OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2302-010

Names of Parties: Alexandra Humphries and Department of Health

Reasons for decision: s48(3)

Provisions considered: s35, s39

Background

1 Ms Alexandra Humphries, the applicant, is a journalist with the Australian Broadcasting Corporation (ABC). On 25 August 2022, she applied to the Department of Health (the Department) for assessed disclosure under the *Right to Information Act 2009* (the Act).

2 Ms Humphries sought information, from within the *past 3 years*, as outlined in her application:

> *Report conducted externally, likely by Deloitte, into procurements and contracting within the Hyperbaric diving and medicine unit.*

3 The application was accepted by the Department on 26 August 2022 and the fee was waived under s16(2)(ba) for *a journalist acting in connection with their professional duties*.

4 Additional time was sought by the Department, pursuant to s15(4)(a) to complete the assessed disclosure assessment, from 23 September 2022 to 30 November 2022. This was explained as being due to *an increase in the number of applications we've received prior to this one ... and due to the larger than normal volume of information we are needing to assess.* The *extension date* was agreed to by the applicant on 29 August 2022.

5 On 14 November 2022, Ms Humphries received a decision from Ms Sophie Doyle, a delegate of the Department under the Act. The information responsive to the request was identified as *... a report conducted by Deloitte, I note this report is in draft form.* The information was not released on the basis it was exempt under s35 (internal deliberative information) and relying on the s33 public interest test.

6 Immediately after receiving the decision Ms Humphries requested a *schedule of documents* from the Department. Also on 14 November 2022 she was advised by Ms Doyle, that a *schedule of documents (or index) is not required to be provided to an applicant under* the Act.

7 On 20 November 2022, Ms Humphries applied for internal review and provided comprehensive supporting submissions.

8 There was delay by the Department in processing the internal review, and an exchange of emails between the parties shows that Ms Humphries contacted the Department on 17 January 2023 seeking an update on progress of the internal review decision. She was advised by Mr Michael Casey, a delegate of the Department under the Act, that a decision would be released on approximately 25 January 2023.

9 On 17 February 2023, the internal review decision was released by Mr Casey. The only information identified and reviewed as being responsive to the request was the same as that identified by Ms Doyle. It was particularised in the internal review decision as:

> *… a Microsoft PowerPoint prepared by Deloitte which is undated and marked as a draft. The slide presentation is identified as an Assessment of the Hyperbaric Unit.*

10 The delegate affirmed the previous decision that the information was exempt in its entirety from release but on a different basis to the original decision maker. The internal review relied upon s18(4) of the Act, which relates to the provision of information and copyright. Because of the approach taken by the Department there were no review rights available to the applicant under the Act.

11 The delegate included commentary in the internal review decision:

- in response to the submissions made by the applicant;
- about the public interest test and s33 considerations;
- addressing the requested schedule of documents; and
- explaining that as reviewer, had he *not formed the view information was protected under copyright, I would rely on s39* [information obtained in confidence] *ahead of s35* [internal deliberative information] *as favoured by the delegate at first instance.*

12 On 20 February 2023, Ms Humphries sought external review as may be available to her under the Act and in conjunction, or as an alternative, sought to complain under the *Ombudsman Act 1978*. This was with respect to the handling of her request for information and the Department's reliance on s18 of the Act and copyright law. The application was accompanied by supporting material and submissions from the applicant.

13 On 16 March 2023, I wrote to the Secretary of the Department, Ms Morgan-Wicks, to raise concern with the purported reliance on s18 which is neither an exemption nor a refusal provision in the Act; it is intended to guide the methods of provision of information. I also advised the Secretary that it would be open to the Department to reconsider its position, having regard to s39 (as this was provided as an alternative exemption in the internal review decision).

14 On 24 March 2023, Ms Megan Hutton, a delegate of the Department under the Act, released a *supplementary internal review* decision (supplementary decision).

No additional information was identified as being responsive to the request and the decision was again that the information was exempt in its entirety.

15 The exemption decision was made pursuant to s39 of the Act as being information obtained in confidence, having regard to s35 (internal deliberative information) and the s33 public interest test. The previous reliance on s18(4) and copyright law was properly abandoned in the supplementary decision, and the applicant's external review rights under the Act were consequently restored.

16 Ms Humphries remained dissatisfied with the Department's supplementary decision and on 29 March 2023 advised, in reply to an email from my office, that she sought external review of the supplementary decision. Her application was accepted under s44, as it was made within 20 working days of having received an internal review decision.

17 Ms Humphries also requested priority processing of her application which I granted having regard to my Priority Policy, the applicant's submissions and the following considerations:

- The delay that occurred in the release of the original and internal review decisions;
- That a further reconsideration was required from the Department as a consequence of the novelty of the approach taken at internal review;
- That no information responsive to the request has been released at all and the subject information is limited in terms of volume; and
- The broader public interest raised as to the *contracted review of a major public procurement and contracting program.*

18 The information identified as being responsive to the request is variably described in the decisions. It is a PowerPoint presentation of 19 slides that contains five findings and recommendations of Deloitte covering *an examination of processes relating to the management of assets, procurement processes (including conflicts management) and leave.* It will be referred to in this decision as the PowerPoint.

Issues for Determination

19 The issue for determination is whether the information, being the PowerPoint, in whole or in part, is eligible for exemption under s39 of the Act.

20 As s39 is contained in Division 2 of Part 3 of the Act, the assessment is made subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under this section, I must then determine whether it would be contrary to the public interest to disclose it by having regard to, at least, the relevant matters in Schedule 1.

Relevant legislation

21 Relevant to this review are ss33, 35 and 39 of the Act. Those sections are copied in Attachment 1 along with s33 and Schedule 1.

Submissions

Applicant

22 The applicant made submissions setting out the basis of her request to this office in February 2023, including the information requested, her concerns at the handling of the assessed disclosure request, and that she is seeking:

> *...a review of the actual decision made and request that you investigate how the Department of Health handles the handling of RTI requests relating to non-personal information. In order to expedite an already excessive long RTI process I ask that you separately look at this review and the general handling of non-personal RTI requests by the Department of Health.*

23 In addressing the substantive matter of her request for information she went on:

> *At issue here is a basic RTI request for information relating to the management of a critical piece of health infrastructure that has eventually come down to whether information in a 'draft' power point presentation, of unknown date, length and content can be accessed, in any part.*
>
> *After almost 6 months no information has been made available about the date of the document, the number of slides, the context in which it was commissioned or whether any activity in relation to the 'draft' report has occurred. The Agency has not even made available a copy of the opening slide (that would have included the copyright/confidentiality clause). Even the branding of Deloitte has not been released. No information has been released in terms of numbers of people interviewed or the duration of the review.*
>
> *The internal review of the 17 February 2023 does reveal that Deloitte was engaged on 23 March 2021 but no other details. By inference the undated presentation/draft report was made between 23 March 2021 and my initial request of 25 August 2022. There is reference to the report being dated 2021. So by the 17th February 2023 this information could be up to 20 months old (alowing 2-3 months for a multinational business to supply a draft progress report). Thereby losing most if not any of the sensitivities that may surround its contents.*
>
> *The Agency took almost 10 weeks to reject my application. The*
>
> *Agency took almost 3 months to reject my internal review.*
>
> *The Agency not only completely changed its entire reasoning for rejecting my application between the original decision and the internal review but did so in a way that erodes several areas of practice and*

procedure that the Ombudsman Office has set down for processing of RTI Requests.

Furthermore the argument constructed for the use of copyright to trump access under the RTI Act and to prevent an applicant from seeking review by the Ombudsman threatens the effective operation of the Act.

Given the way the decision was conveyed "While the information has not been provided because of copyright, the avenue under s44 of the Act creating the right to apply for an external review of the decision is not available*." many applicants would simply cease pursuing their request.*

I would suggest that the likely outcome of the Department of Health deploying this argument wil be an increasing number of instances where external parties insert copyright claims in the briefings, reports and communications they have with this provider and other providers.

A pattern of behaviour bound to spread like wildfire.

24 In the submissions the applicant also addressed the copyright argument, however that was resolved in the supplementary decision and so it is not necessary to revisit that here. The review submissions continue:

The Agency's approach to Section 3

The Agency's officer reached the conclusion that "my view the inclusion of a statement concerning s3 is not a mandatory requirement but a personal preference of the decision maker." *This statement downplayed the arguments I presented, ignored numerous decisions by your office in placing the onus on agencies to justify non-disclosure and ignored the reasoning in the Supreme Court decision 'Gun Control.'*

This reasoning explains why the RTI Officer and the Agency has failed at every stage in this request to facilitate the provision of information as opposed to trying to provide the maximum amount of information and detail (ie date of the document, number of slides, factual material, a synopsis etc, number and level of the people interviewed/consulted).

It would be useful for the Ombudsman's Office to once again clearly articulate what is required by Section 3 and how it should be applied in determining access requests.

Provision of a Schedule to assist the applicant

Aside from the rebuke to your office – "The Ombudsman, I note, has not included a Schedule for a publicised decision since 16 March 2010." *The Agency's RTI Officer demonstrates a clear indifference to the assistance that a schedule provides an applicant. In this instance, as a journalist trying to establish a full awareness of a set of facts, circumstances in the public interest it is of great assistance to know the date of information, the number of slides in a powerpoint presentation and its general content.*

I would request, especialy given the unreasonable delays in this case to date, that your office provides a schedule (or require the Agency to do so) of the requested information containing the information that can be released (Date, number of slides etc). First to remedy the unreasonable delays in this application, Second to provide a useful example to this agency of the ease and benefit of providing schedules.

It is my understanding, and I believe mentioned in an annual report, your office has returned requests to an agency, where there has been an external review and no schedule was provided, to assist your office in its determination.

Section 39 Information Obtained in Confidence

As per the arguments in relation to copyright this information was generated from information held and controled by the agency, the private sector provider was only able to access the data, information and people interviewed with permission and under the authority of the Agency.

Whilst the private sector provider could select, modify and rearrange the information accessed it had no right to withhold, transmit and share the information without permission of the Agency.

Whilst there was a high level of confidentiality that level, degree and extent of that confidentiality was purely under the control and discretion of the Agency. Whilst in this case, driven by unknown reasons, the Agency restricted the distribution of the information on the slides nothing prevented the Agency from changing the extent and diversity of that sharing.

As per the arguments in relation to copyright, the agency should not be allowed to contract out government information from the RTI Act or give it protection (ie Section 39) that in the absence of the letter of engagement it did not have.

The arguments in my internal review in favour of the public interest still apply here.

Therefore Section 39 either has no application or the public interest factors I have outlined previously justify disclosure.

Furthermore as stated in the internal review decision of the 17 February the slides are dated sometime in 2021 making the information very dated and further increasing the arguments for disclosure.

In addition the stated lack of action revealed by the original decision and the internal review favours the view that there is little justification to continue withholding the information. Clearly a decision was formed within the agency, that despite initial concerns, the agency determined no further action was warranted. At best the arguments in favour of continued non-release would largely by excluded by Schedule 2.

Public Interest Considerations

(a) The reviewer failed to alocate any indication of the weight to be given to this factor. I would argue that the weight should be considerable.

(b) The reviewer failed to consider that withholding this information has a clear potential to hinder public debate in the media, in parliament or within health circles. If the management of the Hyperbaric Unit received a clear bill of health this would increase public trust in that unit and the agency in general. Significant weight for release.

(c) The reviewer failed to appreciate that the absence of a decision, final report or folow up action is a matter of great import especialy in relation to a multi million dollar system and one at the centre of life and death consequences for an important group of Tasmanians. If the draft report concluded that no action was required that conclusion would bolster faith in the general administration of the Health system and quieten suspicions re the Hyperbaric Unit management (concerns which trigger the original inquiry). Considerable weight in favour of release.

(d) The reasoning here by the review officer is unclear and seems to dismiss the context that would be provided by an objective external reviewer. Indeed it would be expected that context would be at the centre of this power point presentation. Depending on the content of the presentation the weight for this factor would be considerably more than that given to it by the reviewer.

(e) Happy to accept this determination in absence of any information about content.

(f) Inaction or lack of follow up is an important element of scrutiny and accountability. The Review Officer ignores the damage to these elements when inaction or lack of follow up are not subject to informed scrutiny. The weight that should be accorded this element is significant. In particular the officer made no attempt to respond to the arguments made in my internal review on this point.

"However, of particular note, the Department fails to genuinely consider schedule 1 (1) (f) 'whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation' and schedule 1 (1) (g) 'whether the disclosure would enhance scrutiny of government administrative processes'. Regarding both these matters, release of information regarding the contracting and procurement in relation to a $12 million project wil help the public understand how the Tasmanian Government came to their decision in relation to how contracts, procurement decisions and any issues arising with compliance or

performance are handled. This information would enhance scrutiny of government decision – making processes and government administrative processes, which would lend considerable weight in favour of disclosure."

The Review officer fails to offer anything other than his conclusion as to why access to this information would not increase informed public participation. I would allocate strong weight to this element.

(g) Whilst not having access to any of the information at issue it could be argued that any level of mismanagement of a public health resource impacts on several segments of the population. I would allocate weight to this element.

(h) It is difficult to understand why the reviewer did not think this element was relevant. The management and/or mis/poor management of a multimillion dolar critical life saving unit is one of the more significant public health and safety issues in Tasmania. Great weight should be allocated in favour of release.

(i) Agree not relevant on given information.

(j) The media information in 2016 indicated that a functional hyperbaric unit would be a considerable contributor to the economy of Tasmania – especially the important aqua culture sector. Some weight favouring release.

(k) In the absence of further information would accept this weight.

(l) The disclosure of any negative information impacting upon senior staff on the public payroll is 1. A given and unavoidable consequence of being employed and receiving public monies. 2. The functioning of a hyperbaric unit would promote the interests of a number of individuals whose lives depend on a wel managed and functional hyperbaric unit. 3. It would be surprising that in a preliminary report into procurements and contracting that individual officers would be identified.

(m) Intriguing that this review officer rejects the Ombudsman's determinations on this issue. I would argue that public health officials, under their specific terms of employment, under their professional requirements and general public sector laws and regulations are bound to offer full, frank and candid disclosure when requested by superiors, Ombudsman and agencies like Tas Police and the Integrity Commission. The reviewer has given too much weight to the timid, shrinking violet perception of the Tasmanian public sector and too little to their legal and professional requirements to be objective and open. The factors favouring release outweighed, by a large margin, any factors favouring nondisclosure.

(n) Accept this conclusion.

(o) As per (n) public officials, at any level but certainly senior levels, have a duty to be truthful and fully cooperative with any investigator. I would also assume that most officials would not be specifically identified or have their details redacted under the Act.

(p) This was addressed in my internal review request and the reviewer has failed to provide evidence or an assessment of the weight they put on this element.

(q) As indicated in my internal review the argument and weight given to industrial relation concerns seems peculiar and given too much weight.

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

The Officer makes no attempt to address the arguments I presented on this point.

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

I do not understand the reference to children in care. As indicated in my response to (n) and (o) the candour of officers should be a given and expected of all officers.

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

I am assuming that somewhere in this presentation that Deloitte reached the conclusion that the review into procurements and contracting had been hampered by the actions of certain officers. This conclusion would be a significant reason to release this information in the public interest.

In conclusion

I find the arguments against release poorly formed, lacking evidence and far too much weight allocated to them.

*The reviewer has failed to **fully** consider all relevant factors, was unable to rebut the arguments raised in the internal review and failed to give the factors in favour of release their proper weight.*

Despite reference to recent Ombudsman decisions and 'Gun Control' the Reviewer failed to undertake an informed, fair and considered balancing of the factors from Schedule 1.

25 Following the release of the Department's supplementary decision, the applicant provided the following further submissions in March 2023, verbatim:

I seek a review of the Supplementary Review, dated 24th March, of my application for information in relation to the administration of a multimillion dollar public health facility and service.

I note that none of the concerns I raised in my review application have been addressed or rectified. Indeed the highly unusual step of asking the Department to conduct a supplementary review has revealed not a single piece of information and has only added to the delay in the lawful processing of my initial request. This request has been delayed almost 6 months.

I repeat my request for an own motion inquiry under the Ombudsman Act into the Agency's handling of this request and in the general processing of RTI applications. I would note that the agency has not updated (released?) its disclosure log since September 2022.

As noted below the vast majority of this Supplementary Review is simply a repeat of the majority of the wording (with the removal of the copyright argument) from the original internal review. The Supplementary Review was not undertaken as a fresh decision and the General Manager of Legal Services showed little independent thought or analysis.

Given the public interest arguments included in my original External Review request; the opportunities the agency had to demonstrate why they have not effectively countered the onus on them to provide the information I am legally entitled to and their perfunctory reconsideration; the powerpoint presentation should be released.

The Object of the Act

Both the original decision maker and the General Manager of Legal Services reached the conclusion that Section 3 of the RTI Act is something a public official is free to apply or not apply.

"it is my view the inclusion of a statement concerning s3 is not a mandatory requirement but a personal preference of the decision maker. Nevertheless, the delegate when making a decision is to be cognisant of this matter."

This ignores parliamentary discussion on this point when the FOI Act and RTI Acts were passed. It ignores:

- *the deliberate decision by Parliament to make Section 3 in the RTI clearer and stronger than it had been in the FOI Act.*

- *Judicial and Information Commissioner/Ombudsman/Tribunal decisions on how Object Clauses are to be applied in beneficial legislation like RTI and Ombudsman Acts.*
- *how Objects clauses operate to ensure the onus/burden of proof is on agencies seeking to exempt information under an RTI Act.*
- *the clear guidance on page 2 of the Ombudsman Manual:*

"As s 3(4) states, the Act should be interpreted so as to further its objectives. The subsection also states Parliament's intention that decisions under the Act should be made with a view to facilitating the maximum amount of information, quickly and as cheaply as is reasonably possible.

In line with the title to the Act and with s 7 of the Act - a section which is central to the Act's operation - s 3 speaks of "a right to obtain information about the operations of Government". This statutory right has been created to assist in the better working of democracy, and should be seen as part and parcel of our democratic system of government. The administration of the Act, including the making of decisions under the Act as to whether information requested under it is or is not released, should be approached in this spirit, not defensively."

The entire processing of my request and the decision by the Agency to treat Section 3 as merely discretionary to their administration and application of the RTI Act demonstrates how this approach undermines the RTI Act.

Your office needs to remind all public officials, but in particular the officers in this agency, that Section 3 is more than "the personal preference of the decisionmaker".

Schedule of documents

I note the General Manager of Legal Services has simply repeated the brief, and disparaging critique of your office, and rejected the need in most cases and best practice in all cases to provide a schedule of documents.

The General Manager has made no attempt to address the points made in both my original internal review request and the external review request to your office.

... [copyright discussion omitted]

Information Obtained in Confidence

From Section "39 provides: to "I am of the view that the report prepared by Deloitte was for the purpose of expert advice that was not at hand within the public authority." is simply a cut and paste from the original internal review.

Furthermore the General Manager has shown no independent consideration, and in addition provides no evidence of, why no expert advice was available within the Department. A Department that has considerable staff and resources with internal audit and investigatory capacity and the

ability to engage other services within the wider public service including Tas Audit, the Integrity Commission and your office.

The General Manager quotes a very early 1994 Qld Information Commissioner decision ignoring numerous determinations that make it clear that an agency cannot create or convey an expectation of confidentiality that runs counter to the RTI Act. In circumstances like this in engaging Deloitte the agency has a duty to convey to the company that information provided by the company needs to meet the requirements of the RTI Act.

Public Interest Test

Schedule 1 Matters

The General Manager has simply pasted the internal reviewer's comments on Schedule 1 with no changes. The General Manager failed to independently address these matters and to undertake a genuine weighing and balancing process. This is an alarming dereliction of their obligations under the RTI Act and makes a mockery of your request for the agency to reconsider and remake their internal review decision.

As an applicant I have received no benefit from having a fresh decision made.

I renew my request for an expedited external review.

Department

26 The Department did not make specific submissions in response to this external review, beyond the reasoning of its decisions. In the absence of submissions, and given the varied decisions of the Department, I have primarily had regard to the supplementary internal review decision, as it represents the Department's most recent and final position with respect to the assessed disclosure.

27 The supplementary decision deals with a number of matters, some responsive to the letter sent to the Secretary and some responsive to submissions from the applicant. For the purposes of the decision at hand, I extract from the supplementary decision the reasoning with respect to s39. I include extracts relating to those other matters as relevant in the discussion below.

28 The Department's position, with respect to the considerations under s39, then s35 and s33 public interest, is as follows (footnotes omitted):

Section 39 Information obtained in confidence

[s39 text omitted]

In order for the exemption in s39 to apply it is necessary to establish that the information was communicated to the public authority in confidence. The Right to Information Act 2009 Tasmania Ombudsman's Manual *states:*

There are two limbs to the section, but each is subject to the same precondition – that disclosure of the information would divulge

> *information communicated in confidence by or on behalf of a person ... to a public authority or Minister. Satisfaction of this precondition required evidence. There must be evidence which goes to show that the relevant information was communicated in confidence in this way.*

For s39 to apply it is first necessary to establish that the information was communicated to the public authority in confidence. While the matter of whether information is communicated in confidence *is a question of fact, the meaning of the expression was explained in some detail by the Information Commissioner in* Re "B" and Brisbane North Regional Health Authority

> *... the phrase* communicated in confidence *is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

I am of the view that the report prepared by Deloitte was for the purpose of expert advice that was not at hand within the public authority.

While the expectation of confidentiality is explicitly stated or can be inferred, I consider that a shared understanding that the information would be kept confidential. The intention for providing the information, the nature of the information, the purpose for which the information was provided and the circumstances in which it was provided are, in my view, al factors in support of the fact the information was communicated in confidence.

For the reasons outlined above, I consider the information has been treated as confidential suffices to prove the information was communicated in confidence within the meaning of s39 of the Act.

The second requirement for s39 is that either:

> *(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.*
>
> *The requirement of (a) requires that the information would have been exempt if it were generated by a public authority. The focus of this provision on what would have been the case if the information had*

been generated by a public authority naturally leads to consideration of the exemption provisions at s35 that depends upon creation of the information by a public authority. The presentation of the Draft Report *is confidential advice from an external consultant, which, if it had been prepared within government, attracts the exemption under s35.*

Section 35 Internal deliberative information

[s35 text omitted]

Section 35(2) excludes from exemption any information which is purely factual information whereby for the subsection:

> *The exclusion of purely factual information is intended to allow disclosure of information used in the deliberative process. A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.* Purely factual information *does not extend to factual information that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.*

I concur with the delegate's understanding of the law for s35.

To be satisfied that this information is exempt under s35(l) specificaly, consideration must be given 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.

As noted, the assessment was prepared by an external consultant. The report does include factual information, but I am satisfied the information is not independently factual in that it cannot be separated from the deliberative nature. I am also satisfied that it does not include a final decision, order or ruling given in the exercise of an adjudicative function or is a reason which explains such. This satisfies s35(3). The information is also not older than 10 years, satisfying s35(4).

Even though I am satisfied that s35(1)(a) is met, the following brief comments address (b). My view is that as the report was prepared under a contractual arrangement it is unlikely any future engagement would not reasonably impair the obtaining of similar information. Even though this might be the likely situation, it is probable any future engagement would attract narrower terms addressing the management and use of the information provided.

I am satisfied therefore that the information meets the requirements of s35 of the Act and is exempt in full for the reasons outlined above.

Section 33 Public interest test

[s33 text omitted]

The section sets out how the decision maker determines if the disclosure of information is contrary to the public interest. For this the following matters of Schedule 1 have been applied in relation to the public interest test as required by s33:

[Schedule 1(1)(a), (d), (m), (n), (p) and (q) text omitted]

Public interest

There has been 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 wil not necessarily lead to the conclusion that disclosure of information relating to it wil be in the public interest.*

Public interest has been variously described as the sum of special interests, the sum of all private interests, the net result of individuals pursuing their self-interest, the broad shared interests of society, and the shared or collective values of the community – the goals or values on which there is consensus.

The meaning of the term was considered in some detail by the Full Court of the Federal Court of Australia in its decision McKinnon v Secretary, Department of Treasury *where Tamberlin J noted*:

> 9 *The expression* in the public interest *directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. There will, as in the present case, often be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies and these are sometimes loosely referred to, in my view, as opposing public interests...*
>
> 10 *The expression* the public interest *is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...*

The High Court considered the phrase public interest in O'Sullivan v Farrer, *and described it as:*

> *... the expression* in the public interest, *when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only* ...in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view...

Who may be considered the relevant public *when public interest is at issue has also been considered by the High Court, which found that the public need not include the entire population, but rather, it may include only the interests of a substantial section of the public.*

What is not in the public interest is easier to list:

- private interests;
- personal interests;
- personal curiosity;
- personal opinions;
- parochial interest; and
- partisan political interests.

The above list has been categorised as motivation *type issues by the NSW Ombudsman where focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties), or distinguishing between decisions made in good faith (ie, honesty, for the proper purpose and within power) from those made in bad faith. The meaning of the term, or approach, indicated by the use of the term, is to direct consideration away from such interests towards matters of broader concern.*

So, the public interest test requires a balancing of the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of government and its agencies on the other.

The objective of the Act is to increase the accountability of the executive to the public and the ability of the public to participate in their governance by giving the public the right to obtain information held by public authorities and Ministers relating to the operations of Government.

However, adopting the approach in the judgement by Brett J in Gun Control Australia Inc v Hodgman & Anor 26 *where the factors in Schedule 1 relevantly arise (having regard to the nature of the*

information in question) and then giving proper, genuine and realistic consideration to each of them through an active intelectual process before arriving at a finding upon each. I note the delegate at first instance took into consideration (a), (d), (m), (n), (p) and (q). If applying the public interest test, I would also consider paragraph (g).

Schedule 1 matters

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

I accept that the disclosure of the information reflects public interest with the community having an understanding of and an involvement in the democratic processes. The public interest is in the context of operational matters within the health service.

Government information being accessible meets the objective of the Act by contributing to transparency and accountability.

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

The applicant contends that there is a matter of public interest surrounding the Hyperbaric Unit based on media releases and a media article. As discussed above, an interest by the media does not automatically mean that there is a public interest in the matter. An examination of Hansard did not identify any questions regarding the matter. I am not satisfied there is a debate being conducted about the Hyperbaric Unit.

This matter is not relevant.

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

The only relevant guidance provided by the Ombudsman about (c) notes that ...inform refers not only to reasons for a decision itself, but also to any other information that would provide members of the public with a greater understanding of the decision. As there has been no decision, the information does not serve the function of informing the public.

This matter is not relevant.

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

While the delegate considered this mater relevant, I hold a counter view and consider the assessment does not provide contextual information to aid in an understanding of government decisions.

The Ombudsman when considering (d) has framed it in the context of releasing internal staff names, positions and contact details and

declared such information has the potential to be an aid in understanding government decisions. My view the information includes observations but such commentary cannot be characterised as a decision comprising a concluded opinion or a determination.

This matter is not relevant.

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

The information does not include comment about government dealing with the public. This matter is not relevant.

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

As noted the draft information does not include a decision but is information upon which to consider the observations towards formulating an assessment.

This matter is not relevant.

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

While I consider this matter is not relevant the emphasis is placed on whether the information would enhance scrutiny. In my view, the fact that the information would not enhance the scrutiny of government administrative processes has a neutral effect on the application of the public interest test. The only relevance of saying so is to exclude that consideration as a positive factor in favour of disclosure.

The AAT has said that there is an 'essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better informed decision-making and increased scrutiny and review of the government's activities and ensuring that government may function effectively and efficiently'.

My view is the information would not increase public participation.

…

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

The Ombudsman's commentary has focussed harm to be physical or injury but has not considered reputational harm that may create a negative perception of an individual.

My view is the answer to this matter is in the negative for the authors and officers of the public authority where disclosure would harm their interests. In forming this view it is a reason to find that the disclosure would be contrary to the public interest.

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

The information exchanged by officers of a public authority is understood to allow ideas to be tested and examined. This thinking generally refers to the process of weighing up or evaluating competing arguments or

considerations – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. The interviews conducted by the consultant does not represent a final decision and in my view this outweighs the public interest. I am guided in this view

> *...when one officer submits a draft to another, it is an expression of opinion, recommendation or advice as to the appropriateness of the proposed draft. It is contrary to the public interest to disclose documents which upon due consideration, the proposed signatory has regarded as wholly inappropriate for dispatch or inappropriate for dispatch save in an altered form.*

While the Ombudsman is not convinced by this traditional and, I consider, valid argument for deliberations to be considered confidential. Any apprehension that views expressed in the course of an exchange that may be publicised is inhibiting. Officers will be less likely to communicate frankly, and hence the quality of the deliberations wil be compromised.

…

(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;

As to (p), this matter relates to the broader issue of human resources.

The interviews conducted by the consultant were conducted under the understanding that these would be kept confidential.

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

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

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

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

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

In considering the matters in Schedule 1 as required by s33(2) I would find matter (a) in favour of release. While I find matters (m), (n), (p) and (q) do not support disclosure.

In adopting the delegate's reasoning and my additional comments, on balance, I determine if s39 applied the disclosure of the information would not be in the public interest as if the information had been prepared by the public authority under s35.

Analysis

29 The information responsive to Ms Humphries' request is the 19 slide PowerPoint, with the document title *DoH Hyperbaric Unit DRAFT 01072021*. The document is undated but the properties indicate that the *last modified* date is 2 July 2021.

30 In its supplementary decision the Department claimed the PowerPoint to be exempt in its entirety, pursuant to s39(1)(a) *information obtained in confidence.* While relying on s39, consideration was also given to s35 and the public interest matters arising under s33 by reference to Schedule 1.

Section 39

31 In order for information to be exempt under s39(1)(a) of the Act it must be information that if disclosed *would divulge information communicated in confidence by or on behalf of a person or government to a public authority.* It must

also be established that *the information would be exempt information if it were generated by a public authority*.

32 I must be first satisfied that the information has been communicated *by or on behalf of a person or government* to the Department.

33 Slide 2 of the PowerPoint is a brief letter (undefined date) from a partner at Deloitte to the Acting Manager, Internal Audit at the Department. I, therefore, find that it is information that is being communicated by a person to the Department.

34 I must be then satisfied that the information was communicated to the Department *in confidence*. The factors to consider when determining that question include:[1]

- the intentions of the person providing the information;
- the extent the information has been otherwise circulated; and
- the likely consequences of disclosure.

35 I first look to any confidentiality claimed within the document itself. On slide 3, Deloitte disclaims in part as follows:

> *This report is intended solely for the information and internal use of the Department in accordance with our engagement letter dated 23 March 2021 and is not intended to be and should not be used by any other person or entity. No other person or entity is entitled to rely, in any manner, or for any purpose, on this report. We do not accept or assume responsibility to anyone other than the Department for our work, for this report, or for any reliance which may be placed on this report by any party other than the Department.*
>
> *Confidential - this document and the information contained in it are confidential and should not be used or disclosed in any way without our prior consent.*

36 The Department did not provide any particulars, such as:

- the basis of the *shared understanding* or *the purpose for which the information was provided*;
- whether there was a final, later version of the PowerPoint (which is marked as draft);
- explaining how widely, or if at all, the PowerPoint has in fact been circulated internally or externally; or
- the likely consequences of disclosure.

37 In the absence of particulars about these matters, it is not open to me to make assumptions about the engagement of Deloitte or whether the PowerPoint has

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[1] Moira Paterson, *Freedom of Information and Privacy in Australia* (2nd Edition), LexisNexis Butterworths, Australia, 2015 at 7.97.

in fact been circulated or to speculate on possible consequences from disclosure (other than those that may arise from my assessment of the information).

38 I am, therefore, confined to the text of slide 3. I find, on balance, the disclaimer is sufficient to satisfy me that the author's intention was that the PowerPoint was being communicated in confidence.

39 Before then moving to an assessment of the information under s39(1)(a), I must be satisfied that the information is not excluded by s39(2), which sets out that s39(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.*

40 I am satisfied that none of these exclusions are applicable. It is, therefore, open to me to consider the balance of the matters in s39(1).

41 The Department, in its supplementary decision, relies on s39(1)(a) and that *...the information would have been exempt if it were generated by a public authority* [and that]*... naturally leads to consideration of the exemption provisions at s35.*

42 The correct approach is to review the PowerPoint having regard to it as a whole document, but also to the information contained within it. It will be rare that a whole document, of this type, will be completely exempt under s35. There is usually some factual or innocuous information in a longer document which is either ineligible for exemption under this provision or would not be contrary to the public interest to release.

43 I do accept that prima facie the PowerPoint contains *an opinion, advice or recommendation* that has been prepared by Deloitte *in the course of, or for the purpose of, deliberative processes related to the official business of* the Department (s35(1)(a)).

44 For information to be exempt under s35, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority; or is a record of consultations or deliberations between officers of a public authority; or is a record of consultations or deliberations between officers of a public authority and Ministers.

45 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

46 According to the Act, the exemption outlined above does not apply to:

- purely factual information;[2]
- a final decision, order or ruling given in the exercise of an adjudicative function;[3] or
- information that is older than 10 years.[4]

47 In relation to purely factual information, it does not appear that the Department has properly considered each part of the PowerPoint and has instead viewed it as a whole. A more considered approach to the particular information within the PowerPoint is required. In this instance it includes four findings and recommendations for each of those findings but the PowerPoint also includes a number of index slides with no substantive information on them.

48 As in earlier decisions,[5] I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*[6] (Re Waterford) for the meaning of 'purely factual information' in s35(2). There the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word *purely* in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

49 Regarding *factual information* in the Re Waterford decision, Associate Professor Moira Paterson[7] explains:

> *In other words... it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*

50 In *Re Waterford and Department of Treasury (No 2)*[8] the AAT considered the meaning of the phrase *in the course of, or for the purpose of, the deliberative processes*. It took the view that it is the *thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*[9]

51 In reviewing each of the 19 slides I find that there is *purely factual information* contained in the PowerPoint which cannot be exempt under s35(2). Namely:

- Slide 1 – title Deloitte, draft, Department of Health: Hyperbaric Unit Controls Assessment;

[2] Section 35(2).
[3] Section 35(3).
[4] Section 35(4).
[5] See *Simon Cameron and Department of Natural Resources and Environment Tasmania* (January 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions
[6] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.
[7] Moira Paterson, *Freedom of Information and Privacy in Australia: Information Access 2.0,* LexisNexis Butte rworths Australia, 2nd edition 2015.
[8] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.
[9] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

- Slide 2 – letter from Deloitte to the Department;
- Slide 3 – 'Contents' and limitations;
- Slide 4 – 'Background & scope';
- Slide 6 – 'Summary of Observations';
- Slide 8 – 'Detailed observations';
- Slide 14 – 'Appendices';
- Slide 15 – 'Appendix A: Personnel Interviewed';
- Slide 16 – 'Appendix B: Ratings definitions';
- Slide 17 – 'Contacts';
- Slide 18 – 'Contacts' of Deloitte staff; and
- Slide 19 – 'About Deloitte.'

52 I find the content of those slides is purely factual information and those slides are not eligible for exemption and are to be released without redaction.

53 I am satisfied that the remaining eight slides are prima facie exempt under section s39(1)(a), as these do contain opinion, recommendation or advice given in the course of a deliberative process which could have been exempt information if it had been generated by a public officer. Consideration must then be given to the s33 public interest test.

Public interest test

54 Sections 35 and 39 are both subject to the public interest test contained in s33 and by extension, the relevant matters in Schedule 1 of the Act. In order for the exemption to apply, the Department must establish that *after taking into account all relevant matters, that it is contrary to the public interest to disclose* the PowerPoint, in part of full.

55 I turn to assess the balance of the slides – 5, 7, 9, 10, 11, 12, 13, and 15 – and whether the disclosure of particular information would be contrary to the public interest.

Schedule 1 matters

56 I note that the Department's approach appears to be to review and decide upon the merit of the disclosure of the PowerPoint as a whole, rather than a line by line assessment of the particular information. I urge the Department to be more conscious of the explicit intention of Parliament set out in s3 of the Act and to ensure that discretions conferred on it are exercised so as to provide the maximum amount of official information. This can often be achieved by avoiding holistic assessments.

57 The Department found in the supplementary decision:

> *In considering the matters in Schedule 1 as required by s33(2) I would find matter (a) in favour of release. While I find matters (m), (n), (p) and (q) do not support disclosure.*
>
> *In adopting the delegate's reasoning and my additional comments, on balance, I determine if s39 applied the disclosure of the information would not be in the public interest as if the information had been prepared by the public authority under s35.*

58 I agree with the delegate and the applicant that (a) favours disclosure. The general public need for government information is persuasively argued by the applicant in her submissions, in which she highlights that the information she is seeking relates to *a contracted review of a major public procurement and contracting program.*

59 I reject the Department's position in relation to matter (b) and that an absence of debate in the Hansard records is somehow to be viewed as determinative of whether disclosure would *contribute to or hinder debate on a matter of public interest.* By contrast, I find that the information is of a type that may contribute to debate as highlighted by the applicant in her submissions.

60 I further reject that it is mandatory that there be active debate in the public domain at the time of the application. The consideration here is whether the disclosure of the PowerPoint would contribute or hinder debate on a matter of public interest if it is disclosed. I find that the Hyperbaric Unit is a matter of public interest and that the information in the PowerPoint is likely to contribute to debate rather than hinder it. Accordingly, I find this weighs in favour of disclosure.

61 Contrary to the delegate, I find that (c) – whether the disclosure would inform a person about the reasons for a decision – is relevant. The factors in Schedule 1 are not to be read so narrowly as to unduly limit their application.

62 The section refers to *a decision* and it is my view that is to be read broadly. Here the information contained in the PowerPoint might inform the applicant about a number of different decisions, such as the decision to appoint Deloitte to *undertake an examination of processes,* or decisions made about asset management, annual leave management or procurement and purchasing in the Hyperbaric Unit. I therefore find that this weighs slightly in favour of disclosure.

63 Contrary to the delegate, I find for similar reasoning to (c) that (d) is a relevant consideration because the *disclosure would provide contextual information to aid in understanding of government decisions* on those matters covered in the PowerPoint. This weighs slightly in favour of disclosure.

64 In the same vein, I find that (f) is relevant and favours disclosure. The question here is whether disclosure of the PowerPoint would *enhance scrutiny of government decision-making and thereby improve accountability and participation*. I

agree with the applicant that it would improve public understanding. The PowerPoint contains information about a Hyperbaric Unit, specifically *an examination of processes relating to management of assets, procurement processes (including conflicts management) and leave.* That clearly goes to scrutiny and thereby accountability and participation.

65 Contrary to the delegate, I find that (g) – whether the disclosure would enhance scrutiny of government administrative processes – is a relevant consideration for similar reasons to (f). The scrutiny of government administrative processes here being that of appointing Deloitte to conduct the assessment, the findings of Deloitte's review and the use (if any) of the product of the consulting work.

66 I am confused by the Department's conclusion that the release of this information would not enhance scrutiny of government administrative processes. Release of further information about the Department's operations in the Hyperbaric Unit, in a document specifically reviewing the administrative processes that Unit undertakes, would enhance the scrutiny of these processes. I find this weighs strongly in favour of release.

67 The delegate makes commentary with respect to (m) – whether the disclosure would promote or harm the interest of an individual or group of individuals – but the reasoning is opaque. I do not agree that I have limited my consideration of (m) to physical harm or actual injury, I regularly consider harm to interests to be broader than this in my external review decisions. It is unclear why the release of this information would cause harm to the interests of the authors or Departmental staff or cause them reputational harm, as claimed by the Department. I give little weight to this consideration.

68 The delegate has considered (n) concluding that if the PowerPoint was released that:

> *Officers will be less likely to communicate frankly, and hence the quality of the deliberations will be compromised.*

I cannot accept the notion that public officers, or those contracted to perform work for a public authority, such as Deloitte was here, will depart from their professional and statutory obligations as a consequence of disclosure. This proposition is squarely rejected as a matter favouring non-disclosure.

69 In assessing whether disclosure of information *would prejudice the ability to obtain similar information in future*, regard must be had to the information itself. For example, if it was information obtained by an informant where disclosure of the information may reveal the identity of the informant or procedural matters relating to an investigation.

70 It should not be read into the Act that any justification may be made for a public officer to depart from the proper performance of their ordinary duties in an attempt to displace disclosure now or into the future.

71 In reviewing the information, I am not satisfied that this consideration is relevant and give it no weight.

72 The delegate, in considering matter (p) – whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff – found that:

> *The interviews conducted by the consultant were conducted under the understanding that these would be kept confidential.*
>
> *If the public authority officers become aware that their communication and comments are attributed to them, they may not be as open and frank in their communications as they otherwise would. This would have a significant adverse effect on the public authority's ability to manage matters.*

As in (n) above I reject that it is open to interpret (p) as justifying improper conduct of public officers as a consequence following disclosure of information. This proposition is without merit.

73 All of the relevant public servants are managerial staff and bound by the Code of Conduct in the *State Service Act* 2000. To suggest that these staff would breach their obligations to act honestly and with integrity due to the potential for their comments to be released under the Act or would refuse to cooperate with a review does not seem plausible. It is certainly not behaviour to be encouraged and such an interpretation of matters (n) and (p) seems to be in conflict with the Object and spirit of the Act. Moreover, the PowerPoint is short and not highly detailed, with no personal attribution of comments made by surveyed staff.

74 Accordingly, I do not consider that significant weight is to be given to this matter.

75 Similarly, the delegate has given weight to (q) – whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority – but the reasoning is opaque. I agree with Ms Humphries that the rationale here is *peculiar* and that this matter has been *given too much weight* in these circumstances. This matter does not appear to be relevant and I give it no weight with respect to whether disclosure would be contrary to the public interest.

76 While the Department has put these arguments under matter (n), which I do not agree is appropriate, there is a general consideration that internal deliberative information was considered by Parliament to warrant exemption in some circumstances. Draft documents which show tentative thinking processes can be validly exempt and this document is clearly marked as a draft. The Department observes that it does not represent a final decision of the Department and it has not found any final version to be responsive to Ms Humphries' request, indicating that the document was never finalised and perhaps was not adopted by the Department.

77 I am less persuaded that the tentative quality of the document is as relevant in this instance, however, due to the fact that the PowerPoint was prepared by a paid consultant and appears to be the final work product of that consultancy.

78 In summary, on balancing the Schedule 1 considerations as discussed above, I am satisfied that the disclosure of the 8 slides would not be contrary to the public interest.

Schedule of Documents

79 The applicant complains in her review submissions about the approach taken by the Department to her request for a Schedule of Documents (extracted in Submissions above). I find it necessary in light of her submissions and the Department's response to address this.

80 The applicant sets out the utility to her from a Schedule of Documents being provided in response to a request for information, and she refers to the guidance provided in the Ombudsman's Manual[10] (the Manual).

81 The Department's position, as captured in the supplementary and original internal review decisions, by contrast provides:

> ***Schedule of Documents***
> *A Schedule of documents is not mandatory as noted in an email dated 23 December 202! from the Ombudsman to public authorities that stated:*
>
> > *While it is not a requirement to create a schedule (or index) of information when assessing an application under the RTI Act, we strongly encourage you to consider doing this as a matter of course. ...*
>
> *The Ombudsman, I note, has not included a Schedule for a publicised decision since !6 March 20!0.*
>
> *I do not consider it is necessary or relevant for a Schedule to be included as the request is for a copy of a report prepared by an external provider.*

82 I find the suggestion that there is a failing on my part, as Ombudsman, in not preparing a Schedule of Documents is misplaced. It fails to appreciate the differing roles and functions of the public authority as the holder of information and those of the Ombudsman as the external reviewer.

83 Although the delegate is quite right that there is no statutory requirement for a Schedule of Documents, it is recommended as best practice for decision makers. I note from the Manual that when a public authority is preparing the

[10] Ombudsman Tasmania, *Right to Information Act 2009, Tasmania: Ombudsman's Manual,* July 2010. *Available at* www.ombudsman.tas.gov.au/right-to-information

Statement of Reasons:

> *i. where there are numerous documents, it should use a Schedule of Documents to better explain the decision with respect to each document*;[11] and
>
> *ii.* the Schedule of Documents *is invaluable in helping satisfy these requirements with clarity.*[12]

84 It is a valuable tool that I continue to promote for delegates and in the absence of a Schedule of Documents the decision maker must have some other equally satisfactory approach. The Department's delegates are therefore encouraged to reconsider the approach taken. I note that I have previously undertaken external reviews relating to the Department for which a Schedule of Documents was included, so it is unclear why it is so strongly arguing against their use here.

85 Providing Ms Humphries with a Schedule of Documents when she requested this would appear to have been a more efficient use of time than formulating arguments as to why this should not occur. I again urge the Department to be more conscious of the Object of the Act and that this is beneficial legislation intended to help applicants obtain the maximum amount of information. Ms Humphries concerns about the closed and combative approach of the Department in responding to her request do appear to have justification.

Preliminary conclusion

86 For the reasons given above, I determine that the exemption claimed by the Department pursuant to s39 is set aside.

Conclusion

87 As the preliminary decision of 7 June 2023 was adverse to the public authority it was made available to the Department, under s48(1)(a) of the Act, for input before the decision was finalised.

88 The Department was invited to provide submissions in reply, or advise if it did not wish to do so, by 22 June 2023. No submissions were received and on 23 June 2023 the Department was provided a further opportunity to respond, but elected not to do so.

89 In the absence of submissions from the Department my position remains unchanged.

[11] The Manual at 8.3, p56.

[12] The Manual at 8.3, p57.

90 For the reasons given above, I determine that the exemption claimed by the Department pursuant to s39 is set aside.

Dated: 29 June 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant legislation

Section 33 Public interest test

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

Section 35 Internal deliberative information

(1) Information is exempt information if it consists of –

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

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
(2) Subsection (1) does not include purely factual information.
(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or
(b) a reason which explains such a decision, order or ruling.

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

Section 39 Information obtained in confidence

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

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

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

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
(b) relates to trade secrets or other matters of a business, commercial or financial nature; and

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

SCHEDULE 1 Matters Relevant to Assessment of Public Interest

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

(a) the general public need for government information to be accessible;
(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
(c) whether the disclosure would inform a person about the reasons for a decision;
(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
(g) whether the disclosure would enhance scrutiny of government administrative processes;
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
(i) whether the disclosure would promote or harm public health or safety or both public health and safety;
(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
(k) whether the disclosure would promote or harm the economic development of the State;
(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a' public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2206-006

Names of Parties: C and Sustainable Timber Tasmania

Reasons for decision: s48(3)

Provisions considered: s19

Background

1 Sustainable Timber Tasmania (STT) is a Government Business Enterprise that is responsible for sustainably managing public production forests and for producing and selling forest products from those forests. The applicant, C, is a business owner with a professional interest in the state's timber resources.

2 On 9 May 2022, C made an application to STT for assessed disclosure under the *Right to Information Act 2009* (the Act). He paid the relevant fee.

3 C sought the following Forest Practices Plans (FPPs) and harvest information relating to 23 coupes managed by STT:

> *1. Forest Practices Plans including any amendments for the following coupes:*
>
> *CD103A CO008A EP011A FR039A FR041A MD102A NL115H*
>
> *SB038A SB040A FR041B MN001E MN023A RU047E SB009A SY002A*
>
> *TY042F UR056A*

UR101D

FR015A

CF023B

GL108A

SA152C

Puzzle Link

2. *Information as to whether these coupes listed at 1 above have been harvested or not*

3. *If coupes at 1 have been harvested/partially harvested, please advise harvest volumes by species, sawlog grade and/or pulp volumes.*

4 On 16 May 2022, Ms Jenna Hammond, the RTI Coordinator for STT and a delegated officer under the Act, wrote a letter to C purporting to release a decision on his application. The letter set out that STT would provide the information responsive to Part 2 of his request *through active disclosure* but refused him access to Parts 1 and 3 of his request *in accordance with section 19(a)* [sic] on the basis that the work involved in providing the information requested would substantially and unreasonably divert its resources from its other work.

5 On 17 May 2022, C responded to STT expressing his dissatisfaction that consultation, required under s19(2), had not occurred prior to the making of the purported decision. That consultation is aimed at giving the applicant a reasonable opportunity to consult with a view to being helped to make an application in a form that would remove the ground for refusal.

6 In reply to C, on 19 May 2022, Ms Hammond acknowledged that the purported decision should not have been made prior to consultation and:

> *…should have indicated that* ***Sustainable Timber Tasmania is inclined to refuse parts 1. and 3. Of your information requests unless you wish to further refine your request.*** *I apologise for this error on behalf of Sustainable Timber Tasmania.* [emphasis original]

7 After a period of consultation by way of email, on 27 May 2022 STT actively disclosed the information described in Part 2 of C's request but indicated it remained *inclined to refuse* Parts 1 and 3 pursuant to s19(1)(a) if C did not further refine his request.

8 On 8 June 2022, Ms Suzette Weeding, a delegated officer under the Act, released a decision to C. Ms Weeding signed the decision as the *Right to Information Act 2009 Principal Officer*. In it STT maintained its refusal to provide the information in Parts 1 and 3 pursuant to s19(1)(a). Information about C's review rights, required to be provided pursuant to s22(2)(c), was not included in the decision.

9 On 12 June 2022, C lodged an application for external review of the original decision with this office. Because the decision appeared to be made by the principal officer of a public authority, no internal review was not required by virtue of s45(1)(a) of the Act. After further contact between my office and

STT, it was clarified that Ms Weeding is not the principal officer of STT as defined in the Act. It was then necessary for C to make an application for internal review, which he did on 26 June 2022.

10 On 11 July 2022, an internal review decision was released to C. It was made by Mr Steve Whiteley, the CEO of STT and its principal officer. It affirmed the original decision without variation.

11 On the same date, C sought an external review to this office. His application was accepted under s44(1), as he was in receipt of an internal review decision and had sought external review within 20 working days of receiving that decision.

12 On 19 July 2022, C made a request for priority consideration of his application. On 12 August 2022 I agreed to expedite it on the basis that C advised that the information sought was time critical for his business operations and there appeared to be valid issues with the refusal of the application, preventing substantive assessment of the information.

13 On 12 September 2022, STT was provided with my Preliminary View regarding the external review. That view, formed on an initial assessment of the information and STT's reasons for decision, was that processing the application and providing the requested information would not substantially and unreasonably divert the resources of STT from its other work, having regard to the factors in Schedule 3 of the Act.

14 STT did not agree with my Preliminary View and made further submissions in support of its refusal of C's application on 26 September 2022.

15 Following receipt of STT's further submissions, the Principal Officer – Right to Information of this office engaged with the parties to attempt early resolution. Progress was made with respect to a possible timeline for release of the information. STT, however, insisted that the applicant nominate the priority for release of information which C declined to provide. On 2 November 2022, it was deemed that those attempts to achieve a practical resolution of this matter were unsuccessful, as agreement could not be reached between the parties on a timeline for the release of the relevant information.

Issues for Determination

16 There are two issues for determination relating to the use of s19 and this review:

- Did STT provide C with a reasonable opportunity to consult with it in order to help him make an application in a form that would remove the ground for refusal, as is required by s19(2)?
- Having regard to the matters in Schedule 3, as is required under ss19(1)(a) and (c), would the work required of STT to deal with the application substantially and unreasonably divert its resources from its other work?

Relevant legislation

17 Relevant to this review is s19 of the Act, which incorporates Schedule 3. I attach copies of both to this decision as Attachment 1.

Submissions

Applicant

18 C rejects the assertion of STT that the collation, assessment and disclosure of information responsive to Parts 1 and 3 of his request would amount to a substantial and unreasonable diversion of STT's resources from its other work.

19 Accompanying his application for external review C provided a submission titled *Supporting Document for external review of STT RTI 2203*. Annexed to the submission was a series of emails, and a sample FPP and a sample harvest record. Additionally, I have had regard to links C provided to current and previous versions of the STT website, which I accept show that STT has an *Information Disclosure Policy and Procedure*[1], that FPPs were available for free download in 2018 and for purchase in 2014, and that FPPs regarding Three Year Production Plans are stated to be *available on request.*

20 In summary, C:

- refutes that the provision of the information in Parts 1 and 3 of his request would substantially and unreasonably divert STT's resources and that the *onus of proving* s19(1) is upon STT and its position is unsubstantiated;
- believes that *the information requested was basic in nature* and that:

> [g]*iven the simple nature of the information requested and the fact that under the RTI Act assessed disclosure is considered to be disclosure of last resort, I requested that STT consider actively releasing the information to me;*

- firmly believes that s19 is relied on *simply to avoid providing the information*; and
- asserts that it is *incumbent on STT to ensure that they allocate sufficient resources to processing RTI requests.*

21 In the consultation stage, C requested further information from STT on two occasions. On 17 May 2022, he wrote to STT and asked:

> *a. Can you confirm that the requested Forest Practices Plans are in electronic or paper format?*
>
> *b. Can you confirm whether the information requested in part 3 is held in electronic or paper format?*
>
> *c. Can you advise if the refusal is based on the volume of information requested or the timeline by which the information is to be provided?*

---

1 Available at www.sttas.com.au/about-us/privacy-and-rti (accessed 11 January 2023).

...

*I would also like to state that a refusal under S19(2) must be both substantial **and** unreasonable. I would suggest asking for operational information that should be easily retrieved from a well-managed records system would not meet this threshold. Additionally, as any assessment of exempt information would be minimal (mostly S36) and no third-party consultation required, I cannot see how the processing of the information could remotely be seen to be a substantial and unreasonable diversion of resources.*

22 Then on 19 May 2022, he posed additional questions to STT:

1. *Which year did STT/FT move to an electronic filing system?*
2. *Were FPPs developed for all the coupes listed? If not, which ones were not developed?*
3. *Which of the coupe FPPs are in electronic format and which are in paper format?*
4. *Which coupe harvesting records are in electronic format and which are in paper format?*
5. *What is the total number of documents and pages within scope of the RTI request? (Note, I am not seeking duplicates of any documents.)*
6. *What is the time (in hours) that STT has estimated it would take to;*
    a. *Gather the information in scope*
    b. *Assess the information for release*

If you can provide answers to the above, it would assist me in refining the request.

23 On 6 June 2022, C wrote in response to correspondence with STT:

The questions I have asked to assist me in refining my request are reasonable, and the information should be readily available. You have asked me to refine the scope of my RTI to avoid refusal yet refuse to provide me with information that would allow me to do so.

24 In his submissions C outlined that FPPs:

- are *required under law which shows how the harvesting and reforestation of a harvest area (coupe) will proceed*;
- are *developed by the harvesting proponent and submitted to the Forest practices Authority for approval*;
- typically range *in length from 12-18 pages and follows a standard format*;
- contain *only a small amount of personal information that may be exempt, but the majority of the information contained in the FPP is pretty straightforward and not sensitive in any way*; and
- have previously been *freely available to the public* on STT's website and/or available for purchase.

25 He added that:

According to information provided by the Forest practices Authority in May, the earliest requested FPP creation date was July 2008 and the latest February 20!7. Many FPPs have been updated since being created, with many being updated within the past five years. For example, Coupe MD!02A FPP was created on !!/02/20!5, was updated on 26/07/20!6 and is current until 30/06/2022. Coupe FR04!A FPP was created on 08/!0/20!0 and updated on 26/06/2020.

26 In relation to the harvest records, of the kind he has requested in Part 3, C submitted that:

- they are *simple* records that are *kept by STT and have previously been made available* to him;
- some are historical, as he has received *paper harvest records from as far back as the !970s*; and
- they are used to *compile STT's annual reports that are tabled in Parliament and made available publicly.*

27 **The following is extracted from the 'Discussion' in C's submissions:**

!6. Within days of receiving my application for information, STT quickly concluded that the task of providing the information constituted an unreasonable diversion of resources under S !9(!)(a). To have come to this conclusion, I would have expected STT to have gathered the information in scope and decided on a likely timeframe to process the information and make a decision. However, when this timeframe was requested in my questions of !9th May, STT's response clearly showed that they had no idea about the length of time to collate the information or make a decision– it was simply put in the Section !9 refusal basket.

If STT had not calculated how long it would take to gather the documents in scope and make a decision, how could they have come to the conclusion that the request would substantially and unreasonably divert the resources of the agency?

Previously, STT and its predecessor, Forestry Tasmania, have processed far more complex and voluminous RTI requests for me without issue.

28 C estimates that *the task* of preparing the requested information would be *just under 2 hours for* FPPs and *under half an hour* for harvest records. His basis for this is:

- *assuming every coupe listed has an FPP at an average length of 20 pages, the total would be 460 pages and*
- *allowing 5 minutes or less to redact any personal information from each FPP and*
- *allowing ! minute or less to redact any personal information from a harvest record.*

29 In his 'Discussion' section C submits:

> *19. Document retrieval. An underlying premise of the Right to Information system is that an agency maintains a well-managed records system that allows for easy and efficient document retrieval. It is the year 2022, and I am surprised that STT is claiming that the retrieval of 23 FPPs and associated harvest records from the past decade would somehow unreasonably divert the resources of the agency.*
>
> *If STT's records system is so poor that a simple RTI request results in a Section 19 refusal, then it is an appalling state of affairs and one that should not be tolerated. If STTs record-keeping system is poor, then it should not have any bearing on processing an RTI request. Certainly, an applicant should not be disadvantaged because a well-funded, long-standing Government Business Enterprise can't keep its records in an acceptable fashion.*

30 C rejects that STT's record-keeping systems are in fact poor or that the efforts required for the retrieval of the subject information are substantial. He asserts that with a *well-managed record-keeping system* retrieval should take no more than two hours and estimates that *the total time to collate the requested information and make a decision, should amount to 5 hours or less.*

31 C concludes in his submissions:

> *If an agency wishes to refuse an RTI request under S19, the onus of proving that processing the request would substantially and unreasonably divert the resources of the public Authority from its other work rests with the agency making the claim.*
>
> *In this case, it is abundantly clear that the information requested is routine, should be easily located and should also be able to be provided via active release.*
>
> *I sincerely doubt that STT could justify any more than 5 hours to process this request, and I fail to see how that small amount of time could substantially and unreasonably divert the resources of the Authority from its other work.*
>
> *By issuing a S19 refusal, STT has acted against the objects of the RTI Act. I contend that their refusal under S19 is a deliberate attempt to withhold publicly held information and is an abuse of process. The RTI system in Tasmania faces enough troubles on its own without having Agencies such as STT abusing the system like this. The refusal provided meets neither limb of substantial or unreasonable as required, and for the Principal Officer to issue such a decision is very disappointing.*

32 Additional correspondence was received from C, to which I have also had regard.

STT submissions

33 STT does not dispute that the information requested in Parts 1 and 3 is of a kind that it can, and does, actively disclose. It has, however, refused the request on the basis of the *volume* of information requested and the *timeline* for providing it. It relies on s19(1)(a) to refuse to provide the FPPs and harvest information.

34 In reply to my Preliminary View, STT made submissions which set out the reasons of the original and internal review decisions and provided further explanation of the refusal it maintained. I have had regard to those submissions and other relevant correspondence.

35 Prior to the original decision, STT responded to C's request for information that might lead to him refining his request (as set out in the submissions):

> ***(APPLICANT) Can you confirm that the requested Forest Practices Plans are in electronic or paper format?***
>
> *(Sustainable Timber Tasmania) I can confirm that certified Forest Practices Plans (and any associated variations) listed in your request include both electronic and paper format and are held across multiple filing systems. This is because some of these plans predate Sustainable Timber Tasmania's move to an electronic filing system.*
>
> *Sustainable Timber Tasmania acknowledges that to gather this information from multiple systems and filing locations across the state, compile it and apply personal information redactions is a significant, timing* [sic] *consuming process which will divert its resources unreasonably (Section 19 (2) of the Right to Information Act 2009).*
>
> ***(APPLICANT) Can you confirm whether the information requested in part 3 is held in electronic or paper format?***
>
> *(Sustainable Timber Tasmania) Same as above.*
>
> ***(APPLICANT) Can you advise if the refusal is based on the volume of information requested or the timeline by which the information is to be provided?***
>
> *(Sustainable Timber Tasmania) Both.*
>
> [emphasis original]

36 STT submitted that it declined to answer C's further questions of 27 May 2022 because:

> *... answering them to the level of detail he requested would again, unreasonably divert Sustainable Timber Tasmania's resources from its other work.*

37 STT further submitted that:

- it had explained to C *that as a part of its standard practice, similar stakeholder requests for large numbers of Forest Practices Plans are regularly negotiated and refined to a more reasonable level with other applicants*;
- to *further assist negotiation* it asked C:

Out of the coupes stated in Part 1 of your Right to Information Act 2009 request, which are of specific interest to you and why?

[emphasis original]

- C did not answer the question posed; and
- that the original decision *considered this to be an unsuccessful period of negotiation and therefore,* [the] *original application was refused* pursuant to s19 and the Schedule 3.

38 The submissions address the refusal of the information sought by C in part 1:

> *In determining the refusal of part 1. of the request, Sustainable Timber Tasmania's Principal Officer considered the perceived unwillingness of the applicant to negotiate and refine the scope to a smaller quantity of Forest Practices Plans.*
>
> *Sustainable Timber Tasmania acknowledged that previously it has supplied (as per its standard practice) certified, current and redacted Forest Practices Plans to the applicant, however previously these requests have been for a smaller quantity of Forest Practices Plans outside of the Right to Information Act 2009 process.*
>
> *It is standard practice for Sustainable Timber Tasmania to negotiate the quantity of Forest Practices Plans requested by any applicant, as there is a time and resource intensive process to collect this information, and it is Sustainable Timber Tasmania's intention to address the specific concerns or coupes of interest to an applicant as soon as practicable. In this instance,* [the applicant] *did not provide any further information about the specific concerns and coupes of interest, and as such, the request was unable to be refined to a more reasonable level.*
>
> *Specifically, in reference to assessment under Schedule 3(1)(c), Sustainable Timber Tasmania has a resource of one person available to coordinate right to information applications (with assistance from the Delegate of the Principal Officer and the Principal Officer). In addition to this role, this person also has other key responsibilities associated with government and stakeholder engagement.*
>
> *As insight, the process of gathering this information involves the following for each individual coupe:*
>
> - *identifying whether a Forest Practices Plan exists;*
> - *locating a potentially hard or soft copy of the correct Forest Practices Plan;*
> - *locating any associated variations of a Forest Practices Plan from either a digital or paper filing system across (potentially) seven different regional offices;*
> - *compiling the individual documents for each Forest Practices Plan into one digital file;*
> - *redacting personal information from the one digital file;*

- *amending the file size of the digital file so it can be sent to the applicant.*

Depending on the Forest Practices Plan, as a single document, each Forest Practices Plan could range between approximately 8 to 25 individual A4 pages.

Understanding these implications when the request was received, Sustainable Timber Tasmania entered a period of negotiation to refine the scope of the request with the applicant. The outcome of this negotiation was determined as unsuccessful.

39 STT also relies on Schedule 3(1) matter (h), which relates to refining the application or extending the timeframe for processing the application, submitting:

It was determined the outcome of negotiations to be unsuccessful given the applicant did not refine the scope, and did not state why they were seeking this information or which specific forest coupes they were interested in. The applicant instead asked a series of further questions of Sustainable Timber Tasmania regarding its process of collecting information.

40 With respect to Part 3 of C's request, STT relied on Schedule 3(1) matters (b) and (c):

It was determined that part 3 of [the applicant's] *request which sought harvest volumes by species, sawlog grade and/or pulp volume for any of the coupes which have been partially or fully harvested (which is more than half of the listed coupes) was refused under Section 19 of the Act and specifically the considerations contained in Schedule 3(1)(b) and Schedule 3 (1)(c).*

In determining the refusal of part 3 of the request, the perceived unwillingness of [the applicant] *to negotiate and refine the scope to a smaller number of coupes of interest was also considered.*

Again, Sustainable Timber Tasmania has a resource of one person available to coordinate right to information applications (with assistance from the Delegate of the Principal Officer and the Principal Officer) who also has other key roles.

As insight, the process of gathering information pursuant to part 3 involves extracting reports of three different kinds of information (harvest volume, species, sawlog grade and or pulp volume) from more than one database and cross referencing with sales dockets. This information then requires verifying with appropriate harvesting and sales employees across Tasmania. This information would then need to be adapted into a suitable document for ease of understanding and reading. This would require many hours of Sustainable Timber Tasmania's one resource person which would have diverted them from their other responsibilities as well as severely limited therefore the request is not 'reasonably manageable'.

41 STT also made the following submissions with respect to the adequacy of the consultation under s19(2):

> *Sustainable Timber Tasmania entered a period of negotiation with* [the applicant] *in attempt to assist him in refining parts 1 and 3 of his request.*
>
> *It is Sustainable Timber Tasmania's view that the second round of questions asked by* [the applicant] *on 27 May 2022 were unreasonable questions. For the Ombudsman's office, Sustainable Timber Tasmania wishes to advise:*
>
> - *The* [sic] *was no way to estimate the number of pages of information because this information is not stored anywhere other than the documents themselves. Typically, a single Forest Practices Plan can contain between eight and 24 pages. This is an estimate only. To provide an indication of the total number of documents, Sustainable Timber Tasmania would have to first identify which records are held electronically, and which are held on file. Again, there is no current record which state which documents are held electronically and which are held on file.*
>
> ○ *Therefore, to answer these questions would involve commencing a process to identify all information requested by the applicant.*
>
> - *In* [the applicant's] *submission to the Ombudsman, he stated:*
>
> ○ "For example, if it was shown that FPPs were not developed for some of the coupes, then that would reduce the number of FPPs asked for. Similarly, if some of the coupes had not been harvested, then the request for harvest recorded could also be reduced"
>
> ○ *The information of which coupes do have Forest Practices Plans and which don't is not readily available information held by Sustainable Timber Tasmania. The way which coupe records are stored at Sustainable Timber Tasmania is by coupe name (both) electronically and on file, not by whether or not they have an active Forest Practices Plan. To identify which coupes do or do not have Forest Practices Plans, Sustainable Timber Tasmania would have to go through every coupe name file (both) electronically and on file and look in 'Forest Practices Plans'* folders *which may or may not be empty.*
>
> - *Therefore, to answer these questions would involve commencing a process to identify all information requested by the applicant.*
>
> - *In attempt* [sic] *to reduce the amount of information gathering required by Sustainable Timber Tasmania to help* [the applicant] *refine his scope, Sustainable Timber Tasmania asked* [the applicant] *which coupes specifically he was interested in. This reduces the number of files Sustainable Timber Tasmania has to look through.*
>
> - *This question was asked by Sustainable Timber Tasmania to* [the applicant] *on Friday 3 July 2022, to which* [he] *did not respond.*
>
> Consultation under s19(2)

Sustainable Timber Tasmania confirms its view that **[the applicant's]** *request (noting he did not refine the scope) would amount to a substantial and unreasonable diversion of Sustainable Timber Tasmania's resources from its other work. In rebut to the points raised in the Ombudsman's preliminary view, please find below submissions:*

- *Assumption 1: Page numbers*

○ Sustainable Timber Tasmania does not hold single records of harvest information of individual coupes in one system. This information is recorded differently, and multiple systems would need to be checked to produce this data. Sometimes harvest records could include one page of information, sometimes multiple, depending on the number of systems required to be checked. Importantly, Sustainable Timber Tasmania sometimes checks multiple systems for different harvest data and reproduces this on a single sheet of paper for a stakeholder, for improved accessibility. This has been done for **[the applicant]** *on various occasions.*

- *Assumption 2: Active disclosure of Forest Practices Plans*

○ Sustainable Timber Tasmania does actively disclosure certified and current Forest Practices Plans to stakeholders upon request. As it indicated to [the applicant], however, when a request for Forest Practices Plans is significant (usually more than 10), Sustainable Timber Tasmania asks the stakeholder to refine its request or to highlight which coupes it determines as a priority. Please see a recent example of this below:

[Image excluded]

○ As part of its negotiations with **[the applicant],** *Sustainable Timber Tasmania did ask* **[the applicant]** *which coupes were of specific interest to him but he was not willing to provide this information.*

- *Assumption 2* **[sic]:** *Redaction of information in Forest Practices Plans*

○ Redaction of information in Forest Practices Plans is a time consuming process. It is unfair of the Ombudsman to assume based on the submission of one redacted Forest Practices Plan from **[the applicant],** *that all Forest Practices Plans would take the same amount of time to redact.*

○ Forest Practices Plans are created across several different templates, and information redacted includes names of contractors, principal processers, Forest Practices Officer details, landowner details and sometimes further contractor details contained inside the text. There is always going to be at least three redactions on each page of a Forest Practices Plan. These redactions also need to be applied to any certified variations of a Forest Practices Plan also, so, to provide a rough estimate based on the Ombudsman's own calculation of total page numbers (184 - 575) this would mean at least (anywhere between) 552 - 1,725 individual redactions would be required to be

made. This is not a small processing time. See attached an example of another Forest Practices Plan for an indication of differences.

o Sustainable Timber Tasmania also has a secondary review of all redacted Forest Practices Plans to ensure redactions have been made accurately prior to releasing them to stakeholders. This is additional processing time.

Completing [the applicant's] *full request could easily take in excess of 100 hours and during that time the resource person would be diverted from their other key roles and Sustainable Timber Tasmania's capacity to respond to any other RTI requests would be severely limited.*

Please consider these submissions as part of your review and advise Sustainable Timber Tasmania if there is anything further the Ombudsman requires to process [the applicant's] *external review.*

42 A further email was received from STT on 7 October 2022, in which further information was provided as follows:

- *The coupes (as referenced in* [the applicant's] *application) are mostly historical and no longer current, meaning the associated Forest Practices Plans are going to be very difficult to locate as they are commonly stored in paper filing systems; and*

- *Presently (5 October 2022), Sustainable Timber Tasmania has a high volume of individual Forest Practices Plan requests from stakeholders (comprising of over 290 individual coupes) – it is processing outside of the RTI process. This is being managed across an extended timeframe as a result of having one resource (single person) available to manage this.*

  Sustainable Timber Tasmania would be appreciative of understanding which coupes (as referenced in part a) of [the applicant's] application) are of priority to [the applicant]*, and it can commence active disclosure of this information. Please note that due to the high volume of Forest Practices Plan requests it is currently processing, a timeframe of 30 working days to process 10 (or less) Forest Practices Plans and associated harvest records as active disclosure will be required by Sustainable Timber Tasmania to complete this.*

Analysis

43 The Act gives members of the public the right to obtain information from public authorities unless it is exempt information, and it is expressly provided by s3(4)(b) that discretions conferred by the Act are to be exercised to facilitate the provision of the maximum amount of official information. Accordingly, it follows that refusal to provide information that is not otherwise exempt should only occur when truly necessary.

44 STT made a decision under s19(1)(a) that the work involved to provide the requested information would *substantially and unreasonably* divert its resources

from its other work. Section 19(2) requires that, before making such a decision, that the applicant is to be afforded *a reasonable opportunity to consult...with a view to the applicant being helped to make an application in a form that would remove the ground for refusal* and s19(1)(c) requires consideration of the matters in Schedule 3.

Did STT provide C with a reasonable opportunity to consult with it in order to help him make an application in a form that would remove the ground for refusal, as is required by s19(2)?

45 The parties provided my office with copies of their emails exchanged which formed the s19(2) consultation prior to STT's original decision.

46 STT's answers to C's initial questions, of 19 May 2022, were general in nature and largely unhelpful to assist him in amending his application in a way that would remove the ground for refusal. In answer to his query about the format of the FPPs sought in Part 1 and the harvest information being sought in Part 3, STT advised that the information was in both *electronic and paper format* and *held across multiple filing systems*. STT concluded that *to gather this information from multiple systems and filing locations across the state, compile it and apply personal information redactions is a significant, time consuming process which will divert its resources unreasonably*.

47 STT, responded to C's third question, about whether the refusal was based on *volume* or *timeline*, with a single word response - *both*.

48 When C then sought further information and clarification, STT refused to answer. In my assessment, the further questions posed were reasonable and in accordance with matters listed in Schedule 3 (specifically factors (a), (d), (f) and (e)). It was information that would have been quite readily available to STT with a reasonable level of internal enquiry and it would clearly have been helpful to C.

49 While I accept that s19(1) permits a request for information to be refused without the public authority *identifying, locating or collating the information*, this must be balanced with the explicit obligation to help an applicant in s19(2) and the pro-disclosure focus of the Act. To make no effort to even identify whether information exists will only be justified in extremely limited circumstances. It is routine that initial enquiries, for the purposes of assessing the volume and estimating the time involved, will be undertaken. For example, an estimate of the volume of documents likely for some or all of the relevant coupes, an average time taken for similar searches, an indication of which coupes were historical or more likely to be problematic for records retrieval, or a possible timeframe for provision of some or all of the information, and an indication of any extension of time that may be required by STT. It appears, however, that STT did not undertake appropriate and necessary initial enquiries relevant to informing its decision to not provide any information, which is contrary to the pro-disclosure approach required the Act.

50 Despite C explicitly indicating that he was asking these questions in order to refine the scope of his application, STT asserted that to answer C's questions would equally be an *unreasonable diversion* of its resources. I find that approach to be inconsistent with STT's obligations under s19(2), and steps could, and

should, have been taken to share with C the answers to his questions or other relevant information of a kind that would assist him to understand the refusal decision.

51 STT did advise C that *part of its standard practice* is that requests *are regularly negotiated and refined to a more reasonable level with other applicants*. It did not indicate to him what it considered a reasonable number of FPPs or coupes would be, or explain why it appeared to require him to reduce the list to 10 coupes or less.

52 Further, STT asked C to identify which of the coupes *are of specific interest to you and why?* His choice to not answer the question was *perceived* by the Principal Officer as an *unwillingness of the applicant to negotiate*.

53 I do not accept that C was unwilling to negotiate in the consultation stage. To the contrary, his email requests to STT reflect his willingness to accept and consider what could be done to refine his request in order to obtain the maximum amount of information responsive to his request.

54 I consider that STT failed to provide helpful answers to C's initial questions and then refused to answer the further, relevant questions. This approach hindered the process and prevented C from being informed in a way which may have enabled him to refine the scope of his application and remove the ground of refusal.

55 The consultation was limited and I am disappointed with the closed attitude STT appears to have taken to that consultation. It is clear that more could have been done by STT to provide information to C at that point in time. I am, however, satisfied that overall the parties progressed as far as they were able in this consultation; there was a fundamental disagreement on whether volume of information responsive to the application was excessively large and so the consultation was accordingly bound to fail.

56 I note that far better practice, such as the exemplary consultation I commented upon in my decision of *Robin Smith and City of Launceston*[2], is for steps to be taken to identify the relevant information and provide details about the number of pages or any other reason that is likely to form the basis of a refusal. Addressing the factors in Schedule 3 during consultation, which are required to be considered and discussed in any decision refusing an application under s19(1), is the most effective way to do this.

57 Overall, I am satisfied that STT discharged its obligations under s19(2) and provided C a reasonable opportunity to consult with a view to helping remove the ground for refusal. STT could have done more, however, and it is encouraged to be more engaged and open with future applications and consider providing more insight to its decision making, or utilising options such as seeking an extension of time under provisions in s15 to process larger applications rather than refusing them.

Having regard to the matters in Schedule 3, as is required under ss19(1)(a) and (c), would the work required of STT substantially and unreasonably divert its resources from its other work?

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

58 For an information request to be refused under s19(1)(a), the public authority in possession of the information must be satisfied that the work involved in providing the information would be both a substantial and unreasonable diversion of its resources from its other work. In doing so it must have regard to the nine matters in Schedule 3, as required by s19(1)(c).

59 STT was satisfied, as it set out in both its original and internal review decisions, that the work required to process Parts 1 and 3 of C's request would be both substantial and unreasonable. It did not initially provide a clear rationale to C, with reference to the matters in Schedule 3, however it later relied on matters (c), (b) and (h).

60 Matter (c) relates to whether the retrieval, collation and redaction (as may be required) of the FPPs and the harvest records is reasonably manageable giving due, but not conclusive, regard to STT's size and the availability of resources.

61 STT submitted that it has one staff member dedicated to RTI, who is supported by another delegate of STT's Principal Officer and the Principal Officer. I accept that STT has limited staff available to process RTI applications. Despite this, I do not consider that limited human and other resourcing displaces the requirements to fulfil statutory obligations.

62 The Act intends that official information is to be provided to members of the public and, while at times that may present challenges for public authorities, it would be a perverse outcome if public authorities could avoid compliance with the Act by failing to allocate *any* resources to process right to information requests.[3] There are other mechanisms contained in the Act to enable compliance despite resourcing challenges, such as through negotiation of extensions of time or agreed timeframes for assessment of larger amounts of information in tranches. I am not satisfied that significant weight should be afforded to this factor in this instance, as there is no indication that STT could not process reasonable requests for information.

63 In considering matter (b), the demonstrable importance of the documents to the applicant, I am satisfied that C's professional interest in Tasmania's timber supplies is a factor in determining what might be a reasonable time and effort required. He has a genuine interest in the information requested and I do not accept STT's position that C's failure to rank the relative importance of various documents or particularise his interest in the information, to its satisfaction, adds any significant weight to the argument to refuse the application.

64 As I observed in *Smith and City of Launceston*,[4] the Act does not require an applicant to provide reasons as to their interest in the information requested. While (b) gives the public authority the ability to consider the purpose of an application, or that none has been advanced, I remain of the view that an imprecise or unknown purpose should not be weighed significantly against an applicant. A reasonably sized application does not need to meet any standards

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[3] See *Gina Green and King Island Council* (June 2018) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

[4] See *Robin Smith and City of Launceston No. 1* (September 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at paragraphs 50-51.

of merit or worth to be assessed, to interpret the Act otherwise would be contrary to the concept of providing a right to information to the public. Regardless of this, C has demonstrated the importance of the information to him to the degree that this matter would be a neutral consideration.

65 Matter (h) relates to the outcome of negotiations with the applicant in attempting to refine the application or to extend the timeframe for processing it. In this instance, for STT the *outcome of negotiations with the applicant* was a *perceived unwillingness* from C *to negotiate and refine the scope to a smaller quantity* of FPPs. STT's submissions go on to say that in an attempt *to help* C refine the scope STT asked him *which coupes he was specifically interested in*. Consequently, for STT this would have been a refinement that *reduces the number of files* that it would have to *look through*.

66 I do not consider that this matter weighs in favour of refusal of the application in this instance. I have extensively discussed the consultation which occurred above and, while it did not result in any refinement of the application, there was a fundamental disagreement around whether the application was of a manageable size. While C did not agree to refine his application, this would not be required if the request was of a reasonable size. STT criticises C for not indicating the information he was most particularly interested in, presumably to allow the information to be released in stages commencing with the most important to C. However, STT did not attempt to negotiate an extension of the timeframe for processing the application, which would have had the same result. STT's focus on C prioritising the information is unfortunate as, while not an unreasonable request to make of an applicant, it appears to have become a major obstacle to the release of this information despite the application being readily about to be processed without this guidance from the applicant and STT accepting that the information is of a type which could be actively disclosed. I encourage STT to take a more pragmatic approach in future, consistent with the object of the Act to release the maximum amount of official information.

67 All the matters in Schedule 3 are required to be considered, including those that indicate that the request would not, as a practical or factual matter, be a substantial and unreasonable diversion of resources from other work.

68 Although not raised directly by STT, its submissions do go to matter (d), which refers to the public authority's *estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer time, and the salary cost*, which also goes to (i) and *the extent of resources available to deal with the specified application*.

69 STT did not initially provide any estimates to C as to volume or time involved. In its submissions, STT set out *the process for gathering* that would be involved for each coupe, which includes identifying whether an FPP exists, locating the digital or hard copy from *potentially 7 different regional locations before compiling documents into a digital file, redacting personal information, and amending the file size for sending*. However, no clear indication was given as to what might, with

regard to the particular 23 coupes, be required to fulfil C's request. It remains unclear the steps that STT would have to undertake to provide the information.

70 I accept that STT may *not hold single records of harvest information of individual coupes in one system* and it is *recorded differently, and multiple systems would need to be checked*. However, with good record keeping, the fact that there are multiple storage locations does not automatically mean that retrieving information would be unduly onerous or time consuming.

71 It is, in my view, disingenuous for STT to submit that there was *no way to estimate the number of pages of information because this information is not stored anywhere other than the documents themselves*. STT has not explained why it did not look at the documents themselves, particularly those stored electronically. I am entirely unpersuaded that to look at the records regarding 23 coupes to ascertain if FPPs had been created would be a substantial and unreasonable diversion of resources in itself. I agree with C's comment that STT's record keeping system would need to be unfit for purpose if to even identify such a small number of FPPs would be such a significant undertaking. As I set out above, despite it being possible under s19 to refuse an application without identifying the information responsive to it, this will only be appropriate in very limited circumstances. STT's unhelpful approach in this regard is highly disappointing and not in keeping with the intention of the Act.

72 STT did provide an estimate of the volume of information, however, and the minimum and maximum amount of information which could be responsive to C's request seems to be clear – 180-600 pages of FPPs and harvest records.

73 With regard to the efforts required for redaction, the parties are similarly apart in their estimations. C asserts that given the nature of the documents any redaction would be *minimal*. By contrast STT submits that redaction *is a time consuming process* and lists the types of details that would be redacted including *names of contractors, principal processors, Forest Practices Officer details, landowner details and sometimes further contractor details contained inside the text*. STT also submits that there *is always going to be at least three redactions on each page* of an FPP. There is also a *Secondary review process* for redactions. The estimate, by STT, is that C's *request could easily take in excess of 100 hours*.

74 It is incorrect to suggest that details of the kind listed by STT attract automatic redaction. To the contrary, as I have observed in other decisions,[5] information such as the names and contact details of Forest Practices Officers is not of a type that automatically attracts exemption and it would be unusual for it to be exempt under s36.

75 Both parties have identified that the information likely to require exemption and be redacted is personal information. I have reviewed sample documents

[5] See *Suzanne Pattinson and Department of Education* (August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and Environment* (January 2022), *Camille Bianchi and Department of the Health* (November 2021) and *Clive Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

provided by the parties and accessible in relation to Three Year Wood Production Plans and I am not satisfied that this is an onerous task.

76 Applying the standard estimate of seven minutes per page,[6] the highest reasonable estimate of the time needed to redact 23 FPPs of 25 pages in length would be 67 hours.

77 It is more difficult with respect to the harvest information, but allowing for collation of five pages per coupe for 23 coupes at seven minutes, equals approximately 13.5 hours.

78 Noting that there may be no FPPs or harvest records regarding some of the coupes, the actual time would be likely to be significantly lower than this maximum of 80.5 hours. I am not persuaded that there is sufficient basis for STT's assertion that processing this request *could easily take in excess of 100 hours.*

79 I also had regard to the prior availability of FPPs online and that these are records, according to STT, that are often requested and subject to active disclosure.

80 Further considering matter (d), STT confirmed that it provides FPPs according to its *procedure to make certified Forest Practices Plans available to stakeholders on request.* It is unclear why C's request could not be treated similarly. It is also unclear whether consideration was properly given to options available to STT to release the information, such as in tranches or with extra time by agreement to enable the application to proceed in line with its regular procedure.

81 Having regard to the remaining matters in Schedule 3, I am satisfied that C's request meets (a) and that it has been precisely described to permit STT, as a practical matter, to locate the documents sought within a reasonable time with the exercise of reasonable effort.

82 In relation to matter (e), STT indicated that compliance with the statutory timelines would be difficult and submitted that *10 (or less) FPPs would require 30 days*. I am not satisfied, on the information available, that STT could not comply. It would, however, remain open to STT to seek additional time if so required. Section 19 cannot be used to refuse applications which are large but not unreasonably so, or because it would be difficult to meet statutory timeframes due to competing priorities of a public authority or high volumes of requests for information in general.

83 Overall, it appears the primary issue for STT is that C has requested information in relation to 23 coupes, and it has a preference for limiting such requests to 10. This is not the test for the application of s19 and I am not satisfied that processing C's request would otherwise amount to a substantial and unreasonable diversion of STT's resources from its other work.

6 See *Gina Green and King Island Council* (28 May 2018) and *Damien Matcham and Brighton Council* (23 January 2018), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Preliminary Conclusion

84 In accordance with the reasons set out above, I determine that STT was not entitled to refuse Parts 1 and 3 of C's request pursuant to s19.

85 I direct STT to assess the information responsive to these parts of C's request in accordance with the provisions of the Act.

Submissions to the Preliminary Conclusion

86 The above preliminary decision was made available to STT on 27 January 2023. This was to enable it to make any further submissions in relation to C's assessed disclosure request, prior to the finalisation of my decision pursuant to s48(1)(b).

87 A further submission was received from STT, dated 9 February 2023. It responded to particular paragraphs of the preliminary decision, namely 15, 49, 62, 71 and 74, providing as follows:

> Paragraph 15
>
> *Respectfully, Sustainable Timber Tasmania would like further emphasis to be placed on the Ombudsman's view that a practical resolution of this matter was unsuccessful after Sustainable Timber Tasmania* ***did agree*** [emphasis original] *to provide the information requested to* [the applicant] *through a renegotiated timeframe for release. Sustainable Timber Tasmania asked – through the Ombudsman's office – that* [the applicant] *indicate the priority order for the release of information so that it could process what was most important to the applicant first. Sustainable Timber Tasmania does consider this to be a reasonable request of* [the applicant] *and believes it should be easy for him to answer as he understood what he intends to use the information for.*
>
> Paragraph 49
>
> *Respectfully, Sustainable Timber Tasmania disagrees with the Ombudsman's view that STT did not undertake appropriate initial enquiries prior to its decision not to provide information. As has been previously noted, at the time of the original decision, Sustainable Timber Tasmania was processing a large volume of requests for information outside of the RTI process. By October 2022 this included requests for the release of Forest Practices Plans for over 290 individual coupes to other forestry stakeholders. Accordingly, Sustainable Timber Tasmania was well aware of, on average, how long it would take to obtain the preliminary information which* [the applicant] *had requested.*
>
> *As will be addressed below in relation to Paragraph 71, a significant amount of the time required to process FPPs for disclosure is spent on locating and reviewing them. As such, providing answers to* [the applicant's] *questions would have taken a significant amount of time. Given that Sustainable Timber Tasmania believed his request for 23 coupes was excessive and was inclined to refuse his application, it was felt that undertaking a significant part of the*

work required in disclosure as part of negotiation was an unreasonable and substantial diversion of resources.

Sustainable Timber Tasmania acknowledges the Ombudsman's comments that it should have been more engaged in its consultation with [the applicant]. *However, the fact that he had not provided answers to any of Sustainable Timber Tasmania's questions resulted in the view being taken that he was unwilling to reduce the scope of his request and, accordingly, the negotiation was deemed to be unsuccessful.*

Paragraph 62

Respectfully, Sustainable Timber Tasmania does not agree with the suggestion that it is assigning insufficient resources to RTI applications. In the past Forestry Tasmania had over 600 staff members and had a full time RTI officer. Sustainable Timber Tasmania has roughly a quarter of the number of staff as Forestry Tasmania and therefore does not believe that it is unreasonable to only have one staff member assigned RTI applications with the assistance of other staff when required. The Ombudsman refers to a decision in which a local council assigned 1% of one of its staff member's time to RTI matters. In this instance it is closer to 1% of Sustainable Timber Tasmania's total staff.

Paragraph 71

Respectfully, Sustainable Timber Tasmania does not agree with the Ombudsman's assessment that the storage and filing of FPPs would not be "fit for purpose" if compiling the necessary information is an arduous task. 'Fit for purpose' is subjective and in this instance is based upon what purpose Sustainable Timber Tasmania has for existing FPPs. Outside of the RTI applications, Sustainable Timber Tasmania has very little reason to access FPPs once they have been completed. They are usually reviewed when a coupe is harvested and a new FPP is prepared but this happens over a 60 year period per coupe.

Whenever a FPP is reviewed for this purpose it is then digitised and stored electronically. However, with thousands of FPPs stored in paper form across Sustainable Timber Tasmania has offices around the state it would be a monumental task for Sustainable Timber Tasmania to organise these into a central database which could be accessed efficiently. Given that Sustainable Timber Tasmania does not need regular or even semi-regular access to FPPs the current system is sufficient for its own purposes.

This means that locating FPPs and reviewing there is in fact, the majority of the work involved in disclosing it to a member of the public. Given that Sustainable Timber Tasmania was hoping to persuade [the applicant] to reduce the scope of his request, it was felt that undertaking the majority of the work only to answer his questions would have been an unreasonable and substantial diversion of resources.

Paragraph 74

As a general policy, Sustainable Timber Tasmania always redact the names and contact details of Forest Practice Officers when releasing FPPs to members of the public. Sustainable Timber Tasmania believes these circumstances are quite different to those in the decisions referred to in the Preliminary Decision. This is due to the highly political nature and charged atmosphere surrounding FPPs and forestry matters in general. In the past Sustainable Timber Tasmania staff have experienced harassment and intimidation from groups and individuals when their connection to certain projects has been made public.

Further Analysis

88 I have carefully considered the further submissions made by STT, though they have not led me to alter my position on this matter, as they are in line with STT's previously expressed views. Notwithstanding this, I address STT's submissions individually below.

Paragraph 15

89 I accept, as emphasised by STT, that it ***did agree*** *to provide the information...through a negotiated timeframe for release*. I find, however, that the seemingly immovable position taken by STT, that C must provide a *priority order for the release of information so that it could process what was most important to the applicant first*, has simply created unnecessary delay.

90 It is certainly open to a public authority to seek input from an applicant about any preferential value or priority that the person places on the information being sought when parties are negotiating a staged release. Public authorities are encouraged to take such conciliatory measures. There is, however, no statutory requirement for an applicant to give a preference or priority to information and the failure to do so should not have any negative impact on the progress of a request.

91 Staged release had been agreed to by C and no importance was given by him to some of the information over other information, therefore STT could have immediately started releasing the information in any order of priority that it determined was appropriate and most convenient. For example, digitised records may have been released first or it could have started at the first item and worked down the list. By contrast, and disappointingly, the position taken in resisting disclosure for this reason means that the applicant has received no information to date, although STT agreed in October 2022 to its release.

Paragraph 49

92 I remain unpersuaded that it would be impractical or unreasonable for STT to have provided further information during consultation under s19(2). The scope of C's request was clear and known and the information is of a type that STT accepts is regularly released.

93 As canvassed in [49] to [56] above, more could have been provided to the applicant at the outset in response to his questions. With a forthright explanation about the procedures for accessing information in hardcopy and electronic form, or the basis of the ten coupe limit, or providing suggestions for progressing the request this matter may have progressed quickly and satisfactorily without the need for external review.

94 It remains unclear why, in the course of the application and external review. STT does not appear to have undertaken any searches of its electronic system for records relating to the 23 coupes. It appears to be an obvious and simple step for establishing whether the records are readily accessible in digital form or whether hardcopy files are required from various regional locations.

95 I have been unimpressed with STT's stance which is contrary to the express requirement that discretions conferred in the RTI Act should be exercised to facilitate the release of the maximum amount of official information.

Paragraph 62

96 In relation to the sufficiency of RTI resources, STT made submissions as to the adequacy of its staffing level. The calculation of its staffing is accepted and I am pleased that STT considers it is well resourced to handle requests for information under the RTI Act.

97 This confirms my view that matter (c) in Schedule 3 is of limited relevance, if proper resourcing has been allocated to deal with applications under the Act then reasonable requests for information are able to be managed by STT.

Paragraph 71

98 The information provided by STT about its record keeping practices is the kind of information that could helpfully have been provided to the applicant at the outset.

99 I accept that whether record keeping practices are fit for purpose is a subjective question for a public authority. The public authority, however, has obligations that must be fulfilled under the RTI Act and therefore information should be retrievable with sufficient ease to meet that statutory purpose, in addition to being accessible as needed for its core business.

100 STT submits that FPPs are *usually reviewed when a coupe is harvested* and *whenever a FPP is reviewed for this purpose it is then digitised and stored electronically.* It therefore appears that on that basis that the records of at least 13 of the 23 relevant coupes, which have been harvested, would presumably be digitised.

101 It remains unclear why summary information about those digitised records has not been provided by STT, first to C and then in its submissions to this external review. No submissions have been made about the digital record keeping or software and there is no indication why the access or provision of these records would involve any major effort by STT. I remain unconvinced

that the further location of a maximum of 13 paper records appears to be the *arduous task* claimed by STT.

Paragraph 74

102 In response to this paragraph, STT indicated that it *always redacts the names and contact details of Forest Practice Officers when releasing FPPs to members of the public.* Redactions should only occur when the relevant information is exempt under the RTI Act. While I cannot review the application of an exemption under s36 of personal information at this stage, because the information has not been assessed, I am concerned by this stated practice. It is inconsistent with the requirements of the Act, as I set out in [74] and [75] above.

103 I reiterate my previously expressed view that the names of public officers performing their regular duties is not ordinarily exempt information. The default position is that the personal information of a public officer that relates to the performance of their duties is not exempt information; including name, position, and work contact details. It is only through applying and satisfying the s36 criteria that redaction is permissible when there are specific and unusual circumstances identified to justify it.

104 There are a wide range of professionals and public officers whose work is subject to the Act but there is no basis for automatic redaction of any specific type of officer's details under the RTI Act. This includes public officers working in roles, as described by STT, in a *highly political nature and charged atmosphere.* It equally applies to those public officers who make decisions that may adversely impact an individual's rights and liberty or those in law enforcement roles.

Conclusion

105 In accordance with the reasons set out above, I determine that STT was not entitled to refuse Parts 1 and 3 of C's request pursuant to s19.

106 I direct STT to assess the information responsive to these parts of C's request in accordance with the provisions of the Act.

Dated: 21 February 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 19

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

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

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

having regard to –

(c) the matters specified in Schedule 3 –

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

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

SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application

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

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

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

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

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

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

(f) the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in

that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made;

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

(h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;

(i) the extent of the resources available to deal with the specified application

OMBUDSMAN TASMANIA

DECISION

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

Names of Parties: Clive Stott and Department of Health

Reasons for decision: s48(3)

Provisions considered: s19

Background

1 The applicant, Mr Clive Stott, has an interest in air quality in Tasmania. On 13 June 2022, he lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with the Department of Health (the Department) requesting information about ventilation in hospitals.

2 Mr Stott indicated on his application for information to the Department that he had previously emailed the Premier and Minister for Health, the Hon Jeremy Rockliff MP, seeking this information. His application was in the following terms:

> *Which hospital wards in Tasmania do not have conditioned supply air or ventilation installed?*
>
> *i) Release of schematic diagrams of the heating/cooling/ventilation systems for these wards.*
>
> *ii) Which wards, if any have portable air purifiers installed.*

3 The Department accepted the application on 17 June 2022, after waiving the fee pursuant to s16(2)(a) of the Act.

4 On 15 July 2022, Mr Stott applied to this office for external review under s45(1)(f) of the Act, on the basis that the statutory timeframe had expired and he was not in receipt of a decision from the Department. In his covering email he indicated that *I believe the statutory 20 day limit has expired and health* [sic] *never sought further time.*

5 On 25 July 2022, the Department released a *s19(2) Notice of Decision* (the Notice) to Mr Stott. Mr Michael Casey, the Department's delegate under the Act, indicated an intention to refuse the application on the basis that to process the request would *substantially and unreasonably divert the resources of the public authority from its work* (s19(1)). The Notice offered the applicant five days in which to consult with the Department.

6 On 26 July 2022, Mr Stott responded to the Notice. In his letter he indicated a willingness to consult with the Department with a view to *remove any grounds of refusal for be in compliance with s19(2)*. His response is more fully set out in Submissions below.

7 It appears that the Department never responded to the applicant's letter.

8 Correspondence between my office and the Department occurred in July, August and October 2022, with my officers trying to ensure a decision was released as soon as possible. On 8 November 2022, Mr Casey issued a decision refusing the application pursuant to s19.

9 On 21 November 2022, Mr Stott applied for internal review. Also on 21 November 2022, the Department accepted the internal review request. The acceptance advised the applicant that:

> *In accordance with section 43(5) of the Act, the internal review will be completed within 20 working days of today's date (19 December 2022).*

10 On 21 December 2022, the applicant wrote to the Department because the due date had passed and he had not received the internal review decision.

11 On 26 January 2023, Mr Stott had still not received the internal review decision and applied to my office for review on the basis that the internal review decision had not been received in the required timeframe (s44(1)(b)(ii)). In that application he indicated, *I have heard nothing* from the Department.

12 Again, my officers made efforts to have the Department release a decision to Mr Stott in January and February 2023 including issuing a direction for a decision to be released pursuant to s47(1)(f) of the Act.

13 On 24 February 2023, Ms Sophie Doyle, the Department's delegate under the Act, released the internal review decision. It affirmed the original decision and Mr Stott's application for assessed disclosure was again refused pursuant to s19.

14 On 2 March 2023, my office received an application for a full external review from Mr Stott under s44(1)(b)(i). That application for external review was accepted by my office on 8 March 2023.

15 Mr Stott applied for priority consideration of his application, citing the compelling need for his application to be dealt with due to it relating to the COVID-19 pandemic and vital health considerations. He also raised concerns regarding the complete refusal of his application and the delays he had experienced from the Department. Having regard to my Priority Policy, the matters raised in his request for priority, the circumstances of the application, the information sought and the public interest in that information, I decided to prioritise his request on 8 April 2023.

Issues for Determination

16 The issues for determination are:

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

Relevant legislation

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

Submissions

Applicant's Submissions

18 The applicant has made submissions, as the application has progressed, outlining his position with respect to the information being sought and the consultation process.

19 The applicant's response to the Notice, as emailed by him to the Department on 26 July 2023, provides:

> ***Notice***
>
> *The Department has taken the view to refuse in relation to Schedule 3 by providing me with scant details as to how:*
>
> *19(1) (a) it would substantially and unreasonably divert resources from the authority's other work.*
>
> *(b) it would substantially and unreasonably interfere with the performance by the Minister or the Minister's other functions, and*
>
> *(c) matters I will come to in Schedule 3 as up until now (and outside RTI Act time limits) I have had no response from the department in relation to my request for information.*
>
> *19(2) It therefore follows the department has not up until now provided me with a reasonable opportunity to consult with a view to being helped to make this application in a form that would remove the grounds for refusal.*

Schedule 3

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

(e) I am familiar with RTI timelines.

Period of Consultation

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

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

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

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

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

Mention is made of this in the latest DHHS ***Decision and Statement of Reasons:***
"Whilst the Act does not require an applicant to express reasons for requesting an internal review, when requesting the internal review, the applicant submitted a detailed submission which is summarised under the following headings: 1. Application Fee, 2. Resources Unreasonably Diverted, 3. Reasonable Opportunity to Consult."
. . .
2. Resources Unreasonably Diverted.
I know what is involved in collating existing information because I worked in hospital engineering. I feel DHHS is making the request appear more onerous than it is.

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

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

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

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

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

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

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

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

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

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

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

Department's submissions

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

22 The Notice provides that:

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

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

...

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

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

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

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

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

( ) the timelines binding the public authority or Minister;

Period of Consultation

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

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

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

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

...

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

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

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

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

Reasonable opportunity to consult

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

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

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

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

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

Internal review decision

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

> ***Resources Unreasonably Diverted*** *...*
>
> *Section 19 provides that where an application would substantially and unreasonably divert the resources of the public authority from its work, having regard to the list of factors in Schedule 3, the application may be refused without identifying, locating or collating the information. However, the public authority must allow the applicant to negotiate a more limited or acceptable application. The intention of this section is to find a balance between the pro-disclosure objectives of the Act and the unreasonable disruption that could be caused to the performance of a public authority's daily operations if it was required to process voluminous requests for information.*
>
> *On 13 July 2022, a notice was issued under s19(2) advising that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. The applicant was requested to contact the public authority within five (5) working days of the date of the notice to remove the ground for refusal.*
>
> *The applicant's office emailed the public authority asking the number of pages that require assessment for each point of the request. While, as noted above, s19 provides refusal to disclose the information may be made without identifying, locating or collating the information, a preliminary review was undertaken to gain an indication of the effort to respond to the request.*
>
> *In order to make a decision under s19(1) of the Act, I must be satisfied that the work involved in providing the information requested would both substantially and unreasonably divert the resources of the public authority from its other work. Having considered the matters specified in Schedule 3 of the Act, and based on my enquiries to date with the information custodian, I am satisfied that the work involved in identifying, collating and providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. Concerning the matters specified in Schedule 3 of the Act my reasons are as follows:*
>
> - Matter 1(a): the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort.

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

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

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

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

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

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

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

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

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

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

  (4) extracting the information; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reasonable Opportunity to Consult

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

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

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

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

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

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

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

Analysis

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

Statutory obligations

28 The Act affords an applicant *a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority ... unless the information is exempt information* (s7).

29 Because of these clear intentions in the Act, and that a public authority should take all reasonable steps to release the maximum amount of information possible, refusal of an application should be a last resort. It is only after any avenues for enabling acceptance of a request for information are exhausted that a person's right to information under the Act is to be displaced, and it should not be done so lightly.

30 It is contemplated by the Act that there will be times, despite the best efforts of both parties, when a public authority will be unable to be responsive to a request and that an application will necessarily be refused.

31 I cannot agree with the delegate's assessment in the original decision that *it is not incumbent on the public authority to initiate consultation with the applicant otherwise the requirement would be to enter negotiations as per s13(7).* I find the characterisation of the requirement for the public authority *to consult* is clear in the wording of s19(2):

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

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

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

Consultation

33 Before entering the consultation stage, s19 necessarily requires the public authority to first identify that the information requested is of a kind or scope that to assess it will expend more than the usual resourcing. It must be both a substantial and unreasonable diversion of resources, supported by a rational basis for the conclusion.

34 The public authority is not required to identify, locate and collate the information but is required to assess the application sufficiently to be able to provide a full explanation to the applicant of the reasons for the proposed refusal. The applicant cannot be helped to make their application in a form which will remove the ground of refusal if such an explanation is not provided.

35 It should not be considered a foregone conclusion that simply because the public authority initially found that responding to the request would be a substantial and unreasonable diversion of its resources, that the application cannot be sufficiently refined. Quite the contrary, as there may be any number of outcomes from the consultation enabling the application to be accepted, with varying degrees of refinement required.

36 Engagement by both parties in the consultation process may present a number of positive outcomes that lead to an application being accepted, for example:

a. the applicant being better able to explain their request, especially if they have subject matter expertise that may be relevant;

b. the public authority better understanding the type of information sought or identifying other sources for the information that were not initially contemplated; or

c. the applicant understanding the practical challenges for the public authority and reframing or narrowing the request.

37 The Act does not prescribe how the consultation is to occur but there must be a reasonable opportunity given, and it obviously should be in good faith and fair.

38 The question then is whether the Department provided a reasonable opportunity for the applicant to consult and then engaged in a consultation with the applicant.

Adequacy of consultation

39 I find it necessary to first deal with the approach taken at the original decision making stage before turning to the internal review.

40 The Department offered the applicant the opportunity to respond to the Notice within five days. In the applicant's letter of reply, emailed the next day, he clearly requests to engage with the Department in order to progress the application.

41 The applicant expresses concern at being provided *scant details* with respect to s19(1) and he goes on that *the Department has not up until now provided me with a reasonable opportunity to consult with a view to being helped to make this application in a form that would remove the grounds for refusal. ... I look forward to hearing what help it can come up with to remove any grounds for refusal...*

42 On that basis, I reject the delegate's position that the applicant *decided not to consult* with the Department. I find to the contrary, that his response in fact indicated a willingness to accept and consider guidance as to what could be done to refine his request in order to obtain the maximum amount of information responsive to his request.

43 I further find that the Department, in offering the arbitrary five day period and then not engaging with the applicant, did not provide a reasonable opportunity to consult.

44 It would have been consistent with the statutory requirement to consult for the Department to:

a. respond to the applicant's letter and provide detail about its position and the basis for the conclusion that dealing with the application would be a substantial and unreasonable diversion of resources; and/or

b. schedule an appointment for the parties to discuss the application and the issues arising for the Department that had been identified and that informed the Notice issued.

45 The approach taken by the Department hindered the process and prevented Mr Stott from being informed in a manner which may have enabled him to refine the scope of his application and remove the ground of refusal.

46 I note that far better practice, such as the exemplary consultation I commented upon in my decision of *Robin Smith and City of Launceston*,[1] is for steps to be taken to identify the relevant information and provide details about the actual number of pages or any other reason that is likely to form the basis of a refusal. Addressing the factors in Schedule 3 during consultation, which are required to be considered and discussed in any

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

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

47 I am disappointed by the approach taken by the Department and I find the applicant was not afforded a *reasonable opportunity to consult.* It is clear in Mr Casey's decision that there is confusion regarding exactly what is sought, as he notes that part of the request *seems to be contradictory*. This highlights that there were matters for discussion between the parties. This lack of engagement with the applicant is not consistent with a reasonable approach in helping an applicant to make a valid application.

