OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O** 1602-125

Names of Parties: Ms Christine Smart and City of Launceston

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

Provisions considered: s30, s3l, s37

Background

In 2005, Ms Smart and her partner bought a property on South Esk Road in Launceston. There was an ongoing issue in the area, identified after the City of Launceston undertook to correct anomalies associated with easements. One of these related to her property's boundary, including a one metre encroachment onto public land — a walk-way.

2 Council, at the time, offered affected residents options to address these issues, including the option to purchase the various encroachments that pertained to their land. Given the walk-way is deemed to be a `roadway', a public notice had to be given before the sale of the land could be approved.

3 There were 13 objections to Ms Smart purchasing the one metre encroachment, nine of which were rescinded after objectors had physically seen the area in question and heard its history. Ms Smart alleges the property has been in its current state and has had a fence in the same place for more than 75 years, and she asserts that the easement was created in the early 1930s. The four remaining objectors took the matter to Court and won'.

4 On II January 2016, some four years later, Ms Smart submitted an application for assessed disclosure to the City of Launceston seeking information concerning how much money it had spent regarding the encroachment. Specifically, she asked:

> *How much has it cost the Council to agree/disagree to sell the encroachment at 25 South* Esk Road, *Trevallyn, including* the *separate costing for QC opinion?*

5 Mr Robert Dobrzynski, Council's then General Manager (and therefore its principal officer) released a decision to Ms Smart on 3 February 2016. This decision identified an invoice which it claimed was exempt in full on the grounds it attracted legal professional privilege (s3l).

[1] http://www.examiner.com.au/story/436746/divide-over-courts-fence-ruling/

6 On 5 February 2016, Ms Smart rejected Council's claim that there was only one invoice and cited the matter that she had contested, which would have incurred cost to Council. Ms Smart also disagreed that the information should be exempted. A further search in response to Ms Smart's assertions identified more information responsive to her request, which was referred to in a supplementary decision. The additional information consisted of more legal invoices and other invoices relating to surveying the area in question.

7 On 24 February 2016, Ms Smart submitted the original decision for external review. On 5 April 2016, Mr Dobrzynski released a supplementary decision to Ms Smart. It claimed all the supplementary information was exempt in full on the grounds it too was privileged, with the exception of a purchase order and associated invoice from a firm of surveyors. It also conducted third party consultations with the law firms who had provided the legal invoices on the grounds that their release might have exposed the legal practitioners to competitive disadvantage making it exempt as the third party business information (s37). This was not ultimately, however, relied on as an exemption.

8 Ms Smart submitted the supplementary decision for external review on 6 April 2016. The original and supplementary decisions will be treated from hence as a single decision.

9 In its submissions made as part of the external review process, Council contended that it was more appropriate for it to exempt the three invoices on the basis that their release would be reasonably likely to prejudice the proper administration of the law (s30(I)(a)(ii)).

10 Ms Smart's request for external review has been accepted under s45(I)(a) on the basis that the decisions were made by Council's principal officer.

Issues for Determination

I I Once it has been decided which parts of each invoice are responsive to Ms Smart's application, it then falls to be considered whether those parts that are responsive, or any of them, are exempt on any of the following bases:

- as being reasonably likely to prejudice the administration of a law;
- it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege; and/or
- the disclosure of the information would be likely to expose a third party to competitive disadvantage.

The exemption in relation to competitive disadvantage is contained in s37 which is found in Division 2 of Part 3 of the Act, and is therefore subject to the public interest test contained in s33. Thus, if I should determine that the exemption is made out, I will then need to consider on balance whether a proper application of the test favours the maintenance of the exemption or

the release of the information. In doing so, I shall have regard to the matters contained in Schedule I, but not to the matters in Schedule 2.

Relevant legislation

12 The relevant provisions of the Act - ss30(l)(a)(ii), 31, 33 and 37, and Schedules I and 2 - are attached to this decision.

Submissions

13 Ms Smart says that she wants the information to prove her claim that Council has spent over $30,000 defending a piece of land it originally purchased for $1.00 and is ultimately wasting taxpayer funds. Specifically, she says:

> *I believe Mr Dobrzynski is acting* over *zealously in this matter. I want the rate payers* to *know that LCC has spent in* the *vicinity of $30,000 defining a* piece of *land they purchased for* less *than $1 knowing* full *well that* the fence *was not* on the correct *boundary when they purchased the land.*

14 Ms Smart claims the costs involved do not amount to privileged information. She is not seeking the information provided by counsel, merely the amount of legal costs incurred by Council.

15 Council maintains the exemptions on the information claiming its release would prejudice its case in the Supreme Court in proceedings instituted against it by Ms Smart and would give Ms Smart an unfair advantage in those proceedings, Specifically, Council submits:

> *During mediation, a party is usually at an advantage if it is aware* of the *other party's legal costs already incurred. This is because a represented party* to *litigation inevitably must deal with two competing interests* —the *disposal of the case as* the *party considers just, and disposal of the* case *at minimal* cost.
>
> *Usually, there is a threshold at which the cost* of *running litigation will overcome a party's* desire to achieve *their view of a just outcome. A party who is aware* of *the other party's expenditure on legal* fees is *in a much stronger position to recognise* the *threshold at which* the *party is likely to* settle, *and therefore* to take *advantage* of *it.*
>
> *Were Mrs Smart to be apprised of* the *amount and particulars of the Council's expenditure* on *legal* fees, it *follows that Mrs Smart would be* at *an advantage in any resulting mediation, with* the *result that it is reasonably likely that* the *Council's ability to administer the law with* respect to *her issues would be prejudiced.*
>
> *The Council also maintains that, consistent with* the decision *of Vickery,/ in* Hodgson v Amcor Ltd (2011) *VSC 204 at 1153]* to *1651 it is a* correct *assertion that parts of the material such as disclose the details* [sic] of *work undertaken by legal* practitioners *to advise the Council is*

> *subject to* the s31 *exemption* [legal professional privilege] *by reference to "legal advice" privilege under s 118* of the Evidence Act 2001

16 On 24 August 2016, I wrote to Council seeking additional information in relation to the nature of the legal proceedings, under what legislation the substantive dispute regarding the fence arose, and if the legal expenses were incurred as a result of enforcing particular obligations under that legislation. Council responded:

> *In our* view, the *Council is determining* the *appropriate way to deal with or* defend *a public highway, not* merely *a civil proprietary right. Currently, the nature of the proceeding is a Supreme Court application initiated by Mrs Smart.*
>
> The *Council has lodged a counter-argument that the fence is an obstruction on a highway and must be* removed, *under section 52(3)* of the Local Government (Highways) Act 1982.
>
> *Previously, the proceeding* before the *Magistrates Court (Administrative Appeals Division) was* the *hearing of a disputed decision to close a highway under section 147(3)* of the *Local Government (Highways) Act.*

17 As at 24 November 2017, this matter was still active before the Tasmanian Supreme Court.

Analysis

18 The relevant information consists of three invoices struck by two different law firms and a legal counsel, and totals seven pages.

19 Whether the land is a highway or otherwise is not relevant to this review, which is only concerned with whether or not Ms Smart is entitled to see the invoices.

20 Ms Smart's request seeks access to the dollar amount that has been spent by way of legal costs in relation to the encroachment. Excluding the information already released in full, this leaves only the three invoices. The only relevant information responsive to this request is the total amounts due and paid pursuant to those invoices. Anything else they might contain is not within the scope of Ms Smart's request and will not be referred to or considered.

21 I have considered all the exemptions relied on by Council but cannot see how any of them could apply to the amounts due and paid pursuant to the three invoices.

22 The dollar value does not affect any administration of the law (s30), it would not be privileged from production in legal proceedings on the ground of legal professional privilege (s31), and nor does it expose any third party to any apparent competitive disadvantage (s37).

23 I determine that the total amounts due and paid pursuant to each invoice is to be released in full to Ms Smart. All remaining information on each of the invoices is beyond the scope of her request.

24 Council did, at one point, refer to the decision of Vickery J of the Supreme Court of Victoria in *Hodgson v Amcor Ltd*[2] in which privilege was claimed in relation to a solicitor's memorandum of costs and time ledger.

25 At [56], His Honour observed:

> It is *accepted that legal professional privilege attaches to a communication undertaken, or* to *a document brought into existence, for the dominant purpose of giving or obtaining legal advice. At first glance, a memorandum of professional* costs *or a time ledger prepared by a solicitor* does not have *this dominant purpose. It is prepared for the purpose of accounting* to the client *for work done, and rendering a bill* of *costs in* respect of *it.*

26 His Honour further observed at [57]:

> *However, and subject* to *meeting the dominant purpose* test, *legal professional privilege also protects* the *disclosure of documents that record legal work carried* out *by* the *lawyer* for the *benefit* of the *client. In these cases,* the *protection* extends to *notes, memoranda or other documents made by a lawyer that relate to information sought by the client to enable him or her* to *advise.*

27 Had Ms Smart asked for a copy of the invoice, rather than merely the costs, it is possible His Honour's comments would have some application. She did not. His Honour's comments contemplate those:

> ... cases where *memoranda or bills* of *costs rendered by a solicitor are in detailed form and disclose,* either *directly or indirectly, communications concerning matters* that are protected by *the privilege, including instructions given by a client to his solicitors,* the advice *given, approaches* to potential *witnesses and other such things, stand in an altogether different class. Such memoranda and bills of costs are* likewise *privileged.*[3]

28 None of that sort of information is sought here, and there is no reason to go beyond His Honour's observations at [56].

Preliminary Conclusion

29 **I** determine the total amount payable and paid on each invoice is the only information responsive to Ms Smart's request and should be released in full.

[2] (2011) VSC 204 at [53] to [65]
[3] Supra at [62]

Submissions to Preliminary Conclusion

30 During the time given to Launceston City Council to make a submission in response to the preliminary decision, the new General Manager (and therefore Council's new principal officer), Michael Stretton, decided to release the information in full to Ms Smart.

Conclusion

31 I determine the total amount payable and paid on each invoice is the only information responsive to Ms Smart's request and should be released in full.

32 I note Council voluntarily complied with this decision and Council has already released the information to Ms Smart.

Dated: April 2018

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Section 3 I — 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.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1710-078**

Names of Parties: Mr Damien Matcham and Brighton Council

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

Provisions considered: s12, s19, s22

Background

I Consistently over the last several years, local media outlets have been reporting on the use of taxpayer funded credit cards within local government. Several articles have specifically mentioned Brighton Council, the focus of Mr Matcham's attention.

2 On 24 August 2017, Mr Matcham submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Brighton Council seeking the last seven years' worth of credit card statements for the General Manager, his diary entries for the last seven years, and approvals for any expenditure. The application fee was paid. Specifically, he requested:

> (I) Credit *card statements for the last 7 financial years for* R *V Sanderson.*
>
> *(2) Copies of R V Sandersons diarie's* [sic] *for* the last *7 years.*
>
> *(3) Copies* of approval's [sic] by the *elected councillor's* [sic] *approving any such expenditure.*

3 On II September 2017, Mr Matcham responded to Council's request to revise his scope by changing question one to seven years' worth of credit card statements for all credit card holders rather than just the General Manager, Mr Sanderson.

4 On 13 October 2017, as Mr Matcham had not by then received a decision from Council on his request, he applied it to this office for external review on the basis of a deemed refusal (s45(I)(f)). I accepted this and encouraged Council to release a decision to Mr Matcham.

5 Through negotiation with this office and Mr Matcham, Council agreed it could provide the last two years' worth of credit card statements as a PDF, a function that can be provided through its online portal with the Commonwealth Bank. It was Council's hope this would suffice for the request at Item I. Mr Matcham

agreed to accept the last two years' worth in this fashion, but maintained his request for the other five years' worth of statements.

6 On 20 December 2017, Mr Ron Sanderson, Council's General Manager and therefore its principal officer, released a decision to Mr Matcham. It released in full two years' worth of credit card statements to Mr Matcham, but refused the balance of the request on the basis that complying with it would be substantial and an unreasonable diversion of its resources from its other work (s19). While not naming the section directly, it also claimed Item 3 was otherwise available in its annual report and therefore did not need to be provided (sI2(3)(c)(i)).

7 I note the only redaction on the credit card statements was one agreed with Mr Matcham whereby the credit card number/account number was removed.

8 As the release of Council's decision satisfied his request for external review of the deemed refusal, Mr Matcham subsequently requested on 21 December 2017 the Ombudsman extend the matter to a full external review (s46(2)). This was approved on 22 December 2017.

Issues for Determination

9 There are three issues for determination:

(I) *Would* the *work required* to process the *remaining five years' worth* of *credit card* statements *substantially and unreasonably* divert *Council's resources?*

(2) Would the work required to process the *last* seven *years' worth of diary entries for the General Manager substantially and unreasonably divert Council's resources?*

(3) Is the remaining information claimed by Council otherwise available?

Relevant legislation

10 As noted, Council primarily refused to provide the information because compliance with the request would require a substantial and unreasonable diversion of its resources (s19). It also claimed some information is already otherwise available (sI2(3)(c)(i)). Copies of these sections are attached to this decision.

Submissions

I I Mr Matcham made general statements that he believes Council does have the resources to process the information requested. He claims Council has over $9.5 million in cash reserves that should counter its argument.

12 Council claims its resources are limited. It claims it is a small Council with only 50 full time equivalent staff, one delegated officer, and one principal officer. It claims that to process the remaining five years' worth of credit card statements,

which amounts to 480 pages, would take 56 hours at a cost of $5,600. It further claims it would take 213.15 hours to process 1827 pages of diary entries at a cost of $21,315.

Analysis

13 Even though both Items I and 2 were refused in reliance on s19, the information specific to each item is considerably different and I will consider them separately.

Would the work required to process the remaining five years' worth of credit card statements substantially and unreasonably divert Council's resources?

14 For information to be refused under s I9 I must be satisfied that the work required to provide it would substantially and unreasonably divert Council's resources from its other works. This involves consideration of the matters contained in schedule 3. When a decision is made to refuse information under s 19, the applicant must be given the opportunity to consider any findings made under schedule 3. He or she must then be given the opportunity to consult with a view to being helped to make an application in a form that removes the ground for refusal. Usually this means a revision of the scope of the request.

15 Council released in full two years' worth of credit card statements to Mr Matcham. It was able to download this from the Commonwealth Bank, however, this function only allows the previous two years to be downloaded.

16 Through agreement with Mr Matcham, the credit card/account numbers were removed from the statements. Everything else was released in full.

17 As noted, Council claims it will take 56 hours to process the remaining **480** pages of credit card statements. This is based on an average time of seven minutes per page when reviewing the responsive information, which is the time this office suggest is reasonable in the context of an application for assessed disclosure. As Council has already released two years' worth in full, I am not satisfied it would require any further assessment to release the previous five years' worth. The substantive work involved would be collating it from its filing system and applying a simple redaction to the credit card/account number. Allowing even one minute per page, this would equate to eight hours work. Based on Council's costing, this would cost $800.

18 I am not satisfied the work involved to release the remaining five years' worth of credit card statements to Mr Matcham would constitute a substantial and unreasonable diversion of its resources.

19 I determine the remaining five years' worth of credit card statements are to be released in full to Mr Matcham with the same voluntary redaction to remove the credit card/account numbers.

Would the work required* to *process the last seven years' worth* of *diary entries for the General Manager substantially and unreasonably divert Council's resources?

20 The requirements for s19 have been set out above.

21 Council claims it will take 213.15 hours to process 1827 pages of diary entries at a cost of $21,315. Unlike the matters in Item I, there may very well be information within these diary entries that requires assessment under the Act. While I am confident there may be some entries that can be released, it does not alter the fact that they would first need to be assessed. I agree with Council using the recommended seven minutes per page for assessment.

22 The time estimated to process this part of the request is nearly 10 working days over the statutory timeframe of 20 working days. While not a sole determining factor, it highlights the substantial nature of the work that would be required to be undertaken by Council, which would divert it from its other work. Before a refusal can be maintained, however, it must be determined whether that diversion of resources is also unreasonable.

23 In his request, Mr Matcham has not specified any reason for wanting the diary entries, nor has he identified anything he specifically seeks. It is a broad and general request to see what activities the General Manager has been engaged in, who he has met, and where he has gone. It lacks any specificity which means that Council would need to assess each and every entry. I am satisfied that the work required to be done in this regard would result in a substantial and unreasonable Diversion of Council's resources.

24 I determine that Council can rely on s19 to refuse Mr Matcham's request in relation to the diary entries having regards to the matters in schedule 3, is exempt information. Mr Matcham was given opportunity to revise his scope under s19(2) via this office. Mr Matcham declined to revise his scope any further.

Is the remaining information claimed by Council otherwise available?

25 Council did not provide information responsive to Item 3 and relies on s12, which allows for information to be refused if it is otherwise available. A decision to refuse information under s12 is not a reviewable decision by this office. The reason for this stems from the jurisdiction to conduct the review.

26 Jurisdiction in relation to external review is established under s45(l)(a) when the decision maker was the authority's principal officer. Section 45 provides that an external review can be undertaken if an internal review (s43) would have been possible had the original decision maker have been a delegated officer instead of the principal officer.

27 Section 43 provides that, an internal review only arises where the authority has made in accordance with s22. Section 22 refers to four classes of decision:

- where it has been determined that the applicant was not entitled to information because it was exempt information by virtue of one or more of the exemption provisions:
- where provision of the information was deferred under s17,
- where the application has been refused pursuant to s19; or
- where the application has been refused on the basis that it was a repeat or vexatious application (s20).

28 A decision not to provide information under sI2 is not a decision to which s22 applies. As a consequent, no internal review of such a decision is available under s43 and therefore by extension; nor can it be externally reviewable under s45.

Preliminary Conclusion

29 I determine the remaining five years' worth of credit card statements responsive to Item I are to be released in full to Mr Matcham with the exception of the agreed voluntary redaction of the credit card/account numbers.

30 I determine the diary entries responsive to Item 2 are exempt under s19.

31 I determine the information responsive to Item 3, claimed as otherwise available as per sI2, is not reviewable under the Act.

Submission to Preliminary Conclusion

32 By letter dated 22 January 2018, Council agreed to comply with the preliminary decision.

33 Council noted that the Preliminary Decision did not mention that although Mr Matcham submitted his application on 24 August 2017, the application fee was not paid until 13 September 2017.. This was correctly stated in Council's preliminary s19 decision of 3 October 2017.

Conclusion

34 I determine that the remaining five years' worth of credit card statements responsive to Item **I** are to be released in full to Mr Matcham with the exception of the agreed voluntary redaction of the credit card/account numbers.

35 I determine that the work required to be undertaken by Council to provide the diary entries responsive to Item 2 would substantially and unreasonably divert Council's resources from its other work, and that that part of the application may be refused pursuant to s19.

36 I determine that the decision to refuse to provide the information responsive to Item 3 on the basis that it is otherwise available, relying on s12, is not reviewable under the Act.

Dated: 23 January 2018

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Section 12

(I) 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 19

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

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

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

having regard to —

(c) the matters specified in Schedule 3 —

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

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

TASMANIAN OMBUDSMAN
DECISION

Right to Information Act 2009 Review **Case Reference: 01601-005**

Names of Parties: Mr Damon Smith and Tasmania Police

Reasons for decision: s48(I)(a)

Provisions considered: s33, s35, Schedule

Background

I On 5 August 2015, Mr Damon Smith lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire, and Emergency Management (Tasmania Police).

2 The applicant sought information in relation to the investigation results pertaining to an internal complaint he had made against a fellow police officer.

3 Specifically, he sought:

- [the] *full investigation file relating* to *my allegations against Sergeant Fergus* CAMERON [sic] to *do with pursuit policy breaches and ethics issues.*
- *Including audio interview/written transcript* of *my audio interview, all other audio and written statements, and final conclusions by investigating officer* [sic].

4 On 12 October 2015, Sergeant John Delpero (a delegated officer) released a decision to the applicant. Tasmania Police claimed a series of exemptions under s35 (internal deliberative information) and s36 (personal information).

5 On 28 October 2015, the applicant requested an internal review of the decision.

6 On 16 December 2015, Detective Inspector Ian Whish-Wilson (another delegated officer) released an internal review decision to the applicant, which came to the same conclusion as the original decision.

7 On 24 December 2015, the applicant lodged a request for external review with this office.

Issues for Determination

8 During the review process, the applicant narrowed the scope of his request for external review to:

> The *[complaint investigation]* Report *of [Senior] Sergeant Gillies (the Report), and*

...does *not dispute that information where Police are relying on s36 of the* Act.

9 On 4 May 2016, Tasmania Police made concessions that some previously redacted information could be released to the applicant.

10 In a letter to Tasmania Police of 5 September 2016, the Ombudsman requested that the undisputed information be released to the applicant. Tasmania Police confirmed by letter dated 20 September 2016 that it would comply with this request.

11 In its 20 September letter, Tasmania Police also agreed to release additional information having reassessed it. It has not released that information, pending the outcome of this decision.

12 The scope of the review is now limited to two pages which rely on s35 after the Tasmania Police concessions have been taken into account.

13 The exemptions claimed by Tasmania Police that have not been conceded now only relate to pages 35 and 43 of the Report. Pages 36, 38, and 40 have had all claims of exemption under s35 conceded.

14 The information no longer exempt under s35 as discussed above has revealed the names of people involved in the internal investigation. Tasmania Police submits these names are exempt under s36 as they constitute personal information of a person other than the person making an application under s13.

15 The applicant has excluded s36 from the scope of the external review, however, so I do not need to consider this information further.

16 Before an exemption under s35 can apply, the information must consists of an opinion, advice or recommendation by an officer of a public authority, or is a record of consultations or deliberation between officers of a public authority. This can also extend to a record of consultations or deliberations between officers of a public authority and a Minister. The information must also not be purely factual or be older than 10 years.

17 If the information is found to be exempt under s35, as this section falls within Division 2 of Part 3, it is subject to the public interest test contained in by s33.

Relevant legislation

18 Section 33 provides:

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

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

19 Section 35 provides:

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

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

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

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

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

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

(3) Subsection (I) does *not include —*

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

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

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

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

Submissions

21 Due to the concessions Tasmania Police made throughout the review process,

early submissions are no longer relevant. In relation to the exemptions that remain, Tasmania Police maintains the information is non-factual opinion. Specifically, it submitted:

> The *information is-non factual opinion about Sergeant F Cameron's operational decision making which was reported* for *consideration by the report's addressee Commander B Smith.* There *is no evidence that the opinion is correct and it therefore would* be *unfair on Sergeant Cameron for disclosure to occur.*

22 Initially, the applicant submitted that the information redacted was the core

information he needed to take his complaint further, and suspected that the key issues of his complaint had not been addressed.

23 This is largely no longer a concern given the concessions by Tasmania Police to

release almost all information originally claimed to be exempt. The applicant submitted however:

I cannot submit a grievance in relation to this investigation without scrutinising the summary of *the evidence, the recommendations* of *the investigating officer and there-for (sic] the rationale behind the Commanders (sic] findings.*

I made allegations of *dangerous driving and ethical breaches against a senior* officer, *who has a reputation* for the same. The *findings were un-founded on all allegations with no explanation or reasoning given. I submitted a (sic]* RTI *to access the final* report *and recommendation in order to submit a grievance about the investigation, alleging serious bias towards the senior officer and falsifying my verbal interview in order to punish me.*

I required the final report to enable me *to submit a grievance with a complete overview of my departments (sic] reasoning for their findings.*

Analysis

Section 35

24 The first information claimed to be exempt is the last paragraph on page 35 of the released information.

25 The paragraph appears to be conjecture on the part of the author, Sergeant Gillies, about the relationship between Sergeant Cameron and the applicant. Sergeant Gillies is an officer of a public authority and **I** am satisfied his comments are opinions under s35(1)(a).

26 Section 35(2) provides that purely factual information cannot be exempt under this section.

27 As to the meaning of 'purely factual information', in Re *Waterford and the Treasurer of the Commonwealth* of *Australia (No 1)*[1], the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore, the material must be "factual" in fairly unambiguous terms. To be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes[2].

28 This means that for 'factual information' to be exempt, it must be capable of standing alone as such. The material must not be so closely linked or intertwined with the deliberative process so as to form part of it.

29 Thus, even though a document's contents might be primarily factual this does not of itself mean that the document falls *outside* the deliberative processes exemption.

30 I am satisfied the information is not independently factual in that it cannot be separated from the deliberative nature.

31 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.

