134. In regards s111A of the CYPTF Act, the Department is now of the view that this applies to page 31-32, 41, 53-58 and 73 in addition to pages 1-4 and 39 as recorded in the decision schedule, such that none of that information can be provided under the Act.
135. The crux of the Department's argument is that s111A applies to any information provided by an 'information sharing entity' and that Safe Pathways is such an entity. The Department contends this goes beyond personal information to *any* information provided to the Department by Safe Pathways.
136. As noted earlier, s111A is set out as an attachment to this decision. From an examination of s111A(1), the question to be answered is, accepting that Safe Pathways is an 'information sharing entity', what does the phrase 'information [which] has been provided under the CYPTF Act' mean.
137. Normal statutory interpretation would lead me to consider any relevant definitions in the Act, and if there are none, to consider the purpose of this Act, and the purpose of this particular provision and to refer to any secondary materials, or indeed case law, if available.
138. I am unable to find anything in the CYPTF Act which might guide me towards the meaning of this phrase for the purposes of s111A. I was unable to find anything in the second reading speeches in either the House of Assembly or the Legislative

Council<sup>20</sup> when this provision was first introduced in 2009, then referring to the Freedom of Information Act. Clause notes located<sup>21</sup> merely state:

**Clause 19: Sections IIIA and IIIB inserted**

*The new section IIIA protects information provided by an information sharing entity from disclosure by the Secretary or a Community Based Intake Service under the Freedom of Information Act 1991.*

...

139. The Department's arguments in the decision schedule in relation to pages 1-4 were that there is a contract with Safe Pathways and that there was a need to enter into a 'placement document' for each child, which, amongst other things, set out the level of funding and that payment to the provider is 'upon the operation of the current placement document'.
140. The delegate then stated that such information is directed towards promoting the object under s7 of the CYPTF Act, which was said to be... *the care and protection of children in a manner that maximises a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential.* As the information had been exchanged between the organisation and the Secretary subsequent to an agreement with the Crown, the delegate stated that it was for this reason that under s111A of the CYPTF Act the information should not be provided.
141. I note that the Department has not provided in its submission any case law references or other material to support its interpretation, nor has it claimed to have taken Solicitor General advice on this issue.
142. I turn to s7 of the CYPTF Act, which provides:

**7. Object**

- (1) *The object of this Act is to provide for the care and protection of children in a manner that –*
  - (a) *maximises a child's best interests; and*
  - (b) *recognises that a child's family is the preferred environment for his or her care and upbringing; and*
  - (c) *recognises that the responsibility for the protection of a child rests primarily with the child's parents and family.*

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<sup>20</sup> See the Tasmanian Parliament website under Hansard. As to the relevant search dates see:  
[http://www.thelaw.tas.gov.au/tocview/index.w3p:cond=all;doc\\_id=22%2B%2B2009%2BAT@EN%2BSESSIONAL;histon=:prompt=:rec=:term=](http://www.thelaw.tas.gov.au/tocview/index.w3p:cond=all;doc_id=22%2B%2B2009%2BAT@EN%2BSESSIONAL;histon=:prompt=:rec=:term=)

<sup>21</sup> See [http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/6b3c5e7d-4381-41ec-bb4fc19990548170/5/doc/12\\_of\\_2009-Clause%20Notes.pdf](http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/6b3c5e7d-4381-41ec-bb4fc19990548170/5/doc/12_of_2009-Clause%20Notes.pdf)

(2) *The Minister is to seek to further the object of this Act in partnership with Government Agencies, councils, non-government organisations (whether incorporated or unincorporated), families and communities.*

143. The Act's object is primarily to protect and promote the interests of children and young persons. The Act also provides for the protection of their personal information, as well as that of their families and those who report neglect or abuse, by preventing disclosure through s16, s103 and s111A of that Act.

144. The *Acts Interpretation Act 1931* also provides some assistance in interpretation. At s8A it provides:

*8A. Regard to be had to purpose or object of Act*

*(1) In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.*

*(2) Subsection (1) applies whether or not the purpose or object is expressly stated in the Act.*

145. I consider that the Department is taking too broad a view of the meaning of the phrase 'information [which] has been provided under the CYPTF Act', in light of the objects and purpose of this Act as they relate to children and young persons.

146. To illustrate that this breadth is inappropriate, I refer to the Department's statement that it will be publishing a summary of payments in its upcoming 2016-17 Annual Report. I note that the information published in the Annual Report would be similar to that at pages 1 and 41.

147. The Department's current interpretation of s111A, if it was correct, would therefore prevent it from providing *any* financial information about public monies provided to third parties by way of contractual arrangements, such as Safe Pathways, in its own Annual Reports.

148. I note that it has published such information on contracts over \$50,000, in accordance with Treasurer's Instruction 1111<sup>22</sup>, in its past Annual Reports.

149. The Department has not therefore satisfied me that its application of s111A to financial information is one which properly promotes the purpose or object of the CYPTF Act. Thus I am not satisfied that the financial information at pages 1-4, 31-32 and 41 is information protected by s111A of the CYPTF Act.

150. The Department has also claimed that pages 53-58 and 73 are covered by s111A of the CYPTF Act. I have already found page 53 to be exempt in full.

151. As noted earlier, pages 54-58 are a letter from the CCYP and the Secretary's response. There is no claim before me that the CCYP is an 'information sharing entity' and, indeed, no specific details accompany this general claim. I can see no

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<sup>22</sup> See <http://www.treasury.tas.gov.au/Documents/TI-1111.pdf>

basis for s111A applying to this information. Similarly, I can see no basis for s111A applying to page 73.