48 This is further evident from the suggestion by the Department that the only means of obtaining the information is through a labour intensive manual inspection process to create new information. There is no explanation for this proposal and the basis for it. Nor is there any discussion as to other sources considered, for example, maintenance or depreciation schedules, building or engineering records, service contracts, reports such as air quality audits, or other resources such as schematics that the applicant, with his hospital engineering background, may be familiar with. Without proper consultation, it is impossible to determine whether there may be an alternative solution which may remove the ground of refusal.

49 With respect to the approach taken by Ms Doyle in the internal review decision, there are separate issues that arise for consideration.

50 First, in undertaking the review task the reviewer is to *make a fresh decision* (pursuant to s43(4)(b)) and in so doing approach that task *in the same manner as a decision in respect of the original application* (having regard to s43(5)). It is not at all apparent that the reviewer approached the matter of consultation as required, and instead reliance is made on an assertion that the applicant was out of time in responding to the Notice.

51 Second, the reviewer's reliance on the Department's nominated five days is problematic for the following reasons:

a. The date relied on for reckoning of the five days offered is wrong (the Notice was dated 25 July 2022, not 14 July 2022 as cited) and Mr Stott did in fact respond to Mr Casey within five days; and

b. In any event, there is no statutory requirement that would prevent consultation outside of the Department's nominated five days which appears unreasonably short in the context of lengthy delays in releasing decisions by the Department.

52 I find, for the purposes of the internal review, that the Department failed to engage with the applicant with a view to him being helped to make an application in a form that would remove the ground for refusal as required under the Act.

53 The Act gives members of the public the right to obtain information from public authorities unless it is exempt information, and it is expressly provided

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

Preliminary conclusion

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

Conclusion

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

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

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

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

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

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

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

62 I direct the Department to re-assess the application in accordance with the provisions of the Act.

Dated: 26 June 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant legislation

Section 19

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

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

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

having regard to –

(c) the matters specified in Schedule 3 –

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

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

SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application

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

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

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

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

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

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

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

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

(h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;

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

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-138 O2108-039

Names of Parties: Don Allen and City of Launceston

Reasons for decision: s48(3)

Provisions considered: s36, s37

Background

1 Mr Don Allen is a director of Car Parks Super Pty Ltd, a private company that partly owns a car park site in Paterson Street, Launceston. In around mid-2020, the City of Launceston (Council) received a $10 million grant under the Building Better Regions Fund infrastructure grants program[1] and purchased a share in this car park site[2]. The purchase was to enable the development of part of the site – a proposed $80 million creative industries precinct funded by the New Creative Group[3], also a private company.

2 On 16 March 2021, Council accepted an assessed disclosure application under the *Right to Information Act 2009* (the Act) from a journalist seeking information relating to this proposed development. The information responsive to this request included information that had been provided by Mr Allen and other third parties.

3 On 4 May 2021, Mr Wezley Frankcombe, a delegate of the Council under the Act, forwarded a brief email to Mr Allen's legal representative. This provided notice under s36(2) of the Act that Council had received an application for assessed disclosure and Mr Frankcombe was of the view that the release of this information may be of concern to Mr Allen.

4 On 18 May 2021, Mr Allen's lawyer replied on his behalf and noted that *minimal information has been provided to our client to identify the property matter to which the Right to Information Request relates.*

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[1] Baker, E., *Launceston council received $10m drought grant for 'creative precinct'* - ABC News (9 July 2020), available at www.abc.net.au/news/2020-07-09/pork-barrel-accusations-launceston-drought-federal-funding/12437412

[2] Media release dated 6 June 2020. *Major CBD sites to be redeveloped under Council plan - City of Launceston* available at www.launceston.tas.gov.au/News-Media/Major-CBD-sites-to-be-redeveloped-under-Council-plan

[3] See Note 1.

5 The lawyer outlined that the car park is owned by Mr Allen's superannuation fund and she considered that notice should have be given under s37 of the Act as well as s36. Despite not knowing exactly what the information was, a view was expressed that the disclosure of personal information relating to Mr Allen would be contrary to the public interest and suggested that the application for information should be denied.

6 On 10 June 2021, Ms Louise Foster of Council, a delegate under the Act, communicated her decision to nonetheless provide the information to the original applicant for information, unless an application for review was received from a relevant third party.

7 On 10 June 2021, Mr Frankcombe advised Mr Allen's lawyer about Ms Foster's decision to release information and notified him of his right to seek review of this decision. Mr Frankcombe also set out that he considered that s37 *was not an applicable exemption in relation to your client's information.*

8 Between 15 and 24 June 2021, Mr Allen's legal representative corresponded with Mr Frankcombe asking for copies of the relevant information, as she considered that viewing this was *necessary for our client to form a view on seeking an internal review of the decision.* Council did not provide any further details or a copy of the information, indicating that *this matter is subject to legal proceedings.*

9 On 24 June 2021, Mr Allen's lawyer sought an internal review.

10 By 6 August 2021, no response had been received to the application for internal review in the timeframe set out in s43(2) of the Act and Mr Allen applied to my Office for an external review pursuant to s44(1)(b)(ii). Mr Allen's application was accepted.

11 Between 13 August 2021 and 16 March 2022, this Office communicated with Council regarding the need for it to release a formal internal review decision to Mr Allen.

12 On 21 April 2022, Ms Leanne Purchase of Council, a delegate under the Act, forwarded the information of concern to Mr Allen's lawyer (four emails) and again sought his views on the release of that information to the original applicant.

13 On 12 May 2022, Mr Allen's lawyer wrote to Ms Purchase and referred to the specified emails numbered 1, 2 and 4 and agreed that these could be provided to the original applicant. In relation to the email numbered 3, Mr Allen's lawyer maintained his objection to the release of that email in full. However, to illustrate the areas that Mr Allen most particularly sought redactions, they crossed out in pen the following areas on those three pages:

- Page 1: all of the second and third paragraph;
- Page 2: all of the final and sixth paragraph; and
- Page 3: all of the first paragraph.

14 Mr Allen's lawyer asserted that the *personal information of a person other than the Applicant is prima facie exempt information* and that *Disclosure of information in relation to business affairs, where the disclosure would be likely to expose our client to competitive disadvantage is also exempt (section 37).*

15 Mr Allen's lawyer referred to matters relevant to the s33 public interest test in Schedule 1 of the Act: (j), (m), (s), (v), (w) and (x).

16 Between 30 May 2022 and March 2023, there was communication between Council and this Office regarding Council seeking an extension of time to deal with the internal review. This was refused as there was no basis under the Act for such an extension.

17 On 3 April 2023, Mr Duncan Campbell of Council, another delegate under the Act, notified this Office that further consultation under s37 and a fresh decision was going be made taking into account third party views.

18 On 17 April 2023, Mr Michael Stretton, Council's Chief Executive Officer and principal officer under the Act, released an internal review decision (dated 22 March 2023) to Mr Allen's lawyer.

19 Mr Stretton indicated that third parties were consulted and that Council proposed to release the information, with some information redacted as exempt under ss36 and 37 of the Act. The information redacted was in the email numbered 3, which comprises three pages in total.

20 In relation to this email, Mr Stretton indicated that he had redacted the following information on each respective page:

- Page 1: parts of the second, third paragraph and fourth paragraph;
- Page 2: parts of the first line and the fourth line in the first paragraph, parts of the first and second line in the second paragraph, parts of the third, fourth and fifth paragraph and all of the final and sixth paragraph on that page;
- Page 3: all of the first paragraph; and
- All names were redacted excepting Mr Stretton's name and the name of a commercial real estate firm, Shepherd and Heap.

21 On 2 May 2023, this Office wrote to Mr Allen's lawyers to confirm whether he sought to pursue a full external review, now that a decision had been released to him.

22 On 9 May 2023, Mr Allen confirmed he sought a full external review and this was accepted under s44(1)(b)(i). As he does not object to the release of the emails numbered 1, 2 and 4, this review will be confined only to the email numbered 3.

Issues for Determination

23 I must determine whether the information proposed to be released by Council is eligible for exemption under ss36 or 37 of the Act.

24 As ss36 and 37 are contained in Division 2 Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that information is prima facie exempt from disclosure under either of these sections, I must then determine whether it would be contrary to the public interest to release it. In making this assessment I must have regard to, at least, the matters listed in Schedule 1 of the Act.

Relevant legislation

25 I attach copies of ss36 and 37 of the Act to this decision at Attachment 1.

26 Copies of s33 and Schedule 1 are also included at Attachment

1. **Submissions**

Council

27 Council did not make submissions in relation to this external review beyond the reasoning of its notification decisions. On internal review on 22 March 2023, Mr Stretton gave the following reasons for his decision to partially exempt the information in question:

> *In respect of the email numbered 3, with due attention to your client's views, I considered the exemptions that may be applicable pursuant to sections 36 and 37 of the Act and the applicable public interest considerations at Schedule 1.*
>
> *In considering the matters at Schedule 1, I have formed the view that release of the information acknowledges the public's need for access to information held by Council (a) and that release would contribute to public debate on a matter of public interest (b). Provision of the information would also facilitate scrutiny of Council's administrative ad* [sic] *decision making processes (f)(g).*
>
> *Conversely, release of sensitive and or confidential business and financial information that does not appear to be available to your client's competitors generally (x) has the potential to harm his personal and business interests (m), (s), and his competitive position (w). I consider that such release would be unfair (h).*
>
> *In accordance with these considerations, I have determined that the information is partially exempt from release, as indicated by redaction in the attached document.*

Applicant

28 On 12 May 2022, Mr Allen's lawyer wrote to Council and submitted that:

In respect to the email in item 3 of your letter, our client objects to the release of that email in full. Specifically, our client objects to the release of the material in the paragraphs which are marked by crossing through on the ***attached.*** *In our client's view, there are multiple reasons why his personal information should not be disclosed in relation to the property transaction confirming the above property. We note that personal information of a person other than the Applicant is prima facie exempt information. Disclosure of information in relation to business affairs, where the disclosure would be likely to expose our client to competitive disadvantage is also exempt (section 37).*

We also refer you to the following sections of schedule 1:

1. *Subsection (j), noting the property is the subject of proceedings and to disclose the information may harm the administration of justice for our client.*

2. *Subsection (m), where the disclosure would harm the interests of our client in potentially making information available in relation to his negotiations for a potential sale of the property, the value of the property, or dealings he may or may not undertake in relation to the property, all of which may damage his commercial interests to be made public.*

3. *Subsection (s), the disclosure would harm the business interests of our client and the property owner through potentially making available information in relation to his negotiation position, sale of the property or other matters that may affect his commercial interest.*

4. *Subsection (v), information within the email is extraneous or additional information which does not go to the property transaction.*

5. *Subsection (w), the information in relation to the business affairs of our client which could harm his competitive position in relation to utilisation of his property asset.*

6. *Subsection (x), the information in relation to the property transaction would not be available to the competitors of our client.*

Our client considers the disclosure of the email in point 3 in its entirety is exempt and the application should be denied in respect to that email.

29 The Applicant's lawyer made further submissions to this Office on 10 July 2023 after the external review to this Office was accepted. They set out:

The Launceston City Council's conduct in respect to this application and consideration of our client's rights has been problematic. We wish to draw the Ombudsman's attention to the following:

1. *The first notice issued to our client on 4/5/21 specified that the notice was issued under section 36. The writer noted to the Council that section 37 also appeared relevant. This was denied by the Council Officer as not an applicable exemption. Council have subsequently*

tried to rectify this matter in their letter of 21/4/22 in relation to the internal review by asserting that the original notice was under both sections 36 and 37. This is not correct and it appears the initial notice was flawed in application. Purporting to review the decision under both sections some 11 $^{1}/_{2}$ months later, does not resolve the initial prejudice to our client in not receiving a proper notice under section 37 on 4/5/21.

2. *The Council refused to provide any scope as to the documents to be released following their notice on 4/5/21 other than to state that the documents were emails in relation to a property transaction and providing a long timeframe. Eventually, the Council provided 2 redacted emails, while making it clear that other documents mentioning our client were to be released. The Council justified the lack of detail on the basis that to provide specifics to our client as to the additional emails contained exempt information which would require an assessed disclosure. Our client would not make their own Right to Information Act application in a timeframe that would allow our client to be informed of what was proposed to be released.*

3. *Council asserted that they were not required to provide detail to our client of the documents to be released in any way. Further, that the provision of 2 redacted documents, was provided in good faith due to our client's concerns that he could not answer to the notice. The Council's failure denied our client his right to appropriately respond to the notice issued through having access to the relevant material. A claim of good faith is not relevant to procedural fairness in decision making. Council were required to provide sufficient detail to our client to enable him to properly respond to the notice.*

4. *Council did not respond to the application for internal review of the decision made on 10/6/21. This lead to our client making an application for external review to the Ombudsman.*

5. *Council purported to conduct the internal review under both section 36 and 37 on 21/4/22. 4 emails were provided with this notice as being those for release. This notice inaccurately stated that the initial notice in 2021 had been given under both sections 36 and 37. No explanation is provided as to why documents can be provided on this occasion when the Council would not release them earlier.*

6. *Our client objected to the release of one of the emails by letter dated 12/5/22. We did not receive any other documentation from Council till a decision dated 22/3/23, but only served via email on 17/4/2023. A timeframe which spans an additional 11 months. No notice was received of decision prior to that date.*

7. *From initial notice till Council decision took 23 months. The timeframe resulted from failures by Council to:*

    a) provide information that enabled our client to assess their right to object to the initial notice of 4/5/21 despite multiple

requests. This is a fundamental breach of obligations of procedural fairness;

b) resolve Council's initial notice dated 4/5/21 issued under section 36 by completing an internal review within a reasonable timeframe;

c) respond to matters raised by the Ombudsman through the external review in a timely manner.

d) Recognise that Council had not issued notice under section 37 and proceeding to conduct an internal review of the initial notice under both sections 36 and 37.

8. Notice has been issued to Donald Allen. Mr Allen is not the owner of the subject land. The subject land is registered to Car Parks Super Pty Ltd. The second director of that company, Janet Allen, is named in the correspondence proposed to be released. Neither Mrs Allen, nor the owner of the subject property have been issued with any notices in relation to the Right to Information request.

Council's processes in relation to Right to Information Act applications appear flawed and inconsistent with the rights for procedural fairness both of the applicant for information and our client as an affected person.

Our client seeks for the Ombudsman to review the processes undertaken by Council in assessing the notice issued to Mr Allen under the Right to Information Act.

Analysis

Preliminary issues

30 On 10 July 2023, Mr Allen's lawyer provided the additional submissions set out above in relation to the application for external review. They forwarded 17 attachments that inform this Office of the background to the request for information and, in particular, eight detailed submissions primarily regarding complaints about not receiving the information on which Mr Allen was being consulted in order to obtain his view on whether it should be released. The lengthy delay prior to receiving an internal review decision was also a major concern.

31 In this matter, Mr Allen and his lawyer asked for the relevant information as early as 18 May 2021 and it was not until 21 April 2022, that Ms Leanne Purchase forwarded the information in question (four emails) to Mr Allen.

32 While it is not a requirement under the Act that copies of the relevant information be provided to the person being consulted, it is a not a breach of the Act to do so and is best practice to do this wherever possible. Where the person being consulted was a party to the original correspondence, I cannot see a reason why this could not be provided to them as part of the consultation

process to enable an informed view to be provided by the third party. Mr Allen's frustration with Council's position here is justified.

33 Council then made a decision that the information could be released to the original applicant but initially would not provide a copy to Mr Allen to inform his view being sought through consultation. His concern about this inconsistent and unhelpful position was valid. However, I note that following advice from my Office and concerns being raised by Mr Allen, Council did eventually provide copies of the relevant information and did properly engage with Mr Allen towards the end of the internal review process.

34 Mr Allen also complained about the timeframes not being met under the Act, particularly in relation to not meeting the timeframe for an internal review. Mr Allen requested an internal review on 21 June 2021 and a decision was not provided until 22 March 2023. Council has not provided a reasonable explanation for this extensive delay and it indicated to my Office at several points during that time that the internal review decision was ready to be released. Accordingly, it does not appear to be an issue regarding a backlog of work or lack of capacity at Council to complete the decision.

35 It appears that Council has consciously delayed completion of the internal review decision to enable the progression of the project or associated litigation. This is not a permissible reason under the Act to not issue a decision. While Mr Allen has not been disadvantaged by this delay, as he seeks to block the release of this information, it is detrimental to the operation of the right to information scheme in Tasmania and original applicant for information to have such non-compliance and delays. I urge Council to improve its practices in future.

36 I also urge Council to engage with third parties potentially affected by the release of information in a more helpful manner in future and to provide timely communication, especially when insisting on timeliness themselves. This is in accordance with the express intention of the Act in s3(4)(b) that discretions conferred be exercised so as to facilitate the prompt release of the maximum amount of official information.

Section 36 – Personal information of person

37 Mr Allen claims that his personal information in the email numbered 3 is exempt and should not be disclosed pursuant to s36. For information to be exempt under this section, I must first be satisfied that its release would reveal the identity of a person other than the original applicant, or that the information would lead to that person's identity being reasonably ascertainable. If so, as s36 is subject to the public interest test found in s33 of the Act, I must then assess whether it would be contrary to the public interest to release the information.

38 Mr Allen's name or Car Parks Super Pty Ltd does not appear in the information proposed to be released, but I am satisfied that with the remaining references to the Paterson Street property and the publicity surrounding this matter that his identity is reasonably ascertainable. Accordingly, I accept that the information in question is prima facie exempt under s36.

39 Despite this, it is unclear why the release of this information would be contrary to the public interest under s36. Mr Allen is on the public record as being the director of Car Parks Super Pty Ltd and has been regularly named in the media and in litigation[4] as being associated with this property and project. The information remaining after Council's redactions have been applied is also minimal.

40 Mr Allen relies on matter (j) in Schedule 1 but he does not explain which legal process and how the release of information would may harm the administration of justice. It is not otherwise apparent why the release of this quite innocuous information would harm any legal position.

41 Mr Allen also relied on matters (m*) whether the disclosure would promote or harm the interests of an individual or group of individuals* and (s) *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation* in Schedule 1. However, there seems to be a lack of substance to this argument when applying these public interest matters. Given the significant redactions agreed to by Council, why the release of the remaining information would cause such harm has not been clearly expressed.

42 Mr Allen also argued that matters (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* and (x) *whether the information is information related to the business affairs of a person which is generally available to the competitors of that person* were relevant. He has not provided further submissions after Council agreed to redact the majority of this document, however, and it remains unclear why such harm would result given the innocuous nature of the material and extensive publicity to date.

43 I do not consider that Mr Allen has discharged his onus under s47(5) to show why the information Council proposes to disclose should not be released.

44 Accordingly, I am satisfied that it would not be contrary to the public interest to release the information and agree with Council that this information is not exempt under s36.

Section 37 – Information Relating to Business Affairs of Third Party

45 I now turn to assess the applicability of s37, as Mr Allen has claimed that the remainder of this email is exempt under this provision.

46 Section 37(1)(b) allows for the exemption from disclosure of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application of assessed disclosure, if its disclosure would be likely to expose the third party to competitive disadvantage.

[4] See *Carparks Super Pty Ltd v Launceston City Council* [2023] TASCAT 2 (5 January 2023), particularly [49] to [62].

47 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman* [2010] TASSC 39, Porter J held at [52]:

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

48 The Court further held at [59]:

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

49 At [41] the Court interpreted the meaning of 'likely' to be *a real or not remote chance or possibility, rather than more probable than not.*

50 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*[5] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

51 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

52 I am satisfied that the email in question relates to the business affairs of Mr Allen and Car Parks Super Pty Ltd and, while this is marginal in relation to the information which remains in dispute, I accept that its disclosure would involve a genuine likelihood of exposing him to competitive disadvantage.

53 Council, in its decision dated 22 March 2023, agreed that the release of parts of the email in question would be contrary to the public interest. It did not clearly indicate whether this was pursuant to ss36 or s37 but appeared to be primarily considering the business or competitive position of Mr Allen and Car Parks Super Pty Ltd under s37.

54 It indicated that the following public interest test matters supported release:

- *(a) the general public need for government information to be accessible;*
- *(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;*

[5] [2017] NSWCA 275 (24 October 2017)

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

55 Council acknowledged that this request involved the *release of sensitive and or confidential business and financial information that does not appear to be available to* [Mr Allen's] *competitors generally* and considered the following public interest matters to weigh against disclosure:

- (h) *whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government*;
- (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals*;
- (s) *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation*;
- (x) *whether the information is information related to the business affairs of a person which is generally available to the competitors of that person.*

56 Mr Allen did not accept that the redactions applied sufficiently addressed his objections and he argues that the email should be redacted *in full*.

57 Council has redacted all of the parts which Mr Allen considered to be particularly sensitive in the marked up version he provided prior to Mr Stretton's decision. The detail that is left is minimal and I am not satisfied that the likelihood of it causing harm to Mr Allen's business or competitive position outweighs other considerations favouring release. There is greater detail revealed in the Tasmanian Civil and Administrative Tribunal[6] decision relating to these parties, which contains similar and more up to date information, particularly at paragraphs 49 to 62 of that decision. The development of this area of Launceston is a matter of legitimate public interest and information should only be withheld from the public when this is genuinely necessary.

58 As a result, I find that is what is left unredacted by Council in the email is appropriate to release, especially given the passage of time and the extensive information on this matter already in the public domain.

59 I am not satisfied that the release of the document as redacted by Council would be contrary to the public interest and find that it is not exempt pursuant to s37.

Preliminary Conclusion

60 For the reasons set out above, I determine that the information in question is not exempt pursuant to ss36 or 37.

---

6 See Note 4 above.

Conclusion

61 On 15 September 2023, the preliminary decision was made available to both Council and Mr Allen under s48(1)(b) of the Act, to seek their input before finalising the decision.

62 On 10 September 2023, Council advised this office that it had *considered the preliminary decision and does not intend to make a submission.*

63 On 11 September 2023, Mr Allen's lawyer advised this office that her *client had not intended to make submissions in response.*

64 Accordingly, for the reasons set out above, I determine that the information in question is not exempt under ss36 or 37.

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

Dated: 11 October 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant Legislation

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

Where :

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

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

Section 37 – Information Relating to the Business Affairs of a Third Party

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

(a) the information relates to trade secrets; or

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

(2) If –

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

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

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

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

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

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

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

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f) , decides to disclose the information, the public authority or

Minister must, by notice in writing given to the third party, notify the third party of the decision.

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

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

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

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

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

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

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

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

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** O2010-008
R2202-038

Names of Parties: Emma Hamilton and Department of Natural Resources and Environment Tasmania

Reasons for decision: s48(3)

Provisions considered: s26, s31, s35, s36

Background

1 The Tasmanian Government has announced plans to build a prison in northern Tasmania. The project has generated significant interest in the community, particularly in Westbury which was initially proposed as the site of the facility. The applicant in this matter, Ms Emma Hamilton, is a member of the Westbury community and has an interest in the land use of a local site on Birralee Road. The Crown Land site was originally intended to be transferred to the Tasmanian Land Conservancy organisation for conservation purposes, but was then considered as a potential site for the northern prison. This proposed use as a prison was later abandoned.

2 On 25 June 2020, Ms Hamilton submitted a request for information under the *Right to Information Act 2009* (the Act) to the Department of Natural Resources and Environment Tasmania, then known as the Department of Primary Industries, Parks, Water and the Environment (the Department). The application was accepted by the Department on 1 July 2020.

3 Ms Hamilton originally made a broad request for information seeking ten separate items, all concerning the land at Certificate of Title numbered CT14862/1, as follows:

> *1. Copies of all the surveys, assessments, reports or similar and all field notes held by DPIPWE or done by DPIPWE* [the Department] *on CT 14862/1 including without limitation:*
>
> *a) a copy of the assessment undertaken approximately 10 years ago and referred to by the spokesperson for DPIPWE as reported by ABC on 23 June 2020 which indicated that the "site as not needing protection";*
>
> *b) a copy of the preliminary assessment undertaken by DPIPWE immediately prior to the announcement of the site for the prison*

which found that there was "no impediment that would prevent the building of a prison on the site",

2. The CAR Scientific Advisory Group (CARSAG) meeting minutes, notes and/or any reports provided to it or generated by it which touch upon CT 14862/1.

3. The meeting minutes, notes of and/or any reports provided to or generated by the Advisory Committee established to oversee the strategic plan for the private land component of the CAR Reserve System, (which included representatives nominated by the DPIPWE, Private Forests Tasmania, the Forest Practices Board, the Tasmanian Farmers and Grazier's Association and the Tasmanian Conservation Trust) which touch upon CT 14862/1.

4. Any advice or recommendations made by CARSAG or the Advisory Committee in relation to CT 14862/1.

5. All the correspondence between the former owner of CT 14862/1 and DPIPWE or its agents.

6. Any management plan or operations plan which was prepared (whether implemented or not) for CT 14862/1.

7. Any management, memorandum or correspondence relating to the funding or payments made by the Commonwealth Government to the State Government which relate to CT 14862/1.

8. Any information held by Crown Land Services in relation to CT 14862/1.

9. All correspondence between the Tasmanian Land Conservancy and DPIPWE in respect to CT 14862/1.

10. All records, assessments, reports or field notes regarding Raptor Nest No. 1402.

In this application, references to DPIPWE include references to former Government department[s] which performed functions now performed by DPIPWE in respect of CT 14862/1.

4 On 4 July 2020, the Department contacted Ms Hamilton to seek to refine the scope of the request. On 14 July 2020, the Department issued Ms Hamilton with a letter advising that the initial request was voluminous and would need to be refined. Ms Hamilton subsequently agreed, on 2 August 2020, to clarify and refine the scope of her application under the Act as follows:

In relation to the proposed site for the Northern Regional Prison, information from 1994 to 25 June 2020 (the date of your application):

1. Copy of the assessment, survey, report or similar held by DPIPWE which was undertaken approximately 10 years ago and which was referred to by the spokesperson for DPIPWE on 23 June 2020 which indicated that the land did not need protection.

2. Copy of the assessment, survey, report or similar held by DPIPWE which was undertaken just before the announcement of the land as the proposed new site for the prison which indicated that "there was no impediment that that would prevent the building of a prison on the site".

4. Any electronic records that are readily available in relation to the land from 25 June 2013 – present.

5 On 18 September 2020, Ms Monique Lindridge, a delegate of the Department under the Act, issued a decision in relation to the application. Initially, the Department located 1059 pages of information responsive to Ms Hamilton's request. Of this, 272 pages were removed because they were duplicates or already publicly available. An internet link was provided to the location of the publicly available documents.

6 The remaining 787 pages of information were assessed by the Department under the Act. Of these, 564 pages were released in full to the applicant. Another 223 pages were released in part. The Department claimed that some of the information on these pages was exempt from disclosure under the Act and this information has been redacted. Further minor redactions were made of information that was considered to be out of the scope of the application, as it did not relate to the relevant site.

7 The information which the Department determined could not be disclosed was claimed to be exempt under the following sections of the Act:

- Section 26 – cabinet information;
- Section 31 – legal professional privilege; and
- Section 36 – personal information of a person.

8 On 24 September 2020, Ms Hamilton made a request for an internal review. The request was received by the Department on 25 September. Ms Alison Scandrett, a delegate of the Department under the Act, issued a decision on internal review on 29 September 2020. Ms Scandrett upheld the initial decision in all respects.

9 On 29 September 2020, Ms Hamilton wrote a letter seeking an external review of the Department's decision. The letter was received on 2 October 2020.

10 The application for external review was accepted under s44 of the Act on the basis that Ms Hamilton had received an internal review decision and had

submitted her application to this office within 20 working days of receipt of that decision.

Issues for Determination

11 I must determine whether the information not released by the Department is eligible for exemption under ss26, 31, 36 or any other relevant section of the Act.

12 As s36 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that should I determine the information is prima facie exempt under this section, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant Legislation

13 The Department has relied on ss26, 31 and 36 in its decision. Copies of these sections are at Attachment A.

14 Copies of s33 and Schedule 1 are also attached.

Submissions

15 The Department did not make submissions in relation to this external review, beyond the reasoning of its decisions which is extracted in the *Background* above and discussed in the *Analysis* below.

16 Ms Hamilton did not make substantive submissions in support of her requests for internal and, subsequently, external review of the Department's decision. In her letter dated 29 September 2020 requesting an external review, Ms Hamilton wrote:

> *I ask that you look through these documents and review the decisions that have been made, especially with regards to the portions that have been redacted.*

Analysis

17 The Department identified the documents it considers exempt from disclosure under ss26, 31 and 36. Exemptions have been marked on the relevant pages which have been released in one bundle numbered from 1 to 787. I will refer to this as the Executive Document and use the page numbers to identify documents during my assessment.

Section 26 – Cabinet information

18 Under s26, information is exempt if it is contained in:

> *(a) the official record of a deliberation or decision of the Cabinet; or*

(b) a record proposed by a Minister for the purpose of being submitted to the cabinet for consideration; or

(c) a record that is a copy of, or a copy of part of, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

19 This exemption is subject to some qualifications. The exemption does not apply if ten years have elapsed since the information was first considered by Cabinet.[1]

20 In addition, the exemption does not apply solely because it was submitted, or proposed by a Minister to be submitted, to Cabinet for consideration. The information must have been brought into existence for the purpose of submitting it to the Cabinet for consideration.[2]

21 The exemption also does not apply if the information is purely factual, unless its disclosure would disclose a deliberation or decision of Cabinet which has not been officially published.[3]

22 As to what constitutes 'purely factual information,' this was considered in *Re Waterford and the Treasurer of the Commonwealth of Australia*.[4] 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, and not be inextricably bound up with a decision-maker's deliberative process. In other words, 'purely factual information' must be capable of standing alone.

23 The Department has claimed that certain information on pages 1-5 is exempt information under s26(1)(d). In the initial decision by the Department, the delegate under the Act advised:

> *Some of the information you have requested comprises a record, which if disclosed, would disclose a deliberation or decision of cabinet. This information has been exempted pursuant to section 26(1)(d). Purely factual information contained within the record has been disclosed in accordance with section 26(4).*

24 As the Department's delegate points out, section 26 is contained within Part 3, Division 1 of the Act, and thus not subject to the public interest test. As such, it is crucial that information only be considered exempt under provisions not

[1] Section 26(2)
[2] Section 26(3)
[3] Section 26(4)
[4] *Re Waterford and the Treasurer of the Commonwealth of Australia* (1984) AATA 518 at [14]

subject to the public interest test when this is genuinely necessary, in order to ensure that the Act's intent can be fulfilled.

25 The relevant pages are not identified in any way on their face or in the Department's original decision, although it is clear that the information concerns the site that is of interest to Ms Hamilton. The document sets out the background to the Crown acquisition of the land and intentions for its disposal, and provides a summary of the history and character of the parcel of land.

26 The decision on internal review provides a small amount of additional information. The delegate under the Act explained the claim for exemption of information under s26(1)(d):

> *I confirm that the information on pages 1-5 of the assessed material is a document that was prepared for submission to Cabinet to assist in the deliberations of Cabinet in regards to the site for a northern prison.*
>
> *Whilst most of the document is purely factual and can be released some of the release of some of the material would, if disclosed, reveal a deliberation or decision of cabinet.*

27 From this I understand that the information was brought into existence for the purpose of submission to Cabinet for consideration, thus satisfying s26(3).

28 However, I have since been informed in an email from the Department, dated 27 July 2023, that the information comprising pages 1 to 5 is part of an internal advice document prepared in March 2019 specifically for the then Secretary of the Department, Mr Tim Baker. Mr Baker is not a member of Cabinet but the Department asserts that the disclosure of this advice document would reveal deliberations of Cabinet. With this further information regarding the age of the document, I am satisfied that s26(2) is fulfilled and the information is less than ten years old.

29 It is to be commended that so much information in the document has been conceded as purely factual and released. However, it is apparent that the redacted information refers to deliberations and or decisions of government at the highest level.

30 It is considered that the exemption under s26 protects a particular aspect of the public interest. There is an overriding public interest in deliberations and decisions at the highest level of government remaining confidential. Cabinet confidentiality is fundamental to our system of government, and is protected as a matter of convention. The underlying principle is that the quality and nature of decision making at this level of government would or could be adversely impacted by being exposed to scrutiny.

31 Pursuant to s47(4) of the Act, the Department has the onus to show that information should not be disclosed. In this instance, I am satisfied that the Department has mostly discharged its onus here. The information redacted is exempt under s26 and not required to be disclosed to Ms Hamilton, except for the sentence on page 5 which contains purely factual information. This information is to be released to Ms Hamilton.

32 I will also note my concern about the Department's record keeping and encourage it to ensure all important documents are dated and identifiable in future, both in decisions under the Act and as a general practice.

Section 31 – legal professional privilege

33 The Department has claimed that pages 62, 671 and 674-5 of the Executive Document contain information that is exempt pursuant to s31 of the Act.

34 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.*

35 Legal professional privilege is a rule of substantive law which attaches to confidential communications between a lawyer and their client made for the dominant purpose of providing or obtaining legal advice, or legal services, or for use in connection with existing or anticipated litigation.[5]

36 I must determine whether this privilege applies to the information that the Department has redacted in the course of this application for disclosure of information.

37 In determining the extent of this privilege, I refer to principles stated under Australian law. Legal professional privilege does not attach to documents *per se*, but to communications and the contents of documents where the dominant purpose was the seeking or giving of legal advice or the provision of legal services.[6]

38 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. Thus, legal professional privilege is itself the product

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[5] See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 at paragraph 9 of the High Court, re-affirming the 'dominant purpose test' as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* 201 CLR 49.

[6] *Esso Australia Resources v Commissioner for Taxation* (1999) 201 CLR 49; [1999] HCA 67 (para 35)

of a balancing exercise between competing public interests and, given the application of the privilege, no further balancing exercise is required.[7]

39 The privilege applies where the dominant purpose of a communication or document is the seeking or giving of legal advice or provision of legal services. In considering the words dominant purpose, the Courts have taken into consideration the fact that a large proportion of internal communications within corporations and bureaucracies are necessarily conducted in writing.[8]

40 In addition, legal advice in this context includes advice as to "what may prudently and sensibly be done in the relevant legal context".[9] The ease with which electronic communications are conducted means that many short communications may be created in the normal course of the provision of legal services.

41 As legal professional privilege does not attach to a document as such, but rather to the communication recorded within it,[10] that means:

> *... it attaches also to summaries, notes and copies of documents made by the client or the lawyer of communications which are themselves privileged ...*[11]

Page 62

42 On page 62, the information claimed to be exempt is information contained in a series of emails between employees of the Department. In the first instance, in the email sent to Ms Helen Crawford of the Department on 16 April 2015, only a short section of one sentence has been redacted. In my view, this does not amount to the email having the dominant purpose of seeking or giving of legal advice or the provision of legal services. In addition, the words redacted cannot be properly considered to be summaries or notes made by the client or lawyer of privileged communications.

43 The redacted words merely mention that a notice has been reviewed by Crown Law. Legal professional privilege does not cover all references to legal advice or interaction with lawyers, it must be for the dominant purpose of obtaining legal advice or litigation. I am not convinced that this is the nature of this communication. The communication appears to be of an administrative nature only and I do not consider that it is exempt under s31.

44 In the second instance on page 62, a larger section is redacted in the email addressed to Ms Crawford dated 14 November 2014. I am satisfied that the

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[7] *Waterford v The Commonwealth* [1987] HCA 25; (1987) 163 CLR 54 at 64-65
[8] *Esso Australia Resources v Commissioner for Taxation* (1999) 201 CLR 49; [1999] HCA 67 (para 59)
[9] *Balabel v Air India* [1988] Ch 317 (Balabel), 330; *AWB v Cole* (2005) 152 FCR 382 (AWB v Cole (No. 1)), [410]
[10] *Australian Federal Police v Propend Finance* (1997) 188 CLR501; 141 ALR, 545
[11] *Trade Practices Commission v Sterling* (1978) 36 FLR 244; *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514

dominant purpose of this part of this email is to communicate a summary of some legal advice received and indicates the content of a future request for advice. I am satisfied that the communication contains information that would be privileged from production in legal proceedings and that portion of the document is therefore exempt from production pursuant to s31.

Page 671

45 The relevant communication on page 671 comprises an email between officers of the Department dated 9 March 2018 concerning 'Crown land transfer to Tasmanian Land Conservancy'. The Department claims that the communication is exempt under s31. Again, while the communication may have a legal aspect, I am not satisfied that the communication constitutes part of the act of obtaining or giving legal advice or the provision of legal services.

46 I determine that the information is not exempt under section 31. I will consider the email further in my discussion of s35.

Pages 674-75

47 The emails discussed on page 62 are duplicated at pages 674-75. I maintain my findings in relation to this information.

Section 36 – Personal information

48 The third category of exemption that the Department relies upon is under s36 of the Act, personal information of a person. For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

49 Section 5 of the Act defines personal information as:

> *... any information or opinion in any recorded format about an individual –*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(b) who is alive, or has not been dead for more than 25 years.*

50 The Department has claimed exemption under s36 for names and contact details over numerous pages of the Executive Document. This information, consisting of names, signatures, phone numbers and email addresses, is clearly personal information and I am satisfied that the information is prima facie exempt under s36, subject to the public interest test.

Public Interest test

51 Section 36 is subject to the public interest test in s33 of the Act. Under this test, information will be exempt if, after taking into account all the relevant matters, it is considered to be contrary to the public interest to disclose the

information. Matters to be taken into account in making this determination include, but are not limited to, the matters set out in Schedule 1.

52 The information that the Department claim to be exempt under s36 includes the names and contact details of government employees, both state and federal, persons connected with the Tasmanian Land Conservancy, and members of the public. Given the number of individuals mentioned and the instances of exemption being claimed, I consider it most expedient to deal with the information separately according to category of person, as follows:

(a) Government employees or officers of public authorities;

(b) persons connected with the Tasmanian Land Conservancy (TLC); and

(c) members of the public.

Employees of public authorities

53 The extent of disclosure of personal information of government employees has been considered by the Australian Information Commissioner. Who is of the view, and I have consistently followed this principle in my decisions, that it is reasonable to release personal information such as names, positions or titles, work contact details and email addresses, because this information appears in documents during the course of a person's normal duties.[12] This includes signatures.[13] However, it would not be reasonable to release personal details such as dates and places of birth and personal mobile telephone numbers.[14]

54 It has been the long established practice of this office not to support the arbitrary exemption from disclosure of work details of government employees unless there is some particular or extenuating circumstance. This includes past employees' details.

55 The Department has raised matter (m) of Schedule 1 to support its decision to claim exemptions under s36. Item (m) concerns whether disclosure of the information would promote or harm the interests of an individual or group of individuals. The Department has not provided any justification or exceptional circumstances as to why I should depart from the established practice in relation to this type of information.

56 Therefore, I am not satisfied that the Department has discharged its onus under s47(4) to show why this information would be exempt. I determine that the names and work contact details of government employees are not exempt under s36 and should be released to Ms Hamilton.

57 As in previous decisions, I make the exception for direct and mobile phone numbers of such employees, where these are not routinely provided to the

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[12] *Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013), at [72]-[74].
[13] *J'N' and Commonwealth Ombudsman* [2016] AICmr 62 (19 September 2016).
[14] *Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013), at [72]-[74]

public. I am satisfied that there is a potential for harm with the release of this information and it is valid for public authorities to limit the release of direct contact numbers for its staff to enable contact from the public to be directed through specific channels. This information is exempt under s36 and is not required to be provided to Ms Hamilton.

Tasmanian Land Conservancy

58 According to its website, TLC is a not-for-profit, apolitical, science and community-based organisation that raises funds from the public to protect irreplaceable sites and rare ecosystems by buying and managing private land in Tasmania.[15]

59 A large number of claims for exemption under s36 relate to the personal information of individuals who have a connection to TLC. This includes staff and volunteers who may be professionals, observers, academics, consultants or experts, or people from the general public who have an interest in the work of the organisation and give their time to assist with reviews, surveys and investigations.

60 Many of the staff and professionals connected with the organisations are mentioned on the organisation's website and/or in TLC newsletters and other publications, including their roles, qualifications and contact details. These individuals are already known to be working in this field and their information is already in the public domain, or at least known in the relevant field. With regard to this sub-category, I determine that disclosure of the information claimed to be exempt under 36 would not be contrary to the public interest.

61 The Department has not provided any reasoning as to why this information should be withheld or why it would harm the interests of these individuals or hinder fair treatment of persons in their dealings with government. I therefore determine that the names of the employees and high profile supporters of TLC are not exempt under s36 and may be released. I am satisfied that there is potential harm which could result in the release of the contact details of these persons (other than publicly available business information) and determine that this information is exempt under s36.

62 It is clear from TLC's website and from the information in the Department's Executive Document that TLC also relies on a large number of volunteers to assist in its work for the community and for the State of Tasmania. Volunteers donate their time to a cause of interest, in this case to the protection of valuable habitats and ecosystems in Tasmania. They may come from all walks of life and are private persons who simply give of their time and skills. They may not wish for their personal details to known publicly, and in my view it should be their individual choice.

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[15] Tasmanian Land Conservancy, 'About Us', https://tasland.org.au/about-the-tlc/

63 With regard to the volunteers, as concerns matter (m) of schedule 1, I am of the view that it is possible that disclosure of their information may harm the interests of an individual or group of individuals. And further I consider that matter (n) is also relevant, that disclosure of the information may prejudice the ability to obtain similar information in the future. If volunteers were aware that their personal details may be disseminated widely simply because they volunteer in an activity of personal interest to them, they may cease to volunteer their time, which would be a great loss to the field and to the State. The identity of these persons does not add to the intelligibility of this information, which is readily comprehensible without the names being included.

64 Therefore, in the case of volunteers, I find that it would be contrary to the public interest for their personal information to be disclosed. The personal information of volunteers is therefore exempt under s36 of the Act and is not required to be released to Ms Hamilton.

Community members

65 There are fewer instances of members of the public being mentioned in the communications comprised in the Executive Document. However, for the same reasons set out above with regard to the TLC volunteers, I am of the view that it would be contrary to the public interest to disclose their personal information.

66 I determine the personal information of the general public and community members is exempt under s36 of the Act and is not required to be released to Ms Hamilton.

Section 35 – Internal deliberative information

67 As mentioned above, I determined that information on page 671, comprising the substantial part of an email between officers of the Department dated 9 March 2018, was not exempt information under s31 of the Act. However, I am prepared to consider whether the information is exempt information under s35 of the Act.

68 For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority or is a record of consultations or deliberations between officers or a public authority. In addition, the information must have been prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

69 The exemption under s35 does not apply to the following:

- purely factual information;[16]
- a final decision, order or ruling given in the exercise of an adjudicative function;[17] or
- information that is older than 10 years.[18]

70 As I have already said, the information comprises an email communication concerning the Crown Land transfer to Tasmanian Land Conservancy between employees of the Department. I am satisfied that it consists of opinion, advice or recommendation prepared by an officer of a public authority. I am also satisfied that it was prepared as part of the official business of the Department.

71 Accordingly, I am satisfied that the information is prima facie exempt under s35(1)(a) of the Act.

72 As s35 is subject to the public interest test in s33, it is necessary to assess whether it would be contrary to the public interest to disclose the information, after taking into account all the relevant matters including matters in Schedule 1.

73 The pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and will inevitably weigh in favour of the release of information in any public interest assessment.

74 I also consider that the following matters are relevant in this assessment:

> *(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.*

75 In my view, all of these factors weigh in favour of disclosure and there is some benefit in terms of contributing to the debate on matters of public interest, informing the applicant, adding context about decisions made by the

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[16] Section 35(2)
[17] Section 35(3)
[18] Section 35(4)

government in connection with the northern prison project, and enhancing scrutiny of government decision-making or administrative processes.

76 I consider this of relatively low weight, however, as the information in question is internal deliberative information setting out a tentative process which is to be confirmed by obtaining legal advice. It does not communicate a finalised position and its release could have a detrimental impact on the ability of public officers to perform effectively if their tentatively expressed early positions on a matter were released to the public.

77 Transparency and accountability of government processes are key reasons for the Act existing and for information to be disclosed. However, the Act also recognises that some internal deliberative processes should be exempt from release. While I do not believe that the relevant information would attract legal professional privilege, I consider that it is closely connected and concerns the finalisation of a legally sound administrative process which warrants an appropriate degree of confidentiality in the early stages.

78 In as much as there is significant public interest in protecting the deliberative process and certain information in connection with that process, I find that it would be contrary to the public interest to release the relevant information on page 671 of the Executive Document. The information is therefore exempt under s35(1)(a).

Preliminary Conclusion

79 For the reasons set out above, I determine the following:

- exemptions claimed pursuant to ss26, 31 and 36 are varied; and
- information is exempt under s35.

Conclusion

80 As the above preliminary decision was adverse to the Department, it was made available to it on 31 October 2023 under s48(1)(a) to seek its input before finalising the decision.

81 The Department advised on 20 November 2023 that it would not be making any submissions in response to the preliminary decision.

82 Accordingly, for the reasons give above, I determine that:

- exemptions claimed pursuant to ss26, 31 and 36 are varied; and
- information is exempt under s35.

83 I apologise for the parties for the significant delay in finalising this decision.

Dated: 24 November 2023

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 26 – Internal briefing information of a Minster

(1) Information is exempt information if it contained in –

> **(a) Attachment ARelevant LegislationSection 26 – Internal briefing information of a Minster**(1) Information is exempt information if it contained in –t h e o f f i c i a l r e c o r d o f a d e l i b e r a t i o n o r d e c i s i o n o f t h e C a b i n e t ; o r (d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published. (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date on which the information referred to in that subsection was first considered by the Cabinet at a meeting of the Cabinet.

> (d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date on which the information referred to in that subsection was first considered by the Cabinet at a meeting of the Cabinet.

(3) Subsection (1) does not include information solely because it –

> **(a) Attachment ARelevant LegislationSection 26 – Internal briefing information of a Minster**(1) Information is exempt information if it contained in –t h e o f f i c i a l r e c o r d o f a d e l i b e r a t i o n o r d e c i s i o n o f t h e C a b i n e t ; o r (d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published. (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date on which the information referred to in that subsection was first considered by the Cabinet at a meeting of the Cabinet. (3)

Subsection (1) does not include information solely because it – was submitted to the Cabinet for consideration; or published.(5) Nothing in this section prevents the Premier from voluntarily disclosing information that is otherwise exempt information. (6) In this section –***the Cabinet*** includes a committee of the Cabinet.**Section 31 – Legal professional privilege**

published.

(5) Nothing in this section prevents the Premier from voluntarily disclosing information that is otherwise exempt information. (6) In this section –

the Cabinet includes a committee of the Cabinet.

Section 31 – Legal professional privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

Section 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.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference** R2202-116
O2012-046

Names of Parties: Gerry Willis and Department of Health

Reasons for decision: s48(3)

Provisions considered: s36

Background

1 Mr Gerry Willis is a Furneaux Group resident who is interested in improving health outcomes for residents. He had previously sought data regarding the Patient Travel Assistance Scheme (PTAS) run by the Department of Health (the Department) and obtained this from the Department. The PTAS provides reimbursement for expenses relating to patients who need to travel to obtain health services and treatment. It is regularly used by residents of the Furneaux Group, due to its limited local health services.

2 On 24 January 2020, Mr Willis made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department requesting the following information:

> *Reports for each of the 12 months* [sic] *periods ended 30 June 2018, 30 June 2017, 30 June 2016 and 30 June 2015 listing the numbers of residents of Flinders Island who have flown from the island for health purposes; such reports to summarise the trips by health category and destination.*
>
> *I have included a report entitled "P.T.A.S CROSS-TABBED TOTALS 01/07/2018 TO 30.06/2019" which I have previously been provided with following a similar request.*

3 Mr Willis applied for a waiver of the application fee. The report he attached contained a table which sets out the number of PTAS claims for Flinders Island residents across 34 medical categories (e.g. ophthalmic, cardiac or obstetric). The table sets out the number of claims which relate to travel to Devonport, Burnie, Hobart, Launceston, Victoria, South Australia, New South Wales, Western Australia and Queensland. It then provides total year-to-date figures for claims and trips, and overall total figures for each column.

4 On 18 September 2020, Mr Ross Smith, a delegated officer of the Department under the Act, waived the fee and issued Mr Willis with a decision pursuant to the Act. Mr Smith disclosed tables of information in response to Mr Willis' request (the Tables).

5 The Tables present the information in a summarised format that seems to be based on the PTAS report he had previously received. At the head of the columns, the locations of travel and the total trips year-to-date categories are the same, but there is no column for claims year-to-date listed.

6 In the rows, there are different items, as compared to the report previously provided. Instead of the 34 medical categories, the Tables contain only three rows listing:

WACS – Women and Children

SURG – Surgery

MED – general medicine

7 On 22 September 2020, Mr Willis responded to the Department's decision indicating that he was dissatisfied with the information provided. He queried the relevance of the category titled *Women and Children* and how it related to the year total. He also queried how the surgery and medical category data related to the totals given.

8 On 20 November 2020, Mr Mick Casey, a delegated officer of the Department under the Act, issued an internal review decision. He determined that the full PTAS reports were exempt under s36 (personal information of a person) and that it would be contrary to the public interest to release them, after considering matters (a), (b), (m) and (t) in Schedule 1 of the Act.

9 Mr Casey indicated that he considered that the earlier release of a full PTAS report to Mr Willis was *imprudent*.

10 On 8 December 2020, Mr Willis wrote to Ombudsman Tasmania seeking an external review under the s44 of the Act.

11 The application for external review was accepted by my office on 5 January 2021.

Issues for Determination

12 The issue for determination is whether the relevant information is exempt from disclosure under s36. As this section is subject to the public interest test in s33, if I find that the exemption could apply, I must determine whether the release of information would be contrary to the public interest having regard to, at least, the matters in Schedule 1.

Relevant legislation

13 Relevant to this review are ss33 and 36 of the Act. Those sections are copied in Attachment 1 along with Schedule 1.

Submissions

The applicant:

14 On 8 December 2020, Mr Willis made submissions accompanying his application for an external review to this office. He set out:

> *My name is Gerry Willis, and I am a resident, former Councillor and a prior Chairman of the Flinders Municipality Health Committee.*
>
> *The crux of my application for a review of the decision recorded in Appendix I is that I believe the decision is wrong when the relevant facts are considered.*
>
> *My concern is that the residents of the municipality have a poor record of potentially avoidable deaths (PAD), the reasons for which are apparently not being investigated and potential solutions are not being discussed. Flinders Council has 500.3 PAD per 100,000 residents [refer the table in appendix II], while the next worst local government region in Tasmania has 298.1. Given Tasmania's record is the worst in Australia except for Northern Territory, the record for the Flinders Council region is the worst in Australia.*
>
> *My attempts to obtain meaningful data from the Department on this matter are being thwarted by Mr Casey's decision.*
>
> *My interest in PAD began with an article published in The Examiner on 12 April 2015. I have included the article at Appendix II. It clearly shows that the Flinders Council municipality has the worst PAD figure of any local government area in Tasmania.*
>
> *It seems that no-one in the political or bureaucratic arms of government is interested in either investigating the reasons or making improvements.*
>
> *I have been trying to obtain information which would provide some evidence of the reasons for this appalling statistic and maybe show if there has been any improvement, but have been unable to do so.*
>
> *I had been previously provided with a table described as P.T.A.S. CROSS-TABBED TOTALS which shows the number of trips from Flinders Island to centres for treatment of surgical and medical matters for the period 1 July 2018 to 30 June 2019. P.T.A.S. is the abbreviation for Patient Travel Assistance Scheme (PTAS). This scheme provides financial assistance to Tasmanian residents who need to travel to seek medical treatment. The report is attached to Appendix III.*
>
> *My intention was to see if I could use the information in the format of the PTAS report and determine any trends in the number of conditions being treated. It was for that reason I requested I be provided with the same reports for the years ended 30 June 2015, 2016, 2017 and 2018 by letter of 24 January 2020.*

I received a response by a decision dated 18 September 2020 (Appendix IV).

The data in this report is useless. For example, for the period 1 July 2018 to 30 June 2019, the report shows 47 women and children (WAGS) went off Flinders Island for treatment, 208 for surgery (SURG) and 475 for medical reasons (MED). The split is nonsensical. Does the data mean that out of a total of 720 individuals who travelled for treatment only 47 were women and children? I do not think so.

In a letter to the Senior Consultant, Right to Information, on 2 November 2020 (refer Appendix V) I requested that I be provided with the information I had initially requested in January 2020.

In his decision of 20 November the Senior Consultant satisfied himself that the composition of the data in the PTAS report made it probable for an individual to be identified and he concluded that this information to be personal information. The result of conclusion is that the information was determined to be exempt information and, therefore, not eligible for publication.

On receipt of the decision and upon reading the comment on identification, I scrutinised the PTAS report and I determined it is almost impossible to identify any individual. Indeed, I could not identify individuals. I would do better, if I were so in need of identifying patients, to spend a few days outside the doctor's consulting rooms.

I do admit that providing the split of trips for medical reasons into the destinations might have caused some unwarranted concern. The destinations are not information which would have provided me with any beneficial information and are unnecessary. That was an oversight I should have considered in my request.

…

I contend that none of these matters applies in my request for information and, as a consequence, there is no reason to withhold information on the basis that it is not in the public interest for those reasons.

Given the comments I have made I would appreciate your reviewing the decision not to provide the information I have requested. For the sake of convenience I would be happy to receive the reports requested without destinations.

I would also appreciate your comments, if that is within your ambit, to provide advice on how I might get some improvement in the state of health of residents of the Furneaux Group.

The Department

15 The Department did not provide specific submissions in response to this external review, other than the reasoning of its internal review decisions. The internal review decision determined against the release of information. Relevant excerpts from the internal review decision (incorporating references) are as follows:

> *Personal information can include a person's name, address, telephone number[1], date of birth, medical records, bank account details, taxation information[2] and signature[3]. ... Subsequently, where information that may seem individually harmless but capable of being combined with other pieces can generate a composite, a mosaic, which can be used to identify and say something about a person[4]. For example, the mere mention of a person's name or signature may, however, reveal personal information about them depending on the context.[5]*
>
> *The extent to which the information is well known and the availability from publicly accessible sources[6] are matters to be given regard as part of the assessment.*
>
> *In 2019 the estimated resident population for Flinders was 1 010. In my view the size of the population and the small numbers for some of the categories combined with what is well known within the community does indicate that it is probable individuals might be identified. Under the* Personal Information Protection Act 2004 *health information is categorised as sensitive information that may not* [sic] *disclosed unless reasonable steps are taken to de-identify before disclosing it.*
>
> *The Patient Travel Assistance Scheme (PTAS) provides financial help with travel and/or accommodation costs to Tasmanian residents who need to travel from their permanent residence for treatment.*
>
> *I note the applicant had previously been provided as an active disclosure a table listing PTAS by category and destination for the financial year of 2015-16. In my view the provision of this information was imprudent. The figures recorded for each category by financial year does not delineate if each trip is for a different patient or for the same patient that has had multiple medical trips to the same speciality. Where in the table provided to the applicant, the four trips to Hobart for Rheumatology may represent the trips for one patient.*

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[1] See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252

[2] See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 and *Re Jones and Commissioner of Taxation* [2008] AATA 834

[3] See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

[4] See *Re McKnight and Australian Archives* [1992] AATA 225

[5] See *Re Veale and Town of Bessendean* [1994] WAICmr 4.

[6] See *Re Jones and Federal Commissioner of Taxation* [2008] AATA 413.

I am satisfied the composition of the data it is probable for an individual to be identified and I conclude that this information to be personal information.

Public Interest

There has been 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 information relating to it will be in the public interest[7]

The meaning of the term was considered in some detail by the Full Court of the Federal Court of Australia in its decision McKinnon v Secretary, Department of Treasury[8] *where Tamberlin J noted:*

> *9. The expression in the public interest directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. There will, as in the present case, often be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies and these are sometimes loosely referred to, in my view, as opposing public interests...*
>
> *10. The expression the public interest is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...*

The High Court considered the phrase public interest in O'Sullivan v Farrer[9] *and described it as:*

> *... the expression in the public interest, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ...in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view...*

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7 Re *Public Interest Advocacy* Centre *and* Department *of Community* Services *and Health (No l)* (1991) 14 AAR 180 at 187; Re *Angel and Department of* Arts, *Heritage and Environment* (1985) 9 ALO 113.

8 [2005] FCAGFC 142

9 [1989] 168 CLR 210

Who may be considered the relevant public when public interest is at issue has also been considered by the High Court, which found that the public need not include the entire population, but rather, it may include only the interests of a substantial section of the public[10].

What is not in the public interest is easier to list:

- *private interests;*
- *personal interests;*
- *personal curiosity;*
- *personal opinions;*
- *parochial interest; and*
- *partisan political interests.*

The above list has been categorised as motivation type issues by the NSW Ombudsman where focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties), or distinguishing between decisions made in good faith (ie, honesty, for the proper purpose and within power) from those made in bad faith. The meaning of the term, or approach, indicated by the use of the term, is to direct consideration away from such interests towards matters of broader concern.

Public interest has been variously described as the sum of special interests, the sum of all private interests, the net result of individuals pursuing their self-interest, the broad shared interests of society, and the shared or collective values of the community – the goals or values on which there is consensus.

Who may be considered the relevant public when public interest is at issue has also been considered by the High Court, which found that the public need not include the entire population, but rather, it may include only the interests of a substantial section of the public[11].

So, the public interest test requires a balancing of the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of government and its agencies on the other[12].

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

I am not convinced that there is substantial section of the public interested in the information. I acknowledge there might be a significant

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[10] *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473
[11] *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473
[12] *Harris v Australian Broadcasting Corporation* (1983) 5 ALD 54S

section of the community on Flinders Island but have not seen evidence to substantiate such a view. I acknowledge some weight must be given to the community having an understanding of and an involvement in the democratic processes. The delivery of health services by the very nature of the topic remain a matter of continuing public interest.

I am satisfied the information held by the public authority should be accessible (a) but I am not satisfied it would contribute to a matter of public interest (b). I note that the applicant is a resident of Australia. In considering matter (m) my view that disclosure would harm the interests of third parties by revealing health information.

In my view it is contrary to the public interest to disclose the information that would harm the interests of third parties.

Analysis

16 For information to be exempt under s36, I must be satisfied that it contains information that is the personal information of a person other than the applicant. Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.

17 Mr Casey from the Department, in his internal review decision, does not appear to have not taken a line by line approach to assessing the relevant information and found the information to be exempt in full. I do not consider this a correct mode of assessment, as it will only be in rare instances where a document will be exempt in its entirety. I do not agree that all of the information is personal information and would be eligible for exemption under s36.

18 The heading of the tabular information *P.T.A.S CROSS-TABBED TOTALS* and the relevant dates does not contain any personal information. The names of the columns and the medical categories also do not contain personal information. It is disappointing that these were claimed to be exempt under the section, as there is clearly no basis for such a finding and Mr Willis' concern is justified.

19 Mr Casey considers that it is probable that individuals could be identified from the tabular data and Mr Willis accepts his quoted conclusion regarding *Re McKnight and Australian Archives [1922] AATA 225* that *information may seem harmless but capable of being combined with other pieces can generate a composite, a mosaic, which can be used to identify and say something about a person.*

20 I accept that it is feasible that persons may be identifiable through the release of data regarding travel to obtain specific health care, especially where there are low numbers of people receiving a particular type of treatment. There are multiple instances in the data of a single trip occurring from Flinders Island to another location to receive treatment of a particular medical issue. The Furneaux Group is a small community and that people may be identifiable is a valid concern.

21 I find therefore that the numerical data in the information is personal information and is prima facie exempt under s36. It falls next to consider whether it is contrary to the public interest to release this information.

Public interest test

22 I must consider, at least, the matters in Schedule 1 in assessing the public interest test. My assessment follows:

Public interest matter (a)

23 I agree with the Department in relation to the application of public interest matter (a). Mr Casey determines that; *I am satisfied the information held by the public authority should be accessible (a) the general public need for government information to be accessible*.

Public interest matter (b)

24 In relation to matter (b), Mr Casey sets out that he is *not satisfied* [the release of the information] *would contribute to debate on a matter of public interest.*

25 I disagree with Mr Casey's approach regarding matter (b). The adequacy of medical treatment and access to services is a matter of high public interest and regular public debate. I consider that this weighs in favour of release, though I acknowledge that this specific data is not part of a particular current debate.

Public interest matter (g)

26 I consider that matter (g) *whether the disclosure would enhance scrutiny of government administrative processes*, is also relevant and weighs in favour of disclosure. The PTAS is a vital scheme for residents IN remote areas and a major cost for the Department, that the service and money is most appropriately targeted is an important consideration.

Public interest matter (i)

27 I consider that matter (i) *whether the disclosure would promote or harm public health or safety or both public health and safety* is also relevant. The Department's current PTAS Operational Framework[13] indicates that there is state and national interest in this service.

28 This Framework at page 4 sets it out best as follows:

> *Residents of King Island and the Furneaux Group Islands are the most geographically remote Tasmanian residents.[14] Modified eligibility criteria for residents of King Island and the Furneaux Group Islands recognise that these residents face unique geographical and service access barriers.*

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[13] Patient Travel Assistance Scheme Operational Framework, available at www.health.tas.gov.au under Patient Travel Assistance Scheme Operational Framework, accessed on 24 October 2023.

[14] The ABS Accessibility and Remoteness Index of Australia identifies geographical remoteness based on access to services on a scale of 1 to 5. Classification 5 describes the most remote areas of Australia. King Island and the Furneaux Group Islands are the only geographical areas within Tasmania that are classified at level 5. www.abs.gov.au/websitedbs/d3310114.nsf/home/remoteness+structure accessed 24 October 2023.

The modified eligibility criteria facilitate equity of access to eligible clinical services in accordance with the intent of PTAS policy.

29 Mr Willis expresses that he is particularly interested in health outcomes for Furneaux Group residents and is seeking this information to advocate for better services and to reduce mortality rates. Accordingly, I am satisfied that the release of this information would promote public health and safety and that this matter weighs in favour of disclosure.

Public interest matter (m)

30 I agree with Mr Casey that matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* is of particular importance. Mr Casey, in his decision, sets out his view that disclosure would harm the interests of third parties by revealing health information. This is a valid concern. Health information is particularly sensitive and patients seeking treatment have a reasonable expectation of confidentiality when doing so. I consider that (m) weighs significantly against release where specific patient data may identify individuals.

31 Overall, this was a particularly difficult balance to strike of competing public interest factors. I am not satisfied, however, that there is sufficient likelihood that data sets containing larger numbers (over five trips or patients) will identify specific patients and consider that the release of this information would not be contrary to the public interest. This should be released unredacted to Mr Willis.

32 Data sets of five or fewer have much more genuine potential to identify individuals and I determine that this information is exempt under s36 and should not be provided to Mr Willis.

Preliminary Conclusion

33 For the reasons set out above, I determine that the exemption claimed by the Department under s36 is varied.

Submissions to the Preliminary Conclusion

34 As the above preliminary decision was adverse to the Department, it was made available to it on 7 November 2023 under s48(1)(a) of the Act to seek its input before finalising the decision.

35 On 29 November 2023, submissions were received from Ms Megan Hickey, General Manager, Legal Services and a delegated officer of the Department under the Act.

36 Ms Hickey submitted the following:

PTAS background
The Patient Travel Assistance Scheme (PTAS) is a statewide Scheme that provides financial assistance towards travel and accommodation expenses for eligible Tasmanian residents and their approved escorts who are

required to travel to access specialised clinical services not available locally.

The intent of the Scheme is to address variability in health outcomes, service access and equity between Tasmanians who have ready geographical access to specialised clinical services and those who do not.

PTAS is also an important enabler of safe and sustainable clinical service delivery. Tasmanian clinical services are provided as part of a single statewide system. Decisions regarding place of treatment, including interstate arrangements for some highly specialised clinical services, are informed by the Tasmanian Role Delineation Framework and Clinical Services Profiles.

PTAS supports the equitable movement of Tasmanians within the health system, facilitating timely care and improved service quality by supporting Tasmanians to access the services they need in the parts of the system that are best equipped to provide them safely and sustainably.

PTAS is currently governed by the Department of Health through the PTAS Ministerial Policy. The PTAS Ministerial Policy is operationalised by the THS through the PTAS Operational Protocol. The PTAS statewide service is managed as part of Health Information Management Services (HIMS), which forms part of the Business Improvement and Reform (BIR) Unit, reporting to the Deputy Secretary Policy, Purchasing, Performance and Reform. Clinical governance is provided by five Medical Authorisers, who are also core members of the PTAS Advisory Committee.

In recent years PTAS activity and claim costs have increased substantially. The annual cost of PTAS assistance claims in the financial year prior to the COVID-19 global pandemic was almost $9.4M.

The scheme has also received an increased number of complaints and queries in recent years. It is understood many of these complaints stem from a perception that the scheme is not consistently applied and does not adequately support equitable access for those in very remote areas of Tasmania.

In response to these issues the Business Improvement and Reform Unit commissioned a statewide review of the PTAS by KP Health.

Stakeholder and community member feedback from Flinders Island (representing the FG Islands) and King Island was largely positive. KP Health met with key representatives from each island.

I make these initial comments as the draft decision at paragraph 28 seems to give credence to the applicant advocating for better services and to reduce mortality rates.

It is not a condition for an applicant to provide reasons why the information is being requested as s7 creates a legally enforceable right principally through the processes for the which the Act provides. The granting of credence for the purpose of the request without testing the validity of the statement is unusual. In accepting the purpose of the request and then being satisfied that this would promote public health and safety is the subject of this submission

Mr Willis was a former councillor of the Flinders Island Council. A review of the council minutes did not identify a motion by Mr Willis concerning the provision of PTAS. Furthermore, a review of correspondence to the Minister for Health did not identify Mr Willis or the Council writing about PTAS. The review undertaken by the Business Improvement and Reform Unit and Mr Willis was not a stakeholder identified as a relevant party to participate in the process.

Public interest test

I have concerns regarding the application of the public interest test. Whilst it is quite clear that Schedule 1 is not intended to be exhaustive (s33(2)), the matters listed in it are mandatory considerations and must therefore be taken into account. That involves settling on which of the factors in Schedule 1 relevantly arise (having regard to the nature of the information in question) and then giving proper, genuine and realistic consideration to each of them through an active intellectual process before arriving at a finding upon each.[15]

Although the Deputy Ombudsman lists those matters which favour and those which do not favour disclosure, in my opinion there are deficiencies in the draft report in so far as it does not reveal the obligation to give proper consideration to each of those matters has been met in accordance with the test described in Gun Control Australia.[16]

Public interest matter (b)

> *whether the disclosure would contribute to or hinder debate on a matter of public interest*

It is not in dispute the provision of health service in Tasmania attracts constant public attention and comment. However, to sweep everything associated with the provision of a health service into the same category is sidestepping a proper and genuine consideration. At the time of the request for information there was no public comment or questions asked of the Minister of Health about PTAS. This contrasts for example the questions about Ambulance Tasmania response times or ramping at the Hospitals.

Where it is said that the disclosure would contribute to or hinder a debate the question is whether, in the affirmative, the disclosure would

[15] Gun Control Australia Inc v Hodgman & Archer [2019] TASSC 3 at [36]
[16] Ibid.

contribute to the debate and in the negative is whether it would hinder the debate. The answer to whether disclosure would contribute to the debate will not, automatically dictate the answer that will hinder it. It may neither contribute to, nor hinder the debate.

To determine if the information contributes to a debate, the information must be carefully examined to see whether it materially adds to any debate. I disagree with the position adopted as it fails to establish any link between the desirability of public participation in general and the substance of the disputed information in the circumstances surrounding the decision to which it relates.

It may certainly be said that the disclosure of any information may facilitate, to some degree, public debate. But for the point to bear any material weight it must draw some relevance from the facts of the case under consideration. Otherwise, it may operate as a justification for disclosure of all information in all circumstances.

I note that Heerey J in Colakovski suggested that if the information to be disclosed is of no demonstrable relevance to the affairs of government, it may be unreasonable to disclose it to simply satisfy an applicant's curiosity.[17]

The approach adopted in the draft decision attempts to construe a position by making an assertion without demonstrating how the disclosure of the information would contribute to a debate and what debate is being conducted. The position, as postulated, would mean all health information, regardless of the sensitivity, could be disclosed.

Public interest matter (g)

> *whether the disclosure would enhance scrutiny of government administrative processes*

The position as asserted is the information recording the number of funded trips will demonstrate how the expenditure is most appropriately targeted. The information that is the subject to external review concerns the number of assisted travels from Flinders Island for the financial year. If the request for information was about the funding or the number of requests for assisted travel that had been declined or subject to review the assertion for justifying the disclosure of the information would be looking at government administrative processes.

The figures listed in the table are a record and do not disclose any administrative process. The reasonable interpretation of matter (g) is that it is intended to apply as a consideration in favour of disclosure if disclosure would enhance scrutiny of government administrative processes. In forming such a view is dependent upon demonstrating how it would enhance scrutiny. I disagree with the assertion as that there is

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[17] Ss M Paterson, "Freedom of Information and Privacy: A Reasonable Balance?" (1992) 66 Law Institute Journal 1001

not a genuine or realistic consideration how the information would enhance scrutiny.

Further, the absolute number of persons who have accessed the scheme has been provided to the applicant. To break these numbers down further does not enhance scrutiny of government administrative processes any further.

Public interest matter (i)

> *whether the disclosure would promote or harm public health or safety or both public health and safety*

Public health is concerned with the big picture of how society is organised to maximise health and well-being - about what people can do for themselves as well as the role of institutions and government to ensure good health in our communities.

The primary focus is prevention and early detection, rather than on clinical services. The focus is on the whole population, rather than the individual, and seek to manage risks. In this way, public health complements and works with clinical services.

The Tasmanian Director of Public Health's stated aims of public health are to:

- *protect Tasmanians from public and environmental health hazards;*
- *prevent and reduce chronic diseases and injuries;*
- *prepare for and respond to public health emergencies like flu pandemics;*
- *promote good health; and*
- *reduce inequalities in health.*

Public safety is concerned with the injury to the physical or mental health of the public or any section of the public.

I disagree with the view adopted that the disclosure of the information would promote public health and safety. The information does not fall within the parameters as set out by the Director of Public Health.

Public interest matter (m)

> *whether the disclosure would promote or harm the interests of an individual or group of individuals*

The delegate for the internal decision noted the size of the population on Flinders Island.

37 Ms Hickey then quoted from the 2021 Australian Bureau of Statistics Census data regarding Flinders and Cape Barren Islands.

38 Her submission continued:

> *The* Guidelines for the Disclosure of Secondary Use Health Information for Statistical Reporting, Research and Analysis *references the Health Statistics NSW paper:* Privacy Issues and the Reporting of Small Numbers *refers to community disclosure where a data release has the potential to disclose information about small communities. It is NHISSC's view that managing the risk of identification and attribute disclosure for individuals will generally also ensure that small communities are similarly protected. However additional action may be necessary, e.g. the Northern Territory department does not always release information for certain Statistical Area level 2s (SA2s) because those SA2s, in combination with Indigenous Status, would immediately identify specific Aboriginal communities.*[18]
>
> *The figures recorded by PTAS reflect the number of trips for the financial year. For 2024 an annual report will be released by PTAS - however the data disclosed will not be as granular as set out in the table.*
>
> *The 2021 Census data for Flinders Island and Cape Barren Islands depicts a small and isolated community. In such a small community maintaining the privacy about the health information of individuals reflects the challenges created by the uniqueness of small community compared to a denser population in an urban area. The medical categories listed in the table would statistically be prevalent in the upper age groupings which reduces the sample to nearly half the population of the community. In such cases this increases the risk of identifying individuals.*
>
> *The draft decision notes the difficulty with balancing the public interest factors, but particular consideration should be given that the information relates to a small and unique community that would not be an issue for an urban area where granular data is overtaken due to a larger population.*

Further Analysis

39 Ms Hickey does not take issue with the conclusions reached in my preliminary decision in her submissions and I specifically found information exempt under s36 on the basis that the data related to a small and unique community which led to greater risk of the identification of individual patients.

40 Ms Hickey does provide extensive submissions regarding the validity of my assessment of the public interest test, however, and I will address the points raised in relation to the Schedule 1 matter to which these submissions relate.

[18] National Health Information Standards and Statistics Committee, *Guidelines for the Disclosure of Secondary Use Health Information for Statistical Reporting, Research and Analysis* 15 June 2017

Public interest matter (b)

41 In response to the Department's submissions regarding public interest matter (b), I agree that this factor is not of major importance in this decision. The data in question does not specifically relate to a particular public debate at present. However, I maintain my view that the quality of health services in Tasmania is a regular matter of public debate and further information being released regarding the Patient Travel Assistance Scheme would contribute to that debate. I consider the Ms Hickey's submissions take an overly narrow view of public debate and that this factor does weigh slightly in favour of disclosure.

Public interest matter (g)

42 The Department's submissions in relation to matter (g) in Schedule 1 also take an overly narrow view of this factor. The Patient Travel Assistance Scheme is an administrative process of government. This is data about the use of that scheme, which can be scrutinised if released, and is data collected by a public authority for an on behalf of the people of Tasmania and is therefore the property of the State. This is one of the stated objects of the Act in s3. Disclosing this information would inform the public about the practices of the Department in dealing with residents of Flinders Island who rely on the patient transport scheme to reach the nearest or most relevant health service.

43 I disagree with Ms Hickey's assertion that it would not enhance scrutiny of this valuable service. Mr Willis sets out that he seeks this information for this exact purpose, asserting that:

> *My interest in PAD began with an article published in The Examiner on 12 April 2015. I have included the article at Appendix II. It clearly shows that the Flinders Council municipality has the worst PAD figure of any local government area in Tasmania.*
>
> *It seems that no-one in the political or bureaucratic arms of government is interested in either investigating the reasons or making improvements.*
>
> *I have been trying to obtain information which would provide some evidence of the reasons for this appalling statistic and maybe show if there has been any improvement, but have been unable to do so.*

44 I maintain my view that providing this information would enhance scrutiny of government administrative processes and that this matter weighs in favour of disclosure.

Public interest matter (i)

45 Again, the Department has taken an overly narrow approach regarding the assessment of whether the disclosure would promote or harm public health or safety or both public health and safety (matter (i)). Ms Hickey's submissions focus on the concept of public health as a health promotion initiative within its Department, rather than the general concept of the health of the public. This is

again an overly narrow interpretation of the factor in Schedule 1 and I remind the Department that discretions conferred in the Act are intended to facilitate the release of the maximum amount of official information (s3(4)(b)). The factors in Schedule 1 are not to be interpreted in the most confined manner possible, as this would clearly defeat the stated intention of the Act.

46 I maintain my view that this matter weighs in favour of disclosure.

Public interest matter (m)

47 As I set out earlier, I do not disagree with the Department regarding risks to patient confidentiality relating to the small and unique community in the Furneaux Group and I found information to be exempt to mitigate against the concerns the Department has raised.

48 Overall, I consider that a fair balance was struck in this decision between the release of statistical information regarding health services and protecting patient confidentiality.

Conclusion

49 For the reasons given above, I determine that the exemptions claimed by the Department pursuant to s36 are varied.

50 I apologise to the parties for the inordinate delay in finalising this matter.

Dated: 12 December 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant Legislation

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

Where :

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-009

Names of Parties: Graham Murray and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s36

Background

1 Mr Murray is a supporter of the proposed cable car development on kunanyi/Mt Wellington in Hobart. On 5 April 2019, Mr Murray submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the City of Hobart (Council). He requested access to 14 items of information:

> *1. Every document held by Council within its record management system, including but not limited to; e-mails, file notes, correspondence, advice, internal working documents CONTAINING the words "Cable Car", "Cablecar", "Cableway" or "MWCC" REGISTERED on or after 1 September 2018.*
>
> *2. All documents related to the kunanyi/Mt Wellington explorer bus service and the service provider, and any information associated with the preceding procurement process as well as any information regarding the decision to implement a hop on hop off bus service including costs of implementation, facilities, infrastructure and promotion either cash or in-kind.*
>
> *3. All documents and information pertaining to the authority(s) issued by the Minister under the Cable Car facilitation act, including names, times and dates of everyone to whom these documents were distributed to by Hobart City employees or Alderman/Councillors, including e-mail or mail records/details of where the documents were distributed beyond HCC boundaries - ie to external stakeholders or Alderman/Councillor private e-mail addresses. Please include the electronic copies of all copies of every document that came into the Council or sent from the Council or any of its employees or representatives.*

4. A list of documents, that were provided specifically to the Wellington Park Trust by a third party (not directly to the Hobart City Council as addressee, that were subsequently published by the Hobart City Council or were placed on the open portion of the Hobart City Council meeting any time in the past four years.

5. The log records of the "Aldermans-284e" HCC printer from the morning of Saturday 3 March 20!9, including records of where scanned records were e-mailed to. Any system network records associated with that machine that show details of transactions on that machine on that morning.

6. Keycard security access records that show names and times of access, from the building housing the "Aldermans-284e" printer on the morning of Saturday 3 March 20!9.

7. Security camera recordings with timestamps from the building housing the "Aldermans-284e" printer on the morning of Saturday 3 March 20!9

8. Any information, document or e-mail, including working documents, that refer to me, Graham Murray.

9. Any information, if any regarding the contract or arrangement or transactions or correspondence with Butler, McIntyre, Butler, Partner Daniel Zeeman or any other partner or employee of that firm. Please also include documents, invoices and financial transactions since ! January 20!8.

!0. Documents that relate to legal action or legal opinion paid for or committed to by Council on behalf of its alderman/councillors since ! January 20!5 associated with Council funded legal action against members of the community.

!!. All information relating to Hotel or Visitor Centre development at the Springs since 2000.

!2. All information regarding current commercial leases on kunanyi/Mt Wellington.

!3. All information regarding the cost and operations of the public toilet at the pinnacle of kunanyi/Mt Wellington, including the method, cost and provider of waste removal.

!4. Information regarding my public questions at the Council meeting on !8 March 20!9, including any reasons, including internal directions/deliberations, to truncate the official meeting audio as to avoid the questions appearing on record.

2 Mr Murray's application for external review is concerned solely with item 6 of the requested information, therefore my decision will focus on that item.

3 On 3 May 2019, the then General Manager of Council, Mr Nick Heath, wrote to Mr Murray asking him to revise the scope of his request in accordance with section 13(7) of the Act.

4 On 21 May 2019, Mr Murray wrote to Council proving additional context to his request to assist Council in understanding what specific information he was asking for.

5 On 29 May 2019, Mr Heath provided Mr Murray with a table of estimated time frames to process Mr Murray's request in relation to items 1, 2, 3, 6, 8, 11, 12 and 13. Mr Heath again asked Mr Murray to refine his request to make processing his application more manageable. In the same correspondence, Mr Heath made a decision in relation to the remaining items of information.

6 On 25 June 2019, Mr Murray wrote to Mr Heath indicating that he would not adjust the scope of his request in relation to item 6.

7 On 14 August 2019, Mr Heath wrote to Mr Murray asking him to confirm that he was seeking information relating to Saturday 2 March 2019, rather than Saturday 3 March 2019, as provided in his application for assessed disclosure.

8 On 18 August 2019, Mr Murray wrote to Mr Heath confirming that he was seeking records for Saturday 2 March 2019.

9 On 9 September 2019, Mr Heath wrote to Mr Murray explaining that s36 of the Act applied to his assessment of the requested information because it related to the personal information of a third party. He explained to Mr Murray that he was required under the Act to write to the relevant third party to invite their input as to whether the information should be provided. Mr Heath explained that he could not make a decision regarding the requested information until he had received a response by the relevant third party.

10 On 20 September 2019, Mr Heath released a decision Mr Murray which determined that all information identified as being responsive to item 6 of his request was exempt from disclosure under s36 of the Act. The information consisted of a one page Event History Report regarding access to a certain area of the Hobart Town Hall.

11 Mr Heath also advised Mr Murray that he was of the view that it was contrary to the public interest to release the requested information. Information that is considered eligible for exemption under section 36 of the Act is subject to the public interest test contained in section 33. In making a determination under section 33, Mr Heath was obliged under the Act to have regard to, at least, the matters contained in Schedule 1 of the Act.

12 In his decision, Mr Heath found schedule 1 matters (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government, and (m) – whether the

disclosure would promote or harm the interests of an individual or group of individuals, to be particularly persuasive.

13 As Mr Heath was Council's principal officer, there was no internal review process available.

14 On 18 October 2019, Mr Murray submitted an application for external review of Mr Heath's decision to this office. This application was accepted under s45(1)(a) of the Act, on the basis Mr Murray was in receipt of an original decision made by a principal officer, and it was submitted to this office within 20 working days.

Issues for Determination

15 I must determine whether the redacted information, in whole or in part, is eligible for exemption under section 36.

16 As section 36 is contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in section 33. This means that, should I determine that the requested information is prima facie exempt under this section, I must then determine whether it would be contrary to the public interest to disclose it. In doing so I must have regard to, at least, the matters in Schedule 1 of the Act.

Relevant legislation

17 I attach a copy of section 36 to this decision at Attachment 1.

18 Copies of section 33 and Schedule 1 and 2 of the Act are also included in Attachment 1.

Submissions

19 Mr Murray did not make submissions regarding the validity of Council's application of section 36 to exempt from disclosure requested information. Rather, Mr Murray's application outlined his allegation that someone within Council made unauthorised distributions of a Ministerial Authority document relating to the proposed cable car development on kunanyi/Mt Wellington.

20 Mr Murray is requesting records of who accessed the Town Hall on the morning of 2 March 2019, in what appears to be an attempt to identify who created the scanned copy of the Ministerial Authority that was made available to The Mercury and Tasmanian Times.

21 As part of his application for external review, Mr Murray asserted that The Mercury and the Tasmanian Times were provided unauthorised access to a scanned copy of a Ministerial Authority that permitted the construction of a cable car on kunanyi/Mt Wellington by the State Government.

22 Mr Murray has in his possession information which shows the Ministerial Authority document was scanned from a multi-functional machine housed within the Town Hall on the morning of Saturday 2 March 2019.

23 Furthermore, it is Mr Murray's understanding that a copy of the Ministerial Authority was provided to Council Aldermen on the afternoon of Friday 1 March 2019 for their review.

24 Mr Murray appears to be drawing the inference that the person responsible for scanning that document from the Town Hall on the morning of 2 March 2019, is the person responsible for releasing it to The Mercury and Tasmanian Times without authorisation. He indicated that he considers it is in the public interest to subject wrongdoing by Council employees to public scrutiny.

25 Council did not provide submissions in relation to this external review, beyond the reasoning of its original decision.

Analysis

Section 36 – Personal information of a person

26 Section 36(1) of the Act provides that 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 the application for assessed disclosure. Section 5 of the Act defines personal information as information that would lead to a person's identity being reasonably ascertainable.

27 Council has redacted in full the Event History Report generated by the multi-functional machine housed within the Town Hall from the morning of 2 March 2019. This report details who scanned into the Town Hall during that time. This report is only two lines long.

28 It includes, among other details, the name and user number of a person who scanned into the Town Hall. I am satisfied that if this information was released it would reveal the identity of this person, or lead to their identity being reasonably ascertainable. Accordingly, I find this information prima facie exempt from disclosure under section 36 of the Act.

29 The remainder of the information included in this report details where and when the person scanned into the Town Hall. I am not satisfied this information would identify a person, or make a person's identity reasonably ascertainable. Therefore, I find that this information is not prima facie exempt from disclosure under section 36 of the Act and should be made available to Mr Murray.

Public Interest

30 As previously mentioned, s36 is subject to the public interest test contained in s33 of the Act, requiring consideration of the factors in Schedule 1. Council stated that it considered the following matters to be particularly relevant in determining that releasing information responsive to Mr Murray's request was contrary to the public interest:

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

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

Council did not provide substantive reasons as to why matters (m) and (h) weighed in favour of non-disclosure.

31 Regarding matter (m) – whether the disclosure would harm the interests of an individual or group of individuals – I agree that it is relevant and weighs against disclosure. The release of this information would reveal that a person attended the Town Hall out of business hours when the Town Hall may not be as secure, and that this has the potential to pose a security risk for these people.

32 However, the weight of this matter against disclosure is mitigated because information which illustrates that people attended the Town Hall out of business hours is already publically available. The applicant has in their possession screenshots of the 'properties' of the scanned permit 'seen by' The Mercury, and posted to the Tasmanian Times website. This screenshot details that the scanner at the Town Hall was used on the morning of Saturday 2 March 2019. This shows that it is already public knowledge that Council staff are attending the Town hall outside of business hours. Accordingly, I am not satisfied that releasing this information would add significantly to any security risk posed to Council staff.

33 Regarding matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – I do not agree this matter is relevant and weighs in favour of non-disclosure.

34 Where relevant, matter (h) normally operates to ensure that the equity and fair treatment of *external* persons or corporations dealing with government are considered when assessing whether it would be contrary to the public interest to release requested information. For example, this matter might weigh against the disclosure of information provided to government by an external party on a confidential basis. It would not normally operate to ensure the equity and fair dealings of persons from *within* government are considered.

35 Because matter (h) normally operates to protect the equity and fair treatment of persons *external* to government, and because Council has failed to provide any substantive reasons as to why (h) is relevant in these circumstances, I am satisfied that (h) is not relevant to my assessment under section 33, and therefore does not weigh against disclosure.

36 Furthermore, Schedule 2(1)(d) provides that I am not to consider whether disclosure might cause the applicant to misinterpret or misunderstand the information contained in the requested document because of an omission from the document or *for any other reason*.

37 In his letter to Council dated 29 May 2019, Mr Murray explains that he is seeking the requested information because he wants to know who made an unauthorised distribution of a scanned copy of the Ministerial Authority.

38 At this point I would note the requested information simply shows who attended the Town Hall on the morning of 2 March 2019. It does not, in and of itself, prove who scanned the copy of the Ministerial Authority that was 'seen by' The Mercury and posted to the Tasmanian Times website. Nor does it prove who is responsible for its unauthorised distribution to those media outlets.

39 However, Schedule 2(1)(d) means the possibility of the applicant making the potentially incorrect inference that the person identified in the requested information is the person responsible for any unauthorised distribution to the media of the Ministerial Authority is precluded from influencing my assessment under section 33.

40 Finally, I also find the public interest assessment undertaken by council was somewhat limited because matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.

41 Overall, there is a difficult balance to strike, however I am not satisfied that it is contrary to the public interest to disclose the requested information that was found to be prima facie exempt under section 36 of the Act. Accordingly, the name and user number of the person who scanned into the Town Hall on the morning of 2 March 2019 included in the Event History Report should be made available to Mr Murray.

Preliminary Conclusion

42 For the reasons given above, I find that the exemption claimed by Council pursuant to s36 of the Act is not made out.

Submissions to the Preliminary Conclusion

43 As the above preliminary decision was adverse to Council, it was made available to Council on 1 July 2022 under s48(1)(a) of the Act to seek its input before finalising the decision. Council was also requested to notify the third party impacted by this decision, and seek their input (if any).

44 On 18 May 2023 Mr Adrian Hutchinson, Council's Principal Legal Advisor, advised that Council would not be making submissions in relation my preliminary decision.

45 However, on 19 May 2023, Council forwarded submissions from the impacted third party. These repeated arguments I had viewed and considered which were made during Council's consultation with this person under s36(2). The third party submitted that the release of the requested information would be an invasion of their privacy and pose a security risk to councillors. The third party also submitted that the release of the requested information *would lead to*

unnecessary negative and incorrect speculation about me that I leak 'confidential information'. A claim by the way is ridiculous and I totally reject such a claim.

Conclusion

46 I have considered the submissions of the relevant third party, however they do not change my finding as I reached my conclusion after consideration of the objections of the third party made in similar terms at an earlier stage in the process.

47 Accordingly, for the reasons set out above, I determine that the exemption claimed by Council pursuant to s36 of the Act is not made out.

48 I apologise to the parties for the inordinate delay in finalising this matter.

Dated: 23 May 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 36 – Personal Information of a Person

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

(2) If –

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

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

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to the Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

Schedule 2 – Matters Irrelevant to the Public Interest

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

(a) the seniority of the person who is involved in preparing the document or who is the subject of the document;

(b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;

(c) that disclosure would cause a loss of confidence in the government;

(d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-046

Names of Parties: Janiece Bryan and Glenorchy City Council

Reasons for decision: s48(3)

Provisions considered: s20, s31, s35

Background

1 In 2019, the Glenorchy City Council (Council) was contemplating selling the Derwent Entertainment Centre (the DEC) and the surrounding land at Wilkinsons Point. The proposed sale was a sensitive issue which attracted wide spread media attention. Community views regarding the proposed sale were mixed.

2 The applicant, Ms Janiece Bryan, is a Glenorchy resident. Ms Bryan opposed Council's intention to sell the DEC and held reservations as to whether Council actually had the ability to sell the DEC and surrounding land.

3 On 21 June 2019, Ms Bryan made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Council. Ms Bryan requested:

> *... a copy of the independent legal advice which the Mayor confirmed at Council meetings and referenced in recent correspondence from the Minister for Primary Industries and Water.*

4 On 11 July 2019, Mr Bryn Hannan, Council's Executive Officer and a delegate under the Act, released a decision to Ms Bryan, determining that the information responsive to her request was exempt under s31 of the Act on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

5 On 4 November 2019, Ms Bryan made a second application for assessed disclosure to Council, as she considered Council had waived privilege over the relevant advice. Ms Bryan requested:

> *... "the significant and extensive" independent legal advice obtained by council in regard to the tenure and status of the Derwent Entertainment Centre and surrounding land.*

6 On 21 November 2019 Ms Sharon Cooper, a delegate of Council under the Act, issued a decision to Ms Bryan in relation to her second application for

assessed disclosure. Ms Cooper refused to accept the application under s20(a) of the Act, setting out that it was a repeat application and that there was no reasonable basis for seeking the same information again.

7 Ms Cooper also asserted that, notwithstanding her decision to refuse the application under s20(a), the requested information was exempt from disclosure under s31 of the Act on the basis of legal professional privilege.

8 On 25 November 2019, Ms Bryan sought internal review of Ms Cooper's decision.

9 On 9 December 2019, Mr Michael Jacques, a delegate of Council under the Act, issued his internal review decision to Ms Bryan. Mr Jacques affirmed Ms Cooper's original decision not to accept Ms Bryan's second application. In particular, Mr Jacques reasoned that Ms Bryan's second application for assessed disclosure *does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information*.

10 Having already affirmed the original decision to refuse Ms Bryan's application under s20 of the Act, Mr Jacques then went on to affirm Ms Cooper's original decision to also exempt the information under s31.

11 On 16 December 2019, Ms Bryan made an application to my office requesting an external review of Council's decisions. Her application was accepted pursuant to s44(1) of the Act, as she was in receipt of an internal review decision and sought external review within 20 working days of receiving it.

Issues for Determination

12 First, I must determine whether Ms Bryan's application for assessed disclosure dated 4 November 2019, amounts to a repeat request under s20(a) of the Act.

13 Should I find that Ms Bryan's second application for assessed disclosure does not amount to a repeat request, I must determine whether the requested information is exempt from disclosure under s31 or s35 of the Act.

14 Should I determine that information is prima facie exempt from disclosure under s35 of the Act, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1.

Relevant legislation

15 Relevant to this review are ss20, 31 and 35 of the Act. I attach copies of these sections to this decision as Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

16 Ms Bryan, in her application for internal review, set out her understanding of legal professional privilege and waiver:

> *Legal Professional Privilege, or sometimes referred to as client legal privilege, is protected under s31of the Right to Information Act 2009. Ultimately, this protects communications between a client (Council) and their lawyers who must act independently (typically a law firm). Privilege can be easily waived if the client reveals the nature of that communication outside the lawyer-client relationship. If privilege is waived it means the document is no longer protected and might be disclosed in connection with legal proceedings or some other action.*

17 Ms Bryan went on to assert that Council waived privilege when the then Mayor made comments at a Council meeting on 28 October 2019, and therefore, Council can no longer rely on s31 to exempt the requested information from disclosure:

> *As a result of the statement made at the meeting on 28th October on audio recording, there has been an expressed or implied waiver even if the party's conduct is contrary to their intentions. As the Council stated "we have provided significant and extensive legal advice to show we do have title to the said land", and implied waiver exists and the document is no longer protected.*

Council

18 Council did not make submissions in relation to this external review, beyond the reasoning of its original and internal review decisions. Mr Jacques, in his internal review decision, reasoned that:

> *The request of 4th November 2019 is a request for the same or similar information to information sought under a previous application made on 21 June 2019.*
>
> *The application of 4th November does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information. The only argument is one that the Section 31 exemption does not now apply, an argument that will be dealt with in ground 3.*

19 Mr Jacques reasoned that privilege was not waived because:

> *The statements made by the Mayor to the applicant at the meetings confirms the existence of the advice and its basic conclusions, but do not disclose any privileged component of the facts, discussion and analysis considered within any legal advice.*

20 Mr Jacques continued, setting out that:

> *This is very similar to the case of Osland, where a media release disclosed the conclusions rather than the particulars of a legal opinion. The High Court found that this did not undermine the privilege. Although the gist or substance of the advice had been*

> *disclosed, legal professional privilege in the advice was not waived because "the evident purpose of what was said in the press release was to satisfy the public that due process had been followed . . ." and that purpose was neither inconsistent with the maintenance of the privilege or unfair. (Osland v Secretary to the Department of Justice [2008] HCA 37 @48).*

Analysis

Section 20 - Repeat or Vexatious Applications may be Refused

21 For s20(a) to apply, I must be satisfied the information requested is the same or similar to information sought under a previous application for assessed disclosure made under the Act.

22 I must also be satisfied the current application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.

23 On 21 June 2019, Ms Bryan made an application for assessed disclosure under the Act to Council. As part of that application, Ms Bryan requested:

> *A copy of the independent legal advice which the Mayor confirmed at Council meetings and referenced in recent correspondence from the Minister for Primary Industries and Water.*

24 On 4 November 2019, Ms Bryan made a second application for assessed disclosure under the Act to Council. As part of that application, Ms Bryan requested:

> *...the 'significant and extensive' independent legal advice obtained by council in regard to the tenure and status of the Derwent Entertainment Centre and surrounding land.*

25 I am satisfied the information requested as part of Ms Bryan's application for assessed disclosure made on 4 November 2019 is the same or similar to information sought under the application Ms Bryan made on 21 June 2019. Whether there is a reasonable basis for her again seeking this information becomes the key question.

26 Ms Bryan has indicated that she sought the information again because the then Mayor of Council, Kristie Johnston, at an open Council meeting on 28 October 2019 when discussing the sale of the DEC, commented to those in attendance that *we have provided significant and extensive legal advice to show that we do have title to said land.*

27 Ms Bryan interpreted these comments as waiving legal professional privilege over the advice because they indicate that the advice had been provided to other parties. If the advice had been broadly shared and privilege waived, she asserted that Council could no longer rely on s31 of the Act to exempt the requested information from disclosure.

28 If privilege had indeed been waived, I agree that Council could no longer rely on an exemption under s31 of the Act and this would be a relevant change of circumstances.

29 Therefore, I find the current application, on its face, discloses a reasonable basis for again seeking access to the same or similar information. Accordingly, I find that Council was not entitled to use s20(a) to refuse the application.

Section 31 – Legal Professional Privilege

30 I now turn to consider whether Council validly applied s31 of the Act to exempt the requested information from disclosure.

31 Information is exempt from disclosure under s31 of the Act:

> *. . . if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.*

32 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.[1] It is also codified in Part 10, Division 1 of the *Evidence Act 2001* (Tas) as client legal privilege. Legal professional privilege can be split into two limbs: advice privilege and litigation privilege.

33 This external review is concerned with whether the requested information is protected by advice privilege. Advice privilege attaches to confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice.[2] Privilege will only apply where the communication was made for the dominant purpose of the legal advisor providing legal advice.[3]

34 The information identified as responsive to Ms Bryan's request consists of 18 emails and their attachments. Council found this information to be exempt from disclosure under s31 of the Act on internal review.

35 I have been provided unredacted copies of this information and I will assess Council's application of s31 in relation to these emails and attachments below. Council has labelled each group of emails Folio 1-7 respectively, so I will use this reference system for consistency.

36 As waiver of privilege is a key issue in this matter, I will split my assessment into two stages. I will first assess whether the information is of a type which could be covered by legal professional privilege and then, if so covered, determine if the information would in fact be privileged from production in legal proceedings (which would not be the case if the privilege had been waived).

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[1] *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 *18 September 2006* [44].

[2] See Note 2 at [41].

[3] *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67 *21 December 1999* [61].

Folio No. 1

37 This is an email from Mr Hannan of Council to Mr Roger Curtis of Abetz Curtis Lawyers seeking legal advice that was sent on 29 October 2018. It also includes five attachments that are relevant to the request for advice.

38 I am satisfied that this communication is of a type which could be exempt in full under s31 of the Act, as it was made for the dominant purpose of obtaining legal advice.

Folio No. 2

39 This folio consists of two emails. The first email was sent on 29 October 2018 from Mr Curtis to Mr Hannan. It contains legal advice. The second email is a duplicate of that in Folio No. 1.

40 I am satisfied these emails are of a type which could be exempt in full from disclosure under s31 of the Act.

Folio No. 3 – Email 2 and 3

41 The second email of this folio was sent on 27 September 2019 from Mr Curtis to Mr Tony McMullen, General Manager of Council. This email provided advice to Mr McMullen. I am satisfied this communication was created for the dominant purpose of providing legal advice, and accordingly, it could be exempt from disclosure in full under s31 of the Act.

42 The third email of this folio, sent from Mr McMullen to Mr Curtis, and which copied in the then Mayor Ms Kristie Johnston, Mr Carey Higgins, Council's Manager – Legal and Procurement, and Mr Ronaldson, simply attached the letter of instruction sent to Mr Curtis. There was no other discussion of the legal advice. I am satisfied this communication could be exempt from disclosure in full under s31 of the Act.

Folio No. 4 – Email 1 and 2

43 The first email of this folio was sent on 26 September 2018 from Mr McMullen to Mr Curtis. Attached to this email is a letter of instruction that includes requests for legal advice. I am satisfied this communication was created for the dominant purpose of obtaining legal advice, and accordingly, could be exempt from disclosure in full under s31 of the Act.

44 The third email of this folio was sent on 16 April 2018 from Mr Curtis to Mr Higgins. This email included an attachment detailing legal advice sought by Council. I find that this email, and its attachment, could be exempt from disclosure in full under s31 of the Act because this communication was made for the dominant purpose of providing legal advice.

Folio No. 5 – Email 2, 3 and 4

45 The second email of this folio, sent on 24 April 2018 from Mr Curtis to Mr Higgins, is a letter of advice. This email is exempt from disclosure in full under

s31 of the Act on the basis that it is a communication made for the dominant purpose of providing legal advice.

46 The third email of this folio, sent on 23 April 2018 from Mr Higgins to Mr Curtis requests legal advice. I am satisfied this email could be exempt from disclosure in full under s31 of the Act on the basis that it is a communication made for the dominant purpose of obtaining legal advice.

47 The fourth of this folio, sent on 16 April 2018 from Mr Curtis to Mr Higgins, has attached to it a letter of advice. I find that this email, and the attachment, could be exempt from disclosure in full under s31 of the Act on the basis that it is a communication made for the dominant purpose of providing legal advice.

Folio No 7

48 This folio consists of three emails.

49 The first email, sent on 24 April 2018 from Mr Curtis to Mr Higgins is a letter of advice. I am of the view that this email could be exempt in full under s31 of the Act because the dominant purpose of this communication is to provide legal advice.

50 The dominant purpose of the second email, sent on 23 April 2018 from Mr Higgins to Mr Curtis, is to obtain legal advice. Accordingly, I am satisfied this email could be exempt from disclosure in full under s31 of the Act.

51 The dominant purpose of the third email, sent on 23 April 2018 from Mr Curtis to Mr Higgins is to provide legal advice. Accordingly, I am satisfied this email could be exempt from disclosure in full under s31 of the Act.

Waiver of Privilege

52 As discussed above, advice privilege protects the confidentiality of communications made between a lawyer and their client where those communications are made for the dominant purpose of giving or obtaining legal advice. However, the client, as the person to whom the privilege is owed, can waive that privilege.[4] Waiver can be express or implied.[5]

53 This external review is only concerned with implied waiver. Implied waiver arises where there is inconsistency between the client's conduct, and the maintenance of the privilege protecting the confidentiality of the privileged communications.[6] As such, privilege may be found to have been waived as a result of a client's conduct, even where that was not the client's subjective intention.[7] Notions of fairness, though not determinative, inform this consideration.[8]

[4] *Mann v Carnell* [1999] HCA 66 *21 December 1999* [28] ('*Mann*').
[5] See Note 5 at [29].
[6] See Note 5.
[7] See Note 5.
[8] *Osland v Secretary to the Department of Justice [2008] HCA 37* at [45].

54 Whether implied waiver arises depends upon the context of the particular case, including the purpose of the relevant disclosure.[9] In *Osland v Secretary to the Department of Justice,* the High Court held that the Victorian Attorney-General did not waive privilege by making public reference to legal advice he received from three Senior Counsel that recommended to the Premier that the Governor reject the appellant's petition for a pardon.

55 The appellant, in that case, argued the Victorian Attorney-General waived privilege by stating in a press release:

> *This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.*

56 In concluding that this statement did not waive privilege, the majority made specific reference to why the statement was made, which was to satisfy the public that due process had been followed, and that the decision not to pardon the appellant was not influenced by political considerations.[10]

57 Ms Bryan asserts that the privilege attached to legal advice that Council received informing it of its ability to sell the DEC and surrounding land was waived by the Mayor's comments at the Council meeting held on 28 October 2019.

58 I note that there are two different views on how the Mayor's statement that *we* [Council] *have provided significant and extensive legal advice to show that we do have title to said land* should be interpreted. This arises between what was said, and the contention that the Mayor inadvertently omitted a word and intended to say *we have* [been] *provided significant and extensive legal advice to show that we do have title to said land.* Ms Bryan believes it is the former and Council was indicating that it had provided the legal advice to other parties and should also provide it to her. If the word 'been' was omitted, which is consistent with Council's statements that it has not intentionally waived privilege or broadly shared the advice, any claim in relation to waiver would relate to this occurring inadvertently.

59 Having listened to the recording of the Council meeting and considered Council's subsequent statements, I believe that Ms Johnston misspoke and omitted the word 'been' inadvertently. It seems that Ms Johnston was trying to explain to those in attendance at the Council meeting that legal advice had been sought in relation to Council's ability to sell the DEC and surrounding land, and that Council was acting lawfully and in accordance with that advice.

60 After considering the context and circumstances of this particular case, and after considering notions of fairness, I find that privilege was not impliedly waived if Ms Johnston accidently omitted the word 'been' in her comments.

[9] See Note 9 at [46].
[10] See Note 9 at [48].

This is because, in making these comments, her conduct was not inconsistent with the maintenance of the confidentiality attached to the privilege.

61 It is my view that the purpose of the Mayor's comments was similar to the purpose of the statements in the press release in *Osland;* namely, to reassure and satisfy the public that due process had been followed and that an adopted course was lawful. In this case the advice went to whether Council had the ability to sell the DEC and surrounding land and the comments were in response to suggestions that it did not have that ability.

62 Furthermore, as was the case in *Osland,* the disclosure itself was very minimal. The comments made by the Mayor were general in nature and simply outlined the conclusion of the advice received, rather than providing any detail as to the particulars of the advice.

63 It is also my view that notions of fairness do not dictate that privilege should be waived in these circumstances. Unlike in *Benecke v National Australia Bank*,[11] Council is not attempting to exploit privilege by advancing privileged information as evidence in litigation on the one hand, while also using privilege to prevent that evidence from being properly examined on the other.

64 Further, it would not be unfair on the applicant to deprive her of access to the legal advice received in this instance, because one would not expect access to such information in these circumstances.

65 Indeed one would expect Council to obtain legal advice in relation to matters such as this, and to confirm that it had done so, when its ability to sell the land was publically questioned. Doing so would help alleviate concerns ratepayers might have about the lawfulness of its actions.

66 I find the Mayor, by my interpretation of her comments at the Council meeting on 28 October 2019, did not waive privilege. Accordingly, I find that the requested information is exempt from disclosure under s31 of the Act on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

67 I again note that the applicant has a differing view as to how to interpret the comments made by Ms Johnston at the Council meeting on 28 October 2019. Both interpretations enliven waiver as a potential issue and I have addressed whether privilege was waived by my interpretation of Ms Johnson's comments.