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[1] (1984) 6 ALN N347 at N349

[2] See Re *Evans and Ministry for the Arts (1986)* 1 VAR 315

This satisfies s35(3). The information is also not older than 10 years, satisfying s35(4).

32 I determine the last paragraph of page 35 is exempt under s35(I)(a).

33 There are two exemptions that have not been conceded by Tasmania Police on page 43. They are the last half of the sentence starting *`Whilst I have not listed this matters as allegations',* and the first sentence of the second paragraph under the heading *`Failure* to Report *Speeding — Constable Smith'.*

34 The sentence is an opinion as to what the author, Sergeant Gillies, would have written as a recommendation had one been made. Given Tasmania Police has conceded the other exemptions claimed in relation to recommendations, I see no reason why this one is any more sensitive.

35 It does consist of opinion and has been prepared by an officer of a public authority (s35(I)(a)). It does not contain purely factual information (s35(2)), a final decision, order or ruling given in the exercise of an adjudicative function, or reasons which explain one (s35(3)). It is not older than 10 years (s35(4)).

36 The second claim for exemption relates to a recommendation from Sergeant Gillies that consideration be given to a further investigation. Given the sentence that follows it discusses why an investigation is not likely, I see little value in exempting the material.

37 It does consist of a recommendation and has been prepared by an officer of a public authority (s35(I)(a)). It does not contain purely factual information (s35(2)), a final decision, order or ruling given in the exercise of an adjudicative function, or reasons which explain one (s35(3)). It is not older than 10 years (s35(4)).

38 I determine that neither pieces of information are not exempt under

s35. *Public Interest* Test

39 As s35 falls under Division 2 of Part 3, the public interest provided for under s33 must be addressed.

40 I will start with the exemption on page 35. I have considered the matters in Schedule I of the public interest test and find no matters that would support release of this material. I find matter (m) to be most relevant in that it may harm the interests of individuals, namely Sergeant Gillies, Sergeant Cameron, and the applicant. It is possible (n) and (p) may also be relevant.

41 The exemptions on page 43 have been overturned. There are several matters in Schedule I of the public interest test that support release of this information. Matters (c), (d), and (h) are most relevant. The information, while only opinion and recommendation, will still assist the applicant in understanding the process and the decision making that has occurred by Sergeant Gillies. I find there are no matters that support exemption. The information is similar to that already released in other parts of the report.

Preliminary Conclusion

42 I determine the last paragraph of page 35 is exempt under s35(l)(a).

43 I determine the two pieces of information on page 43 the subject of claims for exemptions not conceded by Tasmania Police are not exempt under s35(1)(a) and should be released to the applicant.

44 I also determine, based on the yet un-actioned concessions from Tasmania Police's 20 September 2016 letter, that the additional information which Tasmania Police thereby agreed to release, pending the outcome of this decision, be now released to the applicant.

45 Finally, I determine Tasmania Police may apply s36 exemption to the information relating to personal information once the s35 exemptions have been removed based on the 20 September 2016 letter.

Submissions to Preliminary Conclusion

46 On 23 October 2019, Tasmania Police advised this office that it had no submission to make with regard to the preliminary decision.

Conclusion

47 **I** determine the last paragraph of page 35 is exempt under s35(1)(a).

48 I determine the two pieces of information on page 43 the subject of claims for exemptions not conceded by Tasmania Police are not exempt under s35(1)(a) and should be released to the applicant.

49 **I** also determine, based on the yet un-actioned concessions from Tasmania Police's 20 September 2016 letter, that the additional information which Tasmania Police thereby agreed to release, pending the outcome of this decision, be now released to the applicant.

50 Finally, I determine Tasmania Police may apply s36 exemption to the information relating to personal information once the s35 exemptions have been removed based on the 20 September 2016 letter.

51 I note that Tasmania Police has already complied with my determinations at paras 49 and 50.

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Date& .a-E OckvtodeA
OMBUDSMAN

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1609-043**

Names of Parties: Environment Tasmania and Department of Primary Industries, Parks, Water and the Environment

Reasons for decision: s48(I)(a)

Provisions considered: s19, s37, s45(I)(e)

Background

Fish farming is a substantial industry in Tasmania and has been a source of significant political, media, and public interest, particularly in recent years.

2 On 26 May 2016, Environment Tasmania submitted an application for assessed disclosure to the Department. It sought a large range of information, such as correspondence between the Department and fish farming companies, information about leases and subleases, correspondence involving the Minister for Primary Industries, and data relating to the potential establishment of a fish farm at Okehampton Bay, near Triabunna. Specifically, it requested information which is separated into four parts below:

I) Any correspondence (including letters, emails and notices) between officers of DPIPWE's Marine Farming Branch and any of the following companies:

a. Tassal (including Tassal Operations Pty Ltd, Tassal Ltd and Tassal Group Limited)

b. Huon Aquaculture (including Huon Aquaculture Company Ltd and Huon Aquaculture Group Limited)

c. Petuna (including Petuna Pty Ltd, Petuna Aquaculture Pty Ltd, Petuna Fisheries, Petuna Seafoods and Petuna Seafarms)

2) Any documents (including letters, emails, notices or applications) by officers of DPIPWE's Marine Farming Branch and/or Spring Bay Seafoods Pty Ltd (`SBS'), its subsidiaries or representatives concerning:

a. The transfer of marine farming lease MF236

b. The sublease of marine farming lease MF236

c. The transfer of SBS's marine farming license

d. Approval for other persons to operate under SBS's marine farming licence

3) Any correspondence between current Minister for Primary Industries and Water, the Hon Jeremy Rockliff MP or his delegates, and any of the companies listed above related to planning for or approval of marine farms for finfish, or their infrastructure, on the east coast of Tasmania between St Helens and Melaleuca.

4) Any background data or documents submitted to officers of DPIPWE's Marine Farming Branch in preparation for the establishment of fish farms at the Okehampton Bay lease by Tassal and/or SBS, including but not limited to:

a. Water quality data

b. Survey data of marine fauna and flora, including listed threatened, endangered and protected species

c. Temperature monitoring logs

d. Resident water modelling or other hydrological information

e. Additional environmental impact assessments

3 On 3 June 2016, Ms Roxana Jones (a delegated officer) released a preliminary decision to Environment Tasmania, stating the Department's intention under s19(1)(a) to refuse to provide the information on the basis that it was `too voluminous and would result in a substantial diversion of resourcing away from core business.' As required by s 19(2), the Department extended an opportunity to Environment Tasmania to revise the scope of its application and remove the Department's ability to rely on s19.

4 Environment Tasmania responded to the Department on 9 June 2016 having revised the scope of its application. Environment Tasmania had excised parts and 3 from its original request and now only sought parts 2 and 4.

5 On 14 June 2016, Ms Jones advised Environment Tasmania that, in its revised form, the work involved in providing the information requested remained a substantial and unreasonable diversion of the Department's resources. Instead of refusing the application at that point, the Department again extended an opportunity to Environment Tasmania to revise its scope. The Department advised that if the request in part two was limited to part 2(b), MFB [Marine Farming Branch] *could provide a* copy of *application* [sic] for *sublease and a copy* of the *sublease document.*

6 On I6 June 2016, Environment Tasmania replied and limited its request: in part 2 to part 2(b) only; and in part 4 to those subparts (a) to (e).

7 The Department replied to the latest revision on 21 June 2016 and claimed that dealing with the request as it stood was still going to be a substantial and unreasonable diversion of its resources away from its other work. It requested

another revision from Environment Tasmania. No further revision was received and on I August 2016, Environment Tasmania submitted an external review to this office on the basis that a decision was overdue and there had been a deemed refusal (s45(l)(f)) of its application.

8 On 12 October 2016, Mr Mick Casey (a delegated officer) released a final decision to Environment Tasmania using the last revised scope of 16 June 2016. The Department claimed the six pages of information responsive to part 2(b) was partially exempt on the basis that it would expose a third party organisation to competitive disadvantage. It also claimed, in response to part 4, that it held no information response to this part.

9 Environment Tasmania extended its deemed refusal application for external review under s46(2) to a full external review. It claimed s37 did not apply and claimed the Department had undertaken insufficient searching for relevant information in relation to part 4 (s45(I)(e)).

Issues for Determination

I0 There are three issues for determination:

- Can the information responsive to part 2(b) be exempt under s37 as claimed because its release would lead to competitive disadvantage?
- Has a sufficient search been undertaken for information responsive to part 4?
- If information is found to be exempt under s37, does the public interest test support its release or exemption?

Relevant legislation

11 The Department initially relied on s 19 and ultimately relied on s37. Environment Tasmania has claimed insufficiency of search under s45(I)(e). I have attached a copy of these sections to this decision, including a copy of Schedule I which contains the matters that must be considered when determining where the public interest lies.

Submissions

12 Environment Tasmania claims that it revised its scope as requested on 3 June and only requested Item 2(b) on the basis that the Department had advised, if this was done, it could provide a copy of the sublease. Specifically, Environment Tasmania submits:

> *On 3 June 2016, DPIPWE issued a notice by under* [sic] section / *9(2)* of *the RTI Act, inviting Environment Tasmania's* [sic] to *narrow its original request.* By *email* on *14 June 2016,* the then *delegated* RTI officer *assessing our request, Roxana Jones, advised Environment Tasmania:*

> *"This request is a coverall... and* as *it stands is too voluminous and would result in a substantial diversion* of *resourcing away from core business.* If *revised, Section 2(b) is* the *only section* of *relevant and MFB could provide a copy of the application for sublease and a copy of the sublease document.*

13 In relation to part 4 of the request, the decision from the Department claimed there was no information found. Environment Tasmania rejects this, claiming that previous communication from the Department insinuated there was information relating to this part. Specifically, it added:

> *In the decision relating to RTI071,* the *DPIPWE* RTI delegate *Mick Casey stated that DPIPWE had no information its possession relating to part 4 of our original application.*
>
> *However, Environment Tasmania considers it likely that DPIPWE has information relevant to this request based upon email correspondence from Ms Jones on 21 June 2016. In this email, referring* to *part 4 of the original* application *Ms Jones stated that she had been advised by the Marine Farming Division that:*
>
> > *"they are unable to action this component of* the *request and deliver on core business obligations. To do so would be an unreasonable diversion of branch resources. Can you please refine your request further".*
>
> *On 22 June 2016, Environment Tasmania requested further information* about *why and how its application should* be *further refined, however, did not* receive *a substantive response* to *its email. On 15 July 2016, Ms Jones emailed* to *say she had only just received information in relation to our original application.* She *did not at any stage advise* there *was no relevant information relating to part 4 of our request. Ms Jones' emails strongly suggest that DPIPWE had voluminous information relevant* to *part* 4 of *our request.*

14 Environment Tasmania also disputed the claim of competitive disadvantage that was relied on by DPIPWE to exempt information in part 2 of the request. Environment Tasmania continued further:

> The *decision found that* "the *disclosing* of *the area of the sub-lease is a factor that can be utilised to estimate production outputs, which is information that companies seek to* preserve".
>
> We note *that it is* extremely *unlikely that release* of *the mere location or size* of the *sublease would provide sufficient information to calculate production outputs from Tassal's* proposed *salmon farm at Okehampton* Bay (there *being number other factors that would* impact *such a calculation, including but not limited to: the fish farm design, environmental constraints, feed inputs, and stocking density).*

> *For example, a comparison can be made between the marine farm sublease* to a leas of *an area for cattle farming. Lease boundaries for a cattle farm do not provide any particular information concerning the quality of the land or its stock carrying capacity.* Where a /ease for *a cattle farm is registered on a property title, it may* be re/eased *to members of* the *public upon payment of a search* fee to *the Land Titles office. Environment Tasmania submits that* there *is no good reason* [to] *grant a higher* level of protection *from scrutiny to one sector of the primary production industry over another.*

15 The Department claimed the information, if released, would lead to competitive disadvantage claiming it is a competitive industry and release of the information responsive to part 2 would give competitors an unfair advantage. Specifically, it submitted:

> The *wording of sub-section (I) is similar to s3 I of the repealed* Freedom of Information Act 1999' [sic] *that was discussed in* Forestry Tasmania v Ombudsman [2010] TASSC 39 where *particular* attention was directed *towards the term competitive disadvantage.*
>
> *A competitive disadvantage will not necessarily be something which, in strict* terms, *impacts on an actual ability* to compete, *and* the *level of competition. What the concept entails is something which puts* one *entity at a disadvantage in relation to a matter which affects its profit making capacity* relative to *its competitive rivals.*
>
> *The aquaculture industry in Tasmania is a competitive market with* more *than a dozen companies active at various locations around* the *state. The disclosing of* the *area of the sub-lease is a factor that can be utilised to* estimate *production outputs, which is information that companies seek to* preserve.
>
> *When the third party was consulted, concern was expressed about* the re/ease of *the information. The third party expressed the view that* the *sub-lease reflects a commercial arrangement* between *two parties that would normally remain private but due to s74* of the Marine Farming Planning Act 1995, it *requires Ministerial approval.*

Analysis

16 Before I get to the substantive issues for determination, I wish to make a comment in relation to the above reliance on the decision in *Forestry Tasmania v Ombudsman* [2010] TASSC 39.

17 It should be noted here that on 24 October 2017 the Supreme Court of New South Wales, Court of Appeal handed down its decision in *Kaldas v Barbour.*[2] Mr Barbour was the New South Wales Ombudsman at the relevant time and

[1] *Freedom* of *Information Act 1991* (Tas)
[2] [2017] NSWCA 275 (24 October 2017)

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

18 Amongst other things, the Court in that case was required to interpret s35A of the *Ombudsman Act 1974* (NSW), which relevantly provides:

> (I) *The Ombudsman shall not, nor shall an officer* of the *Ombudsman,* be *liable,* whether *on the ground of want* of *jurisdiction or on any other ground, to any civil or criminal proceedings in respect* of *any act, matter or thing done or omitted to be done for the purpose of executing this or any* other Act *unless the act, matter or thing was done, or omitted to be done, in bad faith.*
>
> *(2) Civil or criminal proceedings in respect of any act* or *omission* referred to *in subsection (I) shall not* be *brought against the Ombudsman or an officer of the Ombudsman without the* leave of the *Supreme Court.*
>
> (0) The Supreme *Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that* the *person* to be *proceeded against has acted, or omitted to act, in bad faith.*

19 Section 33 of the *Ombudsman Act 1978* (Tas) is in substantially the same terms, particularly s33(I) which reads:

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

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

21 Basten JA (with whom McDonald JA relevantly agreed) found that, properly construed, the reference to "civil proceedings" in s 35A of the NSW Act applied to judicial review. Read in its statutory context, s35A conferred immunity from judicial review proceedings for a number of reasons, including:

a. under s 35A of the NSW Act, the Ombudsman will not be made liable to proceedings for which he or she will be incompetent to give evidence. Section 26 of the *Ombudsman Act 1978* (Tas) is to a similar effect;

b. the express exclusion in s 35A of proceedings brought "on the ground of want of jurisdiction or on any other ground" is consistent with an immunity from proceedings for judicial review. Section 33(I) of the *Ombudsman Act 1978* (Tas) is in similar terms; and

c. the basis on which leave may be sought is limited to the terms of the exception, viz., bad faith. Section 33(2) of the *Ombudsman Act 1978* (Tas) is in similar terms.

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

23 This Office has also taken advice about the provisions of the RTI Act and whether a decision by the Ombudsman under it is amenable to judicial review. Again there are no coercive powers available at the conclusion of a review, and I take the view that there is no provision in the RTI Act, in particular ss47 or 48, to render a decision of the Ombudsman legally binding on a Minister, or public authority. In addition, it seems to me that a review under the *Right* to *Information Act 2009* is not a decision "made...under an enactment" for the purposes of the *Judicial Review Act 2000* because it does not "make a present or contingent difference in the realm of legal rights or obligations, and it must do this because of the force it derives from the relevant enactment"?

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

Can the information responsive to *part 2(b)* be *exempt under s37 as claimed because its release would lead to competitive disadvantage?*

25 There are two `sets' of information responsive to part 2(b) of Environment Tasmania's application for assessed disclosure. The first is a four-page application to sublease a marine farming lease area. The remaining two pages consist of an approval letter for the application and an attached map of the sub-lease area.

[3] *King v Director* of *Housing* (20 13) Tas R 353

26 The Department exempted the application in full on the basis it would lead to competitive disadvantage if the size of the area for sub-lease was revealed. The size of the sub-lease is mentioned as a numeral twice in the application form as 80 hectares.

27 In March 2017, during the time it has taken to prepare this decision, that information was published by the Glamorgan Spring Bay Council:[1] Its website contains a document titled "Okehampton Bay — The Facts", with Tassal's contact details and a request to "please contact us" at the end. Page 3 commences:

> ***How big will the lease site be?***
>
> The *lease will have 28 pens over 80 hectares and stocking density will be managed through licence conditions.*

28 Consequently, the factual basis for the exemption claimed by the Department no longer applies. As this was the primary concern, there is now no reason to exempt any of the application form. The Department did not address why it felt any other information on the four-page application form was exempt. I find no reason for the remaining information to be exempt.

29 If a timely decision had been formed on this application before the information was made public, I am doubtful that the public interest test would have supported exemption anyway given the very strong community, environmental, media and political interest in the topic of fish farming in Tasmania generally, and in particular, at Okehampton Bay. However, that matter no longer arises and will not be dealt with further.

30 I determine the four-page application form should be released in full.

31 For the same reasons above, the redacted information in the two-page letter is now also publicly available and it should be released in full to the applicant.

32 I determine the two-page letter should be released in full.

Has a sufficient search been undertaken for *part 4?*

33 Environment Tasmania claims that the Department's earlier reliance on sl9 indicated that there was a substantial amount of information responsive to its request, and specifically to part 4. The Department's subsequent response of no information found has sparked reasonable concerns that there may have been an insufficiency of search undertaking within the Department.

34 The Department submitted that s19(1) provides it may refuse to provide the information without identifying, locating or collating the information. The revision under s I 9(2) of the broad scope removed certain key words that fundamentally changed the scope of part 4.

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[4] "Okehampton Bay — The Facts", p3 at http://gsbc.tas.gov.au/wp-content/uploads/20 I 7/03/OKEHAMPTON-BAY-FACTS-v-2.pdf

35 When the Department conducted an actual search relating to part 4 of the revised question, it in fact realised there was no information held based on the new question. This is an unfortunate result, but a legitimate one.

36 While the scope was revised down in a way that relieved the Department from providing any information, it remains open to Environment Tasmania to submit a fresh application for the information it had removed from the scope of this application under its revisions.'

37 This confusion might have been avoided by a clearer explanation in the decision to Environment Tasmania.

38 I am satisfied there was a sufficient search for information relating to part 4 based on the revised application as a result of s19(2).

If information is found to be exempt *under s37, does the public interest support its release or exemption?*

39 This matter no longer arises.

Passing Comment

40 **I** will make a comment on the nature of applying redactions to information subject to applications for assessed disclosure.

4**I** There is no mechanism under the Act for me to direct a public authority as to how to redact information, however, I note the Department in this decision chose to rely on white redactions. I suspect this is because information has been `cut' from the document rather than a standard black redaction applied on top of information that has been exempted.

42 I would strongly encourage any public authority not to use this procedure and to use black, or at least, any other obvious colour so that information that has been redacted due to an exemption is clear and obvious to the applicant.

43 White redactions or excises of information are obvious enough in the middle of a paragraph, however, white redactions at the beginning or end of a paragraph, or the top or bottom of a page, can appear as if there was no information existing there in the first place. That may avoid proper scrutiny.

44 I am not insinuating that was the Department's motive, nor any other public authority's motive should they follow a similar practice. I merely wish to lessen the chance for avoidable or embarrassing errors that this practice can create.

Preliminary Conclusion

45 The information responsive to part 2(b) should be released in full to the applicant.

46 I am satisfied a sufficient search has been conducted in relation to part 4.

---

[5] Rosalie Woodruff *and Department* of *Primary Industries, Parks, Water and* the *Environment* (June 2018) O1702-099

Submissions to Preliminary Decision

47 The preliminary decision of 29 October 2019 was sent to the Department on I November 2019, inviting it to make a submission to this office on any matter related to the preliminary decision.

48 On 13 November 2019 the Department provided submissions in response to the preliminary decision and advised that it had released the six pages of information to the applicant in accordance with the decision.

49 The Department submitted:

> *On the understanding that this decision will* be *published, I wish to make a few observations regarding the Preliminary Decision.*
>
> *Paragraph 29 of the decision does* not seem *to portray an accurate conveyance of the public* interest test. The test *is whether it is in the interests of the public to release the information, not what may* be of *interest* to *them. This paragraph seems* to *imply the contrary.*
>
> *This Department deals with a range* of *matters and issues that for a wide range of reasons people may* be *interested in, however it is not always in* the *public interest for certain information to be released.*
>
> *In relation to your passing comments, for a* short *period* of *time the Department was trialling different colours for redactions. In a small number* of *decisions, redaction were made in* white. It *was quickly realised that this was not a suitable colour, and* the *Department has been using grey redactions since. An inspection* of the Department's *disclosure log will demonstrate that white redactions are not, and* never were, *common practice. I would be pleased* to see *some commentary to* this effect *in* the *decision prior to it being released.*

Further Analysis

50 The public interest test limits certain exemptions (those in Part 3 Division 2 (not those in Part 3 Division I) of the Act) to cases where the decision maker considers (requiring that they be affirmatively satisfied), "after taking into account all relevant matters, that it is contrary to the public interest to disclose the information": s33(1).

51 Schedule I contains a non-exhaustive list of "matters which must be considered in deciding" the public interest test: s33(2). Schedule 2 lists irrelevant matters: s33(3).

52 So information falling within Division 2 is not exempt (and given the right to information under s7 must be released) unless its disclosure is contrary to the public interest.

53 I agree that there is a distinction between th meaning of the public interest, and what may merely be of interest to the public, and that the latter does not, of itself, suffice to preclude exemption. For example, salacious gossip might

titillate the media and/or public, but if its disclosure would cause relevant harm then a decision maker might well that disclosure is contrary to the public interest.

54 That said, many of the matters relevant to assessing public interest listed in Schedule I are more likely to favour release where the information relates to a topic of societal concern or debate: see, for example Schedule I paragraphs (b) — (g). In particular, paragraph (b) refers to debate on "a matter of public interest" which must, in that context, mean of interest to the public, rather than the broader public interest test, since the latter would render paragraph (b) circular.

55 It is in this context that paragraph 29 of the preliminary decision referred, legitimately, to "the very strong community, environmental, media and political interest in the topic of fish farming in Tasmania generally, and in particular, at Okehampton Bay", without needing to apply the public interest test given findings earlier in the decision.

56 However, I accept that the multiple meanings of the word "interest" can cause confusion. That could have been minimised in paragraph 29 by replacing "interest in" with "concern over" or, consistently with Schedule I (I)(b), "debate on".

57 I fully accept the Department's response in relation to the preliminary decision's passing comments regarding the Department's use of white to make redactions, including:

> *for a* short period of time the Department *was trialling different colours for redactions. In a small number of decisions, redactionis]* were *made in white. It* was quickly *realised that this was not a suitable colour, and the Department has* been *using grey redactions since.*

58 I accept the Department's advice that it had independently reached the same view as this office as to the unsuitability of white redactions, and ceased its short term trial of those.

59 I trust my passing comments and the Department's independent prior conclusion will strongly encourage any other public authority to avoid using white. White could appear as if information never existed there in the first place (particularly where redactions are at the beginning or end of a paragraph, or the top or bottom of a page), thereby avoiding proper scrutiny. It is vital that it is made clear and obvious to the applicant exactly where information has been redacted due to an exemption, and the ground for that exemption.

60 For these reasons, I do not consider that the Department's observations in its submissions alter the substance of the preliminary decision. Indeed, I appreciate the Department's advice that it has released the six pages of information to the applicant in accordance with the preliminary decision.

Conclusion

61 The information responsive to part 2(b) of the requested information should be released in full to the applicant.

62 **I** am satisfied a sufficient search has been conducted in relation to part 4 of the requested information.

Dated: 20 November 2019

Richard Connock

OMBUDSMAN

Section 19

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

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

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

having regard to —

(c) the matters specified in Schedule 3 —

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

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

Section 37 — Information relating to business affairs of third party

(I) 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 45 — Other applications for review

(I) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if —

(a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43; or

(b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or

(c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or

(d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or

(e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or

(f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(2) If person has applied for information in accordance with section 13, another person may apply to the Ombudsman for review if —

(a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or

(b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

([3]) If a notice of a decision has been given under this Act, an application referred to in subsection (I) must be made within 20 working days of the day on which the applicant received notice of the decision.