152. However, on reflection, I accept that the remaining information at page 39-40 is covered by s111A of the CYPTF Act as it related to young people in Safe Pathway's care and thus I accept that it may not be disclosed under this Act.
153. This exemption under s111A of the CYPTF Act, combined with the exemptions under s35 and s36, means that pages 39-40 should not be disclosed as a whole.
154. In regards s16 of the CYPTF Act, the Department has not suggested that this should apply to any information beyond pages 11-12 and 43. Further, it does not dispute my interpretation of the definition of who is a 'notifier', such that a person who provides information to a Minister is *not* such a person.
155. Rather, it is relying on a protocol, which it claims is that a Member of Parliament would ordinarily write to the Minister, who would then pass it on to the Secretary of the Department for action.
156. In my mind, the wording of s16 of the CYPTF Act is clear. There is no room for an 'overly restrictive interpretation' as the Department suggests my view takes. If a Minister was to be a defined recipient of a notification then they would have been included in the definition of 'notifier'.
157. I further note that it is not clear that the parliamentarian knew who this young person was, such that he or she could make a formal risk notification. Rather, they were making a general referral of an allegation. I consider that if they had actual knowledge then they would most likely have made a notification to the Secretary or a Community-based Intake Service as well as raising their general concerns with the Minister.
158. Thus my view remains that s16 of the CYPTF Act does not apply to the information deleted by the Department on pages 11-12 and 43.
159. As to the Department's submission on s27, on reflection I am satisfied that dot point 4 on page 13 does meet the requirements of s27(1), as it is an opinion or advice at this point rather than factual information. Whether it is factual information may well be determined by the review that is underway. Thus this information should not be disclosed.
160. As to the Department's submission on s35, it is not suggesting that this should apply to any information beyond pages 31-32, 39, 41, 53-58 and 73 as identified in the decision schedule. It is only now concerned with the second dot point on page 31 and the email on page 73.
161. In regards page 31, the Department is arguing that because a figure is an approximate figure, it cannot be considered as factual information. It also considered this information may be exempt under s27 of the Act.

162. Regardless of whether this information is exempt under s27(1) or s35(1) of the Act, I remain of the view that the fact that it is an approximate cost range does not prevent it from being factual information.
163. The Minister had requested information on how much the Department pays per placement, and has also stated that a dollar 'range' would be acceptable. She was requesting an accurate range of placement costs and I find that this is what she was provided with, given the Department is not now claiming that the cost range provided was inaccurate.
164. As to the email on page 73, the Department considers that it is contrary to the public interest to disclose information which, upon consideration, the proposed originator regards as 'wholly inappropriate for despatch without being in an altered form'.
165. I have already found that the information on page 73 is an expression of an opinion but my finding remains that it cannot be exempt under s35(1) because it is not an opinion that goes towards an outcome. The Department has not since satisfied me that this information is exempt under s35(1) and as such, the public interest test has no role to play.
166. As to the Department's submission on s37, it now claims that this exemption also applies to page 31, in addition to pages 1-4 and 41 as recorded in the decision schedule.
167. The Department confirmed my understanding that this payment information came from its own computer system, being payments arising subsequent to invoices lodged by Safe Pathways.
168. The Department submits that I have erred in my interpretation of 'acquired'. It provides a number of dictionary definitions and then suggests that the information was clearly 'acquired'.
169. I consider that a distinction can be made between information acquired from a third party and information generated by the Department consequent to it acquiring information from the third party.
170. That is, the information in the invoice is the information that has been 'acquired'. Notably, the applicant has not sought this information. Any information generated from this acquired information can no longer meet the definition under s37.
171. This distinction can be emphasised by the following example. A business may submit invoices for payment to a Department. The Department may pay the amount on the invoice, but in some situations it may challenge the invoice and not pay it, or it may only pay it in part. Further, invoices may possibly be lodged in one financial year but not paid until the next. Hence the information 'acquired' by way of invoice is not necessarily the same information which may be generated from a Department payments ledger for any given period.

172. Thus the Department has not satisfied me that the information on pages 1-4, 31 and 41 was acquired from Safe Pathways, such that it meets the requirements of s37(1) of the Act.
173. Further, I note the Department has not argued that s12(3)(c) of the Act applies to these net payments, given that it states the total net payment to Safe Pathways will be provided in the Department's 2016/17 Annual Report later this year. This provision would allow for the application to be refused in relation to this particular information.
174. However, after examining page 1, I am satisfied that this particular information would not be disclosed in any Annual Report, as it does not cover either the specific 2015/16 or 2016/17 financial year. Similarly, the remaining information at pages 2-3 and 4 does not cover these specific financial years. Thus s12(3)(c) would not apply so as to allow the application to be refused in regards this particular information.
175. Thus my view remains that no information is exempt under s37 of the Act.
176. As to s39, the Department now claims that this exemption applies to pages 53-58 instead of s35 as applied in the decision schedule. I note I have already found page 53 to be exempt in full and I did consider pages 54-56 under s39 but concluded they were not exempt.
177. I note that the Department states it has consulted with the CCYP but it does not state what the CCYP's view on disclosure was. In any event it is not clear to me why the CCYP was consulted because exemption under s37 was not claimed. It may well have been in relation to s36 - *personal information*.
178. I will not repeat my earlier discussion of pages 54-56 other than to find that the Department has still not satisfied me that this information was communicated in confidence or that disclosure of this information would be likely to impair the ability of the Department or Minister to obtain similar information in the future, in terms of s39(1)(b).
179. As to pages 57-58, being the Secretary's signed response to the CCYP, s39(1) cannot apply because I am satisfied it does contain any information communicated in confidence by a third party to the Department or Minister.
180. Thus I am not satisfied that any additional information is exempt under s39(1) of the Act.
181. Finally, I note that the Department has not addressed my comments and concerns about personal information of a young person being available on its online Disclosure Log.

## **Conclusion**

182. The following information is exempt under s27 and should not be disclosed:
- In full: pages 8-10, 14, 15-17, 21-22, 24, 27-29 and 48-51

- In part: pages 13, 23, 26 and 47

183. The following information is exempt under s35 and should not be disclosed:

- In full: pages 25, 30, 33, 34-36, 42, 52-53 and 59
- In part: pages 31-32, 38, 39-40, 41 and 60

184. The following information is exempt under s36 and should not be disclosed:

- In full: pages 5-7 and 18-20
- In part: pages 2-4, 11-12, 31-32, 40, 46 and 60-61

185. The following information is exempt in full under s39 and should not be disclosed:

- Pages 62-66, 67-70 and 71-72

186. Section 111A of the CYPTF Act applies to parts of pages 39-40 and, combined with those parts exempt under s35 and s36, means that these pages as a whole should not be disclosed.

187. Therefore, those pages to be disclosed in full are:

- Pages 1, 37, 43-44, 54-58 and 73-74

188. Those pages which are to be disclosed in part are attached to the copy of this decision sent to the Department and are as follows:

- Pages 2-4, 11-12, 13, 23, 26, 31-32, 38, 41 and 47

189. Pages 32 (in part) and 38 (in part) are outside the scope of the applicant's application for assessed disclosure and hence this review and should not be disclosed.

190. In addition, the Department should disclose the relevant personal information it has deleted in accordance with s16 of the CYPTF Act at pages 11-12 and 43 in its release of information to the applicant.

191. The Department should also remove identifying personal information from pages 60-61 as published on its Disclosure Log.