68 As mentioned above, Ms Bryan argues that Ms Johnston's omission of the word 'been' was not an accident, and that this accords with her suggestion that the legal advice referred to has been provided to other parties. Ms Bryan's application for assessed disclosure dated 21 June 2019 notes *independent legal advice* referenced in *recent correspondence from the Minister for Primary Industries and Water*. Ms Bryan also submitted to my office an email from the office of former Tasmanian Senator Eric Abetz that referenced the conclusion of legal advice received from council. It is not clear from this correspondence as to

[11] (1993) NSWLR 110

whether the advice itself had been provided to these parties but they were clearly aware of its existence and general contents.

69 Ms Bryan argues in her internal review request that *legal privilege would not apply* to exempt the requested information from disclosure *if the information has already been provided to someone else.*

70 I do not agree with Ms Bryan's assessment.

71 As discussed by the majority of the High Court in *Mann v Carnell,* privilege attached to legal advice will not necessarily be waived when a third party outside the lawyer-client relationship is made aware of the advice.[12] Privilege will not be waived where the disclosure of privileged information by the client is made on a confidential basis for a limited and specific purpose.[13]

72 At its highest, Ms Bryan's assertions could show that Council has made members of the State and Commonwealth Governments aware, on a confidential basis, that it has received legal advice showing that it can lawfully sell the DEC and surrounding land for the specific and limited purpose of facilitating that sale.

73 Such a disclosure would not, in my view, amount to conduct that would be inconsistent with the maintenance of the confidentiality attached to the privilege, and therefore would not waive privilege in a broader sense. Ms Bryan has not expressed any awareness that the advice has been shared with other parties or that other action inconsistent with maintaining privilege has been taken by Council.

74 Accordingly, even if the advice had been shared in this manner, I would still consider that the requested information is exempt from disclosure under s31 of the Act on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 35 – Internal Deliberative Information

75 Council did not seek to exempt any information pursuant to s35, but I consider that it is a more appropriate provision in relation to the potential exemption of the documents considered below.

76 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:

- An opinion, advice, or recommendation prepared by an officer of a public authority, or
- A record of consultations or deliberation between officers of public authorities.

[12] See Note 5 at [30].

[13] *Goldberg v Ng Hango Holdings Pty Ltd* [1995] HCA 39 *3 November 1995*: Gummow J [27]; *Thomason v The Council of the Municipality of Campbelltown* [1939] at 354 – 358 per Jordan CJ.

77 Once one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the Course of, or for the purpose of, the deliberative processes related to the official business of the Department

78 The outlined exemption above does not apply to the following:

- Purely factual information (s35(2));
- A final decision, order or ruling given in the exercise of an adjudicative function (s35(3)); or
- Information that is older than 10 years (s35(4)).

79 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

80 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In Re Waterford and Department of Treasury (No 2) it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.

81 Section 35 is subject to the public interest test in s33 of the Act.

Purely Factual Information

82 As I have just mentioned, information cannot be exempt under s35 of the Act if it is purely factual information. Accordingly, the identities of those who sent and received the following emails, the date and time these emails were sent, the subject of the emails, the names of attachments and salutations are not exempt from disclosure under s35.

Folio 3 – Email 1

83 This email, sent internally from Mr Ronaldson to Ms Jodi Plunkett of Council, simply attaches a letter of advice from Abetz Curtis Lawyers. There are no communications included in the covering email, but it relates to the deliberative process of determining whether the DEC can be sold.

84 I am satisfied this email was sent by Mr Ronaldson to inform Ms Plunkett of legal advice received in relation to Council's ability to sell the DEC. Accordingly, I consider this covering email to be prima facie exempt from disclosure under s35(1)(b) of the Act. The attached advice remains exempt under s31, as previously discussed in my analysis of that section.

Folio 4 – Email 2

85 This email, sent internally on 7 May 2018 from Mr Higgins to Mr Simon Scott, Mr Bill Richardson, Mr Frank Chen and Mr Ronaldson of Council, simply

forwards on a letter of advice Council received from Mr Curtis. There is no further discussion between Council staff regarding this advice.

86 I am satisfied that this was made to update colleagues about Council's ability to sell the DEC. As such, I consider this covering email to be part of Council's internal deliberative process, and is therefore prima facie exempt from disclosure under s35(1)(b) of the Act. The attached advice remains exempt under s31.

Folio 5 – Email 1

87 This email, sent internally on 7 May 2018 from Mr Higgins to Mr Ronaldson, Mr Richardson, Mr Scott, and Mr Chen, forwards on a Letter of Advice received by Mr Curtis. In the covering email, Mr Higgins explains that he had provided a summary of the advice included in the attachment to colleagues in an earlier email.

88 The covering email forms part of deliberations within Council relating to whether Council had the ability to sell the DEC. Accordingly, I am satisfied that this email is prima facie exempt from disclosure under s35(1)(b) of the Act. The attached advice remains exempt under s31.

Folio 6 – Email 1

89 This email, sent internally on 7 May 2018 from Mr Higgins to Mr Ronaldson, Mr Richardson and Mr Scott refers recipients to an attached email from Mr Higgins sent on 30 April that summarises legal advice Council received.

90 Though there is no further discussion between Council staff regarding this advice, I am satisfied that it forms part of the wider deliberations within Council regarding their ability to sell the DEC. Accordingly, I am satisfied this email is prima facie exempt from disclosure under s35(1)(b) of the Act.

Folio 6 – Email 2

91 This email, sent internally on 30 April 2018 from Mr Higgins to Mr Chen, Mr Michael Glover, and Mr Amir Mousavi, is a summary of the legal advice referred to in Mr Higgin's email dated 7 May 2018. It was sent to inform colleagues of Council's ability to sell the DEC.

92 This email forms part of wider deliberations occurring within Council about whether it had the ability to sell the DEC. Accordingly, I am satisfied this communication is prima facie exempt from disclosure under s35(1)(b) of the Act.

Section 33 - Public Interest Test

93 I now turn to consider whether it would be contrary to the public interest to release the documents I have identified as being prima facie exempt from disclosure under s35 of the Act. In making this assessment I am required to consider, at least, all of the matters in Schedule 1 of the Act.

94 Having turned my mind to each of the matters in Schedule 1, I find that the following are relevant and weigh in favour of disclosure:

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

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

c) Whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

95 The DEC is a public asset and I recognise that the release of information relating to Council's ability to sell the DEC would contribute to a debate of public interest. I also recognise, that the release of this information would help the Tasmanian public understand how Council came it its position that it had the ability to sell the DEC.

96 However, I find that matter (j) - whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – is relevant and is the key matter weighing against disclosure.

97 Information I have found to be prima facie exempt from disclosure under s35 consists of internal correspondence within Council that is closely related to information I have found exempt under s31 of the Act. As discussed above, s31 exempts from disclosure privileged information.

98 Council, as the client in these circumstances, has the right to expect that legal advice sought and received will remain confidential. The release of Council's internal correspondence that is so closely related to privileged information risks undermining the confidentiality of the legal advice it received. This has the potential to undermine the proper administration of justice. Accordingly, I find this matter weighs very heavily against disclosure.

99 Having balanced the matters that I have considered relevant, I am of the opinion that it would be contrary to the public interest to release the information that I have found to be prima facie exempt under s35 of the Act

Preliminary Conclusion

100 For the reasons given above, I determine that:

- Council is not entitled to refuse the application pursuant to s20(a); and
- Exemptions claimed pursuant to s31 are varied;
- Exemptions under s35 apply.

Submissions to the Preliminary Conclusion

101 As the above preliminary decision was adverse to Council, it was made available to it on 30 May 2023 under s48(1)(a) of the Act to seek its input prior to finalisation. However, as the preliminary decision upheld Council's

substantive position that the information should not be disclosed, it was also made available to Ms Bryan for her to provide input under s48(1)(b). No submissions were provided by Council, however on 28 June 2023 my office received substantial submissions from Ms Bryan which responded to my preliminary decision. Those relevant to this external review are summarised and quoted as follows.

102 First, in relation to my consideration of whether privilege was waived by my interpretation of the comments made by Ms Johnston at the Council meeting, Ms Bryan asserted:

> *The Ombudsman's decision to change vital audio and written record of evidence based on a personal belief appears to be a serious breach of legal obligations and display a conflict of interest in favour of the Council. This decision is denying evidence about unlawful actions by the Government and Council. I believe I have been denied procedural fairness and natural justice.*

103 Second, Ms Bryan submitted that:

> *The Ombudsman cannot rely on any internal deliberative information* [exemption under s35] *as it is inconsequential to this debate.*

104 Ms Bryan submitted that s35 was irrelevant to my assessment because she:

> *... did not request internal deliberative information but requested the independent legal advice the Council relied upon and stated to confirm they had title to the said land.*

105 However, in any case, Ms Bryan argued that s35 did not apply to exempt the legal advice from disclosure because it should be considered 'purely factual' information:

> *When ruling information as prima facie exempt from disclosure under the Right to Information Act 2009 s35(1)(b) consideration should be given to s35(2) which state* [*sic*] *Subsection (1) does not include purely factual information . . .*

106 Third, Ms Bryan queried whether an email she received from then Senator Eric Abetz dated 18 November 2019 indicated that privilege over the relevant legal advice had been waived, asking:

> *Has there been an additional waiver of professional privilege related to this disclosure of legal advice by a third party?*

107 Fourth, Ms Bryan asserted that privilege cannot possibly attach to the legal advice received from Council because privilege cannot apply to advice that is commissioned for an illegal or improper purpose. Ms Bryan references Legal Briefing 117 on the Australian Government Solicitor website which provides:

Commonwealth Evidence Act

Section 125 of the Evidence Act 1995 (Cth) provides that a communication will not be privileged if made or prepared in furtherance of a fraud, offence, an act attracting penalty, or a deliberate abuse of a power conferred by an Australian law (as defined).

Common Law

At common law, no privilege arises in respect of a communication made for a purpose that is contrary to the public interest; that is, where the communication is made in furtherance of an illegal or improper purpose, whether or not the legal adviser knows of that purpose

For the purposes of the illegal or improper purpose principle, the relevant distinction is between a communication made for the purpose of being guided or helped in achieving an illegal or improper purpose, which is a non-privileged communication, as compared with a communication made for the purpose of seeking advice in relation to past conduct, which may be privileged

However, a communication in relation to past conduct will not be privileged if the communication is for the purpose of covering up a crime or fraud, or for the purpose of defeating or delaying recovery by the victims of a crime or fraud.

The illegal or improper purpose principle covers all forms of fraud and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances, as well as cases of fraud by third parties...

108 Fifth, Ms Bryan asserts that privilege cannot apply to the legal advice if the provider of the advice is not sufficiently independent:

> *The legal advisor does not appear to be independent, have objective impartiality or absence of fear or favour. It is up* [to] *the Senator Abetz to adduce evidence going to these requirements.*

109 Sixth, Ms Bryan queried whether my reliance on Schedule 1 matter (j) as the key matter weighing against the disclosure of information I deemed prima facie exempt under s35, asking:

> *How can enforcement of the law prevent disclosure of the legal advice? . . . Does the Ombudsman['s] decision [at] para[graph] 95 mean the legal advice received is that the Council cannot sell the DEC and land and this is the reason it has been exempted from disclosure pursuant to schedule 1 (j)?*

Further analysis

Scope of external review

110 I reiterate that the scope of this external review is confined to considerations under the Act as to whether the information requested by Ms Bryan is exempt from disclosure or her application able to be refused. This has required me to determine whether her application was a repeat application under s20(a) and whether the requested information is exempt under either s31 or s35 of the Act. Consideration of the public interest test was required in relation to s35.

111 I raise this because the applicant has made extensive submissions that relate to the legality or appropriateness of Council's decision to sell the DEC, and other issues which are not relevant to the question of whether requested information is exempt from disclosure under the Act. Though I recognise the importance of these issues for the applicant and others in the community, and acknowledge that the sale of public amenities such as the DEC is controversial and impacts the Glenorchy community, I can have no regard to those submissions. This is because they go to the underlying issues which have caused Ms Bryan to seek the information, not considerations relevant to my decision on external review regarding the release of the information.

112 However, the applicant has made some submissions that are relevant to this external review, as I set out previously, and I will analyse these below.

Denial of procedural fairness

113 First, the applicant submits that she has been *denied procedural fairness and natural justice* because I considered that Ms Johnston misspoke and omitted the word 'been' inadvertently. I cannot agree with this submission.

114 Having reviewed the audio recording I found it likely that Ms Johnston misspoke and inadvertently omitted the word 'been', because, as outlined above, I consider this a reasonable inference drawn after listening to the recording and considering the comment in the context of other statements by Council. I am of the opinion that Ms Johnston was simply trying to explain to those in attendance at the Council meeting that legal advice had been sought in relation to Council's ability to sell the DEC and surrounding land, and that Council was acting lawfully and in accordance with that advice.

115 However, notwithstanding my interpretation of Ms Johnston's statement, I also considered whether privilege had been waived in the alternative interpretation, asserted by Ms Bryan, that the word 'been' was not inadvertently omitted. In this case I found that privilege was still not waived for the reasons discussed at paragraphs 68 to 74 of this decision. Ms Bryan has also been given the opportunity to make submissions prior to the finalisation of my decision and I have carefully considered these. Accordingly, I do not accept that I have denied Ms Bryan procedural fairness and natural justice.

Relevance of section 35

116 Second, the applicant submits that s35 of the Act is irrelevant to my assessment of whether information requested by the applicant should be disclosed. The applicant also contends that, in any case, s35 of the Act does not apply to exempt this information from disclosure, because the legal advice requested should be considered 'purely factual information'.

1171 do not agree that s35 of the Act is irrelevant to my assessment of the requested information, and maintain my position expressed in the preliminary decision. This is because s35 provides that information is exempt if it consists of records of consultations or deliberations between officers of public authorities in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority.

118 Council identified a range of emails between Councillors and Council staff responsive to Ms Bryan's request. Because these emails were sent internally between Council staff, they were most appropriately assessed for disclosure under s35 of the Act rather than under s31.

119 The information I found to be exempt under s35 does not include the actual legal advice document attached to one of these emails, this remains exempt under s31. I am not satisfied that the substance of the internal emails are purely factual, but I accept the applicant's submissions are partially correct in that there is some purely factual material in these emails which can be released. I have revised the relevant analysis above to reflect that the factual information at the beginning and end of these emails should be released.

120 This includes the identities of those who sent and received the emails, salutations, when these emails were sent, the subject line of these emails and names of documents attached to these emails.

121 Ms Bryan sets out in her submissions, however, that she only seeks the relevant legal advice and *does not seek internal deliberative material.* Accordingly, the purely factual information I found would not be exempt under s35 is out of scope of Ms Bryan's request and not required to be released to her.

Waiver of privilege due to email sent by Senator Eric Abetz

122 Ms Bryan submitted that an email she received from then Senator Eric Abetz dated 18 November 2019 indicated that privilege over the relevant legal advice had been waived. In this email Senator Abetz stated that he knows *Council has legal advice to confirm this* [the ability to sell the DEC and surrounding land]. It is Ms Bryan's submission that this illustrates that privilege has been waived because it indicates that he has knowledge of the legal advice.

123 I do not agree with this submission. As discussed in paragraphs 71 to 74 of my decision, the mere communication of legal advice to a third party will not necessarily waive privilege. In the absence of further details, I have not changed

my view that this email does not substantiate any claim that privilege has been waived.

Waiver of privilege due to an illegal or improper purpose

124 At common law, privilege will not apply where communication is made for a purpose that is contrary to the public interest, that is, where the communication is made in furtherance of an illegal or improper purpose, whether or not the legal adviser is aware of that purpose.

125 This common law rule is reflected in Section 125(1) of the *Evidence Act 2001 (Tas)* and *Evidence Act 1995 (Cth)* which provides that privilege will not apply to:

a) a communication made or the contents of a document prepared by a client or lawyer, or both, or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

b) a communication or the contents of a document that the client or lawyer, or both, or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

126 For s125(1) to apply, it must be first established that Council requested the advice to further the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty. I am not satisfied that there is any evidence of this, and therefore privilege is not waived on this basis.

Independence of the provider of the legal advice

127 For legal advice to attract privilege, the provider of the advice must be sufficiently independent. This is a question of fact, and as mentioned by the applicant, the onus falls on the party claiming privilege to establish the requisite independence.

128 Council received the requested legal advice from Roger Curtis at Abetz Curtis Lawyers. One of the founding partners of Abetz Curtis Lawyers is Eric Abetz, a now former Federal Liberal Senator.

129 Ms Bryan submits that because Mr Abetz was a Federal Senator for the Liberal Party at the time the advice was received, the advice could not attract privilege because the advice was *from a law firm with connections to the Liberal Government* and was not sufficiently independent.

130 I do not agree with Ms Bryan's submission. I accept that Mr Abetz has links to the firm providing the advice, but the advice itself was provided by Roger Curtis, not Mr Abetz. While I accept that the onus falls on the party claiming privilege to establish the requisite independence, there is nothing on the facts available to me that brings the ability of Mr Curtis to provide sufficiently independent legal advice into question. I am not satisfied that privilege would be waived on this basis.

Schedule 1, matter (j)

131 Finally, as part of her submissions, Ms Bryan queried my reliance in my public interest test assessment on Schedule 1, matter (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – as a key factor weighing against disclosure of material I found to be prima facie exempt from disclosure under s35 of the Act. Specifically Ms Bryan asked if this would *indicate or confirm there has been a breach of law surrounding this disposal of land and community entertainment centre with the Government and Council acting in partnership?*

132 To be clear, my reliance on matter (j) was due to of the importance of respecting client legal privilege as a key principle of our legal system. A failure to respect privilege poses a threat to the proper administration of justice. My reliance on the matter was in no way an indication of a belief that there had been any breach of the law regarding this land sale, which was not a matter I am empowered to consider as part of this review.

133 Overall, while I have carefully considered Ms Bryan's submissions, I have not changed the findings set out in my preliminary decision except in relation to a small amount of purely factual information in the internal emails. This does not have an impact on the ultimate conclusion, however, as this information is out of scope of Ms Bryan's request as she has specifically restricted it to the relevant legal advice.

Conclusion

134 Accordingly, for the reasons set out above, I determine that:

- Council is not entitled to refuse the application pursuant to s20(a);
- Exemptions claimed pursuant to s31 are varied; and
- Exemptions under s35 apply.

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

Dated: 30 June 2023

Richard Connock
OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 20 – Repeat or Vexatious Applications may be Refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under s 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

Section 31- Legal Professional Privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review Case Reference:	O1912-004 R2202-133
Names of Parties:	Jonathon Simonetis and Department for Education, Children and Young People
R**easons for decision:**	s48(3)
Provisions considered:	s27, s35, s36

Background

1 Mr Jonathon Simonetis (the Applicant) is the owner operator of the business Tas Laser Skirmish, which is an outdoor Laser Tag games venue in Tasmania. In 2019 the Department of Education, now the Department for Education, Children and Young People (the Department), proposed and made changes to the Department's *Procedures for Planning Off-Campus Activities*. Mr Simonetis had concerns that these changes would have a negative effect on his business and the sector that he operated in.

2 On 21 June 2019, the Applicant, through his lawyer, submitted a request for information under the *Right to Information Act 2009* (the Act) to the Department, together with the usual application fee. The application was received by the Department on 25 June 2019. The request sought:

> *All documents dated between 1 January 2018 to present which relate to any changes or proposed changes to the 'Procedures for Planning Off-Campus Activities', ...* [including] *but not limited to:*
>
> - *documents which relate to the 2019 decision to categorise laser tag as an 'unsuitable activity';*
> - *any reports or documents evidencing consultation (or lack thereof) with relevant stakeholders; and*
> - *complaints or submissions made by community members or other persons which provided an impetus for the 2019 changes.*

3 The Department retrieved a number of documents that were judged to be within the scope of the request. On 4 September 2019, Ms Rowena Taylor, a

delegated officer of the Department, provided a decision to the Applicant on his application. Some of the requested information was released, but a substantial amount was assessed as exempt under the following sections of the Act:

s27 – Internal briefing information of a Minister

s35 – internal deliberative information; and

s36 – personal information of a person.

4 On 30 September 2019, the Applicant's legal representative wrote to the Department seeking an internal review of the decision. The Applicant's lawyer questioned the efficacy and completeness of the search for relevant documents and provided submissions which are set out later in this decision.

5 On 31 October 2019, Mr Rob Williams, a delegated officer of the Department, provided an internal review decision to the Applicant. The internal review decision reached the same conclusions as Ms Taylor's decision regarding the information. However, Mr Williams, advised that a further search had located a number of extra documents which were partially released to the Applicant.

6 On 28 November 2019, the Applicant sought an external review.

7 The application for external review was accepted under s44 of the Act on the basis that the Applicant had received an internal review decision and had submitted it to this office within 20 working days of receiving it.

Issues for Determination

8 I must determine whether the information not released by the Department is eligible for exemption under ss27, 35, 36 or any other relevant section of the Act.

9 As ss 35 and 36 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

10 Copies of ss27, 35 and 36 are at Attachment A.

11 Copies of s33 and Schedule 1 are also attached.

Submissions

12 On 30 September 2019, the Applicant sought an internal review of the original decision under the Act. In support of his request for internal review, the Applicant made submissions through his legal representative regarding the number and substance of the redactions made under the original assessment, specifically:

- **Submissions**12 On 30 September 2019, the Applicant sought an internal review of the original decision under the Act. In support of his request for internal review, theApplicant made submissions through his legal representative regarding the number and substance of the redactions made under the original assessment, specifically:*It is submitted that the Department has dealt with my client's Department, and communications between the Department and my client.• My client is not confident that in the circumstances where the Department made the decision to, arguably, implement major amendments to the Procedures for Planning of Off Campus Activities, little consultation appears to have taken place with key*

Department, and communications between the Department and my client.

- *My client is not confident that in the circumstances where the Department made the decision to, arguably, implement major amendments to the Procedures for Planning of Off Campus Activities, little consultation appears to have taken place with key stakeholders and industry personnel, and if it did, undoubtedly more relevant documents exist and have not been disclosed.*
- *My client also submits that item 1 in the Schedule, particularly the draft letter from the Minister, is of significant importance and the Department ought to exercise its discretion in at least partially releasing this document given that it appears to have only ever been in draft form and it can be inferred that it was never actually effected.*

13 On 28 November 2019, the Applicant sought an external review under the Act and did not make further submissions in support of his application. However, the Applicant indicated on 30 January 2023 that:

> *Although significant time has passed, the decision made by the Dept of Education has had significant financial implications for my business and the industry. Since that decision two businesses offering Laser Tag have permanently closed and a third became unprofitable and transferred ownership to a not-for-profit entity. I appreciate we have now seen 3 Ministers and 3 Premiers since that decision was made, however I'm still very eager for this review to happen.*

Analysis

14 The Department found 27 documents to be exempt from disclosure under ss27, 35 and 36. It listed these documents in two schedules of information and labelled them by document number rather than page number. I will follow this system when referring to various documents, in order to avoid confusion. The two schedules of information represent two separate sets of documents. The first set of documents, numbered one (1) to twenty (20), was attached to the Department's original decision dated 4 September 2019. The second set of documents, numbered one (1) to seven (7), was attached to the internal review decision dated 31 October 2019.

Section 27 – Internal briefing information of a Minister

15 The Department claimed that the information contained in Document 9 was exempt under s27 of the Act. Document 9 is in the first set of documents and consists of 4 pages. It is a Question Time Brief prepared for the 2019 Budget Estimates for the Minister for Education and Training.

16 Section 27 relevantly 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.*

17 I must determine if the information consists of an opinion, advice, or a recommendation prepared by an officer of a public authority or a Minister, or is a record of consultations or deliberations between officers of public authorities and a Minister. If so, I need to be satisfied that the information meets the other criteria of s27. These are that it is not over 10 years old, brought into existence for another purpose or purely factual information and therefore covered by one of the exceptions under ss27(2) to (4). Section 27 is not subject to the public interest test.

18 In her statement of reasons for the decision, Ms Taylor stated:

> *The information that I consider fully exempt under this section consists of a Question Time Brief. The Brief is an opinion of what the Department suggests to the Minister in relation to changes made to the Procedures for Planning Off Campus Activities for*

> *Students. This Brief was provided to the Minister in May 20!9 in preparation for budget estimates. They are suggested speaking notes and may or may not be used by the Minister on the day.*

19 Accordingly, Ms Taylor determined that the information meets the criteria of s27(1) "an opinion, advice or a recommendation prepared by an officer of a public authority ... 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".

20 Ms Taylor also determined that the exceptions under s27(2), (3) and (4) did not apply, indicating:

> *The information is less than !0 years old, and in each case was brought into existence for the purpose of providing a question time brief or briefing note (section 27(2) and (3)). Insofar as it contains factual information, it is not capable of standing alone without revealing the nature of the opinion, advice, recommendation or deliberations of the document. I consider the factual information in the documents is inextricably linked to the opinions, advice, and/or recommendations.*

21 As I have said elsewhere,[1] I have determined documents in the nature of a Question Time Brief (QTB), such as Document 9, may be exempt under s27.

22 Within Document 9, the first item of information for consideration is found under the date of the QTB and the heading 'Key Messages'. The information under this heading was provided to the Minister to be given to Parliament if necessary. Until such time as the Minister reads it into Parliament, it remains the advice of the Department as to what the Minister should say about the issue if the need arises. I am satisfied that the information under the heading 'Key Messages' is exempt from disclosure under s27(1)(a). I am not satisfied the heading itself or the information prior to 'Key Messages' is exempt, as this is purely factual information and should be provided to Mr Simonetis.

23 The next component of the QTB is the series of dot point paragraphs under the heading 'Talking Points'. The information in these dot points appears to provide background and supplementary information relating to the primary key messages on page one of the QTB. It consists of advice and recommendations to the Minister in the form of suggested ways of addressing the issues if it becomes necessary to do so. I am satisfied that this is advice, or recommendation prepared by an officer of a public authority to brief the Minister. As such, I determine the information under the heading 'Talking

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1 See, for example, *Richard Baines and Department of Education* (May 2018) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

Points' to be exempt under s27, unless it falls under one or more of the exceptions contained in ss27(2) to (4).

24 S27(4) provides that purely factual information is not exempt. The information under the 'Talking Points' heading does contain some factual information, but the question is whether it is purely factual information for the purposes of the Act.

25 As to what constitutes 'purely factual information' in *Re Waterford and the Treasurer of the Commonwealth of Australia,*[2] 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, and not be inextricably bound up with a decision-maker's deliberative process. In other words, for 'purely factual information' to be exempt, it must be capable of standing alone. Even where a document's contents are partly factual, this does not necessarily mean that the document falls outside the ministerial briefing exemption.

26 Turning to the information before me, I find that the QTB does contain some factual information which could potentially stand apart from the deliberative process that the Minister must undertake. However, s27(4) provides that the exemption *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.* I consider that, in these circumstances, factual information contained in the 'Talking Points' section of the document is inextricably linked to the content of the advice in the briefing document. I therefore find that page 2 of the QTB is exempt from disclosure under s27, excepting the words 'Talking Points'.

27 The first item of information on page 3 of the QTB is headed 'Political Lines'. This item is blank, no information has been inserted under this heading. The next heading reads 'Quick Facts,' and this is followed by three dot points of purely factual information. Due to the brevity of this information, I am not satisfied that it would reveal the nature of the advice in the briefing and is therefore not exempt from disclosure under s27.

28 Finally, the fourth page of document 9 is a page which is headed 'Background and Facts.' It contains information relating to the authorship and approval of the QTB document. I do not consider that this is the sort of information that is protected from disclosure by s27, as it does not comprise opinion, advice or recommendation, or a record of consultations or deliberations between officers and Ministers. Therefore, I find that it may be released to the applicant.

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[2] *Re Waterford and the Treasurer of the Commonwealth of Australia (1984) AATA 518 at [14]*

29 Having reviewed the document for which exemption is claimed, I am satisfied that s27 is applicable to pages 1 and 2 of the document, excepting the document title and headings on these pages. I find that the Department has not discharged its onus under s47(4) in respect of pages 3 and 4 of the document and they are not exempt under s27. The information I have found not to be exempt should be released to Mr Simonetis.

Section 35 – internal deliberative information

30 The Department relied upon s35(1)(a) and (b) to exempt information in 21 documents responsive to the request for disclosure. For information to be exempt under these sub-sections, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority or is a record of consultations or deliberations between officers of a public authority.

31 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

32 According to the Act, the exemption outlined above does not apply to the following:

. purely factual information[3] ;

. a final decision, order or ruling given in the exercise of an adjudicative function[4]; or

. information that is older than 10 years.[5]

33 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has been considered by the Commonwealth Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)* the Tribunal adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[6]

34 Section 35 is subject to the public interest test contained in s33 and by extension, the relevant matters in Schedule 1 of the Act. In order for the exemption to apply, the Department must establish that the release of information would be contrary to the public interest.

35 The Department maintains that the following documents are exempt pursuant to s35(1)(a) and/or (b) in part or in full: Set 1 – 1, 2, 3, 4, 5, 6, 7, 8,

---

[3] Section 35(2).
[4] Section 35(3).
[5] Section 35(4).
[6] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

10, 11, 12, 15, 16, 17 and 20; Set 2 – 1, 2, 3, 4, 5 and 6. I will consider these in my analysis below.

36 The Department provided similar reasoning in both its decisions in relation to s35, as the internal review decision upheld the original decision. In the original decision, Ms Taylor set out that:

> *The exempt information consists of emails between the Department's officers and Minutes to the Deputy Secretary Support and Development. The Minutes were prepared by officers of the Department for the express purpose of making recommendations to the Deputy Secretary regarding changes to the Procedures for planning off-campus activities. The emails consist of advice, opinions, recommendations, consultations and instructions exchanged between the Department's officers in their deliberations over this matter as well as drafting of words for a media release and answers to questions posed by reporters. It also contains a draft version of a letter prepared by the Department's officers for communication to members of the public which was submitted to officers for comment.*

37 In his statement of reasons for the internal review decision, Mr Williams agreed with Ms Taylor that the information formed part of the internal deliberative process:

> *I am in agreement with Ms Taylor that the information is exempt as officers of a pubic authority require the internal deliberative process, preparing their opinion, advice or recommendations, to carry out their duties. It is critical that officers have some protected space to break down issues and find solutions. I find this section applies also to the further information located relevant to your application. This information consists of emails between the Department's officers and Department of Premier and Cabinet officers.*
>
> *It could be assumed that the internal deliberative information could be disclosed to the broader public and this could harm individuals or a group of individuals by a reluctance to engage in and benefit from the possible better solutions of the thinking process.*
>
> *I have determined that it is reasonable to allow officers of the public authority to have some protected space to discuss potential decision and it is contrary to the public interest to disclose this information.*

Documents

38 A large number of the documents for which exemption under s35(1) has been claimed comprise emails between officers at the Department. Before I deal with individual documents I will make a general point regarding the application of the exemption to the documents.

39 Exemption under s35 has been claimed, in full or in part, by the Department in respect of documents in Set 1 and Set 2. While the documents in Set 2 have been redacted only with regard to the substance of the emails, the documents in Set 1 have been fully redacted, including the details of the senders and addressees, email addresses, subject headings, and salutations. In my opinion, it is excessive to include this extraneous matter in the claim for exemption under section 35. This sort of information is purely factual information within the meaning of s35(2) and should be routinely released, as has occurred in Set 2. None of this information is exempt under s35 in any of the documents assessed as follows, and it should be released to Mr Simonetis.

Individual Documents - Set 1

Document 1

40 Document 1 (Set 1), for which exemption under s35 has been claimed in full, is listed in the Schedule as *Draft letter from Minister regarding prohibiting schools from participating in laser tag activities*. The document consists of two pages and carries the letterhead of Jeremy Rockliff, the Deputy Premier and Minister for Education and Training. The document is in the configuration of a letter, however the address section and opening salutation remains in template form. It is undated and unsigned.

41 The Applicant's legal representative made specific submissions with regard to Document I. As mentioned above, the Applicant's lawyer submitted that the draft letter from the Minister is of significant importance and argued that the document ought to be at least partially released, given that it appears to be only a draft and never actually effected.

42 In her Statement of Reasons, Ms Taylor determined that the draft letter was a version prepared by the Department's officer for communication to members of the public which was submitted to officers for comment. Ms Taylor determined that the document met all the conditions to be exempt information under s35(1).

43 In the Internal Review Decision, Mr Williams, addressed the Applicant's submission. He was of the view that "[i]n most instances, draft versions of documents are considered internal deliberative and are not released, particularly if a final version exists." Mr Williams also advised that a further search for documents identified a final version of the letter which has been released in part (Document 7 (Set 2) - Letter from Minister for Education and Training regarding laser tag.)

44 With regard to Document 1 from Set 1, I agree with the delegate's assessment that the document contains internal deliberative information, as it is a record of consultations between officers regarding the finalisation of draft correspondence and is clearly part of the 'thinking process' of the

Department. I am satisfied the document is prima facie exempt pursuant to s35(1)(b).

Document 2

45 This document comprises a chain of emails between officers from the Department. It consists of 6 pages. The Department has claimed that the emails in this document are exempt from disclosure as internal deliberative information.

46 The emails concern the amendment of the Procedures for Planning Off Campus Activities and I am of the view that they represent a record of consultations or deliberations between officers in the course of this deliberative process. I am satisfied the information contained in the emails is prima facie exempt under s35(1)(b) of the Act.

Documents 3 and 10

47 Documents 3 and 10, dated 8 April 2019 and 11 June 2019 respectively, are both Minutes to the Deputy Secretary Support and Development at the Department. The Subject heading for both is – Procedures for Planning Off Campus Activities – Weapons-Based Real Life Action Games.

48 Exemption has been claimed under s35(1) for the sections of the documents headed Recommendation and Key Issues, and the list of attachments in both documents, and two attached documents in Document 3. I am satisfied that these sections contain opinion, advice or recommendations prepared by an officer of a public authority, and thus are prima facie exempt under s35(1)(a).

Documents 4, 5, 6, 7, 8, 12, 15, 16, 17 and 20

49 These documents are all emails between officers of the Department and can accordingly be assessed as a group. The emails in Documents 4 and 20 relate to updates to procedures for planning off campus activities. Those in Documents 5 and 12 relate to the Laser Tag Ban. Document 6 relates to Hobart College. Documents 7, 8, 15, 16 and 17 relate to responses to media enquiries.

50 I am satisfied that the documents consist of records of consultations and deliberations between officers of public authorities in the course of, or for the purpose of the deliberative processes related to the official business of a public authority or Minister of the government. I am satisfied the information is prima facie exempt under s35(1)(b).

Document 11

51 Document 11 comprises an email communication between Department officers regarding the updated version of the Procedures for Planning off Campus Activities. The email consists essentially of a request for the updated version to be uploaded to the website. The Department has sought

exemption for the whole document under s35(1) as internal deliberative information.

52 As the communication consists essentially of a request to place another document on the website, which is accessible by the public, I find that this document is not in the nature of internal deliberative information, but merely relates to procedural matters. I therefore, consider that this document is not prima facie exempt under s35 and is to be released in full.

Documents - Set 2

53 This set of documents comprises chains of emails between officers from the Department and officers from the Department of Premier and Cabinet, and a letter from the then Deputy Premier, Jeremy Rockliff MP. The emails resemble closely in content and context the emails which were located in the first instance. The Department has claimed exemption under s35 for certain information in Documents 1, 2, 3, 4, 5 and 6 on the grounds that it comprises internal deliberative information.

54 As mentioned above, the second set of documents was released as a result of the internal review of the applicant's RTI request, and a different method of redaction has been used for the documents attached to the original decision. In the second set of documents, the Department has elected to claim exemption only for the substance of the emails. The purely factual matter in the emails, such as the identity and details of the sender and addresses as well as the email subject headings is disclosed.

Documents 1 and 5

55 The Department has claimed that certain information within Documents 1 and 5 is exempt pursuant to s35(1). Some of this information has already been dealt with in the examination of Document 7 (Set 1) which is duplicated here. The new information claimed to be exempt under s35 consists of emails between Department officers and officers from the Department of Premier and Cabinet. I am satisfied the information is also prima facie exempt under s35(1)(b).

Document 2

56 Document 2 (Set 2) consists of one page of emails between Department officers and officers from the Department's communications unit. The exemption has been sought for only part of the document and I am satisfied the relevant information is prima facie exempt under s35(1)(b).

Documents 3, 4 and 6

57 The Department has claimed that certain information within Documents 3, 4 and 6 is exempt pursuant to s35(1). The information consists of emails

between Department officers and Department of Premier and Cabinet officers. I am satisfied the information is prima facie exempt under s35(1)(b).

The public interest test

58 Section 35 is subject to the public interest test set out in section 33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.

59 The Department decided that considerations against disclosure of the exempt information outweighed those in favour of disclosure and that it would be contrary to the public interest to disclose the information. The Department found matters (a), (b), (n) and (o) in Schedule 1 to be of particular relevance in making this decision, with Ms Taylor reasoning:

> *Disclosure of the information may contribute to debate on a matter of public interest and provide contextual information to aid in understanding the process undertaken when officers consult and seek advice regarding potential procedural changes. However, there is a real risk that officers of public authorities will feel inhibited from providing free and fearless advice and recommendations in the future if these types of internal deliberations were to be disclosed. It is essential that comprehensive advice is provided and debated robustly in order to ensure sound, evidence based decision-making. The threat of disclosure of information risks pressuring officers to soften advice, avoid controversy, or not expose risk; this would undermine good government.*
>
> *Whilst some of the exempt information is factual in nature, it is considered to have been integral to the overall deliberative process, having informed the officers' thinking processes and it cannot be considered otherwise. I note however that purely factual information, where it is not deliberative in itself, does not qualify for exemption under sub-section 35(1). I am also satisfied that the exemptions stipulated in sub-sections 35(2)-(4) do not apply.*

60 Mr Williams, in his internal review decision, affirmed Ms Taylor's position and further considered that matters (h), (m), (n) and (p) in Schedule 1 were also relevant. Mr Williams did not expound on this except to say:

> *As outlined in Ms Taylor's decision that to release this information could harm individuals and could impact the future willingness of staff to engage in the thinking (internal deliberative process). It could also impact on the ability of the Department to obtain*

similar information in the future if there is a loss of trust in the Department to be responsible in handling personal information.

61 The Department has attempted to balance the relevant factors regarding disclosure of the information in the public interest. In the first instance, Ms Taylor recognised that there were some matters in Schedule 1 that weighed in favour of disclosure, specifically: (a) the general public need for government information to be accessible, and (b) that disclosure would contribute to debate on a matter of public interest. I agree with this assessment.

62 However, the Department considered that negative consequences of releasing the information outweighed the case for disclosure. The Department's primary consideration appears to be the potential that disclosing information may inhibit officers from freely communicating opinions, advice or recommendations in the normal course of deliberations related to the official business of the Department. The Department relies on matters (n) and (o) in the first instance, and on additional matters (h), (m) and (p) in the internal review.

63 With regard to matter (h), the Department's position on whether it considers this to *promote or hinder the fair treatment of persons or corporations in their dealings with government* is unclear. I do not consider this factor of obvious relevance, as it deals with internal deliberative information rather than the information relating to external parties. Accordingly, I consider this is a neutral consideration or slightly in favour of disclosure due to the impact of these internal deliberations on laser tag businesses interacting with the Department.

64 With regard to matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals,* the Department has again not expanded upon the reasoning for its reliance on this paragraph of Schedule 1. In as much as the applicant's business interests may be adversely affected by the Department's decisions on this matter, I consider this factor to weigh in favour of disclosure.

65 As I have said in earlier decisions[7], I recognise that s35 exists to address circumstances in which it is not appropriate to disclose information which shows the internal 'thinking process' of a public authority, as this can inhibit preliminary discussions or the exploration of alternative options prior to a final decision being made. I consider this a general public interest reason, rather than relating to matter (n), *whether the disclosure would prejudice the ability to obtain similar information in the future*, but recognise that this chilling

[7] See Suzanne Pattinson and Department of Education (2 August 2022) and Todd Dudley and Department of Natural Resources and Environment (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

effect is the reason for the Department arguing that this matter weighed again disclosure.

66 As mentioned above, Mr Williams raised the possibility of loss of trust in the Department as a hypothetical consequence of disclosure of the information. Mr Williams argued this supported the Department's position that disclosure was contrary to the public interest. While it is important for the Department to provide a safe space for its staff to operate without constant scrutiny of preliminary views, I find that the Department's reasoning in this instance aligns too closely with matters prescribed under Schedule 2 of the Act to be irrelevant when assessing the public interest for release of information. In particular, (c) of Schedule 2:

> 1. *The following matters are irrelevant when assessing if disclosure of particular information would be contrary to the public interest:*
>
> *(c) that disclosure would cause a loss of confidence in the government.*

67 I, therefore, may not consider this aspect of the Department's reasoning and urge the Department to be more precise with its wording in future to ensure it does not stray into irrelevant considerations.

68 The Department also relies on matter (o) *whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a pubic authority.* The Department did not expand on its reasoning behind its reliance on this issue, and I do not find the matter relevant in these circumstances.

69 The Department has further relied upon (p) *whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of its staff.* I do not consider this factor to be of significant weight in this matter, as the applicant's complaints were not targeted at a specific member of staff and the information does not relate to any staff disciplinary processes or management of staff in any major degree.

70 I consider that the Department's assessment of the matters in Schedule 1 of the Act was quite limited and did not address all relevant considerations. Apart from matters (a) and (b) it did not appear to find any matters in favour of disclosure.

71 I also consider that matters (c) (d) and (f) are relevant. The release of this information could (c) *inform a person about the reasons for a decision;* (d) *provide contextual information to aid in the understanding of government decisions;* and (f) *enhance scrutiny of government decision-making processes and thereby improve accountability and participation.*

72 There are a number of factors which weigh in favour of release and of disclosure. It is, accordingly, a difficult balance to strike in assessing whether

the disclosure of this information would be contrary to the public interest. Of particular importance is the necessity for staff to be allowed space for the thinking process in carrying out their work without derogating from the principles of good governance, transparency and accountability to the public.

73 I am satisfied that the Department has discharged its onus under s47(4) of the Act to show that s35 is applicable and certain information should not be disclosed. I find that information not already disclosed in Set 1 – Documents 1-8, 10-12, 15-17 and 20; and in Set 2 – Documents 1-6 is exempt under s35 and is not required to be released, except as set out as follows.

74 The Department has not discharged its onus under s47(4) to show that s35 is applicable in relation to the following documents and this information is to be released to Mr Simonetis:

- Document 2 (Set 1)
  (1) The email from G Cumming to A Kowaluk dated 1 April 2019 at 3:03pm; and
  (2) The first two lines of the email from A Walker to M Grining dated 24 February 2019 at 9:57pm up to the word example.

Section 36 – personal information of a person

75 The third category of exemption raised by the Department is that of personal information of a person under s36 of the Act. For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonable ascertainable.

76 Section 5 of the Act defines personal information as:

> *…any information or opinion in any recorded format about an individual –*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(b) who is alive, or has not been dead for more than 25 years.*

77 The personal information for which the Department claims exemption under s36 occurs in Documents 3, 7, 8, 10, 15, 17, 18 and 19 (Set 1) and Documents 3, 6 and 7 (Set 2). It consists of signatures of Departmental officers and personal information of journalists and producers from media outlets, and the personal information of a member of the public.

Signatures

78 Documents 3 and 10 (Set 1) have been discussed above in relation to exemptions under s35(1) of the Act. I will now consider the exemptions claimed under s36(1). The documents are Minutes to the Deputy Secretary

Support and Development regarding procedures for planning off campus activities and are dated 8 April and 11 June 2019 respectively.

79 The only personal information sought to be exempted is the signatures of the officers who approved the Minutes. These officers are not named in the documents. With regard to the respective signatures that appear on each of these documents, they are legible but not perfectly clear. However, it would be possible to discern the identity of the person who approved the documents. The release of the information would, therefore, reveal personal information of a person other than the person making the application, therefore, this information in documents 3 and 10 is prima facie exempt under s36(1).

Members of the media

80 Documents 7, 8, 15, 17, 18 and 19 (Set 1) contain the names, email addresses and contact phone numbers of members of the media. Email addresses have been partially released. This information is duplicated in Documents 3 and 6 of Set 2.

81 The release of this information would disclose personal information of a person other than the person making the application and I am, therefore, satisfied that the information is prima facie exempt under s36.

A member of the public

82 Document 7 (Set 2) is a letter dated 11 June 2019 on Tasmanian Government letterhead from the office of Jeremy Rockliff MP, then Deputy Premier and Minister for Education and Training. The only information for which exemption under s36 is claimed is the name and address of the recipient of the letter. Such information would amount to personal information the release of which would reveal the identity of a person other than the person seeking the information, therefore the information is prima facie exempt under s36.

Public Interest Test

83 Section 36 is subject to the public interest test contained in s33 of the Act, and requires taking into account matters set out in Schedule 1 (see Attachment A). The Department stated that it considered the matters in paragraphs (h), (m), (n) and (p) to be of particular relevance in coming to its determination that the release of this information was contrary to the public interest.

84 I am not persuaded that the matters in the paragraphs nominated by the Department are particularly relevant to the circumstances of the claimed exemption under s36(1) in Documents 3 and 10 (Set 1). It is a nationally consistent position, and one I have frequently set out in past decisions, that the personal information of public officers performing their regular duties is not exempt unless specific and unusual circumstances exist to justify this.

85 There is no indication of any unusual circumstances which would justify the exemption of the information in Documents 3 and 10, and I am not satisfied that this information is exempt under s36. The signatures are to be released to Mr Simonetis.

86 With regard to documents 7, 8, 15, 17 and 18 (Set 1), the Department has claimed exemption under s36(1) in respect of the names and professional contact details of two members of the media who had been reporting on the story in connection with the Laser Tag activity.

87 I am not persuaded, in this instance, that the release of the personal information of these journalists would be contrary to the public interest. Both journalists have media articles available online, which were published under their names shortly after the enquiries with the Department were made. Due to this, it is not apparent how the release of this information would cause any harm to them as individuals or as a group of individuals (matter m) or that it would hinder the fair treatment of persons or corporations in their dealings with government (matter h). These may be highly relevant in other circumstances relating to journalists, but not in this specific matter.

88 With regard to Document 19 (Set 1), the situation is similar to that described in Documents 7, 8, 15 and 18 (Set 1). However, in this instance the member of the media is not a front line journalist but a producer. As such, their name is not normally known in the public arena via publication of articles or presentation of stories on television or radio. I am, therefore, of the view that the information regarding the personal information of this person is exempt under s36(1) from disclosure. The release of the producer's name does not add any meaning to the information and it could cause harm to an individual, so I am satisfied that it would be contrary to the public interest.

89 With regard to Document 7 (Set 2), I also consider that it would be contrary to the public interest to release this information. The name and address of a member of the public receiving a letter from a Minister similarly does not add meaning and could cause harm to the individual. This information is exempt under s36 and is not to be released to Mr Simonetis.

Preliminary Conclusion

90 For the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss27, 35 and 36 are varied.

Conclusion

91 As the above preliminary decision was adverse to the Department, it was made available to the Department on 8 May 2023 under s48(1)(a) to seek its input before finalising the decision.

92 The Department advised on 22 May 2023 that it would not be making any submissions in response to the preliminary decision.

93 Accordingly, for the reasons given above, I determine that exemptions claimed by the Department pursuant to ss27, 35 and 36 are varied.

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

Dated: 23 May 2023

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 27 – Internal briefing information of a Minster

(1) Information is exempt information if it consists of –

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

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

in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(3) Subsection (1) does not include information solely because it –

(a) was submitted to a Minister for the purposes of a briefing; or

(b) is proposed to be submitted to a Minister for the purposes of a briefing –

if the information was not brought into existence for submission to a Minister for the purposes of a briefing.

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

(5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

Section 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.

SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest

Section 30(4) and 33(3)

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

(a) the seniority of the person who is involved in preparing the document or who is the subject of the document;

(b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;

(c) that disclosure would cause a loss of confidence in the government;

(d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review

Case Reference: R2202-124
O2002-034

Names of Parties: Karl Willrath and Dorset Council

Reasons for decision: s48(3)

Provisions considered: s30, s35, s36

Background

1 On 22 June 2018, Mr Tim Watson, then General Manager of Dorset Council (Council) lodged a Code of Conduct complaint under the *Local Government Act 1993* against then Councillor Lawrence Archer, alleging he had been bullied and harassed by Mr Archer. The complaint related to a series of emails between Mr Archer and Mr Watson in which Mr Archer sought information from Mr Watson. The complaint was investigated by the Code of Conduct Panel and a determination was made on 24 September 2018 dismissing the complaint.[1]

2 Mr Willrath is a resident in the Dorset Council local government area and is a person interested in council affairs as they concern the local community.

3 Mr Willrath first attempted to obtain information from Council and filed an application for assessed disclosure under *Right to Information Act 2009* (the Act) on 15 April 2019. However, as there was an error in the processing of that application, Mr Willrath filed a new application to Council dated 26 November 2019, which is the application relevant to this review. Mr Willrath reiterated his request for information as it was set out in his first application dated 15 April 2019, specifically indicating that:

> *I am making this request in relation to the code of conduct complaint made by general manager, Tim Watson against councillor Lawrence Archer dated 22 June 2018. I am requesting all emails relating to this matter including the emails from Archer to Watson where it was alleged the code of conduct was breached. As Watson appears to be dissatisfied with the result, I argue that all (as in all) this information is in the general public interest, thus I ask that application fee be wavered* [sic].

4 Although the April 2019 application included the request for a fee waiver, Mr Willrath did not persist with this request in his new application and Council issued a receipt for the application fee on 26 November 2019.

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[1] The determination report is available at www.dpac.tas.gov.au/divisions/local_government/local_government_code_of_conduct/code_of_conduct_panel_determination_reports/determination_reports_2021, accessed 17 July 2023.

5 On 18 December 2019, Council issued its decision to Mr Willrath. A delegate for Council under the Act, Mr John Marik, determined that the information that Mr Willrath had requested was exempt from disclosure. Mr Marik referred to the *Local Government Act 1993* in coming to his decision, however he did not cite any specific provisions of the Act to justify the claim for exemption from disclosure.

6 On 8 January 2020, Mr Willrath wrote to Council seeking an internal review of the decision.

7 On 5 February 2020, Council issued its internal review decision to Mr Willrath. The then General Manager and Principal Officer under the Act, Mr Tim Watson, advised that he concurred fully with the conclusions made in the first decision and with the decision of Mr Marik. Again, reliance was placed on the *Local Government Act 1993* rather than any exemption under the Act.[2]

8 On 10 February 2020, Mr Willrath submitted the decisions to this office for external review. His application was accepted on the basis that Mr Willrath was in receipt of an internal review decision and it was submitted to this office within 20 working days of his receipt of it.

9 Pursuant to s47(1)(n) of the Act this office wrote to Council on 24 March 2023, requesting it to provide better reasons for its decision in relation to Mr Willrath's application for assessed disclosure under the Act, namely that it nominate the exemption it was relying upon. There followed a series of communications between this office and Council regarding extensions of time for Council to provide better reasons. An extension of time was granted to 20 June 2023.

10 On 20 June 2023, Council provide its response with better reasons for the decision. Council's Right to Information Officer, Ms Carly Hall, advised that Council maintained its view that the information sought is exempt information under the Act, and relied on ss30 (information relating to enforcement of the law) and 35 (internal deliberative information) of the Act.

Issues for Determination

11 I must determine whether the information which was not released by Council is eligible for exemption under sections 30 or 35, or any other relevant section of the Act.

12 As section 35 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test under section 33. This means that, if I determine that the information is prima facie exempt under section 35, I am then required to determine whether it would be contrary to the public

[2] I note that Mr Watson conducted the internal review despite the relevant information being in relation to a complaint he had made regarding an alleged breach of the Code of Conduct for Councillors. While this is highly irregular and reflects an unmanaged conflict of interest, it is not a matter I am able to consider in my determination of this external review.

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

Relevant legislation

13 Copies of ss30, 35 and 36 are at Attachment A.

14 Copies of s33 and Schedule 1 are also attached.

Submissions

15 In an email to this office dated 9 February 2020, Mr Willrath criticised Council's handling of the matter and refuted Council's claim that responding to his request wasted resources. Specifically, he submitted: (verbatim)

> *As per attached i am requesting a review of the RTI. I am after the 13 emails from former Cr Archer to GM Watson that ended up with a Code of Conduct complaint against Archer. This complaint was dismissed, thus i suspect that the refusal by GM Watson not to release these emails because they had been evidence at a hearing is incorrect.*
>
> . . .
>
> *It should also be noted that John Marik has instructed me directly not to take any more RTI out as i am taking up too many resources. To date i have only taken out two. I am still email blocked from Council so this instruction was given verbally.*

16 On 20 December 2019, Mr Willrath responded in writing to Council saying:

> *Mr Marik, as you are aware, I am after the emails from Archer to Watson that prompted the unjust code of conduct complaint against Archer. The fact they ended up in the conduct panel is not relevant to blocking this RTI.*

17 Mr Willrath also submitted, in his initial application for assessed disclosure, that the matter was one of public interest.

18 Ms Hall of Council provided the following submissions in support of Council's previous decisions on 20 June 2023:

> a. *Given the changes to Council's resourcing structure since the initial lodgement of this RTI request, I consider it appropriate that I respond in the capacity of Council's current Right to Information Officer.*
>
> b. *It is believed that the exemption relied upon in accordance with the Right to Information Act 2009 (RTI Act) to support the decision made by Mr Marik, and upheld by Mr Watson following his internal review of Mr Marik's decision to refuse the release of the documentation requested in the abovementioned RTI request was section 30(1)(a)(ii) and/or (iv) of the RTI Act.*

c. *Council decided to seek legal advice on this matter due to a number of potentially relevant circumstances that have arisen since the RTI request was initially lodged with Council, and it is appreciated that an extension of time was offered to enable this to occur.*

Upon further review of this matter and considering the legal advice received, there are additional bases upon which it may be concluded that information within the scope of Mr Willrath's application is exempt information under the RTI Act. I would like to provide the following submission detailing these considerations and subsequent determination on the above RTI request.

Information relating to the enforcement of the law – prejudicing the proper administration of the law (section 30 RTI Act)

The Code of Conduct Panel Determination Report dated 24 September 2018, which was table at the 15 April 2019 Council Meeting, provided a detailed summary of the substance of the emails exchanged between Mr Watson and Cr Archer which formed the basis of Mr Watson's complaint against Cr Archer.

The Determination Report confirms that the factual circumstances were not disputed by either Mr Watson or Cr Archer. The Code of Conduct Panel assessed those emails and determined that Cr Archer had not breached the Code of Conduct. This may, in my view, compromise the proper functioning and jurisdiction of the Code of Conduct Panel for those emails to be publicly disclosed and interrogated when they were analysed by the Panel and determined not to comprise a breach of the Code.

It may also be considered that public release of correspondence, would prejudice the proper administration of the law by serving as a deterrent to members of the public considering making a Code of Conduct complaint.

I further note that section 339(2A) of the Local Government Act 1993 (LG Act) provides that it is an offence for a person to make improper use of information acquired by the person in relation to a code of conduct investigation. A fine of up to 50 penalty units may be imposed. "Improper use of information" is defined to include using the information to cause any loss or damage to a council or person (s. 339(2A)(3)(b) LG Act).

Given the following comment on Mr Willrath's RTI application "As Mr Watson appears to be dissatisfied with the result, I argue that all (as in all!) this information is in the general public interest", I believe that this statement creates a reasonable apprehension that any information obtained in accordance with his RTI request would be used for

"improper purpose" as defined under the LG Act. The fact that disclosure of the information could therefore risk the potential for Mr Willrath to commit an offence under the LG Act provides a further basis upon which it may be concluded that the disclosure of the information would prejudice the proper administration of the law in this instance.

Information relating to the enforcement of the law – (section 30(1)(d), RTI Act)

Section 30(!)(d) of the RTI Act provides that information is exempt information if its disclosure would, or would be reasonably likely to endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person.

Following acceptance of Mr Willrath's RTI application in 2019, issues between Mr Willrath and Council employees escalated. This escalation led to a decision by Mr Watson to restrict Mr Willrath's access to Council offices, Council employees and Council meetings.

In light of the above, I consider that section 30(!)(d) of the RTI Act would also now apply to characterise the information as exempt information. It was likely not evident to Mr Marik or Mr Watson when making their determination on Mr Willrath's application and conducting an internal review of that decision in 20!9-2020 as the matters referred to in the previous paragraph had not occurred at the time of their decisions.

Information comprising the opinion of an office of a public authority (section 35(1)(a), RTI Act)

In the course of, or for the purpose of, the deliberative processes related to the official business of the public authority is exempt information, if the additional public interest test is also met.

I am of the opinion that this section applies to the documentation requested as it relates to internal consultations between Cr Archer and Mr Watson (or his assistant) relating to a Councillor's requests for information and documents in the course of deliberative processes relating to the official business of the Council. The documentation is considered to comprise deliberative processes on behalf of both Cr Archer (as they identify what information he considered to the performance of his functions as a councillor) and the General Manager (as they identify what information Mr Watson considered was necessary to release in accordance with sections 28A-28D of the LG Act)

Public Interest Test

Clause (b) requires consideration of whether disclosure would contribute to debate on a matter of public interest. Although the matter of

Council's General Manager having lodged a Code of Conduct complaint against a Councillor may itself be of public interest, I do not believe that the release of the emails themselves would contribute to debate on the matter. The fact was that the Panel found that the emails did not constitute a breach.

Clause (c) requires consideration of whether the disclosure would inform a person of the reasons for a decision. I do not consider that the disclosure of the particular information would aid this process.

Clause (j) requires consideration of whether the disclosure would promote or harm the administration of justice including the enforcement of the law. As the Code of Conduct Panel has already issued its Determination Report in response to Mr Watson's complaint, the disclosure of that information could harm the enforcement of the law as it relates to the Code of Conduct Panel's decision. This is consistent with the reasons provided in Mr Marik's initial decision.

Clause (n) considers whether the disclosure would prejudice the ability to obtain similar information in the future. The public release of internal consultations between a Council's General Manager and a Councillor, a matter which is of such importance to the proper functioning of a Council that there are detailed provisions included within sections 28A-28D of the LG Act governing this pipeline of communication, would prejudice the effectiveness of requests and exchanges of information between the Council's operational arm (via the General Manager) and the Council's governance (its Councillors).

In closing, after reviewing the documentation and considering the further merits detailed above, I am of the opinion that the original determination along with the above further considerations supports Council's decision to not disclose the information requested in this instance.

Analysis

Section 30 – Information relating to enforcement of the law

Section 30(1)(a)

19 Council has claimed that the emails are exempt pursuant to s30(1)(a)(ii) and/or (iv) of the Act.

20 For s30(1)(a)(ii) or (iv) to apply, I must be satisfied that disclosure of the information under the Act, would, or would be reasonably likely to, prejudice:

> *(ii) the enforcement or proper administration of the law in a particular instance; or*
>
> *(iv) the impartial adjudication of a particular case.*

21 The word prejudice is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally*.[3]

22 I do not consider that paragraph (iv) applies here, as the adjudication of the case by the Code of Conduct Panel has concluded, and the time allowed for appeal has also long expired. I do not have any information before me regarding any other impending proceedings arising out of these events. Therefore, I conclude that there is no case to be prejudiced by any disclosure.

23 With regard to exemption under paragraph (ii), Council argues that the public disclosure and interrogation of the relevant emails after they had been analysed by the Code of Conduct Panel, and determined not to amount to a breach of Council's Code of Conduct, would *compromise the proper functioning and jurisdiction* of the Panel.

24 Council also argues that *the public release of the correspondence would prejudice the proper administration of the law by serving as a deterrent to members of the pubic considering making a Code of Conduct complaint.*

25 As pointed out by Ms Hall, the Code of Conduct Panel Determination Report dated 24 September 2018 provides a very detailed summary of the substance of the email communications between Mr Watson and Mr Archer which formed the basis of Mr Watson's complaint against Mr Archer.

26 That being the case, it is difficult to see how the release of the actual emails would compromise the proper functioning and jurisdiction of the panel. The existence and the majority of the content of the emails is in the public domain. The Panel's determination has already been made, and the Determination Report has been publicly tabled and is available online.

27 Council also argues that the public release of correspondence which has been the subject of a Code of Conduct complaint and investigation would prejudice the proper administration of the law by serving as a deterrent to members of the public who may be considering filing a complaint under Council's Code of Conduct.

28 While this may be a valid concern, it is to be noted that the correspondence in this particular instance is between officers of Council concerning Council business. These are persons undertaking public roles whose work is usually subject to the Act and remain accountable to the electorate in any case. The information does not concern private citizens and the protection of their privacy which may well be a factor that is relevant in other circumstances.

29 The Council's final argument in relation to s30(1)(a)(ii) is that the disclosure of the information would prejudice the proper administration of the law in this instance because it would be in breach of s339(2A) of the *Local Government Act 1993*. Section 339(2A) provides that:

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3 Macquarie Dictionary Online, 2022, www.macquariedictionary.com.au.

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

30 The delegate refers to the following comment by Mr Willrath in his application for assessed disclosure:

> *As Mr Watson appears to be dissatisfied with the result, I argue that all (as in all!) this information is in the general public interest.*

31 The delegate submits that the comment:

> *... creates a reasonable apprehension that any information obtained in accordance with his RTI request would be used for "improper purpose" as defined under the LG Act. The fact that disclosure of the information could therefore risk the potential for Mr Willrath to commit an offence under the LG Act provides a further basis upon which it may be concluded that the disclosure of the information would prejudice the proper administration of the law in this instance.*

32 Council appears to be arguing that the mere release of the email communications to Mr Willrath under this Act may compromise the proper functioning and jurisdiction of the Code of Conduct Panel, as the evidence on which it relied may be publicly disclosed and interrogated.

33 Breach of s339(2A) carries a penalty of up to 50 penalty units. *Improper use of information* is defined to include using the information to cause any loss or damage to a council or person.

34 Section 339(2A) was inserted into the Act by the *Local Government Amendment (Miscellaneous) Act 2018* to address a perceived deficiency in the section. The explanatory material presented to Parliament during the tabling of the *Local Government Amendment (Miscellaneous) Bill 2018 (No. 49*) contains the following:

> *A new provision that explicitly prevents all relevant parties from misusing information they obtain as part of a code of conduct investigation. The act does not currently deal with the misuse of information obtained by panel members or complainants, only elected members and this needs to be addressed.*[4]

35 In my view, the mere act of disclosure of the information under this Act cannot amount to an improper use of information. If a person validly exercises their legal right under the Act to access information it could not be improper. Disseminating and commenting on any information released would similarly not be an improper use of information, provided any comments were not defamatory or otherwise contrary to law.

36 I do not consider that it is appropriate to speculate as to a person's future behaviour and make a decision based on what he may or may not do. Indeed, the relevant section of the Local Government Act already referred to would

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4 Hansard Legislative Council Debate (27 November 2018), available at https://www.parliament.tas.gov.au/hansard

appear to be sufficient deterrent to anyone considering making improper use of any information acquired in relation to a Code of Conduct investigation.

37 I note that Division 3A of the Local Government Act, which deals with Code of Conduct complaints, does not provide that the investigation of such complaints is excluded from the provisions of the Act. There are other instances where the Act is overridden by other statutes and the Local Government Act itself provides some instances of this. However, Parliament has not applied an express provision in the Division concerning Code of Conduct proceedings. Indeed, Parliament has laid out very narrow and specific circumstances where parts of the proceedings and reports must remain confidential.

38 Accordingly, I am not satisfied that all evidence considered by a Code of Conduct panel would be exempt under s30(1)(a)(ii) as a general rule. It must be considered whether this is appropriate and the likelihood of prejudice assessed in each particular circumstance.

39 This exemption is not subject to the public interest test and its use must be restricted to when it is truly necessary, otherwise the intention of the Act to allow for the release of the maximum amount of official information could not be fulfilled.

40 Taking into account all of the above, I find that Council has not discharged its onus under s47(4) to show that the information sought is exempt under s30(1)(a).

Section 30(1)(d)

41 Council has further sought to exempt this information under s30(1)(d).

42 Section 30(1)(d) provides that:

> *Information is exempt information if its disclosure under this Act would, or would be reasonably likely to, endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person.*

43 As I have said in previous decisions,[5] the phrase *emotional or psychological safety* needs to be read in its context, including the preceding words. It is my view that these words denote a risk of harm sufficiently serious as to be commensurate with the endangerment of a person's life or physical safety.

44 Similarly, the words *increase the likelihood of harassment or discrimination of a person* should be read in the same context.

45 This approach is consistent with Parliament's expressed intention that the Act be interpreted so as to further the object set out in subsection 3(1). That object being to improve democratic government in Tasmania by:

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5 See for example, *Simon Cameron and Department of Natural Resources and Environment Tasmania*, Case No. O1801-016, 21 January 2022, https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

> *(a) increasing the accountability of the executive to the people of Tasmania; and*
>
> *(b) increasing the ability of the people of Tasmania to participate in their governance; and*
>
> *(c) acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*

46 The object is to be pursued by giving members of the public the right to *obtain information held by public authorities and Ministers*[6] and *to obtain information about the operations of Government.*[7] It is also expressly stated in s3(4) *that discretions conferred* [should] *be exercised so as to facilitate and promote...the provisions of the maximum amount of official information.*

47 The words *would, or would be reasonably likely to* in s30(1)(d) require an objective assessment of whether there is a reasonable possibility of endangering a relevant aspect of a person's safety, as opposed to a possibility that is farfetched or irrational.

48 The Federal Court has said, in its analysis of corresponding Commonwealth legislation, that a personal or subjective belief is not determinative. Rather, it is necessary to determine whether the documents have such a character that their release would, or could be reasonably expected to, endanger the life or physical safety of any person. It is thus necessary to judge objectively whether there is a possibility that the disclosure of the documents could endanger the life or physical safety of other persons, and if so whether that possibility is a reasonable one as distinct from one which is irrational, absurd or ridiculous.[8]

49 In claiming information contained with the relevant communications to be exempt information under s30(1)(d), the Right to Information Officer and delegate under the Act relied on a version of events involving Mr Willrath and Council employees, specifically:

> *Following acceptance of Mr Willrath's RTI application in 2019, issues between Mr Willrath and Council employees escalated. This escalation led to a decision by Mr Watson to restrict Mr Willrath's access to Council offices, Council employees and Council meetings.*

50 As part of his submissions on 9 February 2020 supporting his application for external review, Mr Willrath advised that he had been blocked from Council, but insinuated that this act of censure was unreasonable and unwarranted on the part of Council. Mr Willrath also said that he was told to cease filing applications for assessed disclosure as he was wasting Council's resources. Mr

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[6] s3(2)
[7] s3(3)
[8] *Centrelink v Dykstra* [2002] FCA 1442 at [24]-[25]. The Federal Court considered the equivalent provision in the *Freedom of Information Act 1982 (Cth)* – s37(1)(c).

Willrath advised this office that he had filed two (2) applications for assessed disclosure under the Act.

51 I am unable to agree that the release under the Act of the information claimed to be exempt under s30(1)(d) would cause Council employees *substantial emotional and psychological harm.* Nor do I agree that the relevant information would, or would be reasonably likely to, endanger the emotional or psychological safety of any of the persons involved.

52 I have no doubt that, at times, interactions between members of Council, employees of Council, and the general public can be trying or fraught. I consider that Councillors and council executives would be used to robust debate, and other employees in local government would be familiar with such situations as being part of the overall Council environment.

53 I have no material, independent or otherwise, that would support any suggestion that any specific person might be even reasonably likely to have their emotional or psychological safety endangered by the release of the relevant information. The delegate's assertion stands alone in that regard and constitutes mere speculation.

54 In relation to whether the release of the information would increase the harassment of or discrimination against a person, again there is insufficient specific detail from Council of the person(s) against whom harassment or discrimination is feared. Neither Mr Archer or Mr Watson are now formally involved with Council and the information that is the subject of this request has already been set out in summary form in the determination report of the Code of Conduct Panel. Mr Willrath is already subject to restrictions on his contact with Council and his application pre-dates those restrictions.

55 Accordingly, despite the difficult relationship between the parties, it does not follow as a matter of course that disclosure of the information that is the subject of this review, would, or would be likely to, endanger the emotional or psychological safety of any relevant employee, or increase the likelihood of harassment or discrimination of such a person.

56 Consequently, I am not satisfied that s30(1)(d) of the Act is applicable to the information responsive to Mr Willrath's request, and I determine that the information is not exempt from disclosure under s30(1)(d).

Section 35 – Internal deliberative information

57 Council also relies on s35 to exempt the information comprising the relevant emails. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority or is a record of consultations or deliberations between officers of a public authority.

58 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

59 According to the Act, the outlined exemption above does not apply to the following:

- purely factual information;[9]
- a final decision, order or ruling given in the exercise of an adjudicative function;[10] or
- information that is older than 10 years.[11]

60 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia* (No 1)[12] where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

61 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)* the Tribunal 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'.[13]

62 As mentioned above, the Code of Conduct Panel summarised the relevant emails in its Determination Report. They substantially concern four separate subjects: the TasWater situation in Bridport; a contract between Council contract and May Shaw; the employment contract of the general manager; and the expenses of elected members and general manager. The summary contains the following:

> *Part One: TasWater correspondence*
>
> *On 4 May 2018 Cr Archer requested the General Manager's Assistant to provide any correspondence from Council to TasWater in the previous five years, in which Council had requested that TasWater address the matter of Bridport water restrictions.*
>
> *On 7 May the staff member emailed Cr Archer to say she would do it that week.*
>
> *On 10 May 2018 Cr Archer again emailed the General Manager's Assistant to ask if she had found any correspondence between TasWater*

[9] Section 35(2).
[10] Section 35(3).
[11] Section 35(4).
[12] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.
[13] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

and Dorset Council over the previous five years, and telling her that he needed the information as he intended to submit a Notice of Motion for the next council meeting (to be held on 21 May 2018).

On 11 May the General Manager's Assistant provided a list of correspondence to Cr Archer with a summary of the content of the correspondence.

On 12 May Cr Archer submitted a Notice of Motion to the General Manager regarding the possible alleviation of TasWater's water restrictions in Bridport.

On 18 May the General Manager's Assistant emailed Cr Archer advising that the General Manager did not agree to provide copies of the correspondence listed in her email of 11 May 2018, but that the matter would be discussed at a workshop in June. ...

On 22 May 2018 Cr Archer requested correspondence between Council and TasWater over the previous five years which in any way relates to the Bridport water supply.

On 23 May the General Manager responded that for various reasons, the Mayor would lead a discussion on the matter at a workshop on 5 June 2018. ...

Cr Archer responded to the General Manager on the same day, reiterating his request for information in accordance with s28D of the Local Government Act 1993 (the Act).

On 31 May the General Manager wrote to Cr Archer, apologising for his delay in responding, and saying that the requested information would be provided in confidence to all councillors at the workshop on 5 June 2018.

On 1 June Cr Archer emailed the General Manager, saying that this was not 'satisfactory', and again requesting that in accordance with the Act, he be provided with the information. He said that he would call into the council chambers to collect the documents at noon on 4 June.

On 4 June the General Manager emailed Cr Archer, again stating that the information would not be available to him that day, but requesting that Cr Archer meet with himself and the Mayor over a number of matters concerning your ongoing conduct.

At 2.07 pm on 4 June Cr Archer emailed the General Manager to say that he had read his email, and that he would come to the General Manager's office on 5 June to collect the requested documents and discuss any matters of concern.

At 4 pm on 5 June, before the workshop which was to commence at 4.30 pm, Cr Archer went to the General Manager's office and asked for the documents. The General Manager declined to give them to him....

Part 2: Contract with May Shaw

... On 7 June Cr Archer requested a copy of the draft contract before the General Manager recommenced negotiations with May Shaw. The General Manager refused to provide the draft. Cr Archer reiterated his request, quoting s28(2)(e) of the Act to justify his request. Later the same day, the General Manager again emailed Cr Archer, suggesting that councillors had been briefed on the contract, and that Cr Archer should go back through previous council documents on the council portal to find the information about the contract.

On 8 June Cr Archer again asked for the draft contract and said that if the General Manager refused to provide him with a copy, he would have no option but to lodge a complaint with the Local Government Division.

In response, also on 8 June, the General Manager told Cr Archer that he would not provide a copy of this draft of the contract until after he had met representatives of May Shaw and had a final draft of the contract. He intended then to present this to Council at a workshop and at a subsequent council meeting. He said that in accordance with s28A (3)(a) and s28A (3)(d) of the Act he refused to provide the current draft of the contract. He again advised Cr Archer that all councillors had been briefed in detail on the matter on two separate occasions.

On 11 June Cr Archer asked the General Manager for copies of the briefings he referred to.

Part 3: General Manager's Contract of Employment (CoE)

On 9 June 2018 in response to a request from Cr Archer for a copy of the General Manager's CoE, the Mayor told Cr Archer that the request should be directed to the General Manager, and that he did not see why Cr Archer required a copy.

After receiving the email from the Mayor, Cr Archer emailed the General Manager on 9 June, requesting a copy of his CoE in accordance with s28 of the Act.

On 15 June the General Manager responded to Cr Archer, requiring him to articulate why he, as an individual councillor, found it necessary to monitor his performance as General Manager. The CoE was not provided.

Part 4: RTI request

> *On 16 June Cr Archer sent an RTI request to the Information Officer at Dorset Council, asking for a list of the monthly allowances and expenses incurred by individual Dorset elected members for the period 1 July 2017 to 31 May 2018; and also the credit card statements for cards issued to the Mayor and General Manager for the same period. The request was sent from Cr Archer's personal email address, not his council email address.*[14]

63 While three of the subject categories covered in the emails involve Council business, I do not consider that the emails are part of a deliberative process. They are emails relating to the provision of information and are administrative in nature, rather than part of a deliberative process. The final email, a request for information under the Act, is clearly not an internal email but a private request from Mr Archer. Accordingly, I am not satisfied that any of the information is eligible for exemption under s35. It is be released to Mr Willrath, subject to my consideration of s36 as follows.

Section 36

64 While Council has not asserted any information to be exempt under s36, I consider that provision to be relevant and should also be discussed here. For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than Mr Willrath, or that the information would lead to that person's identity being reasonably ascertainable.

65 The only personal information contained in the documents is that of Mr Archer, Mr Watson and the Assistant to the General Manager and Mayor. All were public officers performing their regular duties at the time the information was created.

66 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36.[15] The personal information of public authority employees, including name, position, and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it.

67 I do not consider that the circumstances of this case provide an exception to the general rule that the names and email addresses of public authority staff performing their regular duties are not exempt from disclosure. Council has not argued to the contrary. Accordingly, I am not satisfied that this information is exempt under s36 and it should be made available to the applicant.

14 Code of Conduct Panel Report, Dorset Council Councillor Code of Conduct, Complaint against Cr Lawrence Archer, 24 September 2018.

15 See *Suzanne Pattinson and Department of Education* (August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and Environment* (January 2022), *Camille Bianchi and Department of the Health* (November 2021) and *Clive Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

68 I do consider that there are some different considerations regarding direct telephone and mobile numbers of public officers. Direct telephone numbers are often not provided to the public, to ensure that calls are received through established channels. Mobile phones may be used for personal use in addition to work functions and are not necessarily appropriate to release.

69 I am content for the direct and mobile telephone numbers of Mr Watson and the Assistant to the General Manager and Mayor to be redacted, as their release would not provide any additional useful information but has the potential to cause harm to the interests of an individual for the reasons discussed above. I find the telephone numbers redacted are exempt under s36 and are not to be released to Mr Willrath.

70 Mr Archer's home and personal email addresses are also included in the information. These were provided in his private capacity and I am satisfied that they are exempt under s36 and should not be released to Mr Willrath. Their release would not provide any additional useful information but has the potential to cause harm to the interests of an individual.

71 I have not further considered the content of Mr Archer's information request under the Act in relation to potential exemption under s36 (or s39 regarding information obtained in confidence), as the details of this request have been published in my past decision on external review regarding this request and are in the public domain.[16]

Preliminary Conclusion

72 For the reasons set out above, I determine that:

- the exemptions claimed by Council under ss30 and 35 are set aside; and
- information is exempt under s36.

Conclusion

73 As the above preliminary decision was adverse to Council, it was made available to it on 8 August 2023 under s48(1)(a) of the Act, to seek its input before finalising the decision.

74 On 29 August 2023, Council advised this office that would respect the decision made by this office and made no submissions in response.

75 Accordingly, for the reasons set out above, I determine that:

- the exemptions claimed by Council under ss30 and 35 are set aside; and
- information is exempt under s36.

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

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[16] See Lawrence Archer and Dorset Council (17 June 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Dated: 30 August 2023

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 30 – Information relating to enforcement of the law

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

(a) prejudice –

(i) the investigation of a breach or possible breach of the law; or
(ii) the enforcement or proper administration of the law in a particular instance; or
(iii) the fair trial of a person; or
(iv) the impartial adjudication of a particular case; or

(b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of 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 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 investigations 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 isa the subject of the investigation –

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

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

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

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal Information of a Person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review Case Reference:	R2304-009
Names of Parties:	L and Department of Police, Fire and Emergency Management
Reasons for decision:	s48(3)
Provisions considered:	s30, s35, s36, s39

Background

1 L was issued with a Police Family Violence Order (PFVO) in December 2022, which required no contact with L's former partner, M.

2 On 8 December 2022, the Applicant (L) submitted a request for information under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department), together with the usual application fee. The request sought:

> *(1) Statement made by* [M] *for the purposes of obtaining PFVO 131274.1 (the Order);*
>
> *(2) Material (if any) provided by* [M] *in support of the Order; and*
>
> *(3) Authorisation of Commissioner of Police for Constable Sharon Mary Pavier to issue the Order pursuant to the Act (sec 14)*

3 On 30 December 2022, the Department's delegate under the Act, Roslyn French, provided a decision to L's lawyers on his application. Twenty-seven pages of information were found to be responsive to L's request. These were released in a redacted and annotated form which reflected the relevant exemptions applied pursuant to the Act. A written answer was provided to the third part of L's request for information.

4 The undisclosed information was assessed as exempt under the following sections of the Act:

- s30 – Information relating to enforcement of the law;
- s35 – internal deliberative information;
- s36 – personal information of a person; and
- s39 – information obtained in confidence.

5 On 19 January 2023, L's legal representative wrote to the Department seeking an internal review of the decision.

6 On 13 April 2023, Inspector Natasha Freeman, a delegated officer of the Department, provided an internal review decision to L's lawyer. The internal review decision reached the same conclusions as Ms French's decision regarding the information.

7 On 18 April 2023, L's legal representative made an application for external review.

8 The application for external review was accepted under s44 of the Act on the basis that the Applicant had received an internal review decision and had submitted his application to this office within 20 working days of receiving it.

9 The legal representative for L requested urgent review in order to enable L to seek a revocation of the PFVO. Given the impact of the order on the applicant and the legal process on foot, priority was granted on the grounds that there was a genuine and compelling need to prioritise this matter in accordance with my Priority Policy.

Issues for Determination

10 I must determine whether the information not released by the Department is eligible for exemption under ss30, 35, 36, 39 or any other relevant section of the Act.

11 As ss35, 36 and 39 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

12 Copies of ss30, 35, 36 and 39 are at Attachment A.

13 Copies of s33 and Schedule 1 are also attached.

Submissions

14 In support of his request for internal review, L made submissions through his legal representative, specifically:

> *It is our clients* [sic] *desire to receive all relevant information for the purpose of making an application to the Court, pursuant to the* Family Violence Act 2004. *As you are aware, the Family Violence Order, the conditions of it and the basis upon which it*

was issued, may be reviewed pursuant to Section 14 of the Family Violence Act 2004.

We request that you cause the decision to be reviewed and, subject to that review, provide all the relevant information and details in relation to the information provided to the Police for the purposes of issuing the Family Violence Order. The information/material provided thus far, does not disclose any basis of harassment (as defined in the Act), of family violence (as defined in the Act) or otherwise demonstrate a course of conduct which could give rise to a Family Violence Order being issued.

Indeed, some of the material thus far provided to us/our client would indicate that information/contact has been made by third parties. However, it is apparent that Police have considered that the information has issued from our client.

We also note that some material has not been disclosed because:

a. *It is classified as "intelligence" and is exempt pursuant to Section 30(1)(e) of the Act. Please advise us of the relevant law which was to be complied with and confirm that the inspection or investigation in relation to the enforcement of that law, has been completed.*

b. *It is information provided in confidence to the Tasmania Police. The assertion is then made that* [L] *is reasonably likely to "... affect the physical, emotional and/or psychological safety ..." of the third party. There is no basis disclosed as to how that decision is made.*

There is also an assertion and an acceptance that the Complainant has been "a victim of family violence". There is no indication of family violence and there is no indication that the Complainant is a victim of [L].

15 In the original decision by the Department, Ms French cited a decision I made under the Act in 2015 to support her assessment.[1] However, L's legal representative argued the case does not support withholding the information in the present case:

> *I further note the reference being made to the decision of SNF and Tasmania Police (2015). Whilst it is accepted that Tasmania Police may not routinely disclose information under the Act, it is necessary to provide the information and detail for the purposes of seeking a review. Particularly, in the current circumstances*

1 *SNF and Tasmania Police* (2015) Case O1406-171

because it is apparent that there is no violence to the Complainant whatsoever.

16 A copy of the PFVO was attached to L' application for external review, as well as some correspondence concerning issues regarding the authority of Constable Pavier to issue the PFVO, which formed part of the application for information.

17 L's lawyer wished to reiterate all the comments made in their correspondence to the Department (erroneously referred to as the Department of Justice) and made the following submissions:

1. *no violence was ever exercised by* [L] *against* [M] *and/or referred to in the report/information received from the Department of Justice;*
2. *the only reason we require the information/detail is for the purpose of making an application to the Court pursuant to the Family Violence Act 2004 for the order to be removed.*

It was further submitted that:

a. *the Department of Justice/Tasmania Police have not addressed issues requested in our correspondence. I attach herewith a further letter forwarded to the Department for that information;*

b. *the advices received from Tasmania Police with respect to the request are misconstrued. In particular, I note:*

- *with regard to request number 1, the advices received is* [sic] *that the matter of importance is maintaining public confidence in Police. With all due respect to the Department/the Police, the matter of importance is the rights of persons to ensure the Act and its provisions are appropriately utilised. That is, it is not about the Police, it is about the persons who are alleging violence and those who have apparently committed the same. That confidence is maintained by full disclosure of all information to enable it to be reviewed by a court of law. It is apparent that the Police would suggest that the information ought be withheld and not disclosed as a consequence as a fear of reprisal. However, the information/material is necessary for the purpose of a review by the Court.*
- *in relation to request number 2, the assertion is made that disclosure of the information is likely to affect the safety and wellbeing of the person who disclosed it. That comment/detail is provided without any understanding and/or advices from the relevant person. It is incomprehensible that a review officer*

could assert that a persons [sic] *wellbeing would be affected by the disclosure without the knowledge or information of the relevant person; and*

- *with respect to request number 3, there is no indication or detail with respect to the relevant authority. The authority was not provided by the Commissioner of Police. Nor is there any available evidence Constable Pavier was a Police Officer of the rank of Sargent. Indeed, the legislation requires the Domestic Violence Order to be issued by a Police Officer by the rank of Sargent and not one who is merely nebulously authorised to act in such a position for a period of time.*

18 Finally, L's legal representative reiterated that the only reason for the application for information under the Act is for the purpose of pursuing a review under the *Family Violence Act 2004*.

Analysis

19 There are three parts to the application for information. The first part of the request is for the statement made by M for the purpose of obtaining the PFVO referred to above.

20 As mentioned above, the Statutory Declaration made to Tasmania Police was not released to the applicant as it was assessed as exempt information under ss30(1)(e), 36 and 39(1)(a) of the Act, as intelligence information, personal information and information provided in confidence respectively.

21 The second part of the request for information under the Act sought material provided by M in support of the PFVO. Responsive to this request is a bundle of partially redacted and annotated pages, which were released to the applicant. The Department again relied on ss30(1)(e) and 36 of the Act to exempt certain information, as well as ss30(1)(d) and 35, which respectively relate to information which, if disclosed, could endanger the safety of a person and internal deliberative information.

22 The third part of the request sought information to show the whether Constable Pavier was authorised to issue the PFVO. A written response was provided to the applicant on this point, indicating that written records of an acting appointment or authority to act were not created. I am satisfied that this part of the request for information was adequately answered and I am not able to consider whether Constable Pavier had the authority to issue a PFVO as part of this external review.

Section 36 – personal information of a person

23 Section 5 of the Act defines personal information as:

> *...any information or opinion in any recorded format about an individual –*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(b) who is alive, or has not been dead for more than 25 years.*

24 In assessing the information as exempt under s36, Ms French noted:

> *The information assessed includes the following personal information:*
>
> 1. *Information that may identify third parties involved in family violence; and*
> 2. *Information provided by third parties in relation to family violence.*
>
> *The information assessed is the personal information of persons other than your client and may lead to the identification of those parties without their consent.*

25 Ms French noted that s36(2) of the Act requires that relevant third parties are to be consulted regarding the disclosure of information about or provided by that third party. Ms French advised that she did not receive a response to her notification but that she is unable to imply consent on that basis.

26 The statement was made to Tasmania Police in relation to allegations regarding family violence. The parties have advised that a PFVO was subsequently issued under the *Family Violence Act 2004* against L, which remains in operation. I make no comment about whether a family violence offence has been committed.

27 The information contained in the Statutory Declaration falls within the definition of personal information in s5 of the Act. There is clear identification of person/s other than the applicant in the information, their identity is apparent or is reasonably ascertainable from the information. I consider that the information is prima facie exempt under s36 of the Act.

28 With regard to the bundle of redacted and annotated pages that have been released to L, an exemption under s36 has been claimed for some of the information, in particular on pages 1, 3-8, 13, 16-19, 21-23, 25 and 26.

29 I am satisfied that the information in these pages for which exemption is claimed under s36 is personal information within the meaning of the Act, as information about an individual whose identity is apparent or reasonably

ascertainable from the information. I consider the information is also prima facie exempt under s36 of the Act and will proceed to an analysis of the public interest test.

Public Interest

30 That the information may be considered personal information does not preclude it from release, if doing so would not be contrary to the public interest.

31 Ms French expressed her view that it would be contrary to the public interest to disclose the information as it is 'third parties' personal information that is private and not expected to be disclosed in this instance.

32 Ms French referred to a previous decision[2] of this office in which my predecessor said:

> *Strong privacy considerations apply to information which has been provided to police to carry out their function under the Family Violence Act 2004 ... I did not consider that the public interest in privacy was outweighed by information being sought for "legal purposes" ... in my view, it would be contrary to the public interest to disclose the information at issue.*

33 In coming to her conclusion that it would be contrary to the public interest to release the personal information, Ms French referred to the following matters in Schedule 1 of the Act:

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

(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; and

(u) whether the information is wrong or inaccurate.

34 Ms French expressed her view that:

- ... [release of the information] *would be reasonably likely to discourage victims of, and/or other parties to family violence from reporting their information to Tasmania police;*
- *Persons who report their family violence information to Tasmania Police would not reasonably expect their information to be used or disclosed for any reason other than the investigation and subsequent court proceedings; and*

2 *B and Tasmania Police (3 July 2012)* , available at www.ombudsman.tas.gov.au/__data/assets/pdf_file/0009/392634/B-and-Tasmania-Police-July-2012.PDF

- *It would be reasonably likely to hinder Tasmania Police in its business of preventing, detecting and/or investigating family violence.*

35 L's legal representative has repeatedly argued that the information is necessary for the purpose of a review by the Court:

> *the matter of importance is the rights of persons to ensure the Act and its provisions are appropriately utilised. That is, it is not about the Police, it is about the persons who are alleging violence and those who have apparently committed the same. That confidence is maintained by full disclosure of all information to enable it to be reviewed by a court of law. It is apparent that the Police would suggest that the information ought be withheld and not disclosed as a consequence as a fear of reprisal.*

36 In her decision upon internal review upholding the original decision, Inspector Freeman addressed the comments of L's legal representative. Inspector Freeman disagreed that the presence or not of violence would alter the weighting as applied in these circumstances. In her opinion, the key consideration is maintaining public confidence in police and ensuring victims of family violence do not fear reprisal as a result of confidential information being disclosed.

37 Ensuring safety and enforcing the law are important functions that the greater public interest requires. This is clearly stated by Smart AJ in *Gene Simring v Commissioner*[3] which was quoted in the above mentioned case, *B and Tasmania Police*:

> *When a person speaks with the police in respect of a criminal offence and reveals sensitive matters that person expects that statements made will only be used for the purpose of the Court proceedings and not otherwise. There are limits on what can be published. There is a strong public interest in criminal offences being reported to the police and the sources of information not drying up. If victims of crime thought that statements made in the course of a criminal investigation revealing their personal affairs, or some of them, could be released to an applicant under the FOI Act, those sources of information may well dry up or at least there could be a reduction in the flow of information available to the police …*

38 As I have said in previous decisions[4], the Long Title of the Act reflects that there is a general public interest in openness and accountability with respect to

3 *Gene Simring v Commissioner 12009] NSWSC 270, at 169]*
4 *SNF and Tasmania Police* (10 June 2015) Case no. O1406-171

information held by a public authority, provided that it is consistent with the right to privacy. It is not open to me to determine that personal information should be provided to an access applicant, in the public interest under s36 of the Act, as a means of remedying any actual or suspected wrongdoing by a public authority, or any third party individual. The question of whether an applicant should have access to further information in order to pursue a remedy or some other form of redress is a matter for the Courts.

39 I agree that the matters in Schedule 1 identified by the Department are relevant. Matter (m) whether the disclosure would promote or harm the interests of an individual or group of individuals, weighs both in favour of and against the release of the information. The interests of L and M are in direct conflict regarding the release of this information. As I have previously noted[5], however, the public interest is lower in protecting the interests of persons proven or suspected of committing crimes than in protecting the interests of victims of crime.

40 I also consider that matter (j) is relevant – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law. L has made arguments repeatedly regarding the lack of fairness in him not being aware of the allegations against him or the full justification for the issuance of the PFVO. This weighs significantly in favour of disclosure.

41 I agree with the Department that matter (n) whether the disclosure would prejudice the ability to obtain similar information in the future, weighs significantly against the disclosure of the information.

42 With regard to the information for which exemption is claimed under s36, I am satisfied that the Department has reached a mostly appropriate balance in relation to disclosure and release. I agree that M's statement is exempt in full under s36.

43 However, while the Department has released some information in the incident report used by Constable Pavier to inform her decision to issue a PFVO, I consider that some additional information should be released to enable L to be more aware of the basis of the Department's actions. This information is similar to information released on page 3 of the incident report and details meetings or contact between L and M. Namely:

- The third sentence in the final paragraph of page 3;
- The first sentence of the second paragraph on page 4;
- The first 11 words of the first sentence of the fifth paragraph on page 4;

[5] See *D, E and Tasmania Police* (December 2021) and *X,Y and Tasmania Police* (March 2021) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision

- The first seven words of the fourth sentence of the fifth paragraph on page 4;
- The first sentence of the eighth paragraph on page 4, except for words 3-7;
- The first two sentences of the last paragraph on page 4, except for the first seven words of the second sentence;
- The first sentence of the first paragraph on page 5; and
- The first sentence of the second paragraph on page 5.

44 I am otherwise satisfied that it would be contrary to the public interest for the information not listed above to be disclosed. It is exempt under s36.

Section 30 – Information relating to enforcement of the law

45 Section 30 relevantly provides that:

> *(1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –*
>
> *(d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person;*
>
> *(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.*

46 In the bundle of pages of redacted and annotated information that has been released to L, an exemption under s30(1)(d) and (e) has been claimed for some of it. Most of the instances in which exemption has been claimed under s30(1)(d) have already been found to be exempt under s36 and do not need to be considered further, with the only exceptions being the information I listed above as not exempt under s36.

47 L is already aware that M has contacted the Department to raise concerns and a PFVO has been issued. The additional information proposed to be released is brief, seemingly factual and describes meetings and contact which would be known by both parties already. It does not provide any detail of M's reaction to these events or concerns about L. It is not in her statement but in a Department incident report. Accordingly, I am not satisfied that the Department has discharged its onus to show that the release of this particular information is reasonably likely to endanger the physical, emotional or psychological safety of M or increase the likelihood of her being harassed. As s30 is not subject to the public interest test, it must be interpreted narrowly and only applied when truly necessary, otherwise the Act would cease to operate effectively.

48 I will now turn to my assessment of the application of s30(1)(e) to the relevant information marked on pages 6, 7, 9 and 10-14.

49 As I noted in my decision in the case of *SNF and Tasmania Police*, in order for s30(1)(e) to apply, Tasmania Police must provide evidence that disclosure of information under the Act would, or would be reasonably likely to disclose information gathered, collated or created for intelligence.

50 Ms French advised that the information assessed includes information entered onto the Tasmania Police *Family Violence Management System* (FVMS). The information relates to:

- reported incidents of family violence;
- investigation notes and lines of enquiry;
- added internal research notes and running sheets; and
- information gathered for intelligence purposes.

51 Ms French also advised that:

> *Some of the information assessed includes information, which is classified as intelligence. This information is of a confidential nature that has been collected, analysed and subsequently developed into a product to assist Tasmania Police in its business of law enforcement, including offender risk assessment screening and profiling.*
>
> *As some of the information amounts to information collated as intelligence, an exemption pursuant to Sections 30(1)(e) of the Act has been applied to that information.*

52 Exemptions under s30 are not subject to the public interest test under s33.

53 On the material presented, I am satisfied that the relevant information has been gathered, collated or created for intelligence. It is apparent that the information is for the purpose or in the format of databases for criminal intelligence or is otherwise forensic in nature. I am satisfied that this information is exempt under s30(1)(e).

Section 35 – internal deliberative information

54 The Department has also relied upon s35 to exempt certain information on two pages of the bundle of released documents responsive to the request for disclosure. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority; or is a record of consultations or deliberations between officers of a public authority; or is a record of consultations or deliberations between officers of a public authority and Ministers.

55 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

56 According to the Act, the exemption outlined above does not apply to:

- purely factual information[6] ;
- a final decision, order or ruling given in the exercise of an adjudicative function[7]; or
- information that is older than 10 years.[8]

57 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has been considered by the Commonwealth Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)* the Tribunal adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[9]

58 'Purely factual information' has been interpreted by the Commonwealth Administrative Appeals Tribunal (AAT). In *Re Waterford and the Treasurer of the Commonwealth of Australia,*[10] the AAT observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore, the material must be 'factual' in fairly unambiguous terms, and not be inextricably bound up with a decision-maker's deliberative process. In other words, for 'purely factual information' to be exempt, it must be capable of standing alone.

59 Exemptions under s35 are subject to the public interest test under s33.

60 There are two sections of information on page 3 of the bundle released to L that the Department claims are exempt under s35. The first section has already been dealt with under s36, therefore I need only assess the second section.

61 The information which requires my assessment appears to be a comment made for the purpose of communicating an opinion, advice or other information, internally within the department in the course of their normal business of law enforcement. It would therefore fit within the definition set out in s35 as part of the 'thinking process' of the Department, as internal deliberative information.

62 The second page containing information for which exemption under s35 has been claimed is page 6 of the released bundle. The comments appear to be

[6] Section 35(2).
[7] Section 35(3).
[8] Section 35(4).
[9] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.
[10] *Re Waterford and the Treasurer of the Commonwealth of Australia* (1984) AATA 518 at [14]

internal deliberative information in the form of internal communications for the purpose of furthering the Department's work of law enforcement.

63 I am satisfied that the information referred to is not purely factual information capable of standing alone; or a final decision, order of ruling given in the exercise of an adjudicative function; or more than 10 years old.

64 I am satisfied the relevant information on pages 3 and 6 is prima facie exempt under s35(1)(a) of the Act.

The public interest test

65 As mentioned, s35 is subject to the public interest test set out in s33.

66 The Department decided that the considerations against disclosure of the exempt information outweighed those in favour of disclosure and that it would be contrary to the public interest to disclose the information. As noted above in the public interest assessment of s36, the Department found matters (a), (m), (n) and (u) in Schedule 1 to be of particular relevance in making this decision.

67 The Department found that matter (a) weighed in favour of release. However, this was outweighed by other considerations, in particular whether the disclosure would promote or harm the interests of an individual (m); whether the disclosure would prejudice the ability to obtain similar information in the future (n); and whether the information is wrong or inaccurate (u).

68 The Department has attempted to balance the relevant factors regarding disclosure of the information in the public interest. In the first instance, Ms French recognised that there were some matters in Schedule 1 that weighed in favour of disclosure, specifically: (a) *the general public need for government information to be accessible*. I agree with this assessment.

69 As I have said in earlier decisions[11], I recognise that s35 exists to address circumstances in which it is not appropriate to disclose information which shows the internal 'thinking process' of a public authority.

70 The Department has relied on matter (u) *whether the information is wrong or inaccurate*. In this regard Ms French advised that information contained within the FVMS reports includes personal opinions, advice and recommendations of the investigating officer's which are made at a time when the investigation may not be complete, and all facts not yet known. Therefore, Ms French considered it would be contrary to the public interest to disclose the information as its absolute accuracy cannot be substantiated and may be misinterpreted.

71 I agree with Ms French's assessment in respect of mater (u). In this regard, premature release of information before its veracity and accuracy can be

[11] See *Suzanne Pattinson and Department of Education* (2 August 2022) and *Todd Dudley and Department of Natural Resources and Environment* (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

established may be harmful to both the applicant and other persons related to the matter such as the relevant third party. Therefore, matter (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals*, is also relevant. I find that these factors weigh against disclosure.

72 I am satisfied that the Department has discharged its onus under s47(4) of the Act to show that s35 is applicable and certain information should not be disclosed. I find that information not already disclosed on pages 3 and 6 is exempt under s35 and is not required to be released.

Section 39 - Information obtained in confidence

73 The original decision also raised s39(1)(b) as an alternative ground for exemption of information. Ms French argued that the assessed information included information provided to the Department in confidence. She considered that the information was highly sensitive and personal, and its disclosure would be reasonably likely to impair the ability of the Department to obtain similar information in future.

74 In view of the fact that the information has been assessed as exempt under other grounds (ss30, 35 and 36), it is not necessary to again consider whether this information might also be exempt under s39.

Preliminary Conclusion

75 For the reasons set out above, I determine that:

- exemptions claimed by the Department pursuant to ss36 and 30(1)(d) are varied;
- exemptions claimed pursuant to ss30(1)(e) and 35 are affirmed; and
- it was unnecessary to assess the alternative exemption claimed under s39.

Conclusion

76 As the above preliminary decision was adverse to the Department, it was made available to it on 5 June 2023 under s48(1)(a) to seek its input before finalising the decision.

77 The Department advised on 13 June 2023 that it would not be making any submission in response to the preliminary decision.

78 Accordingly, for the reasons set out above, I determine that:

- exemptions claimed by the Department pursuant to ss36 and 30(1)(d) are varied;
- exemptions claimed pursuant to ss30(1)(e) and 35 are affirmed; and
- it was unnecessary to assess the alternative exemption claimed under s39.

Dated: 13 June 2023

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 30 – Information relating to enforcement of the law

(e) 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 or 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.

(f) 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.

(g) 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.

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

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

Section 39 – Information obtained in confidence

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

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

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

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

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

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

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-030 **Names of Parties:** Lake Maintenance Pty Ltd and Homes Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s37

Background

1 Lake Maintenance Pty Ltd (Lake Maintenance) was a long-term provider of maintenance services in relation to social housing properties. These services were contracted by the then Department of Communities (the Department), which has since been disbanded. Responsibility for social housing now rests with Homes Tasmania, a new standalone housing authority. For consistency with documentation at the time of the application, I will continue to refer to the relevant public authority as the Department.

2 Lake Maintenance's contract with the Department for the provision of these services was due to expire on 30 June 2018. The Department reserved the right to extend this contract by three years, however did not do so.

3 As this contract was coming to an end, the Department issued a request for tender (RFT) that sought to engage contractors for the provision of maintenance services for social housing properties across the north, north-west, and south of Tasmania. The RFT attracted 13 applications, one of which was submitted by Lake Maintenance.

4 An evaluation committee was established to evaluate submissions against set performance criteria detailed in the RFT. Applicants who performed best against those set criteria would then be recommended by the Evaluation Committee to the Director of Housing as the preferred contractor/s.

5 Lake Maintenance was unsuccessful in this process. The Evaluation Committee recommended RTC Facilities Maintenance (TAS) Pty Ltd (RTC) be awarded the contract for the provision of maintenance services in the north and north-west regions, while Contact Group was recommended to provide those services in the south.

6 On 15 February 2019, Lake Maintenance submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department requesting from between 1 October 2017 to 1 September 2018:

> *All documents referring (expressly or by implication) to both:*
>
> *(a) procurement reference no. DHHS-5767S; and*
>
> *(b) the applicant or its related parties.*

7 The application noted that related parties included:

> *Darren Nicholson, Robert Bradford, Dominic Chiera, Michael Shade, the applicant's employees and subcontractors providing services in Tasmania, Lake Maintenance Pty Limited (ACN 088 782 718), Lake Maintenance Corporate Pty Limited (ACN159 114 360) and Lake Maintenance Technologies Pty Ltd (ACN 600 338 752).*

8 The application also provided the following to assist the Department in locating the requested information:

> *The applicant seeks a complete record of all matters taken into account or otherwise before the agency in considering its tender addressing procurement no. DHHS-5767S, in circumstances where it was (and had been, since 1 July 2013) the existing provider of general maintenance works and services to Housing Tasmania's property portfolio.*

9 On 10 April 2019, Mr Peter White, a delegate of the Department under the Act, issued a decision to the applicant. Mr White identified 1,434 pages of information as being responsive to the applicant's request. The substantial majority of this information was released in full to the applicant. However, the Evaluation Committee's report regarding the tendering process (the Report), was found to be partially exempt from disclosure under s37(1)(b) of the Act, on the basis that the release of that information would subject third parties to competitive disadvantage.

10 On 7 May 2019, the applicant wrote to the then Secretary of the Department requesting an internal review of the decision.

11 On 20 June 2019, Mr Mick Casey, anther delegate of the Department under the Act, issued a decision to the applicant regarding the application for internal review, which affirmed the original decision.

12 On 18 July 2019, the applicant submitted an application for external review of Mr Casey's internal review decision to my office. This application was accepted on the basis that the application was made with 20 working days of the applicant receiving of the relevant internal review decision, and that the appropriate fee had been paid.

Issues for Determination

13 The Department relied on s37(1)(b) of the Act to partially exempt sections of the Report. I also consider that s35 is relevant to this external review.

14 As ss35 and 37 are contained in Division 2 Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that information is prima facie exempt from disclosure under either of these sections, I must then determine whether it would be contrary to the public interest to release it to the applicant. In making this assessment I must have regard to, at least, the matters listed in Schedule 1 of the Act.

Relevant legislation

15 I attach copies of ss35 and 37 of the Act to this decision at Attachment 1.

16 Copies of s33 and Schedule 1 are also included at Attachment

1. **Submissions**

Applicant

17 The applicant submitted that it is difficult to understand how the release of the redacted information could be considered to be likely to expose a third party to competitive disadvantage, and therefore be exempt from disclosure under s37(1)(b) of the Act. Specifically, the applicant submitted:

> *First, the inherent character of the information likely to have been provided in response to the relevant tender for public housing maintenance services is not likely to be such as to trigger exposure to a competitive disadvantage. The applicant has included with this application a full copy of the information released by the respondent, which includes its own tender (but little else). It would suggest this to be indicative of the kind of information likely provided by other tenderers. The applicant, being a very experienced industry participant in multiple Australian jurisdictions, does not consider its own tender to contain market-sensitive information.*
>
> *Secondly, the tender process is long closed and it may be expected that any future tendering for the provision of such services in Tasmania is not likely to occur for another 3.5 years. The relevant market can be expected to be quite different, by that time, to that which obtained at the time of the tender.*

18 The applicant also submitted that the Department misapplied the public interest test under s33 of the Act, asserting that:

> *The delegate on internal review, finally, misstates the legislative framework, concluding that disclosure of information "is not sufficiently in the public interest" and so it should "remain exempt". This is a fundamental error of law.*

> *The decision maker must instead be satisfied that disclosure "would be contrary to" the public interest. Moreover, it is only if that public interest test is satisfied that the information can be considered to be "exempt information", as opposed to "remaining exempt".*

Department

19 The Department did not make submissions in relation to this external review, beyond the reasoning of its decisions. On internal review, Mr Casey cited confidentiality clause 5.6 of the RFT to justify his exemption of information under s37(1)(b) of the Act. He went on to concur with the statement made by Mr White in the original decision that:

> *...governments do not go about disclosing business secrets, without very cogent reasons. I am not convinced that for this application there are cogent reasons to breach the existing confidentiality.*

20 Mr Casey also held that it was not sufficiently in the public interest to release the exempt information to the applicant:

> *In considering the matters in Schedule 1 as required by s33(2) I find six matters in favour of release: (a), (c), (d), (f), (g) and (t). I find seven matters in favour of exemption (h), (m), (n), (o), (s), (w) and (y).*
>
> *In adopting the delegate's reasoning and my additional comments discussed above, and on balance, I determine that the disclosure of the information is not sufficiently in the public interest and it should remain exempt under s37.*

Analysis

21 The Department has relied solely on s37(1)(b) of the Act to exempt the requested information from disclosure. However, having considered the Department's reasoning, I find that it appears to have misunderstood or misapplied s37 in some instances and actually intended to use s35(1)(a) of the Act to exempt internal deliberative information from disclosure.