SCHEDULE I - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

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

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

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

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1701-095**

Names of Parties: Ms Gina Green and King Island Council

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

Provisions considered: s19

Background

I In October 2012, King Island Council approved a development application for what is now known as the Ocean Dunes Golf Course.

2 Mrs Green is a King Island resident, whose property is near the Ocean Dunes course. Ms Green took part in the development process, and paid particular attention to those aspects of the application that might affect the view from her property. There did not appear to Ms Green to be any problem at that time based on where the application indicated the development's various structures would be located.

3 When the golf course was physically developed, however, a maintenance shed and some electricity infrastructure were allegedly located in a place not indicated in the development application, and these now partially obstruct Ms Green's view.

4 On 14 October 2016, Ms Green lodged an application for assessed disclosure with Council. This was modified by agreement with Council on 20 October 2016, and some information was provided to Ms Green.

5 A second application was made to Council on 7 November 2016 and it is that second application which is the subject of this external review. The second request sought 13 specific items relating to the Ocean Dunes development, namely:

I. Completed permit application forms;

2. Any covering letter associated with any permit application forms;

3. Site analysis plan and site plans;

4. Detailed layout plans;

5. Landscaping plans;

0. Detailed *parking layout;*

6. Traffic impact statement;

7. Heritage report;

8. Letter, report or similar document concerning vegetation management or removal;

9. Geotechnical report;

I I. Letter, email or similar to the proponent from the council requesting further information about the *application;*

12. Responses from the proponent in reply to any request for further information;

13. Any letter of *support or report or other document requested from the council by or on behalf of the proponent in relation to any grant applications* to *the Tasmanian or Australian Governments by the proponent.*

*For DA 1911*12 OCEAN *DUNES*

6 On 16 December 2016, Mr David Laugher, Council's General Manager - and therefore its principal officer - released a decision to Ms Green. Council refused the application, relying on s19(1), on the basis that the work involved in providing the information requested would substantially and unreasonably divert Council's resources from its other work.

7 Ms Green submitted a request for external review on 9 January 2017 and it was accepted under s45(l)(a) because: the decision maker had been Council's principal officer rather than a delegated officer so it was not susceptible to internal review; and it was submitted within the time stipulated in the Act for the making of such a request.

8 On review, it became apparent that Council had not complied with the requirements of s19. Section 19(1)(c) requires any decision to refuse an application relying on s19(1) to have regard to the matters outlined in Schedule 3 of the Act. Council had not had regard to those matters. It is also a requirement that, before an application is refused, the applicant is to be given a reasonable opportunity to consult Council with a view to the applicant being helped to make an application in a form that would remove the ground for refusal (s19(2)). Council did not afford Ms Green such an opportunity.

9 After many unsuccessful attempts to contact Council, and its failure to respond to requests for information in a timely fashion, a formal direction pursuant to s47(1)(n) was issued on 26 September 2017 requiring Council to comply with requests to engage in the external review process and to provide the information requested of it within I 0 working days.

10 On 2 October 2017, Council finally released an amended version of its decision of 16 December 2016 which complied with s19; the matters in Schedule 3 had been addressed and Ms Green had been afforded a reasonable opportunity to revise the scope of her application with a view to removing the ground for refusal.

11 Ms Green responded to Council on 16 October 2017 declining to revise the scope of the application. In her reasons, Ms Green claimed her original and second

applications had already been revised to suit the needs of Council and she did not see any valid reason for further revision.

12 On 10 November 2017, Council released a final decision to Ms Green in which it refused the application because, it asserted, the work involved in providing the information responsive to the request would substantially and unreasonably divert its resources from its other work.

13 On 13 November 2017, Ms Green confirmed her desire for Council's decision to be reviewed in full by this office.

Issues for Determination

14 There are three issues for determination:

- Would the work involved in providing the information responsive to Ms Green's application substantially and unreasonably divert Council's resources from its other work?
- Has Council given sufficient regard to the matters in Schedule 3?
- Was Ms Green given a reasonable opportunity to consult Council with a view to being helped to make an application in a form that would remove the ground for refusal?

Relevant legislation

15 Section 19 is the only provision of the Act under consideration in this review. A copy of s19 is attached.

Submissions

16 Ms Green submits that Council allowed the development to proceed contrary to the development application and she, among others, was not given a fair chance to have a say in the development process. Her daily enjoyment of her view and surrounds has been adversely affected. Specifically she contends:

> The *maps supplied showed* that the *maintenance shed,* to *which* the *power* poles *run to, was in a completely different location from that shown on the* **DA.**
>
> The *Council has acknowledged that* the developer *has* not *put* the *maintenance shed in* the *correct position but has not acknowledged the* power poles *are in the wrong place.* Hence we *need documentation, to establish* whether or *not we have a case to take to* RMPAT.
>
> *The maintenance shed was built on the wrong lot* of *land, and so we* believe *power* poles *are incorrectly located as well.*
>
> *As Council has already "investigated" our concerns, we are wondering why the information we have requested would not* be *readily at hand.*
>
> *Our lawyer has indicated that our request is fairly standard and* he *has made very similar requests over many years as well as advising Local Council's [sic]*

> *about their obligations* to *disclose in formation. In our case the specific list was* the *major parts* of *the contents* of *a planning* file *and this* could *have been located, copied and delivered within a day, just as it would if it was under a planning appeal.*
>
> We feel *that Council is not acting as a model citizen* let *alone a* model *litigant an* [sic] *certainly not as a public authority should act. If council have nothing to hide why not supply us with the information as requested.*

17 Council submits that it remains unviable to process Ms Green's application due to its size. Specifically, it submits:

> We *have thoroughly* reviewed *and considered your application, along with referring to* the *Act. Based on* the *magnitude* of *your request and the and after* [sic] *giving repeated advice on narrowing* the *broad* scope, *I have determined* that *your application for assessed* [sic] *is refused.*
>
> The scope *of the* request *is stated as "all relevant information on Ocean Dunes* Development". *The development in question is a significantly large development within* the *municipality with multiple applications, permits and other* types of *correspondence.*
>
> There *is one senior officer capable of assessing this application in accordance with* the *Act* however, *in* the *overall responsibility* of *the position, the time available to be allocated to* RTI *averaged across a I2-month period would* be less *than I%* of the officer's *time. That represents* less *than 1 hour per fortnight* to *allocate to* RTI *requests.*
>
> *King Island Council does not* have *an* electronic *document management system.* The *filling* system *is paper based. The broad scope* of *the request would require significant resources to review the entire filing system for "all relevant information on Ocean Dunes"* to *identify information and then assess it.*
>
> *In relation* to the *specific documents listed the volume* of *the information is estimated at 750 pages. This equates* to 87.5 *hours* or / *1.5 working days.* The officer *cost has* been *calculated at $78 per hour with* the total *cost of collating and assessing the information for the request estimated* to cost a *minimum of $6,800.*
>
> *...the estimated time* to *collate and* assess the *information is a minimum of 11.5 working days.* The statutory *time frame for processing* RTI *applications is 20 working days. This would represent a significant redirection of already limited resources* from *core council business.*

Analysis

18 As a preliminary matter, I wish to clarify the scope of the request. Council and Ms Green appear to be talking about two different things. Ms Green references the 13 categories of information listed in paragraph 5 above as being the subject of her

application, while Council refers to *all relevant information on Ocean Dunes Development.*

19 Ms Green's application for assessed disclosure includes both descriptions. What Council refers to is the wording under the heading, *General topic of information applied for,* and what Ms Green refers to is the list under the heading, *Details* of *information sought.* The 13 points constitute the scope of the request, not the broad description under the earlier heading, and I proceed on that basis.

Would the work involved in providing the information responsive to Ms Green's application substantially and unreasonably divert Council's resources from its other work?

20 As detailed in its decision, Council says that it would need to process an estimated 750 pages of information. It claims this would take 87.5 hours, or 11.5 working days, at a cost of approximately $6,800.

21 Section 25A of the Victorian *Freedom of Information Act 1982* is the equivalent of s 19 of the Tasmanian Act. In The *Age Company Pty Ltd v Cen1Tex (Review and Regulation),* the Victorian Civil and Administrative Tribunal (VCAT) at paragraph 45 provided a summary of the key case law concerning s25A. In coming to a decision, it took into account the following factors:

- whether, as a practical matter, the application provided a sufficiently precise description to permit location of the documents sought within a reasonable time and with the exercise of reasonable effort;
- the nature and extent of the public interest in disclosure of documents relating to the subject matter of the request;
- whether the request was reasonably manageable having regard, inter alia, to the size of the agency and the extent of its resources usually available for dealing with applications;
- the estimated number of documents subject to the request, and by extension, the number of pages and the amount of officer time, and the salary costs associated with it; and
- the statutory time limit for decision-making.

22 I am satisfied Ms Green's application was sufficiently precise. The actual information sought is not broadly described, but is a list of 13 specific items.

23 If Ms Green's allegations are true, there is a matter of some public interest involved; a planning authority apparently allowing a significant development to proceed in a manner other than that proposed by the developer in its development application and approved by the authority. Non-compliance with a development application that has been the subject of public discussion would not be something the

community would consider reasonable, whether King Island's or more broadly.

24 As Ms Green has indicated, the information being sought is potentially going to influence an application to the Resource Management and Planning Appeal Tribunal

(RMPAT). Scrutiny before a tribunal such as RMPAT will strengthen public interest, not detract from it, and if an application is brought, all relevant information will be required to be produced to the Tribunal.

25 While the work may be a substantial diversion given the unusual practice of Council to keep a development application disaggregated in the way it does, for s 19 to apply the diversion must be both substantial *and* unreasonable.

26 What is unreasonable in this situation must be objectively considered. If this matter were already before RMPAT, for example, I do not expect Council would tell the Tribunal it could not or would not comply with a direction to produce documents. I would expect it would comply with such a direction as all parties appearing before the Tribunal are required to do. This situation is not materially different. **I** can also envisage circumstances where Council might need to find the subject information for its own purposes. I am sure Council could and would collect and collate the information should the need arise. I am not satisfied for these reasons, that the work required is unreasonable.

27 I accept Council's position that it is small and has limited staff. **I** do not accept Council's claim, however, that Ms Green's application is unmanageable due to its size because Council only allocates less than I% of an officer's time to meeting its obligations under the Act. This is not a matter that should affect Ms Green's rights under the Act.

28 The estimated volume of information is 750 pages. As indicated above, Council calculated the approximately 11.5 working days to process that information by allocating seven minutes for the assessment of each page. I agree with Council that seven minutes per page is appropriate and indeed, it is based on guidelines issued by the Office of the Australian Information Commissioner. The calculated 11.5 days is just over half the statutory timeframe of 20 working days for processing an application. I do not accept Council's contention that the work required will be a substantial and unreasonable diversion of its resources if it can complete that work in 11.5 working days utilising a mere I% of an officer's time.

29 As the volume of information is not unreasonably high, and the time to process it is within the estimated statutory timeframe, I am not satisfied the cost attributed by Council of $6,800 warrants refusal of Ms Green's application.

30 I accept that, due to Council's current administrative practices, it might be said that the work required to process Ms Green's application for assessed disclosure could be substantial. What I do not accept is that it would cause a diversion of resources that is both substantial **and** unreasonable, which is required to be established before s **1**9 can be relied on.

31 For the reasons set out above, I determine that the work involved in providing the information responsive to Ms Green's application would not substantially and unreasonably divert Council's resources from its other work.

Has Council given sufficient regard to the matters in Schedule 3?

32 I no longer need to address this based on my determination of the first issue, however, I note Council did comply with the requirements of s19(I)(c) in its final decision of 3 October 2017.

Was Ms Green given a reasonable opportunity to consult Council with a view to being helped to make an application in a form that would remove the ground for refusal?

33 I no longer need to address this based on my determination of the first issue, however, I note Council did comply with the requirements of s 1 9(2) in its final decision of 3 October 2017.

Other Comments

34 While not directly related to this review, I note in the materials provided by Ms Green there is a letter from Council in relation to her first application for assessed disclosure. In that letter, dated I November 2016, Council said it accepted her application for assessed disclosure under the RTI Act, had photocopied the relevant information, but would not release it until Ms Green paid a nominal fee of $10.

35 Under the old *Freedom* of *Information Act 1991,* there was a scale of charges that could be applied by a public authority when processing a request, which was dependent on the volume of information responsive to that request. It would seem that Council had this in mind when it applied the nominal charge. I accept that this was accidental and an honest mistake

36 The scale was not carried over to the RTI Act. Section 16, among other things, now provides that a fixed application fee of 25 fee units must be paid, or a decision made to waive it, before an application for assessed disclosure can be accepted. No other charges are applicable.

37 Section 7 creates a legally enforceable right to information unless that information is exempt. That right is engaged when a valid application is made and the fee paid. To withhold any documentation after that point until a separate additional charge has been paid could constitute an offence under s50(2) of the Act, which provides:

> *A person must* not *deliberately fail to disclose information which is the subject of an application for an assessed disclosure of information, in* the *circumstances where the information is known to the person to exist, other than where non-disclosure is permitted in accordance with this Act or another Act. Penalty: fine not exceeding 50 penalty* units.

38 I make no direction or a determination in this regard as it is not a matter under review. I make the comments in passing, however, to be considered by Council in any future applications it may receive.

Preliminary Conclusion

39 **I** determine that the work involved in providing the information requested would not substantially and unreasonably divert the resources of Council from its other work.

40 **I** direct that Council collate and assess the information responsive to Ms Green's application within 20 working days of receipt of this decision.

Submissions to Preliminary Conclusion

41 Council made a submission in response to the Preliminary Decision on 9 March 2018. Council submits that as Ms Green has withdrawn her complaint submitted to RMPAT, the public interest test is `diluted' and justifies Council's refusal to refuse request.

42 Council also submits that the test of `substantial and unreasonable' *must be in the context* of the *facts and circumstances as known and* not *in* the *context* of *a preferred situation.* Council modified its position from the submission made at an earlier stage about the allocation of resources (1%) and the estimated time it would take to process the Green's application (11.5 days). Council now submits:

- 1% of an officer's time is allocated (under normal circumstances) to processing its obligations under the Act
- In a normal year that would equate to approximately 2.5 days of an officer's time to satisfy all applications
- To satisfy Ms Green's request will require the allocation of 11.5 days of resources on a full time basis (i.e. 100% of an officer's time)
- To satisfy Ms Green's request therefore will require five times the allocation of resources than is normally allocated in one full year for all applications
- During the 11.5 days no other functions are able to be performed or services provided by this officer.

43 Council reaffirms its position that processing Ms Green's application would be a substantial and unreasonable diversion of its resources from its other work.

Analysis

44 **I** will address the issues in order of the submissions made by Council.

45 The first claim being the public interest test is now `diluted' to the point the public interest test would justify Council's decision to refuse the request. Section 19 is not subject to the public interest test under the Act. While there may be an underlying social or cultural context to the `public interest' in broader terms, I am not satisfied it sufficiently applies here. The motive behind Ms Green's need or want to access information is not one of relevant consideration. Under s7, Ms Green has a right to

access information, but this right does not extend to exempt information. Information has not been exempt by Council, it has been refused. Despite that, I am satisfied Ms Green's claim remains sufficiently valid for further consideration.

46 The second claim is that the test for `substantial and unreasonable' *must be in the context of the facts and circumstances as known and not in the context of a preferred situation.* I agree that a preferred context is not appropriate, but the direct contextual approach can also be inappropriate. A balanced approach should be taken here between what is reasonably available to the public authority and what, in general terms, a reasonable person and public authority would consider reasonable in this situation.

47 Would a reasonable public authority or person agree that Council's claims of 2.5 days a year (I % of resources) to process all right to information applications is sufficient?

48 In my view, the answer is clear. This is not a reasonable allocation of resources. accept that this is what Council allocates, and therefore the demand on it under this regime would be substantial, however, it cannot pass the reasonable test.

49 So what is the demand on Council in relation to the Green's application? Council has claimed it will take / / *.5 days of resources on a full time basis (i.e. I 00% of an officer's* time). At 750 pages for assessment and an average allocation of seven minutes per page it would take a . total of 5,250 minutes - or 87.5 hours.

50 If this is divided into by a standard work week, it would take approximately 2.5 weeks of full time officer resources to complete the request. This is about 11.5 days of the allocated statutory timeframe of 20 working days.

51 The requirements of the Act and its predecessor, the *Freedom of Information Act* / 99 /, have been well known to public authorities for nearly 30 years. This is more than sufficient time for public authorities to budget for appropriate resources to deal with applications for assessed disclosure.

52 All the same, this is not Ms Green's problem. It is one for Council to resolve. If I accepted Council's position that an allocation of 2.5 days (I%) for the whole year was acceptable, it sends a message that as long as a public authority chooses not to resource right to information services properly, it can refuse every application. This is entirely inappropriate and not at all what the beneficial nature of the legislation is intended to promote.

Conclusion

53 I determine that the work involved in providing the information requested would not substantially and unreasonably divert the resources of Council from its other work.

54 I direct that Council collate and assess the information responsive to Ms Green's application within 20 working days of receipt of this decision. If more time is required, I recommend Council contact Ms Green and seek an extension.

Dated: 28 May 2018

Richard Connock
OMBUDSMAN

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 (I) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1608-19 1**

Names of Parties: Mr Graham Gourlay and University of Tasmania

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

Provisions considered: s33, s36, Schedule

Background

I On 22 January 2016, Mr Graham Gourlay submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the University of Tasmania. The applicant sought the names of the members of a research committee. Specifically, the applicant sought:

> *Names of the members* of the *Tasmania* [sic] *Social Sciences Human Research Ethics Committee.*

2 On 12 April 2016, Ms Juanita O'Keefe, a delegated officer, released a decision to the applicant. The University claimed the information to be exempt under s36 on the basis it formed the personal information of a person other than the applicant.

3 On 22 April 2016, the applicant requested the University to undertake an internal review of the decision.

4 On 19 August 2016, the time for a decision on internal review under s43 having passed and no decision having been made, the applicant requested an external review of his application by this office on the basis of a deemed refusal.

5 It transpired that the University had not conducted the internal review due to an internal misunderstanding, and on 19 October 2016, I issued a direction to the University to release an internal review decision to the applicant within I 0 working days.

6 On 17 November 2016, Ms Andrea McAuliffe, a delegated officer, released an internal review decision to the applicant. The internal review reached the same conclusion as the original decision and claimed aan exemption for the committee members' names under s36.

7 On 22 November 2016, the applicant requested his application be extended to a full external review as provided by s46(2).

8 Section 36 is contained in Division 2 of Part 3 of the Act. This Division contains exemptions that are subject to the public interest test in s33. This test must be applied before a final determination to exempt information which prime facie falls under one or more of those exemptions is made.

Issues for Determination

9 The only issue to be determined is whether the names of the committee members are exempt pursuant to s36, and if they are, whether it is in the public interest to release them or to maintain the exemption.

Relevant legislation

I0 Section 33 provides:

> *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 / *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.*

I I Section 36 provides:

> *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 /3.
>
> *(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*

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

(e) 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*

(f) 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*

(b) 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*

(g) 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.*

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

Submissions

13 The applicant believes the University is not meeting its obligations under the *National* Statement of *Ethical Conduct in Human* Research that was issued by the

Commonwealth Government's National Health and Medical Research Council. Specifically, the applicant submits:

> The *reason for my objection is that the National Statement on Ethical Conduct in Human Research, issued by the National Health and Medical* Research *Council, 2007, at Section 5.1.28, explicitly states that:*
>
> > `*Where an institution has established an* HREC [Human Research Ethics Committee], *the institution is responsible for ensuring that:*
> >
> > *(g) membership of the HREC is made public in annual* reports *or by other routine* processes *and is available to researchers submitting proposals to that* HREC'.

14 The applicant disagrees with an assertion made by the University that s5.1.28(g) does not extend to actual names, but rather only applies to qualifications. Specifically he says:

> Ms McAu/iffe's statement that `the *National Statement does not require universities to make public the membership* of *their ethics* committees *is* therefore obviously *wrong.*

15 The University, as referred to above, contends that the definition in the National Statement should not be interpreted so literally as to be taken to be referring to the actual names of committee members, but only extends to establishing that members are qualified to sit on the committee. Specifically, it submits:

> *Prior to the original decision being made,* the *members* of the SSHREC [Social Sciences Human Research Ethics Committee] were *consulted, as required by the RTI Act,* to *seek their views on whether their names should* be *disclosed. There were thirteen members* of the *committee who were against disclosure or expressed strong reservations, and* one *was in* favour of *disclosure.*
>
> *Members also* expressed *concern that if their names were disclosed, they may be lobbied or pressured outside the formal* process *by applicants seeking particular outcomes with regard* to *their application for ethics approval, or seeking to change a decision.*

16 The University also claims grounds for exemption given the members of the committee are volunteers and not salaried staff. It submits:

> *Further,* the *members* of the SSHREC *are volunteers, not employees or paid contractors. Participating in* the SSHREC *is a very time consuming and difficult role, involving many hours of reading and participation in meetings at which application for ethics approval are considered and decided upon. Without the goodwill* of these *volunteers,* the *University would* be *unable to* meet *the requirements* of the *National* Statement

and its obligation to ensure sound research practices are supported and continued.

The National Statement does not require *universities to make public* the *membership of their ethics committees. An information survey by this* office of *20 publically funded Australian universities indicates that 50% disclose* the *names of their ethics committee members and 50% do not. This is an indication that the issue is not necessarily clear cut and* other *institutions are evenly balance in terms of whether to disclose or not.*

Analysis

Section 36

17 Information is exempt information pursuant to s36 if its disclosure would involve the disclosure of the personal information of a person other than the person making an application under s13.

18 Section 5 of the Act defines personal information as *any information or opinion in any recorded format about an individual whose identity is apparent or reasonably ascertainable from the information or opinion, and who is alive or has not been dead for more than 25 years.*

19 The names of the members of the HREC are clearly personal information for the purposes of the Act. I am confident all of the individuals are currently alive.

20 As required by s36, I determine all the names are conditionally exempt as they consist of the personal information of another person other than the person making the application under s13. I now need to determine if the conditional exemption can be maintained following a proper application of the public interest test.

Public Interest Test

21 There are 25 matters in Schedule I of the Act that must be considered, at a minimum, when applying the public interest test. Schedule I is not exhaustive, however, and other matters may be considered in addition. The text of Schedule I is attached to this decision.

In Favour of Release

22 Having considered the matters contained in the schedule, I find matters (c), (d), (f), and (h) support release of the names of the committee members.

23 The release of the names would promote the public interest by better informing applicants to the HREC and others about its constitution and provide valuable context to its decisions. This would demonstrate that the members of the HREC are appropriately qualified to sit on the committee.

24 This in turn would expose the University to enhanced scrutiny both in relation to the decisions of the HREC and the appropriateness of its membership. This could only strengthen the dealings of a person with the University's HREC.

25 I have also considered matters in addition to the matters in Schedule I.

26 I note the University did some research into other jurisdictions. I have done so too. The table below is a list of I I state operated universities, and whether or not they publish the names of ethics committee members:

University	Membership Published
Australian National University	Yes
University of Melbourne	Yes
University of Sydney	Yes
University of New South Wales	Yes
University of Queensland	Yes
University of Western Australia	Yes
University of Technology Sydney	No definitive position
University of Wollongong	Yes
University of South Australia	Yes
University of New England	Yes
Royal Melbourne Institute of Technology	Yes

27 As can be seen, the state run universities of every state except Tasmania publish the names of the members of their ethics committees.

28 I have also considered the point raised by both parties in regard to section 5.1.28(g) of the National Statement, and the requirement that *membership* of *the HREC is made public.*

29 In an email to the applicant from the University and submitted as part of this review, the University claims:

> A *legitimate interpretation* of *`membership' in this context is that this clause* does *not mandate the publication* of *names of individuals, but requires that the composition of the committee in terms of the qualifications* of the *members be published or otherwise made known* to *researchers submitting proposals.*

30 This requires some consideration of the meaning of *membership.* The National Statement does not define it, in which case, it should be given its ordinary meaning.