**Dated: 27 June 2017**



Richard Connock  
OMBUDSMAN

## **Attachment I**

### **Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest**

**Sections 30(3) and 33(2)**

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
  - (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
  - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
  - (g) whether the disclosure would enhance scrutiny of government administrative processes;
  - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
  - (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 2009 - SCHEDULE 2**

### **- Matters Irrelevant to Assessment of Public Interest**

### **SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest**

**Sections 30(4) and 33(3)**

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

- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
- (b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
- (c) that disclosure would cause a loss of confidence in the government;
- (d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

## Attachment 2

### **CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1997**

#### **Section 16. Confidentiality of person informing of knowledge, belief or suspicion of abuse or neglect or certain behaviour**

(1) In this section –

*notifier* means a person who provides the Secretary or a Community-Based Intake Service with a risk notification.

(2) Subject to this section, a person who receives a risk notification from a notifier, or who otherwise becomes aware of the identity of a notifier because he or she is engaged in the administration of this Act, must not disclose the identity of the notifier to any other person unless the disclosure –

(a) is made in the course of official duties under this Act to another person acting in the course of official duties; or

(b) is made with the consent of the notifier; or

(c) is made by way of evidence adduced with leave granted by a court under subsection (3).

**Penalty:**

Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 12 months, or both.

(3) Evidence as to the identity of a notifier, or from which the identity of the notifier could be deduced, must not be adduced in proceedings before any court without leave of that court.

...

(7) The *Right to Information Act 2009* does not apply to the identity of a notifier or any information contained in or relating to a risk notification that may lead to the identification of the notifier.

#### **Section 103. Duty to maintain confidentiality**

(1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to –

(a) a child; or

(b) a guardian of a child; or

(c) a family member of a child; or

(d) any person alleged to have abused, neglected or threatened a child –

must not divulge that information.

**Penalty:**

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

(2) A person who attends a family group conference must not divulge any personal information obtained at the conference relating to the child, his or her guardian or a member of the child's family.

**Penalty:**

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

(3) This section does not prevent a person –

- (a) from divulging information if authorised or required to do so by law; or
- (b) from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
- (c) engaged in the administration of this Act from divulging information if it is necessary or appropriate to do so for the proper administration of this Act.

**Section IIIA. Access to information under Right to Information Act 2009**

(1) The Secretary or Community-Based Intake Service must not provide information under Right to Information Act 2009 if the information has been provided under this Act to the Secretary or Community-Based Intake Service by an information-sharing entity.

(2) Nothing in this section prevents a person from requesting, under the Right to Information Act 2009, an information-sharing entity that has provided information to the Secretary or a Community-Based Intake Service to provide that information to the person.



**OMBUDSMAN TASMANIA**  
**DECISION**

**Right to Information Act 2009 Review**

**Case Reference: O1501-144**

**Parties:** Mr Timothy Baird and Launceston City Council

**Provisions considered:** s33, s35, s37, Schedule 1

**Draft Decision:** issued under s48(1)(a)

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**Background**

- 1 On 14 October 2014, Mr Timothy Baird submitted an application for assessed disclosure under the *Right to Information Act 2009* to Launceston City Council.
- 2 The applicant sought information relating to a tender process initiated by Council to upgrade the Sea Port Boardwalk area. Specifically, the applicant sought:

*Historical details of contracts awarded for the current financial [sic] with details of all weighted attributes applied to the Stage 2 of the process with sub-attributes that are given as a point score in the range of 1 – 10. The allocation of these point scores for the sub-attributes have been based on the information provided with the tender and evidence available with the Principal of the Tenderer's previous performance.*

*From this information the Principal will select without bias the tenderer that satisfies both the above evaluation criteria and provides the best value for money for the community. In determining the best value for money for the community, the Principal has regard to the tender report prepared by the tender evaluation panel and other relevant factors, which it considers relevant that could also be provided in support of the transparency of the council decision, and removes any opportunity for the abuse the [sic] system.*

- 3 On 19 January 2015, Mr Robert Dobrzynski, Council's General Manager and therefore its principal officer released a decision to the applicant. Council claimed some of the information responsive to the request to be exempt.
- 4 On 23 January 2015, the applicant requested an external review of Council's decision pursuant to s45(1)(a) - as the decision maker was the Principal Officer, there could be no internal review.
- 5 The applicant seeks the information relied on by Council to determine whether a private company, Darcon Pty Ltd was the most appropriate tenderer for its seaport boardwalk upgrade project. There were five tenders submitted, one was withdrawn. Council used a scoring method for each tender application.

- 6 The scores given by Council are significant as they help identify whether Council acted fairly and objectively. I note the applicant is also seeking any handwritten notes as evidence, which he suggests will support the formal decision to appoint Darcon.
- 7 Council negotiated with the Applicant when the original application for assessed disclosure was received. This resulted in the scope of the request being confined to information specifically relating to the assessment and scoring of the tender applicants resulting in the successful tenderer being selected, and to handwritten notes made by Council officers.

### **Issues for Determination**

- 8 Council relies on the exemptions contained in s35 (internal deliberative information), 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 s40 (information on procedures and criteria used in certain negotiations of a public authority).
- 9 I must consider if the information is exempt under one, some, or all of the sections relied on by Council. Each section identified above is subject to the public interest test and will require a consideration of at least the matters contained in Schedule 1 as required by s33(2).

### **Relevant legislation**

- 10 Section 33 provides:
  - (1) *In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.*
  - (2) *The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.*
  - (3) *The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.*
- 11 Section 35 provides:
  - (1) *Information is exempt information if it consists of –*
    - (a) *an opinion, advice or recommendation prepared by an officer of a public authority; or*
    - (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.*

12 Section 37 provides:

- (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.*

## **Submissions**

- 13 The following relevant documentary evidence is before me:
- the application for assessed disclosure dated 14 October 2014;
  - the original decision by Council dated 19 January 2015;
  - the request for external review dated 23 January 2015;
  - a submission from Council dated 11 February 2015; and
  - full unredacted copies of the tender and scoring information falling within the scope of the application.
- 14 I have also obtained copies of the following documents:
- the *Tendering and Contracting* information sheet published by the Local Government Division of the Department of Premier and Cabinet on its website;

- the Launceston City Council Procurement Policy; and
  - the Launceston City Council Code for Tenders and Contracts.
- 15 The Applicant claims the information has been extensively redacted and due consideration has not been given to the benefit of releasing it.
- 16 Specifically, the Applicant submits:

*There is no release of third party supplied information, although a precedent for releasing tender prices has been usual. I would suggest, that in order to assist in the tender process, each tenderer should be provided such information, to enable improved offers in the future.*

- 17 The Council replied:

*In regard to the tender process, the Council operates in a commercial environment and the business relationships that the Council forms and maintains with local suppliers in the region are of utmost importance to maintaining a competitive position for the Council.*

*...loss of confidence in the Council from local and/or regional suppliers will damage the competitiveness of Council in securing competitive future contracts and ultimately this will affect rate-payers.*

*[The release of tender information] is not the standard practices [sic] of local, state, federal governments as it would impede commercial government relationships – in order for governments to operate in commercial environments, they must adopt the standard practices required for doing business in a competitive and commercial environment.*

### **Analysis**

- 18 As noted, Council relies on s38 (information relating to the business affairs of a third party), s39 (information obtained in confidence), and s40 (information on procedures and criteria used in certain negotiations of a public authority) in regard to the third party information.
- 19 I am of the view, however, that ss35 and 37 are the two most relevant having regard to the nature of the information before me. I will conduct this review having regard to these two sections.