22 Accordingly, I will first assess the applicability of s35(1)(a) to information that the Department has sought to exempt from disclosure, before assessing the validity of the Department's use of s37(1)(b).

Section 35 – Internal Deliberative Information

23 For information to be exempt from disclosure under s35(1)(a) of the Act, I must be satisfied the requested information consists of an opinion, advice or recommendation prepared by an officer of a public authority. I must also be satisfied that the opinion, advice or recommendation was made in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister, or of the Government.

24 This exemption does not apply to the following:

- purely factual information;[1]
- a final decision, or order or ruling given in the exercise of an adjudicative function;[2] or
- information that is older than 10 years.[3]

25 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*[4] where the Commonwealth Administrative Appeals Tribunal observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

26 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*[5], refers to the decision in Re Waterford and concludes that, regarding factual information:

> *In other words . . . it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*

27 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)*[6] it adopted the view that these are an agency's *thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*

Purely Factual Information

28 The redacted information in section 2.1 of the Report identifies people who sat on the Evaluation Committee and who advised the Evaluation Committee. It also identifies people who undertook the financial statement analysis and audited the pricing analysis and who attended a clarification meeting with the preferred applicants.

29 The redacted information on pages 94 and 95 of the Report again identifies who sat on the Evaluation Committee and that the Committee signed off on the recommendation. It also reveals that the then Chief Executive of Housing and Disability Reform at the Department certified the recommendation.

30 I am satisfied this information is purely factual and is, therefore, not exempt from disclosure under s35(1)(a) of the Act.

---

[1] Section 35(2) of the Act.
[2] Section 35(3) of the Act.
[3] Section 35(4) of the Act.
[4] (1984) AATA 518 at 14.
[5] LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30
[6] (1985) 5 ALD 588

Rest of Redacted Information in the Report

31 The Report provides the Evaluation Committee's recommendation as to which applicants should be awarded contracts for the provision of maintenance works for social housing in the south, north and north-west of Tasmania. This recommendation is informed by the Evaluation Committee's analysis of submissions against set assessment criteria outlined in the RFT, and this analysis is detailed extensively in the Report.

32 As such, this information forms opinion, advice and recommendations prepared by officers of a public authority, which were made for the purpose of a deliberative process related to the official business of a public authority. Accordingly, I am satisfied that all redacted information in the Report, with the exception of redacted information that I have already found to be purely factual, is prima facie exempt from disclosure under s35(1)(a) of the Act.

Section 33 – Public Interest Test

33 As noted, s35 of the Act is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt. In making this assessment I am to have regard to, at least, the matters in Schedule 1 of the Act.

34 I find that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.

35 I find that matters (c) – whether disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant and weigh in favour of disclosure. The Evaluation Committee's report provided a recommendation to the Department regarding which companies should be awarded contracts for the provision of maintenance works throughout Tasmania. The Report includes detailed analysis and assessment of applications received in response to the RFT relating to the provision of those contracts. The disclosure of this report would inform the Tasmanian public about why Contact Group and RTC were awarded contracts over other applicants.

36 I find that matters (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – and (g) – whether the disclosure would enhance scrutiny of government administrative processes – are relevant and weigh in favour of disclosure. The release of the Report would inform the Tasmanian public of the due diligence processes employed by government to allow scrutiny of its processes in awarding government contracts.

37 I find that matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – is relevant and weighs against disclosure. Applications made in

response to the RFT were submitted in confidence as evidenced by the specific confidentiality provisions in clause 5.6 of the tender document. It would not generally be consistent with the fair or equitable treatment of unsuccessful applicants, who submitted applications with an expectation of confidentiality, to have analysis and assessment of their applications released.

38 I find that matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The Evaluation Committee completed a frank and robust analysis and assessment of applications and this is reflected in its report. Some aspects of the Report were critical of aspects of the applications received. I am satisfied that were this information released it could harm the interests of those applicants.

39 I find that matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – is relevant and weighs against disclosure. I do recognise that the Report contains information that criticises some submissions and that these criticisms could cause harm to the business or financial interests of the relevant businesses.

40 I find that matter (t) – whether the applicant is a resident in Australia – is relevant and weighs in favour of disclosure.

41 I find that matter (w) – whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person – is relevant and weighs against disclosure. The Report contains analysis and assessment made by the Evaluation Committee of the quality assurance processes and financial position of applicants. I am satisfied that if this information was released, it could cause harm to the competitive position of those applicants.

42 Overall, I find that Schedule 1 matters (a), (c), (d), (f), (g), and (t) are relevant to this public interest assessment and weigh in favour of disclosure. I find that matters (h), (m), (s), and (w) are relevant and weigh against disclosure.

43 Though I find that that matters (h), (m), (s), and (w) weigh against disclosure, the extent which these matters weigh against disclosure is minimised substantially when unsuccessful applicants in the Report are de-identified.

44 It follows that I find the Report should be made available to the applicant in a manner that de-identifies unsuccessful applicants. Releasing the Report in such a way removes the potential for harm to be caused to unsuccessful applicants, and also pursues the objects of the Act by ensuring that a government tendering process is subject to public scrutiny.

45 Accordingly, I am satisfied that it would be contrary to the public interest to release the following information and it is exempt pursuant to s35(1)(a):

- Any reference to the names of unsuccessful applicants (or their partners, sub-contractors or referees) throughout the Report;

- The three dot points at the end of section 2.3 on pages 13 and 14;
- The 6th dot point on page 18;
- The 4th dot point on page 19;
- The 5th to 21st words of the 2nd sentence in the main paragraph on page 19;
- The last 29 words of the 2nd last sentence in the paragraph on page 19;
- The 8th dot point on page 19;
- The 3rd dot point on page 20;
- The last six words of the 4th dot point on page 20;
- The last 13 words of the 1st sentence of the 2nd paragraph on page 20;
- The 4th sentence of the 2nd paragraph on page 20;
- The 1st dot point on page 21;
- The last 15 words of the 3rd dot point on page 21;
- The last 7 words of the 9th dot point on page 21;
- The 6 words of the last dot point on page 21;
- The first 21 words of the sentence crossing pages 21 and 22;
- The last 6 words of the 3rd line of the 1st paragraph on page 22;
- The last 5 words on the 5th, and the first 3 words of the 6th line on page 22;
- The last 11 words of the 4th dot point on page 22;
- The last 6 words of the 5th dot point on page 22;
- The last 24 words of the 1st dot point on page 23;
- The last 9 words of the 6th dot point on page 23;
- The last 3 words of the of the 1st sentence of the 1st paragraph on page 23;
- The last 7 words of the 3rd sentence of the 1st paragraph on page 23;
- The 8th to 10th words of the 4th sentence of the 1st paragraph on page 23;
- The last two words of the 5th sentence of the 1st paragraph on page 23;
- The last 3 words of the 8th sentence of the 1st paragraph on page 23;
- The 12th to 21st words and the last 3 words of the 9th sentence of the 1st paragraph on page 23;

- The 25th and 26th words of the 10th sentence of the 1st paragraph on page 23;
- The 3rd – 5th words and last 9 words of the 6th dot point on page 24;
- The last seven words of the last dot point on page 24;
- The 14th to 20th words of the 3rd sentence of the last paragraph on page 24;
- The 4th to 10th words of the 7th sentence of the last paragraph on page 24;
- The 27th to 42nd word of the last sentence on page 24;
- The 5th dot point on page 25;
- The 6th dot point on page 25;
- The 14th to 20th words of the 9th dot point on page 25;
- The 11th dot point on page 25;
- Last 18 words of the 13th dot point on page 25;
- The last nine words of the last dot point on page 25;
- The last 9 words of the 3rd sentence of the 1st paragraph on page 26;
- The 4th sentence of the 1st paragraph on page 26;
- The 17th to 25th words and the last 8 words of the 8th sentence of the 1st paragraph on page 26;
- The 12th and 13th word of the 9th sentence on page 26;
- The 1st dot point of page 26;
- The 18th to 20th words of the 2nd dot point on page 27;
- The 8th dot point on page 27;
- Last paragraph on page 27;
- Page 28;
- The 3rd and 4th dot points on page 29;
- The 1st dot point on page 31;
- The final word of the 7th sentence of the 1st paragraph on page 31;
- The 2nd sentence of the 1st paragraph on page 31;
- The 4th sentence of the 1st paragraph on page 31;
- The 7th dot point on page 31;
- The 11th and 12th words of the 9th dot point on page 31;

- The 7th to 10th words of the 2nd dot point on page 32;
- The 10th to 16th words of the 5th dot point on page 33;
- The 2nd and 7th dot points on page 34;
- The last 11 words of the 1st sentence of the paragraph on page 34;
- The 9th to 22nd words of the 5th sentence of the paragraph on page 34;
- The last three dot points on page 34;
- The 7th, 8th, 9th and 10th dot points on page 37 (continuing to page 38);
- The 1st to 8th words of the 5th sentence of the paragraph on page 37;
- The 12th word of the 8th sentence of the paragraph on page 37;
- The 2nd dot point on page 38;
- The last word of the last dot point on page 38;
- The last nine words of the second complete dot point on page 47;
- The 25th to 27th words of the third dot point on page 53;
- The last sentence of the 1st substantive paragraph on page 63;
- The dot point at the bottom of page 72;
- The 1st, 5th, 7th,10th, and 12th dot points on page 73;
- The 1st, 4th, 8th and 10th dot points on page 74 (continuing to page 75);
- The 1st, 3rd and 4th dot points on page 75;
- The 1st and 11th dot points on page 76;
- The 3rd dot point on page 77;
- All details including the names of successful applicants in the table on page 82;
- The two dot points in the second paragraph on page 84;
- All details including the names of successful applicants on page 86;
- The last 14 words of the second dot point on page 89;
- The last sentence of the 1st paragraph on page 90;
- The second paragraph under the heading *Other Overall Considerations* on page 91;
- All dollar figures on pages 91 and 92;
- The last 3 words of the 4th sentence of the 1st complete paragraph on page 92; and

- The dollar figure in the final paragraph on page 93.

Section 37 – Information Relating to Business Affairs of Third Party

46 Notwithstanding my assessment of the greater applicability of s35(1)(a) of the Act to the redacted information, it remains is necessary to address the applicability of s37 given the Department's reliance on this exemption.

47 Before proceeding with this analysis, I note the Department has not undertaken any consultation with relevant third parties pursuant to s37(2).

48 Section 37(2) of the Act provides that if a principal officer or Minister decides that disclosure of requested information relating to the business affairs of a third party may be reasonably expected to be of substantial concern to that third party, the principal officer or Minister must obtain that third party's view as to whether the information should be released.

49 Despite applying s37(1)(b) of the Act to exempt information from disclosure on the basis that its release would be likely to expose third parties to competitive disadvantage, the Department did not conduct consultation with those third parties. While it is theoretically possible for the release of information to be likely to expose a third party to competitive disadvantage but not be reasonably expected to be of substantial concern to that third party, it almost always follows that a requirement to consult would exist if information is exempt under s37. That a public authority plans to find the information exempt is not an exception to the requirement to consult relevant third parties. The failure to consult appears to be a significant oversight and the Department should take steps to ensure this is not repeated in future.

50 I now turn to assess the validity of the Department's application of s37(1)(b) the Act. Section 37(1)(b) allows for the exemption from disclosure of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application of assessed disclosure, if its disclosure would be likely to expose the third party to competitive disadvantage.

51 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman* [2010] TASSC 39, Porter J held at [52]:

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

52 The Court further held at [59]:

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

53 At [41] the Court interpreted the meaning of 'likely' to be *a real or not remote chance or possibility, rather than more probable than not.*

54 I note here that in the New South Wales Supreme Court decision of *Kaldas v Balbour*[7] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

55 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

56 The Department has applied s37(1)(b) of the Act throughout the 100 page Report which compared and ranked each application in the RFT, and made recommendations as to which applicants should be awarded contracts in the north, north-west and southern regions.

57 Generally speaking, the release of the Evaluation Committee's assessment of applications are not likely to expose a third party to a competitive disadvantage, because those assessments relate to how applications addressed criteria set out in the RFT rather than providing details of the third parties' general operations. The risk of such disadvantage is further reduced due to my finding that the names and identifying information of unsuccessful applicants to be exempt under s35(1)(a). I will not again consider information I have already found to be exempt, even if it may also have been exempt under another provision.

58 However, I have identified some information in this section of the Report relating to the successful applicants that, were it made available to Lake Maintenance, would be likely to expose the relevant third party to a competitive disadvantage. This information relates to commentary made regarding the Quality Assurance processes and financial positions of these applicants. This type of information is of a kind which would usually be kept confidential by a business and I am satisfied that its release would be likely to expose those applicants to a competitive disadvantage. It is accordingly prima facie exempt from disclosure under s37(1)(b) of the Act.

Section 33 – Public Interest Test

59 As noted, s35 is subject to the public interest test in s33 of the Act, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt under s37.

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[7] [2017] NSWCA 275 (24 October 2017)

60 I find that Schedule 1 Matters (a), (c), (d), (f), and (t) are relevant and weigh in favour of disclosure, while matters (h), (m), (s), and (w) are relevant and weigh against disclosure, for the same reasons as outlined in my public interest assessment of information I found to be prima facie exempt from disclosure under s35(1)(a) of the Act.

61 However I am unable to minimise the weight of those factors against disclosure by de-identifying successful applicants in the Report because the identities of successful applicants are already publically available. As such I find that it is contrary to the public interest to release to the applicant information I have identified to be prima facie exempt under s37(1)(b).

62 It follows that the following information is exempt from disclosure under section 37(1)(b) of the Act because its release would likely expose successful applicants to a competitive disadvantage:

- The 6th dot point on page 32;
- The dollar figure in the 8th dot point on page 32; and
- The 1st dot point on page 33.

63 However, I am not satisfied any other information in the Report is exempt pursuant to s37.

Preliminary Conclusion

64 For the reasons given above, I determine that:

- Information is exempt pursuant to s35; and
- Exemptions claimed pursuant to s37 are varied.

Conclusion

65 As the above preliminary decision was adverse to Homes Tasmania, it was made available on 31 May 2023 to Homes Tasmania under s48(1)(a) of the Act to seek its input before it was finalised.

66 Ms Eleri Morgan-Thomas, Homes Tasmania's Chief Executive Officer, responded in letters dated 14 and 16 June 2023 and in emails dated 15 and 26 June 2023.

67 First, Ms Morgan-Thomas expressed her difficulty in interpreting my decision, as she has found it challenging to reconcile the list of information found to be exempt with relevant parts of the Report. It should be noted that my office provided further explanation of the proposed exemptions and offered to assist Homes Tasmania in identifying this information in the Report. No further assistance was sought by Homes Tasmania.

68 Second, Ms Morgan-Thomas submitted that:

> *. . . removing the names of applicants from the Report is not sufficient to de-identify them given it is a small market and applicants are well known to each other and that the release of the*

report will provide identifiable information to Lake about their competitors.

69 I have considered Homes Tasmania's submission and agree that simply redacting the names of unsuccessful applicants from the Report is insufficient to de-identify them. However, as I have detailed throughout my decision, I have elected to remove further information that I find is sufficient to de-identify unsuccessful applicants. Ms Morgan-Thomas declined to make further submissions as to what (if any) additional information she considered would be necessary to remove to fully de-identify the Report. As such, Homes Tasmania's submissions do not change my finding.

70 Accordingly, for the reasons set out above, I determine that:

- Information is exempt pursuant to s35; and
- Exemptions claimed pursuant to s37 are varied.

71 I apologise to the parties for the inordinate delay in finalising this matter.

Dated: 26 June 2023 (re-issued to make minor correction pursuant to s48(2) of the Act on 6 July 2023)

Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant Legislation

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 37 – Information Relating to the Business Affairs of a Third Party

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

(a) the information relates to trade secrets; or

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

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

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

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

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

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-107

Names of Parties: Linda Poulton and Department of Natural Resources and Environment

Reasons for decision: s48(3)

Provisions considered: s27, s31, s35, s36

Background

1 The Tasmanian Government plans to build a prison in northern Tasmania. The siting of this prison has proven to be controversial, particularly in in the north of the State, where locals are concerned about the impact a prison might have on their communities.

2 On 1 October 2019, Crown Land at 135 Birralee Road Westbury, was announced by the Tasmanian Government as the preferred site for the prison. This site was eventually abandoned and the site of the Ashley Youth Detention Centre in Deloraine is now proposed for the project. In the interim, an alternative Crown Land site, also on Birralee Road in Westbury, was proposed for the prison project. This land had originally been intended to be transferred to the Tasmanian Land Conservancy organisation for conservation purposes.

3 On 18 August 2020 the applicant, Westbury resident Ms Linda Poulton, submitted an application for assessed disclosure to the then Department of Primary Industries, Parks, Water and Environment, now the Department of Natural Resources and Environment Tasmania (the Department), under the *Right to Information Act 2009* (the Act). Ms Poulton requested information relating to the transfer of the Birralee Road property from the Crown to Tasmanian Land Conservancy (TLC).

4 Specifically, Ms Poulton requested the following:

> *1. Any agreement evidencing a proposal to transfer the land to the TLC and/or create a covenant of the title of the land from June 2013 to date.*
>
> *2. Any documents evidencing the steps taken within DPIPWE* [the Department] *to prepare the land to be transferred to the TLC and/or create the covenant on title.*

3. *Any evidence of a notice of communication given to the TLC to the effect that the land would not be transferred to the TLC.*

5 To assist the Department in processing her application, Ms Poulton clarified that in her application:

> *"Agreement" means memorandum, heads of agreement, contract, agreement, deed or similar whether in draft form or otherwise*
>
> *"Correspondence" means letters, emails and files notes of discussions and any other record of communications*
>
> *"Government" means DPIPWE and the relevant Minister*
>
> *"Land" means the proposed site for the Northern Regional Prison comprised in Certificate of Title Volume 14862 Folio 1*
>
> *"TLC" means the Tasmanian Land Conservancy*

6 On 29 September 2020, Ms Allison Scandrett, a delegated officer for the Department under the Act, issued a decision to Ms Poulton.

7 Ms Scandrett identified 409 pages of information responsive to Ms Poulton's request. Of those 409 pages, 243 pages were released in full and 15 pages in part. Section 27 (internal briefing information of a Minister) and s31 (legal professional privilege) of the Act were applied to exempt information from disclosure on the 15 pages partially released and the remaining 151 pages in full.

8 Ms Scandrett also redacted personal information without assessing that information in accordance with s36 of the Act, on the assumption that Ms Poulton did not require this information. She indicated that a full assessment could be done, should Ms Poulton seek this information.

9 Furthermore, Ms Scandrett advised that some information included in the 409 pages of information identified as responsive to Ms Poulton's request was considered to be outside the scope of Ms Poulton's request, and as such was redacted.

10 Ms Scandrett also noted in her decision that some information identified as responsive to Ms Poulton's request was not re-assessed because it had already been made publically available on the Department's public disclosure log.

11 On 29 September 2020, Ms Poulton requested an internal review of the decision issued to her on the same day.

12 On 5 October 2020, Ms Monique Lindridge, a delegate of the Department under the Act, issued an internal review decision to Ms Poulton. Ms Lindridge overturned Ms Scandrett's application of s31 of the Act to 21 pages of information, and made it available to Ms Poulton.

13 Ms Lindridge also varied Ms Scandrett's use of s36 of the Act. Ms Lindridge maintained Ms Scandrett's application of s36 to exempt the personal information of former employees and the contact details of current employees from disclosure. However, Ms Lindridge overturned Ms Scandrett's application of s36 to the names of current public service employees.

14 Ms Lindrdge upheld all other exemptions applied by Ms Scandrett

15 On 6 October 2020, Ms Poulton submitted an application for external review of Ms Lindridge's decision to my office. This application was accepted under s44 of the Act, on the basis Ms Poulton was in receipt of an internal review decision, and sought review of this decision within 20 working days.

Issues for Determination

16 I must first determine whether information not released by the Department is eligible for exemption under ss27, 31, 36 or any other relevant section of the Act. I also consider it appropriate to assess whether s35 applies to exempt from disclosure information identified as responsive to Ms Poulton's request.

17 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is prima facie exempt from disclosure under either ss35 or 36, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1.

Relevant legislation

18 Copies of ss27, 31, 35, and 36 are at Attachment A.

19 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

20 When making her application for external review, Ms Poulton argued that s31 of the Act was applied inappropriately by Ms Lindridge on internal review:

> *My initial analysis of the material* [internal review decision] *indicates to me that the s31 exemption* [has] *been used inappropriately in a number of places. The material released after internal review of the decision would not attract professional legal privilege in my opinion and this makes me concerned that there is not a proper appreciation of how that exemption applies on the part of the delegated officer.*

The Department

21 The Department did not make submissions in relation to this external review, beyond the reasoning of its decisions. On internal review, Ms Lindridge set out that she was:

> *satisfied that some of the information assessed comprises opinions, advice and recommendations prepared by DPIPWE officers for the purpose of providing the Minister for Primary Industries and Water with a briefing in connection with official business. The information relates to a proposal to transfer land at Westbury to the Tasmanian Land Conservancy Inc. I am satisfied that purely factual information contained with the documents has been disclosed in accordance with section 27(4) of the Act.*

22 With regard to exemptions made pursuant to s31, Ms Lindridge's internal review provided the following:

> *The information assessed contains communications between the Department and its lawyers and notes made by Departmental staff which record communications with the lawyer. It is my view that this information was communicated for the dominant purpose of providing legal advice and is therefore exempt under section 31.*

23 Ms Lindridge also contended that s36 is intended to apply to exempt the names of previous public service employees from disclosure:

> *. . . the Ombudsman has directed that the names of public servants should not be exempted pursuant to section 36. The Department has interpreted the Ombudsman's decision to apply only to the names of current employees, and therefore, the names of former employees have been exempted pursuant to section 36.*
>
> *I am therefore of the view that disclosure of personal information, including names, email addresses and phone numbers, is not in the public interest and should remain exempt pursuant to section 36.*

Preliminary Point

Out of Scope Information

24 As I have mentioned previously in this decision, some documents identified as responsive to Ms Poulton's application consisted of information which the Department deemed as outside the scope of Ms Poulton's request. Consequently, the Department redacted this material from the information that was made available to Ms Poulton.

25 These redactions are made throughout the 409 pages of information made available to Ms Poulton, and relate to information concerning land not referred to in Ms Poulton's application for assessed disclosure, and other unrelated correspondence between public service employees.

26 Having reviewed the material, I agree with the Department that this information falls outside the scope of Ms Poulton's request. I find that it was appropriate for the Department apply these redactions. The Department is not under an obligation to provide this information to Ms Poulton.

Analysis

Section 27 – Internal Briefing Information of a Minister

27 For information to be exempt under this section, it must consist of opinion, advice or recommendations prepared by an officer of a public authority in the course of, or for the purpose, 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.

28 Section 27(3) provides that the exemption does not apply to information solely because it was submitted to a Minister, or is proposed to be submitted to a Minister, for the purposes of a briefing, if the information was not brought into existence for that purpose.

29 Section 27(4) provides that purely factual information is not exempt, unless its disclosure would reveal the nature or content of an opinion, advice, recommendation, consultation or deliberations of the briefing.

30 The Department has applied s27 of the Act to two documents identified by the Department as responsive to Ms Poulton's request. The first of these documents is titled *Minute to the Minister for Primary Industries and Water* and is located at pages 132 to 134 of the information provided to Ms Poulton. The second of these documents is titled *Minute to the Minister for Parks, Environment and Heritage* and is located at pages 135 to 137. In total, s27 has been applied in part, to six pages of information.

Pages 132 to 134

31 Having reviewed the redacted material on pages 132 to 134, I am satisfied that the Department has correctly applied s27 of the Act to exempt from disclosure a recommendation prepared by an officer of a public authority in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a Minister. As such, this information is exempt under s27 and the Department is not obliged to make this information available to Ms Poulton.

Page 135

32 The Department has applied s27 to exempt all information on page 135 of material responsive to Ms Poulton's request. This page consists of material relevant to the recommendation made in the preceding three pages, and as such, I am satisfied that it is exempt under s27 of the Act.

Pages 136 and 137

33 The Department has applied s27 on four separate occasions on pages 136 and 137. Having reviewed the redacted material I am satisfied that it consists of a recommendation prepared by an officer of a public authority in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a Minister. As such, the Department is not obliged to make this information available to Ms Poulton.

Section 31 - Legal Professional Privilege

34 Information is exempt from disclosure under s31 of the Act:

> *. . . if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.*

35 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client. It is also codified in Part 10, Division 1 of the *Evidence Act 2001* (Tas) as client legal privilege. The privilege attaches to information communicated in confidence between a legal advisor and client for the dominant purpose of giving or obtaining legal advice. It can also apply to information created in connection to this purpose, such as notes and summaries of the advice requested and received.

36 The Department has applied s31 of the Act to exempt from disclosure information on pages 29 to 38, 88 to 92, 130, 133, 137, 139 to 141, 144 to 150, 155, 158, 190, 194, 195 to 301. I now turn to assess the validity of the Department's application of s31.

Pages 29 to 38

37 The Department has claimed a draft Deed of Agreement is exempt in full under s31. This document was attached to an email that was sent from Ms Annika Everaardt to Mr Jonathan Bryan, both of the Department. The draft contains tracked changes made by Ms Everaardt, who holds a non-legal role with the Department.

38 Because this communication was not between a legal practitioner and a client or relaying legal advice, it is not apparent why it would be exempt from disclosure under s31 of the Act. Instead, I will assess this information under s35 of the Act (internal deliberative information) as it is a draft document.

Pages 88 to 92

39 These pages consist of email correspondence between Mr Justin Harvey of the Office of the Crown Solicitor (the OCS), and Ms Lauren Graham of the Department.

40 Having reviewed these emails, I am satisfied that the communication is for the dominant purpose of giving or receiving legal advice. Accordingly, I am satisfied that these emails are exempt from disclosure under s31 of the Act.

Page 130

41 This page consists of an email sent from Mr Jesse Walker to Ms Kathryn Clark, both of the Department. The Department has applied s31 of the Act to exempt from disclosure a sentence in Mr Walker's email which outlines legal advice the Department has received from the OCS.

42 I am satisfied that s31 is applicable, as the information redacted in this communication contains a summary of privileged advice received. It is exempt under s31 and not required to be released to Ms Poulton.

Page 133

43 This page consists of the background section of a draft *Minute to the Minister for Primary Industries and Water*. The final sentence on this page is claimed to be exempt pursuant to s31. It sets out the substance of legal advice received from the OCS. I am satisfied that this would be exempt under s31 and is not required to be released to Ms Poulton.

Page 137

44 This page consists of the background section of a draft *Minute to the Minister for Parks, Environment and Heritage*. Included in the sixth paragraph of the background section is a sentence which describes legal advice the Department received from the OCS in the same terms as in the minute assessed at page 133.

45 Again, I am satisfied that this information is exempt under s31 of the Act.

Pages 139 to 141

46 The Department has applied s31 of the Act to exempt from disclosure three emails in full.

47 The first email was sent from Mr Walker to Ms Clark. The email forwards legal advice received from the OCS and the second sentence of the email summarises its content. I accept that the second sentence and subject line of the email are exempt, as they reveal the content of privileged legal advice. This information is not required to be released to Ms Poulton. The remainder of the email is administrative in nature and not exempt under any other part of the Act. It may be released to Ms Poulton.

48 The second email was sent from Mr Harvey of the OCS to Mr Walker. I am satisfied that it was sent for the dominant purpose of giving legal advice. Accordingly, I am satisfied that it is exempt from disclosure under s31 of the Act.

49 The third email was sent from Mr Walker to Mr Harvey. It is clear to me that it was sent for the dominant purpose of obtaining legal advice. Accordingly, this email is exempt from disclosure under s31 of the Act.

Page 144

50 Page 144 consists of a draft letter to be sent from the Department to the current Chief Executive Officer of the TLC, Mr James Hattam, with comments and suggested changes from Mr Harvey of the OCS.

51 Accordingly, I am satisfied that this documents is exempt from disclosure under s31 of the Act because it includes information that was communicated for the dominant purpose of giving legal advice.

Pages 145 and 146

52 The Department has applied s31 of the Act to exempt the substance of an email sent from Mr Walker, to Mr Andrew Crane of the Department from disclosure. The second paragraph of the email summarises legal advice provided by Mr Harvey. The other two paragraphs sought to be exempt under s31 indicate that advice was received and describe the proposed course to be taken by the Department.

53 I am satisfied that the second paragraph of the email is exempt under s31, but the other two paragraphs on page 46 are not. The second paragraph is not to be released to Ms Poulton and I will assess the remainder under s35 of the Act.

Page 147

54 The Department has applied s31 of the Act to exempt from disclosure the contents of an email sent from Mr Walker to Mr Crane. The first paragraph which has been redacted summarises advice received from OCS and is exempt under s31.

55 The remainder of the redacted portion of the email indicates that OCS' review of a draft letter will be sought and that a minute will be prepared to have this letter cleared after it has been reviewed. While this is linked to obtaining legal advice, it does not provide details of the substance of the advice request and I am not satisfied that these paragraphs are exempt under s31. I will assess this information in my analysis of the application of s35 of the Act.

Pages 148 and 149

56 The Department has sought to exempt from disclosure a draft version of a letter to be sent from the Department to Mr Hattam. This letter has been reviewed and edited by Mr Walker, who is in a non-legal role. While there is some indication that this was later sent to OCS for legal review, this is not that communication. Accordingly, I am not satisfied that it is exempt from disclosure under s31 of the Act and will consider the letter in my analysis of s35.

Pages 150 and 151

57 These pages consist of two more versions of the draft letter referred to at page 144, and pages 148 and 149. These are draft versions made by

Department staff. Again, these documents are not exempt under s31 and will be considered under s35.

Page 155

58 The Department has applied s31 of the Act to information in an email sent from Mr Walker to Ms Helen Crawford of the Department on 16 April 2014. Specifically, it has been applied to exempt from disclosure a reference to the OCS having reviewed a document attached to the email.

59 The redacted words merely mention that a notice has been reviewed. Legal professional privilege does not cover all references to legal advice or interaction with lawyers, it must be communication for the dominant purpose of obtaining legal advice or litigation. I am not convinced this is the nature of this communication. The communication appears to be of an administrative nature only and I do not consider that it is exempt under s31 or any other section of the Act.

Page 158

60 The Department has sought to exempt information in an email sent to Ms Crawford on 14 November 2014. I am satisfied that the dominant purpose of this part of this email is to communicate a summary of some legal advice received and indicates the content of a future request for advice. I am satisfied that the communication contains information that would be privileged from production in legal proceedings and that portion of the document is therefore exempt from production pursuant to s31.

Page 190

61 The relevant communication on page 190 comprises an email between officers of the Department dated 9 March 2018 concerning 'Crown land transfer to Tasmanian Land Conservancy.' The Department claims that the communication is exempt under s31. As set out above, for the information to be exempt under this section it would need to attract legal professional privilege. However, while the communication may have a legal aspect, I am not satisfied that the communication constitutes part of the act of obtaining or giving legal advice or the provisions of legal services.

62 I determine that the information is not exempt under s31. However, I will consider it under s35.

Page 194

63 Page 194 includes a duplicate of the email on page 155, and I maintain my finding that it is not exempt under s31.

Pages 195 to 214

64 The Department has applied s31 of the Act, to exempt from disclosure all information on pages 195 to 214. These pages consist of various emails sent between Mr Harvey of the OCS, and either Mr Bryan or Ms Graham.

65 I am satisfied that these emails are exempt from disclosure by the application of s31 of the Act. These emails were sent between a legal practitioner and client for the dominant purpose of giving or obtaining legal advice.

Pages 215 to 237

66 The Department has applied s31 of the Act to exempt from disclosure all information contained on pages 215 to 237. These pages consist of draft Deeds of agreement prepared by Mr Harvey for Ms Graham.

67 These drafts included marked up comments made by Mr Harvey for Ms Graham's consideration, and were attached to an email that requested Ms Graham's review. Accordingly, I am satisfied that these drafts were communicated and prepared for the dominant purpose of giving or obtaining legal advice, and as such, are exempt from disclosure in full under s31 of the Act.

Pages 238 to 242

68 The Department has applied s31 of the Act to exempt from disclosure all information contained on pages 238 to 242. These pages consist of a draft transfer document and covering documentation prepared by Mr Harvey requesting Mr Bryan's review. Accordingly, I am satisfied that these documents were prepared for the dominant purpose of providing legal advice, and as such, are exempt from disclosure under s31 of the Act.

Pages 243 to 246

69 The Department has applied s31 of the Act to exempt from disclosure all information contained on pages 243 to 246. These pages consists of emails sent between Mr Harvey and Mr Bryan.

70 I am satisfied they are exempt from disclosure by the application of s31 of the Act. These emails were sent between a legal practitioner and client for the dominant purpose of giving or obtaining legal advice.

Pages 247 to 249

71 The Department has applied s31 to these pages in full. Pages 247 to 249 consist of internal correspondence in 2011 and 2012 between the Department's employees and relate to the payment of legal fees. The emails are not exempt from disclosure by the application of s31. As they are over 10 years old, it is not apparent that they would be exempt under any other section of the Act and they can be released to Ms Poulton.

Page 250

72 The Department has applied s31 of the Act to the whole of page 250 which is a letter sent from Mr Harvey to Mr Daniel Gillie of the Department.

73 I am satisfied that it was communicated for the dominant purpose of obtaining legal advice. Accordingly, this letter is exempt from disclosure in full by the application of s31 of the Act.

Pages 25! to 286

74 The Department has applied s31 of the Act to exempt from disclosure all information on pages 251 to 254. These pages consist of emails sent between Mr Harvey and Mr Walker, sometimes forwarding other information as part of a request for legal advice.

75 I am satisfied that these communications are exempt from disclosure by the application of s31 of the Act, because they were sent between a lawyer and client for the dominant purpose of giving or obtaining legal advice.

Page 287 to 30!

76 The Department has applied s31 of the Act to exempt from disclosure all information on pages 287 to 301. These pages consist of various emails sent between Mr Harvey of the OCS and either Mr Bryan or Ms Graham of the Department. These communication seeks and receives legal advice and I am satisfied that these emails are exempt from disclosure under s31.

Section 35 – Internal Deliberative Information

77 The Department did not seek to exempt any information pursuant to s35, but I consider that it is a more appropriate provision in relation some of the information it sought to exempt pursuant to s31. I will accordingly consider it as follows.

78 For information to be exempt from disclosure under s35(1) of the Act, I must be satisfied that 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.*

79 Once one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the dominant purpose of, the deliberative process related to the official business of the Department.

80 Purely factual information, final decisions, orders or rulings given in the exercise of an adjudicative function (or reasons explaining these), or information over 10 years old cannot be exempt under s35.

81 I must then consider whether it would be contrary to the public interest to release the information, pursuant to the public interest test in s33.

Pages 29 – 38

82 This is a draft version of a transfer deed from the Crown to the TLC, with comments and tracked changes marked. I am satisfied that this is prima facie

exempt pursuant to s35(1)(b), as a record of consultations between officers of the Department in finalising the deed text.

Pages 146 to 147

83 The Department has sought exempt from disclosure information in two emails sent by Mr Walker to Mr Crane, advising Mr Crane of legal advice the Department has received from the OCS and recommending a course of action.

84 I am satisfied that these emails are records of advice prepared by a public officer related to the official business of the Department. Accordingly, I find this information prima facie exempt from disclosure under s35(1)(a) of the Act.

Pages 148 to 151

85 These pages contain two versions of a draft letter to the TLC which contain comments and tracked changes. I am satisfied that these are records of consultations between officers of the Department in finalising this correspondence and are prima facie exempt under s35(1)(b).

Page 190

86 Page 190 consists an email sent by Mr Walker to Ms Clark on 9 March 2018. I am satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority. I am also satisfied that it was prepared as part of the official business of the Department.

87 This information is prima facie exempt from disclosure under s35(1)(a) of the Act.

Section 33 – Public Interest Test

88 I now turn to consider whether it would be contrary to the public interest to release the documents I have identified as prima facie exempt from disclosure under s35 of the Act. In making this assessment I am required to consider, at least, all of the matters in Schedule 1 of the Act.

89 I find that the following matters are relevant and weigh in favour of disclosure:

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

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

c) Whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation; and

f) whether the disclosure would provide the contextual information to aid in the understanding of government decisions.

90 I recognise that the release of the legal justification for the Department's actions and early drafts of documents would contribute to a debate of public interest, and assist the Tasmanian public in understanding how the Department makes decisions to some degree.

91 However, the majority of the information I found to be prima facie exempt is very closely connected to information which is protected by legal professional privilege. As I explained in my recent decision of *Janiece Bryan and Glenorchy City Council*[1]:

> *I find that matter (j) - whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law – is relevant and is the key matter weighing against disclosure in circumstances such as these.*
>
> [The public authority], *as the client in these circumstances, has the right to expect that legal advice sought and received will remain confidential. The release of...internal correspondence that is so closely related to privileged information risks undermining the confidentiality of the legal advice received. This has the potential to undermine the proper administration of justice. Accordingly, I find this matter weighs very heavily against disclosure.*

92 I find this equally true here. While Ms Poulton is correct to a degree that the Department seems to have somewhat misunderstood the limits of s31, I acknowledge that the majority of the information impacted by this misunderstanding is legitimately exempt for different reasons. The remainder of information I considered under s35 was marked up drafts of correspondence or deeds, which I also understand the basis for seeking exemption. It is usually contrary to the public interest to release early iterative versions of documents when the final version is released.

93 After balancing the relevant considerations, I am satisfied it would be contrary to the public interest to release the information I found to be prima facie exempt under s35. This information is exempt under s35 and should not be released to Ms Poulton.

Section 36 – Personal information of a person

94 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than Ms Poulton, or that the information would lead to that person's identity being reasonably ascertainable.

95 I will not address each individual application of s36 by the Department, rather, I will assess the Department's application of s36 of the Act in relation to the following categories of people:

- Public authority staff;
- TLC staff; and
- Other third party professionals.

[1] 30 June 2023, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Public Authority Staff

96 On numerous occasions, the Department found the names and signatures of former public authority staff exempt from disclosure under s36 of the Act. As I have explained in previous decisions, the names of public officers performing their regular duties are not usually exempt under s36. It is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption. Whether a public service employee is a current or former employee irrelevant to the assessment under s36 of the Act. Accordingly, I find that the personal information of former public service employees should be made available to Ms Poulton.

97 The exception to this is direct and mobile phone numbers of Department employees, which I have consistently found to be exempt under s36 in previous decisions, where these are not routinely provided to the public. I am satisfied that there is potential for harm with the release of this information and it is valid for public authorities to limit the release of direct contact numbers for its staff to be able to ensure public enquiries are able to be directed through appropriate channels. This information is exempt under s36 and not required to be provided to Ms Poulton.

TLC Staff

98 The Department has found the names of a small number TLC staff exempt from disclosure under s36 of the Act. The Department has also sought to exempt from disclosure the name of the former CEO of the TLC, Nathan Males and his office contact number and mobile number. I am satisfied that this information is prima facie exempt under s36, as the personal information of these individuals is ascertainable

99 The people named in the documents are paid employees of the TLC in prominent roles, such as the former and current CEOs. I am not satisfied that the release of these details of prominent officers in public roles at an organisation would cause harm to them as individuals or be contrary to the public interest. The names of TLC staff are accordingly not exempt under s36 and may be released to Ms Poulton.

100 I am satisfied that there is some risk of harm in releasing direct and mobile phone numbers of TLC staff and find this information is exempt under s36 and should not be released to Ms Poulton. The release of this of this information would not add value or meaning to the information, but could pose a risk to the interests of these individuals.

Other Third Party Professionals

101 Information identified as responsive to Ms Poulton's request includes the personal information of third parties, including the name of a staff member at

Print Applied Technology (on page 104) and the name of a scientific contact officer and negotiator (on page 406).

102 Though this is considered personal information under the Act, the Department has not established why it would be contrary to the public interest for this information to be released to the applicant. It is not apparent why it the release of the names of these individuals performing their professional duties would cause any harm to their interests or be contrary to the public interest for them to be released.

103 Accordingly, I find that these names are not exempt under s36 of the Act and may be released to Ms Poulton.

Preliminary Conclusion

104 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s27 are affirmed; and
- Exemptions claimed pursuant to s31 are varied; and
- Exemptions under s35 apply; and
- Exemptions claimed pursuant to s36 are varied.

Conclusion

105 As the above preliminary decision was adverse to the Department, it was made available to it on 7 November 2023 under s48(1)(a) to seek its input before finalising the decision.

106 The Department advised on 20 November 2023 that it would not be making any submissions in response to the preliminary decision.

107 Accordingly, for the reasons give above, I determine that:

- Exemptions claimed pursuant to s27 are affirmed; and
- Exemptions claimed pursuant to s31 are varied; and
- Exemptions under s35 apply; and
- Exemptions claimed pursuant to s36 are varied.

108 I apologise for the parties for the lengthy delay in finalising this decision.

Dated: 24 November 2023

Richard Connock
OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 27 – Internal Briefing of a Minister

(1) Information is exempt information if it consists of –

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

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

In the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(3) Subsection (1) does not include information solely because it –

(a) was submitted to a Minister for the purposes of a briefing; or

(b) is proposed to be submitted to a Minister for the purposes of a briefing –

if the information was not brought into existence for submission to a Minister for the purposes of a briefing.

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

(5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 31 – Legal Professional Privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal Information of a Person

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

(2) If –

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

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

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-044

Names of Parties: Linda Poulton and Meander Valley Council

Draft reasons for decision: s48(3)

Provisions considered: ss36 and 39

Background

1 The Tasmanian Government has announced plans to build a prison in northern Tasmania. The siting of this prison has proven to be a controversial issue within the Tasmanian community.

2 On 1 October 2019, the Glen Avon Farms site at 135 Birralee Road, Westbury was announced by the Tasmanian Government as the preferred site for the prison. This site was eventually abandoned and the site of the Ashley Youth Detention Centre in Deloraine is now proposed for the project.

3 The applicant, Ms Linda Poulton, submitted two applications for assessed disclosure under the *Right to Information Act 2009* (the Act) in relation to this project in 2020.

4 Ms Poulton's first application was submitted to the Department of Justice on 25 February 2020. This application was then transferred to Meander Valley Council (Council) on 26 February 2020. As part of her first application, Ms Poulton requested the following:

> 1. *Copy of letter from Premier Hodgman to C Perkins or Council dated 8 May 2018*
>
> 2. *Copy of texts and emails between (to and from, either separately or jointly) T King, C Perkins, M Gill and M Kelly from 20 September 2018 until 31 December 2018 in relation to the northern prison, including without limitation*
>
> a. *The email from T King to M Gill and C Perkins dated 26 September 2018 sent at 9.25pm;*
>
> b. *The email from M Gill dated 26 September 2018 sent at 9.44pm to T King (and which identifies all other recipients of that same email)*

3. *Copy of correspondence dated on or about 15 October2018 to elected members of the Council from the State Government*

4. *Copy of letter from W Johnson to E Archer dated 30 October 2019*

5. *Copy of email dated 4 December 2019 at 10.33am sent from HSEC09*

6. *Copy of all correspondence and records of communications, including texts, emails, letters file notes, minutes, notes and other recorded information between the Councillors and/or staff of the Meander Valley Council and the Ministers or staff of the State Government in relation to the northern prison from 23 December 2019 until the date of this request*

7. *A copy of the expression of interest submitted by M Gill in respect of the Glen Avon Farms site, with commercial elements redacted if necessary*

8. *A copy of the expression of interest submitted by M Gill in respect of the Gatenby Site in Westbury with commercial elements if necessary.*

5 On 19 May 2020, Ms Poulton submitted her second application for assessed disclosure to Council requesting a:

> *Copy of all correspondence and records of communications, including texts, emails, letters file notes, minutes and other recorded information between the Councillors and/or staff of the Meander Valley Council and the Ministers or staff of the State Government in relation to the Northern Prison from 26th February 2020 until the date of this request.*

6 Also on 19 May 2020, Ms Poulton submitted an application for external review to the Ombudsman's office in relation to her first application for assessed disclosure pursuant to s45(1)(f) of the Act. This was done on the basis that Council had not issued a decision to Ms Poulton within 20 working days of receiving her application as prescribed by s15 of the Act.

7 On 24 June 2020, Mr John Jordan, Council's General Manager, issued a single decision in relation to both applications. Redactions were applied to 12 of the 56 pages of information identified as responsive to Ms Poulton's request. On 15 July 2020, Council released further information to Ms Poulton. This included six pages of partially redacted information.

8 On 23 July 2020, Ms Poulton made a second application for external review, this time in relation to Mr Jordan's decision dated 24 June 2020. This application was accepted pursuant to s45(1)(a) of the Act on the basis Ms Poulton's application was made within 20 working days of being issued an original decision by a principal officer and the prescribed fee was paid.

9 As Council dealt with Ms Poulton's applications jointly, her external review requests have also been considered jointly.

10 Following enquiries from one of my officers, Mr Wezley Frankcombe of Council confirmed on 7 July 2023 that *the basis on which information was redacted from the provision of information was sections 36 and 39* of the Act.

Issues for Determination

11 I must determine whether the information not released by Council is eligible for exemption under s36 for being information which, if released, would leave the identity of a person other than Ms Poulton reasonable ascertainable, or under s39 for being information communicated to Council in confidence. I must also consider whether the information not released by Council is eligible for exemption under any other relevant section of the Act.

12 As ss36 and 39 are contained in Division 2 of Part 3 of the Act, my assessments are made subject to the public interest test in section 33. This means that, should I determine that any of the requested information is prima facie exempt from disclosure under ss36 or 39, I must then determine whether it would be contrary to the public interest to disclose it. In doing so I must have regard to, at least, the matters in Schedule 1 of the Act.

Relevant Legislation

13 I attach a copy of ss36 and 39 of the Act to this decision at Attachment 1.

14 Copies of section 33 and Schedule 1 of the Act are also included in Attachment 1.

Submissions

Applicant

15 Ms Poulton sought review on the following bases and made these submissions:

> 1. *In relation to documents sought in my category 2(b), the document provided still does not identify the recipients of the email. I would like to appeal the failure to provide a document identifying recipients and ideally finding on whether de-identifying correspondence* [from] *public servants is appropriate.*
>
> 2. *In relation* [to] *documents sought in my category 5, a copy of the email showing the contents of the email has not been provided. I would like to appeal the failure to provide a copy of the email which reveals its contents.*
>
> 3. *In relation to documents sought in my category 7, more than commercial details appear to have been redacted. I would like to appeal the redaction of the document in so far as that redaction does not relate to commercial in confidence details.*
>
> 4. *In relation to documents sought in my category 8, a copy of a redacted version of an Expression of Interest document has since been provided by Mr Jordan in response to that request.*

> *However, Mr Jordan has failed to provided evidence that this document was actually sent to the Department of Justice (please see email correspondence forwarded with the email to which this letter is attached).*
>
> *I have a copy of an email sent by Martin Gill to the Department of Justice representing evidence of the fact that the Expression of Interest document referred to in category 7 was sent, but no equivalent email has been provided that shows the Expression of Interest in category 8 was sent.*
>
> *I would* [like] *to appeal the redaction of* [the] *Expression of Interest document provided in response to category 8, in so far as that redaction does not relate to commercial in confidence details.*
>
> *I would also like to press for evidence that the Expression of Interest document provided by the Council in respect of the Expression of Interest document in category 8 was submitted to the Department of Justice, including evidence which shows the details of the person submitting.*

Preliminary Points

16 Before proceeding to my analysis of Council's application of ss36 and 39 of the Act, I find it necessary to address some of the submissions made by the applicant.

17 First, Ms Poulton submitted that Council withheld information from its assessment. Specifically, Ms Poulton submits that the contents of an email responsive to item 5 of her request was not assessed.

18 Ms Poulton is referring to an email sent from a Department of Justice scanner to a Department of Justice officer. Attached to it is a scanned copy of a completed *Westbury Town Hall Facilities Hire Agreement*. Having reviewed documents provided to my office by Council, I can see that this information has been assessed by Council under the Act, and as such, I am satisfied that Council has not withheld responsive information from this assessment.

19 Second, Ms Poulton requested information revealing that the Expression of Interest document she requested was submitted to the Department of Justice.

20 I note that this request was made as part of her application for external review on 23 July 2020. This is not the same as the request made as part of her original application for assessed disclosure submitted to Council on 26 May 2020, where Ms Poulton requested:

> *A copy of the expression of interest submitted by M Gill in respect of the Gatenby Site in Westbury with commercial elements redacted if necessary.*

21 Information evidencing that the Expression of Interest document was actually submitted to the Department of Justice falls outside the scope of this request. Accordingly, Council is under no obligation to provide this information to the applicant as it has located and assessed the copy of the Expression of Interest which was requested.

22 Finally, Ms Poulton submitted that Council had failed to provide all information responsive to her application for assessed disclosure. Specifically, Ms Poulton argued that Council failed to provide all information responsive to item 2(b) of her request - *The email from M Gill dated 26 September 2018 sent at 9.44pm to T King (and which identifies all other recipients of that same email)*.

23 In accordance with s48(1)(a) of the Act, a preliminary decision on this external review was issued to Council raising Ms Poulton's concerns regarding Council's perceived failure to provide her with information identifying all recipients of the above-mentioned email sent by Mr Gill.

24 In response to the preliminary decision, Council explained to my office that Council had made contact with the applicant, and that the issue about the missing recipient's had since been resolved. On 23 August 2023, Ms Poulton wrote to my office confirming that this was the case. Accordingly, it is no longer necessary to address this point in this decision.

25 Ms Poulton's remaining submissions will be addressed as part of my analysis below.

Analysis

Section 36 – Personal Information of a Person

26 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than Ms Poulton, or that the information would lead to that person's identity being reasonably ascertainable.

27 Section 36 of the Act has been applied by Council to 16 pages of information identified as responsive to Ms Poulton's request. Those 16 pages consist of various emails, Expression of Interest documents, and a venue hire form.

Names and work contact details of public authority employees

28 Council has sought to use s36 of the Act to exempt the names and work contact details of public authority employees, including councillors and Department of Justice staff from disclosure in emails and a *Facilities Hire Agreement*.

29 As noted in my recent decision of *Suzanne Pattinson and Department of Education*[1], I do not consider that s36 of the Act operates to exempt the names and email addresses of public authority employees undertaking their regular

[1] (2 August 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [82]

duties from disclosure, unless unusual circumstances exist to justify such an exemption:

> *. . . the names of public officers performing their regular duties are not usually exempt under s36. This is consistent with previous decisions by this office and the standard Australian practice, the default position is that personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release. Such information will only be considered exempt when there are specific and unusual circumstances identified which justify this . . .*

30 I do not consider that the circumstances of this case provide an exception to the general rule that the names and email addresses of public authority staff performing their regular duties are not exempt from disclosure. Council has not provided any reasoning to justify such an exemption. Accordingly, I am not satisfied that this information is exempt under s36 and it should be made available to the applicant.

31 I do consider that there are some different considerations regarding direct telephone and mobile numbers of public officers. Direct telephone numbers are often not provided to the public, to ensure that calls are received through established channels. Mobile phones may be used for personal use in addition to work functions and are not necessarily appropriate to release.

32 I am content to leave the direct and mobile telephone numbers redacted, as its release would not provide any additional useful information but has the potential to cause harm to the interests of an individual for the reasons discussed above. I find the telephone numbers redacted are exempt under s36 but the names and email addresses of public officers are to be released to Ms Poulton.

Expression of Interest Documents

33 Council identified two Expression of Interest documents as being responsive to Ms Poulton's request. One Expression of Interest document was identified as responsive to item 7 of Ms Poulton's request, the other was identified as responsive to item 8.

34 The Expression of Interest document identified as being responsive to item 7 of Ms Poulton's request is the Expression of Interest application prepared by Council and Glen Avon Farms.

35 Council has applied s36 of the act throughout this document to exempt the name and contact details of the owner of the Glen Avon farms property, Mr Neville Pope, as well as information identifying the Glen Avon Farms site from disclosure.

36 I considered the Glen Avon Farms Expression of Interest in my decision in *Manuel Sessink and Department of Justice*[2] (Sessink decision) and found this document able to be released in full as this would not be contrary to the public interest. I maintain my finding and Council should make this information available to the applicant.

37 The Expression of Interest document identified as being responsive to item 9 of Ms Poulton's request is an Expression of Interest application prepared by Council and a Meander Valley landowner.

38 Council has applied s36 of the Act throughout this document to exempt from disclosure the name of the land owner and their contact details. Council has also applied s36 of the Act to exempt information revealing the location of the relevant property.

39 I did not consider this document in the Sessink decision but did consider the information which related to the same property in that decision. I determined that it would be contrary to the public interest to release details of the locations of alternative sites proposed for the site of the northern prison which were not proceeded with. I again maintain my reasoning and consider that the release of these details would identify the landowner, or leave their identity reasonably ascertainable. Accordingly, I consider this information to be prima facie exempt from disclosure under s36 of the Act.

Section 33 – Public Interest Test

40 As noted, s36 is subject to the public interest test in s33. I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt.

41 Council did not provide reasons for its decision as required by s22 of the Act, indicating only that *commercial elements* were *redacted if necessary*. Council later confirmed that it relied upon ss36 and 39 but I urge it to be more diligent in future to ensure decisions are properly reasoned and compliant with the Act.

42 However, having reviewed the information I find Schedule 1 matters (a), (b), and (d) are relevant to this public interest assessment and weigh in favour of disclosure. I also find that Schedule 1 matters (h), (m), and (n) are relevant and weigh against disclosure.

43 Matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.

44 Matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. As I mentioned, the siting of the northern prison has been subject to extensive public debate throughout Tasmania. The release of information that would identify alternate sites for the northern prison would enhance debate on a matter of public interest.

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[2] (24 May 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [61]-[73]

45 Matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – is relevant and weighs in favour of disclosure. The release of this information would inform the Tasmanian community of other sites considered for the northern prison and may help the Tasmanian community, to some degree, understand why the Glen Avon site was considered the preferred site.

46 Matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – is relevant and weighs against disclosure. Applicants participated in the Expression of Interest process on a confidential basis. Accordingly, the release of this Expression of Interest document to the public would hinder the equity and fair treatment of applicants in their dealings with government.

47 Matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The siting of the northern prison is a controversial issue and as I stated the Sessink decision, those associated with the Expression of Interest process may withdraw their application in response to potential pressure from the public, if their identities are made publically available.

48 Overall, there is a difficult balance to strike, however given the sensitivity surrounding the siting of the northern prison, I am satisfied that it is contrary to the public interest to release information that identifies this unsuccessful site and landowner to Ms Poulton.

Section 39 – Information Obtained in Confidence

49 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –

> (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.

50 Council has applied s39 of the Act to exempt from disclosure credit card details provided to Council by the Department of Justice to pay the booking fee for Westbury Town Hall. This information consists of the name which appears on the credit card and the cardholder's signature, the card number, and its expiry date.

51 I am satisfied this information was provided to Council in confidence and that if this information was released, others would be dissuaded from providing their payment details to Council in the future. Accordingly, I find this information to be prima facie exempt from disclosure under s39(1)(b) of the Act.

Section 33 – Public Interest Test

52 I am satisfied that it would be contrary to the public interest to release this information. There are no Schedule 1 matters that are relevant and weigh in favour of the disclosure of this information, other than perhaps (a) as the general public need for government information to be accessible is always relevant. However, I consider that the release of this information would expose the State Government to a risk of financial harm (matter (s)). Furthermore, if details of this nature were routinely made available, the public would be less willing to provide their payment details to Council (matter (m)).

Preliminary Conclusion

53 Accordingly, for the reasons given above, I determine that:

- Exemptions claimed by Council pursuant to s36 are varied; and
- Exemptions claimed by Council pursuant to s39 are upheld.

Submissions to the Preliminary Conclusion

54 The above preliminary decision was made available to Council and Ms Poulton on 21 July 2023 under ss48(1)(a) and (b), to seek their input prior to finalisation.

55 Though neither party made submissions relevant to my determination regarding Council's use of s36 and s39 of the Act, both made submissions regarding Council's record keeping processes.

56 These submissions related to Ms Poulton's concerns regarding Council's perceived failure to provide her with information identifying all recipients of an email from Mr Gill, the previous General Manager of Council. As I mentioned at paragraph 24 of my decision, this is no longer a live issue between the parties as Ms Poulton is now satisfied that her request has been responded to by Council appropriately. Accordingly, it is not necessary to further set out the submissions of the parties or discuss its record keeping processes.

Conclusion

57 For the reasons set out above, I determine that:

- Exemptions claimed by Council pursuant to s36 are varied; and
- Exemptions claimed by Council pursuant to s39 are upheld.

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

Dated: 24 August 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

Section 36 – Personal Information of a Person

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

(2) If –

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

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

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

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

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

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

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

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

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

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

Section 39 – Information Obtained in Confidence

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

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

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

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

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

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

(g) whether the disclosure would enhance scrutiny of government administrative processes;
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
(i) whether the disclosure would promote or harm public health or safety or both public health and safety;
(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
(k) whether the disclosure would promote or harm the economic development of the State;
(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review Case Reference:

R2202-106 **Names of Parties:** Malcolm Gardam and

Devonport City Council **Reasons for decision:** s48(3)

Provisions considered: s32

Background

1 In 2016, Devonport City Council (Council), a public authority under the *Right to Information Act 2009* (the Act), decided to enter into an operating lease agreement and associated commercial dealings with Providore Place Devonport Pty Ltd (PPD) to manage and develop Providore Place, a large construction development in central Devonport and part of Stage One of 'The Living City Project' (the project).

2 In September 2019, the Tasmanian Auditor-General, in an audit covering the period December 2012 to January 2019 inclusive, reported on Providore Place as follows:

> *Stage One also include*[s]*... a multi-level car park and a food pavilion, known as Providore Place, to showcase the region's premium produce through restaurants, a distillery, accredited training facilities and market spaces. The Providore Place facility is approximately 1,500m² comprising five permanent tenancies, an open market space and a mezzanine floor to accommodate a cooking school and food education opportunities.*[1]

3 PPD is a company in which Project & Infrastructure Holdings Pty Ltd (P+I), in October 2018, had a 50% direct ownership interest, to operate Providore Place[2]. In December 2021, Providore Place was re-named Market Square Pavilion; however, I will continue to use the name Providore Place in this decision for consistency with the terminology used in the relevant material.

4 On 21 November 2019, Mr Malcolm Gardam made an application for assessed disclosure under the Act to Council. Mr Gardam is a ratepayer in the

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[1] Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government,* September 2019, at page 8, available at www.audit.tas.gov.au/wp-content/uploads/Report-of-the-Auditor-General-No1-of-2019-20-Procurement-in-Local-Government.pdf, accessed 22 June 2023.

[2] See note 1 at page 15.

Devonport local government area and holds concerns about the actions of Council and the manner in which public funds have been used in relation to the project. He sought:

> *1) The signed, unredacted/complete copy of the Project Development Management Agreement (PDMA) in regard to the Living City development management arrangement between Devonport City Council and Projects and Infrastructure Holdings Pty Ltd (P+i)*
>
> *2) Copy of all amendments or replacement agreements, if any, to the original PDMA agreement.*
>
> *3) Provide evidence by way of a summary breakdown by category and value of the 2016/2017 payment of $1,993,626 that substantiates the existence that "...the engagement with P+I has required them to carry some costs with payment not due until project commencement." As reported as being stated by the then Mayor in November 2017.*
>
> *4) The Report of the Auditor-General No. 1 of 2019-20 revealed that a "success fee" was included in the $5.2 million paid to P+I, up to June 2019, with a Council then subsequently confirming the 2016-17 FY payment of $1,993,626 payment included a "success fee" payment of $1.3 million but no further details; accordingly, provide an unredacted copy of the key elements of the performance criteria that P+I was required to achieve to secure payment of the various elements of the "success fee" as provided for under the Living City Project Development Management Agreement, whether ultimately paid or not.*
>
> *5) In response to a question on notice, dated 18th November 2019, asking if there were "costs carried over" in addition to the "success fee" as disclosed by the Auditor-General the DCC Acting General Manager responded "No". Provide documented evidence as to why a "success fee" being a reward in addition to an agreed delivery could possibly be described as "costs carried over" being costs incurred with reimbursement by council being held over to a later time.*

5 On 17 December 2019, Ms Kym Peebles of Council, a delegate under the Act, released a decision to Mr Gardam. She determined that the requested information was exempt under s32(1)(a) the Act as she considered that the information was contained in the official record of a closed meeting of council, and denied Mr Gardam's request.

6 Mr Gardam applied for internal review of Ms Peebles' decision on 18 December 2019 and on 17 January 2020, Mr Matthew Atkins, General Manager of Council and a delegate under the Act, affirmed Ms Peebles' decision.

7 On 31 January 2020, Mr Gardam sought external review of Council's decision. This office accepted his application under s44 of the Act on the basis he was in

receipt of an internal review decision and his application for external review was submitted within 20 working days after receipt of that decision.

8 On 24 March 2020, a delegate from my office directed Mr Atkins to provide better reasons for his decision given it lacked sufficient reasoning to support exemption under s32(1)(a). Council requested an extension to the time for compliance with this direction, citing the initial demands of COVID-19, and on 30 June 2020, Mr Atkins provided a response. The response did not alter the findings from the first two decisions and the reasoning provided is outlined in the Submissions below. Council provided this response to Mr Gardam on 1 July 2020.

9 Following correspondence between my office, Mr Gardam and Council, Mr Gardam advised my office on 31 July 2020 that he wished to withdraw item 5 of his original request. I will therefore only consider items 1 to 4 of the original RTI request in this decision.

10 On 26 May 2023, my office sent a preliminary view to Mr Atkins, outlining the likely decision that it would make should the matter proceed to a formal decision. My preliminary view was that Council had not discharged its onus under s47(4) to show that information responsive to Mr Gardam's request was exempt under s32. After again requesting an extension, Council advised on 13 June 2023 that it *does not agree with* [my] *preliminary view* and it is on that basis that I have proceeded to issue this decision.

Issues for Determination

11 I must determine whether the information is eligible for exemption under s32 or any other relevant section of the Act.

Relevant legislation

12 Council has relied solely on s32 and I attach a copy of that section to this decision at Attachment 1.

Submissions

Council

13 Council did not provide submissions beyond the reasoning in its decisions - which was exceptionally brief - and the better reasons provided. Aside from setting out the scope of Mr Gardam's application and his review rights, Ms Peebles' decision dated 17 December 2019 was limited to the following:

> *Council has assessed the application in accordance with the Act. In response to items 1 – 5, the information is exempt under section 32(1)(a) – Information is exempt information if it is contained in the official record of a closed meeting of council – and therefore will not be released.*

14 Mr Atkins' decision dated 17 January 2020 was almost identical aside from this paragraph:

> *As the Principal Officer I have subsequently reviewed the response. I find that the application was assessed in accordance with the Act and that the response provided by Ms Peebles is appropriate in that the information requested is exempt under section 32(1)(a) – Information is exempt information if it is contained in the official record of a closed meeting of council – and therefore will not be released.*

15 The better reasons for decision provided by Mr Atkins on 30 June 2020 included a response to each of the items of Mr Gardam's application for assessed disclosure, as follows:

> ***Q1. The signed, unredacted/complete copy of the Project Development Management arrangement between Devonport City Council and Projects and Infrastructure Holdings Pty Ltd (P+i)***
>
> ***Response***
>
> *The Project Development Management Arrangement (PDMA) between Devonport City Council (DCC) and Projects and Infrastructure Holdings Pty Ltd (P+i) was presented to Council in closed session on 25 August 2014. Therefore, the information requested is exempt under section 32(1)(a) of the Right to Information Act 2009 (the Act) which states that "Information is exempt information if it is contained in the official record of a closed meeting of council."*
>
> ***Q2. Copy of all amendments or replacement agreements, if any, to the original PDMA agreement***
>
> ***Response***
>
> *In July 2016 an amendment to the original PDMA was presented to Council in closed session. Therefore, the information requested is exempt under section 32(1)(a) of the Act which states that "Information is exempt information if it is contained the official record of a closed meeting of council."*
>
> ***Q3. Provide evidence by way of a summary breakdown by category and value of the 2016/2017 payment of $1,993,626 that substantiates the existence that "...the engagement with P+i has required them to carry some costs with payment not due until project commencement." As reported as being stated by the then Mayor in November 2017***
>
> ***Response***
>
> *The payment of $1,993,626 made to P+i in 2016/17 specifically relates to criteria included in the PDMA. The PDMA was presented to Council in closed session on 25 August 2014, therefore the information*

requested is exempt under section 32(1)(a) of the Act which states that "Information is exempt information if it is contained in the official record of a closed meeting of council."

Q4. The report of the Auditor-General No. 1 of 2019-20 revealed that a 'success fee' was included in the $5.2 million paid to P+i, up to June 2019, with Council then subsequently confirming the 2016-17 FY payment of $1,993,626 payment included a "success fee" payment of $1.3 million but no further details; accordingly, provide an unredacted copy of the key elements of the performance criteria that P+i was required to achieve to secure payment of the various elements of the "success fee" as provided for under the Living City Project Development Management Agreement, whether ultimately paid or not.

Response

The performance indicators are contained in the PDMA, which is contained in the official record of the closed council meeting held on 25 August 2014, therefore the information requested is exempt under section 32(1)(a) of the Act which states that "Information is exempt information if it is contained the official record of a closed meeting of council."

Q5. In response to a question on notice, dated 18 November 2019, asking if there were "costs carried over" in addition to the "success fee" as disclosed by the Auditor-General the DCC Acting General Manager responded "No". Provide documented evidence as to why a "success fee" being a reward in addition to an agreed delivery could possibly be described as "costs carried over" being costs incurred with reimbursement by council being held over to a later time.

Response

It is difficult to ascertain exactly what Mr Gardam is asking as the terminology he has used in this question and the hundreds of other questions he has asked about the same topic is confusing and continually changes. The success fee was not in addition to an agreed deliverable, it was for success in achieving an agreed deliverable - if they had not achieved financial close etc, the success fee would not have been paid. Regardless of the terminology, there was no other additional amount paid as a lump sum, other than that disclosed by the Auditor-General as part of his detailed investigation into this matter

Mr Gardam

16 Mr Gardam provided detailed submissions with his external review application dated 31 January 2020, but aside from his initial comment below, they are mainly focused on the reasons why he made his requests rather than addressing Council's refusal under s32 of the Act. At the outset Mr Gardam described the content of the decisions by Ms Peebles and Mr Atkins as *typically evasive and contrary to the principles of good governance.* He continued by saying:

> *In relation to the Living City project Council has arguably abused the "safe haven" of Closed (secret) Session and unreasonably hidden behind the "exemption" from RTI afforded by Section 32 of the Right to Information Act. The ongoing result of this approach by Council is to frustrate those seeking answers through an absence of transparency which in turn avoids accountability and any opportunity to assess Council's management of Living City.*

17 Mr Gardam then provided supporting arguments for why he sought each of the five items included in his request for assessed disclosure. In relation to the first item in his request, the main relevant comments include:

> *Devonport Council has repeatedly refused to disclose matters associated with the arrangements entered into with P+I as its appointed Project Development Manager along with other matters relating to Living City... Reasons given by Council for not disclosing information have included "commercial-in-confidence" "confidential" and "all matters discussed in Closed Session."*
>
> *It was only due to the Auditor-General Report No. 1 of 2019-20 (Report) that any real details have become available. The detailed findings and recommendations for Living City in the Report are found at Pages 10-19 inclusive.*

18 In relation to item 2 of his request, Mr Gardam said:

> *In fairness should the initial agreement be released then so should any amendments or replacement agreement to avoid any subsequent changes rendering the initial conditions unintentionally misleading.*

19 In relation to item 3 of his request, Mr Gardam referenced his comments in items 4 and 5, which are as follows:

> *After three (3) years of Council refusing to provide any meaningful answers to ratepayer questions the Auditor-General's Report exposed the following in relation to the PDMA:*
>
> *Report Pg.11 – "We found one instance where disclosure did not comply with the LGR.* ***This related to disclosure of annual payments made under the PDMA rather than the required total value of the contracted goods or services****.* [Mr Gardam's emphasis] *DCC advised a total contract amount was not disclosed*

because of the variable components of the agreement. Details of this contract are included under criteria 2.

... In the 28th October 2019 Ordinary Meeting Agenda, as a result of a ratepayer question for about the third time but this time leveraged off the Auditor-General's Report, Council finally conceded that a "success fee" of $1.3 million had been paid to P+I in the 2016-2017 financial year which had not been reported separately as such in the Annual Report for that year.

... Council had repeatedly for over two years refused to answer as to what a $1,993.626 payment to P+i was for in the 2016-2017 FY other than former Mayor Steve Martin saying P+i had "costs carried over"... The previous year was a payment of about $600k.

20 Mr Gardam then provided detailed extracts from Council's *27th November 2017 Ordinary Meeting Agenda* followed by these comments:

Other evidence of Council's avoidance in answering questions relating to the Living City is available on request. Unfortunately, like so many other statements made by Council or its appointed Project Development Manager, Council never provides evidence to substantiate its public representations and for over four (4) years has resorted to various tactics to avoid transparency and accountability relating to this project.

Transparency and therefore accountability is not in abundance at the Devonport City Council.

21 Following this, Mr Gardam provided *a small sample of some of the questionable Council representations... made to the community and State Government about Living City since 2013* before making these final comments:

In closing I simply add that my understanding is that the test whether to release is not that it must be in the general public interest to do so but rather it is not in the public interest to not do so.

The Devonport City Council's attitude to transparency relating to Living City decision making and deals done with private enterprise, almost exclusively done in Closed (secret) Session, has alienated large sections of the electors. This is largely due to Council's refusal to substantiate its representations and provide few real time disclosures other than those forced upon them.

Considering the services related to the requested Project Development Management Agreement and associated documentation is now complete there should be no existing impediments to its release and I strongly urge you to do so to enable public scrutiny of the arrangement.

22 On 31 July 2020, Mr Gardam provided further submissions to my office after receiving the better reasons from Council. The main parts of his submissions are as follows:

> *Having received and reviewed the latest information from the General Manager (GM) I advise as follows in the same sequence as the individual responses to my separate requests for information:*
>
> 1. *Responses 1 to 4 inclusive simply regurgitate the previous offerings of "Therefore, the information being requested is exempt under section 32(1)(a) of the Right to Information Act 2009....."*
> 2. *Response 5 now confirms for a second time that the reported statement by the then mayor Steve Martin in The Advocate on the 21/10/17 as to there being "costs carried over" as a component of the $1,993.626 payment to its Development Manager, as represented to the community in The Advocate on the 21/10/17, is false or misleading and arguably to avoid the public disclosure of a $1.3 million success fee payment.*
>
> *... In summary, I find that after 5 months we have only managed to do the full circle with Devonport City Council and are left with the same reasons as initially received. As to my request No. 5 for information supporting a statement by the former mayor, I advise that no further information is sought from council as to do so will be futile.*
>
> *However, I request that the review be continued in relation to my requests number 1-4 inclusive, based on the following.*
>
> 1. *The GM had offered nothing but the exemption under the Right to Information Act in denying the release of the Project Development Management Agreement (PDMA)*
> 2. *The GM or Document Register makes no mentioned of any review of its option of releasing the requested documentation if councillors voted to do so and instead appears intent on the contents never being publicly disclosed. Consideration of what information Council may be prepare* [sic] *to release is required to be addressed and minuted at the closed sessions that the contract was discussed.*
> 3. *Further to Items 1 & 2 above, the following is the latest question to and response from the GM in relation to releasing the document requested. Having relied on section 32(1)(a) of the Right to Information Act 2009 previously the GM is now offering existence of confidentiality clauses as to why council cannot release the document. Note the latest offering as to why the PDMA cannot be released by DCC was not included on the Document Register as provided by the General Manager.*

[extract from Council meeting dated 27 July 2020 provided]

> *... I repeat, considering the services relating to the requested Project Development Management Agreement and associated documentation is* [sic] *now complete there should be no existing impediment to its release and I strongly urge the Ombudsman to find in favour of doing so to enable much needed public scrutiny of the arrangement.*

23 In an email to my office dated 2 March 2023, Mr Gardam provided the following further submissions:

> *Devonport City Council (Council) has only claimed exemption under S32(1)(a) for not releasing the information requested – the application of and validity of their refusal to release in each separate instance needs to be tested by the Ombudsman's Office against Section 32 and in particular s32 (3 & 4).*
>
> *I note that in addition to Item 1 and 2 requesting a copy of the PDMA and any subsequent contractual changes Items 3, 4 and 5 on review still remain relevant requests today.*
>
> *I comment as follows in relation to council's response to me dated 1 July 2020, five months after being requested to do so by the Ombudsman's Office, and supposedly providing additional information including a Document Register which the following refers to the Notes contained therein.*
>
> *Item 3 – It beggars belief that there was no breakdown of costs supporting a claim of $1,993,626 for management services; apparently other than a single dollar value for a $1.3M success fee claim. Even if we believe the Council just paid on Payment Certificates issued by its appointed Superintendent under the contract then without doubt the Superintendent should have been presented with sufficient details (as I have requested) to assess the accuracy of the claim being made by P+i. The details requested should be substantially available.*
>
> *Item 5 - It states that "Council has not referred to 'a success fee' as 'costs carried over' – this is terminology used by Malcolm himself so we are not sure how we can provide evidence to something that doesn't actually exist other than in his own mind." Apparently, the mayor at the time and designated spokesperson for Council is only that when senior staff agrees that the mayor speaks on behalf of Council; it was the former mayor that tried to explain the size of the 2016/17 payment as including an undefined amount for 'costs carried over' (as explained elsewhere and supported by Attachment F to my submission dated 31 January 2020). My request for evidence supporting the then mayor's statement was initiated because Council had refused to rule out that a 'success fee' or similar existed in the PDMA (it was only the Auditor-General's report that exposed the existence of one that Council had desperately tried to keep secret). Clearly, the General Manager threw*

the then mayor under the bus in his response at the 18 November 2019 meeting and his letter to me dated 1 July 2020.

The conclusion to be drawn from this is that the mayor was either poorly informed by senior staff, deliberately misleading with the statement or it was a blatant lie. This and the existence of a number of Living City "throw away" statements by Council and its representatives throughout the Living City project, that were not supposed to be challenged and certainly not supported by evidence from Council, is why RTI requests have become necessary. It is extremely disappointing that RTI's take years to resolve; no doubt exacerbated by the number of public entities attempting to avoid scrutiny of their decision making knowing that the process takes years.

As stated in my submission, the Council has almost entirely relied on the questionable use of "confidential", "commercial-in-confidence" and that it relates to matters discussed in Closed Session as it has offered up in rejecting this RTI. It is my opinion that Council is abusing the exemptions under the Act and stifling transparency and accountably with its flimsy attempts to captures peripheral documents and information from being publicly disclosed.

Analysis

Section 32

24 Council relied upon s32(1)(a) to exempt information which was considered at closed meetings of the Council. Exemptions under s32 are not subject to the public interest test.

25 Section 32(1) provides that:

> *(1) Information is exempt information if it is contained in –*
>
> *(a) the official record of a closed meeting of a council; or*
>
> *(b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or*
>
> *(c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or*
>
> *(d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.*

26 My previous decision in *Robert Vellacott and Devonport City Council*[3] (*Vellacott*), also in relation to Council and P+I, dealt with very similar information to the information in this review, which was also found to be exempt by Council

[3] (6 April 2022), available at http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

under s32(1). As I outlined in that decision, it is not sufficient that information is merely presented at a closed meeting of council, as the Act is clear that:

> *32(3) Subsection (1) does not include information solely because it –*
>
> *(a) was submitted to the closed meeting of a council for consideration; or*
>
> *(b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –*
>
> *if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.*

27 Also relevant is subsection 32(4), which provides that information that is purely factual information will not be exempt unless its disclosure would reveal a deliberation or decision of the closed council meeting that has not been otherwise published.

28 In *Vellacott*[4], while I accepted that the primary document in question (another agreement between Council and P+I) was considered at a closed session of Council, I was not satisfied that it had been *brought into existence* for submission to a closed meeting. I categorised the document as a record of a commercial agreement between the parties, not a record of a closed session of Council. In addition, I noted that there was nothing in the document that disclosed deliberations of Council and the decision by Council to enter into the agreement had been officially published by Council.[5]

29 I also noted that the key terms of the document in *Velacott* had been published in the Auditor-General's report to Parliament "No 1 of 2019-20: Procurement in Local Government" in September 2019.[6] Consequently, I considered that there did not appear to be any remaining part of the document that would be likely to expose the Council or the third party to any competitive disadvantage or which may justify an exemption under other provisions of the Act.[7]

Item 1

30 The main document in question in this case is Item 1, the PDMA, and it is highly similar to the documents considered in *Vellacott*. Firstly, it appears that while the PDMA was presented at a closed session of Council, it was not *brought into existence* for the purpose of a submission to the closed meeting. Rather, it exists to record the agreement between Council and P+I and it is not a record of a closed session of Council.

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[4] See note 3.

[5] See note 3 at [para. 31].

[6] Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government,* September 2019, available at www.audit.tas.gov.au/wp-content/uploads/Report-of-the-Auditor-General-No1-of-2019-20-Procurement-in-Local-Government.pdf, accessed 22 June 2023.

[7] See note 3 at [para. 33].

31 As I noted in *Vellacott*, the purpose of s32 is to enable the exemption of information that reveals confidential discussions and decisions undertaken at closed meetings of councils. As with all exemptions in the Act, s3 clearly indicates that it should be interpreted in order to facilitate the provision of the maximum amount of information and comply with the pro-disclosure objects of the Act. This is especially the case for exemptions, such as s32, which are not subject to the public interest test. It would frustrate the purpose of the Act if such exemptions were interpreted expansively. This intention is made clear by the fact that s32 specifically restricts the circumstances in which information from a closed session of council will be exempt in ss32(2),(3) and (4).

32 Secondly, there does not appear to be anything in the PDMA which discloses deliberations of Council, and the decision to enter into the agreement has been publicly announced by Council. The signed PDMA does not appear to reveal any confidential discussions or deliberations of a closed session of Council. The facts that (a) the agreement exists, and (b) it was being considered in closed session at the 25 August 2014 Council meeting, were officially published by Council.

33 Thirdly, key terms of the agreement have been published in the same Auditor-General's report mentioned above in *Vellacott.* Therefore, as with my decision in that case, it seems that there are no remaining parts of the PDMA that, if disclosed, would be likely to expose Council or P+I to competitive disadvantage or which would justify an exemption under other provisions of the Act.

34 As I indicated in *Vellacott*, the Auditor-General's Report was mentioned, not with reference to any claim for exemption under s32, but because it may be relevant to alternative claims for exemption under other parts of the Act, which could have potentially been raised by Council.

35 For all of these reasons, I am of the view that Council has not discharged its onus under s47(4) of the Act to show why this information should be exempt under s32 and the information is to be released in full to Mr Gardam.

Item 2

36 Item 2 of Mr Gardam's request asks for copies of all amendments or replacement agreements to the PDMA. Similar to the original PDMA, the amended document does not appear to be a record of a closed session of Council or reveal any deliberations. Its key terms have also been set out in the Auditor-General's Report referred to above. Council has again not discharged its onus under s47(4) and this information is to be released in full to Mr Gardam.

Items 3 and 4

37 Council has specified that this information is contained in Schedule 1 of the PDMA. Accordingly, given my findings in relation to Item 1, I also find that the

information in these items are to be released to Mr Gardam for the same reasons.

Preliminary Conclusion

38 For the reasons given above, exemptions claimed pursuant to s32 are not made out.

Conclusion

39 As the above preliminary decision was adverse to Council, it was made available on 27 June 2023 under s48(1)(a) to seek its input before finalising the decision.

40 On 28 June 2023, Council advised that it did not wish to make a submission in response to my preliminary decision.

41 Accordingly, my findings remain unchanged and, for the reasons given above, exemptions claimed by Council pursuant to s32 are not made out.

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

Dated: 28 June 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant legislative provisions

32. Information related to closed meetings of council

(1) Information is exempt information if it is contained in –

(a) the official record of a closed meeting of a council; or

(b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or

(c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b) ; or

(d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(3) Subsection (1) does not include information solely because it –

(a) was submitted to the closed meeting of a council for consideration; or

(b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –

if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.

(4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.

(5) In this section –
closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the *Local Government Act 1993* and includes a closed meeting of a council committee

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-131

Names of Parties: Manuel Sessink and Department of Justice

Reasons for decision: 48(3)

Provisions considered: s35, s37, s39

Background

1 The Tasmanian Government has announced plans to construct a prison in northern Tasmania. The location of the proposed northern prison has proven to be a controversial and sensitive issue. There has been significant public debate and interest in the best site for the project.

2 To progress the project, the State Government formed a siting panel whose role was to recommend to the Government a suitable site for the northern prison. The siting panel developed a targeted expression of interest process, through which various sites were nominated. These potential sites were then shortlisted and marked against set performance criteria. The site that was deemed most suitable was then recommended to the State Government by the panel as the preferred site. As part of this process, the panel engaged the services of consultancy firm Johnstone McGee and Gandy Pty Ltd, which undertook a detailed assessment of the appropriateness of each shortlisted site.

3 On 1 October 2019, the Tasmanian Government announced that the Glen Avon Farms site at 135 Birralee Road, Westbury was proposed to be the site of the northern prison. This site was eventually abandoned, with a further site on Crown land in Westbury then proposed. This second site was also later abandoned and the site of the Ashley Youth Detention Centre in Deloraine is now proposed for the project, following the closure of the current detention facility.

4 On 13 October 2019, Mr Manuel Sessink made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Justice (the Department). His application related to the proposed northern prison. The information requested was:

- *Item 1: A copy of the evaluation made by the siting panel of the targeted expression of interests received by the Department of*

Justice in response to the attached, including disclosure of the evaluation (including commercial) of all 10 sites which have been considered.

- *Item 2: With reference to the attached . . . a copy of the terms of reference and expression of interest evaluation criteria which would have been in place for the Siting Panel prior to the receipt of the expressions of interest.*
- *Item 3: A copy of the selection and appointment documentation for the Siting Panel including the disclosure of the names and positions of the members of the panel, who would have been representing the Tasmanian public.*
- *Item 4: A copy of all correspondence between the Department of Justice and the Meander Valley Council in relation to the Northern Prison Project in the last 24 months.*

5 On 20 November 2019, Mr Sessink sought external review under s45(1)(f) of the Act. His application was accepted, as the timeframe for a decision to be provided by the Department had elapsed and he was not in receipt of that decision.

6 On 21 November 2019, Mr Tom Saltmarsh, a delegated officer of the Department under the Act, released a decision to Mr Sessink regarding his application for assessed disclosure.

7 While all information identified by the Department to be responsive to items 2 and 3 was released in full to Mr Sessink, some information identified as responsive to items 1 and 4 was claimed to be exempt from disclosure under the following sections of the Act:

- s35 – internal deliberative information;
- s37 – information relating to the business affairs of third parties; and
- s39 - information obtained in confidence.

8 The exempt information included agenda documents and minutes relating to meetings of the siting panel between July 2018 and March 2019, and email correspondence between the Department and the Meander Valley Council. It also included the due diligence report prepared by Johnstone McGee and Gandy Pty Ltd and an expression of interest form submitted by Glen Avon Farms (prepared by Meander Valley Council).

9 Following the release of this decision, Mr Sessink elected to extend his external review request to a full review pursuant to s46(2) of the Act.

Issues for Determination

10 I must first determine whether information not released by the Department is eligible for exemption under ss35, 37, or 39 the Act.

11 As ss35, 37, and 39 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that information is prima facie exempt from disclosure under any of these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1.

Relevant legislation

12 I attach copies of sections 35, 37, and 39 to this decision at Attachment 1.

13 Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

14 In his initial request for information, Mr Sessink made submissions to the Department setting out his view that:

> *For clarity, under the Act, an agency's operational information is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). Al requested information is considered operational information under the act and should be made available to the public.*

15 The Department made no submissions in addition to the reasoning contained in its original decision. Its reasoning for non-disclosure is set out in the context of the relevant exemptions claimed. This reasoning will be analysed below.

Analysis

Section 35 – internal deliberative information

16 The siting panel met five times between July 2018 and March 2019 to discuss potential sites for the northern prison. Six agendas and five sets of minutes relating to these meetings were identified as being responsive to Mr Sessink's request. The Department advised my office that there is an additional agenda document as a siting panel meeting planned for late July 2018 did not take place.

17 The Department relied on s35(1)(b) of the Act to exempt in full all agendas and minutes related to siting panel meetings. For information to be exempt from disclosure under this section, I must be satisfied the requested information consists of records of consultations or deliberations between officers of public authorities. I must also be satisfied those consultations or deliberations were made in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

18 The outlined exemption above does not apply to the following:

- purely factual information;

- a final decision, or order or ruling given in the exercise of an adjudicative function; or
- information that is older than 10 years.

19 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*[1] where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

20 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*[2], refers to the decision in Re Waterford and concludes that, regarding factual information:

> *In other words . . . it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*

21 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)*[3] it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.

Agendas

22 There are six agendas which are responsive to Mr Sessink's request, relating to meetings of the siting panel to be held on 5 July 2018, 16 August 2018, 4 October 2018, 13 December 2018 and 4 March 2019. Each of the agendas requested contains factual information expected in an agenda. This includes information such as who attended the meeting, where and when the meeting was held, and items to be discussed at the meeting. The items to be discussed are of a highly summarised nature, such as *EOI final assessment – Decision*, and do not reveal details of the matters discussed or conclusions reached.

23 While there is no question that this information relates to the internal deliberative process regarding the siting of the northern prison, purely factual information cannot be exempt under s35, as it is specifically excluded under s35(2). The agendas appear to be entirely composed of purely factual information and the Department has not discharged its onus under s47(4) to satisfy me that this information should not be disclosed. Accordingly, I determine that the agendas are not exempt under section 35 and they should be released in full to Mr Sessink.

[1] (1984) AATA 518 at 14.
[2] LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30
[3] (1985) 5 ALD 588

Minutes

24 Five sets of minutes were also responsive to Mr Sessink's request, comprising the record of discussions of the siting panel in its meetings of 5 July 2018, 16 August 2018, 4 October 2018, 13 December 2018 and 4 March 2019. There are two sets of minutes dated 13 December 2018, but the Department has advised my office that the nine page document is mislabelled and actually relates to the 4 March 2019 meeting.

25 Each set of minutes contains information concerning where and when each meeting was held, and who was in attendance. Each set of minutes variously contains other similar procedural information such as apologies, confirmation that the minutes of the previous meeting were accepted, that there was no other business and details regarding when subsequent siting panel meetings would be held. This information is purely factual and stands alone from other information included in the minutes. As discussed regarding the agendas, purely factual information cannot be exempt under s35. Accordingly, the following parts of the minutes are not exempt under section 35 and should be released to Mr Sessink:

- *Minutes of Northern Prison Siting Panel, 5 July 2018*
  - *Title and subject of the minutes*
  - *Attendees*
  - *Agenda item 1, 2 and 7*
- *Minutes of Northern Prison Siting Panel, 16 August 2018*
  - *Title and subject of the minutes*
  - *Members and Attendees*
  - *Agenda item 1 and 7*
- *Minutes of Northern Prison Siting Panel, 4 October 2018*
  - *Title and subject of the minutes*
  - *Members in attendance, attendees and apologies*
  - *Agenda item 1, 2 and 6*
- *Minutes of Northern Prison Siting Panel, 13 December 2018*
  - *Title and subject of the minutes*
  - *Members in attendance, attendees and apologies*
  - *Agenda item 1, 2 and 6*
- *Minutes of Northern Prison Siting Panel, 4 March 2019*
  - *Title and subject of the minutes*
  - *Members in attendance, attendees and apologies*
  - *Agenda item 1, 2, 6 and 7*

26 However, I am satisfied that each set of minutes also contains information that is a record of consultations and deliberations of public officers in the course of the deliberative process of selecting a site for the northern prison. Accordingly, the parts of the minutes not listed above are prima facie exempt from disclosure under section 35(1)(b). For completeness, the relevant parts of the minutes found to be prima facie exempt are listed below.

27 *Minutes of Northern Prison Siting Panel, 5 July 2018*

- *Agenda item 3, 4, 5 and 6*

Agenda item 3 records discussion about the northern prison project, including an expected timeframe for completion. It also records details concerning what the role of the siting panel would be during the process, and some preliminary discussion about potential sites.

Agenda item 4 records discussion regarding the terms of reference of the siting panel. It also details discussion relating to subsequent meetings.

Agenda item 5 contains details of the Department's presentation to Custodial Corrections Tasmania regarding progress of the northern prison project to date.

Agenda item 6 contains record of budget information, and the types of sites open for consideration.

28 *Minutes of Northern Prison Siting Panel, 16 August 2018*

- *Agenda item 2, 3, 4, 5 and 6*

Agenda item 3 details updates on the northern prison project since the previous siting panel meeting. It provides that there has been correspondence between the project team and a number of councils. It also noted discussion concerning the status of the expression of interest process.

Agenda item 4 records discussion of the shape of the expression of interest process, including who a targeted expression of interest process would target, and what selection criteria should be considered as part of the expression of interest process. It also records discussion relating to the minimum size of the prison.

Agenda item 5 records discussion of how best to engage with the community and stakeholders.

Agenda item 6 contains records of the Department's advice to the siting panel about what planning and approvals legislation would apply to the project.

29 *Minutes of Northern Prison Siting Panel, 4 October 2018*

- *Agenda item 3, 4, and 5*

Agenda item 3 records a general progress report of the expression of interest process. Agenda item 4 records discussion about the expression of interest assessment pack, including the criteria of assessment.

Agenda item 5 records discussion about what the expression of interest process would look like after the closure of the expression of interest.

30 *Minutes of Northern Prison Siting Panel, 13 December 2018*

- Agenda item 3, 4, and 5

Agenda item 3 records a general progress report of the expression of interest process. It records details regarding who the siting panel have received expression of interest applications from.

Agenda item 4 records discussion about how to proceed after the expression of interest submission closure date. It also records discussion about problems associated with choosing particular sites.

Agenda item 5 records discussion about the promotion of the northern prison siting and other general business.

31 *Minutes of Northern Prison Siting Panel, 4 March 2019*

- *Agenda items 3, 4 and 5*

Agenda item 3 outlines a general progress report of the expression of interest process. It records discussion relating to the due diligence process, and discussion about potential sites for the northern prison.

Agenda item 4 records the expression of interest final assessment of shortlisted sites for the northern prison. It records how each site performed against the selection criteria.

Agenda item 5 records discussion about how the selection process of the northern prison will progress from that point.

Section 33 – Public Interest Test

32 As noted, s35 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt. In making this assessment, I am required consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.

33 In its original decision, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and weighed those matters in favour of disclosure.

34 The Department did not identify any Schedule 1 matters as weighing in favour of exemption. However, it reasoned:

> *. . . it is contrary to the public interest to disclose the information. The overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when making decisions. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision making. Further, it would also lead to a reluctance*

to document the reasons for a decision, with a consequent loss in transparency in the decision-making process.

35 I agree that matter (a) – the general public need for government information to be accessible - is relevant and weighs in favour of disclosure.

36 I agree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. The siting of the proposed northern prison has been subject to ongoing media coverage and public debate in Tasmania. The release of information illustrating how the government has come to select sites for the northern prison will contribute to debate on a matter of broad public interest.

37 I agree with the Department that matters (c) – whether disclosure would inform a person about the reasons for a decision – and (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant and weigh in favour of disclosure. Disclosure of this information would assist the public in understanding how the government came to its decision regarding where to build the northern prison.

38 I agree with the Department that matter (f) – whether disclosure would enhance scrutiny of government decision-making processes – is relevant and weighs in favour of disclosure. The disclosure of this information would allow the public to make an informed evaluation of the appropriateness of the government's decision-making processes regarding where to site the northern prison.

39 In addition to the Schedule 1 matters listed above, I also find that matter (h) – whether disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – to be relevant and weighs heavily against disclosure. Some of the information included in the minutes identifies unsuccessful applicants who put forward their properties as potential sites for the northern prison. While all would have done so on the understanding that the fact of their application would become known if they were successful, there would have been a reasonable assumption that unsuccessful applications would be treated confidentially. It would hinder the fair treatment of persons in their dealings with government if information that identifies unsuccessful sites and applicants, which was provided to the government in confidence, was made available to the public.

40 As quoted above, the Department relied on the inherent principles of s35 which permits exemption of information which contains the internal thinking processes of a public authority. The Department reasoned that if this type of information was released, it would prevent robust discussion between public authority employees on matters of public interest in the future.

41 I do not find this general type of reasoning persuasive. As I noted in my previous decision of *Todd Dudley and Department of Natural Resources and Environment Tasmania*[4]:

[4] (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

It is intended that public information should be accessible to the public and the Act sets out that internal deliberative information should be released to an applicant unless this is contrary to the public interest. Public officers should be conscious that their communications could be disclosed under the Act and should continue to perform their duties appropriately and confidently regardless of this.

42 Overall, I am only satisfied, after balancing the relevant considerations that it would be contrary to the public interest to disclose information which reveals unsuccessful proponents of potential sites for the northern prison. Accordingly, the following information is exempt under s35(1)(b) and not required to be released to Mr Sessink:

- Minutes of Northern Prison Siting Panel Meeting, 16 August 2018
    - 16th to 18th word of dot point 1, of agenda item 3; and
    - 13th to 15th, and 18th to 22nd word of dot point 2 of agenda item 3.
- Minutes of Northern Prison Siting Panel Meeting, 13 December 2018
    - The 8th to 10th word of the second sentence of dot point 1 of agenda item 3;
    - The 7th word of the first sentence of dot point 2, of agenda item 3;
    - The 5th and 6th word of the second sentence of dot point 2, of agenda item 3; and
    - The 1st sentence of dot point 4 of agenda item 4.
- Minutes of Northern Prison Siting Panel Meeting, 4 March 2019
    - The 8th to 11th words of dot point 2 of agenda item 3;
    - The first sentence of dot point 4 of agenda item 3;
    - The 12th to 13th word of dot point 5 of agenda item 3;
    - All information from agenda item 4 from page 4 to 9, except:
        - Dot points one and two;
        - All information relating to 135 Birralee Road, Westbury on pages 2 and 3;
        - The scores and assessment criteria sub-headings for alternate sites from pages 4 – 7;
    - The 10th - 11th words, and 17th – 20th words of dot point 1 of agenda item 5.

43 However, I am not satisfied it would be contrary to the public interest to disclose the remainder of the information provided within the minutes of the siting panel meetings that was found to be prima facie exempt under section 35.

Accordingly, I determine that this information is not exempt from disclosure and should be released to Mr Sessink.

Email correspondence between the Department and the Meander Valley Council

44 Mr Sessink requested *A copy of all correspondence between the Department of Justice and the Meander Valley Council in relation to the Northern Prison Project in the last 24 months.* The Department found 101 emails to be responsive to this request and released the substantial majority of these emails in full to Mr Sessink. However, the Department relied on ss37 and 39 of the Act to redact information from 11 of those emails. I will analyse the Department's application of ss37 and 39 to justify non-disclosure below.

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

45 For information to be exempt under s37 (information relating to the business affairs of a third party), I must be satisfied that releasing the requested information would disclose information related to the business affairs acquired by the Department from a third party, and that –

(a) the information relates to trade secrets; or

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

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

> *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...*

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

48 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*[5] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this

[5] [2017] NSWCA 275 (24 October 2017)

jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

49 Accordingly, the value of the Forestry Tasmania v Ombudsman case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

50 The Department seeks to exempt from disclosure the contents of four emails exchanged between the Department and the Meander Valley Council. In its original decision, the Department relied upon s37(1)(b) to not disclose this information because it concerned the terms of commercial leases with third party businesses. The Department reasoned that if those details were released, other parties would be in a position to offer leases on more competitive terms. I will consider the validity of the Department's reliance on s37 to not disclose requested information from each of the relevant emails below. I note at the outset that information which was released by the Department indicates that there were two leases associated with the Glen Avon Farms site and that these operated on a year to year basis.

Email from Kim Perkins (DoJ) to Martin Gill (MVC), at 3:52 pm on 10 May 2019 and Email from Martin Gill (MVC) to Kim Perkins (DoJ), at 7:56 pm on 12 May 2019

51 The redacted information in these emails confirms the existences of leases on the Glen Avon Farms site, and the services to which they relate. I am not convinced that the release of this information would be likely to expose the lease holder to competitive disadvantage. The redacted information in these emails does not include information relating to the terms of the lease agreement, such as the rent payable. As such, it is not likely that other parties would be in a position to offer leases on more competitive terms. That the leases exist has already been released in other information. Accordingly, I am not satisfied that this information is exempt from disclosure under s37 and it should be released to Mr Sessink

Email from Kim Perkins (DoJ) to Martin Gill (MVC), at 2:58 pm on 17 May 2019

52 The redacted information in this email confirms the existences of leases, the services to which these leases relate, and the length of these leases. As mentioned, for information to be exempt from disclosure under section 37, I must be satisfied that disclosure would likely expose a third party to competitive disadvantage. The only information not released elsewhere is the services to which the leases relate and the Department has not discharged its onus under s47(4) to show why the release of this information would have any likelihood of causing competitive disadvantage to the leaseholder or the owner of Glen Avon Farms. Accordingly, I am not satisfied that this information is exempt from disclosure and it should be released to Mr Sessink.

Email Martin Gill (MVC) to Kim Perkins (DoJ), at 3:58 pm on 17 May 2019

53 The redacted information in this email contains details relating to the terms of the leases including fees paid, and the holders of the leases. This information is not publicly available and I agree with the Department, which reasons that the release of this information would be likely to cause competitive disadvantage to the lease holders. If this information was disclosed, other parties would gain insights and potentially be in a position to offer leases on more competitive terms. While the risk of competitive disadvantage does not appear to be major, there is a genuine likelihood of it occurring. Accordingly, I find this information prima facie exempt from disclosure under s37.

Section 33 – Public Interest Test

54 As noted, s37 is also subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information relating to fees associated with the lease agreements. In making this assessment, again I am required to consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.

55 In its original decision, the Department indicated that it considered Schedule 1 matters (a) and (m) to be relevant. The Department weighed matter (a) in favour of disclosure, and weighed matter (m) against disclosure.

56 I agree with the Department that matter (a) – the general public need for government information to be accessible - is relevant and weighs in favour of disclosure. However, I give this matter minimal weight because the information concerns a private dealing between a service provider and the owners of private property. As such, disclosure of this information would do little to illuminate the workings of government.

57 I agree with the Department that matter (m) - whether disclosure would harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The disclosure of the terms of the leases would provide competitors the opportunity to offer their services on more competitive terms than the current lease holders. This would certainly harm the interests of the current leaseholders. As such I weigh this matter heavily against disclosure.

58 I am satisfied that it is contrary to the public interest to release details regarding leaseholders and the fees associated with the lease agreements to Mr Sessink. This information is exempt from disclosure under s37.

Section 39 - information obtained in confidence

59 Mr Sessink requested a copy of all correspondence between the Department and Meander Valley Council in relation to the northern prison project in the last 24 months. The Department identified email chains between the Department and Meander Valley Council as being responsive to Mr Sessink's request and accordingly released these emails, with redactions, to Mr Sessink. The Department also identified Glen Avon Farms' expression of interest, prepared by

the Meander Valley Council, as being responsive to Mr Sessink's request. The Department relied upon s39(1)(b) to justify the exemption of this document in full.

60 For s39(1)(b) to apply I must be satisfied that the relevant information was communicated to the Department in confidence. It must then be shown that the release of that information would be reasonably likely to impair the ability of the Department to obtain similar information in the future. Whether information is communicated in confidence involves a factual finding based on the surrounding circumstances of the communication. I will assess whether the s39(1)(b) exemption applies to these documents in turn below.

Meander Valley Council and Glen Avon Expression of Interest

61 The Department has relied upon s39(1)(b) to exempt from disclosure Meander Valley Council and Glen Avon Farms' expression of interest application (the EOI) regarding the site of the northern prison.

62 I am satisfied that the EOI was made in confidence. As the Department explained in its Statement of Reasons, one of the conditions of the expression of interest process was that information provided by applicants would be held by the Department in confidence.

63 I am also satisfied that disclosure of the EOI would be reasonably likely to impair the ability of the Department to obtain similar information in the future. I agree with the Department, which reasoned that the Tasmanian public would be less likely to participate in other expression of interest processes conducted by the Department if they were to have reservations about the confidentiality of those processes. Accordingly, I find this information prima facie exempt from disclosure under s39(1)(b) of the Act.

Public Interest Test

64 As noted, s39 too is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the EOI.

65 In its original decision, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and weighed these matters in favour of disclosure. The Department also considered matters (m) and (n) to be relevant, and weighed these matters against disclosure.

66 I agree that matter (a) - the general public need for government information to be accessible – is relevant and I weigh this matter in favour of disclosure.

67 I agree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. As mentioned earlier, the siting of the proposed northern prison has been subject to ongoing media coverage and public debate in Tasmania. The release of the EOI would inform debate on a matter of public interest by informing the Tasmanian public of the merits of the Meander Valley Council and Glen Avon application.

68 I agree with the department that matters (c) – whether disclosure would inform a person about the reasons for a decision - and (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions - weigh in favour of disclosure. The EOI contains information that provides further detail as to the suitability of the Glen Avon site for the northern prison. This information provides some indication as to why Glen Avon was preferred over other alternate sites for the northern prison, though it does not give as much context or reasoning as the assessment of this information at later stages of the process.

69 I agree with the Department that matter (m) – whether disclosure would promote or harm the interests of an individual or group of individuals – is relevant. The terms and details of the EOI relate to private property provided in confidence. However, I only consider this of very slight weight as the information in the EOI is not controversial and does not extend beyond factual information about the attributes of a property which has been publicly announced as the proposed site of the northern prison.

70 I agree with the Department that matter (n) – whether disclosure would prejudice the ability to obtain similar information in the future – is relevant, and I weigh this matter heavily against disclosure. I accept the Department's submission that given the confidential nature of the expression of interest process, the disclosure of an application would prejudice the ability of the Department to obtain responses to similar processes it might conduct in the future.

71 Overall, this is a difficult assessment in this instance. In most circumstances, similar expressions of interest would be exempt from disclosure. However, in these circumstances, where the EOI has been co-authored by a public authority and is highly factual, I find it appropriate for this information to be disclosed.

72 I also recognise that, while the EOI was submitted in confidence, Glen Avon Farms has been publically announced as the site for the northern prison. The release of this information will help to inform the public of why it was selected, at least at one stage, as the site for the northern prison.

73 I am satisfied that it is not contrary to the public interest to release the EOI. Accordingly, it is not exempt from disclosure and should be released to Mr Sessink.

Email Correspondence

74 The Department has relied upon s39(1)(b) to exempt from disclosure parts of emails exchanged between the Department and Meander Valley Council. The email chains impacted are briefly described below.

Emails between Martin Gill (MVC) and Kim Perkins (DoJ), at 12:48 and 2:23pm on 26 April 2019

75 These two emails are part of an email chain between the Department and Meander Valley Council. The subject of this exchange is the organisation of a meeting between the Department, Meander Valley Council and the owner of the Glen Avon Site. However within this exchange there is the mention of alternate sites that were not successful in the expression of interest process. The alternate sites that were mentioned in the above mentioned emails and have been redacted.

Emails between Kim Perkins (MVC) and Martin Gill (DoJ) at 3:52 pm on 10 May 2019, 7:56 and 8:30pm on 12 May 2019, and 7:46am on 13 May 2019

76 These four emails are part of an email chain between the Department and Meander Valley Council. The subject of this exchange is discussion around leases or subleases attached to potential sites for the northern prison. Alternate sites are named in these emails as part of this exchange and have been redacted.