31 The Macquarie Dictionary defines *members* as: *the state* of *being a member, as of society.* As to the definition of *member,* the same dictionary gives it as *each* of *the persons composing a* society, *party, community, or other body.* A *person* is defined as *a human being.*

32 Turning again to the words of section 5.1 .28(g), I am of the view that its reference to *membership* is a reference to the names of the individual persons who make up the relevant committee, in this instance the SSHREC, not just their qualifications — though these might also be included.

Matters in Favour of *Exemption*

33 I find matters (m) and (n) in Schedule I relevant.

34 There may be some substance to the University's submission that members may feel it will harm their interests if their names are released. It was claimed this could lead to direct petitioning of the SHHREC members, which may in turn create undue influence and pressure. This, it is claimed, could reasonably be expected to prejudice the University's ability to obtain similar information and support again in the future from volunteer members.

35 I do not accept the University's position, however, that information should be supressed under the Act on the basis that there is a chance that a student may inappropriately approach a committee member directly. If this is a real expectation or concern, the University should adopt a policy adequate to address it, and educate staff and students on that policy.

Preliminary Conclusion

36 For the reasons outlined above, I determine that the information is not exempt under s36 after consideration of the public interest test, and the names of the Social Sciences Human Research Ethics Committee — as constituted at the date his application for assessed disclosure was accepted by the University - should be released in full to the applicant.

Submissions to Preliminary Conclusion

37 The University made a submission to the preliminary decision released on 18 September 2017.

38 It drew attention to an error of semantics in that part of the decision concerning research undertaken of a set of universities, where I referred to state operated universities and state run universities. This was based on an incorrect assumption that because the name of a state appeared in the names of those universities that they are state operated. This is not, however the case. I apologise for the unintended oversight and for any confusion it might have caused.

39 The primary point in the further submission from UTAS related to the practice of some institutions publishing the names of their ethics committees' members while others do not, and the general question as to whether those names should be made public or kept confidential. Specifically, it submitted:

> The *University notes your research indicates that ten of the* eleven Universities you *researched do publish* the *names of ethics committee members.*

> *When the application was being assessed internally, the University was in a position to conduct a broader survey* of *twenty Australian universities.* Ten of *the twenty surveyed released* the *names of ethics committee members and* the *remaining ten did not.*
>
> *We submit to you that* the survey *of twenty universities is* evidence *that this issue is* not *clear cut and that no definitive position exists. It is also* relevant *that each of the universities will be regulated by* different Sate *based right to information and* freedom *of information regimes* therefore *making comparisons imperfect.*

40 The University also made a submission that due to changed circumstances in this matter, the public interest has been lessened significantly. It states:

> *The Chair and a number* of the *members* of *the Social Sciences Human Research Ethics* Committee have *changed since the application was* accepted. Also, the *applicant withdrew as a higher degree by research student at the University on 8 August 2017. The University submits these changed circumstances significantly lessen* the *public interest in the names being released* to *the applicant.*

Further Analysis

41 I accept the University's position that the different approaches adopted in different jurisdictions by different institutions across Australia means that what constitutes the best approach is not settled. The number of those institutions that publish and those that do not are, for all intents and purposes, the same; they are evenly split.

42 This uncertainty does not assist, but I am still obliged to do what the Act requires of me, that is: to consider the information; assess it according to the Act; and come to a final decision that is open and reasonable in all the circumstances, having particular regard to the purpose and objects of the Act.

43 As set out in my preliminary decision above, it is not disputed that the information at issue is the personal information of persons other than the applicant and, therefore, prime facie exempt pursuant to s36. The only issue is whether, on a proper and balanced consideration of the public interest test, the exemption should be maintained or the information released.

44 The only external guidance available would seem to be the *National Statement* of *Ethical Conduct in Human Research,* but there is even dissent as to how critical parts of that instrument should be interpreted. For the reasons outlined in paragraphs 28 to 32 above, however, it is my view that section 5.1.28(g), which stipulates that any institution which has a Human Research Ethics Committee must make public the membership of that committee, contemplates the publication of the names of the committee's individual members.

45 While the National Statement is a guideline, it is a clear expression of the views of The National Health and Medical Research Council, Australia's peak

funding body for medical research, and compliance with the National Statement is a prerequisite for receipt of NHMRC funding.

46 I do not agree with the University's submission that, due to changed circumstances, the public interest test is lessened on the basis the committee membership has changed since Mr Gourlay's application was submitted, or because he has ceased his higher degree. The issue is the broader question as to whether committee members names should be published or not as a general proposition, and is not confined to the identities of particular members of the committee from time to time. Indeed, the argument has only been put in the general sense and no submissions have been made or point taken in relation to the protection of the personal information of any particular, individual member.

47 For the reasons set out in my preliminary decision above under the heading, *Public Interest* Test, I maintain the release of the names of the committee members is, on balance, in the public interest.

48 Risk of inappropriate contact from any student engaging with the committee who has knowledge of the individual members should be one addressed directly with students, staff and committee members and dealt with as an internal matter accordingly.

Conclusion

49 I determine the names of the members of the Social Sciences Human Research Ethics Committee be released in full to Mr Gourlay.

50 I apologise to the parties for the inordinate delay in finalising this review.

Dated:

Richard December **2019**

Connock
OMBUDSMAN

SCHEDULE I - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

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

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

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

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference:** 0 1808-1 19

Names of Parties: Mandy Squires and Department of Primary Industries, Parks, Water, and the Environment (DPIPWE)

Draft reasons for decision: s48(l)(a)

Provisions Considered: s30, s37, s39

Background

In February 2018, a polo event was held at Barnbougle in northern Tasmania. After the event, polo ponies were transported to Devonport in two trailers to return to the mainland on the Spirit of Tasmania. Upon return to the mainland, it was discovered that all 16 ponies in one trailer had died at some point between being loaded in Devonport and arriving in Victoria. This was a matter of significant concern to the owner and members of the public, and quickly became a matter of media interest.

2 On 19 July 2018, Ms Mandy Squires, a journalist with NewsCorp, submitted an application for assessed disclosure to the Department, which was accepted on 20 July 2018. Ms Squires sought a large range of information held by the Department that related to its investigation into the death of the ponies. She requested

.

> *Any and all Department of Primary Industries, Parks, Water and Environment documents relating to the death of the polo ponies on the TT Line Spirit of Tasmania in January this year (20 18).*
>
> *Specifically, the report detailing the investigation to date into the horses' deaths, and any preliminary and/or final, findings, of this investigation.*
>
> *The results of the autopsies conducted by scientists/vets on the dead polo ponies.*
>
> *Any documents or emails/messciges received by the Department of Primary Industries, Parks, Water and Environment from TT Line, or representatives of TT Line, in relation to the deaths of the polo ponies.*
>
> *Any documents or emails/messages received by the Department of Primary Industries, Parks, Water and Environment from Charles Sturt University*

vets/scientists or representatives of CSU, *in relation to* the *deaths of the polo ponies.*

Any documents or emails/messages received by the Department of Primary Industries, Parks, Water and Environment from Victoria's Chief *Veterinary Officer and/or New South Wales' Chief Veterinary* Officer, *or their representatives, in relation* to the *deaths of the polo ponies.*

Any documents or emails/messages received by the Department of *Primary Industries, Parks, Water and Environment from Andrew Williams or representatives* of *Andrew Williams, in relation to the deaths* of the polo *ponies.*

Any documents or emails/messages received by the Department of Primary Industries, Parks, Water and Environment from the *RSPCA in relation to* the *deaths* of *the polo ponies.*

Any documents or emails/messages received by the Department of *Primary Industries, Parks, Water and Environment from Johnny Kahlbetzer, or representatives ofJohnny Kahlbetzer, in relation to the deaths of the polo ponies.*

Any documents or emails/messages received by the *Department* of *Primary Industries, Parks, Water and Environment from* the *Jemalong Polo Club, or representatives* of the *Jemalong Polo Club, in relation to* the *deaths* of the *polo ponies.*

Any documents relating to, or evidence showing any knowledge of *an insurance claim relating* to *the death* of *the ponies.*

3 On 10 August 2018, Dr John Whittington, the Department's Secretary and therefore its principal officer, released a decision to Ms Squires. Dr Whittington advised that the Department held an investigation folder in relation to the deaths, which contained 300 separate files. The investigation, it was said, was of *a breach or possible breach of* the *law which may result in court proceedings being instituted.*

4 Exemption was claimed in relation to all this information pursuant to s30(1)(a) of the Act on the basis that its disclosure would, or would be reasonably likely to prejudice the investigation of the breach or possible breach of the law.

5 Dr Whittington also advised that some of the information responsive to the request had been obtained from various third parties and that he considered that the exemptions contained in s37 for information relating to the business affairs of a third party, and s39 for information obtained in confidence were also applicable.

6 On 22 August 2018, Ms Squires asked for an external review of the Department's decision by this office. I accepted the request under s45(1)(a) on the basis that Ms Squires was in receipt of an original decision that had been made by the principal officer of the Department, it had been submitted within 20 working days of her receipt of that decision, and the fee had been waived under s 16(2)(c).

7 By letter dated 29 August 2018, my office requested the Department to provide a full copy of the information responsive to Ms Squires' application for assessed disclosure. No response was received and a follow up request was made by email on 14 September 2018.

8 On the same day, the Department replied by email, advising that there were *thousands* of *pages in the investigation file, which will require time to sort through and compile.* The Department also said that for various reasons, it needed clarification in relation to the scope of the request and asked if it was possible for my office to liaise with Ms Squires to narrow that scope.

9 This is concerning for two reasons. The first being that the Department said it would require time to *sort through and compile* the information responsive to the request, which would suggest that it had not done so before making its decision on the initial request. This in turn might suggest that the exemption had been claimed without assessing each item of information in order to determine whether it was actually exempt or not. If that were the case, I question how the Department could have made a fair, equitable, and robust decision on the application.

10 The second concern arises in relation to the request to narrow the scope of the application. It is unusual that an applicant would be asked to revise the scope of their application at the end stage of the review process. This normally occurs before a decision on a request is made, where the public authority is of the view that it does not have the resources to meet the amount of work involved in providing the information. If the Department was concerned that scope was an issue it should have engaged in negotiations with the applicant at the point that it accepted the original request.

11 Nonetheless, my office wrote to the applicant and put the Department's request to her. On 17 September 2018, Ms Squires agreed to revise her scope to include only:

> *I. Copies of all autopsy reports relating* to the *death* of *the* polo *ponies.*
>
> *2. Copies of any correspondence between* TT *Line/ Spirit* of *Tasmania (or* their representatives) *and Andrew Williams and/or John Kahlbetzer (or their representatives) from February I to current time.*
>
> *3. Any documents* or *emails or messages (correspondence) between the DPIPWE and the RSPCA in relation to the death* of *the polo ponies.*
>
> 1. The *DPIPWE* report *(preliminary* or *otherwise) into* the *death of the polo ponies.*

12 This reduced the amount of responsive information to 116 pages. The Department agreed to provide the information on a USB stick to my office on Friday, 5 October 2018 so the matter could be progressed. This arrangement was cancelled in person at the last minute by the Department, however, and no information was provided.

I3 On 9 October 2018, a third request for the Department to provide the information was sent. This took the form of a formal direction pursuant to s47(I)(q) of the Act and directed the production of the information in digital format.

14 On 29 October 2018, after having received no response from the Department, a fourth request was made to the Acting Secretary, Wes Ford for the information to be produced to this office, again by way of a direction under s47( )(q), by the close of business on 2 November. This direction also noted that failure to follow a direction from the Ombudsman may constitute an offence under s50(I).

15 The Acting Secretary phoned me that afternoon and provided an explanation as to why the information had not been provided. It seems that the matter had been referred to the Office of the Director of Public Prosecutions for the Director to decide whether or not charges should be laid and against whom, and the Department was still waiting on the Director's advice in this regard. While this explanation, on the face of it, appeared reasonable, it did not address the many weeks of ignoring requests or the lack of communication.

16 The Acting Secretary said that he needed to make some enquiries to determine when receipt of the Director's advice might be expected, and having done so, consider seeking an extension of time to comply with my direction. In the interim, I suggested that my Senior Investigation and Review Officer could attend the Department and review the information onsite. This was agreed to and the review occurred on 5 November 2018.

17 On 14 November 2018, after having again received no communication from the Department, I issued a final direction under s47( )(q) to produce the information. advised the Department that failure to comply with a third direction would, in my view, constitute an offence under s50(1) and would be referred to the Office of the Director of Public Prosecutions.

18 The Secretary responded by letter, also dated 14 November. In that letter, he said that Mr Ford had understood that the agreed access to the information by my officer met my direction pursuant to s47(I)(q) of the Act, and he sincerely apologised if there had been a misunderstanding. The Director gave his assurance that the Department understands the import of directions under the Act and advised that Mr Ford had acted in good faith on the understanding that the inspection of the digital file had provided "full and free access to the records" of the Agency. I accept the apology and the assurance, and that Mr Ford acted in good faith.

19 The Secretary agreed to provide the requested information in an electronic format, and on 15 November 2018, II weeks after the original request, it arrived and a substantive review has now been undertaken.

Issues for Determination

20 There are three issues for determination:

- Would the release of the information prejudice or be reasonably likely to prejudice the investigation of a breach or possible breach of the law, and therefore be exempt pursuant to s30(I)(a)?
- Would the release of some of the information reveal a trade secret or expose a third party to competitive disadvantage and therefore be exempt pursuant to s37?
- Was the information communicated in confidence and would its release impair the Department's ability to obtain similar information in the future and is therefore exempt pursuant to s39?

21 Exemption pursuant to s30 is not subject to the public interest test contained in s33, but exemptions pursuant to ss37 and 39 are. When determining whether or not it would be contrary to the public interest to release information, regard must be had to the matters set out in Schedule I. Copies of each of these provisions are attached to this report.

Submissions

22 Ms Squires submitted that the circumstances surrounding the death of animals on a vessel as frequently used as the Spirit of Tasmania was very much in the public interest. Specifically, she submitted:

> *I would argue that, contrary to the view put forward that the information is not in the public interest, any information so far gleaned by* the *DPIPWE relating to how* the *horses may have died is* very *much in the public interest, given thousands of Australians travel on the boat* every year, *many with animals.*

23 In its decision, the Department only provided reasons in relation to its decision to exempt information under s30. In this regard, it submitted:

> It *is imperative that parties to proceedings are able* to *provide, request and submit evidence in accordance with practices and procedures* of *courts and* the *rule of* evidence. *Publishing* evidence *through the* RTI *process* before *parties are able to argue its status through the court process should not be allowed.*
>
> *I need* to *be satisfied that the criteria `would or would be reasonably likely to prejudice' is fulfilled.* The *term requires more than the* mere *risk or mere possibility* of *prejudice. As* there is the *possibility that court proceedings may occur, any information disclosed relating to the reports on* the ponies *are far more likely than not to create* prejudice. The *disclosure* of *documents to an applicant before the parties involved are able to exercise their rights in court to argue against the disclosure of the documents as* evidence *would directly cause prejudice* to *any investigation or fair trial.*

> *I find there is a direct causal link* between *the disclosure of information requested and the prejudice that may be caused if* the *information was disclosed through* the RTI process.

24 In relation to the exemptions claimed under s37 and s39, the Department only offered the following:

> *In addition to section 30, some* of *the information was obtained from various third parties and I consider section 37 and section 39 are also applicable exemptions under the Act.*

Analysis

25 As noted in paragraph 9 above, I have some concerns that the Department might have reached its decision to claim information as exempt before it had assessed each item of information in order to determine whether it was actually exempt or not. Nonetheless, I will consider the information before me, having regard to the sections relied on by the Department.

26 The information at issue consists of:

- an undated DPIPWE report with appendices, claimed to be exempt in its entirety pursuant to all of ss30, 37 and 39 (pages I to 89);
- various information concerning the Spirit of Tasmania, claimed to be exempt pursuant to all of ss30, 37 and 39 (pages 90 to 104);
- various information from the owner of the ponies, again claimed to be exempt pursuant to all of ss30, 37 and 39 (pages 105 to 114); and
- information obtained from the Royal Society for the Prevention of Cruelty to animals also claimed to be exempt pursuant to all three provisions (pages 115 to 1 16).

Would the re/ease of *information prejudice or be reasonably likely* to *prejudice the enforcement of the law?*

27 For information to be exempt pursuant to s30(I)(a) as claimed by the Department, I must be satisfied that its disclosure under this Act would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law.

28 The first piece of information falling for consideration is the undated 89 page report and its appendices. That report is entitled *Polo Pony Transportation Incident 28-29th Jan 2018,* and was created by a Veterinary Officer with Biosecurity Tasmania, a unit of DPIPWE. It also contains information in relation to autopsies performed on some of the horses by the Veterinary Clinic Centre at Charles Sturt University.

29 I note that in the Author's Statement on the second page of the report, the author records their qualifications as follows:

> *I am an Inspector appointed under section 8 of the Animal Health Act 1995 and an* Officer *appointed under section* 13 of the *Animal Welfare* Act / *993. My* duties *involve animal health investigations, animal welfare investigations, and compliance where veterinary expertise is required, for both DPIPWE and* RSPCA.

and contains the following comment:

> *I acknowledge that I have read the Supreme Court of Tasmania* Expert *Opinion Evidence - Expert Evidence code* of *conduct and agree to be bound by it.*

30 This indicates that the report is not simply a report on a matter of interest but is one prepared by an expert for the purposes of providing expert evidence and opinion in an investigation, which may result in court proceedings. The investigation report has been prepared as a result of the investigation of a breach or possible breach of the provisions of the following legislation:

- *Animal Health Act 1995*
- *Animal Welfare* Act *1993,* and
- *Animal Welfare Regulations 2016.*

31 I am satisfied the information contained in the report is directly relevant to that investigation, but before determining whether the information is exempt or not, I must also give consideration as to whether its release would prejudice the investigation.

32 The word *prejudice* is not defined by the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary defines it as meaning *to affect disadvantageously or detrimentally.'*

33 The death of any animal that has likely experienced a period of suffering generates strong emotions in members of the public and others involved. The report under consideration is, as described above, expert evidence; it is a technical report on factors relating to the unfortunate death of the 16 ponies, which, if released, amongst other things could be anticipated to excite the emotions of the public and attract the attention of the media at large.

34 I am of the view that the release of this technical investigation report would be reasonably likely to prejudice the investigation into breaches or possible breaches of the Acts set out above. The premature release of this report, before the information it contains has been put before a court, could also prejudice the enforcement or proper administration of the law in a particular instance[2] or the fair trial of a person.[3]

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https://www.macquariedictionary.com.auffeatures/wordisearch/?word=prejudice&search word type=Di ctionary at 6

[2] Section 30(I)(a)(ii)

[3] Section 30(I)(a)(iii)

35 For the reasons set out above, I determine the 89 page report is exempt under

- s30(l)(a)(i), (ii) and (iii).

36 The second exemption claimed relates to pages 90 to 104. This is described on the Department's Decision Table as "Spirit of Tasmania information". It consists of an email between TT-Line and the Australian Marine Safety Authority (AMSA) which has various attachments that make up the bulk of the information at issue. It is clear that this information also forms part of the ongoing investigation. It contains inspection sheets from the Spirit of Tasmania; locations, consignments, and the contract for transport.

37 For the reasons set out above, I determine this information is exempt under s30(1)(a).

38 The third exemption claimed relates pages 105-114, described in the Decision Table as "Andrew Williams information". Mr Williams is the owner of the ponies.

39 The information contained in pages 105 to 114 consists of an exchange of correspondence between the Department and Mr Williams' legal adviser, Shane Ryan of Ryan Legal, and the emails to which they were attached. I have reviewed this correspondence and have concluded that none of this information is exempt under either ss30, 37 or 39.

40 I have reasons for coming to this conclusion, but cannot record them here without disclosing the contents of the various items of correspondence. I do not propose to do that yet, because I am of the view that there is at least the potential for the information to be exempt pursuant to s3I as information that would be privileged from production in legal proceedings on the ground of legal professional privilege. If there were any privilege attaching to the correspondence it would of course be Mr Williams', and he has not been given the opportunity to make any submissions as to the information's potentially exempt status.

41 As a preliminary matter, I therefore direct that the Department notify Mr Williams, through Mr Ryan, that I have determined that the information in the correspondence is not exempt for the reasons cited by the Department but that it might be on the basis that it is privileged, and invite submissions should Mr Williams wish to claim that it is. I further direct that the Department request that any submissions in this regard be delivered within 14 days of the date of the request.

42 Pages 110 and III consist of another letter from the Department to Mr Williams through Mr Ryan. This letter outlines some of the preliminary findings of the investigation and pre-empts the findings in the report considered above and for the same reasons as those pertaining to the report, I determine this letter —unlike the others referred to above — to be exempt under s30(I)(a).

43 The last piece of information which falls for consideration in relation to s30 is described on the Decision Table as "RSPCA information" and is found on pages 115 and 116. This information is two emails, both from the Department to the RSPCA to notify and keep the RSPCA informed of the investigation as it

progressed. There is no information in these emails that would prejudice the investigation it is merely keeping a relevant body up to date. I determine this information is not exempt under s30.

Would the release of information reveal a trade secret or expose *a third party to competitive disadvantage?*

44 Section 37 has been relied on to exempt the report, the Spirit of Tasmania information, and the Andrew Williams information. The only information not already found to be exempt pursuant to s30 for which this exemption is claimed is at pages 105 to 109 and 112 to 114 — the correspondence between the Department and Ryan Legal and the emails by which it was conveyed.

45 While I am satisfied that the information is not exempt on the basis claimed by the Department, for the reasons set out in paragraph 41 above, I will not comment further in this regard until such time as Mr Williams has had the opportunity to make submissions.

Was the information obtained in confidence *and would its release impair the Department's ability to obtain similar information in* the future?

46 Exemption pursuant to s39 has been claimed for all four categories of information set out on the Department's Decision Table. As the first two categories from pages I to 104, and pages 110 and I I 1 of the third category have already been determined to be exempt under s30(l)(a), I do not need to consider them here.

47 For information to be exempt under s39, I must be satisfied that: it is information that, if disclosed, would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister; and the disclosure of that information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

48 As with s37, the Department has simply cited this section to claim exemption but has provided no reasons for its decision.

49 The remaining information in the third category for consideration is the Andrew Williams information. Again, while I am satisfied that the information is not exempt on the basis claimed by the Department, for the reasons set out in paragraph 41 above, I will not comment further in this regard until such time as Mr Williams has had the opportunity to make submissions.

50 The last pieces of information to be considered are on pages II5 and 116. They are emails that were sent by the Department to the RSPCA, a non-government body, and therefore do not meet the requirements of s39(I) in that they were not information communicated in confidence to a public authority.

51 Accordingly, I determine the information on pages 115 and 116 is not exempt under s39.

Preliminary Conclusion

52 Based on the reasons set out above, 1 determine the following:

- Pages I to 89 are exempt in full under s30(1)(a).
- Pages 90 to 104 are exempt in full under s30(I)(a).
- Pages 110 and **III** are exempt in full under s30(1)(a).

Submissions to Preliminary Conclusion

53 Pursuant to the direction in paragraph 41 above, the Department wrote to Mr Williams care of Ryan Legal on 22 January 2019 notifying him of the decision and asking for any response by 5 February 2019. No response was forthcoming by that date, and the Department forwarded a follow up email to Ryan Legal. No response was received to that either and the Department notified me accordingly by letter dated 7 February 2019 forwarded under cover of an email of that date.

54 The Department also confirmed in its letter that it did not wish to make any further submission of its own.

55 In the absence of any submissions to the contrary from Mr Williams or his legal counsel, **I** confirm my decision contained in paragraph 39 above that none of the information on pages **105** to **114** is exempt under any of ss30, 37 or 39. My reasons follow.

Further Analysis

56 Pages 105 and 106 consist of a letter dated 7 March 2018 from the Department to Mr Shane Ryan, legal counsel for Mr Williams requesting that Mr Williams be made available to be interviewed, and a request to inspect the truck and trailer used to transport the ponies. I am not satisfied that release of the letter would prejudice the investigation. It is only to be expected that the owner of the animals in question would be contacted as part of the investigative process.

57 I determine the letter at pages **I05** and 106 is not exempt under s30. I note this letter has also been claimed to be exempt pursuant to ss37 and 39 and **I** will consider the application of those provisions separately below.

58 Page 107 is a letter in reply from Mr Ryan dated 9 March 2018 seeking clarification in relation to Tasmania's jurisdiction to require an interstate person to comply with Tasmanian law. For the same reasons as the request, I am of the view that this information would not prejudice the investigation and is not exempt under s30.