### **Section 35**

- 20 Section 35 has been relied on by Council to exempt fully handwritten meeting notes made by Council officers as part of the tender review process. The notes are essentially summaries of the tenders received and the recording of some deliberative thoughts about them.
- 21 To be satisfied that this information is exempt under s35(1)(a) specifically, I must first be satisfied that it consists of opinion, advice or recommendation prepared by a public officer in the course of, or for the purposes of the deliberative

processes of a public authority and, amongst other things, that it does not contain purely factual information.

- 22 The definition of *public authority* in s5 of the Act includes a council. In terms of s35(1), I am satisfied the information was prepared by a public officer in the course of the deliberative processes related to the official business of Council.
- 23 Section 35(2) excludes from exemption any information which is purely factual information.
- 24 As to the meaning of 'purely factual information', in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>1</sup>, the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore the material must be "factual" in fairly unambiguous terms. To be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes<sup>2</sup>.
- 25 This means that for 'factual information' to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process as to form part of it.
- 26 Thus, even though a document's contents are primarily factual this does not of itself mean that the document falls outside the deliberative processes exemption.
- 27 While I am satisfied the handwritten notes do contain some factual information, I am not satisfied that it is sufficiently separate from the deliberative material to be considered purely factual information for the purposes of s35.
- 28 Section 35(3) excludes from the exemption any final decision, order, or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order, or ruling. Based on the evidence before me, I am satisfied nothing in the information constitutes a concluded decision or the reasoning behind any such decision.
- 29 Section 35(4) further excludes from exemption any information that is older than 10 years. It is clear from the information submitted to me that the information at issue is not older than 10 years.

#### *Public Interest Test*

- 30 Before I can determine if the material should be exempt having met the requirements of s35, I must consider the public interest test requirements at s33 having regard to, at least, the matters in Schedule 1, a copy of which is attached.
- 31 Having done so, I find four matters in favour of release: (a); (c); (f); and (g). I find seven matters in favour of exemption: (h); (m); (n); (o); (s); (w); and (y).
- 32 I accept the applicant's view that there is a need for government information of this type, in general terms, to be publicly available (a) and in this instance, it

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<sup>1</sup> (1984) 6 ALN N347 at N349

<sup>2</sup> See *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

would help inform a person about the reasons for a decision (c), namely, to award the tender to Darcon.

- 33 I am also of the view that disclosure of the information in the handwritten notes would enhance scrutiny of government decision-making processes to the point that it would improve accountability and participation (f), while at the same time, enhance the scrutiny of administrative processes (g).
- 34 However, this needs to be balanced against those factors weighing against release.
- 35 To release the notes would reveal deliberative information that would reasonably hinder the fair treatment of a person or corporation in their dealing with government (h) as well as harm their interests (m). I accept that the release of this information may lead to notes or other deliberative records being difficult to obtain in future as a result of officers not rigorously recording their thoughts (n). This would do nothing to promote good practice or enhance scrutiny against impropriety.
- 36 I accept the argument put forward by Council that the release of the notes would prejudice the effectiveness of its tender screening process (o), which may very well lead to non-competitive or unnecessarily expensive projects that ultimately harm the financial interests of Council (s). Likewise, this could have a negative impact on the business affairs of those organisations, which have been candidly discussed by Council officers (w)(y).
- 37 I accept that when a third party makes a submission to a tender process, that third party should reasonably expect there to be some level of discussion about them, but there is also a reasonable expectation that any such discussion would be kept confidential.
- 38 Based on the matters referred to above, and on balance, I determine that release of the information is not sufficiently in the public interest and it should remain exempt under s35.

## **Section 37**

- 39 The two remaining documents are the *Report on Tenders* and the *Tender Evaluation Summary Sheet*. I now consider the application of s37 to this information.

### *Report on Tenders*

- 40 This document is the formal summary and collation of information arising from the tender process conducted by Council.
- 41 Council has released some information but relies on s37 to exempt other information on the basis that its release would result in competitive disadvantage to the third parties involved.
- 42 Under s37(2), if a public authority decides that the disclosure of the third party information held would reasonably be of substantial concern to that third party, it must consult with the third party prior to the release of information.

- 43 Council conducted a consultation with the relevant third parties as it formed the view that these third parties would be concerned about the release of the information. Although none of the third parties provided argument but merely said that they did not want the information released, Council acceded to this and the information was duly exempted.
- 44 The exemption in the Act that protects the business interests of third parties serves the legitimate purpose of ensuring commercial engagement with government does not do damage to a business by the release of commercially sensitive information.
- 45 On the other hand, there is also a strong case for allowing the public to have access to certain information that explains and justifies the expenditure of public funds. Arguably, the increasing commercialisation and outsourcing of government activities has made access to business information more significant given the objective of transparency inherent in RTI legislation<sup>3</sup>.
- 46 Clearly there is a fine balance between shedding light on the use of public money to avoid financial impropriety and obtaining value for money, and maintaining government's ability to engage in competitive pricing through the use of contractors without fear of prejudicing their commercial information.
- 47 The Senate Finance and Public Administration References Committee concluded in its 1998 *Contracting out of Government Services* report that usually 'only relatively small parts of contractual arrangements will be genuinely commercially confidential'<sup>4</sup>.
- 48 I conclude that Council honestly attempted to apply this principle when determining what information in the *Report on Tenders* should be redacted.
- 49 The public should have the right to satisfy itself, however, that a government has acted fairly and properly in entering into a contract and that it has obtained value for money. In fairness, this would extend far enough to allow the public access to sufficient information about competing tenders to be able to assess the propriety of the tendering process<sup>5</sup>.
- 50 To release the *Report on Tenders* document in full would, in my view, lead to competitive disadvantage to the unsuccessful tenderers. It would show how Council rated them in terms of key areas such as pricing, experience, and other requirements. Knowing this could allow a competitor to maximise an advantage over another competitor it did not know it had, or conversely, allow a competitor to exploit a weakness it did not know another company had.
- 51 In terms of s37(2), the information discussed in this section was provided to a public authority by a third party. When making the determination below, I have

<sup>3</sup> See generally M Paterson, 'Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State' (2004) 32 *Australian Business Law Review* 315.