Emails between Kim Perkins (DoJ) and Dino De Paoli (MVC) at 9:49, 9:52 and 9:53 am on 9 July 2019

77 These three emails are part of an email chain between the Department and Meander Valley Council. The subject of this exchange is discussion relating to requests for advice from a consultancy firm in relation to an alternate site for the northern prison. Alternate sites are named in these emails and have been redacted. I note that in one of the above emails the name of an alternate site was seemingly inadvertently released.

78 I am satisfied that information which is included in these emails was provided in confidence by applicants as part of the expression of interest process for the siting of the northern prison.

79 I am also satisfied that disclosure of the details of alternate sites for the northern prison would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future. I agree with the Department, which reasoned that the Tasmanian public would be less likely to participate in other expression of interest processes conducted by the Department, if they were to have reservations about the confidentiality of those processes. Accordingly, I find this information prima facie exempt from disclosure under s39(1)(b) of the Act.

Section 33 – Public Interest Test

80 As noted, s39 too is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release information redacted in emails exchanged between the Meander Valley Council and the Department. I note that the Department, in its Statement of Reasons, applied the same reasoning in its application of the public interest test to the email correspondence between Meander Valley Council and the Department as it did in relation to the EOI.

81 In its original decision, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and weighed these matters in favour of disclosure. The Department also considered matters (m) and (n) to be relevant and weighed these matters against disclosure.

82 I agree that matter (a) - the general public need for government information to be accessible – is relevant and I weigh this matter in favour of disclosure.

83 I agree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. As mentioned earlier, the siting of the proposed northern prison has been subject to ongoing media coverage and public debate in Tasmania. The release of alternate sites for the northern prison would enhance debate on a matter of broad public interest.

84 I agree with the Department that matters (c) – whether disclosure would inform a person about the reasons for a decision, (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions - and (f) – whether disclosure would enhance scrutiny of government decision-making processes - are relevant. The release of alternate sites for the northern prison would provide relevant context which would help to inform the public about why Glen Avon was chosen as the preferred site for the northern prison. However, the redacted information in these emails does not provide any guidance as to *why* Glen Avon was selected over alternate sites. Accordingly, I only marginally weigh these factors in favour of disclosure.

85 I agree with the Department that matter (m) – whether disclosure would promote or harm the interests of an individual or group of individuals – is relevant, and I weigh this factor heavily against disclosure. The siting of the northern prison is a controversial issue. I accept the Department's argument that unsuccessful applicants may withdraw their application in response to potential pressure from the public, if their application was made public and may not resubmit their property in any future process. Applicants may miss out on any financial windfall they would otherwise enjoy as a result of their property being selected as the site of the northern prison.

86 I agree with the Department that matter (n) – whether disclosure would prejudice the ability to obtain similar information in the future – is relevant, and I weigh this matter heavily in favour of non – disclosure. Given the confidential nature of the expression of interest process, the disclosure of alternate sites would prejudice the ability of the Department to obtain responses to similar processes it might conduct in the future.

87 Overall, I am satisfied that it is contrary to the public interest to release the locations of alternate sites redacted in these emails. Accordingly, this information is exempt from disclosure pursuant to s39(1)(b).

Out of scope information

88 Mr Sessink's request for assessed disclosure specifically sought *A copy of all correspondence between the Department of Justice and the Meander Valley Council in relation to the Northern Prison Project in the last 24 months*. However, some of this correspondence includes exchanges between either the Department or the Meander Valley Council, and third parties. These parts of the email chains have been redacted. The Department appears to have considered these parts of the email chains to beyond the scope of Mr Sessink's request. While I do not have the ability to make a determination on whether information is within the scope of a request as part of this external review, I encourage the Department to take a wider view of what is within the scope of a request in future. Information within an email chain which was sent between the Meander Valley Council and Department could have been considered within the scope of Mr Sessink's request and s3(4) of the Act is explicit that discretions conferred should be exercised to release the maximum amount of information.

Due Diligence Report

89 The Department identified a due diligence report on the Glen Avon Farms site, prepared by Johnstone McGee and Gandy Pty Ltd, as being responsive to Mr Sessink's request for assessed disclosure. The Department relied upon s39(1)(a) - that disclosure would divulge information communicated in confidence which would be exempt had it been generated by the public authority – to exempt the due diligence report.

90 For s39(1)(a) to apply I must first be satisfied the requested information was communicated to the Department in confidence. Once it has been established that the communication was communicated in confidence, it must then be shown that the information would be exempt if it were generated by a public authority.

91 I am satisfied that the due diligence report prepared by Johnstone McGee and Gandy Pty Ltd was provided to the Department in confidence. The report was produced to inform the Department about the suitability of potential sites for the proposed northern prison. This was done against the backdrop of a confidential expression of interest process that did not divulge the identity of properties put forward as potential sites for the northern prison.

92 I am satisfied the information would be prima facie exempt from disclosure if it were generated by a public authority. This is a report that would be considered to be internal deliberative information under s35(1)(a) if it was produced by an officer of a public authority, as it contains expert opinion which informs the deliberative process of the Department regarding the suitability of various sites for the proposed northern prison. Accordingly, I find the whole of the due diligence report is prima facie exempt from disclosure under s39(1)(a).

Section 33 – Public Interest Test

93 As noted, s39 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt.

94 In its original decision, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d) and (f) to be relevant, and weigh these matters in favour of disclosure. I also find that matters (h) and (m) are relevant and weigh these matters in favour of non – disclosure.

95 I agree with the Department that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.

96 I agree with the Department that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. As mentioned earlier, the siting of the proposed northern prison has been subject to ongoing media coverage and public debate in Tasmania. The release of information regarding potential alternative sites for the northern prison would enhance debate on a matter of broad public interest.

97 I agree with the Department that matters (c) – whether disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant and weigh in favour of disclosure. The due diligence report provided guidance to the northern prison siting panel regarding the suitability of proposed sites. The disclosure of this report would inform the Tasmanian public about why the Glen Avon Farms site was selected over alternate sites.

98 I agree with the Department that matter (f) - whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – is relevant and weighs in favour of disclosure. The release of the due diligence report would inform the Tasmanian public of the fact that the northern siting panel engaged with an external consultant to inform its opinion of the appropriateness of proposed sites.

99 I also find that matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – is relevant and weighs against disclosure. Applicants participated in the expression of interest process on a confidential basis. The due diligence report identifies unsuccessful applicants for the northern prison. The confidential nature of the expression of interest would be undermined if details that identified applicants was released.

100 I also find that matter (m) – whether disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The siting of the northern prison is a controversial issue. Those

associated with the expression of interest process may withdraw their application in response to potential pressure from the public.

101 The Department did not identify any Schedule 1 matters as weighing in favour of exemption. However, it reasoned that there was an overriding public interest consideration in non-disclosure so that officers of public authorities can be confident in having frank and robust discussions when making decisions. The Department reasoned that disclosure would prevent such robust discussions from occurring in the future and that this would impact decision making. The Department also reasoned disclosure would lead to public authority employees being less likely to document their reasons for a decision, which would mean a consequent loss in transparency surrounding decision-making processes.

102 As already discussed in relation to s35, and as I have mentioned in previous decisions, I do not find this general type of reasoning persuasive. It is not even relevant in this instance, as the report was prepared by paid consultants who should be expected to provide appropriate advice regardless of whether this may be released under the Act.

103 Overall, there is a difficult balance to strike, however, I am satisfied that it is contrary to the public interest to release the following information that identifies unsuccessful applicants to Mr Sessink:

104 *Table of Contents (Pages 3 – 4)*

- Point 1.2.2
- Point 1.2.3
- Point 1.2.4
- Point 3.2
- Point 3.3
- Point 3.4

105 *Table of Figures*

All information regarding:

- Figure 3, 5, 7, 21, 22, 24, 26 – 31, 35 – 37, 42 – 50, 75 - 80, 82 – 88, 92 – 94, 96 -112, 119 – 123, and 126.

106 *List of Tables*

- The first five words of Table 1
- The first three words of Table 2

107 *Executive Summary (pages 8 and 9)*

- All words on lines 9 – 13 on page 8
- The 8th and 9th word of the 8th line, of the 4th paragraph on page 8
- The 9th - 15th words of the 9th line, of the 4th paragraph on page 8

- The first three words of the 10th line, of the 4th paragraph on page 8
- The 6th, and 10th – 13th words of the 1st line, of the 5th paragraph on page 9
- The first word of the second line, of the 5th paragraph on page 9
- The last 4 words of the 4th line of the 5th paragraph on page 9
- The first 6 words and last 4 words of the 5th line of the 5th paragraph on page 9
- The first 11 words of the 6th line of the 5th paragraph on page 9
- The 11th – 13th words of the 1st line, of the 7th paragraph on page 9
- The 1st 3 words of the 3rd line, of the 7th paragraph on page 9
- The 5th word of the 7th line, of the 7 the paragraph on page 9
- The 9th – 10th, and 15th – 16th words of the first line of the 8th paragraph on page 9

108 *Project Background (page 10)*

- All of lines 3 – 7 of the 4th paragraph on page 10

109 *Site Descriptions (Pages 11 – 17)*

- All of this section including headings, images and footnotes on pages 12 – 17 – except for 1.2.1 and Figure 2

110 *Site Assessment Methodology (pages 18 - 23)*

- The 1st – 2nd and 4th - 5th words in the 3rd heading on page 19
- The last word on the second last line on page 19
- The 1st – 2nd and 4th – 5th words on the last line on page 19
- The 6th – 15th words of the 1st line on page 20
- All of the information in Table 1, including the heading
- All references to alternate sites in Table 2
- The 1st three words of he 1st heading on page 21
- The 10th to 12th words on the first line of the first paragraph below the 1st heading on page 21
- The first three words of the Heading of Table 2 on page 21
- The first three words of the first line of Table 2 on page 21

111 *Site Assessments (Pages 24 - 81)*

- The incorrect address provided in Table 5
- Parts 3.2 – 3.4.7 on pages 38 – 81 of this section (including footnotes) except for headings

112 *Conclusions (Pages 82 – 96)*

- The last sentence of paragraph 9 on page 83
- The 11th – 12th word of the first line of the 9th paragraph on page 84
- The 2nd – 3rd, and 9th – 12th words in the first line of the 10th paragraph on page 84
- The 10th word of the 10th line of the 10th paragraph on page 84
- The 16th – 19th words of the 3rd line of the first paragraph in section 4.2 on page 85
- The 8th – 10th words of the first line of the 5th paragraph on page 86
- The 10th – 11th words of the 3rd line of the 5th paragraph on page 86
- The 1st – 4th and 8th – 10th words of the second line of the first paragraph under section 4.4 on page 91
- The 1st – 3rd and 8th – 11th words of the first line of the second paragraph under section 4.4 on page 91
- All references to alternate sites and their scores in table 16 on page 91
- All references to land use activities except for concrete batching in table 16 on page 91
- The 7th – 9th words of the first line of the second paragraph under the heading 'Potential Containments of Concerns' on page 91
- All references to activity types and associated chemicals except for agricultural / horticultural and concrete batching plant in Table 17 on pages 91 and 92
- The last word of the first line of the second paragraph on page 92
- The first two words of the second paragraph on page92
- The 4th – 15th words of the first line of the third paragraph under Summary of Desktop Findings heading on page 92
- The first two words of the second line of the third paragraph under Summary of Desktop Findings heading on page 92
- All references to alternate sites and how each alternate site answered the questions provided in Table 18 on page 92
- The last 8 words of the first line of the first paragraph on page 93
- The 9th – 11th words of the first line of the second paragraph on page 93
- The first word of the 3rd line of the second paragraph on page 93
- The last 3 words of the 5th line of the second paragraph on page 93
- The first 3 words of the 6th line of the second paragraph on page 93

- The 2nd – 5th words of point number 8 under Environmental Assessment Limitations on page 93
- The 8th – 11th words of the first dot point under the heading 'Environmental Conclusions' on page 93
- The 6th – 9th words of the second dot point under the heading 'Environmental conclusions' on page 93
- The 11th – 12th words of the 4th dot point under the heading 'Environmental Conclusions' on page 93
- The last 4 words of the third bullet point under the heading 'Environmental Recommendations' on page 94
- The 9th- 15th word of the 4th bullet point under the heading 'Environmental Recommendations' on page 94
- The 10th and 11th words of the 5th bullet point under the heading 'Environmental Recommendations' on page 94
- The last 2 words of the first line of the 4th paragraph in section 4.5 on page 94
- The 1st – 11th words of the 2nd line of the 4th paragraph in section 4.5 on page 94
- The 6th – 14th words of the 5th line of the 4th paragraph in section 4.5 on page 94
- The 6th – 16th words of the 6th line of the 4th paragraph in section 4.5 on page 94
- The 1st – 6th words of the 7th line of the 4th paragraph in section 4.5 on page 94
- All references to alternate sites in Appendix A on page 99
- All references to names of roads in Appendix B on page 101 and 103
- All information from Appendix D, E and F including footnotes.

113 I am not, however, satisfied that it is contrary to the public interest to release the remainder of the due diligence report. The Department has not discharged its onus under s47(4) to show why this should be exempt and, as such, it should be released to Mr Sessink.

Preliminary Conclusion

114 Accordingly, for the reasons given above, I determine that exemptions claimed by the Department pursuant to ss35, 37 and 39 are varied.

Conclusion

115 As the above preliminary decision was adverse to the Department, it was made available to the Department on 18 April 2023 under s48(1)(a) to seek its input before finalising the decision.

116 The Department advised on 24 May 2023 that it would not be making any submissions in response to the preliminary decision.

117 Accordingly, for the reasons given above, I determine that exemptions claimed pursuant to ss35, 37 and 39 are varied.

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

Dated: 24 May 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant legislation

Section 35 – Internal deliberative information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 37 - Information relating to business affairs of third party

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

(a) the information relates to trade secrets; or

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

(2) If –

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

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

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

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

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

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

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

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

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

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

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

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

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

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

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

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

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

Section 39 – Information obtained in confidence

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

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

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

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

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

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

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

Section 33 – Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information

Act Review **Case Reference:** R2202-

104 **Names of Parties:** Manuel Sessink and Meander Valley Council

Reasons for decision: s48(3)

Provisions considered: ss36, 37, 38 and 39

Background

1 The Tasmanian Government has announced plans to construct a prison in northern Tasmania. The location of the northern prison has proven to be a controversial and sensitive issue. There has been significant public debate and interest in the best site for the project.

2 To progress this project, an Expression of Interest process was developed by the State Government to identify suitable sites. As part of this process the Meander Valley Council (Council) submitted an Expression of Interest application on behalf of Glen Avon Farms Pty Ltd (Glen Avon) nominating their property at 135 Birralee Road, Westbury as a potential site for the northern prison.

3 On 1 October 2019, the Tasmanian Government announced that the Glen Avon property was proposed to be the site of the northern prison. This location was eventually abandoned, with the site of the Ashley Youth Detention Centre in Deloraine now proposed for the project.

4 On 23 December 2019, Mr Manuel Sessink submitted an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to Council. Mr Sessink requested access to the following 12 items of information:

> 1. *I request a copy of the Deed of Agreement, signed by the Meander Valley Council and Glen Avon Farms Pty Ltd on 11 August 2009 in relation to the industrial area on the Birralee Rd.*
>
> 2. *I request a list of all financial transactions between Meander Valley Council and Glen Avon Farms Pty Ltd since the signing of the Deed on 11 August 2009 and confirmation of the current Debt under the Deed mentioned above.*

3. *I request a copy of all correspondence and records of interactions between the General Manager of the Council and landowners in the*

Meander Valley municipality regarding the Expression of Interest and site visits.

4. *I request a copy of each of the Expressions of Interest for the Northern Prison Project as submitted by the Meander Valley Council to the Tasmanian State Government.*

5. *I request a copy of all correspondence between the Meander Valley Council and Glen Avon Farms Pty Ltd in relation to the Deed, the Debt and the Expressions of Interest.*

6. *Without limiting the above, I specifically request:*

    a. *The authority given by Glen Avon Farms Pty Ltd for the Meander Valley Council to submit the Expression of Interest on its behalf; and*

    b. *The letter or email which accompanied the submission of the Expression of Interest*

7. *I request a list of all meetings and copies of the minutes those meetings held between Meander Valley Council and the Tasmanian State Government to discuss the Expression of Interest and any meeting where proposed correctional facilities in the Meander Valley Municipality were discussed since 1 June 2017.*

8. *I request a copy of all correspondence between the Meander Valley Council and Glen Avon Farms Pty Ltd in relation to the Northern Prison Project since 1 June 2017.*

9. *I request a copy of all correspondence between the Meander Valley Council and the Tasmanian State Government in relation to proposed correctional facilities in the Meander Valley Municipality since 1 June 2017, including all communication in relation to the planning scheme transition to the local provisions schedule.*

10. *I request a copy of all internal correspondence of the Meander Valley Council in relation to proposed correctional facilities in the Meander Valley Council Municipality since 1 June 2017, including all communication in relation to the planning scheme transition to the local provisions schedule.*

11. *I request correspondence between the Acting General Manager and the Mayor on the one part and representatives of the State Government on the other, as well as the Council's internal correspondence, in relation to the booking of the Town Hall for the Ministers meeting of 16th December 2019 and the attempt by WRAP* **[Westbury Region Against the Prison]** *Inc to book the Town Hall on 15th December 2019.*

12. *I request a copy of internal Council correspondence in relation to the letters and emails received from WRAP Inc.*

5 On 23 January 2020 Mr Jonathan Harmey, Council's then Acting General Manager, issued Council's first decision to Mr Sessink. Mr Harmey found information identified as responsive to items 1, 2, 5, 6, 9, 10, 11, and 12 of Mr Sessink's application exempt from disclosure, either partially or in full. Exemptions under s36 (personal information), s37 (information relating to the business affairs of a third party), s38 (information relating to the business affairs of a public authority), and s39 (information obtained in confidence) were applied by Council. Mr Harmey advised that he would be seeking the input of third parties in accordance with s37 of the Act before making a decision as to whether information responsive to items 3, 4, and 8 should be made available to Mr Sessink. All available information identified as responsive to item 7 of Mr Sessink's application was released in full to Mr Sessink, except for minutes of meetings held on the following dates as no minutes were recorded for these meetings:

- 28 August 2019;
- 22 October 2019;
- 2 November 2019;
- 16 December 2019; and
- 16 December 2019.

6 On 1 March 2020, Mr Sessink submitted an application for external review to this office.

7 On 30 June 2020, Council's then General Manager Mr John Jordan issued a second decision to Mr Sessink after receiving the input of relevant third parties as required under s37(2) of the Act. Mr Jordan applied ss36 and 37 of the Act to partially exempt information identified as responsive to items 3, 4 and 8 of Mr Sessink's application for assessed disclosure.

8 Upon review of Mr Sessink's file, it was noted that there was a jurisdictional issue with the first decision issued to Mr Sessink by Mr Harmey. The decision did not include information about Mr Sessink's right of review or details regarding how to seek review. This is a mandatory requirement under s22(2)(c) of the Act. Mr Sessink did not appear to have been aware of how to seek external review, as he did not apply for external review within 20 working days as required by s45(3) of the Act.

9 On 2 June 2023, my office wrote to Council asking whether it would consider reissuing the first decision to Mr Sessink, this time in compliance with s22(c) of the Act in order to ensure Mr Sessink was able to exercise his right of external review.

10 On 16 June 2023, Mr Harmey advised my office that Council would reissue this decision in compliance with the Act and on 5 July 2023 Mr Jordan did so.

11 On 27 July 2023, Mr Sessink submitted an application for external review to my office in relation to the decision reissued to him on 5 July 2023.

Issues for Determination

12 First, I must determine whether any redacted information is eligible for exemption under ss36, 37, 38 or 39 of the Act.

13 Second, should I determine that information is prima facie exempt from disclosure under ss36, 37, 38 or 39 of the Act, I am then required to determine whether it would be contrary to the public interest to release it by applying the public interest test contained in s33. In making this assessment I must have regard to, at least, the matters contained in Schedule 1.

Relevant legislation

14 Relevant to this review are ss36, 37, 38 and 39 of the Act. I attach copies of these sections to this decision at Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

15 Mr Sessink submitted that he was dissatisfied with the redactions applied to information released to him, setting out:

> *I disagree with the level of redaction in the information provided, including in particular the exemption of names of public authority staff.*

Council

16 Council did not make specific submissions in relation to this external review, beyond the reasoning of its decisions.

17 Mr Harmey's decision of 23 January 2020 set out that he had applied ss37, 38, and 39 of the Act to exempt from disclosure information responsive to items 1, 2, and 5 of Mr Sessink's request (with the same reasoning repeated under each item):

> *I have provided notice in writing to Glen Avon Farms that Meander Valley Council (Council) had received an application for the information in the request and*
>
> - *Stated the nature of the information applied for; and*
> - *Request that, within 15 working days from the date of the notice, Glen Avon Farms provide their view as to whether the information should be provided.*
>
> *I have received the view of Glen Avon Farms and have formed the view that the information is exempt under section 37 of the Right to Information Act 2009 (Act) on the basis that the disclosure of the information under the Act would be likely to expose Glen Avon Farms to competitive disadvantage. It is particularly important that*

> *any release of commercially sensitive information does not do damage to a business. As Council is a party to this agreement I am of the opinion that it is exempt under section 38 of the Act. Glen Avon Farms also provided me with the view that the information was a confidential document, communicated in confidence. I share this view and also consider it to be exempt under section 39 of the Act.*

18 With regard to each request under item 6, 9, 10, 11 and 12, Mr Harmey reasoned that ss36 and 39 of the Act applied to exempt some information identified as responsive to Mr Sessink's request (with comments repeated for each item):

> *You will note that I have amended the documents to ensure that personal information of a person is not disclosed in accordance with section 36 of the Act. This is because releasing this information would involve the disclosure of the personal information of a person other than the person making the application under section 13 of the Act. Personal information meaning any information or opinion in any recorded format about an individual whose identity is apparent or readily ascertainable from the information. You will note that in a small number of instances I have amended the documents to ensure that information obtained in confidence is not disclosed in accordance with section 39 of the Act. This has been amended on the basis that disclosure of that information would be reasonably likely to impair the ability of Council to obtain similar information in the future.*

19 In relation to items 9 and 10, Mr Harmey also explained:

> *There is no correspondence in relation to proposed correctional facilities in the Meander Valley Council Municipality with regard to the planning scheme transition to the local provisions schedule. Council was not aware of any Expression of Interest or opportunity for landowners to submit their land for consideration to the State Government when Council endorsed the Local Provisions Schedule on 12 December 2017. There has been no discussion with the Tasmanian Planning Commission about a correctional facility.*

20 Following the receipt of further responses from landowners consulted with by Council, Mr Jordan's decision of 30 June 2020 set out Council's response in relation to items 3, 4, and 8. Mr Jordan applied ss36 and 37 of the Act to exempt from disclosure information responsive to Mr Sessink's application (with the same reasoning repeated for each item):

> *I have reviewed the view of third party landowners and have formed the view that the information is able to be provided with redaction of personal information of a person and redaction of information relating to the business affairs of a third party that if released would be likely to expose the third party that provided the information to*

substantial harm to the third party's competitive position. It is particularly important that any release of commercially sensitive information does not do damage to a business.

Analysis

Section 36 – Personal Information of a Person

21 For information to be exempt under 36 of the Act, I must be satisfied that its release would reveal the identity of a person other than the applicant, or that its release would lead to that person's identity being reasonably ascertainable.

22 Council applied s36 throughout the information found to be responsive to Mr Sessink's request. I will not address each individual application of s36 by Council, rather, I will assess Council's application of s36 of the Act in relation to the following categories of people:

- public authority staff;
- third party professionals;
- information identifying the Glen Avon site and its owners;
- personal information identifying unsuccessful applicants in the Expression of Interest process; and
- community members.

Personal details of public authority staff

23 On numerous occasions, Council found the names, position titles, phone numbers and email addresses of public authority staff exempt from disclosure under s36 of the Act.

24 As I have consistently held in previous decisions,[1] the names of public officers performing their regular duties are not usually exempt under s36. It is standard Australian practice[2] that the personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption. Council has not established that such circumstances exist in this case. Accordingly, this information is not exempt and should be made available to Mr Sessink.

25 The requested information also reveals that on occasion Councillors and Council staff use their personal emails or phone numbers to conduct Council business. Though Council has not advanced why it would be contrary to the public interest to reveal this information, I recognise that the release of these

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[1] See *Simon Cameron and Department of Natural Resources and Environment Tasmania* (January 2022), *Camille Bianchi and the Department of Health* (November 2021), *Clive Stott and Hydro Tasmania* (February 2021), *C and Department of Primary Industries, Parks, Water and Environment* (December 2021) at www.ombudsman.tas.gov.au/right-to-informatin/reasons-for-decisions.

[2] See *Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013) at [72]-[74].

kinds of personal details could expose those individuals to a risk of harm and that it would be contrary to the public interest to do so.

26 Accordingly, I find the personal email addresses and personal phone numbers of all public authority staff contained in the requested information are exempt from disclosure under s36 of the Act.

Personal information of third party professionals engaging with public authorities

27 Council has sought to exempt from disclosure the personal information of professional third parties engaging with Council and the Department of Justice, namely, communication consultancy staff and members of the media. This information includes names, position titles, professional contact details and work place addresses. The information in this category is minimal.

28 While this is personal information and is prima facie exempt from disclosure under s36 the Act, Council has not advanced any particular reasoning as to why it would be contrary to the public interest to release this information.

29 The parties are simply acting in their professional capacity in their respective roles. Notwithstanding the sensitivity surrounding the siting of the northern prison, it is not readily apparent to me why disclosure of their professional details would be of concern to them or harm their interests. Council has not discharged its onus as required under s47(4) of the Act to show why it would be contrary to the public interest to disclose this information. As such, this information is not exempt and should be made available to the applicant.

Information identifying the Glen Avon site and its owners

30 Council has sought to exempt from disclosure information which would reveal the identities of those who applied to have their property be the site of the northern prison.

31 As I discussed at paragraph 72 of my recent decision of *Manuel Sessink and Department of Justice*,[3] I am not satisfied that it would be contrary to the public interest to disclose information identifying the Glen Avon site or its owners, as this location had previously been announced by the Tasmanian Government as the preferred site for the northern prison. Accordingly, I find that this information should be made available to Mr Sessink.

Information identifying unsuccessful applicants for the site of the northern prison

32 Council has sought to exempt from disclosure information which would reveal the identities of those who unsuccessfully applied to have their property be the site of the northern prison.

33 As I discussed at paragraph 42 of my recent decision of *Manuel Sessink and Department of Justice*,[4] I consider that it would be contrary to the public interest to disclose information revealing those who unsuccessfully applied to

[3] See *Manuel Sessink and Department of Justice* (24 May 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions, at [72].
[4] See Note 3 at [42].

have their property be the site of the northern prison. Accordingly, for the same reasons, I find that redactions applied to the names of unsuccessful applicants are appropriate and this information is exempt under s36.

34 I also find that exemptions claimed under s36 in the following emails are upheld because the release of this information would make the identities of unsuccessful applicants reasonably ascertainable:

- email from Meander Valley landowner to Mr Gill on 26 April 2019 at 11:12am;
- email from Mr Gill to Meander Valley landowner on 10 May 2019 at 4:09pm;
- email from Meander Valley landowner to Mr Gill on 9 May 2019 at 6:18pm; and
- email from Meander Valley landowner to Mr Gill on 10 May 2019 at 7:17pm.

Personal information of other community members

35 Council has sought to exempt from disclosure the personal information of various members of the public who contacted Council to express their concern regarding the northern prison project. This information is prima facie exempt under s36 of the Act.

36 It does not appear that the release of this information would contribute to public debate surrounding the siting of the northern prison or aid understanding of the material. However, the release of personal information, such as names, contact details, and home addresses of members of the public, may expose members of the public to a risk of harm. As such, I find that it would be contrary to the public interest to release this information to Mr Sessink. Accordingly, this information is exempt from disclosure under s36 of the Act.

Section 37 – Information Relating to Business Affairs of Third Party

37 Section 37(1)(b) of the Act provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if its disclosure would be likely to expose the third party to competitive disadvantage.

38 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman* [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...*

39 At paragraph [59] the Court further held that . . . *The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage. . .*

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

41 I note here, that in the New South Wales Supreme Court decision *of Kaldas v Barbour*[5] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

42 Accordingly, the value of the Forestry Tasmania v Ombudsman case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

Deed of Agreement between Meander Valley Council and Glen Avon Farms

43 Council applied s37(1)(b) of the Act to exempt the Deed of Agreement (the Deed) between Council and Glen Avon from disclosure in full, on the basis that its release would be likely to expose Glen Avon to a competitive disadvantage.

44 Having read the document, I am not satisfied that it contains information that would be likely to expose Glen Avon, or any other third party, to a competitive disadvantage. It simply provides the terms of the agreement for Council to design and construct infrastructure works to enable a subdivision and recover the costs from the property owners. There are no costings or details of business undertakings which appear likely to cause competitive disadvantage to Glen Avon. That the agreement exists is already in the public domain. Council has not discharged its onus under s47(4) to show why this

[5] [2017] NSWCA 275 (24 October 2017)

information would be even prima facie exempt under s37(1)(b), so it should be released to Mr Sessink.

All financial transactions between Meander Valley Council and Glen Avon since 11 August 2009, and confirmation of current debt under the Deed of Agreement

45 Council has applied s37(1)(b) of the Act to exempt from disclosure in full a document which records all financial transactions between Council and Glen Avon between 24 March 2010 and 30 September 2020, including the accrual of interest on monies owing.

46 The release of information revealing the amount of debt owed by Glen Avon to Council has the potential to cause Glen Avon a competitive disadvantage. I am satisfied that there is a legitimate likelihood that Glen Avon's competitors would be able to use this information to garner an advantage over Glen Avon. Accordingly, I find that this information is prima facie exempt from disclosure under s37(1)(b) of the Act.

All correspondence between the General Manger of Council and the land owners in the Meander Valley Municipality regarding the Expression of Interest and site visits

47 Council has applied s36 or s37 of the Act to exempt from disclosure information responsive to this aspect of Mr Sessink's request. As I have already assessed redactions applied by Council under s36 to the names of parties in the address lines of relevant emails, the following assessment will be confined to Council's use of s37 in the body of the emails.

48 Six emails were identified by Council as being responsive to this part of Mr Sessink's request. I will now assess the validity of Council's application of s37(1)(b) to each of these emails in turn below.

Email dated 15 November 2018, 10:54am

49 Council's first application of s37(1)(b) of the Act to this part of Mr Sessink's request is to an email dated 15 November 2018 sent from the Managing Director of Glen Avon Mr Neville Pope, to the then General Manager of Council Mr Martin Gill. It has been applied to information revealing the fact that two businesses hold annual leases at the Glen Avon site.

50 I am unable to see how the release of this information, in and of itself, without additional information such as the fees paid under these leases, would expose these businesses to a competitive disadvantage. Furthermore, I note that I have directed that this information be released to the applicant in my recent decision of *Manuel Sessink and Department of Justice*.[6] Accordingly, I find that this information is not exempt from disclosure.

Emails dated 23 January 2019, 10:21pm, 10:15pm, 10:27pm, 9:22pm

51 Council appears to have attempted to rely on s37(1)(b) of the Act to exempt from disclosure information in this correspondence which would either

[6] *Manuel Sessink and Department of Justice* (24 May 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions, at [51].

identify businesses operating at the Glen Avon site, or make the Glen Avon site readily identifiable. The release of information merely identifying the Glen Avon site or identifying businesses operating at the site is unlikely to cause Glen Avon or those businesses competitive disadvantage. Accordingly, I am not satisfied that Council has discharged its onus under s47(4) to show why this information would be exempt and it is to be released to Mr Sessink.

Email dated 23 January 2019 sent from Mr Gill to Mr Pope

52 Again, Council has sought to exempt from disclosure information which would identify the Glen Avon site, and businesses operating at this site, which as discussed above, does not qualify for exemption under s37(1)(b).

53 However, redactions have also been applied to information contained in the first four words of dot point seven of this email, which if revealed, would identify the lease holders of a business operating on the Glen Avon site. Though I find that the release of this information would not be likely to cause a competitive disadvantage, for the sake of completeness, I will re-iterate that this information is exempt from disclosure under s36 of the Act.

A copy of all correspondence between Meander Valley Council and Glen Avon Farms Ltd in relation to the Deed, the Debt and the Expression of Interest

53 As discussed, I am not satisfied that the release of the Deed would expose a third party to a competitive disadvantage. However, I am satisfied that the release of the debt accrued under the Deed could expose a third party to a competitive disadvantage.

54 I also consider that the Expression of Interest prepared and submitted by Council on behalf of Glen Avon is not exempt from disclosure under s37(1)(b) of the Act. The Expression of Interest contains Glen Avon's submission as to why their property would be an appropriate site for the proposed northern prison. I am not satisfied that it contains any information which, if released, would expose any third party to a competitive disadvantage.

55 Furthermore, I note that I directed that this information be released to the applicant in my recent decision of *Manuel Sessink and Department of Justice*.[7] Accordingly, this document is not exempt from disclosure under s37(1)(b) of the Act.

A copy of all correspondence between Meander Valley Council and Glen Avon in relation to the Northern Prison Project since 1 June 2017

56 Information responsive to this request is also information identified as responsive to item three (*All financial transactions between Meander Valley Council and Glen Avon since the signing of the Deed on 11 August 2009 and confirmation of the current debt under the Deed)* and item four (*a copy of each of the Expressions of Interest for the Northern Prison Project as submitted by the Meander Valley*

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7 See *Manuel Sessink and Department of Justice* (24 May 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions, at [71-72].

Council to the Tasmanian State Government.) of Mr Sessink's application for assessed disclosure. As I have already dealt with the validity of Council's application of s37(1)(b) to this information, I will only address Council's application of s37(1)(b) to the balance of information responsive to Mr Sessink's request for *all correspondence between Meander Valley Council and Glen Avon in relation to the Northern Prison Project since 1 June 2017* in this section of my decision.

57 The balance of the information responsive to this part of Mr Sessink's request by Mr Sessink includes emails between Mr Pope of Glen Avon and Meander Valley Councillors and staff. Redactions have only been applied to personal information such as names, emails and signatures. This information is clearly not exempt under s37(1)(b) of the Act and I have already made determinations in relation to s36 above.

Public interest test

58 As noted, s37 is subject to the public interest test in s33. I now turn to assess whether it would be contrary to the public interest to release the details of the debt owed by Glen Avon to Council which I have found to be prima facie exempt.

59 Council did not provide an assessment of the mandatory public interest test in its decision claiming information was exempt under s37. It may be inferred that Council considered matter (s) in Schedule 1 - whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – to be relevant and be the key reason weighing against the disclosure of information identified as prima facie exempt under s37 of the Act. However, inferences should not be required and a proper assessment of the public interest test must be undertaken to comply with the Act. I urge Council to ensure that it meets all legislative requirements in future decisions.

60 I agree that matter (s) is relevant and weighs significantly against disclosure. Matters (w) and (x) – whether the information is information is related to the business affairs of a person which if released would cause harm to the competitive position of that person/which is generally available to the competitors of that person – are also relevant for the same reasons.

61 However, there are also matters which weigh in favour of disclosure. Matter (a) – the general public need for government information to be accessible – is nearly always relevant and weighs in favour of disclosure. Matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. Local government spending and financial decisions are a perennial subject of public debate and scrutiny, which is appropriate and part of the reason the Act was created. The siting of the northern prison has also been a longstanding matter of public interest, particularly in the north of the State where locals are concerned about what impact a northern prison might have on their communities. Information regarding Council's relationship with Glen Avon, who it assisted

and put forward as a site for this project, will contribute to public debate on matters of public interest.

62 Matters (f) and (g) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation/enhance scrutiny of administrative processes – are also relevant and weigh in favour of disclosure. Scrutiny of local government decisions to undertake use public equipment and staff to undertake civil works for private individuals and subsequently being owed large debts is justifiable.

63 This is a difficult balance to strike. However, owing to the high level of public debate surrounding this project and the importance of proper scrutiny of government financial decisions, I am satisfied that it is appropriate that this information is made available. Accordingly, I am satisfied that it would not be contrary to the public interest to release this information to Mr Sessink and find that it is not exempt.

Section 38 – Information Relating to Business Affairs of Public Authority

64 Section 38(a) of the Act provides that information is exempt from disclosure if it is:

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

65 The interpretation of the term *competitive disadvantage* in s38 of the Act is the same as in s37, which is discussed above.

66 Council has applied s38(a)(ii) of the Act to exempt from disclosure information identified as responsive to items one and five of the applicant's request. I will address the validity of each application below.

The Deed of Agreement between Meander Valley Council and Glen Avon

67 As discussed in relation to potential competitive disadvantage to Glen Avon, I am also not satisfied that it contains any information that would be likely to expose Council to a competitive disadvantage if it was released. Council has not discharged its onus under s47(4) to show why the release of this agreement would be disadvantageous to its commercial operations. Accordingly, I find that the Deed is not exempt from disclosure by s38(a)(ii) of the Act. It is to be released to Mr Sessink.

All correspondence between Meander Valley Council and Glen Avon in relation to the Deed, the debt and the Expression of Interest

68 The debt referred to in this request is the debt owed by Glen Avon to Council since the signing of the Deed, and the relevant document is the same financial transaction listing as was assessed in relation to s37.

69 It is not apparent why the release of details of this debt, in and of itself, would be likely to expose Council to a competitive disadvantage. Council may undertake some commercial activities but it is a public body and is required to report its financial position publicly. Section 38 is not intended as a mechanism to allow public authorities to shield themselves from scrutiny of their financial position and appropriateness of their expenditure or debts they are owed.

70 I am not satisfied that Council has discharged its onus under s47(4) to show why this information would be exempt or what competitive disadvantage would result from its release. Accordingly, I find that this information is not exempt from disclosure under s38(a)(ii) and it should be provided to Mr Sessink.

Section 39 – Information Obtained in Confidence

71 For information to be exempt from disclosure by s39 of the Act, I must be satisfied that disclosure of the requested information would divulge information which has been communicated to Council in confidence, and that –

> *(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.*

72 I now turn to address the validity of Council's application of s39 of the Act to the requested information.

The Deed of Agreement between Meander Valley Council and Glen Avon in ful

73 For s39 to apply, the requested information must have been *communicated in confidence to* Council. The Deed itself is clearly not such a document, as it was jointly prepared by Council and the parties to it. The Deed also does not appear to contain confidential details which would have been provided by the relevant landowners regarding their properties or operations, which may be divulged by its release. I am not satisfied that Council has discharged its onus under s47(4) to show why this information would be exempt under s39. Accordingly, I determine that the Deed is not exempt from disclosure and should be released to Mr Sessink.

All financial transactions between Meander Valley Council and Glen Avon since the signing of the Deed on 11 August 2009 and confirmation of the current debt under the Deed

74 Council has applied s39 of the Act to exempt from disclosure a record of transactions between Council and Glen Avon and the total amount of money owed by Glen Avon to Council as at 30 September 2020.

75 Council itself has created this record. It is not a document that was obtained by a third party or reveals information communicated in confidence. Accordingly, I find that this document is not exempt from disclosure under s39 of the Act.

The authority given by Glen Avon for Council to submit the Expression of Interest on its behalf

76 Council have identified one email as responsive to this part of Mr Sessink's application. The email is from Mr Pope, indicating that the owners of the Glen Avon site would be willing to participate in Council's application for the northern prison.

77 Council appear to have applied s39(1)(b) of the Act to exempt from disclosure information indicating that two business hold leases to operate businesses on the Glen Avon property.

78 Given I have already directed that this information be released to Mr Sessink in a previous decision,[8] this information cannot be considered exempt from disclosure under s39(1)(b) of the Act.

The covering letter or email which accompanied the Expression of Interest

79 Council has identified one email as responsive to this part of Mr Sessink's application. The email is from Mr Gill of Council dated 19 November 2018, and was sent to an inbox receiving Expression of Interest submissions.

80 Council appears to have applied s39(1)(b) of the Act to exempt from disclosure information in this email which identifies the Glen Avon Farms site as a potential site for the proposed northern prison. This information is already publically available, as this site was eventually announced as the preferred site for the northern prison by the State Government. Therefore, I am not satisfied that this information is exempt from disclosure and it is to be released to Mr Sessink.

All correspondence between Council and the State Government in relation to the proposed correctional facilities in the Meander Valley Council Municipality since June 20!7, including all communication in relation to the planning scheme transition to the local provisions schedule

81 Council has identified emails between it and the State Government as being responsive to this part of the request. Redactions have only been applied to personal information, such as names and email addresses. This information is more appropriately dealt with by s36 of the Act, rather than s39(1)(b). Accordingly, I am satisfied that none of the redacted information in these documents is exempt from disclosure under s39(1)(b) the Act.

All internal correspondence of Council in relation to proposed correctional facilities in the Meander Valley Council Municipality since ! June 20!7, including all communication in relation to the planning scheme transition to the local provisions schedule

82 Again, it appears as though redactions have only been applied to personal information. This information is not exempt under s39(1)(b) of the Act and has been considered under s36.

8 *Manuel Sessink and Department of Justice* (24 May 2023) at [51].

Correspondence between the Acting General Manager and the Mayor with representatives of the State Government, and Council's internal correspondence, in relation to the booking of the Town Hall for the Minister's meeting of 16 December 2019 and the attempt by the WRAP Inc. to book the Town Hall on 15 December 2019

83 The State Government hosted an information session at Meander Valley Community Hall to listen to the local community's concerns regarding the proposed prison, which at the time, was to be built in Westbury.

84 Council has applied s39(1)(b) to page one of the booking form for Meander Valley Community Hall to exempt from disclosure credit card details used to pay the booking fee for the hire of Westbury Town Hall.

85 I am satisfied that this is a valid application of s39(1)(b) of the Act. This is information that was provided to Council in confidence. If this information was made available to the public, people would be less likely to provide payment details to Council. Furthermore, I note that I have previously considered this to be exempt from disclosure under s39(1)(b) of the Act in my recent decision of *Linda Poulton and Meander Valley Council*.[9]

86 All other redactions to information identified as responsive to this part of the request appear to have been applied to the information revealing the personal information of people other than the applicant. This information is not exempt from disclosure under s39(1)(b) of the Act and has been considered under s36.

Internal correspondence in relation to the letters and emails received from WRAP Inc.

87 All redactions that were applied to information identified as responsive to this part of Mr Sessink's request appear to have been applied to details revealing the personal information of people other than the applicant. Section 39(1)(b) does not apply to this kind of information and this has been considered under s36.

Public Interest Test

88 The only information I have found to be prima facie exempt from disclosure in this external review under s39 of the Act is the credit card details used to book the Town Hall. I considered this information in my decision of *Linda Poulton and Meander Valley Council*[10] and found it to be exempt from disclosure under s39. I maintain this position.

Preliminary Conclusion

89 For the reasons given above, I determine that:

(a) Exemptions claimed pursuant to s36 are varied;

(b) Exemptions claimed pursuant to s37 are set aside;

(c) Exemptions claimed pursuant to s38 are set aside; and

(d) Exemptions claimed pursuant to s39 are varied.

[9] *Linda Poulton and Meander Valley Council* (24 August 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

[10] See Note 9 at [49] – [52].

Conclusion

90 As the above preliminary decision was adverse to Council, it was made available to Council on 12 September 2023 to seek its input before finalisation pursuant to s48(1)(a) of the Act.

91 On 3 October 2023 Mr Wezley Frankcombe of Council confirmed that *Meander Valley Council will not be making a submission in response to the respective Preliminary Decision.*

92 Accordingly, my findings remain unchanged. I determine that:

(a) Exemptions claimed pursuant to s36 are varied;

(b) Exemptions claimed pursuant to s37 are set aside;

(c) Exemptions claimed pursuant to s38 are set aside; and

(d) Exemptions claimed pursuant to s39 are varied.

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

Dated: 4 October 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

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

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

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal Information of Person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

(i) that person's right to apply for a review of the decision; and
(ii) the authority to which the application for review can be made; and
(iii) the time within which the application must be made.

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

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

Section 37 - Information Relating to Business Affairs of Public Authority

Information is exempt information –

(a) if it is –
(i) a trade secret of a public authority; or
(ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage; or
(b) if it consists of the result of scientific or technical research undertaken by or on behalf of a public authority, and –
(i) the research could lead to a patentable invention; or
(ii) the disclosure of the results in an incomplete state would be likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or
(iii) the disclosure of the results before the completion of the research would be likely to expose the public authority or the person carrying out the research unreasonably to disadvantage; or
(c) if it is contained in –
(i) an examination, a submission by a student in respect of an examination, an examiner's report or any such similar record; and
(ii) the use for which the record was prepared has not been completed.

Section 39 – Information Obtained in Confidence

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

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

(2) Subsection (1) does not include information that –
(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
(b) relates to trade secrets or other matters of a business, commercial or financial nature; and
(c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Matters Relevant to Assessment of the Public Interest

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

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-139

Names of Parties: Mount Wellington Cableway Company (MWCC) and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s37

Background

1 Mount Wellington Cableway Company (MWCC) propose to construct a cable car on Kunanyi/Mt Wellington. This project has proven to be a controversial and sensitive topic within the Tasmanian community, particularly in Hobart. There has been significant public debate as to whether the project should go ahead.

2 MWCC had sought relevant approvals from both the City of Hobart (Council) and the Tasmanian State Government to progress the project, and a development application had been lodged with Council.

3 Due to the community interest in the project, three applications for assessed disclosure of information under the *Right to Information Act 2009* (the Act) were lodged with Council seeking information about it. The information responsive to these requests included information provided to Council by MWCC.

4 On 12 February 2020, the then General Manager of Council, Mr Nick Heath, wrote to the then Chair of MWCC, Mr Chris Oldfield, to seek his view as to whether the information should be provided to the primary applicant. This consultation was undertaken in accordance with s37(2) of the Act.

5 The three applications included the following requests for information:

1. *All correspondence between the Hobart City Council and the Environmental Protection Authority (EPA Tasmania) regarding the proposed Mount Wellington Cable Way*
2. *All correspondence between the Hobart City Council and the Mount Wellington Cable Way Company for the period 12 June 2019 to 31 December 2019; and*

3. Copies of:

a. All correspondence between the Hobart City Council and the Mount Wellington Cable Way Company (MWCC) since January 2 2020;

b. Minutes of all meetings held in respect of the MWCC development application in or about the offices of the Hobart City Council, on or about 20 January 2020. I am particularly interested in the Council's reasoning around the non-compliance of the further information supplied by the MWCC under the Land Use Planning and Approvals Act 1993; and

c. All reports briefings, notes etc received by the Hobart City Council from their own external planning consultants in assessing the MWCC development application between 1 July 2019 and 20 January 2020

6 MWCC did not respond to Council's correspondence and, on 7 April 2020, Mr Heath wrote to Mr Oldfield to notify him that because he had failed to provide a view as requested in his letter of 12 February, Mr Heath had decided to release 77 pages of information identified as responsive to the three requests. Mr Heath deemed 12 pages exempt from disclosure pursuant to s37, as information relating to the business affairs of a third party. Mr Heath also indicated to Mr Oldfield that if he was dissatisfied with the decision, he could seek external review from the Ombudsman.

7 On the same day, Mr Oldfield wrote to my office to seek external review of Mr Heath's decision pursuant to s45(1A)(a) of the Act. This application was accepted by my office.

8 During the external review process, additional information was identified which had not been provided to MWCC for consultation. A further round of consultation under s37(2) occurred and MWCC advised Council that it did not object to this information being made available to the primary applicant for information.

Issues for Determination

9 I must determine whether the information proposed to be released by Council, despite MWCC's objections, is eligible for exemption under s37 of the Act.

10 As s37 is contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33. This means that, should I determine that information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it by having regard to, at least, the matters in Schedule 1.

Relevant legislation

11 I attach a copy of s37 of the Act to this decision at Attachment 1.

12 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

Applicant

13 The applicant made two substantive submissions as part of its application for external review.

14 First, the applicant expressed its dissatisfaction with Council's apparent selectivity in identifying information responsive to the three applications for assessed disclosure:

> *It was only with his 7th April correspondence that HCC provided MWCC copes of the information that Nick Heath has decided for release, which we argue is very selective and to the detriment of due process of MWCC's Development Application (DA) currently with HCC (Application No. PLN-19-345).*
>
> *In respect to the **RTI Application 2.** It appears HCC have [sic] omitted at least seven (7) emails/letters that MWCC has identified would fall under "All correspondence between the Hobart City Council and MWCC for the period 12 June 2019 to 31 December 2019;" – for example, Nick Heath has advised their decision to release MWCC's 24th June 2019 letter to HCC r.e. Road Authority Request, but not HCC's 4th July 2019 reply (copy enclosed).*
>
> *In respect to the **RTI Application 3. (b)** it would appear HCC have [sic] chosen to omit at least one (1) email/letter regarding "minutes of all meetings held in respect of the MWCC development application in or about the offices of the Hobart City Council, on or about 20 January, 2020...."; – i.e. 'Summary of meeting outcomes_23 Jan 2020_Final.pdf' as provided to MWCC by HCC on 24th January 2020 (copy available).*
>
> *Also, in respect to **RTI Application 3. (c)** "all reports briefings, notes etc received by the Hobart City Council from their own external planning consultants in assessing the MWCC development application between 1 July 2019 and 20 January 2020." – this appears to be omitted from release (no such information has been supplied to MWCC).*

15 The applicant requested a *ruling that determines rightful release of closer to either all or none of the information due for disclosure, and not a selection of information arguably in favour of one party – as demonstrated by HCC in this case.*

16 Second, the applicant submitted that some of the information identified as responsive to the three applications for assessed disclosure should not be

disclosed because doing so would circumvent statutory processes under the *Land Use Planning and Approvals Act 1993* (the LUPAA) which allows for public comment on proposed developments:

> *Furthermore, I have previously stated to Nick Heath that I do not believe it is the intention of the Right to Information (RTI) Act 2009 ("the Act") to circumvent statutory processes, regardless of his stated opinion that there are two separate statutory obligations at play. For an RTI to have precedence over a DA statutory process destroys the very nature of this statutory process.*
>
> *I am concerned that by releasing some of the information HCC has indicated, they are creating undue and unfair factors on our DA that could influence the remainder of the statutory planning process. This is not the first time MWCC will be placed in the invidious position of either having to engage in public debate, perhaps prior to our responses being fully developed with the input of expert opinion, or accept the consequences of remaining silent. I believe this is simply unfair, unjust and wrong. The public has a right to the expectation of full disclosure as provided under various Planning Schemes and RTI Legislation. The Land Use Planning and Approvals Act 1993 (LUPAA), for example, ensures that disclosure occurs when the process is complete. By HCC taking this decision to release information prematurely and against our wishes, is effectively encouraging public debate at a point partway through a statutory process.*

Council

17 Council did not make any specific submissions in relation to this external review. It did not provide specific reasoning as to why it considered the information was not exempt under s37 or any other exemption under the Act, only indicating on 7 April 2020 that:

> *As I did not receive a response from the MWCC to my letter of 12 February 2020, where I invited its view on whether the information captured by the applications should be disclosed, I have made my decision in the absence of this opinion.*

Preliminary Points

18 Before proceeding to my analysis of whether the information identified for release is exempt from disclosure under s37 of the Act, I find it necessary to address MWCC's submissions that the application of the Act to the requested information would circumvent the development application process under the *Land Use Planning and Approvals Act 1993* , and that Council was selective when identifying information for release.

Interaction with LUPAA

19 The LUPAA provides the public with an opportunity to provide submissions on proposed developments once Government and developers reach agreement as to how those proposed developments are to progress. This stage of the development application process is known as the public notice stage.

20 The release of information relating to a proposed development, prior to it reaching the public notice stage, does not deprive the public of their right to make submissions regarding a proposed development when the public notice stage is reached, nor does it deprive a developer of their right to respond to those submissions.

21 The LUPAA does not ensure the confidentiality of information relevant to the development application process, rather it simply provides an avenue by which members of the public can make submissions regarding proposed developments. As such, I cannot see how the release of the requested information will *destroy the very nature* of the development application process, as asserted by the applicant.

22 Furthermore, I find it important to note that any alleged procedural unfairness suffered by the applicant from the earlier than expected release of information related to its development application will be considered as part of the public interest test assessment under s33 of the Act.

23 This assessment requires me to consider all matters contained in Schedule 1 of the Act, including matter (j) - whether the disclosure of prima facie exempt information would promote or harm the administration of justice, *including affording procedural fairness* and the enforcement of the law.

Council's apparent selectivity

24 As part of its submissions, MWCC expressed frustration at Council's apparent selectivity in identifying information responsive to the three applications for assessed disclosure.

25 In processing this application for external review, it became apparent that Council had indeed failed to assess all information responsive to the primary applicant's applications for assessed disclosure under the Act.

26 As a result, Council was asked by my office to first locate the missing information, and then in accordance with s37(2) of the Act, consult with MWCC to seek their input as to whether this missing information could be made available to the primary applicant.

27 While this consultation occurred without incident and MWCC advised that it did not object to this information being made available to the primary applicant, it is unfortunate that this information was not initially included in the first consultation under s37(2).

28 I strongly encourage Council to be more thorough in searching for information responsive to requests in future, to prevent such oversights occurring in other matters.

Analysis

Section 37 – Information relating to business affairs of third party

29 For information to be exempt under this section, I must be satisfied that its disclosure would disclose information related to business affairs acquired by Council from a third party and that –

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

30 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman* [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...*

31 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...*

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

33 As I have outlined in previous decisions, following the New South Wales Supreme Court decision of *Kaldas and Barbour*[1], I am of the view that I am not subject to the supervisory jurisdiction of the Tasmanian Supreme Court. Accordingly, the value of Forestry Tasmania v Ombudsman as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree. This means there must be a real or not remote chance or possibility that the public

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

authority will be exposed to a disadvantage which relates to or is characterised by competition in the market.

34 I will now analyse whether the information identified for release by Council will likely subject MWCC to a competitive disadvantage under s37 of the Act if it is disclosed. In doing so, I will first summarise the information identified by Council for release to the primary applicant, before assessing it under s37.

Summary of Information identified for release to the primary applicant

1. All correspondence between the Hobart City Council and the Environmental Protection Authority (EPA Tasmania) regarding the proposed Mount Wellington Cable Way

Email from Grace Vaszocz (EPA) to 'findoutmore@mtwellingtoncablecar.com' dated 2 October 2019 at 12:30pm

35 This email consists of a covering email and two attachments relating to the development application MWCC lodged with Council.

36 The first attachment is a letter dated 2 October 2019 from the Director of the Environment Protection Authority (EPA), Mr Wes Ford, to the Project Director at MWCC, Mr Adrian Bold. It is titled 'Request for Further Information Mount Wellington Cableway (PLN-19345)'.

37 The letter explains that information provided to the EPA by MWCC in its letter dated 20 September 2019 differs from information submitted as part of its original development application, and asks MWCC to clarify those inconsistencies.

38 The second attachment is the letter from Mr Bold to Mr Ford dated 20 September 2019 referred to above. It contains information relevant to MWCC's development application and was sent in response to questions raised by the EPA regarding the project.

Email from 'planning@hobartcity.com.au' to Grace Vaszocz dated 23 July 2019 at 3.08pm

39 This is an email sent from the Manager of Development Appraisal, Mr Rohan Probert, to Grace Vaszocz at the EPA. Attached to this email is a letter to the Acting Director of the Environment Protection Agency, Mr Martin Read, from the Director of City Planning at Council, Mr Neil Noye. This letter was sent to notify Mr Read that Council had not yet received additional information from MWCC in response to its request under s54 of the LUPA, and to confirm that the EPA will be advised of when the proposal will be publically advertised as soon as it is known.

40 Attached to this letter is the s54 request referred to above. Because this request was sent from Council to MWCC, I will summarise it below along with other information responsive the primary applicant's request for *All correspondence between the Hobart City Council and the Mount Wellington Cable Way Company for the period 12 June 2019 to 31 December 2019.*

Email from Grace Vaszocz to 'planning' dated 19 July 2019 at 9:00am with letter attached

41 This email contains covering correspondence that refers to an attached letter, and directs queries regarding this letter to be sent to Manager (Assessments) at the EPA, Ms Helen Mulligan.

42 Attached to this email is a letter from Mr Read to Mr Heath dated 19 July 2019. This letter requests that Council provides the EPA with details describing what additional information Council has requested from MWCC in relation to its proposed development, and for Council to produce a copy of MWCC's response when it is provided. It also requests guidance as to when the proposal will be publically advertised.

Email from Grace Vaszocz to 'Records Unit' dated 1 July 2019 at 4:01pm with letter attached

43 This email contains covering correspondence that refers to an attached letter, and directs queries regarding the attached letter to be sent to Ms Mulligan.

44 The attached letter from Mr Ford to Mr Heath dated 1 July 2019 requests specific information from Council regarding the proposal to determine whether it requires assessment by the EPA board under the *Environmental Management and Pollution Act 1994* (the EMPC Act).

Email from Grace Vaszocz to 'Records Unit' dated 2 July 2019 at 12:23pm with attached letter

45 This email contains covering correspondence that refers to an attached letter, and directs queries regarding the attached letter to be sent to Ms Mulligan.

46 The attached letter sent from Mr Ford to Mr Heath dated 2 July 2019 raises additional issues to those identified by Council regarding the proposed cable car development.

Letter from Mr Ford to Mr Heath titled 'Request for Information Mount Wellington Cable Car' dated 5 July 2019

47 This letter advises that the Deputy Director of the EPA, Dr Martin Read, had confirmed by email that the EPA consented to Council forwarding Mr Ford's letter of 1 July to MWCC for its consideration, and confirms that this letter was sent to MWCC on 4 July 2019. It also advises that neither the Interim Planning Scheme 2015 nor Wellington Park Management Plan 2013 allow for the regulation of noise associated with the proposal's development on residents located outside the boundaries of Wellington Park.

2. All correspondence between the Hobart City Council and the Mount Wellington Cable Way Company for the period 12 June 2019 to 31 December 2019

Email from MWCC secretary and project assistant Mr Christian Rainey to Mr Heath dated 24 June 2019 at 12:50pm with attached letter

48 Attached to this email is a letter from the then MWCC Chair, Mr Chris Oldfield, to Mr Heath. The letter dated 24 June 2019 responds to a letter from

Council dated 13 June 2019, and asks Council whether it is prepared to take ownership of a road that will be constructed between McRobie's Rd to the cable way's base station.

Letters from the Senior Statutory Planner at Council Mr Ben Ikin, to MWCC's agent Ireneic Planning & Urban Design, dated 13 June, 21 June, 1 July and 3 July 2019 titled 100 Pinnacle Road, Mount Wellington & 30 McRobies Road, South Hobart – Cableway and Associated Facilities, Infrastructure and Works application No. PLN-19-345

49 These letters relate to the application for a planning permit PLN-19-235 received by Council from MWCC associated with the Proposal on 12 June 2019. These letters have been sent by Council to MWCC under s54 of the LUPAA to request additional information regarding this application.

50 These letters were sent by Council to give MWCC the opportunity to respond to Council's concerns regarding its proposal. Each letter provided additional points of concern that MWCC was expected to address, with the last letter dated 3 July 2019 containing all points of concern raised by Council.

51 Concerns raised by Council related to a range of different aspects of the proposal. In particular, Council queried whether the proposal would comply with planning regulations, whether the base station would be a place of assembly during bushfires, the impact the proposal would have on the biodiversity of the local environment, whether the proposal would expose patrons to potentially contaminated land, the impact the proposal would have on local traffic conditions and whether road maintenance and upgrades would be required, noise impacts, stormwater impacts, broader environmental considerations, the potential for landslides, and the impact of the proposal on the skyline.

Request for Additional Information for Planning Authority Notice from TasWater

52 Though this document is a request for more information from TasWater, it is responsive to the primary applicant's request because it was enclosed in correspondence from Council to MWCC. This document was forwarded on to MWCC from Council so that MWCC could inform Council of how its proposal would address these issues.

53 In this document, TasWater explain to Council that TasWater *will not accept inline boosting from the water network unless it can be demonstrated that periodic filling and testing of the system will not have a significant negative effect on TasWater' s network* and the *minimum service requirements of existing customers.* TasWater requests that Council provides more details regarding MWCC's proposal to alleviate its concerns relating to this issue.

Email from Mr Ikin to Ms Irene Duckett from Ireneic Planning & Urban Design dated 5 July 2019 at 10:33am with attached letter

54 The covering email simply explains that Council received this request for information from the EPA, and that the EPA consented to this letter being forwarded on to MWCC. The email advises that responses are to be made

directly to the EPA, but Council notes that it would appreciate it if responses were also provided to Council. The covering email also specifies that this request for information is not being made under s54 of the LUPAA.

55 Attached to this email is a letter from Mr Ford to Mr Heath requesting specific information from Council regarding the proposal to determine whether it requires assessment by the EPA board under the *Environmental Management and Pollution Control Act 1994*.

3. Copies of all correspondence between the Hobart City Council and the Mount Wellington Cable Way Company (MWCC) since January 2 2020

Letter from the Acting Manager Development Appraisal City Planning Cameron Sherriff to Irenic Planning & Urban Design titled 100 Pinnacle Road, Mount Wellington & 30 McRobies Road, South Hobart & Adjacent Road Reserve Cableway and Associated Facilities, Infrastructure and Works Application No. PLN-19-345 dated 17 January 2020

56 This letter contains Council's assessment of MWCC's responses to requests for additional information under s54 of the LUPA.

Out of scope information

57 Council has identified two emails for release, which upon review, appear to be outside the scope of the primary applicant's request. The first email was sent by Ms Amanda Banks to Ms Jacqueline Harrison, the second email was sent by Mr Heath to Ms Banks. These emails were both sent internally on 24 June 2019, however they have been identified by Council as responsive to the primary applicants request for *All correspondence between the Hobart City Council and the Environmental Protection Authority (EPA Tasmania) regarding the proposed Mount Wellington Cable Way.*

58 Given this information is outside the scope of the primary applicant's request, I will not assess it for release under the Act. I note that because this information is outside the scope of the primary applicant's request, Council is under no obligation to release it to the primary applicant. The Act encourages the release of the maximum amount of information, however, so there is certainly no issue with further internal correspondence being released at Council's discretion.

Analysis of Information Identified for release to the primary applicant against s37 of the Act

59 In making my assessment as to whether the above mentioned information identified for release would be likely expose MWCC to a competitive disadvantage as required by s37, it is necessary to consider the circumstances surrounding this external review.

60 First, it is necessary to consider that the development of a cableway on kunanyi/Mt Wellington is a controversial issue in Hobart and has been subject to much public debate and media coverage. Opinions regarding the construction of a cable car in that location vary.

61 In attempts to win public support for its proposal, MWCC has made significant efforts to be transparent with the Tasmanian community regarding the project, even creating a website dedicated to informing the public of its details.[2] This website details the development application to which this external review relates, and invites viewers to 'explore the detail' of the proposal.

62 The information identified for release by Council is information which informs this proposal, which as mentioned, is detailed extensively by MWCC online. It is not information concerning a project shrouded in secrecy, the provision of details of which, if released to the public, may risk its viability. When considered in this context it is hard to understand how the release of any of the information identified by Council for release would be likely to subject MWCC to a competitive disadvantage. The information proposed for release is substantially similar to that already in the public domain and MWCC has not explained why its release would cause competitive disadvantage.

63 I appreciate that, given the passage of time, circumstances may have changed from the time the primary applications for information were originally made. However, I must assess the current circumstances to comply with the intention of the Act that discretions conferred be exercised so as to provide the maximum amount of official information. Accordingly, at the current time, I am not satisfied that this information is exempt from disclosure under s37 of the Act and determine that it can be made available to the primary applicant.

Preliminary Conclusion

64 For the reasons given above, I determine that the relevant information is not exempt pursuant to s37 of the Act.

Submissions to the Preliminary Conclusion

65 The above decision was made available to Council and MWCC on 5 October 2023 under s48(1)(b) of the Act to seek their input prior to finalisation. No submissions were provided by Council.

66 On 18 October 2023, my office received the following submission from the current Executive Chair of MWCC, Mr Tony Mayell, responding to my preliminary decision:

> *The ... preliminary decision seems to ignore the time-sensitivity of the RTI during our RFI process with Hobart City Council (HCC), which was our key reason for objecting to its release* at the time.
>
> *We believe reliance on the fact that we have a public website with 'similar information' as reason for disclosure is unsatisfactory. Much of the information is, in fact, not similar – particularly the EPA information, which is highly technical and could have turned into a media football,* at the time.

[2] See mtwellingtoncable.car.com, accessed 4 October 2023.

67 Though I recognise that the requested information would have been quite sensitive at the time the primary applications were made, I reiterate that the Act requires me to assess information for release against the circumstances that apply today. Accordingly, any sensitivity or considerations that are no longer applicable, but were relevant at the time of the external review application, cannot influence my decision.

68 I recognise that MWCC's correspondence with the EPA contained highly technical information, and that this information was not all shared on its website. However, the open approach taken and the fact that this correspondence shaped MWCC's final proposal which is detailed very heavily on its website shaped my decision and I maintain this view. It would not be contrary to the public interest to release this information and it is similar to that which is already publically available. Mr Mayell seems to acknowledge that this information is no longer sensitive due to the passage of time.

69 While I have carefully considered Mr Mayell's submissions, I have not changed the findings as set out in my preliminary decision.

Conclusion

70 Accordingly, for the reasons set out above, I determine that information is not exempt from disclosure pursuant to s37 of the Act.

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

Dated: 23 October 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1

Relevant Legislation

Section 37 – Internal Deliberative Information

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

(a) the information relates to trade secrets; or

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

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

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

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

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

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

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

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

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

Section 33 – Public Interest Test

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

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

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

Schedule 1 – Maters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-037
O1909-084

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

Reasons for decision: s48(3)

Provisions considered: s6, s20(a)

Background

1 P died in February 2014 and her sister, O, holds concerns about the circumstances of her death, and the subsequent investigation of it by the Tasmanian authorities.

2 The Coroner determined P died unexpectedly at home on a date between 2 and 5 February 2014.[1] The Coroner was satisfied that *the investigation into the death of* [P] *was appropriate and thorough* and *that there were no suspicious circumstances indicating involvement of any other person*. The Coroner concluded that she could not *determine the cause of death, except to exclude foul play*.[2]

3 On 15 August 2019, O made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department). The fee was waived.

4 The *reason for application*, on the Application for Assessed Disclosure form, was:

> *I want ful disclosure about the efforts of Police in regards to my sisters* [sic] *death.*

5 Under *specific details of the information sought* O requested, verbatim:

> *Letter dated 8 August 2019 from Lee Taylor.*
>
> *Page 5 of the running sheet says*
>
> *RTI 243/18 – Oct 02, 2018*

---

[1] Record of investigation into death (without inquest) of [O], 2015, Coroner Olivia McTaggart.
[2] As per Note 1.

Completion notes: The 4 matters raised have been addressed by Sgt A Peters (please see attached running sheet). Thank you, Max.

Entered by: Sergeant Mel Horan on Jul 04, 2018 at 16:20

I requested originally al documents with my sister name on it. This running sheet should have been counted but clearly withheld on purpose.

Quite clearly there has been a cover up and I am doubting the honesty of the Police Officers involved in my sister case and the actions of other Police officers to hide documents.

Internal affairs is the Professional standards section your staff thinks they are separate divisions within the Tasmania Police they arent.

With this information about the missing running sheet been withheld from me I have to assume my request for audio files has also been denied under the same coverup.

I want everything with her name on it. [P] *and I want the photographs taken by the Forensics Person on the 5 February or any day. I want the accident report from the 19 December 2013. I want photocopies of al the notebook of Police Officers stationed at St Helens Police station from the 30 January 2014 to the 15 February 2014 inclusively.*

I want a copy of the brief submitted to the Coroner. - ALL VERSIONS

I want every document known to Tasmania Police with my sisters name on it to be sent to me.

6 On 16 August 2019, Sergeant Lee Taylor, a delegate under the Act for the Department, released a decision to O. He indicated in that decision that he had contacted O *via email in an attempt to refine the scope* of the application with regards to any duplication with previous applications but she had declined to do so.

7 Sergeant Taylor's decision set out that *[e]nquiries and searches of Department of Police, Fire and Emergency Management (DPFEM) information systems has located information relevant* to the application. He further numbered the parts of O's request and the parties have continued to use this reference system:

1. *I want everything with her name on it.* [P]*;*
2. *I want the photographs taken by the Forensics Person on the 5 February or any day.*
3. *I want the accident report from the 19 December 2013;*

4. *I want photocopies of all the notebook of Police Officers stationed at St Helens Police station from 30 January 2014 to the 15 February 2014 inclusively;*
5. *I want a copy of the brief submitted to the Coroner – ALL VERSIONS; and*
6. *I want every document known to Tasmania Police with my sister's name on it to be sent to me.*

8 A three page document 'Traffic Crash Reporting Number: 13004503', which was responsive to Item 3, was released. There was limited exemption claimed, under s36, with respect to the personal information of others and redaction was applied to the police infringement number, the details of a witness, and the personal and vehicle details of the other person involved in the traffic crash incident.

9 No concerns were raised by the applicant with respect to the redactions and this document was accordingly not considered further.

10 The remainder of O's request was refused pursuant to s20(a), as it was determined to be a repeat application for the same or similar information as O had sought in previous requests to the Department under the Act.

11 The decision also includes a summary of previous enquiries and requests made by the applicant under the Act in 2017 and 2019. It sets out, verbatim, that:

> *On the 19 October 2017, Constable Cowling of Right to Information Services responded to your application and provided a Statement of Reasons to you explaining that since your sisters death was subject of coronial proceedings, al document relating to the death of your sister were in the possessing of the Coroner's Office and hence excluded from assessed disclosure pursuant to section 6 of the Act...This request for information is a repeat o f Items 2 and 5 of your current application.*

12 The applicant wrote to the Department to express her dissatisfaction with the decision and to request an internal review. The request was as follows:

> *I just received your letter and I would like to appeal the decision you made about sections 1 2 4 5 and 6.*
>
> *I requested the accident report (Number 3) on numerous other occasions and was finally received it* [sic] *in this application which means you can give me the other requests because that was a repeat request.*
>
> *The running sheet by Sgt A Peters has never been requested.*

> *I want the photos of the outside wraps of the fentanyl patches that were found at the scene.*
>
> *My application for the audio recordings for 31 January 2014 and your decision saying it didn't exist I believed you and now considering that the Peters running sheet was withheld to me and the Ombudsman I would like to appeal that decision because my trust in the RTI section does not exist anymore.*

13 On 5 September 2019, Commander A P Bodnar, a delegate of the Department under the Act, released an internal review decision to O. That decision affirmed the use of s20(a) and also relied upon s6. It indicated that the majority of the information responsive to the request had been supplied to the Coroner and *any information held by the Coroner would be excluded from release under RTI provisions.*

14 On 17 September 2019, O sought external review by my office. Her application was accepted under s44, as she was in receipt of an internal review decision and had sought review within 20 working days of receiving it.

15 On 21 September 2022, my Principal Officer – Right to Information wrote to the Department with a view to resolving the application (pursuant to s47(g) and (h)) without the need for a determination by me. In that letter the following matters were raised:

> *In view of the quantity of requests and overlapping issues, and the role of the Ombudsman to promote settlement of review applications, I am seeking your agreement for a fresh decision to be made on this application (excepting part 3) to correct some apparent errors. The correction of these issues should streamline the processing of* [O]*'s subsequent external review requests and applications for information.*
>
> *It appears that the application was previously assessed with a view that anything that had been provided to the Coroner would not be able to be assessed under the Act, even if that information was also in the possession of Tasmania Police. This is not a correct interpretation of the Act, as it clearly sets out in s7 that:*
>
> > A person has a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or a Minister unless the information is exempt information.

> *Exemptions may be relevant to prevent the release of some of the information, but information in possession of Tasmania Police which is responsive to a request must be assessed. In liaising with the Tasmania Police RTI team in relation to this external review, it has become clear that information responsive to* [O]*'s request, such as an offence report, forensic photographs and notebook entries, is in the possession of Tasmania Police.*

16 The Department agreed to issue a fresh decision, and Ms Roslyn French, a delegate of the Department under the Act, released a further decision to O on 8 December 2022. A National Police History Record Check relating to P was located and released to O.

17 The remainder of the fresh decision maintained the reasoning in the original and internal review decisions, refusing O's request under ss6 and 20(a) due to her previous requests and the involvement of the Coroner.

18 As the fresh decision did not substantively change the Department's position, I continued to finalise O's external review which was already on foot.

Issues for Determination

19 The issues for determination are, whether:

a. s6 has been properly applied and whether the Act does not apply to the information in the possession of the Department which is also in the possession of the Coroner; and

b. the Department is entitled to refuse O's request as a repeat request pursuant to s20(a).

Relevant legislation

20 Relevant to this review are ss20(a) and 6 of the Act and copies of both are attached to this decision.

Submissions

Applicant

21 In addition to the application for external review and the applications lodged with the Department, I have considered the 'Executive Summary: [P] [date of birth] – Sydney' undated, that was filed by the applicant. I will not quote this here, as it relates to P's life and death and O's investigations into her death, rather than a submission regarding the process under the Act.

22 I accept that O is seeking to obtain the maximum amount of information held by the Department that relates to her sister, both before and after her death.

Department

23 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions.

24 The Department's reasoning is most relevantly set out in the 5 September 2019 internal review decision, in which Commander Bodnar advised the applicant:

> *I have considered your application for Assessed Disclosure dated 15 August 2019; my interpretation is that the application is somewhat similar to a number of previous requests you have made to Right to Information at DPFEM.*
>
> *For ease of reference, I wil refer to the issues you seek to have reviewed in your email of 21 August 2019 as points:*
>
> *At point 1 your request everything with your sister's name on it (*[P]*).*
>
> *At point 2 you request photographs taken by the Forensic Person on 5 February or any day.*
>
> *At point 4 you request photocopies of all the notebook (sic) of Police Officers stationed at St Helens Police Station from 30 January 2014 to 15 February 2014 inclusively*
>
> *At point 5 you request a copy of the brief submitted to the Coroner – All versions*
>
> *At point 6 you request every document known to Tasmania Police with your sister's name on it to be sent to you.*
>
> *Requests contained at points 1, 4 and 6 are somewhat intertwined and similar. The requests are similar to the Application for Assessed Disclosure that you lodged, dated 1 October 2017.*
>
> *I note in correspondence referred to you on 19 October 2017 by the then RTI delegate, Constable Cowling, that inquires* [sic] *had been made with the officer who investigated your sister's death and that everything has been supplied to the,* "Coroner's office and there were no notepad entries relating to this incident. Forensic Services also indicated that any information they held was supplied in full to the Coroner's Office".
>
> *In addition, I caused further inquiries to be made following a previous request for an internal review by you on 25 June 2019 (RTI 131/19 – police notebooks and documentation). The findings in*

respect to that request were consistent with the advice of Constable Cowling to you in October 20!7.

Your request contained at point 2 in relation to the photographs on 5 February or any day, presumably related to the day your sister was located deceased by attending police (approximately !!:40 am) at St Helens. Any photographs obtained by the police would be attached to the Coronial file for review and consideration by the presiding Coroner. I reiterate that Forensic Services have provided all information to the Coroner's Office.

Based on my interpretation of section 6 of the Act (Exclusions of certain persons or bodies), any information held by the Coroner would be excluded from release under RTI provisions, unless, the Coroner was minded to release such information. In my interpretation, the release of any photos obtained on the day is a matter for the Coroner to consider as photographs are deemed to be information under the Act (refer to the definition of 'information' contained at section 5 of the Act).

Your request contained at point 5 seeks a copy of the brief submitted to the Coroner; I interpret this to be the Coronial investigation file. The file falls within the definition of the information contained at section 5 and pursuant to section 6 is excluded from release under the Act – again this would be a matter for the Coroner to consider. Though, I can inform you that the Coroner is provided with a file and not several different versions to consider when undertaking an investigation into the death of a person.

I do note in the Application for Assessed Disclosure (! October 2017), that you state, "I have a copy of the Coroners file [sic] *on my sisters* [sic] *death".*

In respect to point 6, the request you make is broad and in my interpretation the information you seek is predominantly relating to the death of your sister. Any other information, by my interpretation would be regarded as personal information which would attract an exemption pursuant to section 36 of the Act and therefore would not be disclosed to you.

Having considered the information you requested in your application of !5 August 20!9, and considered the points you wished reviewed, I am of the opinion that the request is somewhat similar to previous RTI requests. Therefore, I have applied section 20 of the Act as the information sought, is in essence, a repeat application. I have also

> *applied section 6 and 36 of the Act as referenced in this correspondence.*
>
> *Importantly, in respect to the investigation into the death of your sister and having read the 2015 Coronial finding, issued by Coroner, Ms Olivia McTaggart, I note comments at page 4 of her finding:*
>
> > *"I am satisfied that the investigation into the death of* [P] *was appropriate and thorough. I am satisfied that there are no suspicious circumstances indicating involvement of any other person".*

25 In Ms French's decision of 8 December 2022, this is further commented upon as follows:

> *One matter that needed to be addressed in conducting this review was the status of information held by DPFEM that is (or was) the subject of an investigation under the* Coroners Act 1995. *I have been advised not to release this information and that you should make application through the Coronial Division.*

Analysis

Section 20(a)

26 The original and internal review delegates relied upon s20(a) to refuse to consider parts of the application (Items 1, 2, 4, 5 and 6).

27 For me to be satisfied that an application is entitled to be refused under s20(a), it must be shown that it is *the same or similar* as that *sought under a previous application...and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.*

28 There are two issues that arise from that reliance on s20(a) in relation to O's application.

29 The first is that further information has in fact been provided to the applicant in response to this application. O's request for information indicated that she again sought information regarding her sister as it did not appear that all relevant information had been located and assessed. This has proven to be true as, due to her perseverance, O has now received the Traffic Crash Report and the National Police Check form, and an indication that further notebook entries exist. I therefore find that the application did, on its face, disclose a reasonable basis for again seeking the same or similar information.

30 The second issue is the application of s6 by the delegates to refuse to assess the information held that is responsive to the requests. It appears that there is

further information held by the Department, that would be responsive to the request, however it has been refused under s6 because the information is, or is likely to be, in the possession of the Coroner. I am not satisfied that s6 has been correctly applied and this is discussed in detail below. In relation to s20(a), however, the misapplication of s6 is relevant as it also demonstrates a valid basis for again requesting the same or similar information.

31 In summary, I find that the requirements of s20(a) have not been met and the Department is not entitled to refuse O's request on this basis.

Section 6

32 The delegates of the Department have consistently relied on s6 of the Act in relation to the information in the Department's possession that is, or may also be, held by the Coroner or the Coroners Court.

33 Section 6 provides that:

> *This Act does not apply to information in the possession of the following persons or public authorities, or in the possession of a person whose services are provided or procured for the purposes of assisting the person or public authority, unless the information relates to the administration of the relevant public authority; ...*
>
> *(b) a court; ...*
>
> *(g) a magistrate; ...*

34 Although it has not been particularised by the Department whether s6(b) or (g) is relied upon, both are relevant. The Coroners Court[3] is an excluded public authority (with the narrow exception of information relating to its administration) and the Coroner,[4] who is a magistrate, is also excluded.

35 Neither the Department nor Tasmania Police are excluded under s6 and the Department does not have responsibility for the functions of the Coroners Court or the Coroner. The question then arises whether it is correct for the Department, as a public authority that is not excluded under s6(1), to rely on this exclusion provision and to refuse a request for information in its possession, on the basis that it is also in the possession of an excluded person and public authority. It is a novel approach but I am not satisfied that it is in accordance with the Act.

---

[3] The Coroners Court is a division of the Magistrates Court and is *a specialist court that conducts inquests and investigations* into certain deaths and incidents: Magistrates Court of Tasmania, accessed 18 April 2023, www.magistratescourt.tas.gov.au/about_us/coroners.

[4] Under the *Coroners Act 1995*, s3 interpretation, the coroner is *a person appointed as a coroner under this Act and...includes a magistrate.*

36 It is inconsistent with s7, which provides a person with a legally enforceable right to be provided with information in the possession of a public authority, unless it is exempt information.

37 In circumstances where information may be held by the public authority and it is known to be also held by an excluded person or public authority, the proper course is for the included public authority to conduct an assessment of the information it holds, consistent with the provisions of the Act. If the release of information also held by a court or other excluded body would prejudice the enforcement or proper administration of the law in a particular instance, an exemption under s30(1)(a)(ii) could be relied upon.

38 In summary, I do not accept the Department's strained interpretation of s6 and I find it is not permissible for the Department to refuse to assess information it holds, regardless of whether the information is also held by an excluded person or public authority.

39 I do note that in different circumstances, such as an officer of Tasmania Police being appointed to assist the Coroner as an advisor or similar for an inquest, then s6 arguably could apply to an individual officer. However no such person has been identified here and I do not accept that the section can be relied on in relation to the police investigations that ordinarily follow a death.

Preliminary Conclusion

40 In accordance with the reasoning set out above, I determine that the Department is not entitled to rely on ss6 or 20(a) to refuse O's application.

41 I direct the Department to assess the information in its possession, which is responsive to O's request, in accordance with the provisions of the Act.

Submissions to the Preliminary Conclusion

42 As the above preliminary conclusion was adverse to the public authority, it was made available to the Department under s48(1)(a) of the Act seeking any further input before finalising the decision.

43 Prior to providing its submissions, the Department sought permission to provide my draft decision to the Coroners Court. This was approved pursuant to s48(1)(b) which permits me to make a decision available *to interested parties and to seek input ... before finalising the decision*.

44 On 9 June 2023, Inspector Tony Kay, Right to Information Services for the Department filed brief submissions (the further submissions) set out in full as follows:

> *Right to Information Services has received the Preliminary Decision in relation to the external review of (DPFEM reference) RTI No: 193/19. The matter concerns* [O] *and information regarding the death of her sister,* [P] *on 2 February 2014.*
>
> [O] *made an application through this office on 15 August 2019. This application was assigned the DPFEM reference RTI1 93/19.*
>
> *Thank you for the opportunity to provide a submission in relation to your preliminary findings dated 3 May 2023.*
>
> *Without revisiting* [O]*'s full application and each of the findings, I wil provide a submission into the issue of s6 of the Right to Information Act 2009 (the RTI Act). I acknowledge that the description of how DPFEM delegates have previously applied s6 of the RTI Act, in relation to coronial information in particular, may have been expressed inaccurately.*
>
> *I make the submission, following advice received, that the exclusion provided in s6 of the RTI Act applies to information that is in possession of the Department that arises from the provision of services for the purposes of assisting a coroner.*
>
> *In the specific facts surrounding the DPFEM possession of information requested by* [O]*, the information that is relevant to those duties is excluded information on our submission as it was procured for the purposes of assisting a coroner.*
>
> *All other information relating to* [P] *in the possession of DPFEM has otherwise been released subject to a new DPFEM decision relating to our reference RTI381/22.*
>
> *DPFEM make no further submission in relation to the other points of your Preliminary Decision.*

45 On 19 May 2023, a letter was received from Ms Jane McLeod, Manager (South) Hobart Magistrates Court, providing input on behalf of the Coroners and the Coroners Court. By agreement that letter is reproduced:

> *I refer to the email of 4 May 2023 by Inspector Tony Kay of Tasmania Police to the Coronial Division which provided a copy of the Ombudsman's preliminary decision in his matter. I note from the email permission was given to Inspector Tony Kay to share the*

preliminary decision with the Coroner for the limited purpose of providing any submissions in reply to DPFEM.

The Coronial Division has a significant interest in the determination of this matter and would seek that our position outlined in this letter is forwarded to the Ombudsman for consideration.

Each of the 3 Coroners have considered the preliminary decision and their view is it is not correct. The Coroner who investigated this death, like al current Coroners, is a Magistrate appointed under s4 of the Magistrates Court Act 1987 *and s6 of the* Coroners Act 1995 *(the Act). The Coronial Division of the Magistrates Court is established by virtue of s3B of the* Magistrates Court Act 1987 *and s5 of the Act. A Coroner had jurisdiction to investigate this death pursuant to s21 of the Act because its circumstances satisfied the definition of "reportable death" set out in s3.*

We draw your attention to ss15 and 16 of the Act which provide as folows:

> ***15.Coroner's associates***
>
> *(1) The Secretary of the Department may appoint State Service officers and State Service employees employed in the Department to be coroner's associates and those persons hold office in conjunction with State Service employment.*
>
> *(2) The Chief Magistrate may, with the approval of the Secretary of the responsible Department in relation to the* Police Service Act 2003*, appoint police officers to be coroner's associates.*
>
> *(3) A clerk of petty sessions and a deputy clerk of petty sessions may perform the functions and exercise the powers of a coroner's associate.*
>
> *(4) A coroner's associate may–*
>
> > *(a) on behalf of a coroner, receive information about a death, a fire or an explosion; and*
> >
> > *(b) administer an oath or affirmation or take an affidavit; and*
> >
> > *(c) issue a summons requiring a witness to attend an inquest to give oral evidence or to produce documents or other materials.*

16. Coroner's officers

(1) A coroner's officer must –

(a) assist a coroner in carrying out the coroner's duties under this Act; and

(b) comply with any guidelines issued by the Chief Magistrate; and

(c) carry out all reasonable directions of a coroner.

(2) A police officer is, by virtue of his or her office, a coroner's officer and has the same functions and powers as are conferred or imposed on a coroner's officer by this Act.

(3) A coroner's officer may –

(a) administer an oath or affirmation; and

(b) take an affidavit.

The Coroner's Associates are police officers and al police officers who were involved in the investigation of [P]*'s death are by virtue of their office coroner's officers. They investigated this death and prepared documentation as a result of those investigations on behalf of the Coroner. Those records are the records of the Coroner. Accordingly the documents in question are Coronial Records not in the possession of Tasmania Police in its capacity as Tasmania Police, but rather by virtue of the fact that the individual officers who created the documents did so exercising their powers under the Act in order to further the Coroner's investigation. The documents are therefore exempt from disclosure under s6 of the* Right to Information Act 2009*.*

I further note that section 53A *of the* Coroners Act 1995 *does not apply to this situation and is not relevant. It appears that it is intended to cover situations during investigations where coroners can embargo people gaining access to docs from other agencies (not created for the coroner) that may jeopardise the investigation.*

Further Analysis

46 In determining the issues before me, which remain unchanged, I have taken into account the submissions from Inspector Kay and Ms McLeod and have continued to consider the applicant's submissions.

Preliminary matters

47 In the Department's submissions, Inspector Kay acknowledges that *the description of how DPFEM delegates have previously applied s6 of the RTI Act, in relation to coronial information in particular, may have been expressed inaccurately.* I consider that this concession encapsulates the issues to date and upon which the Preliminary Decision is based.

48 I find that the Department previously did not properly apply s6 to its decision making. The statutory test, under s6, is not that as originally summarised by Commander Bodnar *that any information held by the coroner would be excluded from release under the RTI provisions, unless, the coroner was minded to release such information.* This is discussed below.

49 With due respect to the Coroners, their assertion that my preliminary decision *is not correct* appears to be based on a misunderstanding. I accepted and acknowledged in paragraph 39 of the Preliminary Decision that the Act contemplated that in circumstances *such as an officer of Tasmania Police being appointed to assist the Coroner as an advisor or similar for an inquest, then s6 arguably could apply to an individual officer.* My decision was not made without consideration of ss15 and 16 of the *Coroners Act 1995* (Coroners Act). That, however, was not the argument advanced by the Department. The Department relied on s6 because the information was held by the Coroners Court, not because it was in the possession of a coroner's officer who was a person whose services are provided for the purpose of assisting the Coroner (who is excluded under the Act). It was on that basis that the Preliminary Decision proceeded.

50 As set out above, the Department now bases its reliance on s6 on different reasoning. It considers that all information which has not been released to O is only in its possession due to police officers providing services for the purposes of assisting a coroner.

51 I note that the Department's current position is aligned with the position set out by Ms McLeod. The interpretation of s6 follows.

Section 6

52 Section 6 of the Act provides for *exclusion of certain persons or bodies*. The Coroners and Coroners Court are clearly excluded[5] and a person does not have a right, under the Act, to request information held by the Coroner or Coroners Court.[6]

[5] As a magistrate (s6(1)(g)) and court (s6(1)(b)) respectively.

[6] Except for information that relates to the administration of the Court as provided for in s6 of the Act.

53 By contrast, the Department which includes Tasmania Police, is not and cannot be an excluded public authority. It is only in circumstances where information is in the possession of a police officer by virtue of *services...provided or procured for the purposes of assisting the person* [the Coroner] *or public authority* [the Coroners Court] that the Act provides a limited exclusion.

54 While all Tasmania Police officers are coroner's officers under s16(2) of the Coroners Act by virtue of their office, I do not accept that s6 can be interpreted to apply to Tasmania Police as a whole or all police officers. The wording is explicitly *a person whose services are provided or procured.* It is only identifiable persons who have performed a particular duty who hold information that may attract the exclusion, not all police officers at all times.

55 It is my view that the question is not what is held by the excluded public authority or person (as was previously stated by the Department), it remains a question of what is held by the Department itself as the public authority receiving the assessed disclosure application.

56 The relevant public authority must determine whether an exclusion under s6 applies to its public officers who provided the assistance to an excluded person or body. This will depend on the role of the public officer and the information that person holds. It is not a question to be determined by what is known, or assumed, to be held by a body excluded under s6(1)(a) of the Act.

57 I find it then follows that it is a necessary requirement of s6 for the Department to identify, as a practical matter, the person or persons who have possession of information that would be responsive to a request for assessed disclosure made under the Act. Once identified as possibly attracting exclusion under s6, an assessment would then be necessary to determine whether the information is in the person's possession as a consequence of services provided or procured for the purposes of assisting the Coroners Court as a coroner's officer (pursuant to s16 of the Coroners Act) undertaking the duties of the coroner's associate (pursuant to s15 of the Coroners Act).

58 There is no exclusion by default. It is not sufficient, for example, that a police officer has assisted the Coroner at another time. There must be a nexus between the information and the functions performed as a coroner's officer. The information would have to pertain directly to and be identifiable as work of the Coroner, such as investigations undertaken solely to inform the Coroner or preparation of a coronial file.

59 A request for information that does not come under the Act, because it is excluded by s6(1), will often be addressed by the provisions of another Act. For example, if information is excluded by virtue of it being in the possession of a police officer assisting the Coroner as a coroner's officer then there is an

avenue for that information to be requested under s58B of the Coroners Act and according to the relevant procedures. I acknowledge that the Department has consistently referred O to this process and encouraged her to seek information provided by the Department to the Coroners Court from that body.

60 The Department did, eventually, rectify errors in its assessment of information responsive to O's request and released information to her which should never have been considered to be excluded under s6. This was a traffic accident report and national police check application relating to P, which were clearly unrelated to the investigation of her death. O's perseverance in seeking further information is understandable, given the errors and inconsistent reasoning advanced by the Department in this matter.

61 Due to the incorrect approach and the further information held by the Department, that it later released, I remain satisfied that s20(a) was not available to be relied upon by the Department.

62 The consequences of displacing a person's legally enforceable right to information under s7 of the Act are significant and this exclusion should only be used in appropriate circumstances, which are likely to be rare. Reliance on s6 by a public authority that is ordinarily covered by the Act should be exercised diligently and the decision should be clearly communicated in the reasons.

63 For the avoidance of doubt, I note that the considerations in this decision relate specifically to police officers and due to their automatic role as coroner's officers under the Coroners Act. The same approach would not equally apply to information held by other public authorities.

64 Inspector Kay has set out that there is no further information about P in the Department's possession that would be responsive to the request for assessed disclosure, after considering s6.

65 In relation to the information that has been identified as excluded under s6, I accept that the Department is entitled to rely upon this provision in relation to information which is in its possession solely because it was created or collated due to the role its officers perform in assisting the Coroner. As O requested copies of briefs submitted to the Coroner and there does not appear to have been any police investigation outside of reporting to the Coroner, this appears to be an available conclusion.

66 Despite this, I recognise and acknowledge O's justified frustration with the lengthy and difficult process to date. I strongly encourage the Department to be more diligent in future, to ensure it correctly states the legislation in its decisions and applies the correct test if it intends to rely on this part of s6.

Conclusion

67 In accordance with the reasoning set out above, I determine that the Department is not entitled to refuse O's application by relying on s20(a).

68 Notwithstanding this, I am satisfied that the information responsive to her request, which has not already been released to O, is excluded under s6 and that the Act does not therefore apply to it. It follows that she is not entitled to this information.

69 I apologise to the parties for the inordinate delay in finalising this matter.

Dated: 21 June 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 6 Exclusions of certain persons or bodies

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

(a) the Governor;

(b) a court;

(c) a tribunal;

(d) the Integrity Commission;

(e) a judge;

(f) an associate judge;

(g) a magistrate;

(h) the Solicitor-General;

(i) the Director of Public Prosecutions;

(j) the Ombudsman;

(ja) the Custodial Inspector;

(k) the Auditor-General;

(ka) the Legal Profession Board of Tasmania;

(l) . . . . . .

(la) the Parole Board;

(m) the Anti-Discrimination Commissioner;

(ma) the Commissioner for Children and Young People;

(n) the Public Guardian;

(o) the Health Complaints Commissioner;

(p) Parliament;

(q) a Member of Parliament.

(2) This Act does not apply to the Law Society of Tasmania (the "**society**") established under the *Law Society Act 1962* and continued as a body corporate under the Legal Profession Act 2007 except –

(a) in relation to the performance and exercise of the society's functions and powers under Parts 8 and 9 of the Legal Profession Act 1993 ; and

(b) in relation to the performance and exercise of the society's functions and powers as a prescribed authority under Part 3.2 of Chapter 3 and Chapter 5 of the Legal Profession Act 2007 .

(3) This Act does not apply to information that –

(a) is in the possession of –

(i) the Independent Review; or

(ii) a person acting for, or on behalf of, the Independent Review; and

(b) was given to, or received or brought into existence by, the Independent Review, or a person referred to in paragraph (a)(ii) , for the purposes of the Independent Review.

(4) For the avoidance of doubt, an application made under section 13 is void if the application was made –

(a) in respect of information referred to in subsection (3) ; and

(b) before the commencement of that subsection.

Section 20 Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference:**
R2202-086

O1912-043

Names of Parties: O and Department of Police, Fire and Emergency Management (No 2)

Reasons for decision: s48(3)

Provisions considered: s6, s12, and s20

Background

1. O's sister, P, died in February 2014. Coroner Olivia McTaggart determined P died unexpectedly at home but was satisfied that *the investigation into the death of* [P] *was appropriate and thorough* and *that there were no suspicious circumstances indicating involvement of any other person*. The Coroner concluded that she could not *determine the cause of death, except to exclude foul play*.[1]

2. O, however, remains concerned about the circumstances of her sister's death.

3. As senior next of kin, O is permitted to request information under the Act that would have been available to her sister. Over the years she has made a number of applications for information under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department).

4. On 10 November 2019, O made an assessed disclosure request to the Department for information that is both directly and indirectly related to the investigation into the death of her sister. The reason for the request was *I want full disclosure about my sister*['s] *death at St Helens* and the following information was sought:

> [Item 1] *I would like copies of police notebooks for the following officers.*
>
> *Sharmaine Debra Ward*
> *Bridget Jane Tyson*
> *Paul John Turner*
> *Gavin Brian Chugg*
>
> *for the inclusive dates of 30 January 2014 to the 10 February 2014.*

[1] Record of investigation into death (without inquest) of [P], 2015.

[Item 2] *I would like print outs of soft copies of any and all electronic information on the system for the above officers during those inclusive dates.*

[Item 3] *I would like to know your archival rules for the notebooks and electronic information and the disposal schedule for these materials.*

[Item 4] *I would like to obtain copies of all electronic information for the St Helens Police Station for the period of 30 January 2014 to the 10 February 2014.*

[Item 5] *I would like to obtain performance reports for the officers above resulting from their actions during 30 January 2014 to the 10 February 2014.*

[Item 6] *I want to a complete list of staff who worked at St Helens Police Station between 30 January 2014 to the 10 February 2014.*

5. On 12 November 2019, O expanded the scope of her request to also include:

> [Item 7] *Information reports, running sheets, and digital data from the police officers attending the death scene who had access to a computer on the day in the field.*
>
> [Item 8] *CCTV footage from the police station on the 31 January 2014 and the 5 February 2014.*

6. The Department's assessed disclosure application form requires that a separate form is completed for requests to multiple business areas. O selected Tasmania Police and Forensic Science Service Tasmania. The form was processed as an application for the former and it is unclear whether a separate application was lodged for the latter. This external review decision relates to information in the possession of Tasmania Police.

7. On 22 November 2019, a decision on O's application for assessed disclosure was made by Sergeant Lee Taylor, a delegate of the Department under the Act. The delegate:

> *...applied the following refusals to the assessed information:*
>
> - *Section 12 being Information to be provided apart from Act; and*
> - *Section 20 being Repeat or vexatious application may be refused.*

8. The reasons for decision are as follows:

> *In relation to items 1, 2, 4 and 7 of your application, I am refusing this information pursuant to Section 20(a) of the Act. Therefore I do not disclose any relevant information in relation to these items.*
>
> *Please note once again that this information is in the possession of the Coroner's Office or does not exist.*

In relation to Item 3 of your application, I am refusing this information pursuant to Section 12(3)(c)(i) of the Act. Therefore I do not disclose any relevant information in relation to this item.

In relation to Item 5 of your application, I can advise that there were no performance reviews conducted for these officers during the times you have requested.

In relation to Item 6 of your application, I can advise that the following police officers were rostered at St Helens Police Station between January and February 2014:

Sergeant Gerry KING
Constable Allison ROLLS
Constable Harry EBSWORTH
Constable Christopher SMITHURST
Constable Bridget TYSON
Constable Clinton PORTER
Senior Constable Kent RITCHIE
Constable Louise FRENCH

In relation to Item 8 of your application, St Helens Police have advised that video footage from the period of your application is unable to be located and may no longer exist. Therefore I do not disclose any relevant information in relation to this item.

9. On 25 November 2019, O requested an internal review.

10. On 3 December 2019, Commander M Mewis released an internal review decision which affirmed the original decision. On 9 December 2019, O wrote the following to Commander Mewis in reply:

I have received the Coroner's file from the Coroner.

Police notebooks copies or originals are not included.

I called Paul John Turner and asked him questions and he asked me for the date when the body was found.

I gave it to him and he pulled out the notebook for that day and read his notes to me.

I have explained this to everyone and anyone who I deal with regard to the Police Notebooks as they have not been included in the Coroners file and when you are told that they have been it's not true.

Hence my repeat requests for copies of the Police Notebooks.

I hereby request an appeal under section 44 of the Act to the Ombudsman Office. (BCC)

11. The application for external review was accepted by this office on 11 December 2019.

12. On 21 September 2022, my Principal Officer – Right to Information wrote to the Department (endeavouring to assist with resolution, pursuant to s47(g) and (h) of the Act), in relation to another external review application relating to O.[2]

13. On 8 December 2022, a response to that letter was received from Ms Roslyn French, delegate of the Department under the Act. The letter addressed a number of pending applications for this applicant.[3] The response from that further consideration that is relevant to this application is set out in 'Submissions' below.

Issues for Determination

14. The issues for determination are, whether:

    a. s6 has been properly applied to exclude the information held by the Department;

    b. the information is otherwise available, relying on s12(3)(c)(i);

    c. the Department is entitled to refuse the application as a repeat request, under s20(a); and

    d. there has been an insufficiency in searching for relevant information by the Department pursuant to s45(1)(e).

Relevant legislation

15. Relevant to this review are s6, s12(3)(c)(i), s20(a) and s45(1)(e) of the RTI Act.

16. Copies of the relevant sections are provided in Attachment 1.

Submissions

Applicant

17. I have had regard to the applicant's assessed disclosure and review requests, and the 'Executive Summary: [P] Born [date of birth] – Sydney' undated, that was filed by the applicant.

18. I accept that O is seeking to obtain the maximum amount of information in the possession of the Department that relates to her sister, both before and after her death.

[2] R2202-037.

[3] Tasmanian Police references RTI 193/19, RTI 278/19, RTI 237/20, RTI 219/21, RTI 318/22 and RTI 324/22. RTI 278/19 relates to this application.

Department

19. The Department's letter of 8 December 2022 sets out its position. I take the letter as submissions for the purpose of determining the application, in addition to having regard to the reasoning of the original assessed disclosure decision and the internal review decision.

Original assessed disclosure decision

20. It is useful context to consider the matters raised in the original decision, which clearly informed the decisions of subsequent delegates.

21. The information that was said to be already available related to the *archival rules for the notebooks and electronic information and the disposal schedule for these materials.* A link was provided to the 'Disposal Schedule for Functional Records of the Department of Police and Emergency Management, Disposal Authorisation No 2351.'

22. The delegate relied on s20(a) as follows:

> *I advise that a regional police station such as St Helens gathers, collates and produces a significant amount of information each day concerning a wide range of matters much of which is personal and highly sensitive. To locate, gather and assess this information would take a substantial amount of time and resources.*
>
> *On 11 November 2019, I wrote to you concerning your application in an attempt to refine the scope of the information you seek. The information you request in items; 1, 2 and 4 of your application in its current form it would* substantially *and* unreasonably *divert the resources of Right to Information Services from its other work and interfere with the performance of this section.*
>
> *I recommended that you specifically detail the information you require and relate it to reported incident/s only. At present, without taking those recommendations into account your application is open ended and not sufficiently defined.*
>
> *On 12 November 2019, you replied via email twice to this office and stated,* 'My request is narrow' *and* 'I could have asked for other Police stations as well but I did narrow it to St Helens station'. *You then went onto state, '*So my recommendation is do your job and stop covering up for those staff members because now **I want any and all documents** generated out of St Helens for that period'.
>
> *Further to this you expanded your application to include:*
>
> *1. 'I want information reports, running sheets, and digital data from the police officers attending the death scene who had access to a computer on the day in the field; and*

2. I want cctv footage from the police station on the 31 January 2014 and the 5 February 2014.'

In an effort to provide the information you seek and remove the bar preventing you from obtaining this information, I have assumed from your emails that the information you require is specifically in relation to your sister's death and the surrounding circumstances.

23. The original decision summarised some of the history of prior and related RTI applications:

> *I am satisfied that the information you require in Items 1, 2, 4, and 7 of this application are a repeat of previous applications* ***(RTI 272/17, RTI 131/19 and RTI 193/19)*** *as you seek the same or similar information concerning notebook entries, electronic information and running sheets made and/or held by Tasmania Police with regards to your sisters death. Therefore, I am applying Section 20(a) of the Act.*

Internal review decision

24. The delegate, when considering the internal review application, helpfully provided detailed reasons in relation to each of the requests for information, verbatim:

> *Request No. 1 – Police notebooks*
>
> *I note you have previously requested copies of the police notebooks:*
>
> - *in an application dated 1 October 2017 (RTI 272/17)*
> - *in an application dated 3 June 2019 (RTI 131/19), and*
> - *in an application dated 15 August 2019 (RTI 193/19).*
>
> *The first application was refused on the grounds that what information was available was held by the Coroner's Office, and therefore excluded from disclosure in accordance with s6 of the Act. I am advised that the information sought continues to remain in the possession of the Coroner's Office.*
>
> *The subsequent applications were refused on the grounds they were repeats of the first application, in accordance with s20 of the Act.*
>
> *Again, on this occasion, the Delegate has refused this fourth application for the information on the same basis.*
>
> *In my assessment, there is no doubt that the applications for police notebooks dated 1 October 2017, 3 June 2019, 15 August 2019 and again on 10 November 2019, are all repeated applications for the same information.*

There appears to have been no change to the status of the information sought since the first request in October 20!7, or during any of the intervening periods, and therefore the latest application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.

In any event, even if the information was deemed appropriate for release, it cannot be released as it is not in the possession of the Department, and is excluded pursuant to s6 of the Act.

Accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to the police notebooks was appropriate.

<u>Request No. 2 – Electronic information relating to the named officers for the named period</u>

Again, this information has been previously requested:

- *in an application dated ! October 20!7 (RTI 272/!7), where you sought "every single document", naming the same four police members named in the current application*

- *in an application dated 3 June 20!9 (RTI !3!/!9), where you sought "copies of documents", and*

- *in an application dated !5 August 20!9 (RTI !93/!9) which included references to photographs, reports, notebooks, briefs, documents, and running sheets.*

Given the definition of 'information' outlined in s5 of the Act, and provided to you in the Delegate's response dated 22 November 2019, any electronic information was considered during assessment of your applications, including your latest application dated !0 November 20!9.