59 Page 108 is another letter from the Department to Mr Ryan, dated 29 March 2018, asking whether he has instructions to accept process of service on behalf of Mr Williams and whether he also acts for Willow Polo Pty Ltd or any other organisation associated with Mr Williams.

60 The information on page **109** is a further letter from the Department to Mr Ryan, dated 22 May 2018, again seeking an interview with Mr Williams. As indicated above, these are simple requests and do not constitute information that would prejudice the investigation. I determine the information is not exempt pursuant to s30.

61 Pages 112 to 114 are simple emails that primarily convey correspondence between the Department and Mr Williams' lawyer by way of attachments. None of the information here would prejudice the investigation of a breach or possible breach of the law and I determine it is not exempt under s30.

62 As noted, the letter at pages 105 to 106 is also claimed to be exempt pursuant to ss37 and 39.

63 In order for the information contained in the letter to be exempt pursuant to s37, I must be satisfied that its disclosure would disclose information related to business affairs acquired by a public authority or Minister from a third party, and the information relates to trade secrets, or its disclosure would be likely to expose the third party to competitive disadvantage.

64 As noted at 24 above, the Department claimed exemption by reference to s37 but did not provide any reasons to support this. The letter to Mr Williams sets out the legislative basis for the Department's investigation and seeks to arrange a time to interview Mr Williams and inspect his horse transports as part of that investigation. It contains nothing in relation to Mr Williams' business affairs and is not exempt pursuant to s37.

65 As noted, information is exempt pursuant to s39 if its disclosure would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and the information would be exempt if it were generated by a public authority or Minister, or its disclosure would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

66 The letter contains no information communicated to the Department by any other person, confidentially or otherwise, and it is therefore not exempt pursuant to s39.

Conclusion

67 Based on the reasons set out above, I determine the following:

- Pages I to 89 are exempt in full under s30(1)(a).
- Pages 90 to 104 are exempt in full under s30(I)(a).
- Pages 105 to 109 are not exempt and should be released in full.
- Pages 110 and 11 I are exempt in full under s30(1)(a).
- Pages 112 to 116 are not exempt and should be released in full.

Date
March 2019

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OMBUDSMAN

Section 30 — Information relating to enforcement of the law

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

(a) prejudice —

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

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

(iii) the fair trial of a person; or

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

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

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

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

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

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

(2) Subsection (I) includes information that —

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

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

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

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

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

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

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

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

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

Section 33 — Public interest test

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

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

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

Section 37 — Information relating to business affairs of third party

(I) 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 39 — Information obtained in confidence

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

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

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

(2) Subsection (I) does not include information that —

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

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

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

SCHEDULE I - Matters Relevant to Assessment of Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

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

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

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: O1409-140**

Names of Parties: Mr Michael Atkin and Forestry Tasmania

Provisions considered: sI7, s27, s33, s35, Schedule

Decision: issued under s48(1)(a)

Background

I An application for assessed disclosure under the *Right* to *Information* Act *2009* (the Act) was lodged on 27 June 2014 by Mr Michael Atkin, a reporter with ABC Tasmania (the Applicant) to Forestry Tasmania.

2 The application sought:

> *Any correspondence including emails and meeting minutes from March IS, 2014 until present on the* subject of *state government funding, staffing levels,* the *ongoing financial viability* of *Forestry Tasmania and* FSC *certification between DIER, Minister Harris and/or Forestry Industries Association of Tasmania including from Terry Edwards, the CPSU union, the AWU union and Ta Anne including from Evan* Rolley.
>
> *Any internal reports, meeting minutes and emails relating to the reduction in state government funding* from *March 16, 2014 until present.*

3 Forestry Tasmania released its original decision on 22 August 2014 and identified several emails and letters, as well as an Incoming Government Brief (IGB) as being responsive to the request. The decision was made by Mr James Shevlin, Executive General Manager and delegated officer.

4 Forestry Tasmania released some information but claimed exemption under s35 (internal deliberative information) for the majority of the information in the IGB, and s38 (information relating to the business affairs of a public authority) for the financial forecasts it contains. Both ss35 and 38 are subject to the public interest test contained in s33.

5 The Applicant requested an internal review on 25 August 2014.

6 Forestry Tasmania released its internal review decision on 16 September 2014. This decision was made by Mr Steve Whitely, Forestry's Chief Executive Officer and therefore its Principal Officer.

7 The internal review decision upheld the s35 exemption. It overturned the use of s38 and instead relied on s17 (deferment of provision of information) for

the forecast financial information on the basis it would soon become public as factual information, not deliberative forecast, in Forestry Tasmania's Stewardship Report 2013-14.

8 The internal review decision was made by a different officer to the original decision maker, which satisfies s43(4)(b).

9 The Applicant's request for internal review went to two issues. He claimed Forestry Tasmania did not duly consider the public interest test when exempting the IGB under s35 or s38. He also claimed an issue with sufficiency of search relating to the volume of emails and other correspondence found to be within scope. The Applicant also claimed there to be a precedent of incoming government briefs usually being made public to the media.

10 Forestry Tasmania reaffirmed its decision to exempt the majority of the IGB under s35. In neither the original nor internal review decisions, however, did it address the public interest test.

I I As noted, the financial forecasts previously claimed to be exempt under s38 have now been claimed as exempt under s I 7 on the basis they would be released publicly in the near future under Forestry Tasmania's Stewardship Report 2013-14.

12 A second search was conducted for material that may have been missed in the original gathering of information. Forestry Tasmania affirmed all relevant material was included in the original scope.

13 Forestry Tasmania has not relied on s27 (internal briefing information of a Minister). I am of the view, however, that it would be prudent to consider this section as potentially relevant to the material in the IGB.

Issues for Determination

14 I must first determine if the search by Forestry Tasmania for information responsive to the application has been sufficient. I must also determine if s27 applies more appropriately, or if s35 is the correct section to use. If s35 applies, I must consider how the information relates to the public interest. I must also determine if s17 can be relied on in relation to the forecast financial information in the IGB.

15 Due to the regrettable duration of time it has taken for form a view on this matter, any determination made that identifies purely factual information for release has subsequently been made public through normal processes of information reporting. Accordingly, those pieces of information are open to refusal under s I 2(3)(c) by Forestry Tasmania. This is an important distinction: the information is not exempt because it is information provided to a Minister or because it forms an incoming government brief, but its production may be refused because it is already publicly available.

Relevant legislation

16 Section 17 provides:

(I) A *public authority or a Minister may defer providing information if—*

(a) a decision has been made before receipt *of the application for assessed disclosure* of *information* that *the information will be disclosed as a required disclosure or routine disclosure of information within a period* of *time specified by* the *public authority or Minister but not exceeding 12 months from* the date of *the application;* or

(b) the *information was prepared for presentation* to *Parliament, or has been designated by the responsible Minister as appropriate* for *presentation* to *Parliament, but is yet to* be *presented.*

(2) If the *provision* of *information is* deferred, *the public authority* or *Minister must, when informing the applicant of the reason for* the *deferral, indicate as far as practicable, when* the *information will* be *published* or presented.

(3) A *public authority or a Minister has no power under subsection (1)(b) to defer providing information when* more *than 15 sitting-days* of *either House* of *Parliament have passed since the information was* presented to *the Minister for the purpose* of *being presented to Parliament.*

17 Section 27 provides:

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

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

(b) a record of *consultations or deliberation 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 I ceases to apply after the end *of the period* of *10 years commencing on the date of the creation* of the *information referred* to *in that subsection.*

(3) Subsection I does *not include information solely because it —*

(a) was submitted to a Minister for the *purposes of a briefing; or*

(b) is proposed to be submitted to a Minister for the purposes of *a briefing —*

if the *information was not brought into existence for submission to a Minister for the purposes* of *a briefing.*

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

(5) Nothing in this section prevents *a Minister from voluntarily disclosing information that is otherwise exempt information.*

18 Section 33 provides:

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

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

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

19 Section 35 provides:

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

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

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

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

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

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

(3) Subsection (/) does not include —

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

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

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

Submissions and Evidence

20 The following relevant documentary evidence is before me:

- the undated application for assessed disclosure (later identified as having been made 27 June 2014);
- the original decision by Mr James Shevlin dated 22 August 2014;
- the application for internal review dated 25 August 2014;
- the internal review decision dated 16 September 2014;
- the application for external review dated 17 September 2014;
- submissions from the Applicant and Forestry Tasmania; and
- an unredacted copy of the Incoming Government Brief.

21 The Applicant claims the information contained in the IGB should be released as a matter of public interest. Specifically, he submits:

> *Forestry Tasmania is a* GBE *of significant public interest with government funding and policy directly impacting* its *financial viability. Because of this the information should be released. Incoming Government* Briefs *have been regularly* re/eased to *the media on a state and federal basis and this case should be no* different.
>
> Re/ease of *this information would not alter incoming Ministers being properly briefed about their portfolio, and it should not be assumed that the* release of *information "would hinder* the *working relationship* between *the GBE and* the *government* of the day", *there is no* evidence to *support this assumption.*

22 Further, the Applicant submits:

> *An internal review failed to concede any ground on the initial decision which was overly cautious and I* believe *aimed at protecting Forestry Tasmania and not at improving public accountability, discussion and transparency around taxpayer assistance support.*
>
> *The incoming brief should* be re/eased *in full as it will provide the public with an understanding about what the government was told about Forestry Tasmania before it embarked on a major change of policy for the industry that had significant ramifications for Forestry Tasmania.*

23 Forestry Tasmania maintains its decision to hold the IGB exempt. In its submission, it said:

> We believe *that the IGB was written specifically* for *the information* of the *incoming government* to *provide a clear understanding of the workings and issues that surround our business. The release* of *this information may cause* future /B [issues briefings] to *contain purely factual information that does not address any sensitive or contentious issues that incoming government need to be aware* of

Analysis

24 The Applicant asserted that a sufficient search had not been conducted, and this formed part of the request on internal review. The internal review delegate conducted a second search and confirmed the information in the original scope was all the relevant information held. In the absence of any evidence to the contrary, I have no reason to doubt the information found is the only relevant material held by Forestry Tasmania.

25 **I** am satisfied Forestry Tasmania has provided all relevant information responsive to the request. That being the case, I will only focus on the IGB from hereon.

26 As the title suggests, the IGB was created for the purposes of briefing a new Minister in an incoming government.

27 I am satisfied that the material was generated by an officer of a public authority for the sole purpose of briefing the new Minister as required by s35, not as part of any internal deliberative process.

28 I determine that the appropriate provision which falls to be considered, however, is s27 rather than s35.

29 In its internal review decision, Forestry Tasmania also relied on sI7 to refuse the financial forecast information on the basis that it will be released once final figures have been consolidated, assessed, and audited.

30 Section 17 allows for the provision of information to be deferred in certain circumstances, including where it is intended to be presented to parliament but is yet to be so presented. According to Forestry Tasmania's statement, it did not intend to release the financial forecast information in the IGB in its current form, rather it intended to release a very similar albeit purely factual (and audited) version in its stewardship report.

31 As the information was not intended to be released in the way it existed in the IGB, s17 does not apply. I will therefore consider this information below with the rest of the IGB and any potential application of s27.

Section 27

Incoming Government Brief

32 The IGB is paginated, with numbered titles, and I will refer to each section below.

33 For the requirements of s27 to be met and an exemption upheld, I must be satisfied that the information was created by an officer of a public authority and contains opinion, advice, or a recommendation for the purpose of briefing a Minister in connection with his or her parliamentary duties. Additionally, if these criteria are met, I must also be satisfied the information is not purely factual information.

34 Section 27(2) provides that the exemption does not apply to information that was created 10 years or more ago. On the evidence before me, I am satisfied the information is not older than I 0 years.

35 Section 27(3) provides that any exemption under s27(I) is not to include information solely because it was submitted to the Minister for the purpose of a briefing (s27(3)(a)), or is proposed to be submitted to a Minister for the purposes of a briefing (s27(3)(b)) if the information was not brought into existence for submission to the Minister for the purpose of a briefing.

36 Essentially, if the document was created for departmental purposes and then a decision was made to send it to the Minister on the basis that it might be of interest or useful to him or her, s27(l) would not apply by virtue of s27(3). If the document was bought into existence solely for the purposes of briefing a Minister, however, s27(I) would apply.

37 I am satisfied, not least from the title of the briefing, but also the material inside it, that the IGB was created for the sole purpose of briefing a Minister. This satisfies s27(3).

38 As to s27(4) and purely factual information, I am satisfied the entire document was created by an officer of a public authority and contains opinion, advice or recommendations to a Minister in relation to that Minister's official duties. What is less clear is whether any parts contain purely factual information.

39 In Re *Waterford and the Treasurer* of *the Commonwealth* of *Australia (No* 1)[1], the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely'. Therefore the material must be "factual" in fairly unambiguous terms. To be excluded from exemption the material must not be inextricably bound up with a decision-maker's deliberative processes[2].

40 This means that for 'factual information' to be exempt, it must be capable of standing alone. The material must not be so closely linked or intertwined with the internal briefing process so as to form part of it.

41 Thus, even though a document's contents may be primarily factual, this does not of itself mean that the document falls outside the deliberative processes exemption.

42 I have also considered whether there is precedent for incoming government briefs being made available to the media. I find no sufficient precedent that would lend weight to the release of any incoming government briefs in Tasmania as a matter of course without due consideration being given to the particular context of a specific document. In fact, the evidence available to me would suggest that such briefings are not ordinarily released.

[1] (1984) 6 ALN N347 at N349

[2] See Re *Evans and Ministry for the Arts (1986)* I VAR 315

Factual Information in* the *1GB

Title *Page*

43 I determine the title page contains only purely factual information and should be released in full.

Chapters I to 3

44 Chapters I to 3 are entitled Forestry *Tasmania's Functions, Current Ministerial Charter,* and *Forestry Tasmania's Vision, Mission and Corporate Objectives.*

45 I determine that these chapters contain purely factual information and should be released in full. This information is a mixture of public information available on Forestry Tasmania's website and its stewardship reports.

46 While the corporate objects at chapter 3.3 are not in the Stewardship Report 2013-14, they are included in subsequent stewardship reports. This would seem to indicate that the information is not deliberative but a purely factual statement of Forestry's objectives which it publicly declares.

Chapter 4 — *Forestry Tasmania's Key Activities*

47 I determine that this chapter contains purely factual information and should be released in full. It consists of a list of the key activities then carried out by Forestry Tasmania and is publicly available in the Stewardship Report 2013-14.

Chapter 5 — Recent *changes to Forestry Tasmania's Operating Environment*

48 I determine that the first paragraph and its accompanying four dot points contain purely factual information and should be released in full. It is a statement of fact based on events that had already occurred as a result of the introduction of the *Tasmanian* Forest *Agreement Act 20 /* 3.[3]

49 The second paragraph and its accompanying four dot points do not contain purely factual information. I determine this information to be exempt under s27.

50 While some of the remaining information appears factual, it is not sufficiently separate from statements of opinion, advice, or recommendation to constitute purely factual information for the purposes of the Act. This information contains information about other changes made in Forestry Tasmania.

Chapter 6

51 I determine that this chapter does not contain purely factual information. This chapter, while containing some factual information, is mostly deliberative. The purely factual information that could be separated from the deliberative information can be publicly found in Forestry Tasmania's Stewardship Report 2013-14.

52 I determine that this chapter is exempt under s27.

[3] Since repealed.

Chapter 7

53 I determine that none of Chapter 7 is purely factual information. While there are elements that are factual, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

54 While much of the information in this chapter leads with factual information, this is done for the purpose of then providing an opinion, advice, or recommendation.

55 I determine this chapter is exempt under s27.

Chapter 8 — Markets

56 I determine that the first paragraph and its accompanying two dot points and the second paragraph contain purely factual information and should be released.

57 This information was factual at the time it was created: it is market based information that is independent from the remaining information.

58 Paragraph three and its accompanying four dot points, as well as paragraphs four and five, do not contain purely factual information. While this information does include some facts, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

59 I determine paragraphs three (including dot points) to five of this chapter are exempt under s27.

Chapter 8 - Second Sub-heading

60 The paragraph under this heading does not contain purely factual information. While this information does provide some facts, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information. It refers to some historic data and current activities, then forecasts business activity that could occur in the future.

61 I determine the paragraph under this heading is exempt under s27.

Chapter 8 — Hardlam

62 I determine that paragraphs one and two under this heading contain purely factual information and should be released. This information offers purely factual information about what Hardlam wood is and established international growth figures.

63 I determine that paragraph three does not contain purely factual information. While this information does include some facts, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

64 The information in paragraph three is more specific to the activities and actions of Forestry Tasmania and deliberative in nature. I determine this to be exempt information under s27.

Chapter 8 - Biomass

65 I determine that the information in paragraph one under this heading does contain purely factual information and should be released in full. This information discusses research that has been completed on the use of biomass. The IGB goes as far as providing an internet link to Forestry Tasmania's website where the report is publicly available.

66 I determine paragraphs two to four do not contain purely factual information. While this information includes some facts, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

67 I determine that this information is exempt under s27.

Chapter 8.3 — Forest Stewardship Council (FSC) certification

68 I determine paragraphs one, two, and five under this heading (including the dot points in paragraph five) do contain purely factual information and should be released in full. This information contains independent facts on the stewardship process as determined by the Tasmanian Forest Agreement Act and subsequent policy decisions announced publicly.

69 I determine that paragraphs three and four do not contain purely factual information. While the information they do contain includes some facts, these are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

70 I determine these two paragraphs to be exempt under s27.

Chapter 8 — Progress to date

71 I determine paragraphs two and three do contain purely factual information and should be released in full. This is standard factual information that is not linked to any deliberations.

72 I determine paragraph one and four under this section do not contain purely factual information. While this information does provide some facts, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

73 I determine it is exempt under s27.

Chapters 9.1 and 9.2

74 I determine these two parts do not contain purely factual information. The information is financial information and provides for estimated figures based on the part financial year at that time, as well as deliberative analysis of Forestry Tasmania's financial position.

75 The financial information in this section was released in Forestry's Stewardship Report 2013-14 after being fully consolidated and audited. The finalised financial information relating to Forestry Tasmania's finances is currently publicly available via its website.

76 Because of the deliberative nature of the information in these two parts, I determine the information to be exempt under s27.

Chapter 9.3

77 I note the information in paragraph one has already been released to the Applicant by way of correspondence as part of the original decision. Despite that, I recognise the information is not purely factual and I determine it could be exempt under s27.

78 The second paragraph and table in this part does not contain purely factual information. It includes forecasts and estimates. I note, however, that it is included with the full financial year audited information in the 2013-14 Stewardship Report. This report is publicly available via Forestry Tasmania's website. Please note the name of this chapter has been deidentified to avoid release of exempt information.

79 The information contained in Chapter 9.3 is forecast financial information, and I determine it to be exempt under s27.

Chapters 10, I I, 12, and 1.3

80 I determine these chapters do not contain purely factual information. While some facts are included, they are not sufficiently separate from opinion, advice, or recommendation to constitute purely factual information.

81 This information is drawn from many areas for the purpose of providing opinion and advice to the new Minister. The information is broadly deliberative and does not exist independently as purely factual information.

82 I determine that the information in chapters 10 to 13 is exempt under s27.

Chapter 14 — Corporate Governance

83 I determine that the information in chapter 14 is purely factual information and should be released in full, it relates to corporate governance and is information publicly available via Forestry Tasmania's website and stewardship reports.

84 As it is purely factual information, I determine Chapter 14 should be released in full.

Preliminary Decision

85 I determine the title page, chapters I to 4, and 14 are to be released in full.

86 I determine chapters 6, 7, 9, and 10 to 13 are exempt in full under s27(I)(a).

87 I determine chapters 5 and 8, are to be exempt in part under s27. Please see Analysis above from paragraph 44 for more information.

Further Submissions and Analysis

88 A preliminary decision was sent to Forestry Tasmania on 30 January 2017, and further submissions were sought.

89 In a letter dated 10 March 2017 from Mr Whitely, Forestry submitted that the entire IGB should remain exempt. Specifically it was asserted:

> The *purpose* of Forestry *Tasmania's Incoming Government* Brief *(IGB), dated March 2014, was to provide frank and candid advice to assist* the *incoming government with:*
>
> *I. Their administrative transition* to *government,*
>
> *2. Assumption* of *ministerial responsibility, and*
>
> *3. Establishment of a strong working relationship with Forestry Tasmania.*

90 Further, it was submitted:

> *I contend that the `factual' information is so embedded in* the `deliberative' content of *the* IGB *that it is impractical to produce an edited document containing only* the former. The process of *determining what `factual' information was included was a part* of *the `deliberative' process. In* some *cases, the mere release of titles would provide sufficient signals as to disclose* the *sensitive nature of certain topics.* The *removal* of *`deliberative' material from the IGB would render the document meaningless.*
>
> *I also draw your attention to the decision* of *Professor McMillian in Crowe and Department of Treasury (2013) which was to affirm* the *decision* of *the Department of Treasury of 25 March 2011 to* refuse access to the pages of the *Treasury* ` Blue Book' *(ostensibly* the *same as an* IGB) on *the basis that its disclosure would, on balance, be contrary to the public* interest [under *Freedom of Information Act 1982* (Cth)].

91 The exemption relied on by the Department of Treasury was s47C of the Freedom of *Information Act 1982* (Cth). That section provides for the exemption of deliberative material related to the functions of an agency, Minister, or the Government of the Commonwealth. Like s27 of the Right to Information Act, s47C(2)(b) does not exempt purely factual information.

92 On the same day as he delivered his decision in *Crowe*[4], Professor McMillan also delivered his decision in the matter of *Parnell & Dreyfus and Attorney-General's Department.'*

93 In that matter, Professor McMillan varied two access refusal decisions of the Attorney-General's Department under the Freedom of Information Act in relation to an IGB prepared for the Attorney, and substituted his decision refusing access to some parts of the document sought and granting access to others.

94 The decision in Crowe was referred to by the Commissioner on several occasions, and he applied the same reasoning in reaching his decision in the

[2014] AICmr 72
[5] [2014] AICmr 71

second case. He did note at paragraph 29, however, two important differences:

- *Crowe concerned a decision not to* re/ease *an* IGB *prepared for a party that did not form government, whereas the current matter concerns a brief prepared for a party that did* form *government*
- the *decision under review in Crowe related to only a few pages of* the brief *whereas* the *current matter relates to the entire brief*

95 The Commissioner continued at paragraph 3 I:

> As to *the first* point *of difference, my decision in Crowe was directly based on four considerations that, as I noted at 192], `are specific to the confidential status* of the *brief prepared for a party that did not form government'. The unifying theme of* those *four considerations was that* the *brief had never* been *provided to* the *party for whom it was prepared, and to release it publicly would be unfair to that party, contrary to the conventions* of *parliamentary government and could complicate relations* between *the department that prepared* the *brief and* the *Ministers who have formed government.*

And at paragraph 34:

> As to the *second point* of difference, *the application of an exemption provision should* be *considered by looking first at the contents of* the *document under review, rather than at the entire document as though it had a single or dominating characteristic. It is relevant that the document under review is an IGB and was prepared as a single and composite document,* but the *FOI Act does not accord any special treatment to IGBs.*

96 The IGB in *Parnell* was divided into two parts: the Strategic Brief and the Information Brief. While the Strategic Brief contained a large amount of factual material, the Commissioner was of the view that that material was integral to the deliberative content and purpose of the brief. He found, therefore, that the Strategic Brief did qualify for exemption.

97 In the case of the Information Brief, however, he found to the contrary. It too contained some deliberative material as well as factual information, but the Commissioner found that the latter did not *relate* to opinion or advice as required by the Commonwealth legislation, and he did not regard the deliberative and non-deliberative information as being interwoven and impracticable to separate.'

98 In my view, the decision in *Parnell* is more applicable to this application than that in *Crowe.*

99 I acknowledge Forestry Tasmania's position that the purpose of its March 2014 IGB was to provide frank and candid advice. I do not wish to do anything to

[6] Supra at paragraph 45

hinder that standard function of any government agency. A balance must be struck, however, between the ongoing role of an agency to provide frank and honest advice in its day-to-day obligations to government and fulfilling its obligations under the Act.

100 I do not agree that the factual information in this instance is *so embedded in the `deliberative'* content that it cannot be extricated. I am of the view that the factual information is capable of standing alone as purely factual information.