<sup>4</sup> Commonwealth Senate Finance and Public Administration Committee, *Contracting out of Government Services Second Report*, Senate Printing Unit, Canberra, 1998, p71.

<sup>5</sup> See the process outlined by the Irish Information Commissioner in Case 98188 – Mr Mark Henry and the Office of Public Works at <http://www.oic.gov.ie>.

had due regard to information that might reasonably be expected to be of substantial concern to the third party.

- 52 The objects of the Act articulated in s3 aim to enable the people to hold public authorities accountable in the interests of improving democratic government in Tasmania. In this instance, this requires balancing the transparency of the expenditure of taxpayer funds against the need to protect commercially sensitive information. Having done that, I uphold Council's claims for exemption under s37 of the *Report on Tenders* document with the exception of the following:
- the successful tenderer's name under point 7.0 on page 4 - the name of the successful tenderer has already been released and there is no justifiable reason to exempt it here;
  - the dot point on page 6 concerning changes to the scope of work to be performed - a negotiated change to the scope of the project between the Council and the successful tenderer is not commercially sensitive, rather it is a matter of public works;
  - the 'total reduction' value on page 6 - for the reasons mentioned in the above explanation, this is not commercially sensitive information but a reduction in total tender value;
  - the revised tender price on page 6 - this is also not commercially sensitive, rather it is the final sum of public money spent on the project;
  - the second paragraph under the heading *Experience* on page 6 – this is not commercially sensitive but a definitive statement by council to justify the expenditure of public funds and is in the public interest to release;
  - the figures in table (i) under 9.0 on page 6 - Council's allocated budget for the project is not commercially sensitive third party information, nor is it sensitive to Council's commercial activity;
  - all redactions on page 7 - as above, these figures are not commercial pricing from a third party, they are Council budgeted administration costs; there is no breakdown of line item pricing from the successful tenderer, which would have potentially exposed it to disadvantage;
  - all the fields in Table 1 on page 8 for Darcon - this information does not go to commercially sensitive information about Darcon, rather it proves to the public that Council has engaged a contractor with propriety; and
  - all the fields in Table 3 on page 10 for Darcon and all the fields in the row titled *TOTAL* being the final scores awarded by Council to all tenderers.
- 53 In relation to the latter, if this information contained more than a bare score (e.g. why something was or was not awarded a higher or lower score), I could see how it might be commercially sensitive. The public has a right to know, however, how well a successful tenderer scored in the interests of transparency and to ward off financial impropriety.

- 54 Darcon's rounded score of 96% should give confidence to Council, the tenderer, and the public that the best company was selected for the job. This is highlighted by the release of the other companies' anonymous scores. As all identifying information for other third parties remains exempt, there is nothing commercially disadvantageous being released.
- 55 In my view, the removal of the redactions outlined above will strike a reasonable and fair balance between the public's right to know and the protection of specific third party information.
- 56 The removal of these redactions will provide Council's assessment of, not direct commercial information about, Darcon.

#### *Tender Evaluation Summary Sheet*

- 57 In relation to the *Tender Evaluation Summary Sheet*, the information it contains is similar to that in the *Report on Tenders* being as it is a summary of the key information that is detailed in the other report.
- 58 It does, however, contain more specific information and scoring based on additional attributes and the other tenderers. In terms of s37(1)(b), I am satisfied the release of this information, beyond the aggregated total tenderer scores I have already determined above should be released, would lead to competitive disadvantage; to release any useful information would require the identification of the other tenderers.
- 59 I determine, therefore, the entirety of the *Tender Evaluation Summary Sheet* remains exempt under s37.

#### *Public Interest Test*

- 60 Having found the information discussed above is *prima facie* exempt information, I must now consider the matters in Schedule 1 as required by s33(2).
- 61 Having done so, I find five matters in favour of release: (a); (c); (d); (f); and (g). I find seven matters in favour of exemption (h); (m); (n); (o); (s); (w); and (y).
- 62 I accept that there is an inherent need for government information of this type to be accessible (a), and that it would provide both reasons (c) and context (d) for the decision of an authority. Similarly, I accept that the release of these reports would enhance scrutiny of both the decision-making (f) and administrative processes of Council (g).
- 63 Again, however, this needs to be balanced against those factors that do not favour release.
- 64 To release the reports in full would reveal deliberative information about persons or corporations and would reasonably hinder the fair treatment of those persons or corporations (h), as well as harm their interests (m). I accept that the release of this information may lead to reports not being as robust as they could be in the future (n), a result that would negatively affect the public through the

potential for financial impropriety. This would do nothing to promote good practice or enhance scrutiny.

- 65 I accept the argument put forward by Council that the release of the reports in full would unreasonably prejudice the effectiveness of its tender screening process (o), which may very well lead to non-competitive or unnecessarily expensive projects that ultimately harm the financial interests of Council (s). Likewise, this could have a negative impact on the business affairs of those organisations that have been, by Council officer standards, judged on their competitiveness and suitability (w)(y). If made public, this could be used in ways to harm competitiveness.
- 66 For the reasons discussed above, and on balance, I determine that the release of information in the two reports is not sufficiently in the public interest and it should remain exempt under s37 with the exception of the determinations at para 53.

### **Preliminary Conclusion**

- 67 I accept that the exemptions applied by the Council have been correctly applied with the exception of those items discussed above.
- 68 This draft decision is provided to the Launceston City Council pursuant to s48(1)(a) of the Act.

### **Submissions to Preliminary Conclusion**

- 69 Council was invited to make submissions in relation to the Preliminary Conclusion, but by letter dated 7 November 2017, Council advised that it was content with the preliminary decision.

### **Conclusion**

- 70 I therefore confirm my preliminary decision and accept that the exemptions applied by the Council have been correctly applied with the exception of those items discussed above.

**Dated:** 10 November 2017



**Richard Connock**  
**OMBUDSMAN**

## **Attachment**

### **Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest**

### **Sections 30(3) and 33(2)**

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
  - (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
  - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
  - (g) whether the disclosure would enhance scrutiny of government administrative processes;
  - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
  - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
  - (k) whether the disclosure would promote or harm the economic development of the State;
  - (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.