The first application was refused on the grounds that what information was available was held by the Coroner's Office, and therefore excluded from disclosure in accordance with s6 of the Act. I am advised that the information remains in the possession of the Coroner's Office.

The subsequent applications were refused on the grounds they were repeats of the first application, in accordance with s20 of the Act.

Again, on this occasion, the Delegate has refused this fourth application for the same information on the same basis.

In my assessment, there is no doubt that the applications for electronic information relating to the four named police members dated ! October 20!7, 3 June 20!9, !5 August 20!9 and again on !0 November 20!9, are all repeated applications for the same information.

There appears to have been no change to the status of the information sought since the first request in October 20!7, or during any of the intervening periods, and therefore the latest application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.

In any event, even if the information was deemed appropriate for release, it cannot be released as it is not in the possession of the Department, and is excluded pursuant to s6 of the Act.

Accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to electronic information was appropriate.

Request No. 3 – Archival rules

A link to this publicly available information was provided in the Delegate's response dated 22 November 20!9.

Request No. 4 – Electronic information for St Helens Police Station

This request does not, in any material aspect, differ from the request made at Request No. 2.

My assessment of this particular request is identical to that of Request No. 2, and I see no benefit in repeating that assessment.

Accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to electronic information was appropriate.

Request No. 5 – Performance Reports

I have reviewed the efforts undertaken by the Delegate to access the performance reports of the four named police members, and am satisfied that he, his staff and the staff at St Helens Station have made every reasonable effort to locate any relevant reports.

It is clear that no performance reports for those members, for the relevant period, were completed or, if they were, they are unable to be located.

In any event, and without conducting a formal assessment of any such reports given they are not available, I highly doubt they could be released as they would likely be classified as 'personal information' and exempt pursuant to s36 of the Act.

Accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to these reports was appropriate.

Request No. 6 – List of St Helens Police Station staff

This information was provided in the Delegate's response dated 22 November 20!9.

Request No. 7 – Information reports, running sheets and digital data

This request does not, in any material aspect, differ from the requests made at Request No. 2 and Request No. 4.

My assessment of this particular request is identical to that of Requests No. 2 and No. 4, and I see no benefit in repeating that assessment.

Accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to electronic information was appropriate.

Request No. 8 – CCTV footage

I have reviewed the efforts undertaken by the Delegate to access any closed circuit television (CCTV) footage recorded at the St Helens Police Station during the nominated dates, and am satisfied that he, his staff and the staff at St Helens Station have made every reasonable effort to locate any relevant information.

It is not unreasonable, given the passage of time, that such information would not be available. It is common practice across both the public and private sectors for CCTV footage to be routinely wiped, written over or disposed of after a period of time, unless there has been a specific request to retain a particular time period.

In any event, no footage was able to be located and, accordingly, it is my assessment that the determination made by the Delegate dated 22 November 20!9 with respect to that information was appropriate.

I have also taken into consideration during my assessment that the Ombudsman is currently undertaking a review of the determination made on !6 August 20!9 (RTI !93/!9), at your request. It would therefore be imprudent to make any assessment that could, in any way, be seen to impact, influence or subvert the determination of the Ombudsman. As you have chosen to enact the provisions availed to you by Part 4 of the Act, as is your right, it is appropriate that due process is followed and allowed to reach its conclusion.

Further, I also make note of the various and numerous attempts the Delegate has made to assist you in your pursuit of the information you seek, primarily by attempting to narrow the scope of your enquiry. This has clearly been attempted in good faith, and with a view to assisting you

to focus on the key pieces of information you require, and thereby avoiding unnecessary duplication.

In my view, you have clearly refused to engage in any negotiation as provisioned for in s20(b) of the Act, and have simply reinvigorated the initial requests and added additional repetitions. This refusal to negotiate, coupled with the numerous repetitions, can only be described as vexatious in accordance with that sub-section, and will unlikely assist you to find the outcome you appear to be seeking.

Therefore, having conducted a fresh assessment of the information subject to your initial request, I am satisfied that the exemptions pursuant to sections 20(a) and !2(3)(c)(i) of the Act applied by the Delegate in his assessment, and his correspondence to you on 22 November 20!9, were appropriate and in accordance with the legislation.

Submissions – Letter of 8 December 2022

25. The submissions of 8 December 2022 confirmed the Department's position with respect to each category of information:

Notebook Entries

As noted above, no information has been released.

[As was set out earlier in the letter in relation to another application for external review:

Notebook entries fall under the jurisdiction of the Tasmanian Coroner, as explained previously RTI cannot release this information.]

Archival Rules

In relation to the 'archival rules for the notebooks and electronic information and the disposal schedule for these materials', I can advise that this information is freely available on the website of the Office of the State Archivist at: [link omitted]

Electronic Information

Your request for all electronic information on the system for the above officers during those inclusive dates as well, is too broad to effectively consider for assessed disclosure. I have assumed that your intention is to gather information specifically in relation to your sister's death and the surrounding circumstances, as mentioned above this falls under the jurisdiction of the Tasmanian Coroner and no information can be released from RTI.

Performance Reports

There were no performance reviews conducted for these officers during the times you have requested, accordingly there is no information to disclose.

Complete list of staff at St Helens Police Station

The following Police officers were rostered at St Helens Police Station between January and February 2014:

Sergeant Gerry KING

Constable Allison ROLLIS

Constable Harry EBSWORTH

Constable Christopher SMITHURST

Constable TYSON

Constable Clinton PORTER

Senior Constable Kent RITCHIE

Constable Louise FRENCH

26. The delegate maintained the same position in the letter as the internal review decision.

Analysis

27. For convenience, in the discussion below, I have adopted the item numbers used in the Department's decisions for the categories of information requested by O.

28. I find that the Department satisfied two parts of O's request, as it:

    a. responded with respect to Item 3 (archival records) and was entitled to refuse this as otherwise available under s12(3)(c)(i); and

    b. released information responsive to Item 6 (list of staff at St Helens Police Station).

29. I find, in the absence of any evidence to the contrary, that the Department does not have further information responsive to Item 5 (performance reports) or Item 8 (CCTV footage). There is no further action required regarding these parts of O's request.

30. I now turn to the balance of the request, Item 1 (notebook entries), Item 2 (electronic information relating to the police officers), Item 4 (electronic information from St Helens Police Station) and Item 7 (information reports, running sheets and digital data). The Department relied upon s20(a), assessing that the requests were repeat and the position that there was either no information that could be disclosed under s6 because it was in the possession

of the Coroner, or there was no information that could be released (without reference to a relevant section of the Act).

31. In order for s20(a) to be satisfied the *same or similar* information as previously sought must be requested and the application must *not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.*

32. Of particular relevance in this matter is my recent decision of *O and Department of Police, Fire and Emergency Management*[4] (O and DPFEM No 1) which concerned the same applicant and related to information in the possession of Tasmania Police that related to the death of her sister.

33. The interpretation and application of ss6 and 20(a) was discussed in that decision and is followed here as it is equally relevant. As in *O and DPFEM No 1*, the Department relied on s6 on an incorrect basis, in that the information should be excluded as it was in possession of the coroner as an excluded person.

34. Consistent with my earlier reasoning in *O and DPFEM No 1*, it is not open to the Department, as it has previously done, to rely on s6 to exclude the Department from the Act. As set out in that decision:

> *55 It is my view that the question is not what is held by the excluded public authority or person (as was previously stated by the Department), it remains a question of what is held by the Department itself as the public authority receiving the assessed disclosure application.*
>
> *56 The relevant public authority must determine whether an exclusion under s6 applies to its public officers who provided the assistance to an excluded person or body. This will depend on the role of the public officer and the information that person holds. It is not a question to be determined by what is known, or assumed, to be held by a body excluded under s6(1)(a) of the Act.*
>
> *57 I find it then follows that it is a necessary requirement of s6 for the Department to identify, as a practical matter, the person or persons who have possession of information that would be responsive to a request for assessed disclosure made under the Act. Once identified as possibly attracting exclusion under s6, an assessment would then be necessary to determine whether the information is in the person's possession as a consequence of services provided or procured for the purposes of assisting the Coroners Court as a coroner's officer (pursuant to s16 of the Coroners Act) undertaking the duties of the coroner's associate (pursuant to s15 of the Coroners Act).*
>
> *58 There is no exclusion by default. It is not sufficient, for example, that a police officer has assisted the Coroner at another time. There must be a nexus between the information and the functions performed as a coroner's officer. The information would have to pertain directly to and*

[4] (21 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

be identifiable as work of the Coroner, such as investigations undertaken solely to inform the Coroner or preparation of a coronial file.

35. I am not satisfied that the Department correctly applied s6 and considered the relevant matters. Consequently, for the same reasons as in *O and DPFEM No 1*, I am satisfied that there is a reasonable basis for the applicant requesting the same or similar information for the remaining four requests. The Department is not entitled to rely on s20(a) to refuse her request.

36. In relation to Item 1 (notebook entries) I find that the Department must first assess whether the notebooks are in the possession of a police officer as a consequence of *assisting* the Coroner in their duty as coroner's officer. If so, then the Act does not apply.

37. It may be that the s6 exclusion does apply by virtue of the assistance provided by police officers as coroner's officers[5] but in the event that the information does not meet the requisite threshold it would then be necessary to assess the notebooks under the Act with regard to the exemptions available. I note that O has explicitly raised concerns that relevant notebook entries were not provided to the coroner and are not on P's coronial file. The Department must address this when assessing whether this information can be excluded under s6.

38. In relation to Item 2 (electronic information relating to the police officers), Item 4 (electronic information from St Helens Police Station) and Item 7 (information reports, running sheets and digital data), the Department has consistently relied on s20(a). I, therefore, am not satisfied that the Department has sufficiently considered and addressed the applicant's request as required by the Act.

39. I acknowledge that attempts were made between the parties to narrow the scope of information sought. I do not, however, agree with the unilateral narrowing of O's request that has been adopted in the Department's decision making. Consultation is required and a decision made according to a relevant provision of the Act, such as s19, if an applicant refuses to narrow a scope that the public authority considers unreasonably broad. As I found in *Robert Hogan and University of Tasmania*[6], the Act does not permit a public authority to unilaterally excise parts of an application for assessed disclosure without the agreement of the applicant. The Department states that it had *assumed...that the information you require is specifically in relation to your sister's death and the surrounding circumstances.* This is not in alignment with O's original request and subsequent statements as to the scope of that request.

40. Due to the above, I am not satisfied that the Department has undertaken a sufficient search for relevant information due to its unilateral reduction of the scope of O's request.

[5] See sections 15 and 16 *Coroners Act 1995.*

[6] R2208-010 (June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions, see [11] and [31]-[33].

41. I find that the Department is to consider and reassess these parts of O's requests according to the provisions of the Act. This may require further negotiations between the parties.

Preliminary Conclusion

42. In accordance with the reasoning set out above, I determine that the Department:

a. was not entitled to rely on s20(a);

b. is to assess Items 1, 2, 4 and 7 of O's request in accordance with the provisions of the Act;

c. did not undertake a sufficient search for information responsive to O's request; and

d. was entitled to refuse to provide information in relation to Items 3, 5, 6 and 8 as this was otherwise available under s12(3)(c)(i) or does not exist.

Submissions to the Preliminary Decision

43. As the above preliminary decision was adverse to the Department, it was made available to it on 11 July 2023 for input before the decision was finalised.

44. On 10 August 2023, the Department provided a response to the preliminary decision.

45. Inspector Tony Kay, a delegate of the Department under the Act, advised that:

> *Firstly, I confirm that I spoke with the applicant again specifically in relation to this Preliminary Decision and confirmed with her that the scope of this application is limited to information relating to the death of her sister.*
>
> *Further, I reaffirm the DPFEM submission into the issue of s6 of the* Right to Information Act 2009 *(the RTI Act). I acknowledge that the description of how DPFEM delegates have previously applied s6 of the RTI Act, in relation to coronial information in particular, may have been expressed inaccurately.*
>
> *I make the submission, following advice received, that the exclusion provided in s6 of the RTI Act applies to information that is in possession of the Department that arises from the provision of services for the purposes of assisting a coroner.*

In the specific facts surrounding the DPFEM possession of information requested by [O]*, the information that is relevant to those duties is excluded information, on our submission, as it was procured for the purposes of assisting a coroner.*

With regard to the police notebooks requested by the applicant, I make the submission that the s6 exclusion applies to this information, as confirmed by the scope clarification with the applicant described above and within the facts surrounding DPFEM possession of relevant information. Specifically, information contained in police notebooks has been assessed as meeting the above-described exclusion from the Act under s6.

All other information relating to [P] *in the possession of DPFEM has otherwise been released subject to a new DPFEM decision relating to our reference RTI381/22.*

DPFEM make no further submission in relation to the other points of your Preliminary Decision.

Further Analysis

46. Additional analysis is required regarding O's request for notebook entries under Item 1 of her request. Police notebooks will not always be excluded or exempt information. Whether police notebooks are subject to an assessment for disclosure under the Act, or are excluded by virtue of s6, is a factual matter that must be considered and adequate reasons provided to the applicant to explain the basis for any exclusion or exemption.

47. *In the specific facts surrounding the DPFEM possession of information requested by* [O]*, the information that is relevant to those duties is excluded information, on our submission, as it was procured for the purposes of assisting a coroner. With regard to the police notebooks requested by the applicant, I make the submission that the s6 exclusion applies to this information, as confirmed by the scope clarification with the applicant described above and within the facts surrounding DPFEM possession of relevant information. Specifically, information contained in police notebooks has been assessed as meeting the above-described exclusion from the Act under s6. All other information relating to* [P] *in the possession of DPFEM has otherwise been released subject to a new DPFEM decision relating to our reference RTI381/22. DPFEM make no further submission in relation to the other points of your Preliminary Decision.***Further Analysis**Additional analysis is required regarding O's request for notebook entries under Item 1 of her request. Police notebooks will not always be excluded or exempt information. Whether police notebooks are subject to an assessmentfor disclosure under the Act, or are excluded by virtue of s6, is a factual matter that must be considered and adequate reasons provided to the applicant toexplain the basis for any exclusion or exemption.I am satisfied that, in this instance, the notebooks of police attending the scene*possession of a person whose services are provided or procured for the purposes of*

possession of a person whose services are provided or procured for the purposes of

assisting the Coroner.[7] Therefore the relevant notebook entries in the possession of the police officers assisting the Coroner are excluded from disclosure under the Act, by virtue of s6.

48. Care must be taken, however, when the Act is excluded to ensure that this does not deny a person access to information through any means. In this instance there has been concern that some notebook entries were not actually provided by the relevant police officers to the Coroner, so would not be available under the Act but also not able to be sought through an application to obtain access to the relevant file at the Coroner's Court.

49. O has raised concerns that in the course of seeking information about the death of her sister and trying to obtain the notebooks, she has been referred by the Department to the Coroner and by the Coroner to the Department. This is unhelpful and untenable.

[7] *Coroners Act 1995* s16.

50. In my decision of *O and DPFEM*[8] I clarified the operation of s6 as it relates to police officers assisting the Coroner. By extension, it must follow that if a s6 exclusion has been applied in this manner, that there must be an established process of cooperation between the Department and the Coroners Court to ensure information physically in possession of a police officer, and not in the immediate possession of the Coroner, is shared for assessment.

51. It cannot be that an applicant is left in limbo with respect to a request to the Coroners Court where the information is with the Department.

52. I trust that the Coroners Court will reconsider any request from O for the notebook entries, if previous requests were not assessed while in possession of all relevant information.

53. Due to the above, it is not necessary for the Department to assess Item 1 of the applicant's request for information, as this information is excluded under s6.

54. Now that the Department has confirmed that the applicant only seeks information which relates to the death of her sister, it is also not necessary for it to assess Items 2, 4 and 7 of O's request as this information would also be excluded under s6.

55. While I still consider that an insufficient search was initially conducted, due to the lack of clarification regarding the scope of the applicant's request, I am satisfied that this issue has been rectified now that the scope has been confirmed.

56. The Department made no other submissions as to the balance of the preliminary decision, so my findings remain unchanged beyond the above discussion.

Conclusion

57. For the reasons given above, I determine that the Department:

    a. was not entitled to rely on s20(a), but is not required to reassess the relevant information as it is excluded under s6 of the Act;

    b. did not undertake a sufficient search for information responsive to O's request, but has now taken appropriate steps to rectify this issue; and

    c. was entitled to refuse to provide information in relation to Items 3, 5, 6 and 8 as this was otherwise available under s12(3)(c)(i) or does not exist.

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

[8] See *O and Department of Police, Fire and Emergency Management (No 1)* (21 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Dated: 21 August 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 6 Exclusions of certain persons or bodies

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

(a) the Governor;
(b) a court;
(c) a tribunal;
(d) the Integrity Commission;
(e) a judge;
(f) an associate judge;
(g) a magistrate;
(h) the Solicitor-General;
(i) the Director of Public Prosecutions;
(j) the Ombudsman;
(ja) the Custodial Inspector;
(k) the Auditor-General;
(ka) the Legal Profession Board of Tasmania;
(l) . . . . . .
(la) the Parole Board;
(m) the Anti-Discrimination Commissioner;
(ma) the Commissioner for Children and Young People;
(n) the Public Guardian;
(o) the Health Complaints Commissioner;
(p) Parliament;
(q) a Member of Parliament.

(2) This Act does not apply to the Law Society of Tasmania (the "**society**") established under the *Law Society Act 1962* and continued as a body corporate under the Legal Profession Act 2007 except –

(a) in relation to the performance and exercise of the society's functions and powers under Parts 8 and 9 of the Legal Profession Act 1993 ; and
(b) in relation to the performance and exercise of the society's functions and powers as a prescribed authority under Part 3.2 of Chapter 3 and Chapter 5 of the Legal Profession Act 2007 .

(3) This Act does not apply to information that –

(a) is in the possession of –
  (i) the Independent Review; or
  (ii) a person acting for, or on behalf of, the Independent Review; and
(b) was given to, or received or brought into existence by, the Independent Review, or a person referred to in paragraph (a)(ii) , for the purposes of the Independent Review.

(4) For the avoidance of doubt, an application made under section 13 is void if the application was made –

(a) in respect of information referred to in subsection (3) ; and
(b) before the commencement of that subsection.

Section 12 Information to be provided apart from Act

(1) This Act does not prevent and is not intended to discourage a public authority or a Minister from publishing or providing information (including exempt information), otherwise than as required by this Act.

(2) Subject to guidelines issued by the Ombudsman under section 49 , public authorities or Ministers may disclose information to the public as –

(a) a required disclosure; or

(b) a routine disclosure; or

(c) an active disclosure; or

(d) an assessed disclosure.

(3) Assessed disclosure is the method of disclosure of last resort and –

(a) the principal officer of a public authority is to ensure that there are adequate processes in place in the public authority to ensure that there is appropriate active disclosure, routine disclosure or required disclosure of information by the public authority; and

(b) the principal officer of a public authority is to ensure that the processes in place under paragraph (a) comply with the guidelines issued by the Ombudsman under section 49 ; 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.

Section 20 Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

Section 45 Other applications for review

(1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –

(a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or

(ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or

(b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or

(c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or

(d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or

(e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or

(f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

(a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or

(b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –

(i) relating to the personal affairs of the person; or

(ii) that is likely to expose the person to competitive disadvantage.

(2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –

(a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or

(b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-084
O2009-146

Names of Parties: O and Department of Police, Fire and Emergency Management (No 3)

Reasons for decision: s48(3)

Provisions considered: s45

Background

1 Coroner Olivia McTaggart determined that in February 2014 O's sister P died unexpectedly at home and was satisfied that *the investigation into the death of* [P] *was appropriate and thorough* and *that there were no suspicious circumstances indicating involvement of any other person*. The Coroner concluded that she could not *determine the cause of death, except to exclude foul play*.[1]

2 O, however, remains concerned about the circumstances of her sister's death and is seeking the maximum information that may be relevant to her continuing enquiries.

3 O has made several assessed disclosure applications to the Department of Police, Fire and Emergency Management (the Department) relating to information she is seeking that directly or indirectly relates to the death of P. I have issued two previous decisions in 2023 on related external reviews sought by O.[2] For convenience and to avoid confusion, the decisions are identified by the order received so this is *O and Department of Police, Fire and Emergency Management (No 3)*.[3]

4 On 13 August 2020, the applicant made the following request for assessed disclosure under the *Right to Information Act 2009* (the Act):

---

[1] Record of investigation into death (without inquest) of [P], 2015.

[2] These are *O and Department of Police, Fire and Emergency Management* (R2202-037) released in June 2023 and a preliminary decision was released to the Department on 11 July 2023, for application R2202-086, and will be finalised as *O and Department of Police, Fire and Emergency Management (No 2)*.

[3] Department reference 237/20.

Description of efforts made prior to this application to obtain this information:

I want the call sheet dated from the 30 January 2014 to 1 April 2014 for St Helens police station.

Reason information sought:

I want to know if any calls were made about my sister in any reference and calls reporting other deaths in the vicinity of [street name] *St Helens. But overall I am interested in all calls made to the Police over that period.*

…

Specific details of information sought:

I want to know of all calls made to St Helens Police Station between and inclusive of 30 January 2014 to 1 April 2014.

5 The application was accepted on 17 August 2020 and the fee waived.

6 On 17 August 2020, Sergeant Lee Taylor, a delegate of the Department under the Act, released the assessed disclosure decision. No information was released in response to the request:

> *...where you seek information surrounding the investigation into the death of your sister. Specifically, you seek:*
>
> > *'...all calls made to the St Helens Police Station between and inclusive of 30 January 2014 to 1 April 2014'.*
>
> *I advise that telephone communications to St Helens Police Station were not and are not recorded by Tasmania Police to date, therefore no information relevant to your application is disclosed to you.*

7 On 9 September 2020, O requested internal review.

8 On 24 September 2020, Manager S C Biggs, a delegate of the Department under the Act, released the internal review decision. The original assessed disclosure decision was affirmed:

> *In your application for assessed disclosure dated 13 August 2020 you sought:*
>
> > *'...all calls made to St Helens Police Station between and inclusive of 30 January 2014 and 1 April 2014.'*
>
> *In undertaking the review my enquiries identified that telephone calls made to St Helens Police Station are not recorded and have never been recorded. This means that the information you seek does not exist and consequently no information relevant to your application is able to be disclosed to you.*

9 On 24 September 2020, the applicant emailed a request to this office for external review (quoted verbatim):

> *My request was for phone calls made to St Helens police station between certain dates which could of been listed in Police officers notebooks, running sheets and other types of data materials.*
>
> *If a call came in regarding a bank robbery it would of been recorded somewhere. I want those records, SC Biggs and Lee Taylor assumed it was recorded calls. ITS NOT.*
>
> *All calls would of been logged and officers dispatched. Send me those records.*

10 On 28 September 2020, the applicant lodged an Application for Review. The grounds of review being:

> *I* [requested] *all calls made to St Helens Police station regarding a deceased person at the same location where my sister was found at* [address] *St Helens.*
>
> *The application was narrowed to calls recorded at the police station which does not occur. Calls can be recorded in Officers notebooks, running sheets and post it notes or in other ways not mentioned here. Lee Taylor narrowed it intentionally to limit the scope of my enquiry.*

11 O's request for external review was accepted on the basis that she had received an internal review decision from the Department and sought external review within 20 working days of that decision.

12 On 8 December 2022, after attempts at early resolution by my office across a number of external reviews from O relating to the Department, a letter was sent to O by Ms Roslyn French, delegate of the Department under the Act. The letter addressed a number of pending applications for this applicant.[4] The following is relevantly extracted from that further consideration:

> *You were advised that Right to Information Services (RTI Services) would review all applications currently being externally reviewed... In those applications you seek information held by Tasmania Police.*
>
> …
>
> ***3. RTI 237/20:***
>
> All calls made to the St Helens Police Station between and inclusive of 30 January 2014 to 1 April 2014.

[4] Tasmanian Police references RTI 193/19, RTI 278/19, RTI 237/20, RTI 219/21, RTI 318/22 and RTI 324/22. RTI 237/20 relates to this application.

> *Phone calls act St Helens Police Station and not recorded, therefore I do not disclose any relevant information in relation to this.*

13 On 22 June 2023, further exercising the dispute resolution powers in the Act under s47(1)(g) and (h), my office wrote to the Department inviting further consideration of the applicant's request:

> *...we invite the Department to reconsider the position taken in which a narrow interpretation has been taken to the applicant's request for information.*
>
> *The information requested in the assessed disclosure request was characterised as "the call sheet dated from the 30 January 2014 to 1 April 2014 for St Helens Police Station." The request goes on "I want to know if any calls were made about my sister ... and calls reporting other deaths in the vicinity of* [street name] *St Helens...all calls made to police over that period."*
>
> *In an email to this office on 10 December 2020* [O] *confirmed her position as follows:*
>
> > *My request was for information in any format however the police narrowed it to "recordings" only but if the police were informed of a dead person at the same address a few weeks later there should be a paper trail for it. I want those records.*
>
> *It appears that a narrow approach has been taken to the request with the response being on "recordings" of calls into the police station. This is in the original decision, internal review decision and letter of 8 December 2022 (the consolidated decision attached).*
>
> *Consistent with s47(1)(g) and (h) of the RTI Act, it would be helpful to the Ombudsman if the Department was to reconsider the wording and scope of* [O]*'s request and advise whether the position is maintained or better reasons might be provided.*

14 On 4 July 2023, my office received acceptance of this invitation from the Department.

15 On 1 August 2023, Sergeant Jessica Walshe, a delegate of the Department under the Act, wrote to O in response (see Submissions below). Attached to the letter was a table prepared by Sergeant Walshe summarising the *incident type* of events recorded in the Command and Control System from 30 January 2014 to 31 March 2014.

Issues for Determination

16 The issues for determination are, whether:

a. the information requested was not in existence on the day the application was made (s45(1)(b)); and

b. there was an insufficiency in the searching for information responsive to the request (s45(1)(e)).

Relevant legislation

17 Relevant to this review are ss45(1)(b) and (e) of the Act.

18 A copy of s45 is provided in Attachment 1.

Submissions

Applicant

19 I have had regard to the applicant's assessed disclosure request, application for external review, and the 'Executive Summary: [P] Born [date of birth] – Sydney' undated, that was filed by the applicant.

20 On 10 December 2020, in reply to correspondence from this office on 9 December 2020, the applicant further confirmed her position as follows:

> *My request was for information in any format however the police narrowed it to "recordings" only but if the police were informed of a dead person at the same address a few weeks later there should be a paper trail for it. I want those records.*

21 I accept that the applicant was seeking any information held by the Department that recorded phone calls made in the specified period.

Department

22 In the letter of 1 August 2023, an explanation was provided by Sergeant Walshe about the phone records available from the St Helens Police Station and the further efforts undertaken with respect to the assessed disclosure request.

23 The letter relevantly informed the applicant as follows (quoted verbatim):

> *I can confirm that I have enquired with St Helen's Police Station and there has never been a call list of logs made or created which records incoming calls direct to that station. Further I confirm that there is also no attendance record or written log for any members of the public who may attend the station and provide information. There are also no audio recordings of calls made direct to the St Helen's Police Station. Therefore I confirm that the information initially sought does not exist in the records of the Department of Police, Fire and Emergency Management (DPFEM).*

Ombudsman Tasmania invited us to look at what information DPFEM may possess in an attempt to provide you with some information. I undertook an examination of our Command-and-Control System (CACS). During 2014 CACS was the system that radio room operators used to log incidents and phone calls received by the radio room that required police attention or attendance. I took a broad approach to my examination to try and identify some information that would be responsive to the request to assist you.

I located the CACS incidents for the period of 30 January 2014 to 1 April 2014 for the St Helens area. I have attached the table I created from these CACS incidents to this letter. I have not included personal information (including names, addresses and personal information provided by or about a person) in this spreadsheet as this would be information that DPFEM would otherwise determine as personal information pursuant to section 36 of the Right to Information Act 2009. However, I can confirm that other than her sudden death, there are no incidents that relate or refer to [P] *or that originate from* [P].

In an attempt to resolve this matter, I also expanded enquires to include deaths that police were notified of and/or attended in the St Helen's during the period 30 January 2014 to 1 April 2014. I confirm that the only other sudden death in the St Helen's area during the period of 30 January 2014 to 1 April 2014 was at the St Helen's Hospital. For reasons outlined above and in accordance with section 36 of the Act I cannot provide any further details, however I can confirm that this was due to a medical condition. There were no records that police attended any other deaths at or in the vicinity of [street name]*, except for* [P]*'s.*

There is no further information that DPFEM can release in relation to application 237/20. A copy of this letter will be provided to the Ombudsman Tasmania. Should you wish to provide any response to this correspondence please do so via the Ombudsman's office, as this matter remains as an external review.

Analysis

24 There was a clear error at the outset with the Department's consideration of this application, when the request was read narrowly as only relating to *recordings.* It should have been apparent from the reference to a *call sheet* that was not the full scope of O's request. A proper assessment would have considered whether there was written or recorded information that was responsive to the request and advised the applicant accordingly.

25 There was further error when that initial narrow reading of the request was followed at the internal review and later review stage. In my view, it highlights that the internal review was not carried out in accordance with the

requirements of a *fresh decision* under s43(4)(b) and *given in the same manner as a decision in respect of the original decision* (s43(5)). The Department's failure to identify and address this error, despite the applicant explicitly identifying it in her internal review request, is highly unfortunate and I urge the Department to make greater efforts to ensure that any review undertaken is thorough and questions any assumptions made by a previous delegate.

26 Both the original and internal review decisions were brief and did not assist the applicant in understanding the assessment that was undertaken, such as enquiries made or the reasoning for the conclusion reached.

27 Full and well-reasoned decisions are important for explaining the rational and logical basis upon which conclusions have been reached by a public authority. Oftentimes an applicant has no awareness of the operational matters that inform decisions, such as procedures for collection and storage of different types of information.

28 The Department did provide additional reasoning and information in its letter of 1 August 2023. It helpfully informed O about the internal procedures for the tracking of calls, to which she was not previously privy, and why the information requested is not available.

29 I acknowledge the further efforts that were taken by Sergeant Walshe to identify and release some additional information that may be of assistance to O. I note that the attachment with the Command and Control System incidents is beyond the scope of the request for assessed disclosure and consequently does not form part of this external review, but I commend the Department's decision to release it to provide context and relevant information to the applicant.

30 Now that the error has been corrected, regarding the incorrect narrowing of the scope of O's request, I have been able to review the decision and the searching undertaken by the Department for relevant information. I am satisfied with the Department's explanation of the types of information recorded at the St Helens Police Station and that the records O requested would not have been created.

31 O's exercise of her review rights was justified and understandable, due to the Department's sustained error, but I consider that the ultimate conclusion of the Department, that the information was not in existence, was accurate. I find that the Department did not initially undertake a sufficient search for information responsive to the request, due to its misunderstanding of its scope. I am satisfied, however, that this has been corrected following Sergeant Walshe's thorough review.

Preliminary Conclusion

32 In accordance with the reasoning set out above, I determine that:

a. information sought by the applicant was not in existence on the day the application was made; and

b. the Department did not initially undertake a sufficient search for information responsive to the request, but had taken appropriate steps to rectify this by the conclusion of this external review.

Conclusion

33 As the above preliminary decision was adverse to the Department, it was made available on 7 August 2023 under s48(1)(a) to seek its input before finalising the decision.

34 On 8 August 2023 the Department advised that no submissions were to be made in response.

35 The Department did note in its reply that:

> *Significant efforts have been expended to review all matters relating to* [P]*'s death and provide the maximum amount of information we can.*
>
> *The team's efforts to explain DPFEM holdings as well as broaden the scope have hopefully provided some comfort to the applicant.*

36 I acknowledge and commend those recent efforts to rectify errors and assist the applicant to obtain relevant information, though it is unfortunate that these efforts came at such a late stage in the process.

37 Accordingly, my findings remain unchanged and I determine that the Department was entitled to conclude that there was no information responsive to O's request and has, now, adequately searched for relevant information.

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

Dated: 8 August 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant legislation

Section 45 Other applications for review

(1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –

(a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or

(ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or

(b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or

(c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or

(d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or

(e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or

(f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

(a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or

(b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –

(i) relating to the personal affairs of the person; or

(ii) that is likely to expose the person to competitive disadvantage.

(2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –

(a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or

(b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** O2108-076
R2202-074

Names of Parties: Peter Jacobson and Department for Education, Children and Young People

Reasons for decision: s48(3)

Provisions considered: s36

Background

1 Mr Peter Jacobson has previously been employed by the then Department of Education, which has now been renamed the Department for Education, Children and Young People (the Department). He wished to obtain personal information held about him by the Department in connection with his employment.

2 In early December 2020 and in early February 2021, Mr Jacobson applied under the Act for a copy of all records placed on his personal file in 2020 including *letters, file notes and electronic records* from the Department.

3 On 8 May 2021, Mr Jacobson applied for assessed disclosure under the *Right to Information Act 2009* (the Act), seeking:

> *a copy of <u>all</u> records placed on my personal file in 2020. It includes letters, file notes, electronic records.*

4 He applied for a fee waiver as he considered there had been an unreasonable delay in responding to his past requests for information. Despite this, he paid the application fee.

5 On 18 June 2021, Ms Antonia O'Brien of the Department, a delegated officer under the Act, released a decision to Mr Jacobson. She determined to release the requested information in part, finding some information exempt under s36 – Personal information of a person.

6 Ms O'Brien redacted the names and work contact information of persons other than decision-makers. She considered Schedule 1 public interest matters (h), (m), (n) and (p) in her decision.

7 On 2 July 2021, Mr Jacobson sought an internal review of Ms O'Brien's decision, submitting that he knew the officer with the redacted name, that redactions

were applied inconsistently as a result and sought for records to be released in full to him. He also sought for the fee to be waived again and supplied reasons that I detail in the submissions below.

8 On 29 July 2021, Ms Kristy Pereira of the Department, a delegated officer under the Act, released an internal review decision. Ms Pereira primarily upheld Ms O'Brien's decision to apply exemptions under s36 and redact names. She, however, released extra information sought by Mr Jacobson and expressly refused his fee waiver request.

9 On 12 August 2021, Mr Jacobson requested an external review of the Department's decision to this Office and advised that he sought any information not provided to him following the Department's decisions.

10 The application was accepted for an external review on the basis that Mr Jacobson had received an internal review decision and he had submitted it to this Office for review within 20 working days of his receipt of it.

Issues for Determination

11 I must determine whether any of the information responsive to Mr Jacobson's request is eligible for exemption under s36.

12 As s36 is in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it. In doing so, I must have regard to the factors listed in Schedule 1 of the Act.

Relevant legislation

13 The Department has relied on s36 in its decision. I attach a copy of this section to this decision at Attachment 1.

14 A copy of s33 and Schedule 1 of the Act is also attached.

Submissions

Mr Jacobson

15 Mr Jacobson did not provide this Office with submissions in relation to the external review but made submissions as part of his request for internal review on 2 July 2021.

16 The Department released most of the information to Mr Jacobson after the internal review, so I will not restate submissions which relate to information no longer in dispute. The remaining submissions relate to the names of Departmental officers and fee waiver, as they are the points left in contention. I quote these verbatim (Mr Jacobson's emphasis), as follows:

> *1* ...
>
> *2* *Government officer names – redacted*

It is my understanding the RTI delegate chose **not** *to contact Inspector R Davis at Tasmania Police to obtain consent to release a document containing her name. However, with reference to Sect 36(2), I assert it is a proper part of the RTI process to make such contact. I don't accept the RTI delegate's short-cut, to simply redact a person's name on a record, to be reasonable administrative action. What if the police officer agreed to release her name?*

Your RTI delegate's need to redact a government officer's name on most (and if not all) records that were provided to me, is under question. For an example, on the records dated 27 March 2020, and 25 June 2020 (issued to me) the name of Inspector Rebecca Davis was redacted. It is a **nonsense** *to redact a government officer's name, when that name is well known to me.*

With correspondence dated 8 January 2021...the DoE Secretary, T Bullard, provided me with a copy of his letter dated 24 June 2020 ...that was addressed to Inspector Rebecca Davis at Tasmania Police. Clearly, an **inconsistency** *is evident. It is a* **nonsense** *to sometimes redact the name of this officer, and sometimes not to redact it.*

Notwithstanding that, to disclose the name of a government officer (who is acting for the Crown) is **not** *disclosure of personal information of that person.*

In summary, and to resolve this matter, I require most (and if not all) records to be released to me and **without** *a government officer's name being redacted.*

3 *My application for a waiver of the $40.50 fee – was not properly considered.*

My stated reasons for requesting a fee waiver were:

(i) "There has been an unreasonable processing delay!

(ii)I submitted a RTI request dated 2 Feb. 2021 [sic. 5/02/21]. Nevertheless, Ingrid Bown suggested a PIP request would do, and that was then completed on 22 April 2021. My employee number was on the RTI request, and a copy of my drivers license was sent with my subsequent PIP request. Ingrid Bown addressed a letter to me dated 7 May 2021 and it had attachments. She did not provide information from my personal file" (8/05/21).

On my RTI application (8/05/21) it was noted "...I was supplied with file records of another employee. I have not yet received records I require!..."

On my RTI application, it was also noted I submitted similar requests by: "a letter dated 4 December 2020;
RTI dated 5/02/21; and
PIP dated 22/04/21" (8/05/21).

(i) Since 4 December 2020 I have endeavoured to gather personal information contained on my personal file at the Department of Education. However, it has taken until 18 June 2021 for the DoE to assist me. It is the procedures, processes, and mistakes by DoE officers that have caused this ***6-month*** *delay. To my mind, it is not reasonable administrative action. I resent paying a fee of $40.50 when the service provided by the DoE is very sub-standard. It is in the public interest that I have been provided with reasonable administrative action, and therefore herein I do request a fee refund.*

(ii) Notwithstanding that, this RTI information could have been provided to me ***free of charge****, in association with my Personal Information Protection (PIP) request (File no: 21/2432) dated 22nd April 2021. I was advised by Ms Bown to place the PIP request. I did that.*

My PIP request failed because the DoE ***carelessly*** *provided me with significant personal information which pertained to* ***another*** *employee!! To put this another way, a full and proper search of my personal file records did not occur with the PIP request.*

(iii) It is likely the RTI (re-issued) process and fee is being used to "punish" me for the irresponsible action of a government officer who didn't properly check my PIP request details. It is in the public interest that I have been provided with a reasonable and fair service by the Department of Education. Accordingly, it is reasonable that I may expect and request a fee refund.

Your RTI delegate did not consider my request for a fee refund (made in the public interest); notably, it was based on the aforementioned reasons. The RTI delegate chose not to address the long processing delay, and the negligent PIP process.

In summary, herein I do request a refund of the RTI fee paid of $40.50; and if a refund (technically) happens not to be available, then I suggest it's reasonable that an ex-gratia payment be considered for the same amount.

To conclude, I submit that: (1) all documents in 2020 on my personal file (i.e. that pertain to my personal affairs) be provided to me; (2) the redacted names of government officers on documents provided to me be amended; and, (3) my $40.50 payment be returned to me. Once done, it will resolve this RTI request.

It is difficult not to conclude this is a case where there is avoidance to provide information to a citizen, and it is evidence of an attempt to raise revenue.

The Department

17 The Department did not make submissions in relation to this external review beyond the reasoning contained within its decisions, which is set out as follows.

On 18 June 2021, Ms O'Brien, in the Department's original decision, released the information in part, and submitted the following reasons to exempt the information:

> *Historically, the Department has a number of systems in place to ensure personal information is kept private and is not generally for release to the public, except with the express permission of the person concerned. Privacy is the word we give to being able to keep certain information to ourselves and to control what happens to our personal information. It is essential for the Department to be trusted to responsibly handle the personal information of individuals.*
>
> *I consider that the release of personal information of individuals such as names and phone numbers is contrary to the public interest as release could be of concern to those individuals.*
>
> *On balance I find that it would be contrary to the public interest to release the information and consequently that it qualifies as exempt information under section 36 of the Act.*

18 On 29 July 2021, Ms Pereira determined to release further information to Mr Jacobson via her internal review decision. She replied to Mr Jacobson's three points that he outlined in his letter seeking an internal review dated 2 July 2021. I have removed Point 1 which is no longer disputed, but the remainder sets out:

> *<u>Point 2</u>*
>
> *I have determined to uphold Ms O'Brien's decision in part and have decided that some information previously assessed under the Act as exempt remains exempt information under the following section of the Act:*
>
> . *36 – Personal information of person*
>
> *<u>Point 3</u>*
>
> *We apologise for the delays and frustrations you have experienced in your requests for personal information. As stated above this is a large department and not all your interactions with the Department would be filed on your personnel file.*
>
> *As to your request for a refund, in section 16(3) of the Act it clearly states "Before an application is accepted by a public authority or a minister, the application fee must be paid...". Therefore, as you have paid for a service (and that service has been provided) then a refund of the application fee cannot be given.*

19 The reasons Ms Pereira gave for relying on s36 are as follows:

> *I note your assertion that "to disclose the name of a government officer...is not disclosure of personal information of that person". I disagree with that statement. I consider some names and position titles of persons working in an executive role who represent the*

Agency may be released. However I find no benefit to the public to release the personal information of those staff who have no involvement in the issue at hand and are performing an administrative role.

Analysis

Section 36 – personal information of a person

20 The Department sought to exempt information which relates to the personal information of a person under s36 of the Act. For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than Mr Jacobson, or that the information would lead to that person's identity being reasonably ascertainable.

21 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36.[1] The personal information of public authority employees, including name, position and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it.

22 The Department has not provided any specific reasons for redacting the information that addresses the consistent approach to be taken to personal information of public officers. That staff may be performing administrative roles is not an unusual circumstance or one which I consider justifies the concealment of their identity in performing a public role. The onus under s47(4) to show why this information should be exempt has not been discharged.

23 In the absence of detailed submissions to the contrary, save for brief mention of historical systems, privacy and that it is concerning to the named individuals aside, I am not satisfied that there are other specific or unusual circumstances that justify the exemption of the names of public officers in emails, minutes and other documents. I find those details are not exempt and should be released.

24 The exception to this is in relation to telephone numbers. Ms O'Brien, in her decision of 18 June 2021, found this information to be exempt with the very brief reasoning as follows:

> *I consider that the release of personal information of individuals such as names and phone numbers is contrary to the public interest as release could be of concern to those individuals.*

25 While I do not agree with Ms O'Brien in relation to the names of public officers, I accept that there are valid concerns around the release of direct telephone and

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1 See *Rosalie Woodruff and Hydro Tasmania* [11 July 2023] *Suzanne Pattinson and Department of Education* [August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and Environment* (January 2022), *Camille Bianchi and Department of Health* (November 2021) and *Clive Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

mobile numbers of public officers. As I set out in my recent decision of *Linda Poulton and Meander Valley Council*:[2]

> *Direct telephone numbers are often not provided to the public, to ensure that calls are received through established channels. Mobile phones may be used for personal use in addition to work functions and are not necessarily appropriate to release.*
>
> *I am content to leave the direct and mobile telephone numbers redacted, as...release would not provide any additional useful information but has the potential to cause harm to the interests of an individual for the reasons discussed above.*

26 I find the same rationale applies here and, accordingly, I consider all direct or mobile telephone numbers contained in the information are exempt under s36. The names and email addresses of public officers are not exempt and are to be released to Mr Jacobson.

Waiver of the Application fee

27 Finally, I address the application fee. The Act does not provide the Ombudsman with jurisdiction to externally review a refusal to waive an application fee, though such refusal may form the basis for a complaint under the *Ombudsman Act 1978*.

28 I will note that there is no indication that the Department's actions in relation to the fee waiver request are in breach of the Act. Mr Jacobson's concerns regarding fee waiver relate to delays he alleges have occurred by the Department and that he is seeking to access his own personal information. These are not categories of fee waiver under s16 but should be considered in conjunction with s3(4)(b), which sets out:

> *it is the intention of Parliament – that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.*

29 It is my understanding that the Department has now implemented a general practice of waiving the application fee to applicants who seek access to their own personal information, as it considers that facilitating such access is a purpose which is of general public interest or benefit. I encourage the Department to ensure it is consistent with fee waiver requests and to consider refunds of fees if it acknowledges there have been delays or issues. While this is not mandatory under the Act, it is firmly in keeping with its object and with my published Guideline in relation to charges for information.[3] I say this in a general sense, and make no finding as to whether this is the case here, as it is not a matter I can determine as part of this external review.

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[2] (24 August 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

[3] Guideline 1/2012, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications

Preliminary Conclusion

30 For the reasons set out above, exemptions claimed by the Department pursuant to s36 are varied.

Conclusion

31 As the above preliminary decision was adverse to the Department, it was made available to it on 22 September 2023 under s48(1)(a) of the Act, to seek its input before finalising the decision.

32 On 5 October 2023, the Department advised this office that *it did not intend to provide any further matters for...consideration*.

33 Accordingly, for the reasons set out above, I determine that the exemptions claimed by the Department pursuant to s36 are varied.

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

Dated: 6 October 2023

Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant Legislation

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Where :

personal information means any information or opinion in any recorded format about an individual –

(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and
(b) who is alive, or has not been dead for more than 25 years.

Section 33 – Public Interest Test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

Schedule 1 – Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

DECISION

OMBUDSMAN TASMANIA

Right to Information Act Review **Case Reference:** R2202-121
O2009-167

Names of Parties: Q and Northern Midlands Council

Reasons for decision: s48(3)

Provisions considered: s36 and s39

Background

1 Mr John Millwood was convicted of sexual abuse of a child and sentenced to imprisonment. Following his conviction, efforts were made by members of the community to have his name removed from public plaques celebrating his achievements, which were in the City of Launceston and Northern Midlands Council municipal areas. Mr Millwood's conviction, the efforts to have public recognition removed, the award of compensation for the victim-survivor through litigation, and allegations that Mr Millwood deliberately divested assets to avoid paying compensation have been widely reported in the media.

2 Q, the applicant, made an application to the Northern Midlands Council (Council) for assessed disclosure under the *Right to Information Act 2009* (the Act).

3 On 9 July 2020, Q, through his lawyer Mr Edward Burrows-Cheng, requested the following from Council:

> *All correspondence from John Wayne Millwood to the Northern Midlands Council referring to his criminal conviction or* [Q].

4 During the assessment of Q's application, Council located a single page letter dated 6 August 2019 written by Mr Darrell Grey, the lawyer for Mr Millwood, and sent to the Mayor of Council, Ms Mary Knowles. This was the only information identified as being responsive to the request.

5 On 17 July 2020, Council advised Mr Burrows-Cheng that consultation was required with a third party pursuant to s36. On the same day Council advised Mr Grey, for Mr Millwood, of the request and referred to the consultation required under s36 of the Act.

6 On 20 July 2020, Mr Grey replied to Council:

> *Before my client considers your request, could you please advise who requested information as this will be relevant to our response.*

7 Then on 20 July 2020, Council advised by return email:

> *Received from Edward Burrows-Cheng acting for* [Q].[1]

8 Also on 20 July 2020, Mr Grey replied by return email that he suspected the request related to litigation between Q and Mr Millwood and:

> *Further, it arguably releases confidential information to them whereas they were never intended to be recipient to that information.*
>
> *It is not in the public interest for my correspondence to be released to* [the firm acting for Q].

9 On 5 August 2020, Ms Maree Bricknell, a delegate of the Council under the Act, released the following decision:

> *I refer to your Right to Information request regarding the above and advise that Council has determined that information on file is exempt from release under the Act as it was provided in confidence and would not promote the interests of individual/s nor the public interest.*

10 On 19 August 2020, Mr Burrows-Cheng wrote to Ms Bricknell raising concerns about the original decision and whether it complied with the statutory requirements under s22. He wrote:

> *...the letter does not:*
>
> 1. *identify the name of the person who made the decision (s22(2)(b));*
> 2. *inform my client of his right to apply for a review of the decision, the authority to which the application for review can be made in the time in which my client must apply for a review (s22(2)(c)(i), (ii) and (iii)); and*
> 3. *state the public interest considerations on which the decision was based. (s22(2)(d)).*
>
> *Can you please confirm whether it was intended to be a notice under this section.*
>
> *If so, my client intends to appeal/request a review of this decision by the mechanisms in the act and gives formal notice of that intention.*
>
> *It is requested that this decision be reviewed by the General Manager or a delegated officer of the Northern Midlands Council as required under s43(1) of the Act.*

---

[1] I note that the Act only requires a third party being consulted under s36(2) to be advised that there has been an application for information which they have provided and the nature of the information that has been applied for. It does not authorise the public authority to identify the applicant to the third party and I would only advise a public authority to do so with the applicant's explicit permission. This is particularly important when the information requested is connected to criminal conduct and sexual abuse, as is the case in this instance.

If the purported decision has been made by the General Manager, my client request [sic] *that this matter be referred to the ombudsman for external review pursuant to s45(1)a) of the Act.*

11 On 20 August 2020, Ms Bricknell replied as follows:

I should have advised in the letter that as per section 22(2)(b) I provided the information as a delegated RTI officer, therefore you have a right to apply for an internal review under section 43, and that application can be made to the General Manager within 20 days of receiving my correspondence.

The decision not to release the information was determined to be contrary to the public interest in accordance with section 33 schedule 1 (b), (i), (m) of the Act.

Your intention to appeal this decision will now be referred to the General Manager for internal review and a fresh decision will be made and advised.

12 On 1 September 2020, Mr Des Jennings, Council's General Manager and principal officer under the Act, released an internal review decision. The decision affirmed the original decision, relevantly:

For the purposes of this review, I have read and evaluated all the material associated with your request. All such material the RTI officer drew upon when making the initial determination as described in correspondence dated 5th August and clarified further on 20th August 2020.

Following my review, I affirm the response made by the RTI officer to you under the Act and for the same reasons.

13 On 29 September 2020, Mr Burrows-Cheng lodged an application for external review for his client. Annexed to the application was a summary and supporting documentation:

The applicant applies for a review of the internal review made by the General Manager of the Northern Midlands Council on 1 September 2020 (received 2 September 2020).

On 19 August 2020, the applicant pursuant so s. 43(1) of the Right to Information Act 2009 (TAS) applied for an internal review of the decision made by the Northern Midlands Council on 5 August 2020.

On 2 September 2020, the applicant received the decision from the Northern Midlands Council General Manager about the internal review.

Pursuant to s. 44 of the Right to Information Act 2009 (TAS) the applicant applies for a review of the internal review.

The applicant has satisfied s. 44(!)(a) and 44(!)(b)(i) of the Right to Information Act 2009 (Tas).

14 The application for external review was accepted by my office on 29 September 2020.

Issues for Determination

15 The issue for determination is whether the relevant information is exempt from disclosure under either s36 or s39 of the Act. As these sections are subject to the public interest test in s33, if I find either exemption could apply, I must determine whether the release of the information would be contrary to the public interest having regard to, at least, the matters in Schedule 1.

Relevant legislation

16 Relevant to this review are ss33, 36 and 39 of the Act. Those sections are copied in Attachment 1 along with Schedule 1.

Submissions

Applicant

17 No further submissions have been provided for the applicant beyond that provided with the application for external review and set out above.

Council

18 Council did not provide specific submissions in response to this external review, other than its original and internal review decisions, which are set out above.

Analysis

Statement of reasons and onus

19 The fundamental starting point regarding any matter under the Act is that an applicant has a legally enforceable right under s7, to information identified and in the possession of Council unless that information is exempt information.

20 The process by which the assessment is undertaken and any exemption applied are required to be captured in a statement of reasons. Section 22 provides that reasons are to be given and sets out the relevant requirements.

21 I find that the delegate failed to provide a satisfactory *statement of reasons for the decision* as required under s22(2)(a). The letter of 5 August 2020 did not:

a. *state the reasons for the decision* (s22(2)(a)), rather it merely provided a conclusion reached;

b. identify, in general terms for the applicant, the information being assessed as responsive to the request, namely a single page letter;

c. explain the influence on the decision, if any, of the third-party consultation under s36;

d. specify the exemption provisions under Division 2 of Part 3 of the Act that were considered;

e. properly apply the public interest test under s33 with reference to the relevant exemption provisions; nor

f. comply with s22(2)(b) and (c), as it did not state the name and designation of the person who made the decision or set out the relevant right of review.

22 The brevity with which the assessed disclosure decision was communicated to the applicant did not inform him of the basis upon which his right to the information had been displaced by the exercise of an exemption. It does not include:

a. reasons for the decision; or

b. materials considered; or

c. the issues being addressed;

in the decision-making process.

23 There are a number of long accepted *important purposes* for a statement of reasons, including that:

- *they "encourage better and more rational decision-making";*
- *they "enhance government transparency and accountability and give legitimacy to a decision by showing that the decision was not made arbitrarily and that issues raised by interested parties are being adequately considered"; and*
- *in compliance with procedural fairness, they enable those affected by the decisions to decide whether the decision has been lawfully made and why they have not succeeded.*[2]

24 Although I am satisfied that the letter of 20 August 2020 responding to the applicant's lawyer remedied the deficiencies in point (f) above, I remain dissatisfied that the letters of 5 August and 20 August 2020, when taken together, amount to an adequate statement of reasons as contemplated and required by the Act.

25 I further remain dissatisfied that the letters individually, or when taken together, addressed the requirement under s22(2)(d) to properly *state the public interest consideration on which the decision was based.*

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[2] Justice Melissa Perry, 'Statements of Reasons: Issues of Legality and Best Practice,' 10 June 2020, Statements of reasons: Issues of legality and best practice (fedcourt.gov.au), accessed 26 July 2023 in which her Honour cites Professors Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis, 5th ed, 2019) at 1200-1202.

26 Turning then to the internal review decision, I am not satisfied that Mr Jennings sufficiently undertook to *review the decision and make a fresh decision* (under s43(4)) in compliance with the requirements under s43(5) that it be *given in the same manner as a decision in respect of the original application.*

27 Mr Jennings affirmed the previous decision that the information was exempt in its entirety from release. I find, however, that Mr Jennings failed to make a fresh decision as required and failed to provide an adequate statement of reasons.

28 The brevity of the communication to the applicant does not assist him in understanding the reasoning for the conclusion reached and the basis upon which the original decision was affirmed. Mr Jennings did not particularise anything that was taken into consideration and did not even specify which exemption provision was being applied. There is no reasoning provided, as the decision simply says:

> *I have read and evaluated all the material associated with your request. All such material the RTI officer drew upon when making the initial determination as described in correspondence dated 5th August and clarified further on 20th August 2020.*
>
> *Following my review, I affirm the response made by the RTI officer to you under the Act and for the same reasons.*

29 I find this inadequate as a fresh decision and statement of reasons, as an internal review decision should stand alone even if it is affirming an original decision. Its findings should be clear, without requiring reference to other documents or decisions.

30 I then have regard to s47(4), which provides a positive onus for a public authority *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.*

31 It would be open to me to find that Council has not discharged the onus as a consequence of the inadequate reasons. I have, however, decided not to take this course but proceed to further analysis to determine this matter in order to provide a clear resolution for the parties.

Exemption provisions

32 The exemption provisions are set out in Part 3 Division 2 of the Act. The public interest test, s33, is not a stand alone test and must be applied as a secondary assessment once information is found to be prima facie exempt under an exemption provision.

33 Information is only exempt when the decision maker considers *that it is contrary to the public interest to disclose the information*, as provided in s33. That process requires consideration of the matters listed in Schedule 1, but is not limited to only those matters, and not the irrelevant matters listed in Schedule 2.

34 This assessment and the discretion provided must be exercised consistent with s3(4)(b) of the Act, *so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.*

35 While neither the original nor internal review decision specifies the exemption provision/s to which s33 has been applied, I am able to infer from the decisions and the other relevant information before me that ss36 and 39 were the relevant exemptions considered.

Section 36

36 For information to be exempt under s36, I must be satisfied that it contains information that is the personal information of a person other than the applicant (s13). Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.

37 Council consulted with Mr Millwood through Mr Grey, as he had provided Council with the information being assessed.

38 The objection to the disclosure, received in reply for Mr Millwood, was brief and did not directly address s36 or public interest considerations. The position was that the letter as a whole should not be disclosed and reliance was placed upon:

a. the existence of litigation between the parties;

b. the fact that the letter was arguably confidential information; and

c. it was not in the public interest for the letter to be released.

39 The original decision, upon which the internal review decision relies, did not set out the weight or consideration given to the objection made by the third party.

40 Incorrectly, in my view, Council took the approach of exempting the whole letter rather than taking the preferred line by line approach in assessing each part of a relevant document. It will only be in rare instances where a document will be exempt in its entirety.

41 This is particularly relevant because, aside from the applicant and Mr Millwood, there are two other identifiable people mentioned in the letter. One is by name (S) and the other by relationship to S (T).

42 The Act does not require consultation with S and T as other parties (as they did not provide the relevant information), however it does require consideration be given to the disclosure of personal information about them.

43 I find therefore that the information in the letter contains the personal information of Mr Millwood, S and T, and is prima facie exempt under s36. I then turn to consider the public interest test.

Public interest test

44 Consideration of the public interest test is informed by the type of information being assessed. In this instance the information is a letter sent on behalf of Mr Millwood to the Mayor of Council. It appears to be unsolicited correspondence.

45 I then turn to the Schedule 1 matters that must be considered in assessing whether disclosure of the information *would be contrary to the public interest.*

Personal information of Mr Millwood

46 I agree with Council that matters (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest* and (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals* are relevant.

47 I find additionally, that (a) *the general public need for government information to be accessible* and (j) *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law*, are relevant.

48 I do not agree that (i) *whether the disclosure would promote or harm public health or safety or both public health and safety*, is a relevant consideration.

49 Without discussing the content of the letter, I find that weight is to be given favouring disclosure for matters (a) and (b).

50 As for (m) I must consider the potential impact upon both Q and Mr Millwood that may result from disclosure of the letter. I find that in the circumstances disclosure is favoured, as the public interest in protecting the interests of those who have perpetrated crimes is lower than advancing those of victim-survivors, consistent with the reasons expressed in my past decision of *X, Y and Tasmania Police*.[3] Mr Millwood's criminal conviction and efforts of others to have him stripped of public accolades following this conviction have been widely reported, so it is not apparent that the release of this information would cause further harm to his interests in any event.

51 Mr Grey identified that there was pending litigation between Mr Millwood and Q and so I find that matter (j) *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* is a relevant consideration. However, as the relevant litigation has now concluded, with findings against Mr Millwood, I do not consider that this weighs against disclosure. I recognise that this may have been different at the time of the decision, but must make my conclusions based on the current circumstances due to the Act's pro-disclosure focus.

52 Therefore, after taking into account all the relevant matters, I find it is not contrary to the public interest to disclose Mr Millwood's personal information.

[3] See *X, Y and Tasmania Police* (4 March 2021) and see also *D, E and Department of Education* (17 December 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Personal information of S and T

53 Having regard to the content of the letter and reference made to S and T, I find (m), and the potential harm to their interests, outweighs the other matters in Schedule 1.

54 I am not limited to only those matters in Schedule 1 and I find that the context in which S and T are mentioned in the letter and the fact that they are not parties to this application is a matter that I can and do give weight to. These individuals are unwitting participants in this unsolicited representation made by Mr Millwood and the relevant information is highly personal.

55 I find it would be contrary to the public interest for the personal information of S and T to be disclosed and therefore the following information is exempt under s36:

a. the six words in paragraph 3 from the word *with* to the semi-colon; and

b. the three words in the final paragraph from *by* on line one to the comma on line two.

56 The remainder of the letter is not exempt and is to be released to Q.

Section 39

57 In the absence of an adequate statement of reasons that sets out the relevant exemption provision being relied upon, I have inferred from the reference to confidentiality in the consultation submission from Mr Grey, and the reference to confidentiality in the 20 August 2020 letter, that s39 ought to be considered.

58 Section 39(1) provides an exemption where disclosure *would divulge information communicated in confidence by or on behalf of a person...to a public authority* if either:

a. the information would be exempt information if it were generated by a public authority...; or

b. the disclosure of the information would be reasonably likely to impair the ability of a public authority...to obtain similar information in the future.

59 The letter is not marked confidential and appears to be unsolicited. Although explicit indications of confidentiality are not determinative, they certainly assist as a marker of the author's intention. Furthermore, it is correspondence from a member of the community to Ms Knowles in her capacity as Mayor, concerning matters of interest within her municipality that had been reported in the media prior to the assessed disclosure request.

60 I am satisfied that this is not information of a kind that would be exempt if generated by a public authority, nor is it likely to impair the ability of Council

to obtain similar information in the future due to its unsolicited nature. I therefore find no exemption applies under s39.

Preliminary conclusion

61 For the reasons set out above, I determine that the exemption applied by Council under s36 is varied and any exemption claimed under s39 is not made out.

62 The relevant information, a letter from Mr Grey to Council dated 6 August 2019, is to be disclosed except for the two parts I have found to be exempt under s36.

Conclusion

63 As the above preliminary decision was adverse to Council, it was made available to Council on 28 August 2023 under s48(1)(a) to seek its input before finalising the decision.

64 On 19 September 2023, Ms Bricknell confirmed that *Council has no further input to this matter.*

65 Accordingly, my findings remain unchanged and I determine that, for the reasons set out above, the exemption applied by Council under s36 is varied and any exemption claimed under s39 is not made out.

66 The relevant information, a letter from Mr Grey to Council dated 6 August 2019, is to be disclosed except for the two parts I have found to be exempt under s36.

67 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

Dated: 27 September 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant legislation

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.
(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

35. Internal deliberative information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (1) does not include purely factual information.
(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

36. Personal information of person

(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f) , decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(c) 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

(b) until 20 working days after notification of an adverse decision under section 43 ; or

(c) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

(d) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

39. Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(a) the information would be exempt information if it were generated by a public authority or Minister; or

(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
(b) relates to trade secrets or other matters of a business, commercial or financial nature; and
(c) was provided to a public authority or Minister pursuant to a requirement of any law.

Schedule 1 - Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;
(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
(c) whether the disclosure would inform a person about the reasons for a decision;
(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
(g) whether the disclosure would enhance scrutiny of government administrative processes;
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
(i) whether the disclosure would promote or harm public health or safety or both public health and safety;
(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
(k) whether the disclosure would promote or harm the economic development of the State;
(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-115
O2011-050

Names of Parties: R and Department of Health

Reasons for decision: s48(3)

Provisions considered: s35

Background

1 The applicant, R, is a former employee of the Launceston General Hospital who, on 29 January 2020, sought *access to inspect* her employment file under the *Personal Information Protection Act 2004* (PIP Act). Access was granted to all of her records except for three pages. She applied to the Department of Health (the Department) for disclosure of the balance of information under the *Right to Information Act 2009* (the Act).

2 On 2 June 2020, R, through her lawyer Mr John Pedder, made the assessed disclosure application to the Department. He wrote:

> *I note that upon a review of those documents, certain parts had been redacted I am told by the Department of Human Resource Management within the hospital. We have not been provided with any written reasons as to why those parts of my client's file had been redacted.*
>
> *I would therefore be pleased if you would treat this letter as an application for assessed disclosure of information and provide this office with copies of all parts of my client's file that had been redacted from the employment file, or provide me with full written reasons pursuant to section 22 of the* Right to Information Act 2009.

3 On 3 July 2020, Mr Pedder followed up on the application, highlighting *that no response has been forthcoming*. He afforded the Department a further 7 days to respond.

4 On 21 July 2020, Mr Pedder, lodged an application with my office for external review on the basis that a decision had not been made within the 20 working days as required under the Act. He noted that still no response had been received from the Department.

5 On 11 September 2020 a decision was released by Ms Lisa Howes, Director Office of the Secretary at the Department, a delegate under the Act.

6 Attached to the decision was a Schedule of Documents listing the information assessed that was found by the delegate to be exempt pursuant to s35 and applying the s33 public interest test. This listed the document as:

- *Internal memorandum*, 26 May 2015, page 4 partially exempt; and
- *Email*, 27 to 28 October 2016, pages 34-35 fully exempt.

7 The delegate, relying upon s35, found that the information was internal deliberative information and, as required, considered the factors of Schedule 1:

> *Applying the Public Interest Test as required by s33, I find two matters in favour of disclosure (a) and (c) matters of Schedule. I find three matters in favour of exemption (m) and (n)* [sic]
>
> *I accept that the disclosure of the information reflects public interest with the community having an understanding of and an involvement in the democratic processes (a). The information would inform a person about the reasons for a decision (c).*
>
> *However, this needs to be balanced against those factors weighing against release.*
>
> *To disclose the information would reveal deliberative information that would reasonably harm the interests of individuals (m). I accept that the disclosure of the information may make other deliberative material being difficult to obtain in future as a result of officers not rigorously recording their views (n).*
>
> *Based on the matters referred to above, and on balance, I determine that disclosure of the information is not sufficiently in the public interest and is exempt under s35.*

8 On 7 October 2020, an application for internal review was made.

9 On 26 October 2020, the internal review decision was released by Mr Mick Casey, the delegate of the Department under the Act. That decision, on a slightly different basis, affirmed the original decision and no further information was disclosed.

10 On 15 September 2021, confirmation that the applicant still sought external review was provided and submissions to that review were received from Mr Pedder.

Issues for Determination

11 The issue for determination is whether the redacted information, in whole or in part, is eligible for exemption under s35 or any other part of the Act.

12 As s35 is within Division 2 of Part 3 of the Act, assessment is made subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under s35, I must then determine whether it would be *contrary to the public interest* to disclose it. In doing so I must have regard to, at least, the matters in Schedule 1 of the Act.

Relevant legislation

13 Relevant to this review are ss33 and 35 of the Act. Those sections and Schedule 1 are copied in Attachment 1.

Submissions

Applicant

14 In the application for external review, dated 21 July 2020, Mr Pedder raised the following matters:

> *I am writing for the purposes of making application for a review due to no decision having been made by the Launceston General Hospital, on my client's application for assessed disclosure within a 20 working day period of time. In fact there has been no response received in the form of an acceptance of the application at all.*
>
> *I advise that initially my client made application for access to her employment records under the Personal Information Protection Act 2004, which was made available to myself and my client for inspection.*
>
> *Some delays occurred as a consequence of the COVID-19 outbreak, however, we did then attend the Launceston General Hospital to view those records made available. Unfortunately, the records were redacted.*
>
> *I then received instructions to make application to the Launceston General Hospital for assessed disclosure of all parts of my client's employment file which had been redacted, or we sought full written reasons pursuant to section 22 of the Right to Information Act as to why those parts of my client's file were withheld.*
>
> *I note that the application was made on 2 June 2020. Despite my writing to the hospital again on 3 July 2020 as to why we had not received any response to that request and a follow up telephone call, again we have had no response whatsoever.*
>
> *I would therefore be pleased if your office would conduct a review in relation to this matter.*

15 In his letter dated 15 September 2021, Mr Pedder submitted:

> *At the outset I offer two quotations from decisions that do have a bearing on this review.*

Firstly:-

> *It is the duty of officers in the public section to give frank and fearless advice and generally one would ask why would they shrink from being seen by the release of documents under the Freedom of Information system as doing that very thing.*[1]

Secondly:

> *Senior Public Servants.. .are a sufficiently robust group to understand the need for, and the method of relating clear and frank views to their peers and to Ministers. I am not persuaded by mere assertions to the contrary. Further no evidence was adduced before me that senior officers had actually been inhibited as a result of the Freedom of Information legislation and that frankness has been a casualty of that legislation.*[2]

The decision of 11 September 2020 (adopted by Mr Casey in the Internal Review) was bloated with references to Legislation and case law, but applied little or no actual reasoning as to why the exemption applied nor indeed as to why the public interest test was applied.

It is not until the final paragraph of page 4 of the initial decision that any reference is made to the substance of [R's] *application. Page 5 of the decision indicates that the author is satisfied that the documents are exempt and it is not until page 6 in two sentences that the author says she is satisfied that disclosure would not be in the public interest.*

With respect, reciting the principles adopted in cases is not directing a decision makers mind to the documents and discussing why they meet the tests applicable.

The decision maker in the internal review document has adopted the position that disclosure would prejudice the ability to obtain similar information in the future on the basis of what is described as the ".. .traditional and.. .valid argument for deliberations to be considered confidential". The internal reviewer has indicated that officers will be less likely to communicate frankly, and hence the quality of the deliberations will be compromised.

Yet no explanation has been offered as to why such communication within the Department of Health regarding pay related matters would be affected by disclosure of those deliberations to the public, and in particular the person whose interests were being discussed.

It is put forward by the internal review officer that he adopted the approached [sic] *outlined by Brett J. in* Gun Control of Australia -v- Hodgman and Anor *[2019] TASSC 3. Again, with respect whilst he has paid lip service to that decision as noting that Brett J required decision*

[1] Citing *Yarra City Council v Roads Corporation* [2009] VCAT 2646 at paragraph 38.
[2] Citing *Bracks v Department of State Development* (Unreported) AAT, 10 September 1996.

makers to give proper, general and realistic consideration to each of the criteria within the Schedule of the Act. It appears that the officer has simply listed the schedules criteria, and recited the same conclusions as the initial decision maker, and not set out in any detail how he has come to the decision he has.

In particular under Schedule (m) the officer has indicated that disclosure would harm the interests of the officers concerned, but offered no explanation as to what that harm may well entail. This is simply insufficient for a decision maker. Particularly after referencing Gun Control of Australia v Hodgman*, the author has missed the crucial point made by His Honour. That is, that Justice Brett raised the important point regarding the process of decision making and the requirement to give reasons.*

In fact, the Act contains a statutory obligation to provide reasons for decisions and where the public interest applies, there is an obligation to state the considerations upon which the decision is based. It simply is not sufficient just to recite that an officer's interests may well be harmed by disclosure. I refer again to the two quotes at the start of this letter that bureaucrats are a sufficiently robust group so as to understand the need for and the method of relating clear and frank views being disclosed.

The documents in issue in [R's] *request are not the subject of high level discussions regarding policy or matters that may impact the hospital's ability to carry out its duty. This is a matter relevant only to* [R] *and her employment within the hospital. In fact, I would postulate that the sensitivity of the information and any affect it would have on the officers of the hospital or interest of the individual within bureaucracy is indeed diminished where the release of the information is only likely to result in the mere embarrassment to those officers within that organisation. It is not a reason to find that the disclosure would be contrary to the public interest.*

As I have alluded to within this submission the reasons given by the internal review officer for not releasing the information to [R] *are inadequate. They simply postulate a position and indeed using the term adopted by the internal reviewer,* the traditional approach*, without more is simply not sufficient.*

As noted in the decision of Coulson v Department of Premier and Cabinet *[2018] VCAT 229, the onus rests on the Department to show that disclosure of the material would be contrary to the public interest.*

Further, if factors informing the question of whether disclosure would be contrary to the public interest have been identified under the Act, whilst helpful, they are not determinative. What is required is a consideration of the 'whole of the circumstances', and a conclusion founded upon questions of fact and opinion in the context of and the purposes of the Act, see again Coulson and the references to decisions referred to therein.

Reciting vast swathes of case law and principles derived from such, is not substitute to directing the mind of the decision maker to matters those cases and the Act require them to. That is what Justice Brett was saying in the Gun Control *case, and that is what the reviewing officer did not do.*

There has been no reasonable decision offered as to why the documents sought cannot be released and I urge you to find that they ought be in accordance with the objects of the Act.

Department

16 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions.

17 The Department's reasoning is most relevantly set out in the internal review decision, in which the applicant was advised by Mr Casey:

> ***Decision and Statement of Reasons***
> *Section 43(5) of the Act requires that a decision on review must be given in the same manner as the decision in respect to the original application. Section 7 of the Act states that:*
> *…*
> > *A person has a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or a minister unless the information is exempt information.*
>
> *The Act does not require an applicant to express reasons for requesting an internal review. However, the applicant asserts, the decision maker omitted to consider page 8! of the 327 pages of information that had been redacted from the personal file.*
>
> *The decision maker described that the application under the Act originated from a request to access the personal information in the possession of the public authority under the* Personal Information Protection Act 2004. *My only additional comment is to note that the public authority provided access to the personal information which had some information redacted. The applicant correctly noted that no reasons were given for the redaction of the information and made an application under the Act for an assessed disclosure.*
>
> *I acknowledge that it is difficult for any applicant to assess the strength of a decision as they do not have access to the material being redacted and all the information upon which a case has been considered and reviewed. However, in reviewing the information I feel on balance the decision applied the methodology required from the Act, but I will differ from the decision maker for a portion of page 4 and 34. I will discuss page 8! separately.*
>
> *I generally accept and adopt the reasoning by the delegate for s35, of the Act.* [s35 omitted]...

Section 35(2) excludes from exemption any information which is purely factual information. I agree with decision maker's summary of the law for subsection (2):

The exclusion of purely factual information is intended to allow disclosure of information used in the deliberative process. A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

Purely factual information *does not extend to factual information that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.*[3]

Turning to page four of the memorandum from James Bellinger to Margaret Wilson. A paragraph redacted is a statement of the position adopted by [R] *disputing the methodology for the average salary. The subsequent paragraphs present options supported by opinion and a recommendation. I concur with the reasoning of the decision maker for the subsequent paragraphs that the information was deliberative.*

At page 34 and 35 comprises an email exchange between officers of a public authority exchanging opinions concerning the calculation of the long service leave entitlement. The final email in the exchange is a statement of a final decision. The decision is reflected in the entitlements received by the applicant and I note this information found further in the file was not redacted.

At page 8! is the determination by the Deputy President of the Tasmanian Industrial Commission of 3! March 20!5. The previous 20 pages belonging to this determination was not included in the file. The information custodian advised that only the last page was captured on the applicant's file for reference purposes.

My view is that the paragraph on page four is factual while the final email on page 34 contains information that the applicant accessed under the Personal Information Protection Act 2004. *I am satisfied the information that I refer on page four and 34 is not exempt. As to page 8!, I find that there was no information redacted nor was it discussed by the decision maker. Upon consultation with the information custodian I am satisfied the only pages that were redacted are those discussed by the decision maker.*

Public interest

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 portion of the*

[3] The delegate cited *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

public interested in a certain activity will not necessarily lead to the conclusion that disclosure of information relating to it will be in the public interest.[4]

What I am directed to do under the Act is to consider all relevant matters, including those matters set out in Schedule I, 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.

The discussion by the decision maker summarises the application of s33 and I find there is little gained by repeating what was previously stated.

However, adopting the approach in the judgement by Brett J in Gun Control Australia Inc v Hodgman & Anor[5] *requires identifying which of the factors in Schedule 1 relevantly arise (having regard to the nature of the information in question) and then giving proper, genuine and realistic consideration to each of them through an active intellectual process before arriving at a finding upon each.*

The Schedule 1 matters the delegate considered relevant were (a), (c), (m) and (n). I have considered all the Schedule 1 matters consistent with the approach to determine relevant matters as found in Gun Control Australia.

Schedule 1 matters
(a) the general public need for government information to be accessible;
Government information being accessible meets the objective of the Act by contributing to transparency and accountability.
…
(c) whether the disclosure would inform a person about the reasons for a decision;
The answer to this matter is in the affirmative and it is a reason not to find that the disclosure would be contrary to the public interest.
…
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
My view is the answer to this matter is in the affirmative for the applicant but for officers of the public authority disclosure would harm their interest and it is a reason to find that the disclosure would be contrary to the public interest.
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
The information exchanged by officers of a public authority is understood to allow ideas to be tested and examined. This thinking generally refers to the process of weighing up or evaluating competing arguments or

[4] The delegate cited *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 1)* (1991) 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALO 113.
[5] The delegate cited *Gun Control Australia Inc v Hodgman & Anor* [2019] TASSC 3.

considerations – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. This is the traditional and, I consider, valid argument for deliberations to be considered confidential. Any apprehension that views expressed in the course of an exchange that may be publicised is inhibiting. Officers will be less likely to communicate frankly, and hence the quality of the deliberations will be compromised.

...

In considering the matters in Schedule I as required by s33(2) I find two matters in favour of release: (a) and (c). I find two matters in favour of exemption (m) and (n).

In adopting the delegate's reasoning and my additional comments discussed above, and on balance, I determine that the disclosure of some the information is in the public interest and for the balance remains not sufficiently in the public interest and is exempt under s35.

Analysis

18 The information that I am assessing is the:

- *Internal memorandum*, 26 May 2015, page 4; and
- *Email*, 27 to 28 October 2016, pages 34-35

that were redacted from the applicant's personnel file when she viewed it under the PIP Act and which the Department maintains should not be disclosed as it claims the documents are exempt under s35 of the Act.

19 I accept that there is no determination to be made about page 81, the final page of the determination of the Tasmanian Industrial Commission, dated 31 March 2015.

Section 35

20 The Department has relied upon s35 to exempt certain information on three pages of the documents responsive to the request for disclosure. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority; or is a record of consultations or deliberations between officers of a public authority; or is a record of consultations or deliberations between officers of a public authority and Ministers.

21 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

22 According to the Act, the exemption outlined above does not apply to:

- purely factual information;[6]

[6] Section 35(2).

- a final decision, order or ruling given in the exercise of an adjudicative function;[7] or
- information that is older than 10 years.[8]

23 The meaning of 'purely factual information' in s35(2), was considered by the Commonwealth Administrative Appeals Tribunal (AAT) in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*, where it was observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

24 As to the meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* the view was adopted 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'.

25 Then, if I am satisfied that it is for a deliberative purpose related to official business, I must have regard to the s33 public interest test.

26 I am satisfied that the *internal memorandum*, from Mr James Bellinger, HR Consultant for the Department to Ms Margaret Wilson, Payroll Advisor is prima facie exempt under s35(1)(a). It contains a recommendation with respect to crediting leave and also options and a recommendation for the adjustment of pay. This is internal deliberative information and prima facie exempt under s35(1)(a).

27 The *email* document consists of an email chain of three emails (i to iii) on 27 October 2016 and the fourth, to which they are attached, dated 28 October 2016 (iv). These are (excluding the parties carbon copied):

(i) From Ms Tina Stevens to Ms Wilson, at 1.40pm;

(ii) From Ms Wilson to Ms Stevens, at 2.00pm;

(iii) From Mr Bellinger to Ms Wilson, at 6.56pm;

(iv) From Ms Stevens to Mr Bellinger, at 9.17am.

28 I find that the emails (i) to (iv) are all of an internal deliberative nature, constituting consultations between public officers, and are prima facie exempt under s35(1)(b).

Section 33

29 The Department found that the *information is exempt information ... after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.*

[7] Section 35(3).
[8] Section 35(4).

30 I have reviewed the information, considered the Department's position and considered the relevant factors in Schedule 1. I am, however, not of the same view as the Department and I find that it would not be contrary to the public interest for the information to be disclosed.

31 In considering the *internal memorandum* and the *email* and the factors in Schedule 1, I find that:

- Factor (a) is relevant because it is consistent with the *general need for government information to be accessible* for the disclosure of deliberations relating to the employment entitlements, but I give this nominal weight with respect to the specific information;
- Factor (c) highly favours disclosure because the *disclosure would inform* the applicant about the *reasons for a decision*, specifically decisions about her employment entitlement;
- Factor (f) is relevant, and given nominal weight in favour of disclosure, because *disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability* in relation to employment matters of the kind that existed between the parties.

32 I reject the proposition that there is any basis for concluding that there is any identified or identifiable risk of harm in reliance on factor (m), as suggested by the Department, favouring non-disclosure due to being contrary to the public interest. The relevant public officers were performing their regular duties and it is entirely unclear why the release of information detailing their routine work would cause harm to their interests. I do agree, however, that the release of the information would promote the interests of an individual, R, and that this weighs strongly in favour of release.

33 I further reject the proposition that (n) provides a basis for non-disclosure. The question is whether the disclosure of the information under assessment, if disclosed, would *prejudice the ability to obtain similar information in future.* There is no basis for the assertion that public officers, in performing their duties consistent with their professional obligations would become less frank or diligent and to suggest otherwise, without a cogent claim, is contrary to the Act and to the requirements of the Department's staff as public officers.

34 For the avoidance of doubt, I do not accept that any *traditional approach* as is articulated in the internal review decision is appropriate. As I set out in my previous decision of *Todd Dudley and Department of Natural Resources and Environment:*[9]

> *It has oft been said that public servants must be frank and fearless in their duties and s35 being subject to the public interest test accords with this adage. It is intended that public information should be accessible to the public and the Act sets of that internal deliberative information should be released to an applicant unless this is contrary to*

[9] (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

> *the public interest. Public officers should be conscious that their communications could be disclosed under the Act and should continue to perform their duties appropriately and confidently regardless of this.*

35 I consider that factor (p) – *whether the disclosure would have a substantial adverse effect* on the management or performance assessment by a public authority of its staff – has more weight in this respect here, though this was not considered to be relevant by the Department. Sensitive staffing matters are usually kept confidential and are frequently controversial. There are strong public interest considerations in ensuring workplace relations matters under dispute are able to be effectively handled in accordance with relevant policies and legislation. Human Resources staff being able to seek internal expert advice about how to most appropriately handle such situations without every communication being provided in full to the relevant employee is important for the functioning of these staff management processes. Accordingly, I consider that this factor weighs against disclosure.

36 My weighing of the factors differs to that of the Department. The internal review found that *the disclosure of some the information is in the public interest and for the balance remains not sufficiently in the public interest and is exempt under s35*.

37 I must correct this articulation of the test. It is not whether it is in the public interest to disclose the information. The test, under s33, is whether the release of information prima facie exempt under s35 *would be contrary to the public interest*. While the distinction may seem minor, it is vital that public authorities not alter the public interest test to become whether release is in the public interest (with information only to be disclosed if this is demonstrated) rather than information being disclosed unless it can be demonstrated that it is contrary to the public interest to do so. The default position remains one of disclosure and the goal of the Act, for the maximum amount of information responsive to a request being released, remains constant throughout the assessment process and is crucial.

38 I am, therefore, satisfied that it would not be contrary to the public interest for some of the information claimed to be exempt by the Department to be provided to the applicant.

39 Accordingly, I determine that the *internal memorandum* can be released except for the final four paragraphs from 'As I see it' to 'regarding this matter.' In relation to the *email*, I determine as follows:

a. Email from Ms Tina Stevens to Ms Margaret Wilson, at 1.40pm – release except for the dot points and first paragraph after the dot points;

b. Email from Ms Wilson to Ms Stevens, at 2.00pm – release in full;

c. Email from Mr James Bellinger to Ms Wilson, at 6.56pm – release except for the second paragraph; and

d. Email from Ms Stevens to Mr Bellinger, at 9.17am – release in full.

40 I am satisfied that the remainder of the information is exempt under s35(1)(a) and (b), and is not required to be released to R.

Other issues

41 I take this opportunity to remind the Department of the importance of compliance with the statutory timeframes of the Act when dealing with an application for assessed disclosure (s15).

42 Section 15(1) provides that the public authority *must take all reasonable steps to enable an applicant to be notified of a decision...as soon as practicable but in any case not later than 20 working days after the acceptance of the application.*

43 The period, 20 working days, is the longest time that may be taken. The Act does, however, also contemplate circumstances where more time may be required and provides for extension by agreement (s15(4)(a)) or when certain criteria are met by application to my office (s15(4)(b)).

44 It is not open to public authorities to disregard time frames or arbitrarily extend the time required and they are discouraged from doing so. The consequence for non-adherence often results in additional efforts being required by the applicant, the public authority and this office. For example, where external review is sought solely due to the public authority not having released a decision within the required timeframe.

45 I therefore encourage the Department to actively work with applicants to seek extensions of time when this may be legitimately required or, as may be appropriate, apply to my office for an extension.

Preliminary Conclusion

46 In accordance with the reasoning set out above, I determine that exemptions claimed pursuant to s35 are varied.

Submissions to the Preliminary Conclusion

47 As the Preliminary Decision of 22 September 2023 was adverse to the Department, it was made available to it for input before the decision was finalised, as required under s48(1)(a).

48 On 6 October 2023, Mr Casey wrote to the Deputy Ombudsman, Ms Clare Hopkins, to raise a jurisdictional matter. He was concerned that R's application had originally been made under the *Personal Information Protection Act 2004* and that this might make any decision of the Ombudsman under the Act *ultra vires* (beyond his lawful authority).

49 On 12 October 2023, the Deputy Ombudsman determined that the application was within jurisdiction and there was no consequent issue. My office wrote to advise the Department as follows:

The Deputy Ombudsman has reviewed your correspondence and, as delegate for the Ombudsman, has considered the concern you raise about whether a decision under the Right to Information Act 2009 *(the Act) of the Ombudsman may be* ultra vires*. This was due to the original request for information to the Department of Health (the Department) being under the* Personal Information Protection Act 2004 *(the PIP Act), rather than the Act.*

In correspondence to the Department from Mr John Pedder, lawyer for the applicant, wrote on 2 June 2020:

> I would therefore be pleased if you would treat this letter as an application for assessed disclosure of information and provide this office with copies of all parts of my client's file that had been redacted from the employment file, or provide me with full written reasons pursuant to section 22 of the *Right to Information Act 2009*.

The decision on this application later released by Ms Lisa Howes, a delegate under the Act for the Department, indicated that the application had been accepted under the Act and that the Department had received the required fee from Ms Dudley. An internal review was sought by the applicant and an internal review decision was released by you, as a delegate under the Act. This decision was explicitly made under the Act and enlivened Ms Dudley's right of external review.

The Deputy Ombudsman is therefore satisfied that, on the sequence of events that followed the assessed disclosure request, the Department has accepted and dealt with the applicant's request for information under the Act and not made a decision under the PIP Act. On that basis, therefore, the jurisdiction of the Ombudsman has been enlivened and the preliminary decision is not inconsistent with the Act nor ultra vires.

50 The Department did not make further submissions regarding the substance of the preliminary decision, confirming on 20 October 2023 that it agreed with my proposed conclusions.

Further analysis

51 I am satisfied that there is jurisdiction for me to determine this application.

52 In the absence of submissions from the Department to the preliminary decision, my conclusions remain unchanged.

Conclusion

53 In accordance with the reasoning set out above, I determine that exemptions claimed pursuant to s35 are varied.

54 The Department is directed to release the information according to this decision and the provisions of the Act.

55 I apologise to the parties for the inordinate delay in issuing this decision.

Dated: 23 October 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 33 Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.
(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

Section 35 Internal deliberative information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
(2) Subsection (1) does not include purely factual information.
(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Schedule 1 – Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
(i) whether the disclosure would promote or harm public health or safety or both public health and safety;
(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
(k) whether the disclosure would promote or harm the economic development of the State;
(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2208-020 **Names of Parties:** Robert Hogan and the University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s26, s35, s37, s38 and s40

Background

1 The University of Tasmania (the University) announced a decision to relocate its longstanding campus in Sandy Bay to central Hobart in 2019. This decision sparked a high level of public interest and debate. Mr Robert Hogan is strongly opposed to the University's decision, is a member of the Save UTAS Campus group and has launched a website regarding the campus move.

2 On 24 March 2022, Mr Hogan made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the University as follows:

> *I request copies of the minutes of all meetings of the UTAS Council conducted between 1 January 2015 and 24 March 2022.*

3 The scope of Mr Hogan's request was changed by the University on 16 May 2022 to the following:

> *Copies of the minutes of all meetings of the UTAS Council conducted between 1 January 2015 and 24 March 2022 that relate to University decision making on the move to a city centric campus.*

4 Mr Hogan disputed the way in which the scope of his request was changed by the University, as he did not consent to the change.

5 On 27 May 2022 Mr Simon Perraton, a delegate under the Act for the University, released a decision to Mr Hogan. In his decision Mr Perraton agreed to release the majority of the Council minutes, finding it was in the public interest to do so, but he found parts of the information to be exempt under ss37 and 38 of the Act.

6 Mr Hogan applied for internal review of this decision on 27 June 2022. In his request for internal review, Mr Hogan asserted that *... the Act makes no provision for a decision maker to unilaterally vary the scope of an application and I consider it entirely inappropriate, if not beyond power, for Mr Perraton to have done so.*

7 On 18 July 2022, Ms Jane Beaumont, a delegate under the Act, released a further decision to Mr Hogan, which affirmed Mr Perraton's decision. Ms Beaumont also justified the University's actions in relation to scope negotiations by saying:

> *Given the volume of information you were requesting in your original scope and your refusal to refine the scope of your application through negotiations, the delegated RTI Officer as decision-maker could either (i) refuse your application on the basis that it would be unreasonable,* [sic] *(ii) accept your application and interpret the scope of your request to relate to the subject matter you are interest* [sic] *in.* [highlighted in yellow in the University's decision]

8 On 12 August 2022, Mr Hogan sought external review of the University's decisions. This office accepted his application under s44 of the Act on the basis he was in receipt of an internal review decision, the fee had been paid and his application for external review was submitted within 20 working days after receipt of that decision.

9 Mr Hogan applied to have his external review request expedited and I agreed to grant priority to this matter. This was due to the high degree of public interest in the University's proposed move, and several approaching deadlines, including: the City of Hobart's poll of ratepayers on the proposed move, the University's consultation phase on the CBD move, a rezoning application for the Sandy Bay campus, and the Legislative Council's inquiry into the *University of Tasmania Act 1992,* which Mr Hogan said *will inevitably involve consideration of the proposed move.*

10 The University's actions in reducing the scope of Mr Hogan's application resulted in a significant gap between the information he requested in his original application for assessed disclosure and the information that was assessed in the decisions by Mr Perraton and Ms Beaumont. In his submissions supporting his application for external review, Mr Hogan also raised inconsistencies in the redacted information provided to him which may have indicated relevant information was missing, giving rise to potential further grounds for external review under s45(1)(e) of the Act in relation to the sufficiency of the University's search for information.

11 It is clear the University entered into scope negotiations with Mr Hogan given it was considering whether to refuse his application under s19(2) of the Act on the grounds that *the work involved in providing the information would substantially and unreasonably divert the resources of the University from its other work.* The University was entitled to undertake scope negotiations on that basis and it was also entitled to refuse Mr Hogan's application under s19 if the requirements of that provision were met. However, the Act does not permit a public authority to unilaterally excise parts of an application for assessed disclosure without the agreement of the applicant.

12 For these reasons, on 5 December 2022, my office asked the University to consider issuing a fresh decision to Mr Hogan, which would assess any information responsive to Mr Hogan's original request for information which had not already been assessed. On 8 December 2022, the University agreed to provide a fresh decision to Mr Hogan on that basis and the decision was issued on 16 January 2023. That decision (referred to in this decision as the fresh decision) is largely independent of this decision but overlaps to an extent where the University reconsidered some of the same information. The fresh decision will only be referred to here in relation to the exclusion of further information released or where additional reasons for exemption were claimed by the University.

13 It is unnecessary to further consider the issues raised regarding scope, aside from the comments I make in the Analysis, as the issuing of a fresh decision has addressed that matter.

Issues for Determination

14 I must determine whether the information is eligible for exemption under ss26, 35, 37, 38 or 40 or any other relevant section of the Act.

15 As ss35, 37, 38 and 40 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters in Schedule 1. This means that, should I determine that the information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

16 I attach copies of ss26, 35, 37, 38 and 40 to this decision at Attachment 1.

17 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

The University

18 The University did not make any submissions beyond the reasoning in its decisions, which is set out as follows.

19 At the outset, in his original decision dated 27 May 2022, Mr Perraton said:

> *It is my view that disclosure of relevant information of minutes of all meetings of the UTAS Council conducted between 1 January 2015 and 24 March 2022 that relate to the University decision making on the move to a city centric campus is in the public interest and can be released. It is my view that disclosure of information that would be likely to expose third parties to competitive disadvantage or information that relates to the business affairs of the University that would be likely to expose the University to competitive disadvantage is not in the public interest and will not be released.*

20 In relation to s37, after referring to the wording in the section, Mr Perraton said:

> *Information on amounts spent on construction, works, purchases of buildings and professional services is commercially sensitive information and publishing this information would expose third parties to competitive disadvantage.*

21 In relation to s38, after referring to the wording in the section, Mr Perraton said:

> *Referring to the Court's decision in Forestry Tasmania v Ombudsman [2010] TASSC 39, one way in which a competitive disadvantage may arise is where a competitor acquires information which gives it a negotiating advantage leading to financial detriment. In order to provide space to meet the University's functions, the University is required to compete in a local and national property market. Releasing commercially valuable information such* [sic] *commercial yields, details of financing arrangements, details of construction contracts, would result in market competitors such as large-scale property investors and other higher education providers having information that they would not ordinarily have access to. This information is 'blacked out' in a separate column in Schedule 2.*
>
> *It is my conclusion that the definition of 'competitive disadvantage' is met and the information may be exempt.*

22 Mr Perraton then addressed the matters in Schedule 1 in relation to the public interest test. These are also considered in the Analysis under the *Public Interest Test* relating to s38 below.

23 I note Ms Beaumont's reasoning in her internal review decision dated 18 July 2022 was brief and mainly focused on the dispute regarding scope and s19. In relation to sections 37 and 38, Ms Beaumont only said:

> *I have also reviewed the information redacted in the information provided to you from the original decision (attached in Annexure 1 of this letter). The information redacted which relates to business affairs of a third party if disclosed which may expose the third party to competitive disadvantage. Information is also redacted which relates to business affairs of a public authority involved in trade or commerce. When the University is required to purchase property for its facilities it does so in a competitive property market and to expose details of its decision making thresholds would expose it to competitive disadvantage. Further comments are embedded in the Annexure 1 which provide more insight into the reasons for each redaction. For these reasons I have decided to affirm the decision as it relates to exemptions relied on for exempt information.*

Mr Hogan

24 In his internal review request dated 27 June 2022, Mr Hogan referred to *a number of issues* stemming from Mr Perraton's original decision. First, he raised the fact Mr Perraton did not refer to my previous decision in *Humphries*[1]. He noted that *given its recency* [sic] *and relevancy,* [he] *would have expected Mr Perraton, and UTAS generally, to draw significant guidance from this decision.*

25 Mr Hogan also referred to the format of the *UTAS Council minutes* provided to him and made the f*ollowing additional points:*

- *UTAS Council minutes are of a kind that record decisions only rather than also summarising discussion; and*
- *Having carefully reviewed the extract from minutes* [sic]*, I believe that most of the material contained could not* [Mr Hogan's emphasis] *be considered Exempt Information on any grounds under the Act.*

Taken together, these points indicate that it should have been a relatively straightforward task to consider the full UTAS Council minutes, as I requested, for release.

26 In relation to the University's application of ss37 and 38, Mr Hogan said:

> *... there is no indication that Mr Perraton undertook the redactions in the extract from the minutes in a considered way; rather he has simply referred to Sections 37 and 38 of the Act in a broad-brush manner. This is at odds with the position of the Ombudsman that the onus is on UTAS to show that information is exempt and to consider public interest factors in some depth and in a balanced way. (eg, O paras 44 and 52-53)*
>
> *The redactions in the extract from the minutes appear to have been made in accordance with certain blanket principles, without consideration of the issues. Two that are clearly observable are the redaction of any dollar ($) amounts and the names of any third parties, particularly consultants, even where this cannot possibly have any warrant and/or the information is already in the public domain. (see also O, paras 15-16, 81, 82 and 87).*
>
> *... In sum, I believe that Mr Perraton has erred in his decision making and request that the full UTAS Council minutes for the period 1 January 2015 to 24 March 2022 be provided to me with redactions only where exemptions apply and public interest factors have been considered in a balanced way.*

[1] See *Alexandra Humphries and University of Tasmania* (24 February 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

27 In Mr Hogan's further submissions dated 9 September 2022, he first outlined *a number of significant developments* relating to an increased level of public interest in the University's proposed move. These include:

- the closing of submissions for the *Legislative Council Select Committee Inquiry into the Provisions of the University of Tasmania Act 1992*, where 135 of 149 submissions are *opposed to the proposed move;*
- the commencement of campaigning *with respect to the Hobart City Council Elector Poll on UTAS' proposed move;*
- a heightened *level of public interest in the information contained in the UTAS Council Minutes;* and
- the establishment of *a website – the utaspapers.com*, on which Mr Hogan said he intended to publish a number of relevant documents *to inform public debate.*

28 Mr Hogan then addressed the University's application of s19 by saying:

> *I also do not believe that UTAS could have relied on Section 19 of the RTI Act to refuse my RTI application in full, or that it can (implicitly) rely on Section 19 to effectively refuse part of my RTI application. For refusal to be maintained, the agency involved should establish that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work (Section 19(1)(a) of the RTI Act) This decision must be made having regard to the factors listed in Schedule 3 of the RTI Act. Of particular relevance to this application are Schedule 3.1(a)-(d)...*
>
> *... Dealing with each of these in turn:*
>
> *(a) My request was precise, providing for immediate identification and location of the documents sought.*
>
> *(b) As indicated in my request for priority consideration to the Ombudsman, my RTI applications have been made with the aim of informing public debate and serving the public interest. The UTAS Council Minutes are critical in this regard, as they provide a record of the UTAS Council's decision making process and the degree to which relevant factors were (or were not) considered in this process.*
>
> *(c)-(d) As I have noted above, on Ms Beaumont's revised estimate, the UTAS Council Minutes were approximately 750 pages.*
>
> *...UTAS is a large public authority with a Legal Office, well used to handling RTI requests*
>
> *...The application is not complex nor costly... As previously stated, I understand that copies of the UTAS Council Minutes were readily available through the UTAS Council secretariat.*

> *...My RTI application is not complex because the documents requested are neither raw nor unsorted (far from it), nor could it be argued that it is costly having regard to UTAS' income.*

29 In relation to the redacted extract of the University's Council Minutes provided to Mr Hogan by Mr Perraton on 27 May 2022, with added notations by Ms Beaumont on 18 July 2022, Mr Hogan first referred to an *apparent lack of internal consistency*. I note these assertions have been addressed separately with the University, as outlined above in the Background. Mr Hogan then specifically addressed the University's *claims for exemption under sections 33, 37 and 38*. He first addressed the University's application of s33 in relation to the vote record entry dated 5 April 2019 and said:

> *It is unclear why UTAS has relied on section 33 of the RTI Act in respect of Item 14. Section 33 sets out the public interest test and UTAS has not offered any information as to why it would not be in the public interest to release this information. It is clear that the statutory office holder whose identity has been redacted has declared an intention for "his" disapproval of the City-Centric Campus model as a matter of record. Disapproval votes are extremely rare for the UTAS Council (UTAS could provide the Ombudsman with any other examples). If a member of the UTAS Council has requested that "his" vote be recorded in the UTAS Council Minutes then UTAS needs to conclusively demonstrate why it is not in the public interest for this information to be released.*

30 Mr Hogan then made further submissions specifically related to the public interest matters in Schedule 1, which will be considered in the Analysis under the *Public Interest Test* relating to s38 below.

Analysis

Comments relating to Scope Negotiations

31 At the outset, although not reviewable by way of the external review process under the Act, I wish to comment on the process undertaken by the University in relation to its scope negotiations with Mr Hogan pursuant to s13(7) of the Act. The facts relating to the process are outlined in the Background above.

32 As noted, the University's action in amending the scope of Mr Hogan's application for assessed disclosure without his consent is not permitted under the Act. The Act does not require applicants to negotiate the scope of their requests for assessed disclosure, rather s13(7) is provided for voluntary negotiations and applicants are entitled to refuse to engage in scope negotiations with the public authority. Section 19 or other refusal provisions are available if the refusal to negotiate on scope leads to a request that the processing of which would result in an unreasonable diversion of resources from a public authority's other work.

33 The University's actions in this regard resulted in Mr Hogan expressing a justifiable and significant degree of dissatisfaction with the University's handling of the matter. Although the University is to be commended for promptly agreeing to rectify the problem by issuing a fresh decision, it is unfortunate that considerable resources were required to be expended by this office, the University and Mr Hogan in resolving the issue, which could have been avoided had the University applied the Act correctly in the first place. I hope that the University will act more carefully in future to ensure it complies with its legislative obligations, including compliance with s3(4)(b) of the Act *to facilitate and promote...the provision of the maximum amount of official information* at the *lowest reasonable cost.*

Section 38 – Business Affairs of a Public Authority

34 The University has claimed that most information responsive to Mr Hogan's request, which has not been released to him, is exempt under s38 due to it relating to the business affairs of a public authority. Section 38 is contained in Division 2 of Part 3 of the Act, so that any information responsive to this request, if it is prima facie exempt under this section, is subject to the public interest test found in s33 of the Act.

35 Section 38(a)(ii) of the Act provides that:

> *Information is exempt information –*
>
> *(a) if it is –*
>
> > *(ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage...*

Is the University a public authority engaged in trade or commerce?

36 As I set out when determining the same question in my previous decision of *Alexandra Humphries and University of Tasmania,*[2] given ss6 and 7 of the *University of Tasmania Act 1992,* I am satisfied that the University is a public authority which can engage in trade and commerce. The fact that its functions relate to education and learning do not preclude it from undertaking activities which would be considered commercial to achieve its objectives.

Is the information responsive to the request that of a business, commercial or financial nature that would, if released, be likely to expose UTAS to competitive disadvantage?

37 I now turn to whether the information responsive to the request is of a business, commercial or financial nature that would, if released, be likely to expose the public authority to competitive disadvantage. If I am satisfied that this is the case, the information will be prima facie exempt pursuant to s38.

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[2] (24 February 2022) at [24-26], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

38 As I outlined in *Humphries* and other earlier decisions, in relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman* [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...*

39 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...*

40 At paragraph 41 the Court interpreted *likely* to mean that there must *be a real or not remote chance or possibility, rather than more probable than not.*

41 As I have further outlined in previous decisions, given I am not subject to the supervisory jurisdiction of the Tasmanian Supreme Court, the value of *Forestry Tasmania v Ombudsma*n as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree. This means there must *be a real or not remote chance or possibility* that the public authority will be exposed to *a disadvantage which relates to or is characterised by competition* in the market.[3]

42 I will now assess the individual instances in which the University has sought to exempt information pursuant to s38.

Council Meeting notes 9 May 2014

43 This entry concerns the purchase of the *Websters site* and the information claimed to be exempt pursuant to s38 is:

- a percentage amount relating to a *weighted average yield* threshold;
- a purchase threshold relating to the delegated authority of the Vice-Chancellor; and
- a funding amount for Stage 1 of the Southern Campuses Revitalisation and Activation Project (SCRAP).

44 The first two redactions relate to the planned spending on a new site and also provide information relating to the financial strategy of the University, release of which is likely to have an impact on future commercial negotiations and

[3] *Forestry Tasmania v Ombudsman* [2010] TASSC 39 at [41] and [52].

competition in a commercial market. I agree with the University that they involve *information on decision making around purchases that have to be made in a commercial market* and I am satisfied they are of a business, commercial and financial nature, release of which is likely to expose the University to competitive disadvantage. Accordingly, this information is prima facie exempt under s38, subject to consideration of the public interest test.

45 I am not satisfied the University has discharged its onus under s47(4) in relation to the third redaction and this information is to be released to Mr Hogan. The release of an approved funding amount dating back to 2014 is unlikely to expose the University to competitive disadvantage given the passage of time. If it were a more recent entry I would accept the release of a funding amount in relation to a current project could be likely to expose the University to competitive disadvantage, given it has the potential to negatively impact its negotiating power. As over eight years have passed, however, it is not apparent why there is any reasonable likelihood of competitive disadvantage. This information is not exempt and should be released to Mr Hogan.

Council Meeting notes 8 May 2015

46 The redactions in this entry include further approved funding amounts in relation to specified aspects of the SCRAP project. Again, given this entry dates back to 2015, for the same reasons as the entry above, I am not satisfied the University has discharged its onus under s47(4). This information is not exempt under s38.

47 The University further claimed this information to be exempt under s35 (internal deliberative information) in its fresh decision, saying it relates to an *opinion, advice or recommendation - deliberative in nature – not a final decision*. It provided very limited reasoning in the body of the fresh decision regarding why this information was claimed to be exempt under s35. As the redactions appear to be records of a concluded decision rather than being a record of recommendations or thinking processes, however, the University has not discharged its onus under s47(4) to show that this information should not be disclosed. Accordingly, the information is not exempt under s35 and is to be released to Mr Hogan.

Council Meeting notes 26 June 2015

48 The redactions in this entry are similar to the first entry dated 9 May 2014, in that they involve the acquisition of the *Websters site* and set out an estimated yield percentage amount and purchase price threshold amounts. Further redactions include threshold amounts for the sale of the UniPrint site. Information other than the monetary amounts was initially redacted; however, it was subsequently released in the fresh decision so that information is no longer in question in this external review.

49 I accept the University's assertion that these redactions relate to *negotiations in a commercial market and release may... damage* [the] *ability of* [the] *University to*

negotiate future sales in [a] *commercial market.* Accordingly, these redactions are prima facie exempt pursuant to s38, subject to consideration of the public interest test.