101 I accept Forestry Tasmania's position, however, that the release of even the titles of those chapters that have been identified as exempt could be indicative of the exempt information they contain. For that reason, I have removed reference to those titles in the body of this decision. The titles of chapters that I have determined not to be exempt in full or part, are to be released.

102 I take Forestry Tasmania's point, however, that the purely factual information remaining for release is already publicly available in other documents such as its website and Stewardship Reports. Forestry Tasmania claims there is no valuable information that has been identified for release beyond that which is already public accessible.

103 This does not mean that information is exempt, but it does mean that Forestry Tasmania may refuse the application pursuant to s12(3)(c). This an important distinction: the information is not exempt because it is information provided to a Minister or because it forms an incoming government brief, but its production may be refused because it is already publicly available.

Conclusion

104 I determine the title page, chapters I to 4, and 14 are to be exempt under s **I** 2(3)(c)(ii).

105 I determine chapters 6, 7, 9, and 10 to 13 are exempt in full under s27(I)(a).

106 I determine chapters 5 and 8, are to be exempt in part under s27 and s I 2(3)(c)(ii).

Dated: 17 October 2018

Rich and Connock
OMBUDSMAN

OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference: O1504-155**

Names of Parties: Mr Michael Atkin and Tasmania Police

Reasons for decision: s48(I)(a)

Provisions considered: s26, s27, s30

Background

On 12 February 2015, Mr Michael Atkin, a journalist with the ABC, submitted an application for assessed disclosure under the *Right to Information* Act *2009* (the Act) to Tasmania Police. The application related to theft and trafficking of firearms, the firearm registry, firearms inspections, and amendments to the *Firearms Act 1996.*

2 Specifically, the Applicant sought:

> *Any correspondence including emails, letters and* offence *reports from* / December *2014* to *present on the subject of firearm theft, the stolen gun trade including gun trafficking and the integrity and use* of *the firearm registry.*
>
> [From I March 2014 to present]
>
> > *Any departmental or externally commissioned reports, meeting minutes, investigations and changes in procedures in relation* to *firearms inspections conducted by police.*
> >
> > *Any departmental or externally commissioned reports, including meeting minutes and investigations in relation to firearm theft and the stolen gun trade including gun trafficking.*
> >
> > *Any advice related to proposals to amend the Firearms* Act.

3 On 12 March 2015, Sergeant Rob Reardon, a delegated officer of the Commissioner, released a decision to the applicant. The decision referred to 289 pages of information responsive to the request of which 106 were released to the applicant in part or in full. The information not released was claimed as exempt under s27, s30, s35, and s36.

4 On 23 March 2015, the applicant requested an internal review of the decision pursuant to s43. The Applicant said he was mostly satisfied with the decision, with the exception of some exemptions claimed under s27 and s30.

5 On 17 April 2015, Inspector Stephen Burk, a second delegated officer, released the decision on internal review to the applicant. The internal review decision came to the same conclusions as the original decision.

6 On 24 April 2015, the applicant submitted an application to me for external review claiming the internal review had not addressed his concerns, and asserting that Tasmania Police had adopted a *generalised use* of s30 to withhold information. The applicant sought a review of all exemptions claimed by Tasmania Police.

Issues for Determination

7 In an email dated 22 April 2016, the Applicant limited the scope of his external review to those exemptions applied by Tasmania Police pursuant to s27 (internal briefing information of a Minister) and s30 (information relating to the enforcement of the law). This excluded from review the exemptions applied under s35 (internal deliberative information) and s36 (personal information of a person).

8 I must determine if the information claimed as exempt by Tasmania Police is eligible for exemption under s27 and s30.

9 If s30 is found to apply to any of the information at issue, I must also determine if it is the sort of information referred to in s30(2) and therefore subject to a public interest test. The information with which s30(2) is concerned falls into two broad categories: information relating to certain specified operational and methodological matters; and information that reveals that a law enforcement investigation has exceeded a limit imposed by law. The exemption applies to such information if its release would be contrary to the public interest.

10 This is not to be confused with the public interest test contained in s33. That test only applies when any of the exemptions in Division 2 of Part 3 are claimed, which do not include s30. Like s33, however, ss30(3) and (4) refer to the same matters in Schedule I which must be taken into account when assessing the public interest and those in Schedule 2 that are irrelevant.

Relevant legislation

II Section 26 provides:

> *(I) Information is exempt information if it is* contained *in* —
>
> (a) the official *record* of *a deliberation or decision of* the *Cabinet; or*
>
> *(c) a record proposed by a Minister for the purpose* of *being submitted to* the *Cabinet for consideration; or*
>
> *(d) 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.*

(2) Subsection (I) 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 so/e/y *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.*

12 Section 27 provides:

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

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

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

in the course of *or for the purpose of providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the* Government *and in connection with* the *Minister's parliamentary duty.*

(2) Subsection (1) ceases to *apply after the end of* the *period of 10 years commencing on the date of the creation of the information referred to in that subsection.*

(3) Subsection (1) does not include information solely because it —

(a) *was submitted to a Minister* for *the purposes of a briefing; or*

(b) *is* proposed to be *submitted to a Minister for* the *purposes of a briefing —*

if the information was not brought into existence for submission to a Minister for the purposes of *a briefing.*

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

(5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

13 Section 30 provides:

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

(a) *prejudice*

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

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

(iii) the *fair trial* of *a person; or*

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

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

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

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

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

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

(2) Subsection (I) includes information that —

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

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

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

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

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

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

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

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

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

Submissions

14 On 23 **March 2015, the applicant claimed the public** interest test had been incorrectly applied and should favour release of information claimed as exempt by Tasmania Police. Specifically, he asserted:

> */* believe *Sergeant Reardon has failed* to *duly consider Schedule I — Matters* Relevant *to Assessment* of *Public Interest of* the *Right to Information Act, in particular sections (a-g)* [sic].
>
> *I believe Sergeant Reardon has failed to consider provisions in the act* [sic] *such as Schedule I (d) and (0 which relate directly to giving the public context and understanding about government decisions and processes, in particular why Minister Hidding has said the firearms database is secure and unauthorised access can be ruled out.*
>
> *These documents are* no *longer the subject* of *internal deliberative information and should* be *released in full.*

15 In an email dated 22 April 2016, the applicant submitted:

I am seeking a review of all documents in which [sic] *s30 and s27 have* been used to *justify refusing access* to *documents.*

That s30 should not apply to *some* of the *information and that s33 (and therefore Schedule I) should apply to s30. Therefore, on balance the documents should be released* to *the public for* the *reasons* previously *outlined.*

2 1 am not *seeking personal details be released.*

3 That the elements of s2 7 should not apply to the information for reasons previously outlined and that s33 should apply to s27.

I 6 On 30 June 2016, Sgt John Delpero from Tasmania Police submitted:

The "lock status" [deadlocks and other security factors] *information* on some *of the Offence Reports* (ORs) *was exempted pursuant to Section 30(1)(e)* of the Act. 1 *submit that the information is also exempt pursuant to* Section *30(1)(d) of the Act as to disclose* home *security measures used by third parties would likely endanger the safety of persons.*

Exemptions applied to *sentences specifying time and date* of *an incident on some of the ORs, appear* to *have* been *applied in error as* the *`Committed* Between' *information (which specifies* the *times and dates) on all of* the ORs *was disclosed.*

The [second] *reading speech* [on the amendments to the Firearms Act] *at page numbers 130 to 163, and the clause notes at page numbers 164 to 185,* were *both exempted pursuant to Section 27* of the Act. *Given the reading* speech *and the clause notes are (now) public record, the exemptions no longer apply. Notwithstanding that, I submit* the *aforementioned documents should be denied pursuant to Section 9 of the Act given* both *are otherwise available to view by* the *public online.*

Some of the *information on the ORs that identifies firearms was* exempted *pursuant* to Section *30(1)(a) of the Act which, I* believe, *was applied as disclosure* [sic] *was likely to prejudice the court proceedings. I submit that information which identifies firearms (e.g. serial numbers) is also exempt pursuant to Section 30(1)(e) of* the Act *as, regardless* of the *investigation status or court proceedings status, it is information which correspondingly appears on the Tasmania Police Firearms and Weapons Data System.*

17 In a further letter dated 14 March 2017, Tasmania Police also offered the following:

Notwithstanding the inconsistencies in the original assessment, I submit that all serial numbers and RINs [Rifle Identification Number] of the

> *unrecovered* stolen *firearms is* [sic] *exempt information pursuant to Section 30(1)(c)* **of** the Act.
>
> *… any and all investigative avenues must be protected for Tasmania Police to conduct its business in recovering stolen firearms which, as* evidence *in* the ACIC [Australian Criminal Intelligence Commission] report, *remain in the possession of criminals* **to** *commit crime.*
>
> Three **of** *the stolen firearm s… have (now)* been *recovered. Therefore, 1 have no objection to the disclosure* of [the RIN and serial numbers on pages 199, 206, 215, and 216].
>
> *Notwithstanding the inconsistencies applied in the original assessment, I submit that some of the description and distinguishing mark information is exempt, namely* [those on pages 195 and 231].
>
> *I have no objection to disclosure of* the *drugs and alcohol factor information on page 218.*

18 Additionally, Tasmania Police exempted some information under s30(1)(f) on the basis that investigations were still being conducted. Tasmania Police acknowledges some of these investigations have now concluded. Where an investigation has concluded, however, Tasmania Police submit the information would be exempt under s30(1)(a)(iii) as the matters investigated are now before a court, and its release might prejudice the impartial adjudication of those matters.

19 Tasmania Police also relied on two cases as precedent to support its claims that personal information of people who support Police in the process of an investigation should not be released. As the Applicant is not seeking the personal information of a person in relation to the information at hand, however, I do not need to consider these cases further.

Analysis

Section 27

20 Pages I6 to 21 are two Minutes to the Minister for Police and Emergency Management that discuss proposed amendments to the Firearms Act.

- Pages 25 to 89 refer to a Minute to the Minister and a draft Cabinet Minute.
- Pages 92 to 100 refer to a Parliamentary Liberal Party paper to support the Minister in Parliament.
- Pages 107 to 193 refer to a Minute to the Minister and another draft Cabinet Minute.
- Pages 268 to 283 refer to two Question Time Briefs.

21 I will deal with the Minutes and the Question Time Briefs in this part and address the Cabinet information separately.

22 For s27 to apply to the Minutes and Question Time Briefs, I must be satisfied that: the Briefs contain an opinion, advice or 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 public authority, Minister, or the Government and in connection with the Minister's parliamentary duty.

23 Having read the Minutes and the Question Time Briefs, I am satisfied the information meets the relevant criteria and is exempt information under s27. The information consists mostly of opinion and advice to the Minister on the topic of the Firearms Act. Each Minute also offers a range of recommendations. The information has been prepared by the Department for the Minister for Police and Emergency Management who is the Minister responsible for the Firearms Act.

24 By virtue of s27(2), the Act does not exempt information under s27(I) that is older than 10 years. I am satisfied the information as assessed is not older than 10 years.

25 Section 27(3) provides that information is not exempt under s27(1) merely because it was submitted to the Minister; it must have been brought into existence solely for the purposes of briefing the Minister. I am satisfied both the Minutes and the Question Time Briefs were brought into existence solely for that purpose.

26 Section 27(4) does not exempt 'purely factual information'.

27 As to what constitutes 'purely factual information', in Re *Waterford and* the *Treasurer of the Commonwealth* of *Australia (No /)*', 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 inextricably bound up with a decision-maker's deliberative processes.

28 This means that for 'factual information' to be exempt, it must be capable of standing alone from other information. The information must not be so closely linked or intertwined with the deliberative process such that it forms part of it.

29 While the information at issue contains some factual information, I am not satisfied it contains purely factual information in that the factual information cannot be separated from information concerning the deliberative process.

30 In his application, the applicant asserts that Tasmania Police has failed to consider the public interest test when claiming exemption under s27.

31 Section 33 provides that only the exemptions contained in Division 2 of Part 3 are subject to the public interest test. These are the exemptions contained in

[1] (1984) 6 ALN N347 at N349

ss33 to 42. Section 27 is found in Division I of Part 3 and is, therefore, not subject to the public interest test.

Section *26*

32 The information at pages 29 to 89 and again at pages III to 193 are two variations of a draft Cabinet Minute for the Minister in relation to amendments to the Firearms Act. This information was prepared by an officer of a public authority on behalf of the Commissioner for Police.

33 This information, separated from the material discussed above under s27, is more appropriately considered for exemption under s26 as cabinet information.

34 Pursuant to s26, information is relevantly exempt if it is a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration (s26(l)(b)).

35 Section 26(2) of the Act, like s27, does not extend the exemption in s26(1) to information that is older than 10 years. I am satisfied this information is not older than 10 years.

36 Section 26(3) does not exempt information under s26(1) by reason only that it was submitted to Cabinet; it has to have been brought into existence solely for the purposes of briefing Cabinet. I am satisfied both the Cabinet Minutes were brought into existence solely for the purposes of briefing the Cabinet.

37 Like s27(4), s26(4) does not exempt `purely factual information'.

38 Applying the test in Waterford, I am satisfied that the Cabinet Minute contains factual information, but I am not satisfied it contains purely factual information in that the factual information cannot be separated from the deliberative information.

39 There are some components of the draft Cabinet Minutes that contain information that is, in large part, now publicly available. I refer particularly to the second reading speech notes and the clause notes of the amended legislation, which is published on the Tasmanian Parliament's website. This part of the application may therefore be refused under as s I 2(3)(c)(i) as being information otherwise available.

Section *30*

40 This section contemplates a number of circumstances in which information might be exempt as information related to the enforcement of the law. The information claimed by Tasmania Police to be exempt under s30 relates to documents and a series of offence reports.

Firearm Crimes Assessment Intelligence *Report (pages I* to *12)*

41 The first exemption claimed is in relation to the name of the operation, the parties, and where it is carried out and is to be found at the bottom of page

four and the top of page five. This operation is still active and ongoing, and concerns breaches or possible breaches of at least the Firearms Act.

42 Tasmania Police relies on s30(1)(a)(i). For information to be exempt information under this section, I must be satisfied that its release would be reasonably likely to prejudice the investigation of a breach or possible breach of the law.

43 I accept the submission of Tasmania Police that the release of this information would prejudice its ability to carry out the investigation. The parties involved, or other parties within the location of the operation, whether of direct interest or not, would be able to modify behaviour and practices that would limit Police's ability to prevent firearm crime in Tasmania.

44 I therefore determine this information to be exempt under s30(l)(a)(i).

45 The next claimed exemption is for the information at the bottom of page six which concerns the details of the firearm operation. Tasmania Police relies on s30(1)(f). For information to be exempt under this section, I must be satisfied that its disclosure would be reasonably likely to hinder, delay or prejudice an investigation that is not yet complete. The exemption has been applied to information that provides a strategic understanding of an ongoing operation involving firearms.

46 Tasmania Police claims that its release would prejudice its ability to carry on with the operation in an effective way.

47 I accept the position of Tasmania Police. The nature of the operation is that it is an investigation that is not yet complete as required by s30(1)(f) and knowledge of the specifics of the investigation would allow anyone who perceives themselves to be a possible target of that operation to alter their behaviour in a way that would be reasonably likely to prejudice the Police's ability to conduct an effective investigation.

48 I therefore determine the information on page six to be exempt under s30(I)(f).

49 The information remaining to be considered is on page seven. Tasmania Police relies on s30(I)(c) to exempt the information.

50 For information to be exempt under s30(1)(c), it must disclose a method or a procedure for preventing, detecting or investigating a breach or evasion of the law. Any disclosure of this information must show how it would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

51 The information is the methodology adopted by Tasmania Police to assist in the prevention, detection, or investigation of a breach or evasion of at least the Firearms Act. I accept that if this information is released, it will prejudice Tasmania Police's ability to gather, protect, and use information relevant to an investigation.

52 I determine this information on page seven to be exempt under s30(I)(c).

Offence *Reports*

Summary and MO

53 Tasmania Police applied s30(1)(e) to the information under the heading `Summary and MO [modus operandi]' for the offence report at pages 194 to 196.

54 For information to be exempt under this section, it must disclose information gathered, collated or created for intelligence, which can include anonymous information from the public. The question then is what constitutes intelligence.

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

56 The Summary and MO contains information that has been gathered by Tasmania Police for the purposes of what it calls creating intelligence. To release it, it says, would significantly reduce its ability to carry out its core function of investigating, gathering intelligence about, and apprehending people who break the law. I accept this. The disclosure of Police intelligence would give anyone the opportunity to gain insight into the operational methods and activities adopted by Tasmania Police when investigating a breach or possible
breach of the law. This would significantly hinder its ability to protect Tasmanians effectively. I determine this information to be exempt pursuant to s30(I)(e).

57 Tasmania Police claimed the same exemption for the information contained in the Summary and MO sections of the following offence reports, namely those at:

- pages 197 to 200;
- pages 201 to 204;
- pages 205 to 207;
- pages 208 to 211;
- pages 212 to 217;
- pages 218 to 220;
- pages 221 to 228;
- pages 229 to 232;

[2] Online edition

- pages 233 to 236;
- pages 237 to 242; and
- pages 243 to 248.

58 The information is substantially the same in each report and for the reasons outlined above, I determine that information to be exempt pursuant to s30( )(e).

Property and Firearms - RIN and/or Serial Numbers

59 Tasmania Police applied s30(1)(a) to exempt the remaining information in the offence report; it relates to serial numbers and other descriptions or distinguishing marks of stolen property.

60 In its submission, Tasmania Police claimed that all serial numbers should be exempt under s30(I)(c), a position different to that taken in its original and internal review decisions. On review, I consider that s30(I)(a) and (c) are not apt to exempt this information.

61 I agree with Tasmania Police, however, that RIN and serial number information should be exempt. The information has been gathered for intelligence purposes to assist the Police in solving a crime. To release it, would be to release Police intelligence information, and I determine that information related to RIN and serial numbers to be exempt pursuant to s30(I)(e). This exemption applies to RIN and/or serial numbers contained on the following pages:

- 194 and 195;
- I99;
- 202;
- 209 (the heading `Property and Firearms');
- 219 (the serial number of the second item under the heading `Property');
- 223 (in relation to the first three items);
- 234 (in relation to the first item referred to);
- 235;
- 241;
- 244;
- 245; and
- 247.

62 Section 30(1)(e) has been applied to information under the heading `Investigation Status' on page 196. Having read the information, I can confirm that it is related to intelligence. I determine the information is exempt under s30( )(e).

63 The final exemptions claimed relate to information at the end of page 199. This information is the RIN and serial numbers of the firearms. For the reasons outlined above, I determine the RIN and serial number information on page 199 to be exempt under s30(I)(e).

64 While there are no exemptions claimed for the information on pages 202 and 206, it does refer to serial numbers under the first item of property and is exempt under s30(I)(e). The first serial number of page 206, however, has already been disclosed to the applicant.

65 As well as containing RIN and serial numbers, page 209 contains a description of an item and its distinguishing marks. For the reasons outlined above, I have determined the RIN and serial number information on page 209 is exempt and I extend the exemption to the description and distinguishing mark information.

66 Likewise, on page 234 under the heading `Property', is listed the serial number and distinguishing marks of the first item of property. Police has redacted this information claiming it too is exempt.

67 In relation to the distinguishing marks, I am satisfied that the description given in the offence report is specific enough to allow a person to identify a specific firearm that has been stolen. It is similar in effect to a serial number for identification purposes. I am satisfied that it is information collated by Tasmania Police for intelligence purposes. I determine the description and distinguishing marks are exempt information under s30(I)(e).

68 The information on page 241 also includes the serial number and the description of the firearm, and while the number is exempt, I am not satisfied the description is so specific that it would reasonably identify a particular firearm as opposed to one of many firearms of the same make and model. There are no distinguishing marks or other content that would allow it to be identified separately. I determine the description of the second item of property on page 241 is not exempt and should be released to the Applicant.

69 Again, the information on page 244 includes a description of the item which Tasmania Police claims to be exempt under ss30(1)(e) and (f). The description identifies a scope attached to the firearm of a type which is readily available throughout Australia. There is nothing specific about the scope that would reasonably allow it or the firearm to be identified beyond a group of other firearms of the same make and model, some of which could reasonably have a scope of the same make and model fitted.

70 I am not satisfied this information would reasonably identify a specific firearm for the purposes of protecting Police intelligence material and therefore it is not exempt under s30(I)(e) and should be released to the applicant. Nor am I satisfied that the release of this information would hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete and therefore it is not exempt under s30(1)(f).

Other Property

71 Police have claimed exemptions under s30(I)(e) for each item of property listed on page 231. This information is a basic description of a wallet, its brand name, condition status, an approximation of the amount of money it contained and the name of the person that allegedly owns it, identified by reference to the cards it contained. The description of the item does not contain information that would be exempt under s30.

72 Tasmania Police, however, rely on the exemption under s36 to exempt the name of the person who allegedly owns the wallet as the personal information of a person other than person making an application under s13. I agree this information is exempt and it would be contrary to the public interest to release it.

73 I determine the information under *distinguishing marks* for property item I on page 231 is not exempt under s30(l)(e), but the name of the alleged owner is under s36.

74 Tasmania Police has claimed exemption for a large amount of the information on pages 210 and 211, which is a victim statement, pursuant to s30(1)(e) and (f). I have read the statement and determine the information is exempt under s30(I)(e).

Investigation Status

75 Police relied on s30(1)(e) to claim some information under the heading `Investigation Status' on page 219 to be exempt. This information links an offence outlined in the offence report to other information about a similar offence in a different location. The release of this information would reveal information gathered by Tasmania Police that has been collated for the purposes of intelligence. I determine the information claimed to be exempt by Tasmania Police on page 219 is exempt under s30(I)(e).

76 On page 222, Tasmania Police applied s30(1)(e) to some information, again under the heading `Investigation Status'. This information relates to persons of interest and is directly related to Police intelligence. I determine this information is exempt under s30(I)(e).

77 On page 230, Police claim exemption under s30(I)(e) for two items of information. This information concerns various persons of interest and has been collated for the purposes of accumulating Police intelligence. I determine this information is exempt under s30(I)(e).

Remaining Information

78 Tasmania Police has not applied any exemptions to the information on page 226. I note, however, that the information includes both a motor vehicle engine number and a VIN number. This information has consistently been exempt on the other offence reports and based on the reasons above, I note

this information in the first instance could have been exempt under s30(1)(e). This information, however, has already been disclosed to the applicant

Public Interest Test

79 The applicant raised the issue that Tasmania Police had not correctly addressed the matters in Schedule I when considering the public interest test. This was raised for both the s27 and s30 exemptions.

80 I have already noted that s27 is not subject to the public interest test.

81 The public interest test can only apply in relation to a claimed exemption under s30 if the matters in s30(2) have been met. Those requirements are referred to above in the body of this decision. I am satisfied the information at hand does not meet any those requirements and therefore is not subject to the public interest test.

Preliminary Conclusion

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

a. the wallet's distinguishing marks on page 231 except for the name exempt as personal information under s36;

b. the description of the second item of property on page 241; and

c. the distinguishing marks of the first item of property on page 244.

83 I note (at 78 above) several pieces of information have been released to the applicant that could have been exempted under s30. Since these have been released, however, they do not need to be considered.

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

Submissions to Preliminary Conclusion

85 As the decision was adverse to the public authority, it was given an opportunity to make a submission to this office before a final determination was made.

86 Tasmania Police replied on 23 October 2019 stating that it had no objections to the preliminary decision.

Conclusion

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

a. the wallet's distinguishing marks on page 231 except for the name exempt as personal information under s36;

b. the description of the second item of property on page 241; and

c. the distinguishing marks of the first item of property on page 244.

88 I note (at 78 above) several pieces of information have been released to the applicant that could have been exempted under s30. Since these have been released, however, they do not need to be considered.

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

Dated: 28 October 2019

Richard Connock
OMBUDSMAN

OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** O 1706-022

Names of Parties: Mr Richard Baines and Department of Education

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

Provisions considered: s27

Background

Mr Steve Biddulph is a psychologist and a well known author of books on ways to bring up children. He has over 40 years' experience in psychology, first starting with the Tasmanian Department of Education.

2 In early 2017, the Department planned an event to be held in Devon port, *Building Brighter, Stronger Families,* at which Mr Biddulph was to be a key presenter. Ultimately however, Mr Biddulph withdrew from the event. The circumstances surrounding Mr Biddulph's decision to withdraw drew interest from the media and the broader community.