## TASMANIAN OMBUDSMAN

## DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1502-051

**Names of Parties:** Timothy Kirkwood & Tasmanian Planning Commission

**Provisions considered:** s5, s12(3)(c), s33, s36 and Schedule 1

**Other Acts considered:** Tasmanian Planning Commission Act 1997, s6, s12

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### Background

1. This is an application for review by Mr Kirkwood (the applicant), who is General Manager of Southern Midlands Council. He is seeking a review under the Right to Information Act 2009 (the Act) of a decision of 23 December 2014 of the Tasmanian Planning Commission (TPC), through the Department of Justice, or 'the Department'.
2. On 10 November 2014, the applicant lodged with the Department an application for assessed disclosure of information relating to correspondence between a Dr Richard Barnes and the TPC.
3. The scope of the application was as follows:

- All correspondence during the years 2012, 2013 and 2014 between Dr Richard Barnes and the Tasmanian Planning Commission relating to the proposed rezoning of land at Blackbrush Road, Mangalore, recently subject to amendments 1.2/2014 and 1.3/2014 to the Southern Midlands Planning Scheme 1998 - with the following land identification details:

PID	C.T.	Approx. Area
...	...	...
[5 titles in total]		

- This includes, but is not necessarily limited to:
  - All letters, emails and file notes of telephone calls from Dr Barnes to any officer, manager, delegate or commissioner of the Tasmanian Planning Commission; and
  - All letters, emails, file notes of telephone calls to Dr Barnes from any officer, manager, delegate or commissioner of the Tasmanian Planning Commission; and

- *All meeting notes or minutes of meetings between Dr Barnes and any officer, manager, delegate or commissioner of the Tasmanian Planning Commission.*
  - *Any other records, letters, emails and file notes relating to communications between Dr Richard Barnes and the Tasmanian Planning Commission relating to the Southern Midlands Council area.*
4. On 5 December 2014 the Department made its original decision. The delegate first noted that there was some 'ambiguity' as to whether the TPC was subject to the Act, given the exclusion of 'tribunals' under s6(1)(c). In light of this, he considered that there was information which was 'out-of-scope' because it was material received by the TPC in its capacity as a tribunal/hearing body. He also noted that this information was available to Council as the relevant planning authority through the TPC hearings/determination process and thus this information would be 'otherwise available' under s12(3)(c) and need not be disclosed.
  5. Other information within scope, described as 'private correspondence', was considered to have been provided outside the TPC hearings/determination process. This information was considered to be exempt under s36 – personal information – and after consultation with Dr Barnes, it was determined that it was contrary to the public interest to release this information.
  6. The applicant sought internal review and on 12 January 2015 the Secretary of the Department made a decision.
  7. The internal review was more a response to the claims made by the applicant in his application for internal review, but the Secretary concluded by agreeing with the original delegate's view that the 'private correspondence' identified was exempt under s36 and was not to be released under the public interest test.
  8. The Secretary also identified s39(1)(b) as relevant, as the communications were obtained in confidence and disclosure would be reasonably likely to impair the ability of the public authority to obtain similar information in the future. He also emphasised that the material submitted by Dr Barnes to the TPC in regards the hearings process was available to Council as a planning authority, should it choose to apply for this.

### **Issues for Determination**

9. The information requested under the application for assessed disclosure may more appropriately be broken down into:
  - Information relating to the TPC hearings/determination process
  - Information outside the TPC hearings/determination process

10. The Department has determined that that part of the application relating to information relating to the TPC hearings/determination process may be refused, either under s6 of the Act, or because it is otherwise available under s12(3)(c). I must determine whether this is correct.
11. As to the information outside the hearings/determination process, on review the Department has relied on s36 and to a lesser extent, s39, and that it is contrary to the public interest under s33 to release that information.
12. I must determine whether either s36 or s39 apply here, and if so, come to my own view as to whether it is contrary to the public interest under s33 to release the information.

### **Relevant Law**

13. Section 12(3) relevantly states:

*(3) Assessed disclosure is the method of disclosure of last resort and –*

...

*(c) the principal officer of a public authority or a Minister may refuse an application made in accordance with section 13 if the information that is the subject of the application –*

*(i) is otherwise available; or*

*(ii) will become available, in accordance with a decision that was made before receipt of the application, as a required disclosure or routine disclosure within a period of time specified by the public authority or Minister but not exceeding 12 months from the date of the application.*

14. Section 33 states:

*(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.*

15. Section 36 relevantly states:

*(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.*

## **Submissions and evidence before me**

16. In making the decision I have taken into account:

- The application for assessed disclosure dated 10 November 2014
- The decision of Mr David Phelan, Delegated Officer, Department, dated 5 December 2014
- The application for internal review, dated 23 December 2014
- The decision of Mr Simon Overland, Secretary, Department, dated 12 January 2015
- The application for external review, received on 2 February 2015
- Correspondence received from the parties and Dr Barnes during the review process

17. Arising from my own enquiries I also have before me:

- Publicly available TPC information and decision relating to the hearings/determination in question<sup>1</sup>

18. I also have before me the information from between 2012 and 2014 held by the TPC which is claimed to be outside the hearings/determination process. This leads me to believe that I may not have all the information that passed between Dr Barnes and the TPC, being the information provided in the context of the hearings/determination process, which is also subject to this review. However, I note that this information is stated to be already publicly available.

19. The Secretary has also provided to me an email from the Director of Assessments at the TPC to the Department of Justice's right to information delegate dated 3 December 2014.

20. This noted that there was information within the information claimed to be outside the hearings/determination process which did actually relate to the hearing process and could be disclosed to the applicant. However, the Secretary took the view not to disclose this information as it was, or would be, otherwise available under s12(3)(c).

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<sup>1</sup> <http://www.iplan.tas.gov.au/Pages/XC.Track.Assessment/SearchAssessment.aspx?id=35>  
and <http://www.iplan.tas.gov.au/Pages/XC.Track.Assessment/SearchAssessment.aspx?id=36>

21. Within this information there is an email from Council to the Department of Justice which I am satisfied is not within scope, as it is clear that this was not information held by the TPC.