50 The University raised s40, in addition to s38, for this entry in its fresh decision, saying it related to *Information on procedures and criteria used in certain negotiations of public authority.* Given the redacted entries are only dollar figures and a yield percentage amount, rather than information on procedures and criteria, I am not satisfied that the University has discharged its onus as to why this information would be exempt from disclosure under s40. Accordingly, I find that this information is not exempt pursuant to s40 but my finding under s38 remains.

Council Meeting notes 11 September 2015

51 The redactions in this entry include an approved monetary amount for works on the Academy of Creative Industries and Performing Arts (ACIPA) site and the name of a construction company carrying out the works. The University has said this is *information of* [a] *commercially sensitive nature* and I agree with this assertion in relation to the approved monetary amount, which is prima facie exempt subject to the public interest test.

52 However, I do not agree with the University's comments in relation to the name of the construction company. I cannot see how the release of the name of the construction company would be likely to expose the University to competitive disadvantage. This information is not exempt and is to be released to Mr Hogan.

53 The University again raised s35 (internal deliberative information), in addition to s38, in its fresh decision, saying it relates to *Internal deliberative information, Opinion, advice or recommendation - deliberative nature – not a final decision.* I am not satisfied, however, that the University has discharged its onus under s47(4) to show why this minimal information would be exempt under s35. It does not appear to be preliminary thinking but a finalised decision regarding a payment for the commencement of works to the relevant company and my above findings remain.

Council Meeting notes 11 December 2015

54 The redactions in this entry include details of a proposed lease, including the term of the lease, to the State Government in accordance with the development agreement of the ACIPA project. Following the release of the fresh decision, the only redaction that remains is the term of the lease. It is entirely unclear how the lease of a publicly owned property to another public entity would cause competitive disadvantage. The University has not discharged its onus under s47(4) to show why this information would be exempt under s38 and it is to be released to Mr Hogan.

Council Meeting notes January 2016 (via circulation)

55 The bulk of this entry is claimed to be exempt and it relates to details of a State Government cabinet meeting in respect of the ACIPA development. It mainly consists of details relating to funding committed to the project by the State Government, with some other figures regarding allocation of cash and property to fund the project. The ACIPA project is a public project, the public sector is not a commercial market and it is unclear what competitive disadvantage is likely to result if financial details of such a project are revealed. I note that the funding commitment of the State Government has been publicly announced and the project is now complete.[4] Accordingly, I am not satisfied that this information is exempt and it is to be released to Mr Hogan.

56 The University raised s26(1)(d), in addition to s38, in its fresh decision, saying *Information is a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet (and not a record by which a decision of Cabinet was officially published).* Given this is not a record of the Cabinet meeting itself, but rather a notation within the Council meeting, as well as the fact the relevant Cabinet deliberation has been publicly announced, I do not consider that the University has discharged its onus under s47(4) and my above finding remains. I also note the University did not provide any reasoning regarding it use of s26 in the fresh decision, aside from a brief notation in a table.

Council Meeting notes February 2016 (via circulation)

57 The redaction in this entry is of a threshold amount approved for the purchase of the Theatre Royal Hotel. I am satisfied this is prima facie exempt for the same reasons outlined above in similar entries. I note that although the purchase price is publicly available on the Land Information System Tasmania (the LIST) and has been reported in the media,[5] this involves the amount paid, not the threshold amount.

Council Meeting notes 23 September 2016

58 The only remaining redaction in this entry following the fresh decision is a threshold amount approved in relation to the purchase of the Philip Smith Centre.

59 Again, although the purchase price of the Philip Smith Centre may be publicly available on the LIST, it does not include the threshold amount approved, which is the part that relates to commercially sensitive information. I am satisfied that the figure redacted in the third bullet point is prima facie exempt, subject to consideration of the public interest test.

[4] Media release dated 9 August 2021, *The Hedberg performing arts precinct officially opened*, available at www.premier.tas.gov.au, accessed 10 February 2023.
[5] Howard, J., *Meeting of minds at Theatre Royal Hotel after UTAS adds pub to portfolio* (12 March 2016), The Mercury, www.themercury.com.au/realestate/meeting-of-minds-at-theatre-royal-hotel-after-utas-adds-pub-to-portfolio/news-story/10951f10960eb269e64eb9ab96cb298e

60 The information discussed above is repeated in a second entry regarding the meeting of 23 September 2016, and my findings above applies to the repeated information.

Council Meeting notes 19 May 2017

61 This is a redacted threshold approval amount relating to the purchase of the *Red Cross site* and is prima facie exempt for the same reasons outlined previously, subject to consideration of the public interest test.

62 The University raised s40 in its fresh decision, saying this was *Information on procedures and criteria used in certain negotiations of public authority.* I consider that the University has not discharged its onus under s47(4) in relation to this provision, for the same reasons outlined above in the entry dated 26 June 2015. My finding under s38 remains.

Council meeting minutes 21 September 2018

63 These are two instances of a redacted threshold approval amount relating to the purchase of *79-83 Melville Street (ex-Forestry buildings)*. Although the purchase price may be available online[6] and potentially via the LIST, as I have noted above, there are different considerations relating to threshold amounts as opposed to the actual purchase price. I am satisfied that this is prima facie exempt pursuant to s38, subject to consideration of the public interest test.

64 *Council meeting minutes 14 December 2018*

65 This is a redacted threshold approval amount relating to the purchase of the Fountainside Hotel and two redacted funding amounts for refurbishments of the Fountainside and Theatre Royal hotels. I am satisfied that all entries are prima facie exempt subject to the public interest test.

66 The University raised s35, in addition to s38, in its fresh decision, saying it is an *Opinion, advice or recommendation – deliberative nature – not a final decision.* I consider s35 is not applicable for the same reasons as the entry above, dated 11 September 2015, and my finding under s38 remains.

Council meeting minutes 27 March 2019 (via circulation)

67 The redaction in this entry is no longer in question, as it was released in the fresh decision.

Council meeting minutes 5 April 2019

68 The first redaction in this entry relates to *Future of the Southern Campus* and involves the redaction of the name of one of the members of the University Council in the context of the member wanting *his vote against the city option recorded in the minutes.* The University has not discharged its onus under s47(4) to show why this information should be exempt and the member is on record

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[6] Humphries, A., *UTAS's growing Hobart CBD property portfolio under fire after Forestry building price revealed,* (13 February 2019), ABC News, www.abc.net.au/news/2019-02-12/utas-paying-three-times-value-of-forestry-building/10804612.

in other fora regarding his opposition to the campus move.[7] Accordingly, this information is to be released to Mr Hogan.

69 The second redaction in this entry relates to the *Southern Infrastructure Funding Strategy* and following the fresh decision the only redaction remaining is the name of the proposed advisers for the sale and leaseback transaction relating to the STEM building. I agree with the University that this information is prima facie exempt, subject to the public interest test, given it *relates to negotiations in a commercial market and release may ... damage* [the] *ability of* [the] *University to negotiate future sales in* [a] *commercial market.*

70 The third redaction in this entry relates to *Binding offer – Acquisition of Kemp & Denning (K&D) site* and is a threshold approval amount relating to the acquisition of the site. I am satisfied it is prima facie exempt, subject to the public interest test, for the same reasons outlined above in relation to previous entries involving threshold approval amounts.

71 The fourth redaction in this entry relates to *Strategic Property Purchases – 31-33, 35-37 Bathurst Street and 65 Argyle Street Hobart.* Given these also involve threshold approval amounts they are prima facie exempt, subject to the public interest test, as above.

Council meeting minutes 3 May 2019

72 This entry was released to Mr Hogan in the fresh decision, so I will not consider it further.

Council meeting minutes 30 August 2019

73 The first redactions in this entry relate to *The Hedberg funding and status report* and include threshold approval amounts for spending on this project. The dollar figures are prima facie exempt, subject to the public interest test, as they relate to the allocation of funds rather than actual expenditure. Disclosure of such amounts would have a likelihood of causing harm to the University's competitive position in negotiating contracts to undertake works on this project. The remaining redactions in this entry were released in the fresh decision and no longer require consideration. The second redaction in this entry relates to the *Southern Transformation – Finance Committee report* and includes similar threshold approval amounts, as well as the name of a construction consultancy business proposed to be engaged as advisers to the University. The threshold amounts are all prima facie exempt, subject to the public interest test, for the same reasons outlined above.

74 It is unclear why the disclosure of the name of the consultancy business would cause any competitive disadvantage to the University or that business. The University has the onus to show why this information should be exempt,

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[7] Holmes, A., *Hobart looks to have voted 'no' to the UTAS move – so what happens now?* (28 October 2022), ABC News, https://www.abc.net.au/news/2022-10-28/utas-move-to-hobart-cbd-voted-down-in-elector-poll/101584808.

pursuant to s47(4) and I am not satisfied that it has done so. The name of the construction consultancy is not exempt and is to be released to Mr Hogan.

Council meeting minutes 22 May 2020

75 The redactions in this entry all relate to the *Hedberg Project Budget Status* and include funding amounts in the first nine bullet points as well as a threshold approval amount in the final bullet point. It initially also included explanatory words other than a funding amount in the eighth bullet point; however, given these words were released in the fresh decision, they no longer require consideration.

76 Although I found the University had not discharged its onus in relation to funding amounts in the entries dating back to 2014 and 2015, this entry can be distinguished by the fact it is only two years old, as opposed to seven or eight years old. The passage of time is not so relevant in this instance and, given there is the likelihood that some of these projects are still current, I agree with the University that the *information* [is] *of* [a] *commercially sensitive nature with* [the] *potential to damage* [the] *ability of* [the] *University to negotiate future transactions.* The monetary amounts are therefore all prima facie exempt under s38, subject to the public interest test.

77 The University raised s35 (internal deliberative information) in its fresh decision for the same reasons as previous entries. I consider that this exemption does not apply for the same reasons outlined above and my finding under s38 remains.

Council meeting minutes 4 December 2020

78 The redactions in this entry relate to *Southern Campus Funding* and, rather than threshold amounts, they involve details of the University's financial strategy in this context. I agree with the University that this information is of a *commercially sensitive nature* and there is a likelihood its release would expose the University to competitive disadvantage. Accordingly, this information is prima facie exempt under s38, subject to the public interest test. I note a small amount of information in this entry was released in the fresh decision, including the introductory sentence before the bullet points, *cessary* [sic] *steps to* from the first bullet point, and the last bullet point. That information no longer requires consideration in this review.

Council meeting minutes 30 April 2021

79 The redaction in this entry includes a monetary amount for the *intended acquisition* of the *Freedom Furniture site.* Again, although the final purchase price is publicly available,[8] the redacted amount relates to an *intended acquisition*

[8] Peterson, B., *University of Tasmania extends property portfolio with $9m purchase of Freedom Furniture building,* (9 May 2021), The Mercury, www.themercury.com.au/education/university-of-tasmania-extends-property-portfolio-with-9m-purchase-of-freedom-furniture-building/news-story/671f933cd7313f4680b7e98fef818a49

amount rather than the actual purchase price. This entry is accordingly prima facie exempt subject to the public interest test.

Council meeting minutes 25 June 202!

80 The redaction in this entry, which involved the name of the architect appointed in relation to the *Sandy Bay Masterplan,* was released in the fresh decision so this information is no longer in question in this review.

Council meeting minutes !0 September 202!

81 The redaction in this entry includes a threshold approval amount in relation to a *Contract for the refurbishment of the former Forestry Building* and is prima facie exempt, subject to the public interest test, for the same reasons outlined for similar information above.

Council meeting minutes 3 December 202!

82 The redaction in this entry is the same as the entry dated 10 September 2021 and is also prima facie exempt, subject to the public interest test, for the same reasons.

83 The University again raised s35, in addition to s38, in its fresh decision; however, for the same reasons outlined above this information is not exempt under s35 and my finding under s38 remains.

Public Interest Test

84 When determining where the public interest lies, regard must be had to, at least, the 25 matters contained in Schedule 1 of the Act.

85 In relation to these matters, Mr Perraton, in his decision dated 27 May 2022, said:

> *In considering the public interest test I particularly considered:*
>
> *Factors in favour of disclosure*
>
> - *The University contributes significantly to the economic value of the State. The University Strategic Vision 20!9-2024 emphasises a place-based mission serving an entire State with a view to being globally connected, right-sized and responsive, regionally networked to provide quality and access, and being people-centred. As part of this mission, the University is creating a southern campus in the city of Hobart that is more accessible, with a single heart, where we are more connected to our partners and each other.*
> - *There is a portion of the community who express public concern over the perceived economic and societal impacts of the University of Tasmania Southern Campus Transformation.*
> - *The University as a public institution has an obligation and a desire to share the evidence and rationale for the University's decision surrounding the University of Tasmania Southern Campus*

Transformation with the community in order that the community can gain a better understanding of how the University reached this decision.

Factors against disclosure

- *Referring to the decision in Forestry Tasmania v Ombudsman [2010] TASSC 39, the disclosure of information on commercial arrangements the University enters into would expose the University to competitive disadvantage when dealing in the competitive Tasmanian property market. This in turn would give a competitive advantage to private investors who are not subject to the information disclosure requirements of the RTI Act and who also do not provide other public interest outcomes that the University provides to the State of Tasmania including education, provision and maintenance of public open space, public availability of research results and other benefits that the University provides to the public.*

- *The economic contribution the University to* [sic] *the Tasmanian economy is significant and the University competes in a national market of higher education and research providers. Disclosure of information that may cause commercial damage to the University or to organisations the University does business with may make Tasmania less competitive in comparison to other jurisdictions and therefore may have an adverse effect on the harm the* [sic] *economic development of the State.*

- *Disclosure of information about commercial arrangements such as construction contracts or payments for properties and payments made on properties would confer a competitive advantage on other higher education provides* [sic] *and other private competitors in the property market.*

In my view disclosure of details of commercial arrangements is not in the public interest because this information is not relevant to decision making on the Southern Campus move and is highly commercial in nature.

86 Ms Beaumont did not provide any specific comments in relation to the public interest factors in Schedule 1, setting out only that she had *decided to affirm the decision as it relates to exemptions relied on for exempt information.* She did make additional comments corresponding to each individual entry in the schedule of information redacted, most of which indicated that the information was of a *commercially sensitive nature with* [the] *potential to damage* [the] *ability of* [the] *University to negotiate future transactions.*

87 Ms Beaumont's comments in relation to the public interest test in the fresh decision were almost exactly the same as those in Mr Perraton's decision. The only additions were a reference to t*he general right for information to be available*

and her indication that *much of the decision-making information provides important context* regarding the University's economic contribution to Tasmania.

88 In addressing the public interest matters in his submissions dated 19 September 2022, Mr Hogan first referred to: *Information that could qualify for exemption under Sections 37 and 38 but ought to be released in light of the public interest and previous Ombudsman decisions.* He specifically addressed *construction/refurbishment prices* and, after referring to *Humphries,* he said:

> *The same factors should be applied to the construction and refurbishment costs in the UTAS Council Minutes. Applying the reasoning from Humphries it is in the public interest for this information to be disclosed. UTAS is a public institution and there is considerable public interest in the proposed move to the Hobart CBD along with the fiscal merits of purchase and refurbishment of central Hobart properties.*
>
> *...In light of these facts and applying the Humphries reasoning, the Ombudsman should put strong weight in favour of disclosure. Additionally, the fact that the costs are highly specific to each building and the length of time that has passed in most cases since the costs were approved undermines the argument against disclosure. Information has a variable half-life of sensitivity and information of this type loses that sensitivity very quickly.*

89 Following this, Mr Hogan referred to: *Information that may qualify under the Sections 37 and 38 but is in the public interest to release.* In this regard he said:

> *Broad Project Information*
>
> *It is important to note that it is difficult to place this information in any category because it is very unclear what this information actually contains. If UTAS' arguments are accepted that this information qualifies under section 37 and/or 38, it is likely that it would be in the public interest that it should be disclosed. This information likely goes to the heart of the future of UTAS and its impact on its surrounding areas. UTAS is the most significant provider of tertiary education in Tasmania, meaning that it has a near monopoly and its actions have greater impact than the actions of an institution which has competition. The public interest factor of (a) the public need for this information would be relevant and should be given strong weight in line with Humphries.*
>
> *Information that is Entirely Redacted*
>
> *Again, it is difficult to determine whether the University has validly relied on section 37 and 38 for this information because it is impossible to determine what it is. Even if UTAS' arguments are accepted it is unlikely that all of this information has been validly redacted. The broad-brush approach of completely redacting entries goes against the presumption of disclosure found in Section 4(b) of the RTI Act. This section provides*

that the discretions provided for in the RTI Act should be exercised to provide the maximum amount of official information. UTAS should be attempting to provide information and only redacting where absolutely necessary. This has not occurred in the sections which are entirely redacted. There is even a section where the topic has been redacted that gives no indication whatsoever of what is being discussed (item 18).

Information that is Redacted to the Point Where it is Unclear What the Information is

This information appears as separate points in the UTAS Council Minutes which are partially redacted. It is redacted to the point where it is unclear what the information is. The same points 11 mentioned above apply to this information, while it appears alongside information that is not redacted, redacting entire points does not give an indication of what the information is.

90 In accordance with *Humphries* and having considered the matters in Schedule 1 of the Act, I am of the view that matters (a) – *the general public need for government information to be accessible*, (b) – *whether the disclosure would inform a person about the reasons for a decision* and (f) – *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation* favour release. I am satisfied that the information, if released, would address Mr Hogan's and the general public's need for accessible government information, would contribute to public debate, and would enhance scrutiny of the University's decision-making processes and thereby improve accountability and community participation. The proposed relocation of the University from its Sandy Bay campus to the city has sparked immense public debate, which appears to have recently reached a peak, as identified by Mr Hogan. As I discussed in *Humphries,* this is a matter of legitimate public interest and as a public educational institution, the University receives significant public funding and its business activities are not its primary purpose. These factors therefore substantially weigh in favour of release.

91 I note Mr Perraton's submissions relating to the public interest also loosely align with this view, as he refers to *a portion of the community who express public concern over the perceived economic and societal impacts of the University of Tasmania Southern Campus Transformation.* He further acknowledges that *the University as a public institution has an obligation and a desire to share the evidence and rationale for the University's decision surrounding the University of Tasmania.*

92 I am also of the view that matters (c) – *whether the disclosure would inform a person about the reasons for a decision* and (d) – *whether the disclosure would provide the contextual information to aid in the understanding of government decisions* are relevant and are also in favour of release. In Mr Hogan's original application for assessed disclosure he applied for Council meeting minutes *that relate to University decision making on the move to a city centric campus* in order to *write an article (or series of articles) on how this proposal* [the *proposed move of UTAS' southern campus into the Hobart CBS* [sic] *and the redevelopment of the*

Sandy Bay campus] *developed over time.* However, I am of the view that these matters have lower weight given the release of much of the information that has been redacted by the University, particularly the threshold approval amounts for spending, would not assist in informing Mr Hogan and the general public about the reasons for the University's decision to relocate its campus to the city. Although it may provide some context, I do not believe the contextual information is of significant value in this instance given there is little direct relationship between the threshold approval amounts and other exempt information, and the University's decision to relocate. I accept Mr Perraton's comments in this regard that *disclosure of details of commercial arrangements is not in the public interest because this information is not relevant to decision making on the Southern Campus move and is highly commercial in nature.*

93 Also in accordance with my decision in *Humphries,* I am of the view that matter (s) – *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation* favours exemption and I acknowledge there are valid concerns that the release of this information could cause harm to the business or financial interests of the University. In this regard I accept Ms Beaumont's comments that much of the information is of a *commercially sensitive nature with* [the] *potential to damage* [the] *ability of* [the] *University to negotiate future transactions.* The reality is that if threshold approval amounts are known to third parties with whom the University is negotiating contracts of sale, this would significantly reduce the University's bargaining power. Similarly, if allocated funding amounts are known to third parties with whom the University is negotiating building or refurbishment contracts, the University's ability to achieve competitive prices may be reduced and there is the potential for quotations to be over-inflated. Although its business activities are not its primary purpose, the success of those activities is important for the financial stability of the University and its future prospects.

94 In this regard I agree with Mr Perraton's comments that disclosure could give a competitive *advantage to private investors who are not subject to the information disclosure requirements of the RTI Act.* I also agree with his comments that disclosure *may make Tasmania less competitive in comparison to other jurisdictions* and that disclosure in relation to construction contracts or property purchases *would confer a competitive advantage on other higher education provides* [sic] *and other private competitors in the property market.*

95 I note Mr Hogan's submissions that *applying the reasoning from Humphries it is in the public interest for* the construction and refurbishment costs *to be disclosed.* However, the majority of my findings in *Humphries* can be distinguished from the facts of this case in that the information found to be exempt is predominantly threshold approval amounts for proposed spending rather than construction and refurbishment costs which have actually been incurred. I agree with Mr Hogan that *the length of time that has passed in most cases since the costs were approved undermines the argument against disclosure,* and further that *information of this type loses that sensitivity very quickly;* however, only in relation to the funding amounts dating back to 2014 and 2015. As I have

outlined above, these factors weighed heavily in my decision to find that information did not satisfy the requirements of s38 and is to be released to Mr Hogan. I do not agree that information involving threshold approval amounts *loses that sensitivity very quickly* given they relate to an overall financial strategy when examined in the context of actual purchase prices, and remain likely to place the University at a competitive disadvantage for future commercial transactions.

96 I also note Mr Hogan's comments in relation to *Broad Project Information* and *Information that is Entirely Redacted* but I note that there are some instances where the information does not go *to the heart of the future of UTAS and its impact on its surrounding areas.* The entry dated 4 December 2020, which is entirely redacted, is a good example of this. It contains detailed information regarding the University's commercial and financial strategies. It does not go to the heart of the future of the University, nor does it shed any particularly valuable light on the University's decision to relocate. While I understand his view, I do not accept Mr Hogan's position that a *broad-brush approach of completely redacting entries goes against the presumption of disclosure found in Section* [3]*4(b) of the RTI Act*. Releasing the maximum amount of official information means providing as much as possible after information which is appropriately exempt is excluded. In some instances this can involve extensive redaction and this is not necessarily at all inconsistent with s3(4)(b). In this case, while I have overturned the exemption of some information, there have been valid claims for exemption made over other information. In relation to entries such as those relating to 4 December 2020, the potential detriment to the commercial success of the University if the information were to be disclosed outweighs the factors favouring release.

97 Overall, after weighing the relevant public interest factors, I determine that, on balance, it would be contrary to the public interest to release all entries that I have found to be prima facie exempt under s38. This information remains exempt under s38 and is not required to be provided to Mr Hogan.

Section 37 – Business affairs of a Third Party

98 For information to be exempt under this section, I must be satisfied that its disclosure would disclose information related to business affairs acquired by the University from a third party and that –

> *(a) the information relates to trade secrets; or*
>
> *(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.*

99 Whilst the University sought to rely upon s37 in the alternative for almost all redacted entries, it has not discharged its onus under s47(4) given it has not clearly stated who the third parties are, nor has it referenced any details of third party consultation under s37(2). Even in instances where the third parties

are identifiable, the University has not provided sufficient explanation to discharge its onus to show why those details should be exempt under s37. I am unable to see how the release of names of third party businesses such as advisers and architects would expose those businesses to competitive disadvantage.

100 In terms of information relating to the purchase of particular property sites from third parties, again I cannot see how this would expose those third parties to competitive disadvantage given the fact of the purchase is on the public record and the associated information is not recent, involving commercial transactions dating back to 2015.

101 I am not satisfied that any information responsive to Mr Hogan's request is exempt pursuant to s37.

Preliminary Conclusion

102 For the reasons given above, I determine that:

- exemptions claimed by the University under s37 are not made out; and
- exemptions claimed by the University under s38 are varied.

Conclusion

103 As the above preliminary conclusion was adverse to the University, it was made available to the University under s48(1)(a) of the Act to seek its input before finalising the decision.

104 On 2 June 2023, the University advised that:

- *The fresh decision sought to correct the errors as regards scope in the first decision;*
- *The fresh decision released a significant amount of further information responsive to Mr Hogan's initial request.*
- *We have no further submissions to make regarding the exemptions applied in the first decision as our view is that these have been overtaken by the fresh decision, which is now with you for external review.*

105 Accordingly, for the reasons given above, I determine that:

- exemptions claimed by the University under s37 are not made out; and
- exemptions claimed by the University under s38 are

varied. **Dated:** 2 June 2023

Richard Connock
OMBUDSMAN

Attachment 1 - Relevant legislative provisions

Section 26 – Cabinet Information

(1) Information is exempt information if it is contained in –

(a) the official record of a deliberation or decision of the Cabinet; or

(b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or

(c) a record that is a cope of, or a copy of part of, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date on which the information referred to in that subsection was first considered by the Cabinet at a meeting of the Cabinet.

(3) Subsection (1) does not include information solely because it –

(a) was submitted to the Cabinet for consideration; or

(b) is proposed by a Minister to be submitted to the Cabinet for consideration –

if the information was not brought into existence for submission to the Cabinet for consideration.

(4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the Cabinet which has not been officially published.

(5) Nothing in this section prevents the Premier from voluntarily disclosing information that is otherwise exempt information.

(6) In this section –

the Cabinet includes a committee of the Cabinet.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 37 – Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

(d) notify the third party that the public authority or Minister has received an application for the information; and

(e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the

information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Section 38 - Information relating to business affairs of public authority

Information is exempt information –

(a) if it is –

(i) a trade secret of a public authority; or

(ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage; or

(b) if it consists of the result of scientific or technical research undertaken by or on behalf of a public authority, and –

(i) the research could lead to a patentable invention; or

(ii) the disclosure of the results in an incomplete state would be likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or

(iii) the disclosure of the results before the completion of the research would be likely to expose the public authority or the person carrying out the research unreasonably to disadvantage; or

(c) if it is contained in –

(i) an examination, a submission by a student in respect of an examination, an examiner's report or any such similar record; and

(ii) the use for which the record was prepared has not been completed.

Section 40 – Information on procedures and criteria used in certain negotiations of public authority

Information is exempt information if it consists of instructions for the guidance of officers of a public authority on the processes to be followed or the criteria to be applied –

(a) in negotiations, including financial, commercial and labour negotiations; or

(b) in the execution of contracts; or

(c) in the defence, prosecution and settlement of cases; or

(d) in similar activities –

relating to the financial, property or personnel management and assessment interests of the Crown or of a public authority.

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

SCHEDULE 1 - Matters Relevant to Assessment of Public

Interest 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.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2305-015

Names of Parties: Robert Hogan and the University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s37, and s39

Background

1 The University of Tasmania (University) announced in 2019 that it had made a decision to relocate its longstanding campus in Sandy Bay to central Hobart. In response to representations from the community and other stakeholders regarding this decision, the Legislative Council of the Tasmanian Parliament resolved, in May 2022, to convene a Select Committee to inquire into the provisions of the *University of Tasmania Act 1992*.

2 Particular reference was given to:

- the constitution, functions and powers of the University;
- the constitution, role, powers and obligations of the Council and Academic Senate;
- the appropriateness of the Act to ensure accountable executive, fiscal and academic decision-making; and
- the appropriateness of the Act to protect and promote academic freedom, independence and autonomy.

3 Submissions to the Select Committee closed on 29 August 2022 and 149 submissions, including submissions by the University, are listed on the Parliament of Tasmania website.[1]

4 Mr Robert Hogan has a strong interest in the fate of the University's Sandy Bay campus and is the author of a submission to the Select Committee, as well as hosting a website opposing the campus move.

5 On 26 January 2023, Mr Hogan made an application to the University for assessed disclosure under the *Right to Information Act 2009* (the Act), seeking a copy of research by Deloitte Access Economics mentioned in the University's submission to the Legislative Council Select Committee's Inquiry.

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[1] Parliament of Tasmania, Legislative Council, Inquiry into the Provisions of the University of Tasmania Act 1992, www.parliament.tas.gov.au/committees/legislative-council/select-committees/lc20select20-20university20of20tasmania/submissions/submissions, accessed 14 September 2023.

6 Mr Hogan set out the details of the information he sought as follows:

> *Page 8 of Attachment 1 of Part 13 of UTAS' submission to the Legislative Council Select Committee's Inquiry into the Provisions of the University of Tasmania Act 1992 refers to research by Deloitte Access Economics (DAE).*
>
> *....*
>
> *I request a copy of the DAE research and all related documents (working papers etc).*
>
> *I anticipate that UTAS may argue that DAE's research is:*
>
> - *DAE's IP - Research reports to UTAS and the like will belong to UTAS; DAE should be consulted as a third party about any real IP invested in the project;*
> - *The research is commercially sensitive – truly sensitive material can be redacted;*
> - *My request would involve an unreasonable diversion of resources – given the public interest in this matter, the resources involved processing would be fully warranted.*
>
> *As DAE's research is being used as part of UTAS' main argument for relocation into the Hobart CBD (ie financial sustainability), UTAS should welcome the opportunity to provide that research for public scrutiny.*

7 On 23 February 2023, Mr Brendan Parnell of the University, a delegate under the Act, notified Mr Hogan that the information responsive to his application contained information relating to the business affairs of a third party (Deloitte), and it had been consulted pursuant to s37 of the Act.

8 On 17 March 2023, Mr Parnell released a decision to Mr Hogan. In his decision, Mr Parnell advised that the information located responsive to Mr Hogan's application had been found to be fully exempt from disclosure under ss35 (internal deliberative information), 37 (information relating to the business affairs of a third party), 38 (information relating to the business affairs of a public authority) and 39 (information obtained in confidence) of the Act. A Schedule of Documents was attached to the decision. Three heads of information were listed, as follows:

- Deloitte Financial Feasibility Assessment – Working Draft, March 2022
- Deloitte Financial Outputs – Preliminary Assessment, 30 November 2021
- Internal scenario and sensitivity modelling to the concept Sandy Bay masterplan

9 Mr Hogan applied for internal review of the decision on 17 April 2023.

10 On 15 May 2023, Ms Juanita O'Keefe, another University delegate under the Act, released her internal review decision. Ms O'Keefe upheld the decision in the first instance not to release the information and again relied upon exemptions in ss 35, 37 and 39 of the Act. She no longer relied on s38.

11 On 29 May 2023, Mr Hogan applied for external review. This office accepted his application under s44 of the Act on the basis Mr Hogan was in receipt of an internal review decision, the fee had been paid and his application for external review was submitted within 20 working days after receipt of that decision.

12 Mr Hogan applied to have his external review request expedited and I agreed to grant priority to this matter. I made this decision because of the high degree of public interest in the University's southern campus relocation, and the time critical nature of the matter due to the advanced stage of relocation of the University services to central Hobart.

13 Mr Hogan advised that he also sought external review on the basis that the initial search by the University for information responsive to his request was inadequate. Accordingly, this office liaised with the legal office of the University to ascertain whether any further information required assessment. On 10 July 2023, Mr Parnell contacted Mr Hogan and this office to advise of the active disclosure by the University of a substantial amount of information that may be of interest to Mr Hogan and responsive to his request. Mr Parnell also provided a further list of documents for Mr Hogan's perusal, which may require assessment by the University before considering whether it is appropriate that they be released.

14 Upon consultation with the University legal office and Mr Hogan, it was agreed that the determination of this external review would proceed in respect of the information which had already been assessed by the University, regardless of the result of the consultation between Mr Hogan and the University regarding the assessment of other information. This would form a separate external review, should such review be warranted.

Issues for Determination

15 I must determine whether the information is eligible for exemption under ss35, 37 or 39 or any other relevant section of the Act.

16 As these sections are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters in Schedule 1. This means that, should I determine that the information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

17 I attach copies of ss35, 36, 37 and 39 to this decision at Attachment 1.

18 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

University

19 The University did not make submissions in response to this external review, beyond the reasoning in its decisions, which is set out as follows.

20 In his original decision dated 17 March 2023, Mr Parnell said, in relation to s37:

> *My consultation with Deloitte raised concerns from Deloitte that information they provided as part of their engagement with the University includes business related confidential information of Deloitte. This information was divulged to the University on a confidential basis as it contains information that gives their business a competitive advantage in comparison to other similar professional services firms. If this information were disclosed to the public, it would also then be available to their competitors, and would be detrimental to Deloitte's market position and business affairs.*
>
> *They are also concerned that it would be contrary to the public interest as it would prejudice the effectiveness of Deloitte's information gathering process and ability to deliver accurate and comprehensive deliverables to their clients.*

21 In relation to s39, Mr Parnell said:

> *The Deloitte Working Draft and Deloitte Financial Modelling Outputs collected and utilised information from various sources both from the University and outside the University that was readily understood to have been divulged in confidence. The consultant authors* [sic] *engagement was for strict confidentiality. The report is marked on each and every page as confidential. The report is marked as containing information that has been provided as commercial in confidence not to be distributed to any third parties under any circumstances.*
>
> *If confidential information cannot be provided by and to the University for completion of commercially sensitive advice then it is highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants. Third parties will be less likely to provide necessary information for a usable report if the information they provide is not kept in confidence.*

22 In relation to s35, Mr Parnell said:

> *I have determined that the material you have sought are working drafts and development feasibility assessments for modelling a range of development options. The information was sought from Deloitte and used for internal deliberations only.*
>
> *Feasibility modelling included high-level cost estimates of construction costs of a very early design of infrastructure and building works, financing costs, differing capital models and projected revenue streams and was*

highly sensitive to the input assumptions. The work was scenario and sensitivity modelling to the concept masterplan to understand the potential financial viability of development options and how it may be phased over a period of time. The work was for consideration of the various potential scenarios by the University and therefore its very nature was deliberative, opinion based, and consultative. It was not a final decision nor contain purely factual information and not in the public's interest for it to be released.

If the University is unable to deliberate, it will inhibit and harm the ability of the University to function effectively. It is therefore not in the public interest to release information used for internal deliberation as the University moved towards making a decision and/or embarking upon a course of action.

23 Mr Parnell also outlined a claim for exemption under s38 of the Act. However, as the decision upon internal review did not rely on s38, I will not restate this here.

24 Mr Parnell then addressed the matters in Schedule 1 in relation to the public interest test. These are also considered in the Analysis under the *Public Interest Test* below.

Mr Hogan

25 In his internal review request dated 17 April 2023, Mr Hogan made submissions contesting the claims for exemption made by Mr Parnell in his decision. Mr Hogan argued that the public interest test had not been applied correctly, and that the University has not discharged its onus to show that the information should not be disclosed. Mr Hogan also submitted that there has been an insufficiency of searching for the information by the University.

26 Specifically, Mr Hogan separated his submissions into three heads: documents identified, documents not identified and Mr Parnell's decision.

27 *Documents identified*

In response to the delegate's following statement:

I have determined that the material you have sought are working drafts and development feasibility assessments for modelling a range of development options. The information was sought from Deloitte and used for internal deliberations only.

Mr Hogan observed as follows:

- *The failure to date the third document is contrary to guidance provided on page 61 of the Ombudsman's Manual (section 8.5).*
- *The status of the third document should be made clear. Is it draft or final?*

- *Given their seeming importance, the documents are inadequately described in both the decision letter and the schedule.*
- *I have it on good advice that DAE were still working on this project in August 2022.*

As Utas has placed such emphasis on the financial case for its CBD move, and DAE's work is critical in the statement of UTAS' financial case to the LegCo Inquiry, it would be of major concern if UTAS had relied on draft or preliminary assessments by DAE.

28 *Documents not identified*

Mr Hogan submitted that the University ignored his request for *all related documents (working papers etc)* related to the DAE research which was specifically named in his original application under the Act. Mr Hogan further submitted that all such information should have been included in the schedule of documents and considered for release.

29 As mentioned above, Mr Hogan and the University are now in consultation regarding any other relevant information, which will be dealt with, if necessary, separately from this review.

30 *Mr Parnell's decision*

With regard to the delegate's decision to exempt the information from disclosure Mr Hogan submits as follows:

Mr Parnell's broad-brush approach of completely exempting information goes against the presumption of disclosure found in the RTI Act. Mr Parnell's decision to exempt this information also relies on a series of generic arguments. The documents he has identified are, for example, determined to be exempt under various sections of the RTI Act because; they are "business related confidential information of Deloitte" (RTI Act Section 37); Deloitte's "report is marked on each and every page as confidential" (RTI Act Section 39); they are "working drafts and development feasibility assessments for modelling a range of development options" (RTI Act Section 35); and "the information is likely to expose the University to competitive disadvantage."

The three identified documents all undoubtedly include factual material of a nature that is not sensitive and this should be able to be freely provided. Moreover description of material as "confidential" does not make it automatically exempt under the provisions of the RTI Act.

Over and above this, Mr Parnell's argument on the public interest in his decision letter is weak, especially as he seems to take no account of relevant Ombudsman and Supreme Court determinations. In particular he fails to apply a balancing test for and against the public interest, thereby excluding from consideration a number of elements in Schedule 1 of the Act that are heavily in favour of the public interest. Indeed, Mr

> *Parnell fails to provide any evidence of detailed consideration of the reasons for favouring release in the public interest.*

31 Mr Hogan submits that the proposed relocation of the University's campus to the Hobart CBD and redevelopment of the present site are matters of great public interest. Mr Hogan cites, for example, the Elector Poll that was taken during the Local Government elections in October/November 2022, and the large number of submissions to the Legislative Council Select Committee Inquiry into the *University of Tasmania Act 1992*.

32 Finally, Mr Hogan argues that:

> *UTAS has relied heavily on the "financial" sustainability argument to justify its relocation and in its presentation to the LegCo inquiry it has relied heavily on DAE to make this case. UTAS should release as much relevant material as possible, in line with the objectives of the Act.*

33 In his application for external review dated 29 May 2023, Mr Hogan set out the grounds for his application under s44(1) as follows:

> *I believe that the internal review decision is manifestly flawed, being a broad brush response in which UTAS seeks to find arguments for withholding all the material requested rather than releasing as much as it can.*
>
> *As this case goes to key areas of interpretation, and involves major public interest, I will provide a supplementary submission, prepared in conjunction with Prof Rick Snell, soon. I am also submitting a request for priority consideration.*

34 On 14 August 2023, Mr Hogan filed further submissions. He commenced by providing background to the case and the public interest in it. Mr Hogan's submissions specifically related to the public interest matters in Schedule 1 will be considered in the Analysis under the *Public Interest Test* below.

35 In respect of the University's reliance on s35, Mr Hogan argued that the University was being inconsistent.

> *On the one hand, [the University] claims – by fact of identifying them as responsive to my RTI application – that these are the documents on which UTAS based its major financial claims (its major argument for its relocation project) to the LegCo Inquiry (see Attachment A). On the other hand, it seeks to exempt the documents because they are draft, preliminary or internal documents.*

36 Mr Hogan noted that Ms O'Keefe referred to only one Report in her arguments for exemption under s37 of the Act in her internal review decision. However, the Schedule of Documents attached to the University's first decision indicates that s37 is relied upon for both Documents 1 and 2.

37 Not being privy to the information, Mr Hogan speculated that, based upon his professional experience in dealing with business cases, cost-benefit analysis and

financial modelling by consultants, the information would not be exempt under s37, but that any material that may be exempt under this section could easily be redacted. Mr Hogan further set out that:

> *the STEM Facility Business Case and the numerous consultants reports contained in UTAS' application for a Planning Scheme Amendment have now been released by UTAS in their entirety. I find it difficult to believe that the three documents that UTAS has exempted in this case contain material that is more commercially sensitive than that contained in every single one of those reports, let alone that they are fully comprised of such sensitive material, as the logic of UTAS' position would require.*

38 With regard to the claim for exemption under s39, Mr Hogan submits that the University's argument for relying on this section of the Act is spurious and lacks veracity. In particular, Mr Hogan submits that if the delegate's argument is:

> *... to be taken as having any validity, it would be a recipe for every potential contracting agency and consultant in Tasmania to be able to subvert the RTA Act if they wished. Distilled, the argument is:*
>
> - *We (client and consultant) do not have to worry about whether information is confidential to label it such.*
> - *It is enough for us to agree to treat the information as [sic] it was confidential.*
> - *If we, the client, do not then keep the information confidential [notwithstanding any legal obligations we may have] it may damage our ability to obtain similar information [does Ms O'Keefe mean confidential information or information that is not confidential but merely labelled such?].*
>
> *This is a thoroughly misconceived and/or deeply cynical argument.*

39 Mr Hogan has also made submissions regarding the application of s19 of the Act in anticipation of the University relying on that section to avoid releasing information on the grounds that it would unreasonably divert resources. I will not quote or address these submissions, as this external review does not require an assessment of the application of this section.

Analysis

40 The Schedule of Documents annexed to the University's initial decision on Mr Hogan's application lists the relevant information under three separate headings:

- Deloitte Financial Feasibility Assessment – Working Draft – March 2022 [Document 1]
- Deloitte Financial Outputs – Preliminary Assessment – 30 November 2021 [Document 2]

- Internal scenario and sensitivity modelling to the concept Sandy Bay masterplan

41 As the information consists of two separate, complete documents, clarification was sought as to how the three headings related to the two documents. The University's legal office clarified that the third heading related to certain specific items on page 76 of Document 1 and page 10 of Document 2. The University relies on ss35 and 39 to exempt information under the third heading. For all other information, the University relies on ss35, 37 and 39.

Section 35 - Internal deliberative information

42 For information to be exempt under s35(1), I must be satisfied that 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 or Ministers.

43 As the information was not created by a public officer of a public authority or Minister and does not consist of consultations between officers of public authorities or Ministers, it cannot be exempt under s35. This exemption cannot be used in relation to documents created by external consultants. The information will be considered under the alternative exemption proposed by the University, s39.

Section 37 – Business affairs of a Third Party

44 For information to be exempt under s37(1)(b), I must be satisfied that its release would disclose information related to business affairs of a third party acquired by the public authority from a person or organisation other than the applicant, and that the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

45 The concept of likely competitive disadvantage has been considered by the Supreme Court of Tasmania in relation to the equivalent provision under the now repealed *Freedom of Information Act 1991*. The Court held in *Forestry Tasmania v Ombudsman* that:

> *For the information to be exempt its disclosure needs to be likely to expose the undertaking or agency not to any disadvantage, but a disadvantage which relates to or is characterised by competition. The requirements in ss31 and 32 of the Act that the disadvantage relate to competition may have the preservation of the competitive process as a broad ultimate goal, but primarily the provisions are concerned with the*

potential impact on the undertaking or agency acting as a competitor in the market...[2]

46 At paragraph 41 the Court interpreted 'likely' to mean that there must be a real or not remote chance or possibility, rather than more probable than not.

47 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Barbour*[3] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts of that State. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

48 Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

49 In this instance, the University advises it consulted with the relevant third party (Deloitte) pursuant to s37(2), and Deloitte objected to the disclosure of the information. This was on the grounds that the information includes business related confidential information of Deloitte, and is information that gives Deloitte a competitive advantage in comparison to other firms that offer similar services.

50 The relevant information comprises two reports which were prepared for UTAS Properties Pty Ltd by Deloitte Real Estate Advisory. The University submits that if the information was disclosed, it would be available to the Deloitte's competitors and would be detrimental to Deloitte's market position and business affairs. Specifically, the University set out that Deloitte contended:

- *Disclosure would lessen Deloitte's ability to maintain competition between it's* [sic] *suppliers;*
- *Disclosure would have a potential impact on Deloitte's market position acting as a competitor in the market;*
- *Case studies were included in the report from other projects unrelated to the Sandy Bay Redevelopment that are not in the public domain;*
- *An example to support application of this exemption is Environment Tasmania v Environmental Protection Agency (12 June 2017) – where data about the health of a river did not reveal anything about the third party's operations, but had the potential to be reported wrongly, inaccurately or out of context, there was a real possibility*

[2] *Forestry Tasmania v Ombudsman* [2010] TASSC 39 at [52]
[3] [2017] NSWCA 275 (24 October 2017)

> *and not a remote chance that it's disclosure may damage the reputation of the third party, hence being to it's* [sic] *disadvantage and to it's* [sic] *competitor's disadvantage.*

51 With regard to the above specific submissions, I make the following observations.

52 Deloitte is a commercial enterprise, and is very well known in the market. I do not see how the disclosure of the information would lessen Deloitte's ability to maintain competition between its suppliers.

53 Deloitte is a high profile firm and its type of work, including the nature of its reports, the industries that it operates in, its methods, approach, style and deliverables are all very well known. Deloitte provides a vast amount of information on its websites, in Australia and abroad, with regard to its services, products and expertise. I am not at all convinced that disclosure of the relevant information would have a negative impact on its market position. I would expect that a very large number of its reports have made their way into the public domain, indeed I recently ordered a Deloitte document be disclosed in my decision of *Alexandra Humphries and the Department of Health*.[4]

54 With regard to the case studies set out in Chapter 7 of Document 1 (pages 58-68), I note that the following disclaimer has been set out on page 60:

> *We note that the above information is provided as commercial in confidence and should not be distributed to any third parties under any circumstances.*

55 This is in connection with the case study of the Shell Cove Urban Release Project in NSW. I am aware that a very large amount of information regarding this project (dating back to at least 1995) is publicly available on the Australand (Frasers Pty) website, the Shellharbour City Council website, as well as NSW Government websites with regard to planning and major projects, and the Independent Planning Commission website.[5] I am not persuaded that there is any information here which is not already publicly available. I will refer to this information again during my analysis under s39.

56 With regard to the other case studies set out in pages 61-67, I note that the information contained in them is also in the public domain and can be found on various relevant websites[6]. I will refer to this information again under s39.

[4] (29 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

[5] For example, see: Shellharbour City Council: https://www.shellharbour.nsw.gov.au/things-to-do/waterfront-shell-cove; NSW Government.: https://www.planningportal.nsw.gov.au/major-projects/projects/shell-cove-boat-harbour-redevelopment; NSW Independent Planning Commission: https://www.ipcn.nsw.gov.au/cases/2018/11/shell-cove-boat-harbour-precinct-concept-approval-mp-07-0027-mod1; Frasers Property: https://www.frasersproperty.com.au/nsw/shell-cove.

[6] See La Trobe University: https://www.latrobe.edu.au/__data/assets/pdf_file/0003/600942/1.0-MMP-Introduction.pdf; Kelvin Grove: https://www.aurecongroup.com/projects/government/kelvin-grove-urban-development; https://www.researchgate.net/publication/259742693_Kelvin_Grove_Urban_Village_A_strategic_planning_case_study; Bingara Gorge: https://bingaragorge.com.au/masterplan; Simon Fraser University: https://www.sfu.ca/burnaby2065/campus-master-plan.html

57 With regard to the fourth dot point, Ms O'Keefe has cited my earlier decision of *Environment Tasmania and the Environment Protection Agency* (2017)[7] as authority for an argument that attempts to circumvent the first requirement of s37, that the information be related to business affairs of a person or organisation other than the person making the application under the Act. Regardless of the paragraph quoted by Ms O'Keefe, I have made it clear elsewhere in that decision[8] that the information did relate to business affairs of a third party organisation.

58 In this case however, the first element of s37 is not satisfied, as it is not clear how this report relates to the business affairs of Deloitte. I do not consider that the University has discharged its onus under s47(4) to show that the information is exempt under s37 and should not be disclosed. The information responsive to Mr Hogan's request under the Act was compiled by Deloitte upon engagement by the University to provide development feasibility financial modelling for the Sandy Bay Redevelopment Project. The information relates to the University's project and not to a third party's business affairs. And further, in any case, I am unable to see how the disclosure of the information under the Act would expose the third party to competitive disadvantage.

59 In view of the above, I agree with Mr Hogan that it is difficult to understand why this report would be commercially sensitive for Deloitte. I am not satisfied that any information responsive to Mr Hogan's request is exempt pursuant to s37.

Section 39 – Information obtained in confidence

60 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the University and that –

(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 the Department to obtain similar information in the future.

61 The University relies on s39(1)(b), as set out above. In the University's first decision dated 17 March 2023, the University's delegate under the Act addressed the application of s39 to the information:

> *The Deloitte Working Draft* [Document 1] *and Deloitte Financial Modelling Outputs* [Document 2] *collected and utilised information from various sources both from the University and outside the University that was readily understood to have been divulged in confidence. The consultant authors* [sic] *engagement was for strict confidentiality. The report is marked on each and every page as confidential. The report is*

7 *Laura Kelly, on behalf of Environment Tasmania and Environmental Protection Agency* (12 June 2017) at [147-148] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision.

8 ~~See Note 10 at [138]~~

marked as containing information that has been provided as commercial in confidence not to be distributed to any third parties under any circumstances.

If confidential information cannot be provided by and to the University for completion of commercially sensitive advice then it is highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants. Third parties will be less likely to provide necessary information for a usable report if the information they provide is not kept in confidence.

62 Upon internal review, the delegated right to information officer, Ms O'Keefe, expanded on the University's position and referenced my discussion of the elements of s39 in previous decisions.[9]

63 Legally, information is generally considered to have been *communicated in confidence* if it was communicated and received under a mutual understanding that the communication would be kept confidential.[10] The mutual understanding must have existed at the time of the communication not the time of the request for access.[11]

64 Ms O'Keefe advises that, in this case, the arrangement with Deloitte was for strict confidentiality. In addition, Ms O'Keefe points out that each page of both Document 1 and Document 2 is marked with the word 'confidential,' or with a disclaimer that it contains information that has been provided as commercial in confidence and not to be distributed to any third parties under any circumstances.

65 Subject to s39(2), a mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the public authority,[12] which was not the case here. On the other hand, if a public authority has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the public authority to treat the information confidentially, and therefore any mutual understanding of confidence.[13]

66 While the marking of a document as confidential is not determinative, it is an indication of the intention of the parties. I am satisfied, in this instance, that there was a confidential communication of this information from Deloitte to the University. When a public authority seeks expert advice, it is standard for this to be provided in confidence and the consultant is not at liberty to share that advice more broadly. The public authority may then make the report or

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[9] See *Elaine Anderson and Director for Inland Fisheries* (28 April 2021) and *Blue Derby Pods Ride Pty Ltd and Department of Natural Resources and Environment* (30 June 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

[10] *Re Maher and Attorney-General's Department* [1985] AATA 180. In *Luchanskiy and Secretary, Department of Immigration and Border Protection (Freedom of information)* [2016] AATA 184 at [32]

[11] *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

[12] *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23]

[13] *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265

advice public, or it may be released under this Act, but it will still have been communicated in confidence to the public authority.

67 It is necessary to consider next whether the information would be exempt if it were generated by the University or whether its disclosure would be reasonably likely to impair the ability of the University to obtain similar consultant reports in future.

68 The University has relied upon s39(1)(b), claiming that it is *highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants who are engaged on a confidential basis*. However, I do not consider that the University has discharged its onus to show that s39(1)(b) would apply. Beyond the necessity to show that the information has been provided in confidence, it must be demonstrated that the disclosure must be reasonably likely to impair the ability of the University to obtain similar information in the future. I am not persuaded that this is the case.

69 As I said in my earlier decision of *Simon Cameron and Department of Natural Resources and Environment Tasmania*, someone who is in the business of providing services, such as a consultant, is highly unlikely to decline to provide services because the report they provide under contract with a public authority is released under the Act.[14] Professional consultants and contractors who regularly engage with public authorities will be well aware that their reports may be the property of the Government and end up, to some degree, in the public domain. This is unlikely to deter service providers from seeking new contracts with public authorities.

70 In view of the above, I am not satisfied that the information responsive to Mr Hogan's request is exempt pursuant to s39(1)(b).

71 However, I am prepared to consider whether the information is exempt information under s39(1)(a) of the Act. That is, whether disclosure of the information under the Act would divulge information in confidence by or on behalf of a person to a public authority where the information would be exempt if it were generated by a public authority.

72 In order to determine whether the information would be exempt information if it were generated by the Department rather than a third party, I must assess the information under s35 of the Act – internal deliberative information.

73 For information to be exempt under s35, I must usually be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority, or is a record of consultations or deliberations between officers of a public authority.

74 The University also relied on s35 as a basis for claiming exemption from disclosure of the information. As the information was not prepared by an

[14] (21 January 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [142].

officer of a public authority, the exemption is now being considered by virtue of s39.

75 Having satisfied the requirements of s35(1), I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the University.

76 The outlined exemption above does not apply to the following:

- purely factual information;[15]
- a final decision, order or ruling given in the exercise of an adjudicative function;[16] or
- information that is older than 10 years.[17]

77 The concept of 'purely factual information' in s35(2), was considered in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1).*[18] The Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms, and not bound up with a decision-maker's deliberative process. In other words, the 'purely factual information' must be capable of standing alone.

78 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[19]

79 The University has relied on paragraphs (a) and (b) of s35(1). In the University's decision on internal review, Ms O'Keefe submitted that the relevant material, being *working drafts and feasibility modelling was for consideration of the various potential scenarios by the University and by its nature was deliberative, opinion based and consultative.* Ms O'Keefe further noted that the information is not purely factual or a final decision.

80 In particular, Ms O'Keefe submits:

> *I have determined that the deliberative material is pre decisional; and records the University's thinking process including the processes of reflection on the wisdom or expediency of a proposal or a course of action, which have been conducted prior to a final decision being made.*

[15] Section 35(2)
[16] Section 35(3)
[17] Section 35(4)
[18] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14]
[19] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588

81 The University has claimed exemption in respect of the entire documents and I agree with Mr Hogan that *such a broad brush approach of completely exempting information goes against the presumption of disclosure found in the RTI Act.*

82 Upon examination of the information, I find that the following pages are purely factual in character and are not exempt under s39(1)(a):

- Document 1: pp 1-4, 7 ("Community Objections" segment only), 11, 14-19, 21, 24-25, 30, 35, 38-39, 48, 58-59, 60-68 (apart from the sections titled "Relevance to Sandy Bay Project"), 74-82.
- Document 2: pp 1-5, 9-18, 22.

83 I am satisfied that the information contained in the remaining pages comprises information that could be exempt information if it were generated by a public authority. I am further satisfied that the information consists of opinion, advice or recommendation, or a record of consultations or deliberations. Accordingly, I consider that the information is prima facie exempt under s39(1)(a) of the Act.

Public interest test

84 Section 39 is subject to the public interest test contained in s33 of the Act. It is therefore necessary to assess whether it would be contrary to the public interest to release the information that I have found to be prima facie exempt. In making this assessment, I am required to have regard to, at least, the matters in Schedule 1 of the Act.

85 In the University's original decision, Mr Parnell considered the following matters in Schedule 1 to be applicable in the circumstances:

(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;

(k) - whether the disclosure would promote or harm the economic development of the State;

(n) - whether the disclosure would prejudice the ability to obtain similar information in the future; and

(s) - whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation.

86 I agree that matters (b), (c), and (d) all weigh in favour of disclosure. Disclosure of the information would contribute to debate on a matter of public interest. Conversely, withholding the information would stifle debate. Likewise,

disclosure would inform a person about the reasons for a decision, and provide contextual information.

87 In addition, the pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and weigh in favour of release of information in any public interest assessment.

88 Mr Parnell made the following submissions in relation to matter (k):

> *While the University is an education charity and registered as such, it is also well established that it operates as a trading corporation and must be able to make commercial decisions based on internal deliberations. Threats to this ability to deliberate as part of its commercial operations jeopardises the Universities abilities to meet its core functions and risks harming the economic development of the State if highly commercially sensitive information used for internal deliberations is publicly released.*

89 While I accept that the University does undertake commercial activities and is the only tertiary educational institution in Tasmania, I do not agree that this factor weighs against disclosure in this instance. The University has already decided that it intends to move its Sandy Bay campus and it is difficult to understand the argument that the release of analysis being used to support this decision would harm the economic development of the State. The University is a public institution and, as such, is accountable to the public like other government agencies.

90 Taking this into account with regard to the University's submission around matter (k), it is my view that the risks of harm to the economic development of the State would be greater if major decisions were not subject to public and government scrutiny and accountability.

91 In relation to matter (n), I have already discussed whether disclosure would prejudice the University's ability to obtain similar information in the future in relation to the exemption under s39.

92 In terms of the public interest test, Mr Parnell argues that:

> *Releasing sensitive commercial information supplied by a third-party contractor under an understanding and agreement of commercial in confidence would prejudice the University from obtaining similar information in the future and would place the University in a precarious position if it were required to breach obligations of confidentiality.*

93 Ms O'Keefe reiterated this argument in her decision upon internal review and added the comment that she considered that the:

> *Intellectual property in the Deloitte reports rests with Deloitte. It was procured under confidentiality and was marked confidential.*

94 I am not persuaded by any argument the University has presented that disclosure of the information would prejudice the University's ability to obtain similar information in the future. The University should be aware that the

operation of the Act cannot be circumvented by contract. I find it highly unlikely that the third party would not be aware that entering into arrangements with public authorities in Tasmania may result in disclosure of the resulting reports and information. This is the nature of doing business with government, and such contractors and consultants who do business with government, particularly professional enterprises who are as experienced as Deloitte, will be well aware of this.

95 Likewise, I find that the argument regarding the intellectual property of the third party is ill conceived. It is usual practice that where a party commissions a report, the commissioning party retains copyright. If the parties contemplate other circumstances, that would need to be explicitly expressed in their agreement. On the material before me, I am not able to say whether this is the case. In any case, the Act may not be excluded by contract.

96 In addition, while Ms O'Keefe sets out that *intellectual property in the Deloitte reports rests with Deloitte*, disclosure of the information under the Act is not an infringement of any intellectual property retained by Deloitte. Copyright or intellectual property is not an applicable exemption, this is only relevant in relation to the provision of information under s18(4) where the information is not otherwise exempt. Information is often made available for inspection, instead of copies being provided, in such instances.

97 Finally, I am not persuaded that this situation with Deloitte is any different from the numerous third parties who have been engaged by the University to consult and produce reports which are already publicly available on the University's website. Use of consultants is widespread by public authorities and it would thoroughly undermine the public's right to information if publicly funded consultant reports were considered to belong to the consultants and disclosure were not permitted.

98 With regard to matter (s) the University argued that disclosure would harm the business or financial interests of Deloitte by eroding the competitive advantage of its business in comparison to other similar professional service firms. The University contends that this would be against the public interest because it would prejudice the effectiveness of Deloitte's information gathering process and ability to deliver accurate and comprehensive deliverables to its clients.

99 As with the argument in relation to matter (n), I am not persuaded that disclosure of the information would prejudice Deloitte's ability to gather information and deliver its services to clients. I am not persuaded that disclosure would harm the business or financial interests of Deloitte.

100 In terms of whether the disclosure would harm the business or financial interests of the University, Mr Parnell argued that:

> *As part of its core operations, it competes against universities around the world. If commercially sensitive information is publicly released, it may be*

used by the University's competitors in such a way that it would expose the University to a competitive disadvantage.

101 Ms O'Keefe expanded on the public interest aspect, finding that on balance weight was against disclosure:

> *The University competes in a local, national and international market for the attraction and retention of students. It also competes with 40 other Universities in the higher education sector for students broadly.*
>
> *All specific information relating to commercially valuable information such as commercial yields, details of financing arrangements, feasibility plans for strategic property management and confidential reports would likely result in market competitors having information that they would not ordinarily have access to and likely disadvantage the University from gaining access to this information in the future.*

102 I find this argument to be weak, in view of the number and range of masterplans of university development projects, both in Australia and abroad, that are freely available to the public. Indeed, some of these case studies have been referred to in the assessed documents and are easily accessible. Rather, it seems as if universities are well aware of what development projects and state of the art advancements are taking place within the sector.

103 I note Mr Parnell's argument that the material comprises "working drafts and development feasibility assessments for modelling a range of development options."

104 It appears that the material contains a range of hypothetical scenarios which have been subjected to forecasting computations, which in my view does not amount to revelation of the University's actual financial position or particularly valuable commercial information. But, rather, it presents a range of possibilities based on a number of assumptions which may or may not change over time.

105 Apart from universities which are privately owned, it appears that university development plans are fairly well known. It is therefore difficult to substantiate a claim that disclosure of the information would result in the possibility of competitive disadvantage for the University.

106 In addressing the public interest matters in his submissions, Mr Hogan referred to the public interest considerations which caused him to seek priority in the assessment of this review. These have been noted at the outset. Mr Hogan also submitted that the public interest has been strengthened by a number of developments.

107 First, Mr Hogan submits that, after analysing the material that is publicly available, he has determined that the information sought under this application (which he refers to as the DAE research) is the critical piece of information in the UTAS relocation decision.

108 Second, Mr Hogan submits that the value of the project, which he estimates is at least $4 billion, means that the project is of critical significance to Tasmania. Mr Hogan suggests that if the University's plans fail this could result in the State's finances being severely affected. Accordingly, Tasmanians should be entitled to access the crucial information about the University's plans. Mr Hogan contends that the crucial information is contained within the documents which were located responsive to his RTI request.

109 Thirdly, Mr Hogan submits that there has been a lack of proper government scrutiny of the University's dealings, at both State and Commonwealth level, around this project.

110 Fourth, Mr Hogan submits that the University's southern campus relocation project would be one of the largest infrastructure projects in the history of the State and there are significant financial risks involved with a project this size.

111 Finally, Mr Hogan argues that the University has used a broad brush approach for exempting information which goes against the presumption of disclosure under the Act. Mr Hogan submits that the University has not applied the public interest test correctly by failing to raise any maters under Schedule 1 which could be said to be in favour of disclosure.

112 I agree with Mr Hogan, in this instance, that the University has taken an overly broad approach to exemption and appears to have considered the information holistically rather than undertaking a line by line assessment genuinely considering whether the information could be released. While the redaction of entire documents is not necessarily inconsistent with the object of the Act if the information is legitimately exempt, as I discussed in a previous decision with these same parties,[20] it is unusual that internal deliberative information would contain zero purely factual information or detail that can be released.

113 This is clearly demonstrated in this instance, as there is factual information and publicly available information in the material responsive to Mr Hogan's request and it is disappointing that the University has claimed a blanket exemption over entire documents. While there may have been valid claims for exemption made over some information, the University has been perfunctory in its assessment and failed to acknowledge the substantial amount of purely factual information contained within the documents.

114 It is not clear to me whether the information holds the critical piece of information in the University relocation decision, as Mr Hogan anticipates. However, the information was relied upon in its submission to the Legislative Council Select Committee Inquiry, as mentioned above.[21] Therefore, in my view, if the University is so reliant upon the information as to cite it in its submission to the Tasmanian Government inquiry, it should be available for scrutiny by the public.

[20] See *Robert Hogan and the University of Tasmania* (2 June 2023) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

[21] See Note 2.

115 In addition, this appears to debunk the University's other argument that the information consists of working drafts and is meant for internal use only. If the information has been cited to the Government inquiry, it could be presumed to be a substantially complete iteration. This is a use of the information that is clearly not internal. Finally, it appears that documents are in a sufficient state of finality that they have been delivered to the client (the University) by the consultant (Deloitte) presumably in completion of the terms of its engagement.

116 Thus, using the label "draft" is not sufficient to prevent disclosure under the Act. There must be some sort of evidence that shows that a document is in draft form and not yet a finalised piece of work. This is not the case here, where the evidence seems to show (in referring to the material in a submission to Parliament, and delivery of the report by the consultant to the client) that the work is past the point of being in draft and is a final product.

117 In my view, there is clearly a public interest in how the only higher education institution in Tasmania makes decisions in relation to its functions under its governing legislation, particularly where this involves the administration of public funds.

118 Taking into account all relevant maters, on balance I find that it would not be contrary to the public interest to release the information to the applicant.

1191 do not consider that the University has discharged its onus under s47(4) to show why the information should not be disclosed and it should be released in full to Mr Hogan.

Preliminary Conclusion

120 For the reasons set out above, I determine that exemptions claimed by the University under ss35, 37 and 39 are not made out.

Submissions to the Preliminary Conclusion

121 As the above preliminary decision was adverse to the public authority, it was made available to the University under s48(1)(a) of the Act, to seek its input before finalising the decision. On 12 October 2023, Mr Brendan Parnell of the University made further submissions to this office in response to the preliminary decision.

122 Mr Parnell made submissions with regard to the exemptions claimed under s39, in addition to raising new arguments for exemption of information under s36.

123 With regard to s39(1)(b), Mr Parnell disagrees with some of my assessment, in particular, with regard to the issue of whether the disclosure of information would be reasonably likely to impair a public authority from obtaining similar information in the future. Mr Parnell argues that my reasoning is overly generalised and does not make enough allowance for the possible negative

outcomes which could impact the University and third parties. Specifically, he sets out:

> *Consultants such as Deloitte are regularly engaged by government agencies and, as you note, are unlikely to stop seeking new engagements and providing services as a result of their work and reports being made public. It is highly likely that this type of work forms a significant part of their business and it would not be in their interest to wholesale refuse this work.*
>
> *Nevertheless, while they are likely to keep tendering and seeking government professional engagements, they are less likely to provide useful commercial insights and written reporting on that information where they are aware there is a heightened risk of its public release. In short, government agencies risk receiving a lower standard of third-party professional service if we cannot at the very least redact personal information of their employees (see below) and case studies where they have utilised a range of methods and insights to obtain commercial information – irrespective of whether the information may be located by competitors through a range of publicly available means. The very fact they have brought that information together from outside sources in such a way as to make it relevant to the engagement is part of their utility. While pieces of information may be publicly available, we still require people with the right skills to attain it, assess it, and apply it to the respective engagement scope.*
>
> *In my view, Deloitte's request for their case studies to remain commercial in confidence is an entirely reasonable request in the circumstances of their engagement with the University and it is appropriate to apply the exemption at s39(!)(b). As noted at paragraph 63, the information was communicated under a mutual understanding that it would remain confidential and their work in preparing those case studies should remain so.*
>
> *However, considering your points that much of the information appears to be public, I am also of the view that page 59 of the relevant Deloitte report is information that is useful to the RTI Applicant and provides them with the necessary detail as to what other projects were considered in preparing the report. The RTI Applicant is then provisioned with the information to undergo their own investigations into those projects if they choose and draw their own conclusions. Deloitte, on the other hand, retains confidentiality of the information they prepared in confidence from those case studies. I believe this is not only a fair and reasonably* [sic] *outcome, but a correct balance of ensuring we achieve meeting the public interest with the Deloitte reports while exempting commercial in confidence information relevant to s39(!)(b).*

124 Mr Parnell also submitted that the exemption of certain personal information under s36 should now be considered. The University had not previously claimed any exemption under s36, in view of the University's position that all

the information responsive to Mr Hogan's request was exempt under other sections of the Act. However, Mr Parnell submitted that it is now appropriate to consider the exemption of certain personal information under s36, detailed in his correspondence to this office dated 28 September 2023. Specifically, the personal information relates to employees of the University and of the third party on page 3 of Document 1, and pages 3 and 5 of Document 2.

Further analysis

125 In determining the issues before me, I have taken into account the submissions from Mr Parnell, and have continued to consider Mr Hogan's previous submissions.

Section 39(1)(b) – Information obtained in confidence

126 I understand the University's desire, and that of Deloitte, to keep certain information from disclosure, particularly the information around the aforementioned case studies. I also understand the concerns that the standard of advice and service from third parties may suffer if third party consultants thought that the information and product they deliver could not be controlled the way they would like. Insights that have been gleaned from other clients and projects which may be commercial-in-confidence might not be shared, if these were subject to disclosure under the Act. I accept that this is likely to be the case in relation to the Shell Cove Urban Release Project case study on page 60 of Document 1, which is marked as commercial-in-confidence, and will accept that this is prima facie exempt under s39(1)(b).

127 I have not altered my view regarding the remaining case studies, as this information is in the public domain and I am not convinced that Deloitte or any other consultant would fail to provide similar analysis of such material in future under a paid contract for services. It has expended effort to collate the publicly available material and discuss the parallels to the University's project, but it was compensated for this effort and I am not persuaded that such work would not occur or would not be done to the same standard if these case studies are released.

128 I turn to assessing the public interest test in relation to the case study regarding the Shell Cove Urban Release Project at page 60. The University's main argument is in relation to matter (n) in Schedule 1 (which is almost identical to the test in s39(1)(b)), in relation to *whether the disclosure would prejudice the ability to obtain similar information in future*. It appears, from the additional disclaimer on page 60, which sets out that *the above information is provided as commercial in confidence and should not be distributed to any third parties under any circumstance*, that the information provided in part of that case study is not publicly available and has been obtained by Deloitte through its relationship with a party connected to the Shell Cove Urban Release Project. While it is not clear exactly on what basis this information is shared, it may well be that Deloitte is sharing commercial-in-confidence material obtained from one client with another, on the proviso that this is kept secret. While the

situations are different and Deloitte may have full permission from its clients to share this information with the University, there are some parallels with the type of behaviour which led to the recent scandal regarding PwC using taxation information obtained in confidence from the Australia Taxation Office to advise other clients on how to minimise their taxation obligations.

129 I have accepted that there is a reasonable likelihood of prejudice to the ability to obtain such information again, and give this factor moderate weight as I agree that commercial insights may not be shared as readily if they were made available to the general public under the Act.

130 I also agree with the University that factor (s) is relevant – *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation*. This information does not relate to Deloitte or the University but, if it is commercially sensitive, could negatively impact the Shell Cove Council or Australand by releasing confidential details of their contractual arrangements. If this information has been shared without their knowledge, this could be even more detrimental. Accordingly, this weighs significantly against release of the contractual terms set out in the case study.

131 I also consider that factors (a) and (b) are relevant as there is always a *need for government information to be accessible* and this does relate to *debate of a matter of public interest*. I do not weigh these factors as highly in relation to this case study as with other parts of the information, however, as it is provided only as a point of comparison with similar projects and does not provide significant insight into the actions of the University. It has similarly lower weight in relation to matters (c) and (d), as it does not provide particular insight into the decision of the University to move its campus or much contextual information to understand this decision.

132 This is a difficult balance to strike in the circumstances but, overall, I determine that there is some information on page 60 of Document 1 which is exempt under s39(1)(b) as it would be contrary to the public interest to release it. This is only the dot points following the words *The commercial terms of the DMA* [Development Management Agreement] *were as follows*. The remainder of the words and images on the page (including the dot points in the red text box) are not exempt and should be provided to Mr Hogan.

Section 36 – personal information

133 The University now considers that certain personal information that appears in the reports should be exempt under s36 of the Act. This information consists of names of persons involved in the production of the reports. They appear on page 3 of Document 1 (a list of four Deloitte staff members), and pages 3 (the same list of Deloitte staff) and 5 of Document 2 (the name of a University staff member instructing Deloitte).

134 I consider that the provision is relevant and I am prepared to consider it at this late stage. For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than the applicant, Mr

Hogan, or that the information would lead to a person's identity being reasonably ascertainable.

135 As the information in question is the names of various individuals, I am satisfied that it is personal information of those people and it is prima facie exempt under s36. I will now consider the public interest test.

136 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers or officers of public authorities, such as the University, performing their regular duties are not usually exempt under s36.[22] The personal information of public authority employees, including names, position, and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it.

137 With regard to the University Development Manager listed on page 5 of Document 2, I do not consider that the circumstances of this case provide an exception to the general rule that the names of public authority staff performing their regular duties are not exempt from disclosure. That this officer holds a role at the University is information already available online and the University provides no argument as to why it would be contrary to the public interest for details of this person performing their regular duties to be released. I, therefore, consider that the employee's name on page 5 is not exempt and may be disclosed.

138 With regard to the employees of the third party who are listed on page 3 of the Document 1 and page 3 of the Document 2, the University has similarly not advanced any argument as to why the release of this information would be contrary to the public interest. These are consultants performing their regular duties and all of the people named have online profiles setting out their roles at Deloitte. It is not apparent why the release of this information would have any professional or personal consequences for them or *harm to the interests of an individual* under factor (m) in Schedule 1.

139 I am not satisfied that the University has discharged its onus under s47(4) to show why this information would be exempt and I find it would not be contrary to the public interest to do so. It is to be released to Mr Hogan.

Conclusion

140 For the reasons given above, I determine the following:

- that exemptions claimed by the University under ss35, 36 and 37 are not made out; and
- the exemption claimed by the University under s39 is varied.

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[22] See *Suzanne Pattinson and Department of Education* (August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and the Environment* (January 2002), *Camille Bianchi and Department of Health* (November 2021) and *Clive Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Dated: 23 October 2023

Richard Connock
OMBUDSMAN

Attachment 1 - Relevant legislative provisions

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processes

related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Personal information of a person

(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

(2) If –

(a) Attachment 1 - Relevant legislative provisionsSection 35 – Internal Deliberative Information(1) Information is exempt information if it consists of – (a) an opinion, advice or recommendation prepared by an officer of a public authority; or (b) a record of consultations or deliberations between officers of public authorities; or(c) a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processesrelated 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 ofthe creation of the information referred to in that subsection.

Section 36 – Personal information of a person(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than theperson making an application under section 13.If –an application is made for information under this Act; and concerned may be reasonably expected to be of concern to the third party –

concerned may be reasonably expected to be of concern to the third party –

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided, or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 37 – Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

(d) notify the third party that the public authority or Minister has received an application for the information; and

(e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided;

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 39 – Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(a) the information would be exempt information if it were generated by a public authority or Minister; or

(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

(b) relates to trade secrets or other matters of a business. Commercial or financial undertaking; and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

SCHEDULE 1 - Matters Relevant to Assessment of Public

Interest 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.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2202-140
O2006-097

Names of Parties: Rosalie Woodruff and Hydro Tasmania

Reasons for decision: s48(3)

Provisions considered: s35 and s36

Background

1 On 19 December 2018, Hydro Tasmania (Hydro) received an application for assessed disclosure under the *Right to Information Act 2009* (the Act) from Dr Rosalie Woodruff, Member of Parliament for Franklin.

2 Dr Woodruff's request related to the 600MW Karuma Hydropower Project[1] (the project) in Uganda that Hydro was involved with through Entura. Entura is a *part of* Hydro that *delivers specialist power and water consulting services to governments, funding agencies, utilities, investors and project developers across the Indo-Pacific region.*[2]

3 The parties entered a period of negotiation to refine the scope of the request. Those negotiations are captured in a series of emails between them and reflect the agreement reached. They are commended for their efforts to progress the request in that manner.

4 On 7 February 2019, Mr Will Greer confirmed to Hydro that Dr Woodruff did not require *engineering or technical information that does not relate to refined terms*. He also set out what was sought and had been agreed between the parties:

> *In relation to Karuma Dam project all correspondence containing the key terms-*
>
> 1. *Bribery.*
> 2. *Shooting death(s).*
> 3. *UPDF/Uganda People's Defence Force.*
> 4. *Security.*
> 5. *Human rights.*

[1] Latest news dated 30 March 2017, www.entura.com.au/news/powerchina-engages-entura-to-advise-on-ugandas-largest-hydropower-project/, accessed 29 May 2023.
[2] About, www.entura.com.au/about/asset-owner-heritage, accessed 29 May 2023.

6. *Ethical filtering*
7. *Worker safety.*
8. *Worker death.*
9. *Due diligence process*
10. *Filtering process.*
11. *Project evaluation.*
12. *Work Health Safety Assessment.*
13. *Site visit safety instructions.*
14. *Compound safety.*

Given relatively [sic] *small amount of time Hydro/Entura has been engaged in the project and the above refinement of terms I do not consider a restriction of the time period necessary.*

5 In total, Hydro identified 146 pages of information responsive to the assessed disclosure request. On 22 March 2019, Hydro provided the redacted documents with an accompanying letter from Mr Michael Howarth (2 pages) to Dr Woodruff:

> *I refer to previous discussions, and exchanges of correspondence, between Mr Greer of your office and myself in connection with your two RTI's from last December.*
>
> *I confirm that in relation to your requests it was agreed, thank you, that you did not require information relating to the technical aspects of the project, and that the information could be limited to those word groups referred to in Mr Greer's email dated 31 January 2019 (the refined scope).*
>
> *In accordance with that refined scope I now enclose the information referral to those word groups.*

6 The letter did not particularise the basis for the exemptions, under the Act, that had been applied.

7 The assessed disclosure document bundle, with redacted information, includes:

Pages 1-2	Cover letter from Mr Howarth, 22 March 2019
Pages 3-20	'Country Risk and Security Report,' 27 April 2017, Dynamiq
Pages 21-30	First series of emails about the project
Pages 30-44	'A. Detailed sustainability screening of Karuma Hydropower Project,' Entura (A1-A14)
Pages 45-80	'Sustainability Screening Process, New Markets (Countries),' November 2016, Entura (report in 3 parts)
Pages 81-120	Second series of emails about the project

Pages 121-148 'Internal Briefing Report: Karuma Hydropower Project,' 13 Dec 2018, Entura (includes draft and final version of part '1. Screening of the Karuma Hydropower project.')

8 In reply to a query from Dr Woodruff about the exemptions applied to the information, Mr Howarth wrote, on 5 April 2019:

> *Some minor redaction was made where the material touched on the technical material which was outside the agreed scope;*
>
> *Other partial redactions were in relation to personal information, which is exempt subject to s36; and*
>
> *Remaining partial redactions were in relation to opinion and advice, or consultations and deliberations by, and between, officers of the business, which are exempt pursuant to s35; with the un-redacted material being 'factual information' which is not exempt under that section.*

9 On 30 April 2019 Mr Greer, on behalf of Dr Woodruff, sought an internal review of the decision:

> *I write to request a an* [sic] *internal review of the Karuma Dam RTI on the basis that documents have been redacted without relevant exemptions in the RTI Act being applicable, namely s36 and s 35. Much of the redacted material appears to fal within the agreed scope and should be released.*
>
> *The redactions of the Risk Ratings, in particular, are inconsistent throughout and do not appear to be valid.*
>
> *I provide some examples below:*
>
> - *The redaction in part of Document: Detailed Sustainability Screening of Karuma Hydropower Project, including the Risk Ratings and notably the Overal Project risk rating.*
> - *The reduction in part of C Sustainability screening of Uganda, including Community Mitigation on page C-1 8.*
> - *Redaction in Part of Internal Briefing Report, Karuma Hydropower Project, 13 December 2018.*

10 An internal review was conducted and on 28 May 2019 a decision, confirming the original decision, was released.

11 On 6 June 2019 an Application for Review, under s44, was received by my office. From that point there were difficulties with the progression of the external review application due to the lack of a decision by Hydro on the fee waiver application and the lack of evidence of delegation under the Act for the internal reviewer. These issues were eventually resolved by the decision of the principal officer of Hydro, Mr Stephen Davy being issued on 16 June 2020. It is his decision that is the subject of this review.

12 The decision of Mr Davy is a decision of the principal officer and he wrote that it was a *re-issuing of the decision made pursuant to your Right to Information request received on 19 December 2019.*

13 Further on, the letter erroneously informed Dr Woodruff that she could apply to the CEO for an internal review of the decision, under s43, whereas the letter should have informed her of her immediate external review rights from a decision of the principal officer, pursuant to s45(1)(a). Although it was a defective instruction with regard to the relevant review rights, I do note that the correct information about the review rights was included in the cover email, to which the letter was attached.

14 The application for external review was accepted by my office as within jurisdiction as a review from an original decision of the principal officer, where the fee was waived.

Issues for Determination

15 I must determine whether the information is eligible for exemption under s35 'Internal deliberative information' or under s36 'Personal information of a person.'

16 As ss35 and 36 are contained in Division 2 or Part 3, my assessment is subject to the s33 'Public interest test.' This means that should I determine that the information is prima facie exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

17 Hydro relies on ss35 and 36 in its decision to exempt information. I attach copies of those sections along with s33 and Schedule 1.

Submissions

Applicant submissions

18 In the request for internal review Dr Woodruff submitted that there appeared to be inconsistencies with the way in which Hydro applied the exemptions to the information.

19 Her position is that there is a stronger public interest in releasing the information than not doing so.

Hydro submissions

20 Hydro did not make specific submissions to this external review, beyond the reasoning of its decision. In relation to the redactions Mr Davy advised Dr Woodruff, in the decision of 12 June 2020, that:

- Some minor redaction was made where the material touched on the technical material which was outside the agreed scope;

- Other partial redactions were in relation to personal information, which is exempt subject to s36; and
- Remaining partial redactions were related to opinion and advice, or consultations and deliberations by, and between, officers of the business, which are exempt pursuant to s35; with the un-redacted material being 'factual information' which is not exempt under that section.

21 In order to identify which sections have been relied on for the application of exemptions, it was necessary for me to have regard to the reasoning provided in the first internal review decision dated 28 May 2019, which was later followed by Mr Davy:

> ### *2.1 Information relevant to the* Detailed Sustainability Screening of Karuma Hydropower Project
>
> *The redacted material in this document is primarily exempt information under Section 35 of the RTI Act. The nature of the redacted information contained in the document was primarily internal deliberative information prepared by and between officers of Hydro Tasmania. A minor redaction was also made of technical material that was outside of the agreed scope.*
>
> *The Request specificaly referred to the overal* Project Risk Rating. *There are no redactions in that section of the document*
>
> ### *2.2 Information relevant to the* Sustainability Screening of Uganda
>
> *The redacted material in this document is exempt information under s 35 of the RTI Act. The nature of the redacted information contained in the document was internal deliberative information prepared by and between officers of Hydro Tasmania.*
>
> *The Request specifically referred to the redaction on page C-1 8. The nature of this redaction is advice or a recommendation prepared by an officer of Hydro Tasmania and is therefore exempt information under section 35 of the RTI Act.*
>
> ### *2.3 Information relevant to the* Internal Briefing Report, Karuma Hydropower Project, 13 December 2018
>
> *The redacted material in this document is exempt information under either ss 35 or 36 of the RTI Act. The nature of the redacted information contained in the document was either internal deliberative information prepared by and between officers of Hydro Tasmania, or personal information.*

Analysis

Section 35 – Internal deliberative information

22 For information to be exempt under this section I must be satisfied that it consists of:

- An opinion, advice or recommendation prepared by an officer of a public authority,[3] or
- A record of consultations or deliberations between officers of public authorities.[4]

23 When one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process related to the official business of Hydro.

24 The outlined exemption above does not apply to the following:

- purely factual information;
- a final decision, order or ruling given in the exercise of an adjudicative function; or
- information that is older than 10 years.

25 As to the meaning of 'purely factual information' in s35(2), I refer to Re *Waterford and the Treasurer of the Commonwealth of Australia (No 1)*[5] where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

26 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)*[6] it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.

27 Then, if I am satisfied that it is for a deliberative purpose related to official business, I must have regard to the s33 public interest test.

28 Unfortunately, and unhelpfully, Hydro has not made clear the sections applied to the various exemptions and the reasoning is general and not specific to the redactions. The first original decision of 22 March 2019 did not explain the exemptions and the later reasoning of the internal review decision of 28 May 2019 (set out above) did not reason through the section or the s33 requirements.

[3] Section 35(1)(a).
[4] Section 35(1)(b).
[5] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14].
[6] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

29 Given the limited information available, I have considered the instances where it is apparent s35 may have been applied. In reviewing the redacted information, and in the absence of s33 considerations, I was required to further consider whether Hydro has discharged its onus under s47(4) that provides:

> *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 to determine the outcome of review on the basis that the onus is not discharged.*

30 It was necessary for me to review all the information, including the two series of emails that are not mentioned in the internal review decision of 28 May 2019, and deal with each in turn. First having regard to s35, then (in the absence of fulsome reasons or submissions) whether there was an apparent s33 basis for exemption on the face of the documents, or whether I considered the Hydro's onus under s47(4) had not been discharged.

First series of emails

31 I have reviewed the information, being a series of internal emails about the project, to which s35 has been applied. Having regard to both subsections I am satisfied that the information on pages 21 and 25 is prima facie internal deliberative information pursuant to s35(1)(a) and (b).

32 In the absence, however, of any considerations taken into account by s33, I am not satisfied that Hydro has discharged *the onus to show that the information should not be disclosed.* It is therefore open to me to determine the outcome on the basis that the onus is not discharged. It is not otherwise apparent why the release of this information would be contrary to the public interest.

33 I therefore find that Hydro has not discharged the onus of showing, pursuant to s33, that the information should not be disclosed.

'A. Detailed sustainability screening of Karuma Hydropower Project,' Entura (A 1 -A 14)

The report

34 I have considered the information in the body of the report about the project.

35 I am satisfied that pages 31, 33, 34, 36 and 37 prima facie contain opinion, advice and recommendations amounting to internal deliberative information related to the official business of Hydro consistent with s35(1)(a).

36 In the absence, however, of submissions addressing the matters relevant to assessing the public interest test under s33, I cannot be satisfied that the information should not be disclosed. Again, it is not otherwise apparent why the release of this information would be contrary to the public interest.

37 Therefore, I find that that Hydro has not discharged its onus, under s47(4), and consequently I am not satisfied that Hydro has shown that the information should not be disclosed.

References

38 Under the heading *References* on page 37, the source of the redacted information is unclear. At the end of the page and continuing to page 38 there is a large section of text that appears to be from another source. There is nothing to suggest that this is internal deliberative information, which must be produced by public officers.

39 I am not satisfied that this is information that falls within s35, and therefore I find it should be disclosed.

Summary against Entura's Sustainability Code

40 I have reviewed the information set out in Table A1, on pages 40 and 41, to which s35 has been applied. In having regard to both subsections I am satisfied that the information is prima facie internal deliberative information pursuant to s35(1)(a) and (b) that is for official business purposes.

41 In the absence, however, of any of the relevant considerations being applied, as required by s33, I cannot be satisfied that it would be in the public interest to not disclose the information. Again, it is not otherwise apparent why the release of this information would be contrary to the public interest.

42 On the basis that I am not satisfied that Hydro has discharged the onus of showing that the information should not be disclosed, I therefore find that the information should be disclosed.

Approval page

43 Having due regard to s35, I am not satisfied that the four words on A-12, page 42, fall within the section. Therefore, those words should not be subject to redaction.

44 In regard to the balance of the *Approval* page, to which s35 has been applied, I am satisfied that the information prima facie is internal deliberative information pursuant to s35(1)(a) and (b).

45 In the absence, however, of any relevant considerations being applied, as required by s33, I cannot be satisfied that Hydro has discharged its onus and shown that the information should not be disclosed and why it would be contrary to the public interest is not otherwise apparent. I therefore find that the information should be disclosed.

Sustainability Screening Process, New Markets (Countries), November 2016, Entura Report

46 I have reviewed the information in this report about the project, to which s35 has been applied. I am satisfied that the redacted information on pages 69 and 73 constitutes internal deliberative information pursuant to s35.

47 Again, in the absence of any consideration of the s33 public interest test Hydro has not discharged its onus and it is not otherwise apparent why the release of this information would be contrary to the public interest.

48 I therefore find that the information should be disclosed.

Summary against Entura's Sustainability Code

49 I have reviewed the information set out in Table C2, on pages 75, 76 and 78, to which s35 has been applied. In having regard to both subsections I am satisfied that the information is prima facie internal deliberative information pursuant to s35(1)(a) and (b) that is for official business purposes.

50 On the basis that I am not satisfied that Hydro has discharged its onus of showing that the information should not be disclosed and why its release would be contrary to the public interest is not otherwise apparent, I therefore find that the information should be disclosed.

Approval page

51 Having due regard to s35, I am satisfied that the information on C-21, page 79, falls within the section and that the information is internal deliberative information pursuant to s35(1)(a) and (b).

52 In the absence, however, of any relevant considerations being applied, as required by s33, I cannot be satisfied that Hydro has discharged the onus upon it and I therefore find that the information should be disclosed.

Second series of emails

53 There is considerable redacting of the second series of emails. These are therefore addressed in turn.

- 15 November 2016, time stamp 9.48pm.
    i. page 82 – the first line does not satisfy s35(1)(a) or (b).
    ii. pages 82-83 – the information does prima facie satisfy s35(1)(a) or (b). Absent any submissions that consider s33 and that in the context of the document as a whole it is not apparent that there is any obvious basis under s33 favouring non-disclosure, I therefore find the information should be disclosed.
- 18 September 2017, time stamp 8.20pm.
    i. page 85 – the information does prima facie satisfy s35(1)(a) or (b). Absent any submissions that consider s33 and that in the context of the document as a whole it is not apparent that

there is any obvious basis under s33 favouring non-disclosure, I therefore find the information should be disclosed.

- 24 October 2016, time stamp 9.49am.

  i. pages 103, 104, 105, 170 and 108 – the information satisfies s35(1)(a) or (b) however absent any submissions that consider s33, or obvious application of the considerations in that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

- 21 December 2018, time stamp 3.40pm.

  i. pages 111 and part of 112 – the information satisfies s35(1)(a) or (b) however absent any submissions that consider s33, or obvious application of the considerations in that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

  ii. Page 112 – the large section of text redacted appears to be a quote from the source that is linked and it is unclear why this has been redacted. It is not apparent that this is internal deliberative information to which s35 applies so it should therefore be disclosed.

- 20 October 2016, time stamp 10.52am.

  i. pages 113 and 114 – the information satisfies s35(1)(a) or (b) however absent any submissions of the relevant factors in s33 and no obvious application of the considerations under that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

- 4 October 2017, time stamp 5.30pm.

  i. page 17 – the information satisfies s35(1)(a) or (b) however absent any submissions of the relevant factors in s33 and no obvious application of the considerations under that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

- 11 December 2018, time stamp 4.38pm.

  i. page 119 – the information satisfies s35(1)(a) or (b) however absent any submissions of the relevant factors in s33 and no obvious application of the considerations under that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

'Internal Briefing Report: Karuma Hydropower Project,' 13 Dec 2018, Entura

- Page 125 *Contents* – the wording at point 2 does not attract any apparent exemption under the Act and should be disclosed.

- There is some duplication in the documents pages 1 to 7 of the report (from pages 130 and 142) and the redacting is not consistent. Having regard to s35 I am satisfied that this is internal deliberative information however absent any consideration of the relevant factors in s33 there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

- Page 144 to 147 have been redacted in their entirety. The information satisfies s35(1)(a) and (b) however absent any consideration of the relevant factors in s33 and no obvious application of the considerations under that section, there is no basis for favouring non-disclosure. I therefore find the information should be disclosed.

54 Overall, as Hydro did not undertake the required assessment of the s33 public interest test, it did not discharge its onus to show why information would be exempt from disclosure under s35. The Act is clear that government information should be released wherever it is not exempt, so I set aside all uses of s35 in relation to this application.

Section 36 – Personal information of person

Public officers and employees

55 For information to be exempt under s36 I must be satisfied that its release would reveal the identity of a person other than Dr Woodruff, or that the information would lead to that person's identity being reasonably ascertainable.

56 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36.[7] The personal information of public authority employees, including name, position, and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it.

57 The practice of automatically redacting the names of public officers and employees and their work-related personal information is to be avoided. This extends to signatures.

58 Given the extent to which redaction has been applied under s36 to public officers and employees, I have taken a holistic approach to reviewing the information and identified the organisations, rather than individuals or specific documents to which s36 has been improperly supplied.

59 In the absence of submissions to the contrary, I am not satisfied that there are specific or unusual circumstances that justify the exemption of the work-

[7] See *Suzanne Pattinson and Department of Education* (August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and Environment* (January 2022), *Camille Bianchi and Department of the Health* (November 2021) and *Clive Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

related personal information of public officers in reports, emails and other documents of Hydro or Entura. I find those details are not exempt.

60 Hydro has not provided any reasons for redacting the information that addresses the consistent approach to be taken to personal information of public officers. The onus under s47(4) to show why this information should be exempt has not been discharged.

Personal information of others

Uganda Police Force report

61 Attached to the email of 13 December 2018, timestamp 12.56pm (page 97), is a Uganda Police Force report dated 4 September 2018. Hydro has sought to exempt the names of the relevant police officers and the deceased person to which the report relates. I am satisfied that this is personal information and is prima facie exempt under s36.

62 Due to the limited nature of the redactions, there are few public interest considerations in favour of disclosure and the potential for harm to the interests of individuals outweighs the factors in favour of disclosure. I find that the personal information of the individuals and police officer named in the report is exempt pursuant to s36.

Email of 20 October 2016, 10.30am

63 This email (on page 103) refers to a person from a consultancy business in Switzerland. It is not apparent what the relationship between Hydro or Entura and that person is.

64 Again, due to the limited nature of the redaction there are few public interest considerations in favour of disclosure and the potential for harm to the interests of an individual outweighs the factors in favour of disclosure. Accordingly, the information contained in the end part of the first sentence and the second sentence is exempt under s36.

Dynamiq staff member and contact details

65 The name, position title and contact details of the Managing Principal of Dynamiq, a company contracted by Hydro or Entura to provide the *Country Risk and Security Report*, has been redacted in emails sent in October 2016.

66 While this information does contain personal information, Hydro has not discharged its onus to show why the Managing Principal's name, position title and general telephone number should be exempt under s36. It is not apparent why this would be contrary to the public interest and it should be released.

67 I am content to leave the direct and mobile telephone numbers redacted, as this has the potential to cause harm to the interests of an individual as it is unlikely that these details are usually shared beyond company clients. I find this information is exempt under s36.

Out of scope

68 The parties agreed to a scope of information to be disclosed (as set out above), being that *engineering and technical* information was not required. Mr Davy set out in his decision that *some minor redaction was made where the material touched on the technical material which was outside of the agreed scope.*

69 Mr Greer, on behalf of Dr Woodruff, raised some concerns that information had been redacted as being out of scope on this basis when this was not justified. I have had regard to that agreed scope when reviewing the information which was exempted by Hydro. I only considered that one redaction in an email dated 15 November 2016 regarding concrete could relate to engineering and technical information, all other information has been dealt with above in relation to ss35 and 36. Though I considered that this comment also did not appear to be particularly technical and would encourage Hydro to consider releasing it in addition to the other information.

Other matters

70 Public authorities need to ensure that a person is properly informed of their review rights, as this is a legal requirement under s22(2)(c) of the Act. In the letter of 12 June 2020, Dr Woodruff should have been, but was not, informed that under s45(1)(a) she had a right to apply for external review directly to my office, because the reviewable decision was one made by the CEO as Principal Officer.

71 Fortunately, in this instance, there was no identified disadvantage to Dr Woodruff resulting from this error.

Preliminary conclusion

72 For the reasons given above, exemptions claimed pursuant to s35 are set aside and those claimed in relation to 36 are varied.

Conclusion

73 Because the conclusion in the Preliminary Decision of 30 May 2023 was adverse to the public authority it was made available to Hydro, under s48(1)(a) of the Act, for its input before 16 June 2023.

74 On 7 June 2023, Mr Edwards, the lawyer representing Hydro, sought and was granted an extension of time until 30 June 2023. The basis of the extension was that:

> *...the HT officer who had carriage of this matter (Mr Howarth) is no longer employed by HT, thus there is little to no current institutional knowledge surrounding the relevant application for assessed disclosure;*
>
> *and*

> *the relevant application for assessed disclosure dates back to December 2018, and both my client and I require additional time in which to perform a general review of the history before being in a position to properly consider and respond to the preliminary decision.*

75 A further extension was sought and granted as a final extension requiring a response not later than 12 July 2023.

76 On 11 July 2023, Mr Edwards advised that no submissions would be made by Hydro in response to the Preliminary Decision. I acknowledge the further encouraging comment that:

> *...Hydro Tasmania notes the Ombudsman's comments regarding the redactions. Since the RTI was originaly lodged Hydro Tasmania have* [sic] *reviewed its processes for reviewing al RTI requests in an effort to ensure redactions are as limited as possible in the interests of transparency.*

77 Accordingly, for the reasons set out above, I determine that:

- exemptions claimed pursuant to s35 are set aside; and
- those claimed in relation to 36 are varied.

78 The further information is to be released to the applicant consistent with the provisions of the Act.

79 I apologise to the parties for the inordinate delay in issuing this decision.

Dated: 11 July 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.
(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

35. Internal deliberative information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
(2) Subsection (1) does not include purely factual information.
(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

36. Personal information of person

(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13 .
(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party

– the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f) , decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43 ; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
(g) whether the disclosure would enhance scrutiny of government administrative processes;
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
(i) whether the disclosure would promote or harm public health or safety or both public health and safety;
(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
(k) whether the disclosure would promote or harm the economic development of the State;
(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest

1. The following matters are irrelevant when assessing if disclosure of particular information would be contrary to the public interest:

(a) the seniority of the person who is involved in preparing the document or who is the subject of the document;

(b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;

(c) that disclosure would cause a loss of confidence in the government;

(d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review Case Reference:	O2004-001 R2202-101
Names of Parties:	Tarkine National Coalition and Department of Natural Resources and Environment Tasmania
Reasons for decision:	s48(3)
Provisions considered:	s31, s35, s36, s37, s39

Background

1 Venture Minerals Limited (Venture) is an Australian Stock Exchange listed company in the business of mineral exploration and production. It was incorporated in 2006 and is based in Western Australia. Its major projects in Tasmania include the Mount Lindsay Tin-Tungsten Deposit, the Riley Iron Ore Mine, and the Livingstone DSO Hematite Deposit, all located in North West Tasmania.[1]

2 On 3 August 2013, Venture had been granted approval to develop a direct shipping ore hematite mine near Riley Creek in north western Tasmania which included conditions for the protection of wildlife in the project area and transport route.

3 On 20 May 2015, the then Australian Government Department of the Environment issued a decision to vary a condition of approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The variation included the deletion of the existing condition 24, with a new condition that directed Venture to contribute no less than $144,000 to the Save the Tasmanian Devil Program. This was to compensate for unavoidable impact to the Tasmanian devil population through roadkill, in accordance with any approved Tasmanian devil recovery plan and for the purpose of "Maintenance of the Tasmanian Devil Insurance Population."

4 On 13 November 2019, the Tarkine National Coalition (Tarkine) lodged an application for information under the *Right to Information Act 2009* (the Act) to the Department of Primary Industries, Parks, Water, and Environment, which is

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1 Venture Minerals Ltd, *Annual Report*, 30 June 2022, https://www.annualreports.com/HostedData/AnnualReports/PDF/ASX_VMS_2022.pdf

now the Department of Natural Resources and Environment Tasmania (the Department). Tarkine is represented by the Environmental Defenders Office (EDO).

5 The information request sought:

> 1. *Any information regarding the payment of money by Venture Minerals Limited, its employees or representatives, to DPIPWE and/or the Save the Devil Program;*
> 2. *All correspondence between DPIPWE* [the Department] *and Venture Minerals Limited about the payment of monies mentioned in 1 above;*
> 3. *All correspondence between DPIPWE and Commonwealth Department of Environment and Energy about the payment of monies mentioned in 1 above; and*
> 4. *All internal and/or external correspondence relating to Mr Scott Jordan's email and letter to Mr David Pemberton dated 26 September 2019 concerning the payment of monies by Venture Minerals Limited, its employees or representatives to DPIPWE and/or the Save the Devil Program;*
> 5. *Any information concerning Venture Minerals Limited's proposal to amend or vary condition FF4 (4) of Permit Part B, Permit Conditions – Environmental (PCE) No. 8786 as contained in Permit DA2021/00068;*
> 6. *Any Environment Protection Notice(s) or other approval(s) that purport(s) to vary or otherwise allow for activities prohibited by condition FF4 (4) of Permit Part B, Permit Conditions – Environmental (PCE) No. 8786 as contained in Permit DA2021/00068;*
> 7. *Any information concerning the recommencement of the activity permitted of Permit Part B, Permit Conditions – Environmental (PCE) No. 8786 as contained in Permit DA2021/0006* [sic].

6 On 17 January 2020, the Department's delegate under the Act, Monique Lindridge, provided a decision to Tarkine. One hundred and fifty-two (152) pages of information were found to be responsive to Tarkine's request. These were released in a redacted and annotated form which reflected the relevant exemptions applied pursuant to the Act. Ms Lindridge found 44 pages to be partially exempt, 31 pages exempt in full, and 77 pages were released in full.

7 The undisclosed information was assessed as exempt under the following sections of the Act:

- s27 – briefing material of a Minister;
- s31 – legal professional privilege;
- s35 – internal deliberative information;
- s36 – personal information of a person;
- s37 – related to the business affairs of a third party; and
- s39 – obtained in confidence.

8 On 18 February 2020, Tarkine's legal representative, the EDO, wrote to the Department seeking an internal review of the decision.

9 On 28 February 2020, Alison Scandrett, a delegated officer of the Department, issued the internal review decision. For the most part, Ms Scandrett reached the same conclusions in the internal review decision as in the original decision. Ms Scandrett authorised the release of four more pages of information.

10 On 30 March 2020, Tarkine made an application for external review. The application for external review was accepted under s44 of the Act on the basis that the applicant had received an internal review decision and had submitted an external review application to this office within 20 working days of receiving that decision.

11 On 2 April 2020, EDO, on behalf of Tarkine, filed submissions in support of its application. It requested that all the information held by the Department that falls within the terms of the initial application be released in full, except for:

> *(a) Pages 112-113 of the information, to the extent that the documents at those pages constitute a briefing to the Minister for Environment, Parks and Heritage that is subject to the exemption in s 27 of the RTI Act; and*
>
> *(b) Any email addresses, phone numbers or other contact details that have been exempted from disclosure on the basis of s 36 of the RTI Act.*

Issues for Determination

12 I must determine whether the information not released by the Department is eligible for exemption under ss31, 35, 36, 37 and 39 or any other relevant section of the Act.

13 In view of Tarkine's refinement of the scope of their request for information, with respect to s36, I am only required to consider the exemption to the extent it has been applied to names in the information, but not contact details.

14 As ss35, 36, 37 and 39 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under these

sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

15 Copies of ss31, 35, 36, 37 and 39 are at Attachment A.

16 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant's Submissions

17 In support of the request for internal review, EDO made submissions on behalf of Tarkine requesting that the original decision be overturned and the information be released, specifically:

> *(a) it was not open to the Delegate apply section 35* Right to Information Act 2009 *(the Act) to the information identified in the Decision as it is not clear what deliberative process the information related to, and/or the exemption has been applied to information that was not of an "internal deliberative" nature;*
>
> *(b) it was not open to the Delegate to apply section 36 of the Act to some of the information identified in the Decision as the identities of some of the correspondents are readily apparent from the documents that have been released;*
>
> *(c) it was not open to the Delegate to apply section 37 of the Act to the information identified in the Decision because no competitive disadvantage is likely to be suffered by Venture Minerals in the release of the information; and*
>
> *(d) it was not open to the Delegate to apply section 39(1) of the Act to the Draft Roadkill Management Plan because it was submitted pursuant to a requirement of a law and section 39(2) applies; and*
>
> *(e) even if you find section 35, 36, 37 and/or 39 of the Act may apply to the information identified in the Decision, for the detailed reasons outlined in our submissions below, the public interest weigh in favour of its disclosure.*

18 Tarkine questioned the exemption under s31 of the Act of seven pages of information. It noted that legal professional privilege is not defined in the Act and submitted:

> *that for section 31 of the Act to apply to the information identified in the Decision, the information must be communications between a practising lawyer and EPA* [Environment Protection Authority]

officers made in connection with giving or obtaining legal advice, including in relation to anticipated or actual legal proceedings before a court. Any information that does not fall within this confined category of documents, or that comes from or is shared with a third party (i.e. not the lawyer or the EPA), or would have come into existence in any event, would not be privileged from production in legal proceedings and is therefore not eligible to be subject to a section 3! exemption.

19 Tarkine relied on the authorities of *Esso Australia Resources v Commissioner for Taxation* [1999] HCA 67, *Waterford v Commonwealth* [1987] HCA 25, and *Grant v Downs* [1976] HCA 63.

20 With regard to the exemption of information under s35 of the Act, Tarkine questioned whether the claims of exemption are justified. Tarkine suggests the possibility that some emails contain purely factual information rather than internal deliberative information.

21 Tarkine further argues that even if information complied with section 35, the Department failed to apply the public interest test correctly and that correct application of the public interest test would result in a finding that it was not contrary to the public interest to disclose the information.

22 Tarkine submits that the following factors in Schedule 1 of the Act support a finding that the public interest weighs in favour of release of the information:

- *there is a general public need for government information, and especially information relating to the proposed relaxation of environmental conditions and controls to be accessible – per item (a) in Schedule !;*
- *the disclosure would contribute to debate on a matter of public interest, i.e. the debate around the environmental impacts arising mining* [sic] *in takayna / the Tarkine – per item (b) in Schedule !;*
- *the disclosure would inform our client about the reasons the EPA may, in the future, purport to decide to approve variation(s) to Venture Minerals' development permit conditions – per item (c) in Schedule !;*
- *the release of the information is likely to provide important contextual information to understand what is proposed by Venture Minerals in application to vary the conditions of its approval, and the process by which the conditions are being varied – per item (d) and (j) in Schedule !;*

- *the release of the information will enhance scrutiny of government decision-making and administrative processes and thereby improve accountability and participation – per items (f) and (g) in Schedule 1;*

- *the release of the information will promote the environment and ecology of the State by enabling proper scrutiny of the EPA's regulatory functions – per item (l) in Schedule 1.*

23 Tarkine also made submissions regarding exemptions claimed under s36 of the Act - personal information of a person. In the case of various redacted names, Tarkine argues the identities of persons are discernible because of other unredacted information, and therefore, there is no basis on which to claim exemption of the name under s36. Tarkine has relied on the authority of two earlier decisions of this office: *Richard Webb and DPIPWE* (2020) and *Michael Atkin and DPIPWE* (2017).[2]

24 In addition, Tarkine submitted that the public interest weighs in favour of the release of the names of the Venture Minerals' officials. They rely on matters (a), (b), (d), (e), (h) and (j) of Schedule 1 to support their position. They also submit that matters (i), (m), (n) and (o) do not weight against them.