3 On 4 April 2017, Mr Richard Baines of ABC Tasmania submitted an application for assessed disclosure to the Department seeking information about Mr Biddulph and a proposed presentation by him. Specifically, the applicant sought:

I. All information exchanged between the Education Department and parenting author Steve Biddulph regarding his planned presentation.

All information held in the department and created since I January 2017 in relation to Steve Biddulph's planned presentation.

3. All information exchanged between the Education Department and the office of *the Education Minister Jeremy Rockliff in relation to Steve Biddulph's planned presentation.*

4. All information exchanged between the Education Department and the Department of *Premier and Cabinet in relation to Steve Biddulph's planned presentation.*

0. All information held by the Education Department including but not limited to correspondence, emails, letters, meeting minutes and briefings with any of *the following: the Premier Will Hodgman*

and the Education minister Jeremy Rock/iff *and any of their staffers at the Education Department or DPAC in relation to* Steve *Biddulph's planned presentation.*

4 On 23 May 2017, Ms Jenny Gale, the Department's Secretary and therefore its principal officer, released a decision to the applicant. The Department claimed the information responsive to the request to be exempt on a number of bases, namely as being: briefing information of a Minister (s27), personal information (s36), and/or information related to the business affairs of a third party (s37).

5 The Department identified 261 pages of relevant information. The material primarily consisted of emails passing between Departmental staff and Mr Biddulph in relation to the planned event. The exemptions claimed pursuant to s36 and s37 largely related to information concerning Mr Biddulph and his business dealings with the Department.

6 Some material consisted of information provided to the Minister for Education to be used in Parliament. This was the information claimed by the Department to be exempt pursuant to s27.

7 On 5 June 2017, the applicant sought external review of Ms Gale's decision by this office. In doing so, he said that he did not take issue with the exemptions claimed under s36 and limited the scope of his application for external review to only that information claimed to be exempt pursuant to s27.

Issues for Determination

8 The exemption under s27 was claimed in relation to information contained in what the Department referred to in its original decision as 'Attachment 19', which consisted of five documents including emails, Question Time Briefs (QTBs), and the response to a Notice of Motion (NoM).

9 Section 27 is in the following terms:

> (I) *Information is exempt information if it consists* of—
>
> *(a) an opinion, advice or a recommendation* prepared by *an* officer *of a public authority or 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 (I) ceases* to *apply after the end of the period of 10 years commencing on* the date of *the creation of* the *information referred to in that subsection.*
>
> *(3) Subsection (I) does not include information solely* because *it —*

(a) *was submitted* to *a Minister for* the purposes of *a briefing; or*

(b) *is proposed* to be *submitted to a Minister for* the *purposes of a briefing —*

if the *information was not brought into existence for submission to a Minister for the purposes of a briefing.*

(4) *Subsection (I) 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.*

10 I must therefore 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 Ministers. If it is, I then need to be satisfied that it meets the other criteria contained in s27(1).

11 If I determine the information to be exempt under s27(I), I must then be satisfied that it is not covered by any of the exceptions contained in ss27(2) to (4).

Submissions

12 The applicant rejects the Department's claim for exemption under s27 on the basis that the Premier made public statements to the effect that the Department had acted alone in preparing the subject information. Specifically, he submits:

> *At* the time of the Steve *Biddulph incident the Premier Will Hodgman distanced his government totally from the matter — saying it was a unilateral decision made by the* DoE.
>
> *In light of this statement, I* see *no basis* for *the Department* to *prosecute* the *argument about briefing* to a *Minister when* the *Premier has made it* so *clear this decision was made by* the DoE *alone.*
>
> At *best there is a breakdown in communication* between the Department and *the Government, at worst there's been misleading* statements to *the public about how much the Government knew about attempts to silence Mr Biddulph.*

13 The Department claims the information was prepared solely for the purposes of briefing the Minister in relation to the issue at hand, especially the QTBs. It claims it followed the *Guide* to *Writing for the Minister,* which specifically highlights that while some parts of a QTB may be made public, others will not. It submits:

> *The information in Attachment 19 was processed through* the *Department's Ministerial Services Unit* (the *Unit).* The *advice in* the Guide to Writing for the Minister *clearly states that a* QTB *has a `style that allows it to* be *read* out *in Parliament', but that there is a background* section *in* the *template for `assistance* to *the Minister in providing background/contextual information'.*
>
> It *is important* to *note both QTBs are draft in that one contains Track Changes* [sic] *and* they *both contain a highlighted paragraph. As the Unit only provided draft QTBs it is clear* they were not to be read *out in Parliament in that format and were indeed internal briefing information of a Minister.*

14 The Department also expresses concern over a section of the QTBs entitled *Political Lines,* which are words prepared internally by the Minister's office. Specifically, it adds:

> *Further, both* the *QTBs contain a heading `Political Lines' which are points written by* the *Minister's Office* to provide advice to the *Minister. The title `Political Lines' and the grey shading indicates this* to *Department staff who have no responsibility for the points.*

15 It goes on to concede that it did not in its decision refer to some relevant information, such as Notice of Motion 1462 and several newspaper articles, on the basis that they were already in the public domain. Appropriately, the Department recognises that it should have raised this in its decision. It acknowledged that:

> *... there is factual information in Attachment 19 such as the Notice of Motion 1462 and newspaper articles (The Mercury, the Advocate). However, this factual information is easily* accessible *on the internet and therefore was not required* to be *provided to Mr Baines. In hindsight it may have* been useful *in* the *response to Mr Baines to provide some words around the factual information being easily* accessible on the internet.

Analysis

16 Before I consider the information and submissions in detail, I refer to the submission from Mr Baines relating to the Premier's public comment that *it was a unilateral decision of the* Department. He submits that the Department cannot rely on s27 as the Government distanced itself from the Department's decision. On the material available to me, however, I conclude that the comment related to the chain of events instigated by the Department leading to Mr Biddulph's withdrawal from the event, rather than the information at issue.

17 But even if it did, this is not the test for determining whether or not the information can be exempt under s27. The Act provides that information can be exempt 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, providing a Minister with a briefing in connection with the official duties of a public authority in connection with the Minister's parliamentary duties.

18 A Minister does not necessarily need to be aware of a decision being made to deliver a brief. If information is created in the manner outlined above for the purposes of briefing a Minister, it may be exempt under s27.

19 There are 24 pages of information which fall to be considered. They include several emails, Question Time Briefs (QTB), Notices of Motion (NoM), and some newspaper articles.

20 Dealing first with the Notices of Motion and the newspaper articles, the Department did not provide this information in its original decision but did not claim it to be exempt. Rather, as noted, it claimed that the information was publicly available and was therefore *not required* to be *provided* to *Mr Baines.*

21 While this might be true, the Department should not have excluded it from its decision. Any information responsive to an application for assessed disclosure must either be released, claimed to be exempt, or its production refused.

22 In any event, the applicant can access this information without recourse to the Act and I will not take the point further here. I do, however, suggest that in future decisions, the Department addresses all information responsive to the request it is responding to.

23 Three of the emails included in Attachment 19 are primarily the means of distributing the QTBs and the NoMs. These emails contain no substantive information but merely reference the information attached to them. The Department asserts that s27 applies to the emails on the basis they form part of the briefing information for the Minister.

24 The emails themselves do not contain any information that could reasonably be considered opinion, advice, or recommendation. They were the vehicles for the delivery of the attachments, which do contain that sort of information.

25 I determine s27 does not apply to the emails and they should be released in full. The attachments to those emails are dealt with below.

Section 27

26 There remains to be considered two QTBs dated 6 March 2017, one identified as I 9a and the other as I 9c. Both QTBs are identical in their terms except for the fifth dot point on page two, and another small variation. In document I 9a, all the text in the dot point is highlighted in yellow and struck out, while in I 9c, it is highlighted but not struck out. In I 9a, there is also a small tracked change with a `D' struck out before the name of the Minister. On I 9c, this has been rejected and appears alongside the Minister's name. These differences are not relevant to my determination

27 The first item of information for consideration is found under the date of the QTBs, but above the title "Key Messages". This information is a summary of

the public stance that some key people and organisations had taken in relation to Mr Biddulph's withdrawal from the event. While it alludes to factual information, in context, it is closely connected with an opinion prepared by an officer of a public authority for the purpose of briefing the Minister.

28 I determine the information below the date and above the heading "Key Messages" to be exempt under s27(I), subject to the requirements of s27(2) to (4) below.

29 The information in the box headed "Key Messages" was provided to the Minister to be given to Parliament if necessary, but as yet, it has not been. 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 should the need arise. I am satisfied that the information under the heading "Key Messages" is exempt under s27.

30 The next set of information is in the form of dot pointed paragraphs under the heading "Talking Points". The information in these dot points appears designed to provide background and supplementary information relating to the primary key messages on page one of the QTB. It consist of advice and recommendations to the Minister in the form of suggested ways of addressing the issues should it become necessary to do so, and I am satisfied that it is advice, or a recommendation prepared by an officer of a public authority to brief the Minister. As such, I determine the information under the heading "Talking Points" to be exempt under s27(I) unless it falls under one or more of the exceptions contained in ss27(2) to (4).

31 Section 27(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.

32 As to what constitutes 'purely factual information', in Re *Waterford and the Treasurer of* the *Commonwealth* of *Australia* (No 1)[1], the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' has the sense of 'simply' or 'merely'. Therefore, the material must be "factual" in fairly unambiguous terms, and not be inextricably bound up with (in that case) a decision-maker's deliberative processes.

33 This means that for 'factual information' to be exempt, it must be capable of standing alone from other information. The information must not be so closely linked or intertwined with exempt information such that it forms part of it.

34 I am satisfied that while the dot points under the title "Talking Points" contain some factual information, that factual information is so bound up with the advice and recommendations in the QTBs that it is not purely factual

[1] (1984) 6 ALN N347 at N349

information and is therefore, exempt under s27, again subject to the exceptions in ss27(2) to (4).

35 There follows highlighted Dot points of information under the heading "Political Lines". Again, these dot points contain advice or recommendations in the form of suggested responses.

36 The Department submitted this was not prepared by it, but is something that is prepared by the Minister's office. Section 27 relevantly provides that information is exempt information if it consists of an opinion, advice or a recommendation prepared by an officer of a public authority **or** Minister.

37 As the information was prepared by staff in the Minister's office, it was opinion, advice, or a recommendation prepared by an officer of a Minister and is exempt under s27(1), subject to ss27(2) to (4).

38 The final item of information to be considered is a copy and paste of a media release written by Alice Giblin on behalf of Andrea Dawkins MP. This is public information and was not prepared by an officer of a public authority or a Minister. It is not exempt under s27 or any other section and should be released in full.

39 Addressing the exceptions in ss27(2) and (4): I am satisfied none of the subject information is older than 10 years; that all of it was brought into existence purely to brief the Minister; and there is no purely factual information preventing exemption.

Preliminary Conclusion

40 For the reasons outlined above, I determine the Notices of Motion, the newspaper articles and the emails are released in full.

41 I also determine in relation to the Question Time Briefs, I determine they are exempt under s27. I determine the media release is not and should be released in full.

Submissions to Preliminary Conclusion

42 The Department of Education was provided with a copy of my preliminary decision and was given until 2 May 2018 to make a submission to this office.

43 By letter dated 23 April 2018, Mr Tim Bullard, the Secretary of the Department and therefore its principal officer, advised that the Department accepted the preliminary decision, did not wish to make further submissions, and had indeed already complied with the preliminary conclusion and released the information as determined in that decision.

44 Accordingly, there is nothing further to consider in this matter.

Conclusion

45 For the reasons outlined above, **I** determine that the Notices of Motion, the newspaper articles and the emails are to be released in full.

46 **I** also determine that the Question Time Briefs are exempt under s27. I determine the media release is not and should be released in full.

47 I note the Department has already complied with this decision.

Date: May 2018

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DECISION

Right to Information Act Review **Case Reference: O 1**702-099
O1702-100

Names of Parties: Rosalie Woodruff MP and the Department of Primary Industries, Parks, Water, and the Environment

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

Provisions considered: sI9, s20

Background

The two matters subject to this external review are related to an earlier application for the assessed disclosure of information to the Department of Primary Industries, Parks, Water, and the Environment that was not. On 9 September 2016, Ms Woodruff submitted that application and I will refer to it using the Department's reference of RTI 015/2016-17 (RTI 015).

2 The applicant sought a range of information in RTI 015 relating to correspondence passing between industry leaders and the Department's Marine Farming Branch concerning fin-fish farming on the East Coast of Tasmania. Specifically, she sought:

> *I.* *All correspondence between Petuna Aquaculture and the Marine Farming Branch concerning planned expansion of fin-fish farming on the East Coast* of *Tasmania, since I January 2014;*
>
> *2.* *All correspondence* between *TASSAL Group and* the *Marine Farming Branch concerning planned expansion* of *fin-fish farming on the East Coast of Tasmania, since 1 January 2014;*
>
> *3.* *All correspondence between Van Diemen Aquaculture and the Marine Farming Branch concerning planned expansion of fin-fish farming on* the *East Coast* of *Tasmania, since I January 2014; and*
>
> *4.* *All correspondence* between *Huon Aquaculture Group and the Marine Farming Branch concerning planned expansion* of *fin-fish farming on* the *East Coast of Tasmania, since I January 2014.*

3 On 23 September 2016, Mr Mick Casey, the Department's RTI delegated officer, released a preliminary decision to Ms Woodruff in which he refused to release the information responsive to the request pursuant to s19(I) on the basis that to release it *would substantially and unreasonably divert* the *resources* of

the Department from its other work. The applicant was appropriately given the opportunity under s19(2) to narrow her request with a view to making a request in a form that would remove the ground for refusal.

4 The applicant agreed to confine the information sought by her solely to that information responsive to Item 2 of the request, being information relating to the TASSAL Group.

5 On 7 December 2016, Mr Casey released a decision on the revised request which claimed part of the information to be exempt, but released other parts. No internal review of this decision was sought, and therefore, as noted, no external review was either.

6 On 22 December 2016, the applicant submitted two new applications for assessed disclosure. These respectively sought information in the same terms as items I and 4 of RTI 015, being information relating to Petuna Aquaculture and to Huon Aquaculture; our reference O1702-099 relates to Huon Aquaculture, and O 1702- 100 to Petuna Aquaculture.

7 On 13 January 2017, Ms Katrina Oakley, another delegated officer, released a combined decision on both applications to the applicant. The combined decision refused to release the information, relying on s20(a) which provides that a public authority may refuse an application when, in its opinion, the information requested is the *same or similar to information sought under a previous application* to [the public authority] *and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.*

8 On 16 January 2017, the applicant sought an internal review of the combined decision.

9 On 9 February 2017, the applicant submitted both applications for assessed disclosure to this office for external review under s45(1)(f) on the grounds that the Department had not made a decision on internal review within the 15 working days provided for doing so by the Act. No negotiated extension of time had been agreed and the applications were accepted for review as deemed refusals.

10 On 3 April 2017, before I had made a decision on external review, Ms Alison Scandrett, another a delegated officer, released a combined internal review decision to the applicant. The Department's internal review decision came to the same conclusion as the original decision, and the applications were refused under s20(a).

11 On 16 June 2017, pursuant to s 46(2), the applicant requested that I treat the application for external review as extending to an application for review of that decision in accordance with s45.

Issues for Determination

[1] http://dpipwe.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log

12 The test in s20(a) is whether the subject application for assessed disclosure seeks information which is the same or similar to information sought under a previous application, and there is no reasonable basis for seeking the information again.

13 I must determine if the limiting of an application to certain information following consultation pursuant to s 1 9(2) constitutes an alteration to the information *sought* thus excising other information completely from the application, or if the information in its entirety is *sought* in the first instance. In which case, even if some information is excluded after the fact by negotiation, it remains the information sought by the applicant for the purposes of s20.

14 If I determine that the applicant is seeking in her two subject requests the same or similar information sought by her in her earlier request, I must then determine if the applicant has *any reasonable basis for again seeking access to the same* or *similar information.*

Submissions

15 On 10 August 2017, my office wrote to the applicant seeking her views on the Department's decision to refuse the application under s20(a). No submission was received.

I6 The Department makes the claim that once an application is accepted, the request becomes the agreed scope unless negotiated prior to acceptance under s **1**3(7). Relevant to RTI **015,** it specifically submits:

> Section 15(3) of *the* Act *provides that, subject to the payment of* the *prescribed* fee, *or exemption of* the *prescribed* fee *under section 16(3), an application is taken to be accepted by a public authority* on *a) the day it is received or b) if negotiations are entered into under* section *13(7), on the completion of the* period *of* those *negotiations.*
>
> *Negotiations under* section *13(7) take a special status and application are not deemed accepted until negotiations as to refinement* of scope occur. *No negotiations occurred pursuant* to *section 13(7) in this instance. As such, RTI 015 was accepted* on *9* September *2016 by the Department,* the *day it was* received...

17 It also claims that it had commenced preliminary work after the original scope of RTI 015 had been accepted. It further provided:

> *A number of actions happen immediately upon acceptance of an application, such as the commencement of a search* of the *Department's records* to locate *relevant material for the request. Such a search was undertaken upon receipt* of *application RTI 015, and the search revealed that the amount* of *information for the requests held by* the *Department was voluminous. As at 9 September 2016, work within the Department commenced on RTI 015 as the application's* scope *was accepted in full.*

> *In relation to RTI 015, a* letter *dated 19* September *2016 was* sent to *the appellant pursuant to section 19(2)* of the *Act advising her that the* request *was voluminous and dealing with the request would involve an unreasonable diversion of resources.* The *appellant was advised that this could* be *a grounds for refusal* of the *application pursuant to section 19(1).*

18 The Department makes the assertion that because the principal application was accepted in full and the extent of information sought not negotiated under s13(7), then the scope is the entirety of the original application that was accepted and then refused. It claims that this precludes the applicant from requesting the same or similar information again. Specifically, the Department submits:

> *I consider that the application was* accepted *as submitted* to the *Department on 9 September 2016, and as such all four aspects* of the request were *accepted. The refined application* scope *in no way alters the status of the application received by the Department on 9* September. *As such,* RTI *042 and 043 request information that was already sought on 9* September. A *repeat application is ground* for *refusing the application pursuant* to *section 20 of the Act.*
>
> *If* one *takes a purposive approach to interpretation of the* Right to Information Act 2009, the *Act clearly intends that resources should not be unreasonably diverted. It would* defeat the *purpose of* section */9 if a person were enabled to avoid its operation simply by refining the* scope of *an application only to make a fresh request for* the *very information they had just negotiated* to remove from *their request. The purpose* of *section 20 is quite clearly to prevent applicants asking again for information that has already been requested and exempted or refused, unless* the *applicant can show a reasonable basis for seeking it again. What constitutes an application under* the *Act must* be *read to give* effect to the *purposes* of section *19 and 20.*

19 The Department also cited *The Secretary, Department* of *Treasury and Finance v Kelly*[2] a decision of the Victorian Supreme Court, Court of Appeal in which Ormiston JA held that the applicant had deliberately attempted to circumvent the proper administration of the Victorian Freedom of Information Act by breaking a large request into 321 individual requests over a 10 day period, in order to in order to avoid attracting that Act's equivalent provision to s19. The Department submitted that:

> *Whilst* Kelly *did not deal directly with* the *issue at hand in this appeal, i.e. what constitutes the* scope *of an application, I consider that the statements of reason in* Kelly *are of direct relevance to this case. What constitutes the* scope *of an application under the Act must be determined in a manner* to *give* effect to the *provision of the Act, and I*

[2] (2001) VSCA 246

> *suggest that an interpretation that would allow an applicant to circumvent the intended operation of the Act should be avoided. In relation to the facts at hand, the term application must be read to mean* the *application as received and accepted by the Department* on *9* September *2016.*
>
> *The appellant had already been advised by the Department that* to *answer* four *requests on this matter (application RTI 015) would cause a substantial and unreasonable diversion* of *resources. During negotiation under section 19(2) in relation to RTI 015* the *appellant agreed to narrow the* scope of *the* four *requests to* one request. The *appellant was clearly aware that all four requests would require a substantial and unreasonable diversion of the Department's resources.* The *appellant proceeded* to *lodge further applications such that the totality of* the *information requested* was three of *the original four* requests. The two *applications in December were lodged to "evade" the operation* of the Act *as intended by* section *1 9. Such an avoidance, in my view, cannot be allowed.*

For the reasons given later, I do not consider the decision in Kelly to be on point, nor of any real assistance when it comes to determining the matters falling for consideration here.

Analysis

20 It is clear that an application was made on 9 September 2016 (RTI 015) which sought four parcels of information relating to four different fin-fish farming companies. The fee was waived on that application under s16(I)(b) on the basis the applicant is a Member of Parliament acting in her official duties. No negotiations were sought or entered into pursuant to s13(7) in an attempt to refine or redirect the application, and it was accepted in full on 9 September 2016 being the date it was received by the Department.

21 The initial work that took place after this point determined that the volume of work required to carry out the application for assessed disclosure *would substantially and unreasonably divert* the resources of *the public authority from its other work.*

22 The Department, having come to this conclusion, quite rightly wrote to the applicant with its preliminary view that the application should be refused under s 19. As required by s19(2), the Department extended to the applicant *a reasonable opportunity to consult* [with it] *with a view* to *the applicant being helped to make an application in a form that would remove* the *ground for refusal.*

23 The applicant appropriately engaged in this process which resulted in Items I, 3, and 4 being excised from the application. This removed the Department's ability to rely on s 19 and an assessed disclosure of the revised application followed. A decision was made and released to the applicant. No application for internal or external review was requested.

24 On 22 December 2016, the applicant submitted the two new applications for assessed disclosure that respectively sought the information responsive to Items I and 4 of the RTI 015 application, and the Department refused them under s20(a) on the basis that the information they seek, *in* the *opinion* of *the* [the Department], is the *same or similar* to *information sought under a previous application to* [the Department] *and the application does* not, on *its* face, *disclose any reasonable basis for again seeking access to the same or similar information.*

25 Of key importance here is the identification of the information that was *sought* by the applicant in RTI 015. This word is not defined in the Act, and as such, it is to be given its ordinary meaning. Sought is the past participle of seek, which is relevantly defined as to *try to obtain*[3]*.*

26 For the purposes of the Act, information is sought, or an action to try to *obtain* it is taken, when an application for assessed disclosure is made and the information it refers to is subjected to the process; that is, the information is identified, collated and considered, and a decision made to either release it, or claim it exempt.

27 This did not occur in relation to Items I, 3, and 4 in RTI 015. Despite initial attempts to gather information by the Department, which identified the volume of work required, the application for assessed disclosure was not processed. Consultation under s19(2) was utilised by the Department specifically to avoid having to undertake that process on the basis that the work involved *would substantially and unreasonably divert the resources* of [the Department] *from its* other work.

28 The consultation led to the applicant's request being confined to the information referred to in Item 3, being information relating to TASSAL. The object of consultation under s 19(2) is to give the applicant 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. That is what happened here. The application ultimately made following consultation related only to information responsive to Item 3. That was the only information sought, and that was the (previous) application dealt with by the Department. Section 13(7) has no relevance.

29 In its submission, the Department asserts that it would defeat the purpose of s19(1) if an applicant can agree to a reduction in scope, have the reduced application assessed, and then ask for the remaining information excised in a later request.

30 The purpose of s19(1) is to prevent a public authority from being so overburdened with a substantial and unreasonable request that it would be prevented from doing its core work. Section 19(2) acts as a safeguard against

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[3] Macquarie Dictionary Online, https://www.macquariedictionary.com.auffeatures/word/searchRword=sought&search word type=Di ctionary as accessed, 7 September 2017

blanket refusals when an applicant may not know that dealing with the request could be a substantial and unreasonable diversion of an authority's resources.

31 Revising the information requested at this point is fundamentally changing the request that is being made. That is, it is altering the information being sought and requiring assessment under the Act.

32 If this were not true, it would create a situation where potentially large swathes of information, revised out of a request under s19(2), would become completely excluded from the right to information process without even being considered.

33 I offer the following by way of example. If an applicant was to submit an application to the Department and request every piece of information held by it on every possible subject, the Department would be perfectly entitled to invoke the provisions of s19. Assume, however, that, following consultation pursuant to s 19(2), the information sought was revised down to just the Department's organisational chart. On the argument of the Department above, this applicant would be unable to seek the assessed disclosure of any other information relating to the Department at all, ever again. I hardly think that this can be correct.