22. In lodging his application for external review, the applicant stated:

*The following comments form the basis of this Application to the Ombudsman for a review of the decision made by the Departmental Secretary:*

*Throughout the review decision made by the Departmental Secretary reference is made to the concept that the emails were "private correspondence between it (Tasmanian Planning Commission) and Dr Barnes".*

*The review fails to acknowledge that the Tasmanian Planning Commission does not have any function or power which could properly contemplate any "private correspondence" being sent to it by any individual. The Tasmanian Planning Commission's functions are to advise the Minister in respect of a number of matters under s.6(1A) of the Tasmanian Planning Commission Act 1997, to plan for the provision of transport and infrastructure from land development, and to provide advice to local government.*

*It also has the functions imposed on it under the Land Use Planning and Approvals Act 1993. Those functions include s.40 dealing with public hearings, s.30K and 30L concerning consideration of representations and reports to the Minister etc. There are no functions of the Tasmanian Planning Commission which contemplate private correspondence between a landowner and the Commission.*

*Further, the Secretary is wrong to conclude that the Tasmanian Planning Commission was a non decision making body. Its function, so far as Planning Schemes are concerned, is to make decisions about applications. It is no part of the function of the Tasmanian Planning Commission to provide advice to individuals, or to engage in correspondence with individuals, outside of the statutory processes contained within the Land Use Planning & Approvals Act 1993. To do so is an absolute corruption of those processes.*

*It also follows that the conclusion made by the Secretary that a relevant consideration was that an individual may be "less likely to correspond with the TPC in future" is wrong. The TPC has no function that contemplates individuals privately corresponding with it.*

## **Analysis**

### **Section 5 – information in the possession of a public authority**

23. The crux of the applicant's submission is that the TPC should not be generally corresponding with parties or any person such as Dr Barnes, as this is outside of the functions it has been delegated by legislation.
24. However, the fact is that there has been correspondence between Dr Barnes and the TPC, which the TPC and the Department considers not to be part of the hearings/determination process.
25. Section 7 of the Act gives a person a legally enforceable right to be provided with information in the possession of a public authority or a Minister unless the information is exempt information.
26. 'Information in the possession of a public authority' is defined in s5 to mean information 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 another public authority.
27. The issue here is whether this information held by the TPC relates to its 'official business'. If not, the information is not subject to this Act.
28. As to the TPC's official business, its role and responsibilities are set out on its website<sup>2</sup>:

#### ***Role of the Tasmanian Planning Commission***

*The Commission's roles include:*

- *assessing interim planning schemes*
- *providing planning advice to the Minister for Planning and Local Government*
- *assessing projects of regional and State significance*
- *reporting on draft State Policies*
- *assessing planning schemes*
- *assessing planning directives*
- *inquiring into the future use of public land, and*
- *reviewing reports and representations on draft management plans.*

*The Commission's main responsibilities are set out in the following Acts:*

- *Land Use Planning and Approvals Act 1993*
- *State Policies and Projects Act 1993*
- *National Parks and Reserves Management Act 2002*
- *Water Management Act 1999*
- *Wellington Park Act 1993*

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<sup>2</sup> See [http://www.planning.tas.gov.au/the\\_commission/role](http://www.planning.tas.gov.au/the_commission/role)

- *Public Land (Administration and Forests) Act 1991*

29. The legislative basis for the functions and powers of the TPC is set out in the *Tasmanian Planning Commission Act 1997* (the TPC Act) as follows:

*s6. Functions and powers of Commission*

*(1) The Commission has the functions imposed and powers conferred on it under any other Act.*

*(1A) In addition to the functions and powers referred to in subsection (1), the Commission has the following functions and powers:*

*(a) to provide advice and support to the Minister in relation to the performance of his or her functions, and the exercise of his or her powers, in relation to land use planning under this or any other Act;*

*(b) to provide advice to the Minister in respect of matters related to land use planning;*

*(c) to plan for the coordinated provision of transport, and of infrastructure, for land development;*

*(d) to provide advice to local government in relation to planning schemes under the Land Use Planning and Approvals Act 1993 and the functions of local government under that Act;*

*(e) to review, and advise the Minister in respect of, State and regional strategic land use planning matters.*

*(2) The Commission may do all things necessary or convenient to be done for or in connection with, or incidental to, the performance of its functions.*

*(3) The Commission must perform its functions and exercise its powers in a manner that furthers the objectives set out in Schedule 1.*

30. With respect, I disagree with the applicant's submission that there is no such thing as 'private correspondence' with the TPC.

31. What the applicant is stating is that the TPC cannot engage with anyone in the community outside of the public hearings and determination process.

32. My response is that anyone is entitled to write to the TPC about any matter, and can provide them with any information they choose. Further, anyone can write to another person or body, and can copy that letter or email to the TPC where they think it of relevance. I note that Dr Barnes, as a town planner and, at that time, an aspiring free-range chicken farmer, would appear to have more interest in the TPC's work than most.

33. It is then up to the TPC to determine whether what is being requested or provided comes within its legislative powers.

34. In addition to the functions imposed and powers conferred on it under any other Act, the TPC has a broad range of other functions and powers, as set out at s6 of the TPC Act and exercised in accordance with Schedule 1 of that Act. I believe that these provisions are broad enough for the TPC to engage in correspondence with anyone outside of the hearings/determination process.
35. I have examined the undisclosed information and note that there are times when the TPC has provided a substantive response and other times when it has stated that a matter is currently outside of its powers (because there is no related hearing/determination process) or that it is not in a position to provide Dr Barnes with certain information.
36. The applicant claims that to engage in correspondence with individuals is acting outside of the TPC's statutory processes, and is an 'absolute corruption' of those processes but there is no compelling evidence before me to suggest that the TPC has not acted within its powers.
37. I am therefore of the view that the information in question is held in accordance with the official business of the TPC, and is therefore 'information in the possession of a public authority' for the purposes of this Act.
38. It would seem to me that the applicant and Council have some dissatisfaction with the TPC hearings/determination process and how it handled the matter in question. However, this is not evidence that the TPC has not acted within its powers in relation to information held outside of the hearings/determination process.

### **Section 12(3)(c) – information otherwise available**

39. I note that the TPC's hearings/determination process is contained within Part 3 of the TPC Act, which is titled 'Hearings conducted by the Commission'. As to the generally public nature of evidence given to the TPC in relation to its hearings, s12 of that Act states:

*s12. Written evidence and submission documents to be made public*

*If a person –*

*(a) gives written evidence to a hearing; or*

*(b) makes a written submission to the Commission –*

*the Commission must, as soon as practicable, make available to the public in any way it thinks fit the particulars of the evidence or the contents of the submission, other than any matter where –*

*(c) the person objects to the matter being made public and the Commission considers that evidence of the matter would have been taken in private if it had been given orally at a hearing; or*

*(d) the Commission considers that, even though the person does not object to the matter being made public, evidence of the matter would have been taken in private if it had been given orally at a hearing.*