- *there is a general public need for government information, and especially information relating to the proposed relaxation of environmental conditions and controls to be accessible – per item (a) in Schedule 1;*

- *the disclosure would contribute to debate on a matter of public interest, i.e. the debate around the environmental impacts arising mining* [sic] *in takayna / the Tarkine – per item (b) in Schedule 1;*

- *the disclosure would provide the contextual information to aid in our client's understanding of the EPA's consideration of Venture Minerals' application to vary its permit – per item (d) in Schedule 1;*

- *the disclosure would inform the public about the rules and practices of government in dealing with the public, in as far as it will make clear who is involved in processes to vary permit conditions – per item (e) in Schedule 1*;

- *the disclosure would promote equity and fair treatment of persons or corporations in their dealings with government, in as far as it*

2 *Richard Webb and Department of Primary Industries, Parks, Wildlife and the Environment* (30 January 2020); *Michael Atkin and Department of Primary Industries, Parks, Wildlife and the Environment* (1 March 2017), available atwww.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

will reveal that companies and their representatives have ready access to EPA staff who are willing to assist them in varying permits conditions – per item (h) in Schedule 1;

- *the disclosure would not harm public health or safety or both public health and safety as the persons involved are acting in the professional capacities on behalf of regulated companies, and no truly personal information would be revealed (in as far as only corporate emails, phone numbers or addresses would be released) – per item (i) in Schedule 1;*
- *the disclosure would promote the administration of justice, including affording procedural fairness and the enforcement of the law, in as far as it will enable our client to potentially call or subpoena relevant witnesses should the issue of the variation of Venture Minerals' development permit come before the Courts – per item (j) in Schedule 1;*
- *the disclosure would not harm the interests of an individual or group of individuals in as far as the individuals involved are acting in professional representative capacities and not in personal capacities and this would not have any expectation this information would be kept confidential – per item (m) in Schedule 1;*
- *the disclosure would not prejudice the ability to obtain similar information in the future, as necessarily any person contacting a regulator in a professional representative capacity on behalf of a regulated company would understand the need to identify themselves and that this information may be revealed through the RTI process – per item (n) in Schedule 1; and*
- *the disclosure would not prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority – per item (o) in Schedule 1.*

25 With regard to the exemption of information under s37 of the Act, Tarkine also questions the legitimacy of the claim of exemption:

> *No evidence has been supplied to support the assertion that Venture Minerals would suffer competitive disadvantage if the letter was released. Simply stating that the company is listed on the ASX does not articulate what, if any, disadvantage would be suffered by Venture Minerals if the information was released, however it does imply that the company may lose stock value.*

26 Tarkine submits that this does not amount to a competitive disadvantage under the Act and relies on the authority of *Forestry Tasmania v Ombudsman* [2010] TASSC 39.

27 In addition, Tarkine disputes the Department's reliance on certain matters in Schedule 1, in finding that disclosure of the material was contrary to the public interest.

28 Tarkine submits that the public interest weighs heavily in favour of release of the information, and relies on matters (a), (b), (c), (d), (e), (f), (g), (j), (l), (w) and (y) in Schedule 1 of the Act.

29 The Department found that the 'Draft Roadkill Minimisation Plan', comprising 25 pages of the redacted information supplied was exempt under s39 of the Act – information obtained in confidence. However, Tarkine argues that the Draft Roadkill Minimisation Plan was provided to the EPA pursuant to a requirement of law and, therefore, the information comes within s39(2)(c) of the Act and not exempt under s39(1).

30 In the alternative, Tarkine submits that the public interest weighs in favour of the release of the information in the Draft Roadkill Minimisation Plan. EDO relies on matters (a), (b), (c), (d), (e), (f), (g), (j), (l), (n), (w) and (y) in Schedule 1 of the Act.

31 The Department undertook an internal review of the original decision and issued a new decision in light of Tarkine's submissions. For the most part the original decision was upheld, although four pages which had previously been deemed exempt were released to Tarkine.

32 Tarkine applied for external review of the internal review decision and EDO filed submissions in support of that application. As set out above, Tarkine is not pursuing the release of the information found exempt under s27, or any email addresses, phone numbers of other contact details which were claimed to be exempt under s36. The submissions largely re-iterated those made to the Department in the request for internal review, but added the following points.

33 In relation to the information found by the Department to be exempt under s31 of the Act, Tarkine relied again on the legal authorities referred to above, as well as an earlier decision of this office.[3]

34 Through the EDO, Tarkine submitted that the exemption under s31 of the Act does not apply to the redacted information on pages 114 and 129, as claimed by the Department, because:

> *the documents are emails between members of the EPA who are not practicing lawyers. Furthermore, they do not appear to relate to*

3 *Simeon Thomas-Wilson and City of Hobart* (October 2017), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

any legal advice provided to the EPA by a practising lawyer. While the subject matter of the emails may relate to anticipated legal proceedings, if they do not contain legal advice, the exemption does not apply.

35 In view of its analysis of what can be gleaned from the information on pages 114 and 129, EDO also expressed its doubts as the applicability of the exemption under s31 to the information on pages 103 to 110.

36 With regard to exemptions claimed under s35 of the Act, Tarkine reiterated its submission of the possibility that the information was purely factual and, therefore, s35 did not apply. In addition, in response to reasons given in the internal review decision, Tarkine argued that "[i]f the information does not form the basis of a decision, then it is not related to the "deliberative processes" of the EPA." Tarkine reiterated its submissions with regard to the public interest.

37 With regard to exemptions claimed by the Department under s37, Tarkine also submitted that the document at pages 134 to 136, which has been fully redacted, contains information which is already matter of public record.

Department's submissions:

38 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions. Extracts from each are set out below, with footnotes and links to information already available omitted.

39 At the outset, in her original decision dated 17 January 2020, Ms Lindridge noted:

Section 7 of the Act gives a person a legally enforceable right to be provided, in accordance with the Act, with information in the possession of a public authority or a Minister unless the information is exempt information. DPIPWE is a public authority under the Act.

Material which has already been released to you under a previous RTI has not been reviewed to see if it matches this query. Please note that no information was found in relation to item 6.

Planning permit DA 2012/00068 has not been assessed as in accordance with section 12(3)(c)(i) it is otherwise available;

The approval offset document referenced on page 1 has not been assessed as in accordance with section 12(3)(c)(i) it is otherwise available.

DPIPWE has found 152 pages of information relevant to your request. I have assessed the information against Part 3 of the Act to determine whether any of it is exempt information. I have decided that some of the

information is exempt pursuant to section 27 (Internal briefing information of a Minister), section 3! (Legal professional privilege), section 35 (Internal deliberative information) and section 36 (Personal information of person), section 37 (Information relating to business affairs of third party) and section 39 (Information obtained in confidence) of the Act. You will note that 44 pages have been exempted in part, 3! pages have been exempted in full and 77 pages have been released in full.

Please note that some information has been identified as outside the scope of your request and is marked accordingly.

…

Some of the information you have requested is comprised of opinions, advice and recommendations prepared by DPIPWE officers for the purpose of providing the Minister for Environment, Parks and Heritage with a briefing in connection with official business, being mining operations at Riley Creek Mine. This information has been exempted pursuant to section 27(!). I note that sections 27(2) and 27(3) do not apply to the information in question.

The internal briefing information contains some factual information, however, I consider that the information in question is not 'purely factual' as its disclosure would reveal the nature of the advice. I therefore consider that the entirety of the internal briefing information meets the definition of exempt information under section 27.

…

The information you have requested includes legal advice and correspondence which is subject to legal professional privilege. These documents have been exempted pursuant to s 3!.

…

Some of the information you have requested, if disclosed, would divulge information acquired by DPIPWE which relates to the business affairs of a third party, Venture Minerals Limited. Venture Minerals Limited is a publicly listed company on the Australian Securities Exchange (ASX). I consider that disclosure of a letter containing information not yet available to shareholders would be likely to expose the third party to a competitive disadvantage.

…

For information to be exempt under section 39, it is necessary to establish that the information was communicated to DPIPWE in confidence. The confidential communication of information can be actual or implied.

Factors which are taken into account when determining this question include; what the intentions of the person providing the information were; to what extent that information has been otherwise circulated and the likely consequence of disclosure. The information in question consists of a draft Roadkill Minimisation Plan. The draft plan was provided to DPIPWE for consultative purposes only and was not formally submitted pursuant to law.

Pursuant to s 39(1)(a), the information would be exempt information if it were generated by DPIPWE. The information would be exempt pursuant to s 35(1)(b) (Internal deliberative information) if it were DPIPWE's information as it would be considered a recommendation made by an officer of the public authority. The draft plan contains some factual information, however, I consider that the information in question is not 'purely factual' as its disclosure would reveal the nature of the information.

This information may be exempt information if, after taking into account all relevant matters including those specified in Schedule 1 of the Act, I conclude that it is contrary to the public interest to disclose the information.

44 Ms Lindridge then addressed the matters in Schedule 1 in relation to the public interest test. These are also considered and extracted in my later analysis of the application of the public interest test relating to ss35 and 36.

Internal review decision

45 Ms Scandrett's internal review decision set out that:

Legal professional privilege
I confirm that the information you have requested includes legal advice and correspondence which is subject to legal professional privilege. I exempt these documents pursuant to s 31. I will not elaborate on what these documents are due to the risk of waiving their status as privileged.

Section 31 is contained within Part 3, Division 1 of the Act, Exemptions not subject to the public interest test.

Internal Deliberative Information
I confirm that the information you have requested includes internal deliberative information. The material relates to the deliberations within the EPA relating to certain proposals made by Venture Minerals, and the EPA's options in relation to these. They do not comprise any finals decisions or the reasons for final decisions.

The material that I consider to be internal deliberative in nature does not contain any purely factual information.

Where a document contains both factual material and information involved in the deliberative processes of an agency, access need only be provided to the factual material if the deliberative material can be separated out (Harris v Australian Broadcasting Corporation). If the two types of information are inextricably intertwined and cannot be separated, the whole of that material will be exempt (Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs).

The word "purely" refers to whether documents simply or merely contain information of a factual nature. In other words, the information must be factual in fairly unambiguous terms (Re Waterford and Treasurer (No 1)). Whether a document contains purely factual material is a matter of substance: the form or the words used are not of themselves determinative (the Full Federal Court in Harris v Australian Broadcasting Corporation).

Section 35 is contained within Part 3, Division 2 of the Act, so is subject to the public interest test.

It is my view that disclosure of this information would not contribute to debate on the matter (b). Nor do I consider this information 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).

The information is an exploration of issues and offers suggestions as to how these may be dealt with. This material does not form the basis for a decision, and therefore, (c) and (f) would not apply in the positive. The deliberative material does not amount to a 'decision' and therefore (c) would not support release.

In terms of the factors above, in my view, disclosure would prejudice DPIPWE's ability to constructively and frankly document options available to them (n). The material discussed also goes to the confidential business affairs of Venture Minerals, so disclosure would be likely to harm their competitive position by disclosing information not currently available to the market, as well as disclosing information that is not currently available to Venture Minerals' competitors ((w) and (x)).

Personal Information of Person

The documents requested contain personal information.

The appellant has stated, in relation to the redaction of Venture Minerals' representatives and contractors names, that their "identities are apparent because their position title with the company is left unredacted, and a

simple google search would reveal the names of these persons". Individuals may change jobs at any time. Those working in private enterprise will often not have their name made publically available online. The communications are made from a position within the company, the name of the person occupying that position at any point in time does not add value to the communication, and as they are not public servants, it cannot be argued that release of their names would in any way help to hold government accountable or make it more transparent.

In order for the personal information to be exempt, it must also be contrary to the public interest to release it. I do not consider the release of the personal information of non-government employees to positively fulfil any of the matters to be considered in Schedule 1 (specifically, (b), (d), (e), (h), (i), (j), (m), (n) or (o)). I find that this invasion of their privacy would create harm to them (matter m).

There are some instances in the original decision where the person's identity is readily discernible from the information that has been provided, and I release the personal information in this circumstance.

Information relating to business affairs of third party

I confirm that three pages of information, being a letter received from Venture Minerals, relates to the business affairs of Venture Minerals. This information outlines certain matters that relate to Venture Minerals' plans in relation to the Riley Creek Mine. Venture Minerals Limited is a publicly listed company on the Australian Securities Exchange (ASX). As a listed entity, Venture Minerals is required to comply with certain disclosure obligations under the Corporations Act and various statutory instruments created under it. Listing Rules 3.1 and 3.1A. provide:

> *3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*
> *3.1A Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:*
>
> - *The information concerns an incomplete proposal or negotiation; and*
> - *The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and*
> - *A reasonable person would not expect the information to be disclosed.*

Compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX market and other markets that trade in ASX quoted securities

or derivatives of those securities. Reflecting this, Parliament has given the rule statutory force in section 674 of the Corporations Act.

The material under consideration in this right to information application consists of material that a reasonable person would expect to have a material effect on the price or value of the entity's securities, however the material concerns an incomplete proposal or negotiation. As such, disclosure of the information now may impact upon Venture Minerals competitive position as a listed company.

This exemption is subject to the public interest test. I adopt the matters considered by the original decision maker, and consider further matters to be relevant. I consider that release would harm the business interest if Venture Minerals (matter (s)), would disclose information about the business affairs of Venture Minerals which is not generally available to competitors, being others in the mining industry (matter (x)). I find that the release of information regarding a proposal which may or may not proceed would not contribute to debate on the matter (matter (b)), would not inform a person about the reasons for a decision (matter (c)), and would not provide any contextual information to aid in the understanding of government decisions (matter (d)). Schedule 1 contains a non-exhaustive list of matters to consider when applying the public interest test. In this instance, I have also considered the fact that disclosure of confidential business information before it has been disclosed to shareholders and the market would likely have a negative effect on the share price of Venture Minerals, resulting in a financial loss to those who hold shares in the company.

On balance, I find that it is not in the public interest to release this information.

Information obtained in confidence

The three pages of information discussed in relation to section 37, were also communicated to DPIPWE in confidence, and not in compliance with any requirement of law. One page of information, at page 114, makes reference to the confidential information. The fact that the information is confidential was confirmed by Venture Minerals when they were consulted pursuant to section 37. As the information may have market impacts, the confidentiality of the communication is clear.

This exemption is subject to the public interest test. I adopt the matters considered by the original decision maker, and consider further matters to be relevant. I consider that release would harm the business interest if Venture Minerals (matter (s)), would disclose information about the business affairs of Venture Minerals which is not generally available to competitors, being others in the mining industry (matter (x)). I find that the release of information regarding a proposal which may or may not proceed would not contribute to debate on the matter (matter (b)), would not inform a person about the reasons for a decision (matter (c)), and

would not provide any contextual information to aid in the understanding of government decisions (matter (d)). Schedule 1 contains a non-exhaustive list of matters to consider when applying the public interest test. In this instance, I have also considered the fact that disclosure of confidential business information before it has been disclosed to shareholders and the market would likely have a negative effect on the share price of Venture Minerals, resulting in a financial loss to those who hold shares in the company.

On balance, I find that it is not in the public interest to release this information.

The original decision exempted a draft roadkill management plan pursuant to this section. Draft documents are never provided to a requirement of law, and are always provided voluntarily as part of the negotiation process which results in a final document. The original decision has released final versions of documents.

There is a general need for government information to be accessible (matter (a). However, the release of a draft document may hinder debate on the matter (matter (b)) as any debate at this stage will be based on potentially incorrect information. The document was not generated by Government, so does not provide any information in relation to decision making, rules of practice, or administrative processes (matters (c) – (g)). The document I am considering is a draft proposal by a business which was not required to be provided (matter (v)).

On balance, I find that the release of this information is not in the public interest.

Analysis

46 152 pages of information were found responsive to Tarkine's initial request under the Act. Certain information was assessed by the Department as exempt information under ss31(legal professional privilege), 35(internal deliberative information), 36(personal information of a person), 37(information relating to business affairs of a third party), and 39(information obtained in confidence).

47 A schedule of documents was attached to the decision on internal review indicating 27 pages assessed as fully exempt, 44 pages assessed as exempt in part, and 81 pages released to Tarkine in full. The information has been collated as one set of documents with the pages numbered from 1 to 152.

Section 31 – Legal Professional Privilege

48 The Department has claimed that ten pages are exempt in full pursuant to s31 of the Act. In the initial decision, the Department claimed the exemption applied to information on pages 103-110. Upon internal review, the Department also claimed that information on pages 114 and 129 was exempt under s31.

49 Section 31 provides that:

> *(1) 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.*

50 Exemptions claimed under s31 are not subject to the public interest test in s33 of the Act.

51 It is therefore necessary to determine whether the privilege would apply to the information that the Department has redacted in respect of this application.

52 Legal professional privilege is a rule of substantive law and attaches to confidential communications between a lawyer and their client made for the dominant purpose of providing or obtaining legal advice, or provide legal services, or for use in connection with existing or anticipated litigation.[4]

53 This privilege also extends to in-house lawyers giving advice to the organisation by whom they are employed[5] and can include communications between internal legal officers and lawyers from within or between public authorities.

54 In addition, legal advice in this context includes more than just telling the client the law; it also includes advice as to "what may prudently and sensibly be done in the relevant legal context."[6] It is necessary to recognise the form and nature of advice in a practical day to day context.[7] The ease with which electronic communications are conducted means that many short communications may be created in the normal course of the provision of legal services.

55 Legal professional privilege does not attach to a document, but to the communication recorded within it.[8] Accordingly, only sections of emails that contain the substance of the communications are protected, and not email headings and addresses. This also means that privilege attaches to summaries and notes, made by the client or lawyer, of communications which are themselves privileged.[9]

56 In this case, the information claimed to be exempt is written communication between the Department and the Office of the Solicitor-General. The Department, in this instance, is the client.

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[4] See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 at paragraph 9 of the High Court, re-affirming the 'dominant purpose test' as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* 201 CLR 49.

[5] *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098.

[6] *Balabel v Air India* [1988] Ch 317 (Balabel), 330; *AWB v Cole* (2005) 152 FCR 382 (*AWB v Cole* (No. 1)), [410]

[7] *Archer Capital 4A v Sage Group (No 2)* [2013] FCA 1098.

[8] *Australian Federal Police v Propend Finance* (1997) 188 CLR 501; 141 ALR, 545

[9] *Trade Practices Commission v Sterling* (1978) 36 FLR 244; *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514

57 I have reviewed the ten pages over which exemption is claimed under s31 of the Act, and I am satisfied that the documents contain information that would be privileged from production in legal proceedings and that those portions of the documents are therefore exempt from production.

58 Specifically, page 103 of the information mainly consists of an email from a senior legal service officer within the Department to the Deputy Secretary (EPA). I am satisfied that the body of the first email on page 103 is exempt under s31. The rest of the material on page 103 is not privileged and can be released.

59 Page 107 of the information consists of email communications between the EPA and the Office of the Solicitor-General. I am of the view that the information is administrative in nature and not exempt under s31, except for topic of the advice sought which is reference the subject lines of the emails and the first paragraph of the email from the Office of the Solicitor-General. This topic is exempt under s31 but the remainder of the content may be released to Tarkine.

60 Pages 104-106 and 108-110 are quite clearly confidential communications between a lawyer and their client made for the dominant purpose of providing or obtaining legal advice, or provide legal services. I am satisfied that they are exempt information under s31.

61 The Department initially claimed exemption for some information in pages 114 and 129 under s35 of the Act. Upon review the Department claimed that the information was also exempt under ss31 and 39. While both pages make reference to a future request for legal advice, I consider that they are not exempt under s31 but should be considered under the other exemptions claimed. Section 31 must be interpreted narrowly to ensure that the maximum amount of official information can be released under the Act and I am not satisfied that these references to an advice request are sufficient for this material to be subject to legal professional privilege. I will consider these pages in relation to the other relevant exemptions below.

Section 35 – internal deliberative information

62 The Department has relied upon s35 to exempt certain information on four pages of the documents responsive to the request for disclosure. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority; or is a record of consultations or deliberations between officers of a public authority; or is a record of consultations or deliberations between officers of a public authority and Ministers.

63 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

64 According to the Act, the exemption outlined above does not apply to:

- purely factual information[10] ;
- a final decision, order or ruling given in the exercise of an adjudicative function[11]; or
- information that is older than 10 years.[12]

65 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has been considered by the Commonwealth Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)* the Tribunal 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'.[13]

66 'Purely factual information' has been interpreted by the Commonwealth Administrative Appeals Tribunal (AAT). In *Re Waterford and the Treasurer of the Commonwealth of Australia,*[14] the AAT observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore, the material must be 'factual' in fairly unambiguous terms, and not be inextricably bound up with a decision-maker's deliberative process. In other words, for 'purely factual information' to be exempt, it must be capable of standing alone.

67 Exemptions under s35 are subject to the public interest test under s33.

68 The first pages for which exemption under s 35 is claimed are pages 114 and 129, which I briefly referred to above in connection with s31. The Department also claims that some information on page 141 is exempt under s35. All of these documents consist of email communications between officers of the Department.

69 I am satisfied that the information consists of opinion, advice or recommendation prepared by an officer of a public authority; or is a record of consultations or deliberations between officers of a public authority as part of the 'thinking process' of considering the variation of conditions regarding the Venture Minerals mine. I am also satisfied that it is not purely factual information; a final decision, order or ruling given in the exercise of an adjudicative function; or more than 10 years old. It is therefore prima facie exempt.

Public interest test

70 The Department decided that the considerations which weighed against disclosure of the information outweighed those in favour of disclosure, and that

[10] Section 35(2).
[11] Section 35(3).
[12] Section 35(4).
[13] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.
[14] *Re Waterford and the Treasurer of the Commonwealth of Australia* (1984) AATA 518 at [14]

it would be contrary to the public interest to disclose it. The Department found matters (b), (c), (d), (e), (f), (g), (n), (w) and (x) in Schedule 1 to be of particular relevance in making this decision.

71 The Department is of the view that:

> *disclosure of the information would not contribute to the debate on the matter (b). Nor do I consider this information 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 decision (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).*

72 The Department did not mention matter (a) – the general public need for government information to be accessible – which always weighs in favour of release. The Department only raised matters which weigh against disclosure. I agree that, given the amount of information which is being released as opposed to the information for which exemption under s35 is claimed, it would appear that its release would not contribute significantly to public debate (b) or provide substantial contextual value (d). Similarly, I do not find matters (e), (f) or (g) to be as relevant in the circumstances due to the minimal application of the exemption.

73 The Department argued that disclosure of the information would prejudice its ability to document the options available to them in a frank and constructive way (n). In addition, the Department advises that the information also touches on the confidential business affairs of a third party, so that disclosure would mean a likelihood of harm to its competitive position, as well as disclosing information that is not currently available to Venture Minerals' competitors (w) and (x).

74 I do not agree with this assessment or that these matters are relevant here. As I have repeatedly expressed in previous decisions[15], I do not consider that matter (n) is often relevant in relation to s35. These are internal deliberations and to suggest that public servants would be reluctant to do their regular, paid duties or would not do these properly if records of their actions were disclosed under the Act is not a matter I will readily accept. I do not consider that (n) is at all relevant in this instance.

[15] See Todd Dudley and Department of Natural Resources and Environment (12 May 2022), Suzanne Pattinson and Department of Education (2 August 2022), Alexandra Humphries and Department of Health (29 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisons

75 Despite this, as I have said in earlier decisions[16], I recognise that s35 exists to address circumstances in which it is not appropriate to disclose information which shows the internal 'thinking process' of a public authority. Considerations of whether to obtain legal advice and internal discussions around the merits of options to proceed on a matter are squarely in this category of internal deliberative information.

76 I agree with Tarkine that matter (l) is relevant – whether the disclosure would promote or harm the environment and or ecology of the State. Scrutiny of government assessment actions in relation to applications for variation of mining permit conditions to try to protect threatened species can definitely promote the preservation of the environment and this factor weighs in favour of disclosure.

77 After balancing these considerations, I agree with the Department that s35 is applicable and that the information found to be prima facie exempt on pages 114 and 129 is exempt from disclosure under s35(1)(b). I do not agree in relation to page 141 and find that the information claimed to be exempt under s35 is not exempt and should be released to the applicant.

Section 36 – personal information of a person

78 The Department relied on s36 of the Act to exempt certain information on 45 separate pages as personal information. For information to be exempt under this section of the Act, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

79 Section 5 of the Act defines personal information as:

> *any information or opinion in any recorded format about an individual –*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(b) who is alive, or has not been dead for more than 25 years.*

80 The Department has assessed certain names, email addresses, mobile phone numbers and signatures as exempt, subject to the public interest test in s33, because they are captured by the definition of personal information and meet the definition of s36(1) of the Act.

81 Tarkine has limited the scope of its request by excluding personal information that consists of phone numbers, email addresses or other contact details. I therefore confine my assessment to information consisting of names of persons and signatures. These names and/or signatures broadly belong to past or

[16] See *Suzanne Pattinson and Department of Education* (2 August 2022) and *Todd Dudley and Department of Natural Resources and Environment* (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

present officers and employees of public authorities, Venture Minerals or contractors/consultants in specialist technical fields.

82 This information falls within the definition of personal information in s5 of the Act. There is clear identification of person/s other than the applicant, their identity is apparent or is reasonably ascertainable from the information. I consider that the information is prima facie exempt under s36 of the Act.

Public Interest

83 That the information may be considered personal information does not preclude it from release, if doing so would not be contrary to the public interest.

Public officers and employees

84 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36.[17] The extent of disclosure of personal information of employees has been considered by the Australian Information Commission. It is considered that it is reasonable to release personal information such as names, positions or titles, work contact details and email addresses, because this information appears in documents during the course of a person's normal duties.[18]

85 The personal information of public authority employees will only be exempt when there are specific and unusual circumstances. This applies to signatures and also to past employees of public authorities if the information came into existence while the person was a public officer.

86 The Department has generally released the names of current employees and public officers. However, in the absence of submissions to the contrary, I am not satisfied that there are specific or unusual circumstances that justify the exemption of the names of past public officers, whether of the Department, the EPA or West Coast Council, in reports, emails, letters and other documents. I do not consider that it would be contrary to the public interest and they should be released.

Personal information of others

Venture Minerals

87 The Department has claimed exemption under s36 in respect of the names of a number of officers of Venture Minerals. In particular, the names of the Managing Director, the Chief Operating Officer and the Operations Manager have been

[17] See *Suzanne Pattinson and Department of Education* (August 2022), *Simon Cameron and the Department of Primary Industries, Parks, Water and Environment* (January 2022), *Camille Bianchi and Department of the ~~Health~~* (November 2021) and *~~Clive~~ Stott and Hydro Tasmania* (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

[18] *Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013), at [72]-[74]

redacted in numerous documents. However, other information such as the position title and company letter head are disclosed in the same documents. As the holders of these positions are on the public record, it is therefore apparent what information has been redacted, such that the redaction serves no purpose.

88 While this information does contain personal information, the Department has not discharged its onus to show why the company officers' names should be exempt under s36. I do not consider that it would be contrary to the public interest to withhold these names of senior Venture Minerals staff and they should be released.

Contractors, consultants, experts

89 The Department has claimed exemption under s36 in respect of the names of a number of employees, contractors and/or experts engaged by Pitt & Sherry, which is a well-known specialist engineering and environment consultancy company.

90 The profiles of company officers are available to be viewed on their website. Their names are on documents in relation to the work they are engaged to produce. In particular, I refer to the lead consultant on the Roadkill Minimisation Plan project (pages 9, 12, 85, 102, 115, 117 and 130) and the General Manager for the Principal Roads and Traffic Engineer (pages 28, 49, 52, and 67) whose name remains unredacted on page 36.

91 The Department has also claimed exemption under s36 in respect of the name of the wildlife biologist engaged by Pitt & Sherry who authored the report entitled "Reducing risks of roadkill along the eastern Pieman Road" and whose name is redacted on pages 18, 69, 81 and 117. However, his name appears unredacted on pages 71, 78, 80, 81, 84, 118, 122, 124 and 125. As the name has already been disclosed, it is inconsistent to withhold the name from release on isolated pages of the information.

92 It is not apparent how the release of this information would cause any harm to them as individuals, or as a group of individuals, or otherwise be contrary to the public interest, and it should be released.

Section 37 - Information relating to the business affairs of third party

93 For information to be exempt under this section, I must be satisfied that its disclosure would disclose information related to business affairs acquired by the Department from a third party and that –

> *(a) The information relates to trade secrets; or*
>
> *(b) The disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage*

94 This section of the Act is subject to the public interest test in s33.

95 The information in issue is three pages, 134 to 136, and is described in the Schedule of documents as a 'Letter'. The Department initially said that disclosing this information would divulge information acquired by the Department which relates to the business affairs of a third party, Venture Minerals. The Department argued that Venture Minerals is a publicly listed company on the Australian Securities Exchange (ASX) and disclosure of the information contained in the letter which is not available to shareholders would be likely to expose the third party to a competitive disadvantage.

96 In response, Tarkine submitted that:

> *No evidence has been supplied to support the assertion that Venture Minerals would suffer competitive disadvantage if the letter was released. Simply stating that the company is listed on the ASX does not articulate what, if any, disadvantage would be suffered by Venture Minerals if the information was released, however it does imply that the company may lose stock value.*

97 In its decision on internal review, the Department provided further explanation. It confirmed that the three pages of information was a letter received by the Department from Venture Minerals and relates to the business affairs of that company, including matters that relate to Venture Minerals' plans in relation to the Riley Creek Mine. Ms Scandrett also advised that, as a listed company, Venture Minerals is required to comply with certain disclosure obligations under the Corporations Act and other statutory instruments:

> *Listing Rules 3.1 and 3.1A:*
>
> *3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*
>
> *3.1A Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:*
>
> - *The information concerns an incomplete proposal or negotiations; and*
> - *The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and*
> - *A reasonable person would not expect the information to be disclosed.*

98 Ms Scandrett further advised that

> *Compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX market and other markets that trade in ASX quoted securities or*

derivatives of those securities. Reflecting this, Parliament has given the rule statutory force in section 674 of the Corporations Act.

99 Ms Scandrett submitted that the relevant information consists of material that a reasonable person would expect to have a material effect on the price or value of the entity's securities. And, as the information concerns an incomplete proposal or negotiation, disclosure of the information may impact upon the third party's competitive position as a listed company.

100 In response, the EDO submitted that *the fact that disclosure of Venture Minerals' letter to the EPA* might *affect the price of Venture Minerals' securities (though our client does not accept this), is irrelevant to the question of whether disclosure is likely to expose Venture Minerals to competitive disadvantage in the sense relevant to s37.*

101 As I have said in previous decisions on the question of likely competitive disadvantage,[19] 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...*

102 At paragraph 41 the Court interpreted the meaning of 'likely' to be 'a real or not remote chance or possibility, rather than more probably than not'.

103 With reference to the discussion of competitive disadvantage under s37(1) in *Forestry Tasmania v Ombudsman* outlined above, I note that in the New South Wales Supreme Court decision of *Kaldas v Barbour*[20] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the Ombudsman Act 1978, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

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19 See, for example, *Blue Derby Pods Ride Pty Ltd and the Department of Natural Resources and Environment Tasmania* (June 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

20 [2017] NSWCA 275 (24 October 2017)

104 Accordingly, as I have stated in other decisions, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

105 Taking into account the information provided by the Department, my assessment of the information in the three relevant pages is that it complies with the description in s37 as information related to business affairs acquired by a public authority from a third party, the disclosure of which under this Act would be likely to expose the third party to competitive disadvantage. I am satisfied that the information is prima facie exempt under s37.

106 I will note, however, that I agree with the EDO and do not consider that the Corporations Act rules regarding disclosure should be seen to countermand the Act. The obligations under each piece of legislation are different and both can simultaneously be complied with. A third party's information will not be released without notice under the Act and any ASX disclosure obligations could be complied with after such notice was received, if release was found to be not contrary to the public interest. Public authorities should focus on whether the disclosure would cause competitive disadvantage and assessment of the public interest test, as these are the necessary steps under the Act.

Public interest test

107 As mentioned above, exemptions under s37 are subject to the public interest test set out in s33 of the Act. It is therefore now necessary to assess whether, after taking into account all relevant matters, it would be contrary to the public interest to disclose the information I have found to be prima facie exempt. In making this assessment I am required to have regard to, at least, the matters in Schedule 1 of the Act.

108 In its initial decision the Department took into account the matters (w) whether the information is related to the business affairs of a person which if released would cause harm to the competitive position of that person; (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation; and (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.

109 I agree that these matters are relevant to the information in issue, as the letter details financial circumstances and proposed future business changes.

110 Upon review, Ms Scandrett found that other matters were also relevant. In particular, matter (x) whether the information is related to the business affairs of a person which is generally available to the competitors of that person. In this

case Ms Scandrett advised that the information was not generally available to the third party's competitors, being others in the mining industry.

111 Ms Scandrett was also of the view that release of the information would not contribute to debate on the matter (b), nor inform a person about the reasons for a decision (c), nor provide contextual information to aid in the understanding of government decision (d).

112 Ms Scandrett also took into consideration that disclosure of confidential business information, before it has been disclosed to shareholders and the market, would be likely to have a negative effect on the share price of the third party, resulting in a financial loss to shareholders.

113 Tarkine also gave consideration whether the disclosure of the information would be contrary to the public interest and submitted that the public interest weighed heavily on release of the information. They relied on matters (a), (b), (c), (d), (e), (f), (g), (j), (l), (w) and (y) in Schedule 1 of the Act.

114 Firstly, Tarkine raised matter (a) the general public need for government information to be accessible. Furthermore, contrary to the Department's view, Tarkine is of the view that disclosure would contribute to the debate on a matter of public interest (b), that is, the environment impact of mining in the region. I agree that these factors are relevant for these reasons.

115 I do not agree that matters (c) whether disclosure would inform them about reasons for a decision; (e) whether disclosure would inform the public about rules and practices of government in dealing with the public; (f) and (g) whether the disclosure would enhance scrutiny of government decision making and administrative processes; and (j) whether disclosure would promote procedural fairness and enforcement of the law, are particularly relevant in this instance in relation to this document. This is because the document is not generated by government, but by a third party. But I acknowledge that these factors do slightly weigh in favour of disclosure, as the letter indicates the proposal being considered by government and will assist in the understanding of the determination of the request.

116 I agree that disclosure of the information may provide some contextual information (d) and promote the environment and ecology of the State (l). However, the extent that this information achieves these purposes seems of lesser consequence than the other information which has already been disclosed.

117 Tarkine also submitted that disclosure of the information would not cause harm to the competitive position of the third party (w) and (y). Whereas, the Department have the opposing view with regard to these matters under Schedule 1. As set out above, I am of the view that there is a chance that the disclosure of the information may cause harm to the competitive position of the

third party. I am therefore, more persuaded by the Department's view on this point as the letter does appear to contain information that is not generally available to Venture Minerals' competitors. However, this is only in part and there is significant detail which is already known and other parts of the letter are unlikely to cause any harm to Venture Minerals' competitive position.

118 Overall, there are factors which weigh both in favour and against release and disclosure. Taking into account the character of the information in these three pages I am satisfied that the release of some parts would be contrary to the public interest. These are:

- The second sentence in the second paragraph on the first page;
- The third paragraph on the first page;
- The fourth paragraph on the first page, except for the words at the start of the first sentence up until *Riley Iron Ore Mine*; and
- The second and third sentences in the second paragraph on the second page.

119 The information listed above is exempt under s37(1)(b) and not required to be disclosed to Tarkine. I am not satisfied that the remainder of the letter is exempt and it should be released to Tarkine, subject to my consideration of s39.

Section 39 - Information obtained in confidence

120 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –

(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.

121 The Department applied the exemption under this section to a number of pages. The only remaining pages of information that have not been dealt with under another section are:

- a letter from Venture Minerals to the EPA at pages 134-136;
- pages 86 to 100 and described in the Department's Internal Review document decision table as 'Draft Roadkill Minimisation Plan'; and
- part of an internal email on page 129.

Venture Minerals letter

122 I have considered this letter (pages 134-136) under s37 and have determined parts of it to be exempt under that section due to the potential competitive disadvantage to Venture Minerals. The remainder of the letter I consider to be uncontroversial and consists of information which is already known by the applicant, regarding the changed permit condition being sought and the reasons for this.

123 Accordingly, while I accept that this is information which was provided in confidence as part of an initial approach to the regulator, I am not satisfied in this instance that the disclosure of the information would be reasonably likely to impair the ability of the Department to obtain similar information in future. I determine that the information in the letter, except for that which I have found to be exempt under s37, is not exempt and is to be released to the applicant.

Draft Roadkill Minimisation Plan

124 The Department advised that the draft plan was provided to the Department for consultative purposes only and was not formally submitted pursuant to law. The Department is of the view that disclosure of the draft plan may prejudice the Department's ability to obtain similar information in the future.

125 There are a number of reasons why draft documents have been considered to be exempt and contrary to the public interest to disclose, including in cases where a final corresponding document has been released. In some cases the Department's argument may have merit. However, in this instance the draft version is identical to the corresponding part of the final Roadkill Minimisation Plan, which has been released as part of the application under the Act. Therefore it is not necessary to consider any argument regarding the draft nature of the version for which exemption is claimed.

126 The information described as the Draft Roadkill Minimisation Plan can be released.

Email at page 129

127 The Department has also claimed part of the second sentence of the second paragraph of an internal email on page 129 is exempt under s39. This is an internal document and there is no indication that it reveals information obtained in confidence. I am not satisfied it is exempt under s39 or any other section of the Act and this information should be released to the applicant.

Preliminary Conclusion

128 For the reasons set out above, I determine that exemptions claimed by the Department pursuant to s31, 35, 36, 37 and 39 are varied.

Conclusion

129 As the above preliminary decision was adverse to the Department, it was made available to it on 26 September 2023 under s48(1)(a) of the Act, to seek its input before finalising the decision.

130 On 13 October 2023, the Department advised this office that would not be making any submissions in response.

131 Accordingly, for the reasons set out above, I determine that exemptions claimed by the Department pursuant to s31, 35, 36, 37 and 39 are varied.

132 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 13 October 2023

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 31 – Information Legal Professional Privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) Attachment ARelevant LegislationSection 31 – Information Legal Professional Privilege Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.**Section 35 – Internal Deliberative Information**(1) Information is exempt information if it consists of – an opinion, advice or recommendation prepared by an officer of a public authority; or a record of consultations or deliberations between officers of public authorities; or a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government. (2) Subsection (1) does not include purely factual information. (3) Subsection (1) does not

include – a final decision, order or ruling given in the exercise of an adjudicative function; ora reason which explains such a decision, order or ruling. (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

(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided, or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

37. Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If–

(a) (e) if the information is information to which a decision referred to in section 45(1A) relates – during 20 working days after the notification of the decision; or where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.**37. Information relating to business affairs of third party**(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and – the information relates to trade secrets; or the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.(2) If–a n a p p l i c a t i o n i s m a d e f o r i n f o r m a t i o n u n d e r t h i s A c t ; a n d 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 providedthe information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided

the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

(d) notify the third party that the public authority or Minister has received an application for the information; and
(e) state the nature of the information applied for; and
(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f) , decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its right to apply for a review of the decision; and
(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43 , until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43 ; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 39 – Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(c) the information would be exempt information if it were generated by a public authority or Minister; or

(d) 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.

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

(1) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** O2002-054
R2202-043

Names of Parties: The Eaves Family and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s35, s37, s39

Background

1 Geraldine, Sarah and Darrell Eaves (the Eaves family) are the owners of a property located at 32-34 Marine Terrace, Burnie. As at December 2018 the property was leased to the Department of State Growth (the Department).

2 On 6 December 2018, the Department issued a notice asking for expressions of interest (EOI) for a property to lease in the Burnie area from 1 November 2019 to accommodate the Department's Transport Group's operations.

3 The Eaves family submitted their proposal to the Department on the deadline of 18 January 2019, but was not successful in relation to the new lease. The Department's premises were moved to a new location at 54-56 Mount Street in Burnie.

4 On 2 September 2019, the Eaves family submitted a request to the Department for information under the *Right to Information Act 2009* (the Act). The application fee was paid. The general topic of information applied for was set out as follows:

> *Information and documentation is sought in relation to the State Growth expression of interest process which closed on 18 January 2019 and the decision made for the NW Transport Services Group accommodation to relocate from 32-34 Marine Terrace to 54-56 Mount Street Burnie.*

5 The Eaves family sought certain documents as well as answers to specific questions: (verbatim)

> *Request for Documentation*
>
> *1. Please provide a copy of the expression of interest decision outcome report for NW Transport Services Group accommodation which was*

signed on 12 August 2019 by State Growth, Deputy Secretary, Amanda Russell.

2. *Please provide a copy of the expression of interest proposal from Mr Ian Hall or his company for the property at 54-56 Mount Street, Burnie.*
3. *Pitt and Sherry report – assessment of the property 32-34 Marine Terrace, Burnie (as requested by Department of State Growth).*
4. *Terms of reference and/or memorandum of understanding for the expression of interest process.*

Answers to questions

(a) Which individuals and what businesses and real estate agents were provided with an expression of interest premises specification?

(b) How many members were appointed to the Committee and/or Sub-Committee/s?

(c) What are the Committee member's expertise, knowledge and/or professional experience to be a member on the Committee?

(d) What was the criteria that formed the basis for a decision to be made?

(e) Do we, The Eaves Family, as a proponent, have the right to appeal the decision?

(f) Have the financial costs been calculated to the full term for the lease, for all proposals received. If so, how what re the costs and how has this been calculated?

(g) Prior to the formal report sign off on 12 August 2019, were any instructions provided to any other property owner or real estate agent and/or other third party on behalf of an owner to make modifications to their property in preparation for the Transport section of State Growth in Burnie?

(h) Has there been any changes in facilities and/or requirements since the expression of interest closed on 18 January 2019?

(i) What are the costs associated with the move to 54-56 Mount Street?

(j) How much, over the term of the intended lease, will State Growth be costing to the Tasmanian taxpayer?

(k) Will all costs associated with the relocation and contribution from the Department of State Growth in relation to the relocation of Transport Services NW from 32-34 Marine Terrace Burnie to 54-56 Mount Street Burnie be made available to the public?

(l) State Growth's Property Manager, Mr Shaun Willie, advised that State Growth would be seeking to upgrade all State Growth facilities to 'A' grade standard:

a. Will all current property owner's, with State Growth as a tenant, be advised that State Growth will require 'A' grade standard facilities?

b. Will State Growth be 'going out to market' and commencing an expression of interest process to relocate all State Growth services to 'A' grade facilities?

6 On 20 November 2019, Ms Alison Lander, a delegated officer of the Department, provided a decision to the Eaves family on their application. Some information was released and answers provided to the questions asked. Ms Lander provided the following table to explain her decision regarding the four key documents.

Doc. 1	Transport Group North-West Accommodation Evaluation Report	Withheld in part – s35; s36; s37; s39[1]
Doc. 2	Proposal for 54-56 Mount Street, Burnie	Withheld in full – s37; s39
Doc. 3	Pitt and Sherry Accessibility Report	Withheld in full – s35; s39
Doc. 4	E-mail setting out terms of Expression of Interest for leased property in Burnie	Released in full

7 On 12 December 2019, the Eaves family sought an internal review of the decision on their application under the Act.

8 In their application for internal review, the Eaves family expressed general dissatisfaction with the documentation that was released as well as the answers provided in response to their questions. As part of their request for review, the Eaves family also raised new questions and sought additional documentation.

9 On 16 January 2020, the Department issued its decision on internal review. In his decision, Mr Kim Evans, the Secretary and Principal Officer of the Department, affirmed the original decision on the same grounds, specifically:

The information consists of internally deliberative information; third party personal information; third party business information

[1] These exemptions under the Act relate to internal deliberative information (s35), personal information (s36), information relating to the business affairs of a third party (s37) and information obtained in confidence (s39).

which, if released, could expose the third party to competitive disadvantage; and information obtained in confidence. I am satisfied that disclosure of the information would be contrary to the public interest, as it would compromise the Department's commercial dealings and be likely to have a negative flow-on effect for the Crown's commercial dealings more generally, as well negatively impacting future internal deliberative processes by inhibiting officers from participating fully and openly in such processes.

10 With regard to the further questions and clarifications requested by the Eaves family, the Secretary provided answers with regard to the Eaves family questions 2 and 3 concerning the Evaluation Committee. The Secretary advised that the remainder of the new questions and requests for information did not fall within the scope of the original decision or the scope of the internal review. Therefore, they would not be considered. However, the Secretary, did forward the additional requests to the Deputy Secretary Business Services for consideration and response.

11 On 13 February 2020, the Eaves family submitted the decisions to this office and sought an external review, on the bases that:

- the Department failed to take into account certain matters under Schedule 1 of the Act, when administering the public interest test;
- the Department gave disproportionate weight to certain other matters under Schedule 1;
- the Department is withholding certain information relevant to the original application; and
- the assessment of the original RTI application and subsequent internal review had not been conducted objectively.

15 The application for external review was accepted under s44 of the Act on the basis that the Eaves family had received an internal review decision and had submitted it to this office within 20 working days.

Issues for Determination

16 I must determine whether the information not released by the Department is eligible for exemption under ss35, 37 and 39 or any other relevant section of the Act. The Applicant is not contesting the exemption of information under s36.

17 As ss35, 37 and 39 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under these sections, I

am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

18 Copies of ss35, 37 and 39 are at Attachment A.

19 Copies of s33 and Schedule 1 are also attached.

Submissions

20 In their request for an internal review, dated 12 December 2019, the Eaves family argued, in relation to their request for information regarding costs associated with the EOI process, that:

> *It is unacceptable that these costs are unknown and will not be divulged. All costs associated with relocation should be made to be transparent. The Tasmanian taxpayer has a right to be informed of how their money is being spent. The Tasmanian taxpayer should also be aware of the amount that will be expended as a contribution to the relocation of services. The Department of state Growth has an obligation to be transparent in relation to how they spend.*

21 With regard to specific documents, such as the Evaluation Report (Document 1), the Eaves Family submitted that third party information in relation to the EOI is accessible to the public and, therefore, requested an explanation as to why the information is being withheld.

22 The Eaves family made submissions regarding the number and substance of the redactions made under the original assessment:

> *Namely, we request that the decisions made by the delegate and the Principal Officer in their respective reviews of our initial application are externally reviewed by you for reasons including, but not limited to:*
>
> *1. The Department of State Growth has failed to take into account the following relevant matters when undertaking the "public interest" test pursuant to section 33 of the Act, all of which are set out in Schedule 1 to the Act and favour disclosure of the requested information:*
>
> *(a) Item (d): whether the disclosure would provide the contextual information to aid in the understanding of government decisions;*
> *(b) Item (e): whether the disclosure would inform the public about the rules and practices of government in dealing with the public;*

(c) *Item (f): whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;*
(d) *Item (g): whether the disclosure would enhance scrutiny of government administrative processes.*

2. *The Department of State Growth incorrectly weighed the relevancy of item (c) of Schedule 1 of the Act that "disclosure would inform a person about the reasons for a decision", which was viewed as being "only weakly in favour of disclosure". This item in fact weighs heavily in favour of disclosure.*

3. *We believe that the Department of State Growth are* [sic] *withholding the following information the subject of our initial application:*

   (a) *Information provided to the owner (or their agent) of the property at 54-56 Mount Street, Burnie ("Mount Street Property") either verbally or written, relating to the outcome of the Expression of Interest.*

   Our request for information of this nature does not extend to personal information or information that concerns the business affairs of a third party. The information we seek is that which will demonstrate when the owner of the Mount Street property (or its agent) was informally and/or formally advised that it was the preferred tendered and/or was successful in securing the lease.

   (b) *Information regarding a change to the facilities and/or requirement since the Expression of Interest process closed;*

   (c) *Information relating to instructions provided to any property owner or real estate agent, or other third party on behalf of an owner, to make modifications to their property in preparation for the Transport section of State Growth in Burnie to relocate to.*

   Like above, our request for information of this nature does not extend to personal information or information that concerns the business affairs of a third party. The information we seek is that which demonstrates that all participants in the Expression of Interest process were treated equally and received the same information and opportunities.

4. *It is our view that the delegate was entirely subjective in assessing the initial application, likewise the Principal Officer when undertaking the requested internal review. We feel that their decision has been influenced, and we have been prejudiced, by our previous communications with the Deputy Secretary of the*

Department of State Growth (Ms Amanda Russell); the Minister of State Growth (Minister Michael Ferguson MP) and other internal office holders.

We request that documents the subject of the initial application (that have not yet been disclosed) are released.

23 On 22 March 2022, Mrs Eaves wrote to this office with further submissions in respect of their application under the Act. The submission contained certain new information with regard to the Mount Street premises; some new questions in respect of the Department's Expression of Interest process in respect of this premises; and further information regarding the Eaves family's involvement in the building industry and experience with the Department. I have considered this information but will not quote it in this decision.

Analysis

24 The Department identified three documents it considers exempt from disclosure under ss35, 36, 37 and 39 in a schedule of information. These were the Transport Group North-West Accommodation Evaluation Report (Document 1), the EOI proposal from the owners of 54-56 Mount Street, Burnie (Document 2) and an Accessibility Report by consultants Pitt & Sherry (Document 3).

Section 35 – Internal deliberative information

25 The Department relied upon s35 to exempt certain information responsive to the Eaves family's request for disclosure. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority or is a record of consultations or deliberations between officers of a public authority.

26 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.

27 According to the Act, the outlined exemption above does not apply to the following:

- purely factual information;[2]
- a final decision, order or ruling given in the exercise of an adjudicative function;[3] or
- information that is older than 10 years.[4]

[2] Section 35(2).
[3] Section 35(3).
[4] Section 35(4).

28 As to the meaning of 'purely factual information' in s35(2), I refer *to Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*[5] where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

29 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)* the Tribunal adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[6]

30 Exemption under s35 has been claimed in respect of Documents 1 and 3.

Document 1

31 Document 1 (the Evaluation Report) was released in part, but some information was considered exempt under s35(1)(a). In her decision, Ms Lander advised the following:

> *The Evaluation Report is an internal report produced by the Committee, whose function was to review and evaluate the expressions of interest received in response to the Department's invitation to submit proposals for accommodation of the North-West Transport Group. It identifies the members of the Committee, and includes the Committee's views on the proposals submitted as assessed against the identified criteria, estimates of likely costs associated with the options evaluated, recommendations as to how the Department should proceed with its leasing negotiations, and a final recommendation as to the preferred proponent.*

32 The Evaluation Report comprises a document produced to explore leasing options to consolidate the Transport Groups' North West Accommodation. The document sets out the evaluation of the short listed proposals in response to the call for expression of interest. The final recommendation appears on the first page of the document and certain information has been redacted on page 2 of the document under the heading *Expression of Interest Outline*.

33 Pages 5 to 8 comprise the section of the document where the evaluation of the shortlisted properties is set out. There are two shortlisted properties, the Marine Terrace property owned by the Eaves family, and the Mount Street property which was the successful property. Each property is assessed against the evaluation criteria for the purpose of comparison.

34 The third column on pages 5 to 8 has been redacted. This column sets out the evaluation for the Mount Street property based on the information provided in

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[5] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14

[6] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

the owners' proposal (Document 2). The Eaves family proposal is assessed in the second column and this was released in full.

35 Page 9 of the document contains the evaluation summary in which the evaluation scores for the two properties are set out side by side. The third column contains the scores for the Mount Street property. This third column has been redacted. Beneath the criteria scores is a section which contains an explanatory note of the total lease costs which is followed by the summary of the evaluation committee. These two sections have also been redacted.

36 Ms Lander considers that the Evaluation Report consists of opinion, advice or recommendation not otherwise known to the applicants, and factual information that is not separable from the deliberative process. And further, that the Committee's views on the Mount Street Proposal are opinion and advice, and the context in which that opinion and advice were provided was a deliberative one related to the functions of the Department. Therefore the information falls within the scope of the s35 exemption.

37 Ms Lander admits that the Evaluation Report may contain some factual information, but says that s35 still applies because the information is so closely linked or intertwined with the deliberative process as to form part of it, and thus not factual information that is capable of standing on its own.

38 Ms Lander concluded that:

> *… while the Evaluation Report provides information supporting a recommendation for action by the Department, it is not a final decision or a reason for such a decision given in the exercise of an adjudicative function, since the evaluation process was not an exercise of judicial function. I further note that, in this case, I have released the final recommendation contained in the Evaluation Report.*

39 Upon examination of the document, I agree that the redacted information in pages 5 to 9 meets the description set out in s35(1)(a) as comprising opinion, advice and recommendation prepared by officers of a public authority in the course of a deliberative process which relates to its official business. I am also satisfied that none of the information contained in the document is excluded by s35(3) being a final decision, order or ruling given in the exercise of an adjudicative function or a reason that explains the same. As Ms Lander noted, the final recommendation has been released.

40 However, I find that the three words redacted on page 2 of the Evaluation Report after *Expressions of interest receives* [sic] and the members of the Evaluation Committee at pages 3 and 10 are purely factual information and therefore cannot be considered exempt under s35.

41 Apart from the purely factual information, I am satisfied that the redacted information in the Evaluation Report is opinion, advice or recommendations of

public officers and relates to a relevant deliberative process. It is therefore prima facie exempt under s35(1)(a), subject to the public interest test.

Document 3

42 The Department has also sought to exempt Document 3, the Pitt & Sherry Accessibility Report, under s35. This report was not created by a public officer of a public authority or a Minister, so cannot be exempt under s35. It will be considered under the alternative exemption proposed by the Department – s39 (information obtained in confidence).

The public interest test

43 Section 35 is subject to the public interest test set out in s33 of the Act. It is therefore now necessary to assess whether it would be contrary to the public interest to release the information I have found above to be prima facie exempt. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.

44 The Department said that it found the following matters in Schedule 1 to be of particular relevance in making this decision:

> *(a) whether the disclosure would inform a person about the reasons for a decision;*
>
> *(m) whether the disclosure would promote or harm the interest of an individual or group of individuals; and*
>
> *(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation.*

45 Ms Lander considered that matter (c) weighed in favour of disclosure as the release of the redacted information could inform the Eaves family about the reasons that the Department decided to withhold the information. However, Ms Lander also thought that the release of the information would not particularly enhance the information already known or available to the Eaves family. I agree that (c) is relevant and weighs in favour of disclosure.

46 I consider that the pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and weigh in favour of release of information in any public interest assessment, it is unclear why Ms Lander did not consider these to weigh in favour of disclosure. I also consider that the following factors are relevant and weigh in favour of disclosure:

> *(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and*

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

47 I consider that matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – is also relevant, and agree with Ms Lander that (m) and (s) are applicable. This information was generated as part of an EOI process and discusses the merits of properties owned by third parties outside of government. The potential harm to the owners of 54-56 Mount Street is low, however, as it is public knowledge that they were successful in winning the lease contract. Contracting with government comes with a requirement that the Act will be applicable to your dealings with public authorities, so the risk of harm to a successful EOI applicant is minimal.

48 Ms Lander's conclusion after balancing the relevant public interest matters was that there is significant public interest in protecting the deliberative process and the information informing that process:

> *Officers must feel free to provide their opinions, advice and recommendations, and to participate openly in consultative and deliberative processes, in order for decision and action resulting from those processes to be robust. Third parties participating in such processes must feel confident that the information they provide will be treated with appropriate confidentiality – if they do not, they may choose not to engage in future, and others may be discouraged from doing so as well.*

49 As I have indicated in past decisions, I have concern about arguments that tend towards concluding that public officers will not conduct fair or robust assessments unless they are protected from disclosure under the Act. Transparency and accountability of government processes are key reasons for the Act existing and it is imperative that officers are frank and fearless in their duties regardless of whether records of their actions may be disclosed and scrutinised. While there are some internal deliberative processes which are tentative and appropriate to be exempt from release, it would defeat the purpose of the Act if s35 were used in an expansive manner.

50 I generally agree that it is important for EOI or tender processes to be conducted with a degree of confidentiality, but the information in question here only relates to the successful applicant. There is much more limited rationale for assessments relating to the successful applicant to be kept confidential, as discussed earlier.

51 I also note that elsewhere it has been determined that information comprising the scores which a public authority assessment team gave to the successful tender submission in the tender evaluation process ought to be disclosed.[7]

52 Accordingly, I am not persuaded that it is contrary to the public interest to release any of the information sought to be exempted under s35(1)(a) by the Department. The relevant information relates to the successful applicant and I do not consider that the evaluation process would be compromised by the release of this information. The exception relates to some lease costing information on page 9.

53 I am satisfied that it would be contrary to the public interest to release the final two lines on page 9 immediately above the heading *Recommendation*, as well as the second line in the table in *Total lease cost*. This information is exempt under s35(1)(a) and is not required to be disclosed.

Section 36 – personal information of a person

54 Pages 3 and 10 of Document 1 contain the names and job titles of the members of the Evaluation Committee. Exemption for this information is claimed under s36 as personal information of a person. The Eaves family has advised that they are not interested in the personal information contained in the documents. Therefore, I do not need to consider exemption further.

55 However, I will take this opportunity to note that it is well established that the names and job titles of public servants undertaking their regular duties are not considered exempt information, unless there are extenuating circumstances. Had the Eaves family sought this information, I would not have considered that the Department had discharged its onus under s47(4) to show that this information should be exempt.

Section 37 - Information relating to business affairs of third party

56 For information to be exempt under s37(1)(b), I must be satisfied that its disclosure would disclose information related to business affairs of a third party acquired by the Department from the third party, and that the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

57 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman* [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*

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7 *Rylsey Enterprises Pty Ltd and Cassowary Coast Regional Council* [2015] QICmr 13 (12 May 2015)

> *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...*

58 At paragraph 41 the Court interpreted likely to mean that there must be a real or not remote chance or possibility, rather than more probable than not.

59 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*[8] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the Ombudsman Act 1978 and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

60 Accordingly, the value of the Forestry Tasmania v Ombudsman case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

Document 1

61 Exemption under s37(1)(b) has been claimed in respect of the information redacted in Document 1 which relates to the owners of 54-56 Mount Street. The Department has primarily set out its reasoning regarding s37 in relation to Document 2 and has not discharged its onus under s47(4) to show why the information in Document 1 would be likely to expose the relevant third party to competitive disadvantage. It is largely factual information which relates to a premises chosen to be the Department's offices and it is not obvious what competitive disadvantage would be likely to occur.

62 The only exceptions are in relation to information set out in certain parts of the *Evaluation of short listed properties* table which detail changes or incentives the owners of 54-56 Mount Street offered when attempting to win the lease, the costings in the table on page 9 and the last paragraph under *Summary of evaluation committee* on page 9. These are prima facie exempt under s37(1)(b).

Document 2

63 Document 2 consists of the proposal by the owners of 54-56 Mount Street in response to the call for expressions of interest for the relocation of the

8 [2017] NSWCA 275 (24 October 2017)

Department's North West Transport Services Group in Burnie. The document has been withheld in full.

64 Ms Lander considered that that the proposal was exempt under s37(1)(b) as it contained business information of a third party that could expose them to competitive disadvantage if the information was released.

65 Ms Lander was of the view that:

> *the information is commercially sensitive, in that it consists of a confidential business proposal. It is not the sort of information that would normally be provided to a competitor, and I note that the applicants in this case are direct competitors in the same EOI process. Because the information includes costs proposals in the context of the specific features of the premises, disclosure of this information could cause competitive disadvantage for the third party in their future dealings.*

66 The Eaves family has specifically asked to be provided with a copy of the EOI proposal for the Mount Street property. Ms Lander consulted with the third party in accordance with s37(2) of the Act and has advised that the third party strongly objected to the disclosure on the information contained in the Mount Street Proposal, which is reproduced in the Evaluation Report.

67 I agree that this information is prima facie exempt under s37(1)(b), as there is a clear likelihood of exposing the owners of the Mount Street property to a competitive disadvantage.

Section 33 – Public Interest Test

68 As noted, s37 is also subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be prima facie exempt. In making this assessment, again I am required to consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.

69 In its original decision, the Department undertook a global assessment of the public interest, so my previous analysis regarding the public interest test remains relevant here. I consider matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – to be most relevant in relation to s37. This weighs heavily against disclosure, especially when the information is being sought by a direct competitor.

70 I am satisfied that it would be contrary to the public interest to disclose the information regarding the third party's business affairs that comprises the Mount Street Proposal, the lease costings on page 9 of Document 1 and which is set out in certain parts of the *Evaluation of short listed properties* table in Document 1. Namely the:

- last four sentences in *Office Area*;
- second sentence in *Warehouse area*;
- first sentence in *Car Park* after the word 'spaces';
- fourth sentence in *Car Park*; and
- second sentence in *Fit out standard*.

71 This information is exempt under s37(1)(b) and is not to be released to the applicants. However, the remainder of Document 1 is not exempt under s37.

Section 39 – Information obtained in confidence

72 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –

> (1) (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.

Document 3

73 Document 3 comprises the Property Access Report by Pitt & Sherry for the Eaves family property at 32-34 Marine Terrace, Burnie (the Accessibility Report). Ms Lander advised that the document was commissioned by the Department to assist in understanding the issues related to compliance with the relevant accessibility legislation and standards.

74 The Department claims that the Accessibility Report is exempt under s39(1)(b) of the Act. For the information to be exempt under this section, its disclosure must divulge information communicated in confidence by or on behalf of a person to a public authority. I must be satisfied that the information would be exempt information if it were generated by the public authority rather than a third party.

75 Ms Lander has advised that the contract governing the relationship between the Department and the consultants, Pitt & Sherry, includes confidentiality provisions. On this basis, Ms Lander is of the view that the Accessibility Report was provided to the Department in confidence. I accept that this is the case, as it is usual for the government or public authorities to enter into confidential contractual arrangements with consultants for the purpose of generating reports.

76 In order to determine whether the information would be exempt information if it were generated by the Department rather than a third party I must assess the information under s35 of the Act – internal deliberative information.

77 As set out above, information will be exempt under s35(1)(a) if it consists of opinion, advice or recommendation prepared by an officer of a public authority, in the course of, or for the purpose of, the deliberative processes related to the official business of the public authority. The exemption does not apply to information that is purely factual information, or information that consists of a final decision, order or ruling given in the exercise of an adjudicative function, or information that is more than 10 years old.

78 Ms Lander argues that the whole report was relied upon by the assessment committee when undertaking its evaluation of the EOI proposals and, therefore, the entire report is considered deliberative, coming within s35.

79 Ms Lander admits that there is some factual information in the Accessibility Report but not to the extent that would exclude the application of s35:

> *While the Accessibility Report contains factual information such as the layout of the Marine Terrace premises, and the relevant accessibility standards, the entire purpose of the report is to provide a professional opinion of compliance and potential risk to the Department, for the purpose of informing a deliberative process of evaluating competing accommodation proposals. The factual information in the report is inextricably linked to the formulation and articulation of advice and recommendations.*

80 I am satisfied that the Accessibility Report could come within the scope of s35. The Accessibility Report is dated January 2019, therefore the information is less than 10 years old. Nor does it comprise a final decision, order or ruling given in the exercise of an adjudicative function.

81 The Accessibility Report contains a combination of factual information as well as opinion, advice and recommendation. This applies particularly to the information contained on pages 1 to 6 (as numbered in the Accessibility Report). It would be very difficult to separate the purely factual information in this section from the opinion and advice regarding the property. I am therefore satisfied that pages 1 to 5 would have been prima facie exempt under s35(1)(a) as comprising internal deliberative information had the Accessibility Report been prepared by officers of a public authority.

82 I consider that the first two unnumbered pages of the document, as well as pages 7 and beyond, contain purely factual information and therefore would not be able to be exempt under s35.

83 In view of the above, I am satisfied that the information contained in pages 1 to 6 of the Accessibility Report comprises information that could be exempt information if it were generated by a public authority. I am further satisfied that the information was communicated in confidence to the Department. Accordingly, I find that the information is prima facie exempt under s39(1)(b) of the Act.

Public interest test

84 As mentioned above, section 39 is subject to the public interest test.

85 In relation to the Accessibility Report, Ms Lander is of the view that:

> *the public interest rests in knowing the Department sought appropriate professional advice to support its decision-making, not in the detail of that advice. I also consider it possible that the applicants' interests could be harmed by disclosure, by giving the applicants an opportunity to rely on professional advice prepared for another party that may well not appropriately address the applicants' specific needs and interests.*

86 I am not persuaded that the applicants' interests could be harmed by disclosure of the information in the Accessibility Report. It may not specifically be of use, but I am unable to see how it could be harmful to their interests to have more information about their own property. It could even be advantageous to them, as the Eaves family would be better placed to engage with the Department in the future if they had the information in the Accessibility Report.

87 Ms Lander has elaborated on her thinking as follows:

> *Additionally, the Department must feel free to seek professional advice to inform its decision-making, without the risk that disclosure of that professional advice may be released contrary to its interests. If that were to become commonplace, public authorities may become reluctant to seek such advice, which would be highly prejudicial to the public interest.*
>
> *Additionally, I am also of the view that there is considerable risk to the Crown's future interests if this type of professional advice becomes liable to inappropriate disclosure, as it may expose the Crown to ancillary liability contrary to the public interest.*
>
> *In my view, it is important for the public to be sure that appropriate advice is sought where necessary, and is used to inform a robust deliberative process. However, it is not necessarily as important for the detail of that advice or deliberation to be generally available.*

88 Disclosure of such information will always be subject to a public interest assessment, but I am somewhat concerned that Ms Lander appears to consider release under the Act to be inappropriate disclosure of information. If taxpayer funds are spent on obtaining expert advice, that advice should be released to the public when the advice is not exempt or its release is not contrary to the public interest. I am confused by the argument that public authorities would be reluctant to seek professional advice if this could be released under the Act, as

there is a chance this could be against the interests of the public authority. Presumably the situation envisaged is where the public authority does not act in accordance with professional advice it has spent public funds to obtain. As I have set out earlier in relation to s35, it is incumbent on public servants to act appropriately regardless of the potential for information to be released under the Act. The Act is meant to increase accountability and public authorities should be able to justify their actions in seeking, accepting or disregarding professional advice.

89 In this case, the Accessibility Report is a quite straightforward assessment of the Eaves family property against the Building Code of Australia and other Australian standards. The Department relied on its findings in assessing the Eaves family property was not meeting certain accessibility standards and was a significant factor in its decision not to continue to the lease the property.

90 As I have already said, the pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and weigh in favour of release of information in any public interest assessment. I am also of the view that matters (d), (e), (f), (h) and (o) of Schedule 1 are relevant.

91 The disclosure of the Accessibility Report would give context to the Department's decision (d) and inform about the practices of government in dealing with the public (e), as well as promoting equity and fair treatment of persons and corporations in their dealings with government (h). I do not think that disclosure of the information in the report would prejudice the effectiveness of the procedure of assessment conducted by the Department but would, rather, improve accountability and participation (f).

92 In conclusion, I consider that the Accessibility Report in its entirety can be disclosed to the Eaves family, as this would not be contrary to the public interest.

Provision of information

93 Finally, I have noted that the Department has dealt with information it claimed to be exempt in Document 1 by removing it from the Evaluation Report. The Department advised my office in September 2020 that it had 'extracted' the information to be released rather than providing a redacted document. No notation was provided on the information indicating where information had been removed and confusion as to the content and omissions ensued. The Department further advised that it had ceased this practice following guidance from this office. I trust this change has been implemented, as the previous practice was not compliant with the Act.

94 In accordance with s18(2) of the Act, it must be clearly noted that a redacted document is not a complete copy of the information when information is

deleted. A redacted document gives a more accurate impression of the overall information, as an extract does not provide the context or structure of the original document. Therefore, I urge the Department to rerelease the information to the Eaves family in redacted form.

Preliminary Conclusion

95 For the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss35, 37 and 39 are varied.

Conclusion

96 As the above preliminary decision was adverse to the Department, it was made available to it on 2 June 2023 under s48(1)(a) to seek its input before finalising the decision.

97 The Department advised on 22 June 2023 that it would not be making any submission in response to the preliminary decision.

98 The Department did note that its *short-lived practice* of extracting information rather than using redactions *has long been discontinued*. I commend the Department for rectifying this issue promptly.

99 Accordingly, for the reasons set out above, I determine that exemptions claimed by the Department pursuant to ss35, 37 and 39 are varied.

100 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 23 June 2023

Richard Connock
OMBUDSMAN

Attachment 1 - Relevant Legislation

Section 35 – Internal Deliberative Information

(1) Information is exempt information if it consists of –

(a) an opinion, advice or recommendation prepared by an officer of a public authority; or

(b) a record of consultations or deliberations between officers of public authorities; or

(c) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

(a) a final decision, order or ruling given in the exercise of an adjudicative function; or

(b) a reason which explains such a decision, order or ruling.

(4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

37. Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

(d) notify the third party that the public authority or Minister has received an application for the information; and

(e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

39. Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(a) the information would be exempt information if it were generated by a public authority or Minister; or

(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

(b) relates to trade secrets or other matters of a business, commercial or financial nature; and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

(1) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m)whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o)whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w)whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review Reference: **Case** O1910-141

R2202-136

Names of Parties: Woolnorth Wind Farm Holding Pty Ltd and Department of Natural Resources and Environment

Reasons for decision: s48(3)

Provisions considered: s37

Background

1 Woolnorth Wind Farm Holding Pty Ltd (Woolnorth) is a company that operates in the environmental services/renewable energy industry. It is a joint venture enterprise between Hydro Tasmania and Shenhua Clean Energy. It operates wind farms, or wind power complexes, in the far North West (at Bluff Point and Studland Bay) and North East of Tasmania (at Musselroe Bay).

2 On 7 August 2019, the then Department of Primary Industries, Parks, Water and Environment (now the Department of Natural Resources and Environment – the Department) accepted a request for information pursuant to s13 of the *Right to Information Act 2009* (the Act) from a journalist in relation to eagle strikes at wind farms.

3 The information requested included:

- *Records of eagle strikes across... all Tasmanian wind farms...*
- *Any photographs of dead or injured eagles at windfarm locations across Tasmania...*
- *Reports of dead or injured eagles at Wind Farm zones submitted to DPIPWE* [the Department] *since the start of recording to the present.*

4 A search of the records in the Department's possession identified a number of documents relevant to the request. Some of the relevant information held by the Department related to Woolnorth and its wind farm operations.

5 In accordance with section 37(2) of the Act, a Right to Information Third Party Consultation notice was sent to Woolnorth on 20 August 2019 seeking its view on whether the information should be released. The notice informed Woolnorth that the Department had received an RTI application from a

journalist for information in relation to eagle strikes at Tasmanian wind farms. The notice enclosed information that had been located in the Department's records that was considered relevant to the application, namely some personal information of Woolnorth staff and six photographs of eagles killed by striking Woolnorth's wind turbines. Woolnorth was requested to respond within 15 days from the date of the notice.

6 On 6 September 2019, Woolnorth responded to the third party consultation notice advising that it supported redaction of the personal information of staff and requested that certain photographs in the possession of the Department not be released. Briefly, Woolnorth argued that the release of the photographs would have a negative impact on the Woolnorth business. Woolnorth also argued, by reference to matters in Schedule 1 of the Act, that it was contrary to the public interest to release the information.

7 On 13 September 2019, the delegated officer under the Act, Ms Monique Lindridge, advised Woolnorth that she agreed with the redaction of the personal information of staff but that she intended to release the photographs. She considered the photographs in terms of section 37(2) and decided that the information did not meet the requirements for exemption under that section, as she considered it would not be likely that their disclosure would cause any substantial harm to Woolnorth's competitive position. In addition, the delegate did not consider the disclosure of the photographs to be contrary to the public interest.

8 On 24 September 2019, Woolnorth applied to the Department under section 43(3) of the Act for an internal review of that decision. Through its lawyers, Woolnorth submitted that the photographs were exempt from disclosure under section 37 of the Act on the basis that they were comprised of information relating to business affairs of a third party, and that disclosure of the information would be likely to expose the third party to competitive disadvantage.

9 Woolnorth also submitted that, pursuant to section 33 of the Act, it would be contrary to the public interest to disclose the photographs.

10 On 4 October 2019, a delegated officer under the Act, Ms Alison Scandrett, released an internal review decision. Ms Scandrett rejected Woolnorth's submissions. She concluded that the photographs did not relate to the business affairs of Woolnorth and, therefore, section 37(1) did not apply. She further considered that the release of the photographs would not be likely to have any substantial impact on the Woolnorth's competitive position and, therefore, section 37(2) did not apply.

11 On 21 October 2019, Woolnorth sought an external review of the Department's decision by my office.

12 The application for external review was accepted under section 44 of the Act on the basis that Woolnorth had received an internal review decision and had submitted it to this office within 20 working days of receipt of the internal review decision.

Issues for Determination

13 I must determine whether the information which was not released by the Department is eligible for exemption under section 37 or any other relevant section of the Act.

14 As section 37 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in section 33. This means that, if I determine that the information is prima facie exempt under section 37, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

15 The Department relied on section 37 in its decision. A copy of this section is at Attachment A.

16 Copies of section 33 and Schedule 1 are also attached.

Submissions

17 Woolnorth's first submission on 6 September 2019 was in response to the third party consultation under section 37(2) of the Act. The submission, prepared and filed by Woolnorth's lawyers, stated as follows:

> *Woolnorth also request that the photographs accompanying each of the Bird/Bat Strike Forms are redacted. We request this on the basis that, in isolation, the photographs could be used to inform the general public in an 'out of context' manner resulting in negative impacts to the Woolnorth business as well as the wind industry in Tasmania. Woolnorth consider the photographs to be an unnecessary addition to the public record and are contrary to the public interest in accordance with several matters listed in Schedule 1 of the Act:*
>
> *a. The general public have no need for this 'government information' (acquired and accompanying photographs) to be accessible. Summary information on all eagle mortalities at these assets, that is arguably in the public interest, is already made available via Annual and Public Environment Reports. These are available at https://www.woolnorthwind.com.au/health-safety. We also note that the information published via RTI008(2019-20)*

contains, in Woolnorth's view, an adequate level of detail for the general public.

k. It is possible that the disclosure of images would impact negatively on the development of future wind farms in Tasmania (economic development [of] *the State).*

m. For the same reasons outlined above, the disclosure of the images is likely to harm the interest of an individual or group of individuals.

s. *The images are likely to harm the Woolnorth business. The public communication of eagle mortalities by Woolnorth via our public reporting processes should be sufficient to fulfil any public interest requirements.*

18 On 14 November 2019, the lawyers for Woolnorth wrote to this office to present submissions in relation to the application for external review.

19 The lawyers summarised Woolnorth's position that the photographs should be exempt from disclosure under the Act because:

(a) The Photographs concern and are related to the business affairs of Woolnorth for the purposes of s.37(1) of the Act;

(b) The disclosure of the Photographs would be likely to expose Woolnorth to competitive disadvantage for the purposes of s.37(1)(b) of the Act; and

(c) Per s.33 of the Act, after taking into account all the relevant matters it would be contrary to the public interest to disclose the Photographs.

Woolnorth did not assert that the photographs are, or disclose, trade secrets.

20 In presenting its submissions, Woolnorth maintained that the internal review decision of the Department contained three critical errors, concerning:

(i) the threshold requirement of s37(1);

(ii) 'reputational damage'; and

(iii) the operation of s37(2).

First error – threshold requirement of s37(1)

21 Woolnorth submitted that Ms Scandrett erred in her reasoning with regard to the interpretation of the term *related to business affairs* under s37(1) when assessing the relevant information.

22 In the Department's internal review decision dated 4 October 2019, Ms Scandrett concluded that the photographs did not relate to the business affairs

of Woolnorth and were, therefore, not exempt information under s37(1). She set out that under s37(1):

- *The information must be related to business affairs and be acquired by a public authority from a person or organisation other than the person making an application. The information must either relate to trade secrets, or the disclosure of the information must be likely to expose the third party to competitive disadvantage.*
- *The term 'business affairs' clearly denotes information that has a commercial value. Information has a commercial value 'if it is valuable for the purposes of carrying on the commercial activity in which that person is engaged'. It is not sufficient that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operation. The matter in issue must itself by information about business affairs, in order to satisfy this requirement.*
- *The section does not appear to be concerned with protecting reputation, rather it is concerned with protecting information with a commercial value that would or could be diminished or destroyed if the information were disclosed.*

23 Woolnorth disagreed with this approach and argued that the photographs in issue did relate to its business affairs. Specifically, it asserted:

> *In order to take the benefit of s.37(1), information must be "related to the business affairs" of the third party in question. The term "business affairs" is not defined by the Act but, applying orthodox principles of statutory interpretation, this phrase simply means 'the commercial affairs conducted by the relevant third party.'*
>
> *All that is required in order to satisfy s.37(1) is that the information in question touches upon or concerns (i.e. is related to) the commercial activities of the relevant third party. Put another way, if the information in question does not in any way touch upon or concern business affairs, it will not satisfy the threshold requirement of s.37(1).*
>
> *In the Second Decision,* [the Department] *approaches s.37(1) on the basis that the information in question (in this case, the Photographs) must in and of itself reach some arbitrary level of commercial value before it can be said to be* "related to the business affairs" *of the relevant third party.* [the Department]

> *asserts that it is not enough that the information in question "has some connection with a business.... Or will be used by a business in the course of undertaking business operations", a claim that is contrary to the plain language used in s.37(1). Having said all this,* [the Department] *concluded that the Photographs do not relate to the business affairs of Woolnorth and s.37(1) is not available in this case.*

24 Woolnorth took the position that the Department committed an error by *elevating a simple threshold test into something far more onerous and arbitrary*, submitting:

> *In this case, there can be no doubt that the Photographs relate to the business affairs of Woolnorth; they directly concern Woolnorth's core business activity, namely the operation of its wind farms. As such, the threshold requirement of s.37(1) is met...*

Second error – reputational damage

25 Woolnorth submitted that Ms Scandrett's view, that s37 *does not appear to be concerned with protecting reputation, rather it is concerned with protecting information of a commercial value that would or could be diminished or destroyed if the information were disclosed,* was flawed reasoning, specifically:

> *This assertion demonstrates a failure to recognise that s.37(1) protects both trade secrets and other information that, if disclosed, would be likely to expose a third party to competitive disadvantage.... s.37(1)(b) is not concerned with protecting the information itself because of that information's inherent value, it is concerned with the commercial consequences of that information being released to the public.*

26 Woolnorth further submitted that damage to reputation is a legitimate basis for seeking the protection of section 37(1)(b) and that it is a form of commercial disadvantage that the Ombudsman has accepted in previous cases.

Third error – operation of s37(2)

27 Woolnorth then turned to what it identified as the third error, which concerned the Department's approach to the operation of section 37, and specifically the relationship between s37(1) and s37(2).

28 Following her assessment regarding section 37(1) discussed above, Ms Scandrett considered section 37(2), setting out on page 2 of the internal review decision:

> *If the information applied for is not in the categories provided in section 37(1), but the disclosure of it may still be expected to be*

of reasonable concern to the third party as it may cause substantial harm to their competitive position, it may be exempt pursuant to section 37(2). A competitive position is the position which the appellant has, or is trying to acquire, relative to its competitors. A competitive position is something which gives a business an advantage over its competitors, which in turn allows it to, for example, attract more customers, or acquire a larger market share.

29 In response, Woolnorth submitted that the approach taken by the delegate towards the operation of section 37 and the relationship between section 37(1) and section 37(2) contains an essential error, that the delegate interpreted section 37(2) as providing a separate and distinct basis of exemption from section 37(1).

30 Woolnorth submitted that section 37(2) does not provide a discrete basis for exemption, but *is a tool that can be deployed by the relevant Minister or public authority for the purpose of assessing whether or not requested information meets either of the exemptions set out in section 37(1).*

31 It further submitted:

Put simply:

(a) S.37(1) provides two exemptions from disclosure; and

S.37(2) allows the relevant Minister or public authority to engage in third consultation with any entity whose competitive position may be affected by a requested disclosure, and seek that entity's view as to whether or not either of the exemptions in s.37(1) apply.

32 Woolnorth then made submissions with regard to competitive disadvantage and the delegate's interpretation of s37(1) :

The relevant application for assessed disclosure has been made by a journalist. It is therefore reasonable to infer, if disclosed, the Photographs will almost certainly be widely published in the Australian media (if not further afield).

The public release of the photographs would cause Woolnorth to suffer competitive disadvantage for the purposes of section 37(1)(b) of the Act in the following ways:

(a) The graphic nature of the Photographs is such that, if they were to be released or reported upon by the media wrongly, inaccurately or without the appropriate context (which cannot be controlled once the Photographs are disclosed) this is likely to cause

undue public distress, upset and other adverse reaction which will unfairly result in reputational damage to Woolnorth's brand, public standing and social licence. This in turn is likely to cause Woolnorth to unfairly suffer increased levels of scrutiny, which in turn impacts stakeholder confidence (e.g. investors in Woolnorth) which in turn would put Woolnorth at a competitive disadvantage in the N.E.M. [National Energy Market] vis a vis *other entities concerned with generating energy; and*

(b) Bird-strikes are an industry wide concern for wind farm operators and the release of the Photographs without the appropriate context (again, which cannot be controlled one the Photographs are disclosed) is likely to unfairly associate what is an industry-wide issue with Woolnorth's operations in particular, which in turn is likely to have all of the negative effects described in paragraph (a) above.

33 Woolnorth made further submissions as to relevant public interest matters being those contained in paragraphs (a), (b), (k), (s) and (w) of Schedule 1 of the Act, which will be discussed below.

Analysis

34 Section 37 provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if either:

- the information relates to trade secrets; or
- its disclosure would be likely to expose the third party to competitive disadvantage.

35 The information at issue is six photographs of deceased eagles, which are attached to three separate Bird/Bat Strike Forms completed by Woolnorth and provided to the Department. Ms Scandrett in her internal review decision considered that the photographs did not relate to the business affairs of Woolnorth. Woolnorth made submissions opposing this finding, as set out above.

36 I will first address this issue and whether the Department has made an error in relation to its interpretation of *business affairs* in relation to the photographs.

37 As set out above, Ms Scandrett of the Department considered that *the term 'business affairs' clearly denotes information that has a commercial value*. She relied

on the authority of *Re Cannon and Australian Quality Egg Farms Ltd* [1] for the interpretation of 'commercial value'. The cited authority concerned the interpretation of, inter alia, section 45(1)(b)(i) of the *Freedom of Information Act 1992* (Qld). It is questionable whether the authority has any application in this instance, given the vastly different wording of that particular repealed Queensland statute when compared to the current Tasmanian legislation. Regardless, I would note that the cited authority does not rule that the term 'business affairs' is limited to information that has a commercial value, but only that the s45(1)(b) applies to information that has a commercial value.

38 In my view, it is faulty logic to conclude that the term 'business affairs' necessarily implies that the information, of itself, must have commercial value. I agree with Woolnorth regarding the orthodox principles of statutory interpretation, that the words of the section should normally be given their ordinary meaning. Woolnorth's submission, that the section will be satisfied if the information touches upon, concerns or is related to the commercial activities of the third party, is sound.

39 While it is only the photographs which are at issue in this review, this does not mean that they should be viewed in isolation. The photographs should not be severed from the rest of the record of which they are a part and viewed as if they were separate documents which exist for their own sake when determining whether they relate to the business affairs of Woolnorth.

40 The photographs are attached to a series of documents or records and should be viewed in conjunction with those records. The records consist of three separate forms which are dated 16 January 2019, 23 January 2019 and 1 April 2019, respectively. The forms are entitled *Environment – Bird/Bat Strike Form*. There are some written instructions for the use and completion of the form, and then follows sections to be filled in with various details such as reference number, site, date and time, some identifying data sections, and a diagram which also needs to be completed by an appropriate company officer.

41 The first form, (reference number 261/19) consists of four pages. The first page of the form contains the written section described above, the next three pages contain photographs which relate to the information on the first page. The second and third forms (reference numbers 238/19WF and 262-19) both consist of two pages. In each case, the first page consists of the written section and the second page contains photographs which relate to the written information.

42 It is clear that the photographs form part of the records that they are attached to. It is also clear that the records relate to the business of Woolnorth; the operation of wind farms. Therefore, I am satisfied that the photographs

[1] (1994) 1 QAQR 491 at [51]- [54].

comprise information acquired by the Department from an organisation other than the applicant, namely Woolnorth, relating to its business affairs.

Competitive disadvantage

43 The next matter I must assess is whether the disclosure of the photographs would be likely to expose the third party to competitive disadvantage pursuant to s37(1)(b).

44 As set out above, Woolnorth submitted that the delegate erred in determining that s37(1) was not concerned with protecting reputation and argued that damage to reputation is a legitimate basis for seeking the protection of s37(1)(b). Woolnorth set out that, in previous external review decisions under the Act, this office has accepted damage to reputation is a form of commercial disadvantage.

45 My previous decision of *Environment Tasmania and the Environment Protection Agency*[2] was one such case in which I considered the possibility of reputational damage to a third party under section 37(1). In that case, I accepted that certain:

> *information ha*[d] *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 the third party's reputation, hence being to* [the third party's] *disadvantage and to its competitors' advantage*.

46 Clearly each case must be looked at on its own merits, however, in principle, I agree with Woolnorth's proposition that reputational damage is a form of potential competitive disadvantage for the purposes of s37(1)(b).

47 Woolnorth further submitted that Ms Scandrett took an erroneous approach in relation to the relevant test – applying s37(2), *whether the disclosure.. .would be likely to expose the third party.. .to substantial harm to the third party's competitive position,* rather than s37(1)(b) whether *the disclosure of the information.. .would be likely to expose the third party to competitive disadvantage*.

48 I agree with Woolnorth that Ms Scandrett, in this instance, is mistaken regarding the operation of the various elements of section 37. Ms Lindridge was also mistaken in her original decision on this point. In the context of the Act, s37(2) does not replace the test for exemption in s37(1) but provides guidance in relation to third party consultation. That the test remains that in s37(1) is further clarified in s43(3)(b), which sets out that internal review can be sought *if a decision to provide information that is likely to expose an external party to competitive disadvantage has been made by a delegated officer under section 37*. Section 37(2) does not create a discrete exemption and both delegates erred in finding that this was the case.

2 See *Laura Kelly, on behalf of Environment Tasmania & the Environment Protection Agency* (June 2017) [148] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

49 Despite this error, both delegates considered the impact of the release of this information on the competitive position of Woolnorth and concluded that the release of the information would not have any substantial impact upon Woolnorth's competitive position.

50 As mentioned above, Woolnorth submitted that the disclosure of the photographs would be likely to expose Woolnorth to competitive disadvantage.

51 In the internal review decision, Ms Scandrett accepted Woolnorth's submission that the relevant market is the *generation of electricity using wind farm technology*, *and their competitors are other wind farm operators*.

52 However, Ms Scandrett did not accept Woolnorth's submission as to how the release of the photographs would harm their competitive position. Ms Scandrett set out that *electricity consumers are not able to elect who generates their power, meaning it is unlikely that the release of the information will cause substantial harm to* [Woolnorth's] *competitive position*.

53 Firstly, this statement by Ms Scandrett would appear to be an oversimplification of the energy market. There is significant competition in a very complex energy market, and there would, no doubt, be a number of variables in the negotiation of the delivery of energy services.

54 Woolnorth made submissions relying on the authority of the decision of *Forestry Tasmania v Ombudsman,*[3] in which the Supreme Court of Tasmania considered the meaning of 'competitive disadvantage'. Woolnorth submits that the principles of the case support their position in relation to competitive disadvantage.

55 Woolnorth's submission briefly restates the position taken by the Court in that case that draws a distinction between broad and narrow senses of competition, depending on the position and identity of the competing parties. That is, the narrow approach applies to market rivals, whereas the broad approach applies to the buyer/supplier relationship. Woolnorth restates that the case found that the principle of competitive disadvantage may apply to both these variants.

56 Woolnorth submits that, in this case, the 'narrow' concept of competition applies, that is:

> *(a) The relevant market that Woolnorth operates within is the generation of electricity (in Woolnorth's case, via wind farming); and*

3 *Forestry Tasmania v Ombudsman* [2010] TASSC 39

(b) The relevant market competitors of Woolnorth are other entities that produce and sell electricity into the National Energy Market or N.E.M.

57 In relation to the market, Woolnorth advises that its business is concerned with the generation of renewable energy in Tasmania using wind farms. It currently operates two wind farms at Woolnorth and one farm at Cape Portland. In terms of the relevant market in which Woolnorth competes, the electricity generated by Woolnorth is fed into the National Energy Market (NEM) which extends to all states and territories except Western Australia and Queensland. In this sense, Woolnorth submits that it competes with all other energy suppliers (including all forms of energy, such as coal, gas and hydro power) who feed into the NEM.

58 Woolnorth further advised that it will soon be in direct competition with other Tasmanian wind farms which are being developed, including the Cattle Hill wind farm in the Central Highlands of Tasmania developed by Goldwind Australia. I note that the Goldwind facility has been completed and is now fully operational.

59 As I have said in previous decisions,[4] 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...*

60 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'.

61 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

4 See, for example, *Blue Derby Pods Ride Pty Ltd and the Department of Natural Resources and Environment Tasmania* (June 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

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".[5]

62 With reference to the discussion of competitive disadvantage under s37(1) in *Forestry Tasmania v Ombudsman* outlined above, I note that in the New South Wales Supreme Court decision of *Kaldas v Balbour*[6] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the Ombudsman Act 1978, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

63 Accordingly, as I have stated in other decisions,[7] the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

64 In accordance with section 47(5) of the Act, when an external party seeks review of a decision by a public authority to disclose the business information of that external party, that party has the onus to show that there are grounds to establish that the information should not be disclosed. I am satisfied that Woolnorth has demonstrated that the disclosure of the Photographs could expose it to competitive disadvantage.

65 While I do not consider that the competitive disadvantage is likely to be significant, as the fact of the eagle deaths has already been publicly reported, I accept that there is some likelihood of competitive disadvantage. This pictorial 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 Woolnorth's competitive disadvantage and to its competitor's advantage.

Public interest test

66 As stated at the outset, exemptions under Division 2 of the Act, such as section 37, are subject to the public interest test set out in section 33 of the Act. It is therefore now necessary to assess whether, after taking into account all relevant matters, it would be contrary to the public interest to disclose the information I have found above to be prima facie exempt. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.

5 '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

6 [2017] NSWCA 275 (24 October 2017)

7 See *Blue Derby Pods Ride Pty Ltd and NRE, Op Cit.* [25-26]

67 Neither of the Department's decisions considered the public interest test, as both found that the information was not prima facie exempt under s37. In Ms Lindridge's decision of 13 September 2019, however, she briefly discussed the public interest:

> *I note that while available statistical information on eagle strikes may sufficiently advise the public on this matter, I do not consider it contrary to the public interest that the photographs are made available.*

68 Woolnorth made extensive submissions in arguing that the disclosure of the information would be contrary to the public interest:

> *In this case, application of the public interest test requires the decision maker to balance the potential harm to Woolnorth in terms of competitive disadvantage likely to arise from disclosure of the Photographs against the public interest in bird strikes at wind farming operations.*

69 Woolnorth submits that the public interest matters relevant to this case are set out in paragraphs (a), (b), (k), (s) and (w) of Schedule 1.

70 Matter (a) concerns *the general public need for government information to be accessible* and matter (b) concerns *whether disclosure would contribute to or hinder debate on a matter of public interest.*

71 Woolnorth's submission in respect of these two matters is essentially that the disclosure of the photographs would not result in a better-informed public in relation to the phenomenon of bird strikes at wind farms. Extensive data about the phenomenon is regularly provided, and the forms to which the photographs are attached better inform this data. Woolnorth argues that "disclosure of graphic photographs will not contribute in a positive or productive way to public debate regarding the issue of bird strikes at wind farms":

> *Extensive details of eagle mortality rates are currently made available to the public via several public documents, including Woolnorth's Annual Report and Public Environment Reports which are available on Woolnorth's website.*
>
> *Disclosure of the Photographs will not better inform the general public as to the issue of bird strikes at wind farms. Disclosure will produce unhelpful emotional responses from the public and generate negative sentiment towards Woolnorth, a company concerned with developing renewable sources of clean energy. Renewable sources of energy are critical to the future of the Tasmanian community, and it is contrary to the public interest to*

> *allow the release of information that will likely result in ill-informed and unfair attacks on Woolnorth.*
>
> *To be clear, Woolnorth does not take issue with DPIPWE* [the Department] *disclosing the relevant Bird/Bat Strike Forms less the Photographs; Woolnorth does not shy away from the issue of bird/bat strikes and has no desire to conceal the issue from the public. Woolnorth simply submits that these documents less graphic photography provide enough information to satisfy the general public need for information regarding bird strikes at Woolnorth's wind farms, whilst preventing Woolnorth from being subjected to competitive disadvantage.*

72 Matter (k) of Schedule 1 concerns *whether the disclosure would promote or harm the economic development of the State.* In this regard, Woolnorth submitted that disclosure of the photographs could harm the case for wind farming in Tasmania.

73 Woolnorth submits that wind farming is an industry which contributes positively to the economic development of the State. And further that the public interest is not served by the disclosure of the photographs, which has the potential to result in negative economic consequences for the State.

74 The final two matters under Schedule 1 which Woolnorth relies on, in paragraphs (s) and (w), are inter-related. Matter *(s)* considers *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation*. Matter *(w)* concerns *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.*

75 Woolnorth refers to and relies on its previously set out submissions regarding competitive disadvantage under s37(1)(b) of the Act; that disclosure of the photographs is likely to harm the business, financial interests, and competitive position of Woolnorth.

76 I consider that the Woolnorth's assessment of the matters in Schedule 1 of the Act was focused on those which weighed against disclosure and did not address all relevant considerations. It did not appear to find any matters in favour of disclosure. The pro-disclosure object of the Act and matter (a) – *the general public need for government information to be accessible* – weigh in favour of release of information in any public interest assessment.

77 I agree with the Woolnorth that (b) is particularly relevant, though I do not agree that the release of the information would hinder debate rather than contribute to it. The impact of wind farms on bird species, particularly those which are endangered, is a matter of public concern and debate. Releasing

further information would contribute to that debate, even though the photographs do not reveal major new information about bird strikes.

78 While I understand Woolnorth's argument that the disclosure of the photographs could hinder proper debate on a matter of public interest, I am not persuaded as to its merit. That the photographs may be used by others against Woolnorth in debate about the overall environmental benefit of its wind farming operation is not a hindrance of the debate.

79 Woolnorth's primary argument is that the photographs have the potential to elicit an emotional response. Raw or primary data, while giving an accurate and detailed picture, may not be as interesting to the general public as an actual photograph of a deceased (in some cases endangered) eagle.

80 It may be true that graphic photographs that appeal to the emotions could be disseminated further and wider through the media, including social media, and result in a skewed perception rather than a properly informed view among the wider public. As a consequence, Woolnorth and/or the wider industry may find themselves expending resources correcting public perceptions that it does not consider balanced. This is the nature of public debate, however, and while there is a risk that information could be taken out of context and used wrongly, carelessly, inaccurately, or even maliciously, the factual nature of the photographs and their accuracy is not in question. It would defeat the purpose of the Act if such a risk of negative publicity or differing views in a public debate was considered to weigh against the release of information.

81 Woolnorth has also relied on paragraph (k), arguing that this feared skewed perspective on its wind farming operations could harm its business and, by extension, the economic development of the State. I do not agree that this factor is relevant, as there is no plausible indication that the release of these photographs would cause damage to the economic development of Tasmania.

82 Woolnorth has also focused on matters (s) and (w) and relied on their arguments above in relation to s37(1)(b). In as much as I have agreed with its interpretation of 'business affairs' and 'competitive disadvantage,' I am persuaded that these matters weigh in favour of non-disclosure of the photographs. There is a risk of reputational damage, due to the release of additional information about the deaths of these eagles, some of which are endangered. I do not consider that these factors weigh strongly against disclosure, however, as the photographs do not reveal any previously unknown information and are not particularly graphic. While I accept that Woolnorth holds significant concerns about competitive disadvantage, I am not persuaded that the impact of the release of these photographs on its competitive position would be major. Bird strikes are a known issue for all wind farms and environmental monitoring is standard across the industry.

83 Overall, there are factors which weigh in favour of release and of disclosure. On balance, I am not persuaded that this information is exempt under s37. The Department's decision to release the information to the original applicant under the Act should stand.

Preliminary Conclusion

84 For the reasons set out above, I determine that the relevant information is not exempt pursuant to s37.

Submissions to the Preliminary Conclusion

85 The above preliminary decision was forwarded to the Department and Woolnorth in order to seek their input before finalising the decision, in accordance with s48(1)(b).

86 On 5 April 2023, the Department advised that it did not intend to make any further submissions in relation to this matter.

87 On 20 April 2023, the legal representative of Woolnorth provided submissions in response to the preliminary decision. These further submissions were confined to my assessment of the public interest test.

88 Woolnorth's submissions are threefold. Firstly, with regard to the assessment of matters under Schedule 1 of the Act, Woolnorth comments:

> *The Ombudsman has not identified any matters in Schedule 1 of the Act relevant to the assessment in addition to those identified by my client. Accordingly, and with respect, the comment made in paragraph 76 of the Preliminary Decision is unwarranted – my client's assessment has not omitted or failed to address any relevant matters in Schedule 1, they have identified what they believe to be the relevant factors and advanced their view with respect to same.*
>
> *In brief, the Ombudsman takes the view that:*
>
> 1. *factors (a) and (b) are relevant, but weigh in favour of disclosure;*
> 2. *factor (k) is irrelevant;*
> 3. *factors (s) and (w) are relevant, and weigh in favour of non-disclosure; however*
> 4. *on balance, the public interest test is not met thus the Photographs are not exempt from disclosure.*
>
> *Assuming that factor (k) is irrelevant, in the Ombudsman's view we are left with four relevant factors in Schedule 1, two of which favour disclosure and two of which do not.*

89 Secondly, Woolnorth also cited a previous external review decision I made in *Huon Aquaculture Group Pty Ltd and Department of Primary Industries Parks Water and Environment*[8] and submitted that the outcome of that case should be replicated here. It set out:

> *In that matter, the Ombudsman:*
>
> *1. accepted that graphic photographs of dead seals* "may well cause distress, upset and potentially adverse reactions by Tasmanian, Australian and overseas consumers" (para 102);
>
> *2. such information met the requirements of s 37(1) of the Act (para 107); and*
>
> *3. after having regard to the factors (b), (f), (g), (s) and (w) of Schedule 1, concluded that it would be contrary to the public interest to release the relevant photographs (see paras 162 to 169).*
>
> *Whilst there are undoubtedly differences between Woolnorth Wind Farm Holding Pty Ltd and Huon Aquaculture Group Pty Ltd in terms of ownership, product, market and customer base, the circumstances are sufficiently similar that the outcome in this external review ought not deviate from the conclusions reached in Case Reference 01408-842, including with respect to the public interest test.*
>
> *As was the case in Case Reference 01408-842, Woolnorth Wind Farm Holding Pty Ltd routinely discloses detailed information with respect to bird strikes which in turn informs the public and facilitates informed debate as to this issue. We submit that the public interest factors (in particular (b), (s) and (w)) favour non-disclosure for, essentially, the same reasons expressed in paragraphs 162 and 169 of Case Reference 01408-842.*

90 Thirdly, Woolnorth questioned an assessment which it considered appeared to be based on the degree of graphicness of the photographs.

Further Analysis

91 In its submissions, Woolnorth appears to have some doubts regarding the sufficiency of my assessment of the public interest test. I will clarify that the matters in Schedule 1 of the Act do not necessarily all carry the same weight in any one case. Additionally, these matters may be weighted differently in different circumstances. Each matter is always decided on its own merits.

92 Under the Act, I am required to consider all relevant matters, including those matters sets out in Schedule 1, and disregard the matters in Schedule 2, and

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8 (July 2017), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

form a conclusion as to whether or not it is contrary to the public interest for information to be disclosed.

93 Although I have found that the information is prima facie exempt under s37(1)(b), I am not persuaded that any actual competitive disadvantage would be significant. Specifically, I consider the likelihood of harm to the business or financial interests of Woolnorth by the disclosure of the photographs is low (matter (s) of Schedule 1). Likewise, I consider that the likelihood of the information causing harm to the competitive position of Woolnorth to be low (matter (w) of Schedule 1).

94 While it is without question that the *Huon Aquaculture Group Pty Ltd and DPIPWE* decision relates to similar information, it is easily distinguished from the circumstances in this review. As Woolnorth has pointed out, that matter differs from the current situation in a number of ways, such as in terms of ownership, product, market, and customer base. Nevertheless, Woolnorth argues that the circumstances are sufficiently similar that a similar conclusion should be reached in this case.

95 I agree that there are some similarities with regard to the two sets of circumstances. However, I am of the view that any similarities are outweighed by the differences, particularly the type of industry, structure of the market, the type of product, and the character of the producer and the typical consumer in that market.

96 The circumstances of the *Huon Aquaculture* case were very particular. In that case, the applicant was a direct competitor of the third party whose information was being considered for disclosure. Whilst this in itself was not a determinant factor, it is noted that the potential for causing harm or competitive disadvantage to the third party's business was clearly apparent. In this case, the applicant is a journalist and not an industry competitor.

97 In addition, the product involved in the *Huon Aquaculture* case, as well as the market and type of customer, meant that the potential for competitive disadvantage or harm to the business or financial interest was far higher. Once the products are packaged, they are identifiable by their branding and other information as originating from a particular producer. Thus, the product of one producer is clearly distinguishable from the product of another producer. Accordingly, the consumer is able to directly choose between the products of competitors in the same market.

98 In this case, the industry that Woolnorth operates in, that of producing and supplying energy, is a far more complex and sophisticated market. The end consumer of Woolnorth's product is not as easily able to choose another supplier's energy product. While the consumer has a limited ability to choose between types of energy, it may be no simple task to change from one energy

type to another. It is almost impossible for a consumer to determine the exact source of their electricity.

99 Woolnorth's energy product is supplied through the National Energy Market (NEM), as already mentioned. The NEM is a wholesale market through which energy generators and retailers trade electricity in Australia, and includes all methods of electricity production (fossil fuels, hydro, wind). The NEM facilitates the exchange of electricity between generators and retailers, and retailers then resell the electricity to businesses and households.

100 The market is highly competitive, with many energy generators and retailers participating in it. The market operates around a common pool, or spot market, for wholesale trading in physical electricity. This process determines an electricity spot price which reflects physical supply and demand across the NEM.[9] Financial markets sit alongside the wholesale market and involve retailers and generators entering into contracts to buy and sell electricity at an agreed price, enabling retailers to manage the risk of volatile wholesale prices. The electricity product is ultimately directed to end users anywhere within the NEM area.

101 In view of the complex nature of the market and the level at which competitive decisions are made, it is apparent that the disclosure of the photographs is not likely to be factor in the price setting and contractual arrangements for distribution of the end product. Nor am I persuaded that it is likely to affect investment decisions.

102 The phenomenon of bird and bat strikes at wind farms is a worldwide phenomenon, of which the industry is well aware. It is certainly not unique to Woolnorth and would be a common issue for any wind farm.

103 Woolnorth has also argued that my Preliminary Decision gives the impression that the more graphic an image is considered to be, the more likely it is that disclosure would be considered contrary to the public interest. I do not agree that this is a correct interpretation of my comments. Indeed, in some circumstances, the opposite could be argued. In cases involving harm to animals, it would be prudent to consider carefully what is being depicted in any images for which disclosure is sought. The graphicness or otherwise is not the determinant factor in my decision.

104 While I have carefully considered Woolnorth's submissions, I have not altered my determination that the relevant information should be released.

Conclusion

105 For the reasons set our above, I determine that the relevant information is not exempt pursuant to s37.

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[9] Factsheet on National Energy Market, available at www.energy.gov.au/government-priorities/energy-markets/national-electricity-market-nem, accessed 27 April 2023.

106 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 28 April 2023

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 37 – Information relating to business affairs of third party

(1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –

(a) the information relates to trade secrets; or

(b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –

(d) notify the third party that the public authority or Minister has received an application for the information; and

(e) state the nature of the information applied for; and

(f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and

(c) inform the third party of –

(i) its right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of the third party; or

(b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

33. Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

(1) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.