34 In this case, the applicant clearly accepted the Department's position in relation to its resourcing and operational requirements and agreed to limit considerably the information she wished to access at that time. Once this was done the staff and time resources of the Department were available to deal with its other work, including other applications for assessed disclosure.

35 As noted the Department also cites the Victorian Court of Appeal's decision in *Kelly* to support its claims that the applicant is deliberately trying to evade the proper administration of the Act. In that case, Mr Kelly had made 321 requests of the Department over a fourteen day period, the information which they all sought was so obviously connected that correspondence passing between the parties treated them as a totality. The applicant Department sought to rely on the Victorian equivalent of s 19 (s25A of the Freedom of Information) to refuse the requests by characterising all of them as effectively a single request.

36 In the course of deciding the matter in favour of the Department, Ormiston JA observed that: To *my way of thinking* the device employed by the *respondent (and his clients) was as transparent a means* of *evading the requirements* of *s.25A as one could fairly imagine.*[4]

37 The circumstances of Kelly are plainly distinguishable from the present case, where the applicant has made only three applications, and at different times; one in September 2016 and two three months later in December 2016. (It is noted that the applicant has not sought information responsive to Item 3 of RTI 015, relating to Van Diemen Aquaculture.) I acknowledge that the general

[4] Supra, at paragraph 4

nature of the information sought is concerned with the planned extension of fin-fish farming on the East Coast, but it is sought in relation to a number of separate and specific entities. **I** also infer from the fact that the Department was able to process and come to a decision on RTI 015, that each of the subject applications would, on their own, be manageable.

Preliminary Conclusion

38 I am satisfied that the two applications at issue are not repeat applications for the purposes of s20A and cannot be refused by the Department on that basis.

39 **I** am so satisfied because I determine that the information excised from the original application for assessed disclosure (RTI 015) following consultation pursuant to s I 9(2) led to an application in a form that removed the grounds for refusal, and the excised information was not sought as part of that application.

40 I direct the Department to process the applicant's two applications for assessed disclosure in accordance, with the Act, as if those applications had been received today.

41 I do not agree with the Department's contention that the applicant's actions amounted to an attempt to evade the proper administration of the Act and find that they did not.

Submissions to Preliminary Conclusion

42 No submission was received from either party in relation to the preliminary decision.

Conclusion

43 For the reasons set out above and in the Preliminary Conclusion, I determine the applications from Ms Woodruff are not repeat and the Department is to now turn its attention to processing each application under assessed disclosure.

44 **I** note, however, the Department has acted on the preliminary conclusion and has released a decision directly to the Ms Woodruff.

Dated: 6 June 2018

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O BUDSMAN

Section 19

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

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

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

having regard to —

(c) the matters specified in Schedule 3 —

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

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

Section 20

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.*

TASMANIAN OMBUDSMAN
DECISION

Right to Information Act Review **Case Reference: O1706-106**

Names of Parties: Mr William Yabsley and Department of Justice

Reasons for decision: s48(1)(b)

Provisions considered: s6, s9

Background

On 12 April 2017, Mr William Yabsley submitted an application for assessed disclosure to the Department of Justice (the Department). The application was received and accepted by the Department on 27 April 2017. The period of time after sending and before receiving appears to have been inflated due to the Easter holiday period.

2 The applicant sought a large range of information, under 17 numbered headings. The information requested relates to material held by the Supreme Court of Tasmania, specifically in relation to a matter heard by the Court in which the applicant was a party.

3 The applicant specifically requested:

> *An audio visual copy* of *all appearance by me* before the Supreme *Court* R *v Yabsley as from March 2010 to 2013 inclusive.*
>
> *2 Documents related to the creation* of *the transcript* of *my trial and appeal: that is in what format it was provided to* the *transcriber and on what type* of *machine.*
>
> *3 Details of all devices upon which the creation* of the *audio visual tapes were generated: this will include when* they *were installed; their maintenance records; and the dates they* became *active after installation* for *all Hobart* Supreme *Courts; including any malfunctions and failures to properly audio visually record any matter pertaining* to *me.* If *these are* not kept *by* the *Supreme Court then I require the specific business address* of those *responsible for the installation of cameras and recording devised* [sic] *used by the Court.*
>
> *4 A* copy of *the voir dire and any documents Justice Evans relied upon in his decision that Monis was the law and that* the other *arguments: the constitutionally implied right to* free speech; *the ridiculous claim the Postal* [sic] *service can be impugned;* the *fact that* the *Crown Witnesses could easily identify my handwriting and still opened the correspondence (soliciting* the *mail); and many other important arguments that I needed to put to the court* were *deliberately blocked by Justice Evans.*

5 *A copy of the statute cited by Justice Evans to deny me my legal right* to *address* the court *merely because 1 was representing myself I believe this may be contained in the part* of *the Transcript* [sic] *the Court did not provide to me. It relates to a* Rule [sic] *in which the Trial Judge [sic] is required to sum up the case for* the *defendant.*

6 *A transcript* of pages *as from page 323* of *the Trial* [sic] *that were not provided to me by the court.*

7 *A complete transcript* of the *Justice Wood Hearing* [sic].

8 *A complete transcript of* the *Appeal* [sic] *and decision of the appeal — the appeal transcript* not *being provided by the Court.*

9 The *material* evidence *upon which* they relied *in making that decision.*

10 *From Justice Wood the material evidence upon which that claim by her was based.*

11 *The material evidence used by Justice Evans (and later by Justices Porter, Pierce* [sic] *and Estcourt) to make the claim* that the *tape and or transcript was admissible in a court of law either as evidence or an aide.*

12 *A copy* of any document *in which Justice Evans or Mr McTaggart made such a direction.*

13 The evidence *upon which Justices Evans, Porter, Pierce* [sic], *and Estcourt relied as presented as evidence in court: to prove a tape made in 2009 that was not* the *result of any charge and was not audio visually recorded was presented as evidence to the Jury* [sic] *and was made under* State *Law* [sic].

14 *A* copy of *the evidence they relied upon to demonstrate that a State Court* [sic] *exercising Federal Jurisdiction* [sic] becomes *a Federal Court* [sic].

15 *Any document in evidence that demonstrates a conversation held in Tasmania under Tasmanian Law* [sic].

16 *Any material evidence used by any* other above *judges to* prove there *could be a clash* of *Evidence Acts.*

17 *Any documents relating* to *how the Judges determined that the Crown Witnesses* [sic] were *relevant* to the *material* evidence before the *Court as none were Board Members* [sic] *and Mr Fallu testified that the Board never tabled, discussed or responded to any of that correspondence.*

4 On 22 May 2017, Ms Julia Hickey (a delegated officer) released a decision to the applicant. The decision released the information responsive to topic three in full. It also referred to s6 and claimed that the Supreme Court was an excluded authority, and refused to supply all remaining information on that basis, and pursuant to s9 on the basis that the information was already otherwise available.

5 On 24 May 2017, the applicant requested an internal review of the decision. The applicant rejected the use of s6 and s9, and offered a definition of

`administration' for the purposes of s6. That definition is referred to in detail later in this decision.

6 On [15] June 2017, Mr Simon Overland, the Secretary of the Department and therefore its principal officer, released an internal review decision. The internal review decision also provided a definition of `administration' for the purposes of s6. It too is referred to in detail later.

7 The results of the internal review were that:

a. information under headings I, 4, 5, and 9-17 was refused as information in the possession of an excluded authority under s6, and information under headings 6-8 was refused under s6 and s9; and

b. information under headings 2 and 3 was released in full.

8 The applicant lodged an application for external review on 18 June 2017.

9 As noted, information responsive to the information at items 2 and 3 was released in full and I will not consider it further.

Issues for Determination

10 All remaining information in scope of the request was refused under s6. This section provides that the Act does not apply to information in the possession of certain persons or public authorities unless the information relates to the administration of the person or public authority. The information at hand is in the possession of the Supreme Court of Tasmania, a body excluded under s6(l)(c).

II I must determine if the information in scope of the request relates to `administration' or rather, `operation'. The result of this will determine which information is not subject to the Act under s6.

12 Further, information responsive to items 6-8 was refused under s9 on the basis that the applicant is not entitled to information that may be purchased at a reasonable cost in accordance with arrangements made by a public authority. This information related to transcripts of the applicant's matter when it was heard in Court.

13 The first determination I must make here is if the information under headings 6-8 is covered by s6. If it is, then s9 cannot apply as the information is excluded from the Act. If s6 does not apply, then I must consider if the information in these questions can be refused under s9.

Relevant legislation

14 Section 6 relevantly provides:

> *(I) 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;

(k) the Auditor-General;

(I) the *State Service Commissioner;*

(m) the *Anti-Discrimination Commissioner;*

(n) the *Public Guardian;*

(o) the Health Complaints Commissioner;

(p) Parliament;

(q) a Member of Parliament.

15 Section 9 provides:

A person is not entitled under this Part to —

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

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

Submissions

16 The applicant claims that s6 has been applied with a focus on the words `a court' rather than `relates to administration'. The applicant states the

provision of transcription and other recorded material in a trial or hearing is administrative, not operational. Specially, the applicant says:

> The *key phrase in section 6 of the Act is not the words `a court'* they are [sic] *`unless the information relates to the administration* of the *relevant public authority' — in this case the Supreme Court.*
>
> *No reasonable* person *could seriously make a finding that* the *administrative process of providing to* the *transcribers of* the *audio visual tapes in any Trial* [sic] is *not part* of *the administration* of the *Court.*
>
> The *term `administration' is not defined in* the RTI Act or *the Acts Interpretation Act. Administration means* the *day to day running* of *a business, company or organisation;* the people *responsible* for *running* the *business, company or organisation; the management and disposition* of property *of a deceased person, on insolvent company, by a legally appointed administrator;* the *management of public affairs;* the *action* of *dispensing, giving or applying something.*
>
> *The Collins Dictionary defines it as the range of activities connected with an organisation and supervising the way that an organisation or institution functions.*

17 The applicant claims that s9 does not apply on the basis that he is entitled to the transcripts and other recorded material as the defendant. He specifically claims:

> *Section 9 does not apply in* this case because the defendant *in a trial has* reasonable *rights* to be *provided transcripts* of *all Hearings* [sic], *Voir Dire* [sic] *and Trial Transcripts* [sic] *during* the *conduct* of *a trial, as well as the audio visual tapes that contain much more information and evidence relevant to the Trial* [sic] *than mere words on transcripts.*
>
> The *legal issues is the Hearings* [sic] *and Voir Dire* [sic] *and parts* of *the Trial* [sic] *transcript that* were *not provided* to me, *and which are part* of *the proper administration* of the of *the Court (without which I was denied a fair trial) and are clearly part* of *the trial.*

18 The applicant asks many other questions that are related to legal matters that are outside my jurisdiction to review. My role is only to review a decision under the Act and determine if the Department's interpretation and claim for refusing the information is appropriate. I am not in a position to address the applicant's extraneous questions.

19 The Department relies heavily on s6 of the Act and claims the Act does not apply to much of the information responsive to the request. The Department submits the definition of `administration' is strictly related to office management as opposed to the day to day operation of the Court. Specifically, the Department submits:

> The *term `administration' is not defined in* the *RTI Act or* the *Acts Interpretation Act. As that is* the *case the normal approach would be to*

consider the regular dictionary definition, the context of *the RTI Act, and possibly any judicial decision reflecting on* the *interpretation of such a* term *as used in similar legislative circumstances.*

The Macquarie Dictionary definition of administration is `the management or direction of *any office* or employment'. It *is about such matters as* the *staff and resources of an office, the management* of *those resources, and the provision of logistical support.*

[The Act] *does not apply to information relating to the judicial role of the court or a judge in conducting proceedings and deciding cases that are considered by the court. Put another way, the* Act *applies only to information relating to administration* of the *operations* of the *entity, not the administration of justice.*

20 The Department further relied on the High Court authority of *Kline v Official* Secretary to *the Governor General (2013)* HCA 52. While this decision relates to the *Freedom* of *Information Act 1982* (Cth), the Department claims it shares many similarities with the Tasmanian Legislation. That case concerned similar matters to those under consideration here, in that information held by the Official Secretary to the Governor-General was exempt unless it related to `administration' only. The Department relies on several statements made by the Court in relation to the term `administration' in the context of the FOI Act. Specifically, the Department states:

> There *is support for this view in a decision* of the *High* Court *ofAustralia,* Kline v Official Secretary to the Governor General (2013) *HCA 52.* The *decision relates to the* Freedom of Information Act 1982 *(Cth) which has many similarities to the RTI Act. Pursuant to the F0I Act, a document in possession* of the Official Secretary to the *Governor General is exempt "unless the document relates to matters of an administrative nature".*
>
> *The FOI* Act *also contains a similar limitation in respect of judicial officers and court officers such as* registry *staff and* the decision of the *High Court makes comment about* these *officers.*
>
> *In particular, at paragraph 36... the Official* Secretary, like *courts and* other *bodies governed* by *the FOI* Act, *is only required* to *grant access* to a *limited class* of documents, *characterised by a relationship* between the *document and the subject matter of an "administrative nature".*
>
> *At paragraph 41... by contrast, the exception* of *a class* of *documents which relates to "matters* of *an administrative nature" connotes documents which concern* the management *and administration* of office *resources. This is a common enough connotation* of *the epithet "administrative".* The *Full Court apprehended this distinction in s6A(I)* correctly, *referring* to *the latter class* of *documents as relating to the office "apparatus" which supported* the exercise of *the Governor-General's substantive* powers *and functions.*

Analysis

Section 6

21 Information under headings 2 and 3 has been released in full and **I** will not consider it further. This leaves 15 items of information the Department has refused under s6.

22 It is clear that the Supreme Court of Tasmania is a court for the purposes of s6(I)(b). The application of s6 rests solely on the key words *unless the information relates to the administration of the relevant public authority.*

23 As both parties have pointed out, neither the Act nor the Acts *Interpretation Act 1931* contain a definition of `administration'. In this situation, the rule is to give the word its ordinary meaning.

24 I have considered both parties' views above on the definition of administration. The matter of *Kline* provides some compelling guidance as to the meaning of the term `administrative' when used in respect to legislation similar to this Act.

25 **I** have also had regard to the definition contained in the Macquarie Dictionary, a dictionary consistently favoured by courts, which is the *management or direction of any office or* employment.

26 The definition contained in the Merriam-Webster Dictionary is *performance of executive* duties. I note it offers an example for use in management — as in *worked in the administration of a hospital.* This example separates the substantive operational functions of an authority from its administrative functions. The saving of a life by a doctor and a nurse is operational, the work of accountants, cleaners, and office staff are administrative.

27 The Collins Dictionary defines administration as the *range of activities connected with organising and supervising the way that an organisation or institution functions.*

28 I consider it also appropriate here to consider what constitutes the court's operational functions.

29 I determine `operation' relates to the process of carrying out the practical work of the Court. This is its substantive judicial function and the purpose for its existence. That being, to apply the law directly to matters before it, to call on resources it requires to do this, and to promote justice in Tasmania.

30 **I** determine `administration' is the support structure that allows the Court and its officers to undertake its substantive operational duties. This reasonably will include human resources management, financial management, security, cleaning and hygiene services, customer services, and purchasing and procurement of sundry items to name a few.

31 I determine the Act does not apply to the information under the remaining 15 headings.

32 The information requested relates to a proceeding before the Court and therefore its judicial function rather than its general administration.

33 1 note the applicant claims more information should be provided in response to items 2 and 3, however, the Department only has to provide the information in its possession that relates to its official business.

Section 9

34 The Department applied s9 to the information responsive to items 6-8 in addition to s6. 1 have determined above that the remaining **15** items, which include items 6-8, are not subject to the Act.

35 Therefore, s9 does not apply.

36 Should I have found s6 not to be applicable, I consider the Department's use of s9 would be appropriate given the opportunity for the applicant to purchase the subject information at a reasonable cost in accordance with arrangements made by the Supreme Court.

Preliminary Conclusion

37 I determine the Act does not apply to the information responsive to items **1** and **4-17** as they request information from a body excluded from the Act under s6, namely a court. This information is not information that relates to the administration of that public authority.

Submissions to Preliminary Decision

38 The preliminary decision was released to both parties on 28 October 2019.

39 Both Mr Yabsley and the Department were invited to make a submission to this office on any matter related to the preliminary decision.

40 On 29 October 2019, the Department responded stating that it would not make a submission.

41 On the same day, Mr Yabsley made lengthy submissions in relation to the preliminary decision some of which are not relevant to this external review.

42 The relevant issues raised in his submission can be summarised as follows:

a. the section 15 timeframes set out in the Act allow for 20 working days for a decision but it has taken this office 2.5 years to release its preliminary decision;

b. Schedule 3 of the Act requires reasonable time and management of decisions;

c. this office failed to consider the operation of section I0 of the Act;

d. the authority relied on in Kline was a failure in law as that matter dealt with the *Freedom* of *Information Act 1982* (Cth) and not the Tasmanian *Right to Information* Act *2009;*

e. further, the authority in *Kline* was not relevant as it related to the Governor-General and this matter did not;

f. the recorded tapes of his appearance before the Supreme Court of Tasmania were administrative only, not operational;

g. section 9 should not be applied as Mr Yabsley alleges he never received a copy of the transcripts from the Court in the first instance;

h. the tapes in question do not affect the Court's powers if the recording function was removed so they cannot therefore be operational;

i. the Department failed to provide all the information it has in its possession for the two questions that it did release information under as required by the Act;

j. the preliminary decision is biased and inaccurate;

k. the interpretation and reliance on section 6 is wrong in law;

I the definitions provided for `administration' have been deliberately misinterpreted in a narrow way to suit a specific purpose in the decision; and

m. failure to take into consideration the public interest

test. **Further Analysis**

43 The first two matters raised by Mr Yabsley relate to timeframes and the matters set out in Schedule 3.

44 Section 15 was relied on to suggest this office has 20 working days to complete a review. This is not correct. Section 15 refers to public authorities or Ministers when preparing decisions. The relevant section for the Ombudsman is s47(6)(a) that provides the Ombudsman is to use the powers in this section of the Act to resolve an application for review as soon as practicable.

45 There is no definitive timeframe that must be met when undertaking an external review.

46 The matters in Schedule 3 only relate to the operation of s **I 0** or s19. Neither of these sections were relied on by the Department. Schedule 3 is therefore not relevant to the review.

47 Mr Yabsley alleges this office failed to consider the use of s I 0 (electronic information). It might be possible that the recordings sought by Mr Yabsley could be electronic information for the purposes of s **10.**

48 This section allows a public authority to refuse an application, or part of it, if the information requested cannot be produced by the public authority using its normal computer hardware and software and technical expertise, and producing it would substantially and unreasonably divert the resources of the authority from its usual operations, having regard to the factors in Schedule 3.

49 **I** am not sure why Mr Yabsley wants this office to consider a potential further ground for refusal of the information he seeks. It was not referred to by the Department and I will not consider it here. **I** am of the view that the

requirements of s I 0(I)(b) would not be met in any event, as producing the information would not substantially and unreasonably divert the Court's resources from its usual operations.

50 Mr Yabsley alleged that reliance on *Kline* was not open to the Department or the preliminary decision maker in this office. This was due, he said, to the fact that it was concerned with the *Freedom* of *Information Act 1982* (Cth) and the Official Secretary to the Governor-General, not the Right to *Information Act 2009* nor a matter similar to that of Mr Yabsley's.

51 I do not propose to get into a lengthy discussion about the doctrine of precedent. It is a matter of fact, however, that Australia has one common law and if the reasons for a decision in one case are relevantl and can apply in another, then those reasons should be applied unless there is a specific reason not to do so.

52 The FOI Act and the RTI Act are significantly similar in many ways. In *Kline* the similarity was that each Act only deals with information in the possession of particular bodies. Both Acts also have a list of bodies that are excluded from their operation, except for information related to their administration.

53 This was directly considered in *Kline.* The matter related to whether information requested from the Official Secretary, an excluded body, was administrative or operational in nature. The part of *Kline* relied on by the Department was the distinction the Court drew between administrative and operational functions.

54 I am satisfied the reliance on *Kline* was appropriate both in law and relevant to this matter.

55 Following that, Mr Yabsley maintains that the taped recordings of the Supreme Court of Tasmania are administrative and not operational. The first part of Mr Yabsley's reasoning, in my view, is correct.

56 He claims the mere existence of a recording system for the Court is not operational. Information that related to the installation and maintenance of the system, for example, is inherently administrative. The Department also recognised this when it released information requested by Mr Yabsley as to the make and model of the system, when it was installed, and how and when it is maintained.

57 When a matter before the Court is recorded using this system, however, the actual recording using that system creates information that goes beyond the administrative and becomes operational. Once judicial proceedings before the Court have been recorded, the information in those recordings is not related to a mere administrative function but is clearly related to the Court's operation.

58 Further, Mr Yabsley makes the claim that because the removal of the recording system would not affect the power of the Court to carry out its work, it is

therefore not operational. With respect to Mr Yabsley, I cannot accept this view.

59 The recording of matters before the Court does not have to be of fundamental or foundational importance for it to be considered operational. Mr Yabsley draws a line between, in my view, a minor operational function and one that might be considered more fundamentally substantial. This is not relevant to the operation of s6. If the information is operational, then it is excluded. This exclusion is not determined by degrees of operational information.

60 For the reasoning already set out in the preliminary decision, I am not swayed by Mr Yabsley's arguments and I determine that the recorded information is operational in nature and therefore excluded from the operation of the Act.

61 This brings me to Mr Yabsley's claim that s9 should not be relied on as he did not receive a copy of the transcripts. Section 9 provides that a person is not entitled to information if it can be inspected under another Act or may be purchased at a reasonable cost in accordance with arrangements made by the relevant public authority.

62 The operation of s9 does not arise as I have already determined that the information is excluded under s6. If this were not the case, however, production of the transcripts could, in my view, be refused under s9 as they are available to Mr Yabsley for a reasonable fee.

63 Sections 588 to 590 of the *Supreme Court Rules 2000* provide that Mr Yabsley may apply to the registrar for a copy of the transcription if he meets the requirements they contain. Rule 823 in Schedule 2 sets out the cost of transcription at $2.00 per page if the matter has already been transcribed or $7.50 per page if it has not.

64 Mr Yabsley alleges the Department has not released all information in its possession in relation to the questions in his application where it has released information; specifically in response to questions 2 and 3.

65 The response from the Department was comprehensive and relevant. Based on the wording of the original request by Mr Yabsley to the Department, I am of the view it has been answered in full.

66 Mr Yabsley's submissions further clarify the nature of some of the information he seeks. It appears that there is some information being sought as to what happened with the relevant transcript. If this is the case, then it is, for the reasons already set out above, excluded material under s6. If not, then I am satisfied the Department has answered it in full.

67 Mr Yabsley claims the decision is biased and inaccurate, that reliance on s6 is wrong in law, and that any interpretation applied by this office of the meaning of `administration' is deliberately narrow to suit our own purposes.

68 The only purpose and motivation of this office is to ensure fair and reasonable decisions are made by public authorities and Ministers under the Act. This

office has no interest in protecting public authorities or Ministers or by taking an assertive approach on behalf of applicants.

69 The information in each review is assessed against the relevant sections of the Act, taking into account the Act's objects, the applicant's legally enforceable right under s7, and if applicable, relevant public interest considerations.

70 This is something this office does fearlessly and with vigour. I do not, however, want to dismiss Mr Yabsley's claims out of hand. I have reviewed the material, the decisions of the Department, submissions from all parties, and the preliminary decision, and **I** am certain there has been no bias on the part of this office and the application of the law to the facts in this matter has been appropriate.

71 The final point raised by Mr Yabsley was that the public interest test was not applied in the preliminary decision.

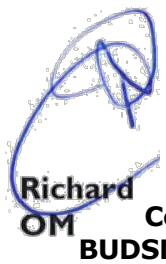
72 Section 33 of the Act provides that the public interest test must be considered before exempting information pursuant to any of the grounds for exemption contained in Division 2 of Part 3 of the Act. This includes the exemptions contained in sections 34 to 42. None of these sections have been raised or referred to in this decision, and therefore the public interest test does not apply.

73 For these reasons, I am not satisfied that anything submitted by Mr Yabsley alters the preliminary decision.

Conclusion

74 **I** determine the Act does not apply to the information responsive to items **I** and 4-17 as they request information from a body excluded from the Act under s6, namely a court. This information is not information that relates to the administration of that public authority.

Dated: 10 July 2019



Richard Connock
OMBUDSMAN