40. From the undisclosed information before me, I have identified a number of documents which I consider fit within the purview of s12, as they relate to the hearings/determination process, and as such should be publicly available. For TPC identification purposes these are set out at Schedule 2.
41. In regards this information, I note that the TPC Director of Assessments has advised the Department that there was a substantive written submission to the TPC by Dr Barnes which was 'overlooked when it was received because of the way it was in another document requesting to be heard at the hearing'. The Director also notes that this document was referred to by Dr Barnes at the hearing and it was tabled, and that copies were available to other parties, such as Council. It was also noted that there were a number of other email exchanges about the hearing process and likely reporting dates that can be treated as public documents.
42. I am satisfied that the obligation under s12 of the TPC Act for the TPC to, 'as soon as practicable, make available to the public in any way it thinks fit the particulars of the evidence or the contents of the submission' is sufficient to satisfy the requirement of s12(3)(c) of the Act that this information be 'otherwise available'.
43. I note that s12 of the TPC Act does have provisions for keeping certain information private but I am satisfied from the evidence before me that this provision would not apply here, given the tabling of the substantive document at the hearing by Dr Barnes and the TPC Director's stated views on the disclosure of this and the other documents.
44. Thus I am satisfied that there is a legal right for the public to have access to these documents and that they are freely available either off the TPC website or by attending their office for inspection, and thus the information is 'otherwise available' in terms of s12(3)(c). Thus the application in respect of this information may properly be refused.
45. I note that it is therefore not necessary for me to consider whether the TPC is in any way excluded by virtue of the Department's argument that it is a 'tribunal' in terms of s6 of the Act.
46. To be clear, the remaining undisclosed information is correspondence between Dr Barnes and the TPC from 2012 to 2014 which does not relate to the hearings/determination process.

### **Section 36 – personal information**

47. I consider that all information sent by Dr Barnes to the TPC, including attachments, and all information sent by the TPC to Dr Barnes, not already addressed above, is exempt information under s36.

48. This is because releasing this information would involve the disclosure of the personal information of a person other than the person making an application under section 13, namely the personal information of Dr Barnes, where 'personal information' is defined at s5 to mean any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion and who is alive, or has not been dead for more than 25 years.
49. There is thus no need to consider whether s39 also applies here. In any event, I have addressed whether information was received in confidence and whether disclosure would impair the ability to obtain such information in the future under the public interest considerations that follow.

#### **The public interest test- s33**

50. Section 33 requires that for the above information to be exempt it must be established, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
51. Relevant matters which must be taken into account are set out in Schedule 1 of the Act. Schedule 2 sets out those matters which a decision-maker should not take into account. The schedules are included as Attachment 1 to this decision.
52. Having turned my mind to Schedule 1, I give particular weight to the fact that the person seeking the information is acting on behalf of, and on the instructions of, the council he is general manager of. Being a case of a public authority seeking information about an individual, through another public authority, I do not believe there is a *general public need* for such government information to be accessible in such circumstances.
53. I do not believe that disclosure would contribute to a debate on the public interest, because, despite the applicant's ultimate claim of a 'corruption of processes', this has not been established. The information and evidence before me does not suggest any corruption of process in light of the TPC's broad powers.
54. I note that if the applicant has evidence of actual wrongdoing by the TPC then he should consider taking the matter to the Integrity Commission. However, for the purposes of this review, on the evidence before me I can see no benefit to the public interest in disclosing correspondence outside of the hearings/determination process.
55. I can understand the applicant and Council's concern about not properly receiving all evidence relevant to the hearings/determination process in a timely fashion prior to the hearing, so they could properly address it at hearing. In this context, I have identified information in the undisclosed documents which is, in

my view, part of the hearings/determination process, and thus should be publicly disclosed by the TPC.

56. The consequence of this finding is that the application for assessed disclosure can rightfully be refused in regards those particular documents, as it is information which comes under s12(3)(c) as 'otherwise available'. Thus the applicant and Council's concerns as stated above are not a relevant consideration in regards the *remaining* undisclosed information subject to the public interest test. That is, disclosure would not enhance scrutiny of any TPC decision-making processes as all information relevant to that process is or will be publicly available.
57. I acknowledge that disclosure might enhance scrutiny of government administrative processes, being TPC processes generally, but in light of my previous findings, I do not think that in the circumstances of this case the benefits of any additional scrutiny outweighs the undermining of the privacy of an individual.
58. I return to the issue of whether disclosure would impair the TPC's ability to obtain certain information in the future. This is usually a consideration where complaints are made about the actions or inactions of a public authority or Minister and disclosing the name of the complainant may discourage complaints generally in the future, which may be seen as against the public interest.
59. However, I am satisfied that there are no formal complaints in the remaining undisclosed information which were made to the TPC in the first instance for investigation or action. Thus, the public interest consideration of whether the disclosure would prejudice the ability of the public authority, the TPC, to obtain *similar information in the future*, is an irrelevant consideration here.
60. Overall, I am satisfied that it is contrary to the public interest to disclose the remaining information.

## **Conclusion**

61. As I am not requiring the disclosure of any personal information, there is no necessity for me, or the TPC or Department, to consult with Dr Barnes.
62. My conclusions are that:
  - I am satisfied that all information held by the TPC that is within the scope of the application for assessed disclosure meets the definition in s5 of the Act, being 'information in the possession of a public authority', and is subject to this Act; and

- I am satisfied that any information provided by Dr Barnes to the TPC, or by the TPC to Dr Barnes, in the context of the hearings/determination process and not currently before me, is information which, in accordance with s12 of the TPC Act, is publicly available, and which I find under s12(3)(c) of the Act is 'otherwise available', such that the application for assessed disclosure is properly refused in this regard; and
- I am satisfied that from the undisclosed information before me, there is information which I consider to be information which, in accordance with s12 of the TPC Act, is publicly available, and which I find under s12(3)(c) of the Act is 'otherwise available', such that the application for assessed disclosure is properly refused in this regard; and
- I am satisfied that the remaining undisclosed information is exempt information under s36 of the Act and that it is contrary to the public interest to disclose it.

63. For the purposes of identification by the TPC and the Department, I attach to its copy of the decision as Attachment 2 the undisclosed information before me which I consider in accordance with s12 of the TPC Act is publicly available, and which I find under s12(3)(c) of the Act is 'otherwise available'.

**Dated:** 14 February 2017



**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Right to Information Act 2009, SCHEDULE I - Matters Relevant to Assessment of Public Interest**

**Sections 30(3) and 33(2)**

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 2009 - SCHEDULE 2**

### **- Matters Irrelevant to Assessment of Public Interest**

### **SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest**

Sections 30(4) and 33(3)

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

- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
- (b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
- (c) that disclosure would cause a loss of confidence in the government;
- (d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

## **Attachment 2**